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Department for Business Innovation & Skills
By email: marcelle.janssis@bis.gsi.gov.uk

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Dear Ms Janssis

Introduction

The National Federation of Property Professionals (NFOPP) comprises a number of divisions which are professional bodies/self regulatory organisations who represent and regulate agents conducting a wide variety of property work. Agents join the divisions of NFOPP purely voluntary and some members belong to more than one division. The aim of all of NFOPP's divisions is to support members by promoting the highest standards of professionalism and integrity, and to encourage members of the public to proactively choose our members. NFOPP has a total membership of around 13,500 individual agents.

NFOPP comprises:

- National Association of Estate Agents (NAEA)
- National Association of Valuers and Auctioneers
- Institution of Commercial and Business Agents
- Association of Residential Lettings Agents ([ARLA](#))

Members of all divisions must meet various requirements in order to initially obtain and subsequently maintain their membership. These requirements have been designed with consumer protection in mind, such as requirements to provide an annual accountant's report.

To further support and protect the consumer the NAEA and ARLA have launched licensing schemes. The schemes ensure that when consumers use a licensed office they have access to a qualified member. Only firms which have at least one Principal, Partner, or Director member of NAEA or ARLA are allowed licensed offices.

Encouraging new business models: proposal to amend the Estate Agents Act 1979

Thank you for your letter of 8 June 2012. We are keen to make comments on this proposal which we see as detrimental.

Previous experience suggests that the proposal is unlikely to either increase consumer choice or encourage market innovations, but if it did then this benefit would be vastly outweighed by decreased consumer protection. We also have serious concerns that the proposal may result in the UK government breaching its European and international anti money laundering/counter terrorist financing obligations.

When the OFT's Home Buying and Selling Study was published in 2010 we expressed the view that the methodology for the Study was flawed. We see this proposal as the wrong

direction of travel and feel that if the right questions had been asked as part of the Study this would have supported our position. Some thoughts on alternative proposals which could be included in the Enterprise and Regulatory Reform Bill are included below.

Yours sincerely

A handwritten signature in cursive script, appearing to read "Elizabeth Richards", enclosed in a light grey rectangular box.

ELIZABETH RICHARDS
HEAD OF LEGAL & POLICY

Glossary and Abbreviations

ARLA: Association of Residential Lettings Agents.

BIS: Department for Business Innovation & Skills.

CEARA: Consumer Estate Agents and Redress Act 2007.

CPRs: Consumer Protection from Unfair Trading Regulations 2008.

EAA: Estate Agents Act 1979.

Internet agent: estate agency services being provided over the internet. These services go beyond mere advertising and therefore are not covered by the current EAA section 1(4) exemption.

Internet portals: advertising portals which operate in a similar way to newspapers and do not go beyond this, covered by the current EAA 1(4) exemption.

NAEA: National Association of Estate Agents

NFOPP: National Federation of Property Professionals.

OFT: Office of Fair Trading.

PMA: Property Misdescriptions Act 1991.

Question 1 Is being within the scope of the existing Act i. a burden on existing businesses in the home buying and selling market or ii. a barrier to new business models?

Burden?

We do not see the application of the EAA as a disproportionate burden, in fact we would describe the EAA as light-touch and in need of strengthening and broadening in terms of sectoral coverage. For example we would very much like to see lettings agents brought into scope, and we cannot understand why the EAA clauses concerning insurance cover for client money and standards of competence were never brought into force. We would prefer the government to concentrate on these gaps rather than creating new exemptions.

The definition in the EAA governs application of the CEARA and we see redress as an essential consumer protection. In fact PPD members of any of the divisions of NFOPP must belong to a redress scheme even if this isn't a legal requirement, e.g. redress is compulsory for PPDs members of ARLA. CEARA is effective in the way that it encourages best practice through the application of widely accepted Codes of Practice, as well as providing a mechanism for redress when things go wrong. The Property Ombudsman has indicated to us that he has dealt with complaints about internet agents and we cannot understand how it can be in the public interest to remove this function.

It is important that the OFT retains the power to issue warning and banning orders to any type of agent including internet agents. We appreciate that using these powers may be challenging in the context of the internet because of jurisdictional issues but in our view it is important that, in theory at least, the powers are available. Of course the value of enforcement mechanisms can't only be measured in terms of numbers of cases pursued because they also act as a deterrent.

The application of the Estate Agents (Provision of Information Regulations) 1991 and the PMA both flow from the EAA. We have previously made BIS aware of our strong view that the PMA should not be repealed.

We feel strongly that all consumers, including internet consumers, require protection in all of these vital areas. It may be worth bearing in mind that a large proportion of consumers do not get to choose which type of agent handles their transaction, i.e. buyers.

We see the CPRs as a far greater barrier and challenge for both traditional and internet agents, but this proposal will not impact in this area.

We are expecting some significant developments in this area very soon. BIS are expected to announce their decision on the future of the PMA shortly, and the OFT are also expected to publish their guidance for estate agents about the CPRs and Business Protection from Misleading Marketing Regulations (2008) in early September.

Barrier?

The EAA wasn't a barrier to Google Earth and Map's listing feature which was launched but quickly withdrawn. We believe that the withdrawal was for commercial reasons rather than a result of concerns about breaching legal requirements.

