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26<sup>th</sup> June 2018

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Dear sir/madam

### **Modernising consumer markets: green paper**

The Society of Chief Officers of Trading Standards in Scotland is a Scottish Charitable Incorporated Organisation (SC047951), and is the professional body representing the heads of service for trading standards services in Scottish local authorities.

I very much welcome the opportunity to respond to this Green Paper, and I am pleased to outline our responses to the consultation questions below:

## Chapter 3 - Digital markets that work for consumers

- 6 How can the government support consumers and businesses to fully realise the benefits of data portability across the digital economy? And;**
- 7 As technology continues to develop, how do we maintain the right balance between supporting innovation in data use in consumer markets while also preserving strong privacy rights?**

- We appreciate the opportunities that could be created through increased data portability, however we are concerned that some consumers may be put more at risk from emerging innovation than others, particularly around their vulnerability to being scammed. Consumers taking less care of their data may well be exploited by scammers for ID theft and other electronic crime. We raised similar concerns over the 'Open Banking' initiative, which seemed

totally against traditional scam-prevention advice about keeping personal and sensitive details as private and secure as possible.

- We are open-minded to developments with emerging technologies that may well benefit consumers, however we urge the government to proceed cautiously where sensitive data is concerned and ensure that adequate research is commissioned and adequate protections put in place to safeguard consumers and deter business from an unfair advantage.

**9 Is the legal framework that covers consumer-to-consumer transactions appropriate to promote consumer confidence?**

- We agree that significant change is unnecessary in this area, however it would strengthen the framework if increased guidance and clarity for consumers were provided by government, and we also feel that 'satisfactory quality' is the standard that should be met in these sorts of transactions. It would certainly be helpful to have more clarity over when a consumer-consumer transaction becomes a business-consumer transaction, which is a grey area that has challenged many trading standards services in the past.
- We would also highlight the clear challenges for enforcers in regulating the "collaborative economy" especially with disruptive and innovative trading styles such as Air BnB and Uber. Even in more traditional channels such as auctions, we are aware of growth in consumers buying directly at auction with no rights or warranties, when in fact the goods may be homogenous retail goods otherwise sold through normal channels.
- One suggestion for business identification under consumer protection rules could be alignment with the tax regime, so that any consumer sales for profit would become a business transaction. It could then be left to enforcement authorities to make a judgement based on better regulation principles on what action is appropriate. Otherwise any redress in consumer-consumer transactions should remain a civil matter.
- SCOTSS' Fair Trading expert group has already considered consumer issues around the collaborative economy in some detail, and we would be happy to share that work separately if that would be helpful.

**10 In what circumstances are personalised prices and search results being used? In which circumstances should it not be permitted? What evidence is there on harm to consumers?**

- We are aware that these practices are becoming widespread, as technology improves, especially in the travel and accommodation sector. The crucial issue is truthfulness, and to what extent a consumer can make an informed choice given the information that is presented to him.

- We feel more must be done to educate consumers around personalised pricing, and technology, for example cookies that record data from website visits, which in particular was subject to an article in the Sunday Times of 24 June [their investigation found differing prices depending on the cookies stored on the user's computer, mostly to a consumer's detriment). There is also the connected issue of "scarcity claims" (e.g. "only 2 rooms left at this price") which is useful information for the consumer as long as they are true and connected to fixed capacity like hotel rooms or seats on a flight, and not, for example, merely relating to the supplier's own allocation from the whole market. We feel there are risks over reference prices, i.e. offering discounts from an inflated price, and the risk that the consumer is misled into thinking the personalised price represents a special offer when in reality it does not.
- This is a difficult and complex area for enforcement, but members are keen to explore options and solutions with the CMA once their current investigation is concluded. We also have little handle on overall harm, but hopefully the work will provide more data to enable the CMA to evidence real consumer detriment. It is then up to national regulators and agencies to take a lead and share expertise in this evolving area.
- We feel personalised pricing is inappropriate in regulated markets.

