Law Society of Scotland

Second reading briefing

Digital Markets, Competition and Consumers Bill

December 2023

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful, and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We welcome the opportunity to consider and provide comment on the Digital Markets, Competition and Consumers Bill[1] (The Bill) ahead of the second reading of the Bill in the House of Lords on 5 December 2024.

General remarks.

The Bill proposes to provide the Competition and Markets Authority (CMA) with new powers and duties in regulating competition in digital markets regarding, and its powers in the investigation and enforcement of competition law. The Bill also seeks to update and strengthen the powers of designated enforcers of consumers protection legislation and to resolve consumer disputes, as well as enhancing consumer protections in relation to unfair commercial practices, subscription traps and prepayments to savings schemes.

The Government considers that "existing competition and consumer laws are not designed to address the unique barriers to competition in digital markets.[2]" The Bill also seeks to amend parts of existing legislation, namely:

- the Competition Act 1998,
- the Enterprise Act 2002
- The Consumer Rights Act 2015
- The Consumer Protection from Unfair Trading Regulations 2008.

[1] publications.parliament.uk/pa/bills/cbill/58-03/0350/220350.pdf

[2] 220294en.pdf (parliament.uk)

Generally, we welcome the Bill as it updates competition law in the UK, and we support the provisions in the Bill on fake reviews and subscriptions. We believe that the approach to designating digital giants to be subject to scrutiny appears sensible and provides clarity for those subject to it.

We welcome the Government updating the CMA's powers of investigation to reflect changes in technology and practices, however we consider there must be a balance between the powers of the CMA and the financial remedies for consumers, and fairness to the business, in the event the CMA uses its powers incorrectly.

Related to this we note the CMA will be granted powers to levy fines for breaches of market investigation orders and remedies. We consider this power should not apply to breaches (pre- or post-the Bill becoming law) of orders/remedies that were in place before the Bill is enacted. Otherwise, providing the CMA with such "retroactive" fining power is contrary to legal and regulatory principle, including legal certainty, procedural fairness, sound public governance and legitimate expectations. Similarly, we question, by reference to the same principles, the ability of the CMA to amend or expand market investigation remedies that were in place before the Bill becomes law.

We also note that the regulatory environment, which is complex, is being looked at in other areas, including (by way of indicative example) the CMA's review of its concurrency arrangements[3], the Department for Business & Trade's (DBT) Call For Evidence relative to the Smarter Regulation[4] and the Regulatory Landscape programme[5], the House of Lords Industry and Regulators Committee inquiry into the UK regulators[6] and the Digital Regulation Cooperation Forum (DRCF') Call for input on its workplan[7]. There are also ongoing investigations which are pertinent to the issues which this Bill is seeking to address: for example, the CMA's Market Investigation into Cloud Services. We are concerned that this Bill is seen and informed by these other initiatives and the opportunity is taken to simplify, rather than complicate, the regulatory environment (including through granting the CMA the retroactive ability to fine or unravel agreed remedies).

[3] Concurrency review call for inputs (publishing.service.gov.uk)

[4] Smarter regulation non-financial reporting review: call for evidence - GOV.UK (www.gov.uk)

[5] call_for__evidence__regulatory_landscape_overview_and_questions.odt (live.com)

[6] Call for Evidence - Committees - UK Parliament

[7] https://www.drcf.org.uk/publications/papers/call-for-input-drcf-workplan-202425

We note the Explanatory Notes[8] state the intention of the Bill is to allow for punitive damages in all UK courts, however (the Bill seeks to achieve this by lifting an existing statutory bar on punitive damages in competition actions, rather than creating a freestanding right or power) this would not have this effect in Scots Law, as punitive damages generally not as a generality available under Scots Law

We are not persuaded that the standard of review of CMA decisions should be on a judicial review basis rather than full merits review going forward. We are concerned this will reduce the CMA's existing incentive to properly evidence its conclusions and we welcome changes to the scope and size of financial penalties, as this is consistent with neighbouring economies.

