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MEMBERS' SATISFACTION SURVEY
- a synopsis of the MISCO report

A STUDY IN MALTESE REGULATION - Estate agency services

A suitable case for treatment?



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The general concept of regulation

The object of this brief paper is to address the omission of the law to provide suitable regulation of what are popularly termed "estate agents". It attempts to highlight some relevant issues and to raise questions, rather than reach conclusions or provide answers.

Before focusing on the particular activity under review, we need to agree on the meaning of "regulation" in this context and to understand its underlying rationale. At the outset, it would be correct to remark that we are all creatures and subjects of law. The law is not a phenomenon which is extraneous to us. We have personal identity cards and passports, and we vote at elections and we pay taxes. We have various rights and obligations arising from a variety of laws. These phenomena are and have to be established by legislation. Unless we fall within the cracks in the style of "*Il fu Mattia Pascal*"², the State is normally aware of our existence and demands certain obligations from us. In return, it concedes to us various rights and benefits. In often peculiar fashions, we may be subjected to regulation even after we die. Death certificates have to be produced, monies paid to government in the form of stamp duties and what assets we leave behind become re-designated

as an "inheritance" for the benefit of others.

This introduction is only intended to demonstrate that regulation is the norm (sic) rather than the exception. Regulation is extensive and almost all-embracing. We just cannot escape it. It may not always have been so, but certainly today's complex society structures and the extensive role played by government and other public authorities require the support of an extensive legal framework. We are here interested in one particular type of regulation. This paper is not concerned with the general civil, criminal or general commercial laws. The type of regulation that concerns us here is quite different, and relates to laws that seek to establish a suitable framework governing a number of specific sectors of economic or professional activity identified as warranting such intervention.

A different kind of regulation

This paper is therefore concerned with a special and relatively sophisticated type of regulation: one that identifies a particular activity, profession, or a form of business, and seeks to establish for it a special legal regime³. A few familiar illustrations may help set the scene. Activities carried out by professionals, such as doctors, lawyers, architects, accountants and auditors, are subject to special laws which govern their authorization to exercise their profession and provide for oversight and discipline. The setting up of special corporate vehicles, particularly companies and co-operatives, too is subject to special laws which govern their mode of incorporation, their governance and reporting requirements and their winding up. Even some matters of broader importance such as the archaeological heritage, development and planning, broadcasting and the travel trade are subject to special rules. As a result, much professional and economic activity now falls under special regulatory frameworks and controls.

The latest example at the time of writing must be Bill number 31 published last September in the Government Gazette which proposes a comprehensive regulatory framework for the relatively new profession of mediators. The Mediation Act represents the first time that mediators are about to be regulated as such. The Bill proposes a two-tier regulatory set up with a Board looking after general policy matters while the



Malta Mediation Centre deals with the all the day to day administrative and regulatory decisions. This is the regulatory set-up originally introduced in the Malta International Business Activities Act 1988. The Bill envisages authorization requirements and for the possibility of disciplinary action. Yet another recent regulatory initiative recently published relates to the profession of psychologists⁴. These are therefore two fresh instances where specific sectors of activity have been identified as warranting a special type of regulation.

A government serves the common good by correctly identifying areas where regulation is required most in the best interest of the community. Having done this, other difficult questions arise, e.g. what type or level of regulation is best suited for the sector under consideration. Typical questions would include questions as to whether the framework should include an oversight

agency, and if the answer is yes, whether a new regulatory agency should be set up or whether one could adapt or use an existing agency. Would the Department for Consumer Affairs⁵ and the Consumer Claims Tribunal⁶ be assigned a role in the new framework? Should it be decided that a new oversight agency is required, what legal status should it enjoy, what powers and controls should it have; would it charge fees; would the new law provide for fines or other administrative sanctions, such as the suspension or withdrawal of a licence for possible contraventions; would new criminal law offences be created? What conditions should be set out for licence applications? Are we contemplating a compensation fund to act as a safety net for customers against possible insolvency or other mishaps? How would it be funded, or is the idea not really feasible? There should probably be rules on the holding of clients' assets, possibly with reference to both funds and immovable property.

There will always be a number of alternatives to choose from, and there will always be an overhanging risk of lapsing into over-regulating, or of under-regulating, the sector. Some will probably prefer to let sleeping dogs lie. If it is decided to act, a most undesirable approach would be to copy and adopt a foreign model whose market circumstances, legal system, public expectations, and self-regulatory and other administrative structures may be vastly different from ours. I think we should be very clear from the outset what benefits are to be gained by regulating a sector which henceforth has only been subject to the ordinary law of the land, and whether these benefits outweigh the possible disadvantages.

Consumer Rights White Paper 1991

At this juncture, it is useful to remember that some years ago a Nationalist government had briefly considered this subject and had registered a brief policy position which it was even happy to publish. This policy was included in the White Paper⁷ published under the heading "Rights for the Consumers" in August 1991⁸. Regrettably, fourteen years and sundry ministers and parliamentary secretaries responsible for consumer protection later, this published policy appears to have been completely forgotten. It was not followed up by any initiative. The White Paper⁹ contained a mere half a page (page 29) to the subject of "Purchasing a House" where it 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." It promised that attention would be given to the matter by the Consumer Protection Council¹⁰. In any event, government promised that the new consumer protection structure would tackle the following three objectives:

- "a) that property-dealing enterprises give their non-commercial customers a fair deal;
- b) that estate agents do not indulge in abusive sales methods;
- c) that advertisements and other information defused to promote the selling of a house are substantially truthful and relevant."

