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The Regulation of Estate Agents¹

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Abstract

This paper traces attempts to create a regulatory framework for the carrying on of estate agency work in Malta and on relevant developments overseas. An initial proposal published in 1991 was not followed up but in early 2016 government published a new White Paper and draft law on the subject – Malta's Property Code and Regulations. The authors analyze critically these latest proposals and argue that the draft law is deficient in various ways. They comment on the role and powers of the proposed new regulator and the grave anti-competitive issues that it may give rise to. The apparent inaction of Malta's consumer and competition agency is also highlighted. Finally, the paper comments on the comparative dimension and briefly describes differences in the regulatory approaches adopted by the European Union, United Kingdom and in Australia. The difficulties encountered by Cyprus are also looked into.

¹ The information in this article is correct as of January 2017.

1. Introduction: to regulate or not to regulate, and how?

Estate agency work has for many years represented perhaps the most startling and controversial unregulated activity in Maltese law. Estate agency broadly refers to the activity where buyers or sellers, as consumers, approach and engage the services of intermediaries to assist them in transactions involving the sale or rent of immovable property. Estate agents carry out a socially useful activity which brings together buyers and sellers, owners and prospective tenants, and they greatly facilitate the marketing of immovable property matching demand with the available supply.

The law does not provide for any comprehensive legal framework for persons wishing to engage in the activity which is very lucrative and widespread in Malta. Today we still lack a proper legal definition of what qualifies a person as an estate agent. Anybody can do it. No licence or registration is required.² The notification requirement to the Trading Licensing Unit has been removed following the coming into force of LN 420 of 2016. Not being regulated is not something out of the norm. Several countries regulate estate agents differently. Some do not regulate them at all and one current example is Malta. Others follow a self-regulation certification or accreditation system. For example within the European

² Local case law substantiating this is sufficiently clear. See, for example, *Henrietta Falzon vs John Frenzo Azzopardi et.* where the Court states that '*Li l-ligi speċjalment f'materja ċivili ma tirkjedni ebda rekwiżita speċjali biex wiehed ikun jista jikkwalifika ruhu bħala sensal f'operazzjoni ta' bejgħ ta' bini, ta' trasferiment enfiwewtiku u ta' operazzjoniet oħra fejn ġeneralment tinterċedi l-operat ta' terza persuna biex l-operazzjoni proposta u minnu inizjata, isseħħ definitivament.*' [First Hall, Civil Court] 6 October 1964. Informal translation: the law, particularly in matters such as civil law, a person who acts as an intermediary (sensal) towards the conclusion of a transaction concerning the sale of property, transfer of an emphyteusis and other transactions does not require any special requirement for that transaction, which he would had initiated, is concluded.

Economic Area³ around 14 states rely on self-regulatory methods.⁴

This paper briefly traces local attempts to regulate this sector, touches upon relevant laws, examines the so-called White Paper⁵ and draft Bill which have been published⁶ by the Maltese government, and looks into recent developments in the European Union, the United Kingdom, Cyprus, and Australia. Local reactions from various sectors will also be referred to. This paper however will not go into the purely private law aspects of property intermediation.

2. August 1991: 'Rights for the Consumer'⁷

The absence of a sector specific legal and regulatory system for estate agents had been identified and deplored in the White Paper published in August 1991 with the above title. Back then the Government had proposed a licensing and oversight framework to improve the level of service and to ensure better protection for the public. The initiative was planned as part of a major overhaul of the general consumer protection situation in the islands which in 1991 was in a very

³ The European Economic Area unifies the EU Member States and the three EFTA members into one single market.

⁴ Mutual evaluation of regulated professions – Overview of the regulatory framework in the real estate sector, a report based on information transmitted by Member States and on a meeting of the 6 June 2014, Document date: 19 January 2015 - Created by GROW.A.5 - Publication date: 16 February 2016. <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjrqNLx3NHOAhWDUhQKHUITCFsQFggeMAA&url=http%3A%2F%2Fec.europa.eu%2FdocsRoom%2Fdocuments%2F15486%2Fattachments%2F1%2Ftranslations%2Fen%2Frenditions%2Fnative&usq=AFQjCNG0gYUkwDPCiKvAYz5IXIcGNwESuw>> accessed 20 August 2016.

⁵ Parliamentary Secretariat for Competitiveness and Economic Growth, 'Malta's Property Code and Regulations' (White Paper, 2016)

⁶ The 2014 Budget document for 2015 had indicated that a consultation process was to be launched after the publication of the White Paper proposing the regulation of estate agents, property agents and consultants. (vide p 32) The White Paper was then launched on 14 January 2016.

⁷ Department of Information, 'Rights for the Consumer' (White Paper, 1991)

poor state. Important measures followed the 1991 policy consultation document, including the setting up of a new Department for Consumer Affairs in 1992 and the passage of the Consumer Affairs Act in 1994. The White Paper acknowledged that the 'purchase of a house may ... be the most important and expensive transaction entered into by a consumer throughout his entire life and thus requires consideration.'⁸ Government promised to introduce measures that would meet the following objectives: (a) estate agents would give their non-business customers a fair deal; (b) estate agents would not indulge in abusive sales methods; and (c) that adverts and other material promoting property sales would be substantially truthful and relevant. However an estate agency legal framework never materialised.

Much law was then added in 2000 when EU membership was approaching. No specific EU directive exists on estate agents (as opposed say to package tours⁹ and timeshare¹⁰) and this shows from the lingering lacuna. This is not to suggest that the services offered by an estate agent are entirely outside the law. If the transaction between an agent and a consumer exists in terms of general law, then various important rules apply, including EU-derived rules prohibiting unfair contract clauses¹¹ and unfair commercial practices,¹² today inserted and described in the Consumer Affairs Act 1994. Likewise the Competition Act 1994, by way of example, prohibits agreements between undertakings which have the

⁸ *ibid* 29.

⁹ Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L 326/1.

¹⁰ Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] OJ L 33/10.

¹¹ Consumer Affairs Act, Chapter 378 of the Laws of Malta, Part VII.

¹² *ibid* Part VIII.

object or effect of restricting competition.¹³ However, no rules raise licensing, educational, financial, or other qualifications or criteria, apply to persons offering these property-related services to the public.

3. 2004: 'A Study in Maltese Regulation-Estate Agency Services: a suitable case for treatment?'

The Autumn edition of the official journal on the Malta Institute of Accountants published in April 2004 contained a paper by one of the writers which explored the subject from a regulatory perspective.¹⁴ It asked whether estate agency should be regulated or not. The paper pointed out that: 'Operators of estate agency undertakings have ... so far escaped specific regulation, are only governed by the general law of the land and are not accountable to any specialised public authority.' It analysed what the law could do to regulate this activity and the dangers that may lurk whenever such initiative is contemplated particularly risks of capture and other anti-competitive and trade-barrier issues. Describing the legal situation as 'untenable and inappropriate',¹⁵ the paper predicted that estate agency and related services, like many other activities before it, would at some point become subject to some authorisation and oversight regime: 'Sooner or later, this subject shall have to be addressed. It is a suitable case for treatment where the responsibilities and duties of care of estate agents would be clearly spelt out....'¹⁶ In conclusion it warned that 'the agenda should not be allowed to be dominated or led by the industry itself as significant vested interests are involved. The new regulatory set-up should actively safeguard competition

¹³ Under Article 5 any agreements, decisions and concerted practices between undertakings which prevent, restrict or distort competition are prohibited.

¹⁴ David Fabri, 'A Study in Regulation – Estate Agency services: a suitable case for treatment?' [Autumn 2004] (29) *The Accountant*.

¹⁵ *ibid* 31.