We are concerned there are no procedures for first level reviews of decisions to designate a business as having Strategic Market Status, and that there are no procedures for challenges to breach and penalty decisions other than judicial review.

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We think it is a missed opportunity that media mergers are being treated differently and we consider that the requirement for retention of information at clause 118 (Duty to preserve documents relevant to investigations) imposes too far reaching an obligation.

We also consider there may be possible Article 6 of the European Convention of Human Rights[9] (right to a fair trial) concerns on searches of private dwellings.

We are concerned that drip pricing practices, where a firm displays a smaller price upfront, and additional costs are added throughout the transactional process, are not included in the provisions of the Bill.

We support the introduction of tick boxes for consumers to tick so they understand each key provision(s) in believe that tick boxes could be used for the key provisions for subscription contracts, such as cancellation provisions.

We believe there should be better and improved coordination and cooperation between designation of designated enforcers - FCA, CMA, local authority Trading Standards, as poor coordination and cooperation

[8] 220294en.pdf (parliament.uk)

[9] Human Rights Act 1998 (legislation.gov.uk)

can cause difficulties for enforcement bodies. Also, it is important that designated enforcers, particularly local authority Trading Standards have sufficient resources and staff to enforce the consumer protection provisions effectively.

We are concerned that the consumer protection is spread over too many statutes, and this may lead to overlap and confusion for parties. The Bill provides the Government the opportunity to consolidate consumer protection legislation into one single, standalone, and clear consumer protection law, however it may be confusing for parties, as consumer protection law is contained in several different pieces of legislation.

We also consider it is worth noting that as the regulation of digital markets in Chapter 1 is a new set of substantive rules, the competition law case law on extra-territorial jurisdiction would not in principle apply. It is to be welcomed therefore that this is something explicitly dealt with in the Bill. Indeed, it is difficult to see how the legislation would function without the twin tests above being included.

We also consider from a jurisdictional perspective of the Bill, that the Bill adopts the rules on jurisdiction used in competition law in the EU and seems to respect international comity by not going beyond territorial limits on issues that would require the active co-operation of other states.

Comments on the Bill

The Bill is divided into six parts and has 26 schedules.

Part 1 and Schedules 1 and 2.

Part 1 of the Bill concerns Digital markets and clause 1 is the overview clause and sets out the 8 Chapters in Part 1 and makes provision for the functions that are conferred on the CMA in relation to the regulation of competition in digital markets.

Chapter 2 sets out the requirements on the power to designate undertaking as having Strategic Market Status (clauses 2 to 8).

We note clause 4 on Link to the United Kingdom and under clause 2(1)(a) of the Bill one of the conditions for designation of SMS is that the digital activity needs to have a link to the UK. We consider that clause 4 (a) could be seen to reflect the effects test or at least it seems to have been inspired by it and adapted to make sense for the digital world. While the CMA has been tasked with developing guidance on the operation of significant parts of the Bill once enacted, the term “significant number” may need greater precision in the act to provide both the CMA and businesses with sufficient clarity and legal certainty (especially where 4b and 4c do not apply).

Clause 4(b) involves no claim for extra-territorial jurisdiction and is a standard basis for exercising enforcement jurisdiction, and we note clause 4 (c) reflects the “qualified effects test” and is in line with EU member states.

We note clauses 9 to 18 regarding procedure and the investigation of Strategic Market Status.

Chapter 3 concerns conduct requirements (clauses 19 to 25), and under clause 25, the CMA are required to review a designated undertaking.

The CMA's role places a stronger emphasis and grants more discretionary authority in pursuing contestability-goals, as outlined in Chapter 4's Pro-Competition Interventions, compared to the relatively lesser emphasis and discretion allocated to fairness-goals discussed in Chapter 3 on Conduct Requirements. The CMA should be able to prioritize fostering competition in the market over giving primary focus to fairness-related objectives. The designation requirements concerning the link to the UK are notably more lenient and flexible overall.