## **11 Should terms and conditions in some sectors be required to reach a given level of comprehension, such as measured by online testing?**

- Yes, we agree entirely that terms and conditions must be clear and comprehensible for the average consumer, while accepting there are differences in complexity between different markets.
- The Behavioural Insights work described in the paper sounds encouraging and we would support giving this approach a chance and for government to pursue further, perhaps with CMA taking a lead role. If there is anything that SCOTSS and its members can do to help in due course, perhaps with surveillance across particular sectors, then we would be pleased to engage with that.

## Chapter 4 - Improving enforcement of consumer rights

Foreword:

*SCOTSS appreciates the investment that both UK and Scottish governments have made in ADR as a key mechanism for resolving consumer disputes. Regrettably it seems clear that the ADR landscape is not working as effectively as it must. While some effective and reputable ADR schemes exist, many are less than effective, and most retail transactions will not be covered at all. In particular the requirements of Part 4 of The ADR for Consumer Disputes (Competent Authorities and Information) Regulations 2015 make little sense, and serve to confuse consumers and add a burden on business.*

*Many of our members have worked to promote ADR as a beneficial framework, so we are hopeful that changes to the regime will lead to a significant improvement for the consumer.*

**12 How can we improve consumer awareness and take-up of alternative dispute resolution?**

- We think it is fair to say that the current ADR landscape is not working effectively, while some ADR schemes do a good job for example in financial services, many are less effective. In our members' experience many businesses simply do not participate or do not do so in the correct spirit. We would be concerned about the value of attempts to increase consumer awareness before the landscape is working properly.
- The Trader Information Requirements in SI 2015:542 are a good example of where the system does not work, i.e. requiring companies to direct consumers to ADR providers that they freely admit they will not use!
- Once the system is felt to be working properly, then the appropriate publicity should be given, in partnership with Citizens' Advice and local authorities, and also through the curriculum in schools so that ADR becomes embedded in communities.

**13 What model of alternative dispute resolution provision would deliver the best experience for consumers?**

- There is a particularly crowded 'market' of ombudsmen, which adds to consumer and business confusion. We feel some simplification or rationalisation is necessary to improve accessibility for consumers and provide clearer lines of accountability and redress.
- It may be beneficial to support a single ADR for each market sector. This would make it easier to endorse and promote, and reduce confusion for consumers, although we appreciate there may be difficulties in segmenting and defining markets.
- Overall, we feel ADR must be:
  - Simple and easy to access
  - Low or no cost to the consumer
- We like the idea of a levy-based system where larger companies fund an ADR framework that really works for consumers and allows smaller businesses to meet their obligations simply and cost effectively.

**14 How could we incentivise more businesses to participate in alternative dispute resolution?**

- In our view businesses are already under sufficient obligation to participate in ADR systems. The incentivisation approach has proven largely ineffective thus far, and we would support an extension of compulsory ADRs in appropriate market areas, backed up with an administrative penalty regime such as FPNs, delivered by local authority trading standards services.
- There may be opportunities to work in particular sectors, where regulators or other bodies are already engaging with business, for example through the Primary Authority Principle, or through the Consumer Code Approval Scheme.

**15 Should there be an automatic right for consumers to access alternative dispute resolution in sectors with the highest levels of consumer harm?**

- Yes, we are strongly in favour of consumers having a right to access ADR in sectors where there is proven consumer harm. On a UK level it would be unrealistic to achieve compulsory ADR across all markets, but it has already been shown to be achievable in particular sectors where deemed necessary.
- We would suggest the idea of a levy-funded 'consumer court' in these market sectors, which would prevent any further strain on the existing civil court network and provide swift and fair outcomes for consumers. We are also keen to explore with the Scottish Government if a Scottish Consumer Court is an option, under Justice powers, to provide a wide-ranging ADR backstop for consumers in Scotland.