¹⁶ *ibid*.

and consumer choice and not inadvertently promote closed shops or cartels.’¹⁷

4. The proposed new Real Estate Agents Authority

The recent draft Bill recommends the establishment of yet another new public authority.¹⁸ Its place within the whole national enforcement fabric is unclear. The relevant regulations concerning its relations with other authorities have not been published.¹⁹ Unless this is clarified there may be two plausible scenarios leading to undesired results: (i) duplication of work which may in instances lead to contradictory regulatory measures; and (ii) inaction as enforcement agencies may rely on each other.²⁰

The new authority may confuse consumers even further especially when it comes to lodging complaints. We may have a repeat of the Fantasy Tours debacle where consumers, already lost as a result of no clear leadership, ended up knocking on every door possible registering, their case with the Tourism Authority, the Competition and Consumer Affairs Authority, the Consumers’ Association, and the Police in the desperate hope that they could recoup the money paid for cancelled tours. In reality consumers would be unable to recognise which is the more suitable authority to address their

¹⁷ *ibid.*

¹⁸ White Paper (n 5) draft article 8.

¹⁹ According to draft article 30 (2) (f) the Minister may have the power to make regulations ‘regarding the cooperation with other authorities, entities and agencies and the relationship between the Authority and other authorities, entities and agencies including consultations, provision of information and any other matter of mutual interest.’

²⁰ For example the Australian Consumer Law and Fair Trading Act 2012, is extended to apply to the Estate Agents Act, 1980 (No 9428 of 1980), of the state of Victoria (Australia), see article 93A. In the case of the draft Real Estate Agencies and their Agents Act this aspect is not addressed in the Act itself but provides for the publication of subsidiary legislation in this regard. Until subsidiary legislation is published an element of uncertainty may prevail between regulators.

concerns. Are they expected to after all? Really and truly consumers are only interested in getting a remedy rather than being uselessly herded from one authority to another with no light at the end of the tunnel.

As if this were not enough, persistent consumers face yet another hurdle. The White Paper suggests that when a complaint is lodged before the authority, a €50²¹ charge becomes due. This seems to be the trend as recently even complaints lodged before the Financial Services Arbiter face a fee of €25.²² A mediation process seems to be off the cards and once the process is triggered, the Authority would be required to decide within an undefined period of time. Four issues arise. First, the charge may deter consumers from lodging complaints. This may place the same Authority at a disadvantage as it will not be able to detect and address practices taking place in the sector. Secondly a timeframe ought to be imposed within which the Authority is to conclude its investigations and decide. Should we continue with the practice that when an issue arises we are given the impression that something is being done where in reality time is bought for it to be forgotten into oblivion? Thirdly, decisions are not required to be reasoned. Fourthly, no provision is made to allow the Authority to intervene in those circumstances where consumers are in an imminent risk of irreparable damage.

Enforcement is essential for any regulatory authority. A public authority should have all possible instruments at its disposal to address any unwarranted conduct. The regulation of agents is identified as one of the vehicles to protect consumer interest. As soon as the draft Bill was launched, some operators immediately expressed concern that a person might end up not

²¹ White Paper (n 5) draft article 9 (2).

²² Sarah Carabott, 'Arbiter insists on complaints in Maltese' (*Timesofmalta.com*, 28 June

2016) <<http://www.timesofmalta.com/articles/view/20160628/local/arbiter-insists-on-complaints-in-maltese.617005>> accessed 30 July 2016.

only being heavily fined, but also imprisoned.²³ However, according to the draft Bill, imprisonment is not triggered automatically, as the authority may impose an administrative fine up to €500.²⁴ No guidelines exist as to how this would work out. Curiously, the Authority will not be able to suspend or withdraw a licence as the relevant rules have likewise not yet been published. This means that licensed persons who would have been found guilty of misconduct may still be allowed to operate.

A final word on the Authority's setup, which is somewhat opaque. We know that there will be a Board, but know nothing else, not even the criteria upon which the selection of Board members should be made. In reality anyone may be appointed since the Minister may even waive the disqualification clause.²⁵ Nothing suggests that consumer organisations will be represented. Moreover, if the Authority is called upon to decide a complaint will the Board undertake this? What are the measures that curtail any conflict of interest in the conduct of an investigation? And finally, who takes the final decision? These are issues which still need to be ironed out and clarified.

5. What's in it for Consumers?

Consumer concerns, if any, are only vaguely referred to in the recently published document with the result that the

²³ Miriam Dalli, 'Developers hit out at 'far-fetched' proposal to jail unlicensed real estate agents' (*Maltatoday.com*, 18 February 2016) <http://www.maltatoday.com.mt/news/national/62376/imprisonment_of_unlicensed_real_estate_agents_farfetched_mda_says#.V-04PVR97IV> accessed 30 July 2016

²⁴ Draft article 27 states that those guilty may become liable to a fine (*multa*) not exceeding €20,000 or imprisonment for a term not exceeding six months. This is however subject to draft Article 28 which states that the Authority may impose an administrative fine not exceeding €500.

²⁵ The proviso to draft article 8 (4) states: 'Provided that the Minister may waive the disqualification of a person under this paragraph if such person declares the interest and such declaration and waiver are published in the Gazette.'

'advantages' of this draft legislation to consumers remain hazy and unclear.

The White Paper is contradictory and this puts into doubt its 'consumer interest' credentials. 'Elevating' property intermediaries to a professional status is one of the purposes behind this whole initiative. Consumers may benefit from this measure as it will 'promote public confidence in the performance of estate agency work.'²⁶ Estate agents will be bound by a 'so-called' code of conduct. However, one question remains: why is government proposing to leave unregulated a section of these service providers, namely the *sensara*, and thereby creating a vacuum? Or is it the case as was stated by Chris Grech where 'some people are going to have to be shelved?'²⁷

The White Paper focuses on the licensing requirements for estate agencies and their agents with little tangible concern towards enhancing the quality of service through competition for the benefit of the consumer. If the latter is the real focus of this initiative, then one can easily classify the draft Bill as work in progress.

A schedule in the draft law purports to govern the conduct of affairs in consumer-to-agent relations²⁸. It hints at the procedures and modalities that should take place before engaging an estate agent or property consultant. The draft fails to specifically require that (a) consumers should be presented with pre-written agreements explaining the terms of business and details of any applicable charges before using a service and (b) that such agreements should be drawn up in a clear and concise manner. Consumers may end up having to read lengthy agreements devised in fine print. In order to save time, consumers might probably rely on the agent's explanations and

²⁶ White Paper (n 5) 11.

²⁷ Quoted in 'Laying the right foundations to prevent a property bubble', Case Study (May 2016) The Business Observer.

²⁸ *ibid* 33.

assurances and sign the documents perhaps when not completely aware of its full implications.

In this regard one would have expected more initiatives in favour of the consumer. For example, the rules could (i) provide for à la carte services according to the requirements of the consumer; (ii) specify the duration of an agreement; (iii) regulate withdrawal charges to impede potential switching barriers that reduce competition and consequently consumer choice and in this context address situations where an agent performs badly; and (iv) introduce a name and shame' scheme to alert consumers to 'rogue' operators. One would have also expected to find proposals to curtail issues concerning misleading information, false impressions, hide important information, and inaccurate claims of false claims about the price.²⁹ 'Dummy bidding'³⁰ too should be made unlawful. Last but not least, other initiatives favouring price transparency thereby enhancing consumer choice through price comparison would greatly benefit consumers.

6. The Unfair Commercial Practices Directive

The draft Bill is proposed in isolation. Nothing indicates that an assessment has been carried out on the suitability, or otherwise, of existing consumer legislation to estate agency transactions.

²⁹ 'Underquoting' takes place to attract the attention of potential buyers by claiming that the property is said to be within their budget when in reality the price is higher. Consumers may spend considerable time setting appointments with architects and lawyers to assess the building structure and legal implications to later find out that in reality the asking price is higher than initially quoted by the real estate agent.

³⁰ This is when someone pretends to be interested in purchasing a property by bidding in an auction competing with the genuine bidder in order to push the price upwards.

In 2008, as an EU member, Malta transposed³¹ the Unfair Commercial Practices Directive,³² in many respects a maximum harmonisation Directive. This now forms part of the Consumer Affairs Act 1994. In the field of immovable property, the Directive³³ allowed Member States to set rules beyond those it established due to the 'complexity and inherent serious risks'³⁴ for consumers.