Clauses 26 to 35 set out the enforcement of conduct requirements and clauses 36 and 37 concern the commitments relating to conduct requirements.

The provisions relating to final offer mechanism are contained in clauses 38 to 43.

Chapter 4 concerns pro-competition interventions (clauses 44 to 54) and Chapter 5 sets out the merger requirements (clauses 55 to 66). Chapter 6 concerns investigatory powers (clauses 67 to 80), and compliance reports are set out in clauses 81 and 82.

Chapter 7 concerns enforcement and appeals and the civil penalty provisions are set out in in clauses 83 to 90 and the offence provisions contained in clauses 91 to 96, with the further enforcement provisions in clauses 97 to 100.

Chapter 8 concerns the administrative provisions, including the regulation coordination and information sharing provisions at clauses 106 to 108.

Part 2 and Schedules 3 to 12.

Part 2 of the Bill concerns Competition and we note the anti-trust provisions in Chapter 1.

The investigation provisions are set out in clauses 117 to 119. We note clause 118 (the duty to preserve documents relevant to investigations), and we consider the obligation this imposes is too ambiguous. In particular it appears to place an obligation on persons to preserve any document which they suspect would

be relevant to an investigation, in any circumstances where they suspect that an investigation "is likely to be carried out". The scope of this obligation, and its potentially indefinite duration, is so broad as to effectively create an obligation to maintain all documents indefinitely where any potential market or competition issue arises.

We are also concerned that the CMA's powers under clauses 119 and 120 to seize any device or document, including in domestic premises, from any person present on those premises (whether connected to the business under investigation or not) are simply so broad as to be inconsistent with the rights of those liable to be affected, including family members and guests of individuals associated with a business under investigation. Such persons are very unlikely to have any legal representation present or available in the event of a dawn raid on domestic premises. All of this will take place in the context of a civil (not criminal) investigation.

The enforcement provisions are contained in clauses 121 to 123. We also note clause 123, regarding the provisions on exemplary damages, are not applicable in Scotland notwithstanding explanatory notes that suggest the intention is otherwise. Paragraph 526 of the explanatory notes says that clause 122 "makes amendments to the Competition Act 1998 to enable the CAT, High Court of England and Wales, the Court of Session and Sheriff Court in Scotland, or the High Court in Northern Ireland to award exemplary damages in competition cases (except in collective claims)". The reference to the Court of Session and Sheriff Court in Scotland being able to award exemplary damages in competition cases clearly suggests that a failure of the Bill to have that effect would be an omission.

In that context, we note that the Bill seeks to achieve this by amending Schedule 8A to the Competition Act 1998 to omit Part 8 which currently provides that "A court or the Tribunal may not award exemplary damages in competition proceedings." In other words the Bill proceeds from the assumption that the only thing stopping exemplary damages in competition proceedings is Part 8 / paragraph 36 of Schedule 8A to the 1998 Act.

That seems to be the reasoning behind paragraph 528 of the explanatory note’s which states that "Exemplary damages, in common law, are awarded beyond what is compensatory for the loss or harm which occurred to punish particularly egregious conduct. In cases where compensatory redress is considered insufficient in light of the defendant’s conduct, additional and proportionate exemplary damages can be sought. Courts have developed well established principles regarding the award of exemplary damages, including when such an award may be made and the quantum thereof." However, exemplary damages are not available at common law in Scotland, and it would require specific provision to be made in legislation for them to become available. A failure to permit the Scottish courts to award exemplary damages, while allowing them in England and Wales, would be likely to seriously undermine Scotland as a forum for competition damages actions.

Chapter 2 contains the merger provisions (clauses 125 to 129) and **Chapter 3** sets out the provisions regarding markets (clauses 130 to 134).