Similarly it may be helpful to mention that there is no legal barrier to private sellers advertising their properties themselves on internet portals or in newspapers. Although internet portals tend to restrict use of their products to agents this represents commercial considerations rather than legal prohibitions. For this reason changing the law is unlikely to impact in this area.

Question 2. Does the way 'estate agency work' is defined in S 1 of the EAA cause uncertainty about the scope of the Act and thereby create a significant barrier to businesses wishing to set up new business models, such as online estate agencies or matching sites?

We do not believe there is uncertainty around the EAA definition.

Question 3. Are there any significant barriers to entry to the home buying and selling market caused by other legislation?

As well as the CPRs another example of difficult legislation for internet agents are the Money Laundering Regulations 2007. These regulations require a risk based approach to customer due diligence and monitoring. The application of these regulations towards internet agents represent the UK's implementation of European and international commitments. See our response to Q9.

Question 4. The proposal is that businesses, such as online sites, that act simply as 'passive intermediaries' offering a limited, low-risk service to buyers and sellers, whether

or not they charge a fee, should be outside the scope of the EAA. What do you think the benefits and disadvantages of amending the scope of the EAA in this way would be?

We question the low-risk conclusion, especially if the implication is that traditional estate agency poses higher risks. Certainly in terms of criminality the internet provides anonymity which often hinders law enforcement. European and international money laundering policy makers (with input from the UK government) have formally defined non face to face business such as internet business as higher risk. In other words lack of human intervention is seen as increasing risk.

Traditional estate agents are often the only party involved in a transaction to meet both the seller and buyer and this puts them in a good position to assess risks. Traditional agents are also generally present during viewings which adds value in terms of personal safety.

Purely passive intermediaries are already covered by the section 1(4) exemption. In our view is that anything that goes beyond the current exemption should continue to be covered by the EAA and the associated legislation and protections that flow from the current definition whois an estate agent in the EAA.

Question 5. If the EAA was amended as proposed what activities should result in a business ceasing to be a 'passive intermediary' and coming within the scope of the EAA?

BIS will be acutely aware of the problem of defining activities in legislation. No doubt whichever activities are chosen the description will be gamed by agents eager to squeeze their activities into the new exemption. In addition it is very difficult to future proof definitions to take account of evolving technology. A particular area for consideration may be internet auctions.

Question 6. What do you estimate the likely effects of the proposed change to be on the operational costs and profitability of individual firms or the industry as a whole?

We do not see the current coverage of the EAA as being the reason for the current market dynamics. For this reason we do not believe that changing the EAA will alter the market, but if it does then consumers will be put at risk.

Question 7. Would the purpose of the proposed change be best served by amending the definition of 'estate agency work' i.e. the activities within the scope of the EAA (S 1.1) or by amending the set of activities which are exceptions to the EAA (S 1.2, 1.3 and 1.4)?

No reply.

Question 8. What, if any, beneficial or detrimental effects might the proposed change have on consumers?

Please see above concerning potential detriment.

Question 9. Could there be unintended consequences of the proposed change and if so, what?

The application of the Money Laundering Regulations 2007 towards estate agents flows from the EAA. The exemption that is being proposed would lead the UK government to breach the European Money Laundering Directives.

Directive 2001/97/EC brought real estate agents into the scope of AML and required Member States to take specific and adequate measures necessary to compensate for the greater risk of money laundering when establishing a business relationship non face to face. Directive 2005/60/EC confirmed that the requirements apply to activities performed on the internet

The Financial Action Task Force describes non-face-to-face business relationships or transactions as higher risk¹.

The exemption of solicitors from the EAA may need updating. Solicitors may increasingly provide estate agency services as Alternative Business Structures for the purposes of the Legal Services Act 2007. We suggest liaison with the Solicitors Regulation Authority on this issue.

We wonder about the implications of the proposal towards property auctions.

Question 10. Would there be particular issues about implementing the proposal in Scotland, Wales or Northern Ireland?

No reply.

Question 11 Are there any other points you wish to make about this proposed change?

Consumers may already presume that all agents are subject to positive licensing. In our view adding to this misunderstanding by creating a two tiered approach to consumer protection is unacceptable, especially as buyers get no choice in the type of agent they deal with.

We previously had the impression that legislative time was probably not available to deal with the issue of regulation of agents but it is encouraging that the Enterprise and Regulatory Reform Bill could be used for this purpose. We strongly suggest that the opportunity is taken to address our highest priority area which is to extend the scope of the EAA to lettings agents. We see this as essential for consumer protection given the large sums of client money held by lettings agents. We support the development of regulation for lettings agents and landlords in Wales and would like to see this built upon. The OFT is

¹ We believe that the UK may be in breach of FATF Recommendation 28 in relation to estate agents. Recommendation 28 requires states to take the necessary measures to prevent criminals or their associates from being professionally accredited, or holding or being the beneficial owner of a significant or controlling interest or holding a management function.

currently compiling an intelligence report in respect of lettings agents which may help inform this project.

A review of the banning order mechanism in the EAA would also be worthwhile. It may be possible to improve the power so that banned agents can no longer become lettings agents or provide back office functions for estate agents. Our view is that the OFT is too cautious in this area and strengthening the legislation may encourage them to be more active.