The purpose of the Directive was to address unfair practices taking place in the market such as providing consumers with incorrect information, or using devious techniques to influence their decisions, and not taking down outdated advertisements from websites. These may take other forms such as essential information not included in advertising, problems with incompetent agents, problems with poor advice, lack of pricing transparency, and misleading descriptions and information on costs. In this regard, should the consumer enforcement agency³⁵ identify an unfair commercial practice, it is empowered to take action through an administrative decision which may include the imposition of administrative fines³⁶ and the issue of public warning statements.³⁷ These enforcement mechanisms are already legally in place and at the disposal of the Director General of the Office of Consumer Affairs.³⁸

³¹ Act to amend the Consumer Affairs Act and to make amendments to other laws, Act II of 2008.

³² Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Directives 84/450/EEC, 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) No 2006/2004 [2005] OJ L 149/22

³³ *ibid* article 3 (9).

³⁴ *ibid* recital 9.

³⁵ The Office for Consumer Affairs forms part of the Malta Competition and Consumer Affairs Authority and is established by Part V of the Malta Competition and Consumer Affairs Authority Act, Chapter 510 of the Laws of Malta. .

³⁶ Consumer Affairs Act (n 11) article 106A.

³⁷ *ibid* article 8.

³⁸ Established under Malta Competition and Consumer Affairs Authority Act (n 35) Part V.

The European Commission, under the Consumer Protection Cooperation framework, also organises workshops for national authorities, which include Malta's Office for Consumer Affairs, 'to exchange best practices, promote a common understanding of EC law and improve enforcement.'³⁹ The European Commission also issued guidelines for the proper application of the Directive. In 2016 it adjourned⁴⁰ the 2009 'Guidance on the application of the Unfair Commercial Practices Directive' making specific reference to immovable property and emphasising the strict adherence to those articles⁴¹ in the Directive which address misleading commercial practices. The guidelines reiterate the 'the importance and uniqueness of the decision that consumers make when purchasing immovable property.'⁴² Particular attention is given to providing consumers with full information to enable them take an informed decision by ascertaining that services, such as water and electricity, are provided, the surface area of the immovable property, and the price of the property, inclusive of VAT and all other charges such as agent's commission, are correctly and fully stated.

Malta adopted a minimalist approach when transposing the Directive and did not venture beyond the level of protection provided by the text. The term 'product' in the Consumer Affairs Act reproduces the definition provided by the Directive and includes immovable property.⁴³ To date Malta, like a number of other Member States, did not take advantage of article 3(9) of the Directive by which Member States are allowed to make special rules for immovable property.⁴⁴

³⁹ Answer given by Commissioner Jourová to a question lodged at the European Parliament, E-000918-16 by Tibor Szanyi on 1 February 2016.

⁴⁰ Commission Staff Working Document, SWD (2016) 163 final, Brussels, 25 May 2016.

⁴¹ Articles 6 and 7.

⁴² Commission Staff Working Document (n 40) 165.

⁴³ Consumer Affairs Act (n 11) article 51A.

⁴⁴ Article 3(9) of the Directive reads as follows: 'In relation to 'financial services', as defined in Directive 2002/65/EC, and immovable property, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates.'

However other EU Member States, which have chosen not to do so, had other pre-existing separate rules and enforcement systems regulating the conduct of estate agents. In Malta there are no special rules to regulate the local *sensara* and estate agents; this however does not exclude their activities from the reach of Part VIII of the Consumer Affairs Act.

It may be useful to examine whether this section of the Consumer Affairs Act was ever used to address any malpractices in the sector. Between 2009 and 2013, the Malta Competition and Consumer Affairs Authority (the MCCA) received a total of 198 complaints which have been classified as unfair commercial practices.⁴⁵ Unfortunately, no details are available as to how many of these concerned the property market. It seems that no major issues have been detected by the local consumer watchdog.⁴⁶ The two cases which have been reported concern the improper completion of structural works.⁴⁷ The MCCA would intervene in cases where illegally built property is advertised, by agencies or traders, as this would be tantamount to misleading advertising. In such situations offenders may be fined up to €47,000.⁴⁸ Therefore regulatory powers are already present in the statute books which, if applied, may be used to curtail malpractices in the property market.

In this respect, one may refer to two recent cases in the UK showing the utility of these regulations. In one case an estate agent was fined by the Court £7,500 after pleading guilty to misleading advertising.⁴⁹ The agent had advertised holiday homes as if they were permanent residential properties.⁵⁰ In

⁴⁵ PQ 7525 session 118 of 11 February 2014.

⁴⁶ PQ 21393 session 337 of 7 December 2015.

⁴⁷ PQ 21394 session 339 of 14 December 2015.

⁴⁸ *ibid.*

⁴⁹ The regulations, transpose the unfair commercial practices directive, which amongst others stipulate that agents must not omit material facts which could affect someone's transactional decisions.

⁵⁰ Graham Norwood, 'Agent faces £7,500 bill after 'misleading' ads about homes on sale' (*Estateagenttoday.co.uk*, 22 July 2016) <<https://www.estateagenttoday.co.uk/breaking-news/2016/7/agent-faces->

another case a letting agency was prosecuted for 'ghost listing'. The company was eventually fined £6,600 for listing apartments which were in fact not available. It was revealed that property owners discovered that their property had been listed as available for rent when in reality this was not so. In both cases the offences were found in breach of the Consumer Protection Regulations, 2008.⁵¹

Under the Unfair Commercial Practices Directive the European Commission was obliged to review whether the exemption from full harmonisation contained in article 3(9) should be maintained.⁵² A report⁵³ was drawn up in 2011 to examine the application of this part of the Directive.⁵⁴ All Member States were invited to participate. Regrettably, Malta's contribution to this EU wide study⁵⁵ was negligible. The contribution would have been useful in the context of the drafting of the current White Paper and would have analysed experiences in this area.

7-500-bill-after-misleading-ads-about-homes-on-sale> accessed 16 August 2016.

⁵¹ Graham Norwood, 'Agency fined by council for 'ghost listing' flats to let on Zoopla' (*Lettingagenttoday.co.uk*, 10 June 2016) <<https://lettingagenttoday.co.uk/breaking-news/2016/6/agency-fined-by-council-for-ghost-listing-flats-to-let-on-zoopla>> accessed 17 August 2016.

⁵² Unfair Commercial Practices Directive (n 32) article 18.

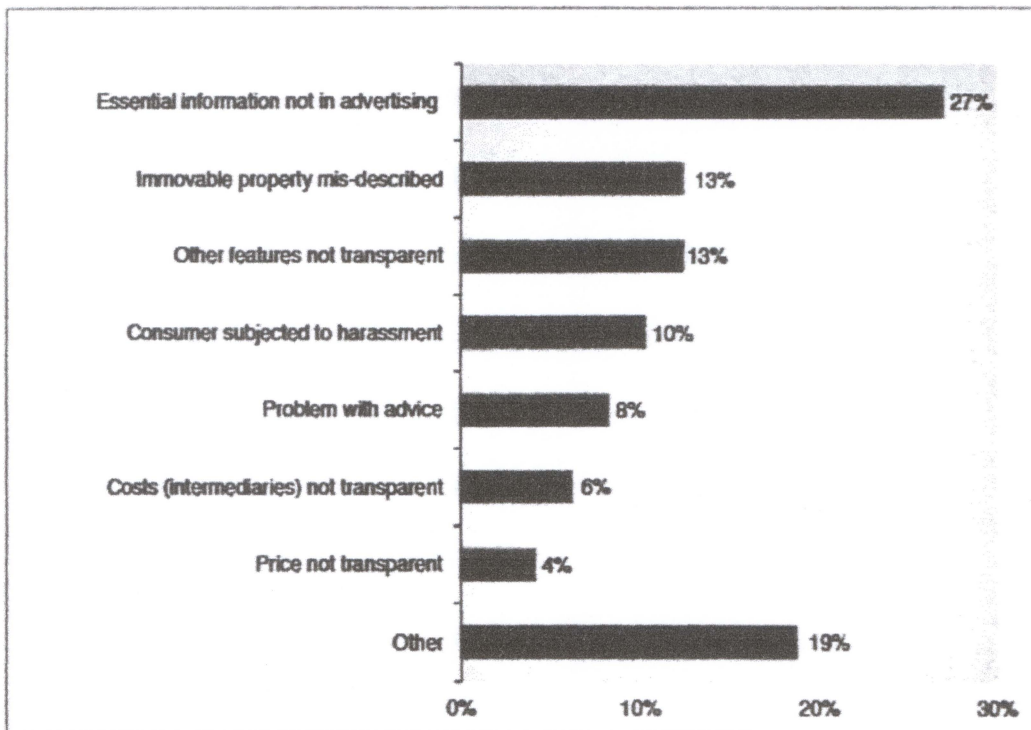
⁵³ Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU (n 32), Part 1 – Synthesis Report, conducted by Civic Consulting. It was concluded on 22 December 2011 and published by the European Commission on 14 March 2013, COM(2013) 139 final.