In general terms we welcome the changes to the CMA's jurisdiction, powers and procedures in relation to mergers and markets that are set out in these provisions. In particular we welcome the addition of a de minimis threshold for mergers caught by the "share of supply" test in section 23(2) of the 2002 Act as this will give significantly more certainty in respect of mergers of small enterprises in niche markets which can presently face a significant burden in identifying market definition.

We note that an opportunity appears to have been missed to align thresholds for media mergers with other mergers.

We welcome the procedural changes in respect of market studies and investigations which we consider to be sensible modifications to the existing law.

Chapter 4 concern cartels and the miscellaneous provisions are set in chapter 5 (clauses 136 to 139).

Part 3 and Schedules, 13, 14, 15, 16 and 17

Part 3 sets out the provisions regarding the enforcement of consumer law. The provisions concerning relevant infringements are set out in in clauses 141 to 143 and Consumer Protection Orders and Undertakings are set out in Chapter 3. Clause 144 determines the enforces and clauses 146 to 148 set out the application for enforcement order and interim enforcement order provisions.

The powers of the court on application under clause 146 are detailed in clauses 149 to 152 and the online interface orders and interim online interface orders are detailed in clauses 153 to 155. Furthermore, the provisions relating to undertakings and further provisions are set out in clauses 156 to 161 and the notification requirements of the CMA are detailed in clauses 162 to 165.

Clauses 166 to 168 set out the jurisdiction provisions and clauses 169 to 172 contain the miscellaneous provisions.

Chapter 4 sets out the direct enforcement powers of the CMA and the power of CMA to investigate suspected infringements is contained in clause 173. Infringement notices and penalties are contained in clauses 174 to 176 and the undertaking provisions are set out in clauses 178 to 183. The direction provisions are contained in clauses 184 to 189 and the provisions regarding false or misleading information are contained in clauses 190 and 191. The misleading and appeals provisions in clauses 192 to 195.

Chapter 5 concerns the monetary penalty provisions (clauses 196 to 200) and **Chapter 6** sets out the investigatory powers of enforcers (clause 201).

Chapter 7 sets out the miscellaneous provisions (clauses 202 to 209), and **Chapter 8** contains the interpretation provisions (clauses 210 to 216).

Part 4 and Schedules, 18, 19, 20, 21, 22, 23 and 24

Part 4 concerns Consumer rights and disputes. Chapter 1 sets out the protections on consumers from unfair commercial practices, and Chapter 1 transposes the provisions of the Consumer Protection from Unfair Trading Regulations 2008 (S.I. 2008/1277) to the Bill. Clause 217 is the overview of Chapter 1.

Clause 218 prohibits unfair commercial practices. Clause 218 (4) sets outs the circumstances where a commercial practice is unfair, namely, 'where it is likely to cause the average consumer to take a transactional decision that the consumer would not have taken', otherwise as a result of the practice.

Clause 220 concern misleading omissions, and we have no comments at this time.

We note clause 221 regarding aggressive practices, and we support that the vulnerability of a consumer is one of the factors taken account in determining whether a commercial practice uses harassment, coercion or undue, and the characteristics of a consumer's vulnerability are set out in clause 239 (4) – age, physical or mental health, credulity, and the circumstances they are in.

We note clause 225, which provides consumers with a right of redress, subject to the four conditions set out in clause 225 (2) to (5) are met. The conditions are:

- the consumer has entered into a business-to-consumer contract, and the trader supplies a product to the consumer and the consumer makes a payment to the trader for the supply of a product (Clause 225 (2).
- the trader engages in a prohibited practice in relation to the product or where a consumer enters into a business-to-consumer contract for goods or digital content— (i) a producer engages in a prohibited practice in relation to the goods or digital content, and (ii) when the contract is entered into, the trader is aware of the commercial practice that constitutes the prohibited practice or could reasonably be expected to be aware of it (Clause 225 (3).
- the prohibited practice is a significant factor in the consumer's decision— (a) to enter into the contract or (b) to make the payment (Clause 225 (4)
- the product concerned is not a product excluded from the application of rights of redress by regulations under section 225 (Clause 224 (5)