**16 What changes are needed to ensure local and national enforcers work together within an effective framework for protecting consumers?**

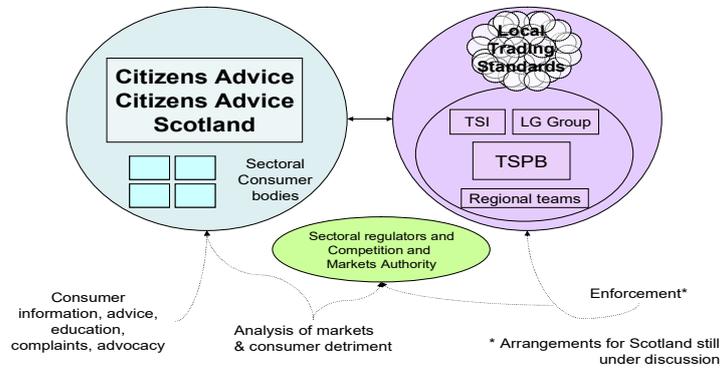
Foreword:

*SCOTSS entirely supports the need to review the current framework, to ensure a strong locally based system of consumer law enforcement that works for consumers and honest business alike. Locally based regulation, through a coordinated system of local authority enforcement has long been proven to be the most effective, the closest to consumers and business, and the best informed to take appropriate action. Centralised action should have a subsidiary function, supporting local services with expertise and resource where it is needed most, and tackling the most complex and widespread consumer crime. SCOTSS is therefore alarmed at the apparent shift in resource from local to central, from over 90%:10% at the time of the last landscape change to the quoted 75%:25% now, and action needs to be taken to safeguard local capability, which is the cornerstone of the UK system.*

*We think the Green Paper could be clearer in its description of the current landscape in para 160, where it fails to recognise the fundamental differences between NTS and TSS, namely that TSS has its own enforcement team and does seek to use powers delegated from local authorities, rather than using the approach of NTS, commissioning local authorities to carry out national and cross border work.*

SCOTSS strongly supported in its response to the last consumer protection landscape consultation back in 2011 (DBIS "Empowering and Protecting Consumers - Consultation on

Figure 2: Proposed Future Consumer Landscape



institutional changes for provision of consumer information, advice, education, advocacy and enforcement, June 2011), a separate 'system' in Scotland as we saw that as providing better value and accountability north of the border (fig 2 left refers). However, it is clear now that this approach has serious weaknesses. Hosting and employment of the Scottish team by the local government association in Scotland [COSLA], which is neither a

public nor an enforcement body, has caused real problems, with most Scottish local authorities understandably reluctant to authorise the external officers employed by COSLA. The introduction of the latest Data Protection legislation has underlined the issue, as COSLA is not a 'competent enforcement authority'.

Local services in Scotland have also not benefitted to the same extent as colleagues in England and Wales, as the commissioning approach is not used, with any enforcement on national casework being performed inhouse by a central team. This, together with Devolution changes subsequent to 2011, lead us to believe that moving forward, there should be a single approach, with the delivery of national services in Scotland (although being discrete) being aligned with National Trading Standards in England and Wales, and much more closely integrated with local trading standards services. We remain convinced (as we underlined in our 2011 response) that SCOTSS, as the Heads of Service group for local authority services in Scotland, must be intrinsically involved in the governance of the national team in Scotland (as ACTSO is with National Trading Standards) thus ensuring positive engagement and the most effective joined up approach possible between local and national enforcement services.

We are clear the national teams have added much to the landscape and to capability, particularly around major casework and the development of intelligence, but this opportunity must be taken to join national and local much more effectively, improving engagement and helping ensure future fitness for purpose.