⁵⁴ According to the terms of reference the purpose of the study was to examine the application of the Unfair Commercial Practices Directive in the areas of financial services and immovable property in the EU Member States. The purpose of the study was: (i) to identify rules which Member States might have in place, other than those implementing the UCP Directive, to address unfair commercial practices in the areas of financial services and immovable property; (ii) to describe the most common unfair commercial practices in these areas; and (iii) to recommend whether the exemption under article 3(9) should be kept or removed.

⁵⁵ Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU (n 32), Part 1 – Synthesis Report, conducted by Civic Consulting (n 53).

One of the purposes of the EU study was to identify the most common unfair commercial practises taking place in the European immovable property market. It would have been useful to learn how the local consumer agency would have addressed issues relating to misleading behaviour, misleading omissions, aggressive practices, or undue influence involving immovable property. Regrettably we have no details on what actions were taken, if any, by the local consumer authority. These studies are done for a beneficial purpose and national consumer agencies should be encouraged to participate and contribute the Maltese experience.

Reported common unfair commercial practices reported in study on the application of the Unfair Commercial Practices Directive



Source: Civic Consulting, Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU; Part 1 – Synthesis Report p 125

Although the reported cases may not be totally relevant to the Maltese scenario, this study remains an eye opener. Twenty three countries⁵⁶ reported that unfair practices did occur when buying property⁵⁷ and highlighted that one of the major problems concerned the absence of essential information in advertising.⁵⁸

It is possible that both consumers and estate agents may not even be aware that certain practices are prohibited because they would not have an understanding of what constitutes an unfair commercial practice or of a practice that goes against the law. In these cases, these instances will remain unreported. Issues raised by some estate agents seem to confirm this. In her feedback on the White Paper Julie McKenzie listed a number of concerns and questioned how specific situations such as: (i) misled clients; (ii) misleading property descriptions; (iii) falsified paperwork;⁵⁹ will be addressed. It is also interesting to look into practices that may be taking place to entice property owners to 'put their property on the agency's books.'⁶⁰ Clearly, a number of operators are still unaware of the unfair commercial practices regulations and their implications - food for thought regarding the quality and effectiveness of the awareness campaigns conducted by the European Commission⁶¹ and by the MCCA on the matter.

⁵⁶ Civic Consulting states that it received 35 responses from enforcement authorities and other organisations from 26 countries. No responses were sent from Malta and Romania on unfair commercial practices in the immovable property sector. Greece, Iceland and Latvia did not report any unfair commercial practices in the sector, see p 123.

⁵⁷ *ibid* 124.

⁵⁸ *ibid*.

⁵⁹ Julie McKenzie, 'Malta to Regulate The Real Estate Market' (*LinkedIn.com*, January 18 2016) <<https://www.linkedin.com/pulse/malta-regulate-real-estate-market-julie-mckenzie>> accessed 19 August 2016.

⁶⁰ FrancoHomes – Who we are, <<http://francohomesmalta.com>> accessed 19 August 2016.

⁶¹ In 2014 the European Commission launched a two year campaign covering 14 Member States.

Consumer regulation should feature prominently in any future courses for property agents and managers.⁶²

7. Competition concerns

The White Paper discriminates between the different types of property intermediaries and proposes to exclude the *sensar*, strangely translated as the 'village broker',⁶³ from the purview of the regulations. The White Paper does not explain this exclusion. Like estate agents, *sensara* are property intermediaries, and the exclusion means that they will not be required to have a licence as long as they restrict their activities: (i) by not advertising their services; (ii) by limiting their services to occasional transactions; and (iii) by not employing persons in the conduct of their business.⁶⁴ The exclusion would also mean that the commission rate charged by the *sensar* will continue to be regulated solely by the Civil Code provisions.⁶⁵ In the absence of an agreement with the customer, this will not be more than two per cent.⁶⁶ On the other hand, the proposed regulations will crystallise current practice, bypassing Civil Code provisions, whereby estate agents will be allowed to charge a higher commission up to a maximum of five per cent unless otherwise agreed.⁶⁷ The very term 'village broker' may

⁶² The proposed training courses for property agents do not list consumer law under the law section but is classified as 'consumer protection' within a subsection entitled 'Practice knowledge' along with other subjects like office procedures, information technology, quality assurance and so on.

⁶³ White Paper (n 5) 15.

⁶⁴ *ibid.*

⁶⁵ Upon agreement of a sale of property a *sensar* normally charges 1% to the seller and 1% to the buyer. On the other hand an estate agent charges 3.5% or 5% depending whether the property sold was under a sole agency agreement or not.

⁶⁶ Civil Code, Chapter 16 of the Laws of Malta, 1362.

⁶⁷ The provision to the definition of the word 'commission' states the following: 'Provided that, in the absence of a signed sales mandate agreement, the commission shall not in any way exceed 5% + VAT of the purchase price of the mentioned property; or one month's rent in the case of a rental agreement and the provisions of article 1362 of the Civil Code shall not apply.'

also imply geographic limitation, a proposal that may give rise to further difficulties under competition rules.

For the *sensar* the exemption may at first sight be good news. However, the proposed measures imposed on the *sensar* may cumulatively distort competition as it will restrict the activities of the *sensar* and subsequently consumer choice. The *sensar* is not competing with the real estate agent on a level playing field and is placed at a disadvantage. Consumers, being buyers or sellers of property, may be compelled to go to estate agents as they would be able to service the whole of Malta. This would also mean that consumers will have no other option but be charged higher rates. *Prima facie*, this proposal, may mean that the *sensar* may be gradually and silently elbowed out of the market. Indeed, concerns have been aired by some estate agents on how to 'police'⁶⁸ advertising done by the *sensara*. Perhaps the concern should be the proposed prohibition of advertising by *sensara* and not the other way round.

The past has seen sporadic official attempts to break a system of market sharing which discourage competition; and these initiatives were curtailed even through special legislation. One such example involved Hompesch Station Limited where the company was discriminated against and not paid the full commission by Enemalta for not following what had been agreed upon between Enemalta and the General Retails and Traders Union (the GRTU). It had chosen to sell fuel differently from the other petrol stations bound by the agreement. Over the years the agreement was eventually incorporated in a legal notice.⁶⁹ This rigid system which left no room for competition was challenged before the Office for Fair Competition⁷⁰ which

⁶⁸ Julie Mc Kenzie (n 59)

⁶⁹ LN 102 of 2002 which was replaced by L.N. 1 of 2006 which still maintained the anticompetitive provisions of the agreement.