We note the definition of "prohibited practice" means an unfair commercial practice involving— (a) a misleading action, or (b) an aggressive practice, however we consider the scope should be extended to include the contravention of the requirements of professional diligence (as set out in clause 222), as this furthers the protection of consumers for redress where a trader has failed to exercise honest market practice in the trader's field of activity, or the general principle of good faith in the trader's field of activity. Withstanding this, a consumer may still have the option to pursue a civil action for damages against a trader for a breach of contract or pursue redress by alternative dispute resolution if the trader is a member of an ADR complaints process.

We note clause 227 regarding the enforcement of rights of redress, and for consumers in Scotland can raise proceedings to enforce a right to unwind in either the Sheriff Court or the Court of Session (clause 227 (2). Clause 244 (5) amends paragraph 1 of Schedule 1 of the Prescription and Limitation (Scotland) Act 1973[10] to take account of any obligation arising by virtue of rights of redress in Chapter 1 of Part 4 of the Bill.

We support clause 228 (2), where a consumer cannot make a claim for compensation under a rule of law or equity, or under an enactment, if the consumer has been compensated under the right to redress, and a consumer cannot make a claim to be compensated under the right to redress if they have been compensated under a rule of law or equity, or under an enactment, as this would be unfair as consumer(s) may be compensated twice.

Clause 229 concerns inertia selling, and we have no comment currently.

Clause 230 sets out the offences relating to unfair commercial practices, and clause 231 sets out the due diligence defence and innocent publication. We note the wording of clause 231 (1) which states that “It is a defence for a person (“the defendant”) charged with an offence under section 229 to prove” – we have concerns with some of the terminology from a Scottish perspective, firstly an individual in Scotland accused of alleged offences under consumer protection legislation is known as the accused[11] not “the defendant”, and secondly local weights and measures authority’s and the CMA do not charge the accused, the accused is cautioned for the alleged offences and a report is sent to the Crown Office and Procurator Fiscal Service (COPFS) for consideration.

Clause 233 concerns the penalty for offences and the time limit for offences are set out in clause 234.

Clause 235 permits the Secretary of State to amend Schedule 18 (commercial 25 practices which are in all circumstances considered unfair) to add, remove or amend a description of a commercial practice (Clause 235 (1) (a) to (c), and the Secretary of State can amend section 223(2) (rights of redress: prohibited practices) as well. We believe that in the event the Secretary of State amends the description of a commercial practice, that appropriate consultation procedures take place for stakeholders to comment.

We welcome the definition of an “average consumer” at clause 239 sets out the meaning of an “average consumer” however we consider that the definition of an "average consumer” does not demonstrate the attitude towards risk[12], and we support the meaning of “average consumer”: vulnerable persons (clause 240) as a result of their age, their physical or mental health, their credulity and the circumstances they are

[10] Prescription and Limitation (Scotland) Act 1973 (legislation.gov.uk)

[11] Section 63 Criminal Justice (Scotland) Act 2016 (legislation.gov.uk)

[12] Average Consumers and reasonable care (localgovernmentlawyer.co.uk)

in (clause 240 (4). We consider that the inclusion of vulnerable persons in the definition of an average consumer is important as vulnerable consumers may be more likely to be the victim unfair commercial practices due to factors in clause 240 (4) and this provides clarity for designated enforcers, such as Trading Standards.

A product is defined at clause 240, as goods, a service and digital content. We welcome this as it is clearer than compared to other pieces of consumer protection legislation, such as the definition in the regulation 2 of the General Product Safety Regulations 2005[13].

We note clause 243 (1) which revokes the Consumer Protection from Unfair Trading Regulations 2008 (S.I. 2008/1277).

Chapter 2 concerns subscription contracts.

Clause 247 (1) defines a subscription contract as a contract between a trader and a consumer— (a) for the supply of goods, services, or digital content by the trader to a consumer in exchange for payment by the consumer.