- Although SCOTSS is pleased at the recognition the Green Paper gives to the fundamental role of local authority services, we are concerned at the statistics quoted in paras 156-159 and in particular around the suggested 75% of resource sitting with local authority trading standards services. We know at the last landscape change this was over 90% so the shift from local to national is dramatic, and the risks to the viability of the local authority enforcement system identified in the Paper (and also in two reports by Audit Scotland) need to be addressed swiftly. SCOTSS' own workforce data also shows an alarming risk to the service in Scotland in terms of age demographics that needs to be addressed quickly.
- SCOTSS strongly supports the idea of a national body as described in para 163-165 that will add leadership and support to local services from the centre, allowing local authorities to focus on local issues, while

providing the capability to intervene in cross border issues where necessary. It is worth underlining however that local council trading standards services are not wholly confined to interactions with local businesses, but still work regionally, and interact with national companies and brands. There are clear similarities here, with the approach the Government is taking with OPSS, and we note the CMA also retains consumer enforcement powers. Care will need to be taken that the landscape does not become confusing at a national level with a proliferation of separate bodies or agencies, particularly with the Scottish Government about to consult on proposals for 'Consumer Scotland'. SCOTSS would support discussions with either of those existing bodies to see what extended role they could play in the landscape, rather than create another national agency, however it seems a more elegant solution to 're-invent' the existing National Trading Standards operation as a public body and extend its remit to the whole of the UK for reserved matters, to include Scotland at least in policy, governance and accountability terms. SCOTSS would expect to engage in any future discussions around what the most effective framework might look like.

- Any new national statutory body must provide:
  - i. A coordinating and leadership role, with a voice in Government
  - ii. An intelligence and national priority setting role
  - iii. A supportive role in monitoring the performance and improvement across local authority trading standards services
  - iv. An ability to direct local services, or take action where local resource is insufficient
  - v. An enforcement capability to take on major national casework, and tackle industry wide failure.
  - vi. Robust engagement with local services to ensure a joined-up approach to enforcement.
  
- As mentioned above, SCOTSS is fully supportive of a new statutory basis for the national trading standards teams. We believe they play a crucial role in the development of a world class consumer protection regime, but they must be fully integrated into the enforcement framework, supporting and working with local authority services, and providing capacity and expertise to benefit consumers and business. We think there should be a harmonised and consistent approach to delivering trading standards nationally and regionally, improved accountability and transparency, and a more prominent role for SCOTSS as the Heads of Service group in Scotland, which will help ensure positive outcomes and the best possible engagement between national and local services.
  
- SCOTSS is particularly supportive of the commissioning approach currently taken by National Trading Standards in E&W, which spreads resource across local authority services, creating centres of excellence and supporting trading standards at grass roots level. We have noted some excellent outcomes from the NTS teams in recent years, with

significant successes in cross border casework. This review must learn from the experience of the past six years and ensure that the outcome is a fit for purpose and sustainable regulatory and enforcement framework.

- SCOTSS strongly supports the suggestions in the Paper around the extension of civil fining powers, something we believe has real potential as a deterrent to help get early informal resolutions to cases. However only with the caveat mentioned elsewhere in our response, that there needs to be a recognition that without a strong base level of resource in local authority services, these powers are unlikely to be utilised by trading standards at a local level. Any strengthening of civil powers will of course need to recognise and accommodate any particular differences that the Scottish legal system might require. We also accept the importance of retaining criminal sanctions, for use in appropriate circumstances of serious criminal activity or consumer detriment.
- SCOTSS recognises the importance of a robust cross-border enforcement system (paras 166-171), and it is particularly vital in the inter-connected digital e-Commerce world. We support the suggestions in the Green Paper on this issue and hope that close regulatory alignment can be achieved within Europe, and that the UK will continue to play a leading role internationally.

## Chapter 5 - A regulatory and competition framework for the future

### **17 Do you agree with the initial areas of focus for the Consumer Forum?**

- We agree that it is appropriate to focus on these areas initially, however this is quite a narrow scope, and the Forum should be able to extend its focus as necessary to account for consumer concerns that are raised by regulators or consumer groups. We note the membership of the Forum also appears quite restricted and it may be prudent to include consumer representatives as permanent members.

I hope this response is helpful, and if you wish to discuss any points or any other matters in further detail, please do not hesitate to contact me. Please feel free to publish our response on the BEIS website if appropriate.

Yours faithfully

**Sandra Harkness**  
**Chair SCOTSS**

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