⁷⁰ Quoted from the case *Hompesch Station Limited vs Korporazzjoni Enemalta, L-Awtorita ta' Malta dwar ir-Rizorsi u b'nota tas-6 ta' Novembru 2015 ir-Regolatur ghas-Servizzi tal-Energija u l-ilma qed jassumi l-atti tal-proceduri minflok l-Awtorita ta' Malta dwar ir-Rizorsi, Ministru ghar-Rizorsi u Affarijiet Rurali u b'nota tal-5 ta' Novembru 2014 il-Ministru ghall-Energija u s-Sahha*

found that this measure ran contrary to competition law for the following reasons:

- i. the individual undertakings [made by] members of GRTU through their collusion
- ii. the agreements between GRTU and Enemalta, which agreements constitute a decision
- iii. the individual agreements between Enemalta Corporation and the petrol station owners infringed Article 5(1) of the Competition Act 1994 by:
 - a. fixing trading conditions in the retail fuel market
 - b. limiting or controlling the retail fuel market
 - c. imposing the application of dissimilar conditions to equivalent transactions with other parties outside such agreement, thereby placing them at a competitive disadvantage.

This decision was eventually confirmed by the then Commission for Fair Trading⁷¹ which declared:⁷²

(a) illi l-ftehim li l-intimata GRTU laħqet mal-Korporazzjoni Enemalta fit-18 ta' Marzu, 1997 u li baqa' jiġi żviluppat għal snin wara u saħansitra kristallizzat f'avvizi legali illi jorbtu lill-operaturi tal-pompi tal-petrol b'ħinijiet ta' ftuħ u metodoloġija ta' bejgħ tal-fuel jikkostitwixxi akkordju, deċiżjoni jew prattika illi timpedixxi,

qed jassumi l-atti tal-proceduri minflok il-Ministru għar-Rizorsi u Affarijiet Rurali, il-General Retailers and Traders Union [First Hall, Civil Court] 23 November 2015 4.

⁷¹ The responsibilities of the then Commission for Fair Trading have now been taken over by the Competition and Consumer Appeals Tribunal.

⁷² *ibid.*

trażżan jew ixekkel il-kompetizzjoni ġusta bi ksur tal-ligi

(b) illi tali operat, kif orkestrat mill-GRTU ippreċipita lill-amministrazzjoni governattiva faġir anti-kompetittiv ipprojbit u lill-Awtorita intimata finattivita regolatrici illi effettivament illimitaw u ikkontrollaw is-suq tal-bejgħ tal-karburant.⁷³

At this juncture it is also opportune to mention that practices taking place in the real estate agency sector were being looked into by the Competition Office.⁷⁴ The Office was investigating for a breach of article 5 of the Competition Act and Article 101 of the Treaty of the Functioning of the European Union.⁷⁵ This is considered as a serious offence in competition law. The infringement, which was formally communicated to the Federation of Estate Agents in a Statement of Objections,⁷⁶ consisted in the 'fixing of commission rates for

⁷³ Informal translation: (i) that the agreement signed between GRTU and Enemalta on 18 March 1997 and in subsequent years it was developed and crystallised in legal notices which obliged petrol station owners to open within specific times and the method of selling of fuel is tantamount to an agreement, decision or practice which restricts competition and contrary to law; and (ii) such behaviour, as organised by the GRTU led the public administration to perform prohibited anti-competitive behaviour which effectively restricts and controls the sale of fuel.

⁷⁴ PQ 33657, session 464 of 2 April 2012.

⁷⁵ Briefly, article 5 of the Competition Act and article 101 of the Treaty of the Functioning of the European Union amongst others prohibit 'any agreement between undertakings, any decision by an association of undertakings and any concerted practice between undertakings having the object or effect of preventing, restricting or distorting competition.'

⁷⁶ A Statement of Objections is a procedural step before a final decision is taken. According to the European Commission a statement of objections is a formal step in Commission 'antitrust investigations in which the Commission informs the parties concerned in writing of the objections raised against them. The addressee of a Statement of Objections can reply in writing to the Statement of Objections, setting out all facts known to it which are relevant to its defence against the objections raised by the Commission. The party may also request an oral hearing to present its comments on the case.' Vide Memo 07/314 of 27 July 2007.

estate agents' services in Malta and Gozo.'⁷⁷ The Office also found that the Federation of Estate Agents had 'published them [the commission rates] on its website.'⁷⁸ Whilst the Federation denied any price fixing it explained that the intention behind recommending commission rates was 'to create uniformity in the industry.'⁷⁹

Indeed, today a cursory look at the websites of local estates agents shows that there is still uniformity in commission rates charged being that of 3.5% for sole agency and 5% in case of an open agency.⁸⁰ The information contained in the websites do not advise that these rates are negotiable.⁸¹ It is interesting that websites, this time round, do not contain (i) any reference to the Federation of Estate Agents' website;⁸² and (ii) do not indicate membership or adherence to the rules and directives issued by the Federation of Estate Agents.

The procedures⁸³ initiated by the Competition Office were challenged by the Federation and the Constitutional Court confirmed that they infringed the right of fair hearing before an independent and impartial court of law as enshrined in the

⁷⁷ Statement of Objections issued by the Office for Competition, 1 August 2013, 3 para 1.

⁷⁸ *ibid* 5 para 12.

⁷⁹ *ibid* 6 para 21.

⁸⁰ For example:

<<http://remax-malta.com/buying/purchasing-procedure.aspx#estate-agency-fees-payable>> accessed 19 August 2016

<<http://belair.com.mt/selling/commission-rates>> accessed 19 August 2016.

<<http://globalpropertyguide.com/Europe/Malta/Buying-Guide>> accessed 19 August 2016

<<https://move2gozo.com/sellers/117-service-commission-rates>> accessed 19 August 2016

<<http://fairdealproperties.com.mt/PropertyInMalta.aspx>> accessed 19 August 2016

<<http://franksalt.com.mt/sell-or-let-a-property/sole-agency-properties/>> accessed 19 August 2016

<<http://www.dhalia.com/propertypackages/>> accessed 19 August 2016

<<http://www.perry.com.mt/en/selling-expenses/>> accessed 19 August 2016.

⁸¹ This was also noted in the Statement of Objections (n 77) p 12 para 49.

⁸² At the time of writing (6 September 2016) it is deactivated.

⁸³ Introduced by Act VI of 2011.

Constitution.⁸⁴ The competition concern raised by the Office however remains. Interestingly the MCCA annual reports published between 2013 and 2014 do show that the Office was looking into the property sector.⁸⁵ No reference is made to the litigation in its 2015 annual report. A reply to a parliamentary question⁸⁶ posed to the minister responsible for consumer affairs submitted in early 2015 revealed that the property sector was still under the lens of the Office for Competition. However the Statement of Objections is no longer applicable.⁸⁷ It is not clear whether the investigation is still ongoing or resolved. Regrettably not all decisions taken by the Office are published.

One question is whether the chosen formula to distinguish between estate agents and the *sensara*, and the repercussions that it may bring about to competition, is appropriate. This consideration must be given careful attention since it seems that members of the Federation collectively enjoy a strong position in the market. Indeed the Competition Office noted that the Federation was the only association for estate agents in Malta and Gozo⁸⁸ and:

[I]n 2011, ... had approximately 68% of the market for real estate agency services. If the market had to be defined more broadly so as to include brokers together with real estate agents, it is calculated that the members of FEA [Federation of Estate Agents] held 57% of the market in 2011.⁸⁹

Another possible issue concerns the proposed Authority itself. The White Paper simply states that the

⁸⁴ See also *Federation of Estate Agents vs Direttur Generali (Kompetizzjoni), L-Onorevoli Prim Ministru u L-Avukat Generali* [Constitutional Court] 6 May 2016.

⁸⁵ Malta Competition and Consumer Affairs Authority Annual Reports: May 2011 – December 2012 p 5; Year 2013 p 5; Year 2014 p 3 and p 10.

⁸⁶ PQ 13938 session 238 of 2 February 2015.

⁸⁷ PQ 28772 session 455 of 28 November 2016.

⁸⁸ Statement of Objections issued by the Office of Competition (n 77) 8 para 29.

⁸⁹ *ibid* 4 para 9.