Clause 248 concerns excluded contracts and Schedule 19 sets out description of excluded contracts. We note clause 248 (2) allows the Secretary of State by regulation to amend the description of excluded contracts in Schedule 19, we think the Secretary of State should consult with appropriate stakeholders in this process.

Clause 249 sets out the pre-contract information requirements traders must provide to consumers for subscription contracts. We support this as it helps consumers to make informed decisions in their transactional decision-making process, and the pre-contract information requirements are consistent with other consumer protection legislation, such as The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013[14].

We also support the additional pre-contract information requirements under clause 250 (2), where trader(s) must ensure that consumer(s) expressly acknowledge that the contract imposes an obligation on the consumer to make payments to the trader. This must be in writing, and it protects traders and consumers, as both parties are aware of the payment arrangements in the subscription contract, and it improves clarity for the parties.

We also support the requirements under clause 251 regarding reminder notices, which requires a trader to give the consumer a notice on the first renewal payment for which the consumer will become liable under

[13] The General Product Safety Regulations 2005 (legislation.gov.uk)

[14] The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (legislation.gov.uk)

the contract (clause 251 (1) (a). The content and timing of the reminder notice are contained in clause 252 and a reminder notice must contain the information set out in Part 3 of Schedule 20.

We consider arrangements for consumers to exercise right to end contract are helpful under clause 253, as consumers can cancel a subscription contract in a single communication, and without having to take any steps which are not reasonably necessary for bringing the contract to an end (clause 253 (1). We think this is positive, as there should not be any unreasonable barriers to prevent a consumer from cancelling a subscription contract.

Clause 254 requires a trader to acknowledge the cancellation (clause 254 (2) (a) and refund any overpayments to the consumer (clause 254 (2) (b), again we support these provisions.

Clauses 255 and 256 provide rights for consumers to cancel subscription contracts if traders breach those duties.

Clauses 257 to 259 provide rights for consumers to cancel subscription contracts during cooling-off periods. We note clause 258 which defines “initial cooling-off period” and “renewal cooling-off period”. Clause 259 requires a trader to give the consumer a cooling off notice.

Clause 260 allows the Secretary of State by regulation to make further provision about the cancellation of subscription contracts and we support that in the circumstance, the Secretary of State wishes to extend a cooling-off period under clause 260 (1) (c), that the Secretary of State must consult such persons as the Secretary of State considers appropriate (clause 260 (5).

Cause 261 sets out the offence of failing to provide pre-contract information about initial cooling-off rights and clause 262 provides for the due diligence defence.

We note clause 264 concerning the penalty for offences and enforcement and from a Scottish perspective, a person guilty of an offence under clause 261 (1) is liable on summary conviction to a fine not exceeding level 5 on the standard scale[15].

We note clause 265 (Information and notices: timing and burden of proof), and we think it may be unreasonable for a trader to be held accountable for a consumer not receiving the communication where the reason is beyond the control of the trader.

If the trader has taken all reasonable steps to communicate with the consumer, such as giving the information or notice by email, a message sent online or other means of electronic communication, and the trader has not received confirmation that the information has failed to send or has not been sent to the consumer, then it may be unreasonable for the burden of proof to lie with the trader as to whether

[15] Criminal Procedure (Scotland) Act 1995 (legislation.gov.uk)

information or a notice has been given by the trader to the consumer in accordance with this Chapter (clause 265 (6).

Clause 266 concerns terms of a subscription contract which are of no effect and clause 267 sets out the other remedies for breach by a trader.

Clause 268 concerns the application of Part 4, Chapter 2 of the Bill and the provisions on Crown application are in Clause 269.

