



## Reform of Consumer Law draft regulations: proforma for additional comments by 11 October 2013

We welcome any further comments on the draft Regulations. If you would like to comment, please complete this form.

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Please return completed forms to:

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Please tick a box from the list of options that best describes you as a respondent.

<input checked="" type="checkbox"/>	Business representative organisation/trade body
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	Medium business (50 to 250 staff)
	Micro business (up to 9 staff)
	Small business (10 to 49 staff)
	Trade union or staff association
	Other (please describe)

### Comments

Please use this table for any comments that you may have on the draft Regulations.

Proposed Measures	Comments on the Draft Regulations
Consumer Protection from Unfair Trading (Amendment) Regulations	<p style="text-align: center;"><u>Introduction</u></p> <p>The Office of Fair Trading (OFT) has published guidance about the implications of the current regulations for property sales; <i>OFT guidance on property sales, Compliance with the Consumer Protection from Unfair Trading Regulations (2008) and the Business from Misleading Marketing Regulations (2008)</i>. This guidance will need to be updated before the amended regulations come into force.</p> <p>The OFT is about to start work on similar guidance for lettings agents. At this stage we are unsure whether this guidance will just cover the current regulations, or whether it will also cover the new regulations. The relevant factor is probably the timetable for the new regulations.</p> <p>In view of this background, these comments have been copied to Lorraine Flisher of the OFT.</p> <p>The current and new regulations appear to apply to agents</p>

in respect of vendors and purchasers, and landlords and tenants, provided the vendor, purchaser, landlord or tenant is a consumer. Agents' duties go beyond duties owed to the party who pays their fee. Under the regulations agents also have duties in respect of the counterparty to their client's transaction.

Sales agents do not undertake contracts relating to the actual sales of real property (with the possible exception of auctions). In contrast, it is common for lettings agents to play some kind of role in relation to rental contracts between landlord and tenants.

### Definitions

#### Definition of consumer

The OFT guidance regarding property sales and the current regulations define consumers as:

- ***Clients ( who are not themselves businesses) who have contracted to use your property sales services***
- ***Potential clients ( who are not themselves businesses) who are looking to pay for property services and have come into contact with you and/or your marketing***
- ***Potential or actual buyers or sellers (who are not themselves businesses) who come into contact with you and/or your marketing as you act on your client's behalf.***

***KEY POINT- In the CPRs, 'consumer' goes beyond a client who pays for your services or someone who buys directly from you. It also includes: a prospective client, a prospective or actual viewer, a potential buyer of your property (for example where you are selling homes you have built), someone who buys or seeks to buy from you client, and some who sells property to you.***

We hope that the proposed change to the definition of 'consumer' can be avoided. We are concerned that any new reference to 'wholly or mainly outside of business' would add confusion. We have attempted to illustrate our concerns below, in the context of lettings.

### Definition of trader

An issue which arose in the context of the OFT's guidance was whether information known or suspected by one person in a firm was deemed to be known by the whole firm?

Will the revisions to the definition of trader take trader's employees outside of the scope? Or are employees still caught because they are 'agents', even though they are acting in the name of the trader?

### Examples

#### *Landlords*

It is already difficult to establish whether landlords are consumers or traders, under the current law. This applies to tax law and consumer law by way of judicial precedent (OFT v. Foxtons), or indeed the Furniture and Furnishings (Fire) (Safety) Regulations 1988, where much exchange of communication between the industry and Government never satisfactorily established the definition, which actually led to a change in the regulations.

Landlords vary between large commercial organisations with large property portfolios to landlords letting out a single property, e.g. reluctant landlords who are renting their previous home because they are unable to sell. In fact these are the two extremes, many landlords fall somewhere in between.

In our response to a 2012 BIS consultation, *Enhancing Consumer Confidence by Modernising Consumer Law*, we commented as follows:

***'When agents enter into agency contracts they must determine whether their client is a trader or consumer, but the ambiguity of the definitions means that making this differentiation can be difficult. For example lettings agents may struggle to determine whether a landlord is a trader or consumer. This issue was explored in the case of Office of Fair Trading v Foxtons (2009) EWHC 1681 (Ch). After the case was concluded the OFT issued this Q& A which appears on their web site:***

***Who is a 'consumer landlord'?***

**Firstly, the landlord must be an individual and not a company. Secondly, in letting the property the landlord must be acting 'for purposes outside his trade, business or profession.' Consumer landlords include individuals:**

***i. who let out their property whilst travelling abroad***

***ii. who let out part of their property in order to fund their mortgage***

***iii. whose property investment represents part of their pension plan or other long term saving***

***Institutional landlords who let multiple properties, such as Housing Associations, are likely to be traders.'***

#### *Tenants*

The trader or consumer question also applies to tenants. In some instances it will be clear that tenants are traders, e.g. universities and businesses arranging accommodation for their students or employees. In other instances it will be less clear whether the tenant is a trader or a consumer. This would be true where a sole trader wishes to rent a residential property for the use of a member of staff.

#### Part 4A

#### Consumer's Rights to Redress

As a professional body ARLA recognises the rights of consumers. In fact ARLA successfully lobbied in favour of the Enterprise and Regulatory Reform Act (2013), section 83. When this is brought into force all lettings agents will have a legal obligation to belong to an approved redress scheme, which has been a requirement for Principal, Partner, Director members of ARLA for some time.

Despite this position, ARLA is concerned about the right to unwind residential leases. The Cancellation of Contracts Made in a Consumer's Home or Place of Work etc. Regulations (2008) do not apply to rental contracts and the draft Consumer Contracts (Information, Cancellation and Additional Payments) Regulations (2013) do not propose removing this exemption for residential leases. We believe this exemption (which also applies to the sale of immovable property) reflects the need for a smooth and uninterrupted buying and renting processes.

The new right to unwind is reminiscent of cancellation

	<p>rights, but with the much longer cancellation (relevant) period of 90 days. We are alarmed that Regulation 27E(6)(d) indicates that the right to unwind can be exercised as long as the lease has not expired. In our view tenants should not be able to unwind after they have taken occupation. The new proposed rights pose an unacceptable level of risk for landlords (if they are traders). They also poses risks for lettings agents, and the level of that risk is likely to alter dependent upon the service being provided by the agent.</p> <p>The proposal could lead to misleading actions and aggressive commercial practices resulting multiple actions. Criminal conviction plus civil proceedings brought by consumer(s) could cause double jeopardy, and this will be compounded if the new rights are also intended to apply to the statutory redress schemes under the Enterprise and Regulatory Reform Act (2013), section 83. If a trader is found guilty of a criminal offence the affected consumers are likely to refer to this conviction in the context of their Part 4A action, which it appears may be court action and/or a complaint to an Ombudsman.</p>
<p>Consumer Contracts (Information, Cancellation and Additional Payments) Regulations</p>	<p>We welcome the continued exemption for residential rental contracts. However rental contracts may still be impacted by the regulations because in some circumstances they may apply to the contracts which landlords enter into with guarantors in respect of unpaid rent. As indicated above, landlords may be consumers or traders. It is also possible that guarantors may be consumers or traders.</p>

Thank you for taking the time to provide feedback on the draft Regulations. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would you be content if we were to contact you again either for research or to send through consultation documents?

Yes

No

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