Authority will be composed of a chairman and an additional four to six members.⁹⁰ In the absence of criteria on the basis of which the members will be selected, the members selected may just represent one sector. The Competition Act also applies to actions of public or state-owned entities.⁹¹ Case law establishes the parameters on the basis of which the behaviour of a public entity may be scrutinised. The concept of undertaking in competition law comprises every entity regardless of its legal status and the way it is financed.⁹² Local jurisprudence also clearly lays down that it is unacceptable for a legislatively established administrative structure to regulate a market in a manner which is: (i) not objective; (ii) not in the public interest; and (iii) does not promote competition.⁹³ Indeed the then Commission for Fair Trading had noted that:

(f)l-istruttura li giet imwaqqfa u stabbilita mill-Awtorita tat-Turiżmu ta' Malta a tenur ta' l-artikolu 3 tal-Kapitolu 409, il-membri li kienu jikkostitwixxu din l-Awtorita fil-perjodu meta s-soċjetajiet lanjanti issottomettew l-ilment tagħhom kienu jirriżultaw li huma membri li għandhom interessi kummerċjali specifici f'setturi partikolari tas-suq turistiku li kienu qed jirregolaw; Illi allura kienu f'pożizzjoni li setgħu faċilment jinfluwenzaw is-suq de quo favur tagħhom, kemm individwalment, kif ukoll bħala grupp. ... Illi allura ma għandux ikun tollerati li struttura legiſlattiva minnha nnifisha sservi biex effettivament jinħoloq cartel fejn intrapriżi li suppost qed jikkompetu b'mod ġust fis-suq, ikunu minflok qed jikkooperaw flimkien kontra l-

⁹⁰ White Paper (n 5) 18.

⁹¹ Article 30 (1) of the Competition Act.

⁹² Jones and Sufirin, *EC Competition Law* (2nd edn, Oxford University Press, 2004) 107.

⁹³ One may refer to various cases such as 2/2003 Carmel Mifsud vs Malta Transport Authority 5 July 2004, 1/2004 Bargain Holidays – European Air Bargains vs Malta Tourism Authority 17 October 2005, before the Commission for Fair Trading and more recently 1/2015 Malta Bargains Limited (UK) vs Malta Tourism Authority and Director General (Office for Competition) 19 May 2015 before the Competition and Consumer Appeals Tribunal.

*interessi tal-kompetituri tagħhom u tal-konsumatur.*⁹⁴

This is a case which raises the potential conflict between regulatory and competition rules. When this happens, competition rules have to prevail. Associations bringing together various undertakings sometimes take initiatives which go beyond that of promoting high ethical standards in the sector for the consumer's benefit, but may in instances influence the market. A recent petition lodged by the Federation of Estate Agents before the Committee on Petitions of the European Parliament is an example. The concern focused on the alleged incompatibility of the AIP permit granted to EU citizens purchasing holiday homes in Malta with EU legislation which prohibited them from renting out the properties.⁹⁵

These considerations should encourage the authorities to take a closer look into the market particularly in the light of the forthcoming initiatives included in the White Paper. For example, it would be interesting to examine how commission rates have varied over the last years; how much has been paid by consumers in brokerage fees, extent of competition, and tendencies in residential real estate brokerage fees. Real estate agents may be less inclined to show property that offers them less commission. To what extent are commission rates

⁹⁴ Quoted in *1/2015 Malta Bargains Limited (UK) vs Awtorita tat-Turizmu ta' Malta u d-Direttur Generali, Ufficju tal-Kompetizzjoni*, decided before the Competition and Consumer Appeals Tribunal 19 May 2015, 4. Informal Translation: In the structure that had been set up and established by the Malta Tourism Authority on the basis of Article 3 of Chapter 409 (of the Laws of Malta), it resulted that during the time when this complaint was lodged the members who constituted this Authority have specific commercial interests in particular sectors of the touristic market that they themselves regulated; therefore they were in a position that they could easily influence the market to their favour; both on an individual basis and collectively. [...] so it must not be accepted that a legally constituted structure be used to effectively create a cartel where undertakings which are supposed to compete fairly against each other in the market, are instead together cooperating against the interests of their competitors and the consumer.

⁹⁵ Petition 0577/2006. CM/766177EN.doc, PE396.596/REV III dated 30 January 2009.

negotiable and pricing models available for consumers? The examination of practices taking place in this sector acquires more relevance especially in the light of a claim that estate agents 'have pushed the asking prices up.'⁹⁶

A number of examples from foreign jurisdictions demonstrate the efficacy of competition law in addressing unlawful practices. In New Zealand, the Commerce Commission initiated proceedings and issued warnings for alleged price fixing and anti-competitive behavior against a number of real estate agencies.⁹⁷ It alleged that competition rules have been breached after estate agencies coordinated their response to the changed pricing model of Trade Me, an online advertising platform.⁹⁸ To date three estate agencies admitted the conduct and reached a settlement prior to Court proceedings. Collectively they were fined \$4.35 million. In one of the rulings Justice Venning noted that the anti-competitive behavior impacted persons who were making one of their most significant financial decisions.⁹⁹ He also said that:

a limited number of vendors paid the full \$159 fee that ... [was] ... passed on to them, but more importantly some vendors may have elected not to list on Trade Me because they were facing a full \$159 fee. The fact of not having a listing of Trade Me may have led to a lower number of 'buyer eyes' or interest in their particular property. It might have meant they have missed out on potential purchasers and ultimately a potentially higher price for sale.¹⁰⁰

⁹⁶ TENLAW: Tenancy Law and Housing Policy in Multi-level Europe, National Report for Malta by Kurt Xerri, Sergio Nasarre Aznar, and Patrick J Galea <<http://tenlaw.uni-bremen.de>> accessed 19 August 2016.

⁹⁷ 13 national and regional real estate agencies, a company owned by a number of national real estate agencies, and 3 individuals. The Commission has also issued warnings to an additional eight agencies for their role in the conduct.

⁹⁸ 'Commission files court proceedings against real estate agencies', Commerce Commission, New Zealand, Press Release, 17 December 2015.

⁹⁹ 'Manwatu agency to pay \$1.25m penalty in real estate price fixing case', Commerce Commission, New Zealand, Press Release, 20 May 2016.

¹⁰⁰ *ibid.*

In the UK, the Competition and Markets Authority (the CMA)¹⁰¹ recently issued an open letter warning estate agents that they cannot collectively decide to transfer the advertising of their properties to one online portal from other competing platforms. Such decisions have to be taken independently from each other.¹⁰² The CMA noted that an estate agent should decide alone whether or not to use the services of a particular property portal or not. In this case the UK National Association of Estate Agents worked closely with the authorities on the issue.¹⁰³

Finally, a reference to the consultation process is appropriate. It appears very likely that the process¹⁰⁴ leading up to the White Paper has been influenced by the estate agents and the developers. The former organization is now formally an affiliate member of the Malta Developers Association.¹⁰⁵ The Federation of Estate Agents brings together thirty estate agencies.¹⁰⁶ Mr Douglas Salt has proudly stated that 'I, in the capacity of President of the Federation of Estate Agents, have

¹⁰¹ This replaced and took over the functions of the Office of Fair Trading with effect from 1 April 2014.

¹⁰² 'Estate agents warned over possible breach of competition law', Press Release published by the UK Competition and Markets Authority on 21 April 2016, <<https://www.gov.uk/government/news/estate-agents-warned-over-possible-breach-of-competition-law>> accessed 17 August 2016

¹⁰³ *ibid.*

¹⁰⁴ Miriam Dalli, 'New property code only protects vendors, broker claims' (*Maltatoday.com*, 16 March 2016)

<http://www.maltatoday.com/mt/lifestyle/property/63109/new_property_code_only_protects_vendors_broker_claims#.V-1Qh1R97IV> accessed 16 August 2016.