We note clause 270 (1) on the power to make further provision in connection of Part 4, Chapter 2 of the Bill, as the Secretary of State can by regulation:

(a) about how and when information or a notice that a trader is required to give to a consumer under this Chapter may or must be given;
(b) about the information that is to be contained in a notice given under this Chapter;
(c) about the arrangements that a trader must make under section 253 to enable a consumer to exercise a right to bring a subscription contract to an end, and about when a consumer may exercise such a right;
(d) specify the period of time within which the refund of an overpayment must be made under section 254(2)(b);
(e) specify descriptions of cases for the purposes of section 266(2) (and about the day on which a contract renews for those purposes).

We think the Secretary of State should consult with appropriate stakeholders in this process where appropriate and we note clause 270 (3) that regulations under this section are subject to the negative procedure.

Clause 271 amends parts of the Consumer Rights Act 2015 and clause 272 sets out the other consequential amendments. We have no comments.

Clause 273 is the interpretation clause and clause 274 concerns index of defined expressions. We have no comments.

Chapter 3

Chapter 3 sets out the provisions on consumer saving schemes. Clause 275 (1) defines a consumer savings scheme contract as:

- a consumer makes payments to a trader (clause 275 (a) (i)
- the trader credits those payments to an account that is held by the trader for the consumer (clause 275 (a) (ii)

- the payments credited to the consumer's account provide a fund for the consumer to redeem as goods, services or digital content in accordance with the terms of the contract (clause 275 (a) (iii)

Clause 276 sets out the other defined terms. The provisions on excluded arrangements are set out in in clause 277, and an arrangement is an excluded arrangement if its description is detailed in Schedule 21 and clause 277 (2) permits the Secretary of State to make further provision in connection Schedule 21 and we believe the Secretary of State should consult with appropriate stakeholders in this process where appropriate.

We note that regulations clause 277 (2) are subject to the affirmative procedure.

Clause 278 concerns insolvency protection requirement. We support the provisions in clause 278 (1), which requires a trader operating a consumer savings scheme to make and maintain the arrangements set out in section 279 (insurance arrangements) or in section 280 (trust arrangements) to cover, in the event of the trader's insolvency, the cost of returning to the consumer any protected payments at the time of the insolvency. While we support protecting consumers in the event a trader operating a consumer savings scheme becomes insolvent, we note in clause 278 (1) that the only insolvency process referred to is administration, and it does not include or refer to liquidation, and CVA (from a UK-wide corporate insolvency perspective), or bankruptcy and IVA (from an English sole trader and partnership perspective) or sequestration and protected trust deeds (from a Scottish law sole trader and partnership perspective). We believe this should be amended to include other forms of insolvency.

We note clause 278 (4) regarding the references to a trader's insolvency are references to a trader being subject to — (a) administration within the meaning of the Insolvency Act 1986, (b) administration within the meaning of the Insolvency (Northern Ireland) Order 1989 (S.I. 1989/2405 (N.I. 19)), or (c) proceedings under the insolvency law of a country or territory outside the United Kingdom during which an entity's assets and affairs are subject to the control or supervision of a third party or creditor, however this does not address matters from a Scots Law perspective or more generally, as noted above.

We consider clause 278 (4) should be amended to take account of all forms of corporate and personal insolvency in terms of the Insolvency Act 1986, as well as Scots Law and include the Bankruptcy (Scotland) Act 2016.

Clause 279 concerns insurance arrangements, and where a trader relies on arrangements under this section for the purpose of satisfying section 278, the trader must maintain insurance under one or more appropriate policies with an insurer authorised in respect of such business in the United Kingdom, the Channel Islands or the Isle of Man (clause 279 (1). We support this.

Clause 280 concerns trust arrangements and we support the provisions, and we note clause 280 (1) regarding that the payment are held on a trust and this would require the appropriate arrangements in the relevant jurisdiction(s), and the arrangements used must be appropriate for the jurisdiction in which they are held. For example, an English trader using English trust rules should not be able to set up in Scotland

and use the same arrangements if the funds that they collect are to be held in Scotland as the arrangements may not be sufficient to create a trust over those funds.

Clause 281 sets out the information requirements, clause 282 concerns the exercise of functions relating to this Chapter and clause 283 is the interpretation clause.