¹⁰⁵ Duncan Barry, 'White Paper to regulate estate agencies to be issued in coming months, FEA becomes affiliate of MDA' (*Independent.com.mt*, 25 June 2015) <<http://www.independent.com/mt/articles/2015-06-25/local-news/White-Paper-to-regulate-estate-agencies-to-be-issued-in-coming-months-FEA-becomes-affiliate-of-MDA-6736137903>> accessed 10 August 2016.

¹⁰⁶ FEA affiliates with MDA dated 25 June 2015, source:

<http://mda.com/mt/fea-affiliates-with-md/> accessed 16 August 2016.

been heavily involved in the drafting of the governing White Paper.¹⁰⁷

Government support to certain activities and initiatives ought to be more prudent and judicious, especially when demonstrating support to arrangements between undertakings which choose to group together, cooperate, form federations, and other affiliations. Activities taking place within such setups may not be in conformity with competition law and participants should be informed by the competition authorities of the serious consequences that such cooperative behavior may bring about. The Government should not give its moral backing or blessing to any potentially anti-competitive arrangements.

8. 2016: 'Estate Agents and regulation: Is it enough?'

In March 2016, a business breakfast on the above topic was organized by Business Observer, which is affiliated with The Times of Malta, to discuss the recently published new proposed measures to regulate the estate agency and related business activity. The meeting provided a useful forum for an audience which in the main consisted of people working in estate agency. Vanessa Macdonald, the local journalist, who chaired the event, proved well-prepared for the task and she did not pull any punches and kept the discussion flowing. Happily, she did not allow it to stray into official propaganda and instead managed to get some sparks flying. As is the regrettable norm, people continued to confuse White Papers with draft Bills. A White Paper is more than a draft Bill accompanied by ministerial messages and brief explanatory notes.

There were some notable conspicuous absences, namely the architects and more significantly the consumer

¹⁰⁷ Douglas Salt, 'The Continued Rise Of Frank Salt Real Estate' (*Mbrpublications.net*,) <<http://www.mbrpublications.net/the-continued-rise-of-frank-salt-real-estate/>> accessed 16 August 2016.

agencies, both the public¹⁰⁸ and the voluntary organizations. Are the latter still in active operation, are they not capable to influence the debate?

In the main real estate agents were perhaps more interested in their self-described 'profession' than in the better interests of customers. The acquisition of professional status was not only a vanity project but one perceived to land the practitioners higher commissions and perhaps a stronger position in the property selling market which today is not restricted to fully fledged super-organized estate agency firms. These firms have no doubt forgotten that most of them had very humble beginnings themselves.

Mr Douglas Salt, from the estate agency industry, wrongly stated that the sector had for many years 'opted' for self-regulation, which by his admission did not work. What he describes as 'opting' for actually refers to successive governments' persistent inertia and reluctance to regulate the sector over scores of years. Mr Salt apparently fails to distinguish between non-regulation and self-regulation, and indeed confuses them.

One of the main speakers, Mr Sandro Chetcuti, from the Property Developers Association, made some members of the audience happy by making populist jibes against university academics and against architects, lawyers, and notaries. He solemnly claimed that in this experience as a flat-builder he has found that the true skills required in this sector are only acquired from what he conjured up as the 'university of life'.

Clearly, controlling and dominating the policy, the drafting and the discourse on the subject is part of the agenda of the property builders and the property sellers, at least the major

¹⁰⁸ The three-year report (2013 to 2016) covering the activities of the Consumer Affairs Council, a government constituted advisory which, amongst others, is entrusted to monitor the enforcement of laws that 'directly or indirectly' affect consumers under the Consumer Affairs Act 1994, does not indicate that the subject was even discussed. Source: House of Representatives, PQ 26738 session 421 20 July 2016.

ones who enjoyed the privilege of participating and significantly influencing this recent Bill which they are now only too happy to praise and to promote. They have apparently 'opted' for proper regulation but clearly on their own terms and in their own best interests. We are also being led to believe that a few in-house lectures and exams will make professionals of them all and by the way the Minister, may still exempt some operators from these new requirements.

9. The International Scene

This part of the paper does not purport to provide an exhaustive comparative study of all the various regulatory models and systems but provides a small collage of experiences from other EU and non EU legal systems. It shows the diversity that exists within the EU itself, and how in instances measures must also respect fundamental EU principles of freedom of movement. The case of Australia is also briefly looked at.

9.1. A glance at the EU position

The EU dimension of this subject would deserve much more extensive treatment than is possible here. The EU has not introduced any specific directive or regulation on the carrying out of estate agency services and has not sought to harmonise the regulation of this activity as it has done with say, financial services. This does not imply that the work of estate agents is not of interest to the Commission. The relationship between consumers and estate agents give rise to issues of consumer protection and competition which have been at times tackled at the level of EU law through measures including the prohibition of cartels and price fixing, and the prohibition of unfair contract clauses, unfair commercial practices, and misleading advertising.

Although no specific directive address estate agency, the EU Commission has in recent years shown great interest in

the sector, commissioning a couple of very extensive reports. Two main reports are being referred to here. The first relates to the mutual recognition of estate agents throughout the Union.¹⁰⁹ A second interesting and studied comparative report examines how estate agency is regulated by Member States.¹¹⁰ These reports are compulsory reading for anyone wishing to learn more about how estate agents are regulated or otherwise within the EU.

The European Commission has also taken various initiatives for furthering and safeguarding the mutual recognition of professions throughout the European Union. Various national reports have been drawn up on the matter. The main objective of the exercise is to promote freedom of establishment and freedom of movement of European professionals and for such purpose to establish a framework for the mutual recognition of professional qualifications and to remove unnecessary or disproportionate restrictions which obstruct the implementation of these principles. Estate agents are included in the list of professionals falling within the terms of Directive 2005/36/EC on the recognition of professional qualifications, as amended by Directive 2013/55/EU. This document sets out a transparency exercise and a mutual evaluation of all regulated professions. Article 59 of the revised Directive 2005/36/EC requires Member States to notify, assess, and justify the proportionality of any existing national entry restrictions, including those applicable to estate agents.¹¹¹

¹⁰⁹ 'Mutual evaluation of regulated professions – Overview of the regulatory framework in the real estate sector' (n 4).

¹¹⁰ 'Study on the application of Directive 2005/29/EC on Unfair Commercial Practices in the EU, Part 1 – Synthesis Report' (n 55).

¹¹¹ 'Mutual evaluation of regulated professions - Overview of the regulatory framework in the real estate sector' (n 4). See also Public consultation on the regulation of professions: Member States' national action plans and proportionality in regulation. Document date: 26 May 2016 - Created by GROW.A.5 - Publication date: 26 May 2016)

9.2. UK law and recent developments

The main legislation in the UK on the subject is the Estate Agents Act of 1979 which was preceded by a consultation process that examined the various possible regulatory approaches. The aim of the legislation was to protect consumers and avoid abuses and conflicts of interest by estate agents. The original suggested approach was to set up a regular licensing regime with fit and proper criteria. Instead, the Act is peculiar and presents a novel form of regulation though possibly not one that merits to be copied. Here the law does not create a positive obligation on a person wishing to act as an estate agent to apply for some form of licence or registration with an authority. Instead the law allows any person to act as an estate agent, until and unless he is found, for reasons say of fraud or violence, to be unfit. In such circumstances, the Director General of Fair Trading¹¹² was authorized to issue an injunction prohibiting him from continuing to work as an estate agent. The Act also obliges estate agents to ensure that clients' monies are not abused. The Director General was required to keep both the sector and the law under review and to report periodically on the working and enforcement of the law.

Another relevant law is the Consumers, Estate Agents and Redress Act of 2007 which was specifically focused on the rights of aggrieved consumers and established adequate investigative powers and remedies through an independent redress system. In fact, the Director General of Fair Trading operates what are called Estate Agents Redress Schemes of which estate agents operating the UK must become a member. More recently, consumers acquired additional protection through the adoption of the Consumer Protection from Unfair Trading Regulations 2008.