Chapter 4 concerns Alternative dispute resolution for consumer contract disputes.

Clause 284 defines and related items, and ADR means any method of securing or facilitating an out-of-court resolution of a consumer contract dispute that is carried out by an independent third party acting in relation to both parties to the dispute (clause 284 (1), and ADR does not include anything carried out by a person in their capacity as a judge or a member of the staff of a court or tribunal (clause 284 (2).

Clause 285 sets out other definitions on Chapter 4 and clause 286 concerns the prohibitions relating to acting as ADR provider and the provisions on the prohibitions relating to charging fees to consumers are detailed in clause 287.

Clause 288 concerns exempt ADR providers which means a person who is listed in Part 1 of Schedule 22 (clause 288 (1) (a), and an “exempt redress scheme” means a scheme or other similar arrangement which is listed (or of a description listed) in Part 2 of Schedule 22.

Clause 289 sets out the provisions on applications for accreditation, and a person who wishes to be an accredited ADR provider must apply to the 25 Secretary of State for accreditation to enable the person to carry out ADR or to make special ADR arrangements (or to do both) (clause 289 (1). We note clause 289 (1) allows the Secretary of State to determine the procedure for accreditation. We believe the Secretary of State should consult with appropriate stakeholders with experience in ADR in this process where appropriate.

Clause 290 concerns the determination of applications for accreditation or extension of accreditation and clause 291 sets out the provisions on Revocation or suspension of accreditations etc, and clause 291 (2) allows the Secretary of State by notice to the ADR provide to revoke the accreditation on the application of the ADR provider.

Clause 292 concerns fees payable by accredited ADR providers and clause 293 deals with the accreditation criteria, which are set out in Schedule 23. The Secretary of State amend Schedule 23 by adding new criteria or removing or varying any criteria (clause 293 (2), and this is subject to affirmative procedure.

The provisions on enforcement notices are contained in clause 294, and this allows the Secretary of State to give an enforcement notice to an ADR provider if the Secretary of State satisfied that the provider is contravening, or has contravened, any one or more of the following—

- the prohibition in section 286(1) or (2).
- the prohibition in section 287(1) or (3).
- a condition on its accreditation.
- the duty to pay a fee due under section 292(1).
- a duty imposed by regulations under section 295.
- a duty imposed by a direction under section 296.

We note that an enforcement order can be published with the permission of the High Court or the Court of Session, be enforced as if it were an order made by that court.

The ADR information regulations provisions are set out in clause 295 and are subject to negative procedure.

We note clause 296 (6), where the duty to comply with a direction is enforceable by the Secretary of State in civil proceedings — (a) for an injunction, (b) for specific performance of a statutory duty under section 45 of the Court of Session Act 1988, or (c) for any other appropriate remedy or relief.

Clause 297 concerns the disclosure of ADR information by the Secretary of State. We have no comments at this time.

Clause 298 sets out the meaning of “ADR information” and other terms in clauses 295 to 297. We note clause 299 regarding the power to provide for other persons to have accreditation functions etc.

Under clause 299 (1), the Secretary of State may by regulations make provision for or in connection with the conferring on another person of any function falling (within subsection (2), so far as it is exercisable in such cases or circumstances as may be prescribed by the regulations, in place of the corresponding function of the Secretary of State. Clause 299 (2) sets out the function’s regulators may be subject to by the Secretary of State.

We note that regulations clause 299 are subject to the affirmative procedure.

Clauses 300 to 302 concern complaints by consumers to traders.

Part 5 and Schedules 25 and 26

Part 5 sets out the provisions on investigative assistance to overseas regulators (clauses 303 to 309), and the provisions relating to disclosing information overseas are contained in clause 310, which amends Part 9 of the Enterprise Act 2002 (information) and the duty of expedition on the CMA and sectoral regulators is set out in clause 311.

Part 6

Part 6 sets out the general provisions. We have no comments at this time.

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