It appears that one of the reasons why the British Parliament has been reluctant to regulate this sector by means of a stricter regulatory licence framework is the fear that

¹¹² (n 101).

regulation may prove anti-competitive and drive smaller operators for the market. In fact, recently, as reported in *EstateAgentTODAY* of 13 June 2016, Mark Hayward the managing director of the National Association of Estate Agents elicited this interesting comment from the then Housing Minister Brandon Lewis: 'I've asked him for regulation of our industry and he said no. He told me it was anti-competitive because if all agents were licensed he believed we would set our fees higher and that would not benefit the consumer.'¹¹³

The most significant recent report is that published in January of this year for the House of Commons.¹¹⁴ This briefing paper, entitled 'Are estate agents regulated?', explored the current legislative framework in the UK and referred to all the different relevant legislation, starting with the 1979 Act. It revealed that there are 14,500 estate agents in the UK, several of which operate mainly online.

9.3. Cyprus – Regulation and Freedom of Movement

The European Commission has recently investigated Cyprus for raising illegitimate barriers against persons coming from other Member States wishing to act as estate agents in its territory. Certain requirements in Cypriot law were found to create an unnecessary and disproportionate barrier to freedom of movement and establishment. Rather than face infringement procedures, Cyprus agreed to remove these restrictions from its laws. This case highlights what restrictions violate EU law as illegitimate barriers and are very relevant to Malta, both in the field of estate agency and beyond.

The European Commission established that the conditions imposed on non-Cypriot EU nationals wishing to do

¹¹³ Graham Norwood 'Government 'rules out estate agency regulation' (*Estateagenttoday.co.uk*, 26 May 2015) <<https://www.estateagenttoday.co.uk/breaking-news/2015/5/government-rules-out-estate-agency-regulation>> accessed 30 July 2016.

¹¹⁴ Lorraine Conway, 'Are estate agents regulated? Commons Briefing papers SN06900 (United Kingdom 26 January 2016).

estate agency work were discriminatory and not in conformity with EU law. The conditions included the possession of a three year course University degree or similar; proof that applicant had already worked for one year in Cyprus (work carried out in another member state was not recognised); and the undergoing of a written test on Cypriot law relating to the sale of property. It was also noted that the relative application form was however only offered in Greek. This fact by itself did not breach EU law but the requirement that applicant be able to speak Greek did (see reports in Cypriot Property News). It would appear that the local estate agents association (the CREAA) worked very hard to push the authorities into creating a variety of obstacles for non-Cypriots who wished to exercise their profession thereby offering competition to its members more inclined toward preserving their monopoly.¹¹⁵

Cyprus argued unsuccessfully that the national requirements were necessary due to the peculiarities and legal difficulties raised by property transactions on the island due to ownership and title issues resulting from the division of the island on ethnic and religious lines. It has however been noted that non-Cypriot EU nationals are still finding it very difficult to be allowed to exercise the activity of estate agent on the island despite changes to the laws in 2010.¹¹⁶

Various other difficulties have been identified in the work of estate agents in Cyprus, especially uncertainties with legal title and lack of legal protection for unwary buyers of property on that island. The authorities have apparently failed to address the situation and the media is awash with warnings against buying property in Cyprus. Cases have involved property fraud involving mis-descriptions, unauthorized

¹¹⁵ Indeed, estate agents are represented at EU level by their association-lobby group known as The European Association of Real Estate Professions (CEPI-CEI).

¹¹⁶ See <<http://www.news.cyprus-property-buyers.com/2012/10/02/discrimination-against-non-cypriot-estate-agents/id=0012748>> accessed 25 February 2017.

developments, and other property scams often carried out by unauthorized brokers and intermediaries.¹¹⁷

9.4. The Australian Competition and Consumer Commission

We have already remarked that different countries have adopted different measures and strategies to impose some order, predictability and fairness in the way estate agents transact with customers. One interesting jurisdiction is Australia.

Here the Australian Competition and Consumer Commission (the ACCC) is the public authority charged with safeguarding and promoting both consumer protection and fair competition. In several respects it mirrors the Maltese MCAA already referred to earlier in this paper. The ACCC specifically regulates and oversees the activities of estate agents who are subject to a regular licensing and supervision framework set out in the law.¹¹⁸ Briefly, the ACCC enforces rules which govern the obligations of estate agents to provide customers with full and correct information on the property and which prohibit such wrong-doing as making false or deceptive claims and dummy bidding. The rules make it easier for Australian consumers to understand their legal relationship with estate agents and to use their rights at law to secure a fair deal. Consumers may also check whether the estate agent is duly licensed.

10. Concluding remarks

This paper has highlighted various issues relating to how estate agents are regulated and what direction such regulation may take in Malta. The recent local White Paper is not only mis-named but it falsely describes itself as a property code. It is nothing of the sort and does not go anywhere near

¹¹⁷ See generally <<http://www.news.cyprus-property-buyers.com/>> accessed 25 February 2017.

¹¹⁸ See the ACCC's useful and extensive website: <<http://www.accc.gov.au>> accessed 25 February 2017.

that stated description. The document is more limited than it presents itself to be: the attached draft law is patchy and unsatisfactory, while as a White Paper it fails absolutely. Unfortunately, the White Paper lacks focus and is very economical, to say the least, on why certain proposals were being made. Proposals made in a vacuum may result in ineffective and half-baked initiatives. They present difficulties in addressing sufficiently fundamental competition issues as well as the terms of the relationship between estate agent and consumers. One hopes that the authorities will carefully re-consider the original proposals and take the occasion to also rectify stylistic deficiencies evident in the first draft.

One also wonders, in the absence of any significant information from the consumer authority, how it can be claimed that the White Paper is 'evidence of the government's awareness that the interests of consumers are not protected enough solely by general consumer protection legislation, civil law provisions and jurisprudence.'¹¹⁹ Furthermore, it now appears that government's opinion on this point is the opposite. Indeed in 2014 Maltese authorities had remarkably informed the European Commission that 'the interests of consumers are already protected by general consumer protection legislation, civil law provisions and jurisprudence.'¹²⁰

English reports highlight the danger that regulation may, rather than increase consumer protection, instead strengthen existing business practices and the privileged position of the incumbents. In some jurisdictions, such as Australia, those working in the industry must either have a license or be employed by a licensed real estate agent, and carrying out the activity without the proper licensing may in

¹¹⁹ Marc Agius Fernandez 'Regulating the real estate business' (*Timesofmalta.com*, 6 December

2015) <<http://www.timesofmalta.com/articles/view/20151206/business-news/Regulating-the-real-estate-business.594744>> accessed 14 August 2016.

¹²⁰ 'Mutual evaluation of regulated professions – Overview of the regulatory framework in the real estate sector', a report based on information transmitted by Member States and on a meeting of 6 June 2014 (n 4) 13.

instances also lead to imprisonment.¹²¹ The Cypriot experience is an important lesson for Maltese lawmakers.

Regulation is not a matter for amateurs or superficial thinking. Regulation is a much more complex phenomenon. There is no rule which says that regulation by itself automatically works to promote consumer protection and guarantee fair competition. Regulation, if devised badly or implemented poorly, may turn out to be the consumer's worst enemy and may actually limit and prejudice fair competition.

Whereas the initiative is broadly a positive step that means that for the first time estate agents in Malta shall in future be subjected to a special authorisation regime, the proposal currently on offer is not quite right. It is of no comfort that this new draft law is being greeted and eagerly awaited by the estate agents themselves rather than by Maltese consumers or the general public. The reason may lie in the justified perception that this work was guided by the estate agents in conjunction with property developers largely in pursuance of their own interests.

¹²¹ For example, for the state of Victoria Article 12 of the Estate Agents Act 1980 (no 9428 of 1980) stipulates a fine or imprisonment; in other instances, no imprisonment is envisaged such as the state of Western Australia and New South Wales. See article 26 of the Real Estate and Business Agents Act 1978 in the case of Western Australia and article 8 of the Property, Stock and Business Agents Act 2002 for New South Wales.