In reality, no such action has been taken in this respect and no specific regulation of property sales or estate agency has been introduced or attempted. These three principles do not constitute a comprehensive policy position on the subject, and should be seen as merely an initial indication of basic principles that would underlie future action. The principles are still useful but they are insufficient, and a more extensive re-appraisal is now overdue.

Estate agency – to regulate or not to regulate?

Estate agency is a socially important activity. There is a need for the services that estate agents provide. It is one of only a few significant economic activities which have so far escaped being subjected to a tailor-made regulatory framework. Some sectors are more stringently regulated and controlled than others. Financial services clearly belong to the first category, while public transport generally (including the horse-drawn *karozzini*, taxis and buses) probably belong to the latter.

Operators of estate agency undertakings have therefore so far escaped specific regulation, are only governed by the ordinary law of the land and are not accountable to any specialized public authority. Persons who either individually or through companies carry out this financially lucrative and socially important activity are not subject to any licensing or other regulatory control or oversight, other than the normal general rules of law that apply to each one of us. What can this imply in practice? It implies that if an estate agent or property negotiator is found to have breached his client's trust and may have even committed a



criminal offence (say fraud or misappropriation), there is no authority that can suspend his activity or withdraw his licence. He would be subject to criminal prosecution in the courts, but more or less that's it. In Malta, estate agents are therefore a rare breed, an economic sector with a significant impact on the financial life of consumers which has been allowed to operate in a legal vacuum. We do not even have a proper definition of an "estate agent", a designation which is of clear foreign origin, and which may not be the ideal appellation of these service-providers. Indeed, it is used throughout this paper for the sake of convenience seeing it is in common use and is immediately understood.

A number of other issues remain to be adequately addressed and resolved.

Certainly, it would be very useful to know precisely who and what we are attempting to regulate, and secondly why, and to make sure that both the subject matter and the objectives of the legislation are clearly defined. Rights and duties should be clarified: who exactly are the estate agent's clients and to whom does he owe a fiduciary duty, and further can both sides in a transaction be his clients? One may need to determine the fate of the various part-time "sensara" operating, often quite efficiently and cheaply, in many villages in Malta and Gozo. Would they be declared illegal? One may try to somehow bring them into the new legislative framework under a system of registration and broad oversight with or without a basic reporting requirement. This matter requires some reflection as they too seem to provide a useful social function.

Another question is whether the commission that estate agents can



charge their clients for their services should be regulated, or whether competition forces should be allowed to operate. The Civil Code provision regarding commission on sales, though useful, is inadequate and fresh ideas are required. The drafters of a law to regulate estate agents would have to address this matter, and serious policy decisions would have to be taken. It is no secret that the level of commissions some operators charge has sparked some controversy. I suggest that the current commission-based fee is not the only viable or appropriate form of remuneration. The argument that commissions have always been charged in a certain fashion does not mean that we may not re-appraise the situation and suggest alternative forms and modes of establishing payment for services. After all, estate agents are providing a service just like other professionals and traders. Other fair methods of remuneration, not seemingly applied in current local practice, may be investigated.

Most economic and professional activities which affect our lives including our financial affairs and other important transactions are to one extent or another subject to specific legislation and control in Malta. One can certainly debate and argue on the manner and the degree of intrusiveness of the legal framework that may be devised for this sector. There are various alternatives and precedents that may be considered. It should not be an exercise to impose a system control just for its own sake, or merely to create a new source of revenue. A proposal for a new regulatory framework should have clear and proper objectives, founded on an understanding of the market and of the way it operates with its imperfections and needs. It should also take into account legitimate grievances received from time to time from consumers. This applies equally to estate agents

One approach could be to adopt a financial services type framework of licensing coupled with the introduction of the fit and proper test for persons interested in assisting members of the public with their property needs. This may be seen as unduly stringent. Or else one can opt for a softer approach with a basic registration procedure and low entrance thresholds. However, I would certainly not support any moves towards self-regulation, as these inevitably lapse into an ineffective pretence. The island has no record of successful self-regulation experiences.

It would appear that Government has no current policy on the regulation of estate agency. Certainly none has been recently announced or published. The fact there is no EU Directive on this subject has meant that Malta was not obliged to transpose anything in this field. Does it take a scandal to re-ignite interest in this matter?

Future action

To summarize and to conclude, the position with regard to the regulation of estate agents in Malta is that no specific regulation is yet in place. I am confident that it will come in time as the current legal situation appears to me to be untenable and inappropriate. 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. A law should explain what they may or may not do, who may or may not undertake this activity, what happens when things go very wrong. Such an initiative would be in the best interests of reputable operators and of their customers. One of the objectives of regulation is to create more certainty and predictability for regulated entities and for their customers. Hopefully, any eventual legislative exercise would represent a proportionate response to local realities and requirements, and not

lapse into some knee-jerk quick-fix shamelessly copied from an inappropriate foreign model.

Regulatory approaches differ from one sector to another, and from one country to another. There is hardly ever a one-size-fit-all solution to regulation. Some cases justify a complex regulatory framework incorporating a specialized central regulatory structure which may have to be empowered to issue licences or other forms of authorization, to lay down minimum conduct of business standards and other requirements, and to monitor and to punish wrongdoing. In other cases, a softer approach may be preferable. Some countries opt for forms of self-regulation. This last scenario might not be the ideal case for Malta where public expectations would favour direct regulation and administrative oversight by a public agency. In most advanced countries, estate agents are governed by a special set of rules that at least seek to ensure they are competent and *prima facie* trustworthy, subject to oversight and reporting, and subject to a mechanism capable of investigating and punishing wrongdoing. Some systems prove more effective than others. Broadly, the systems which unduly depend on self-regulatory mechanisms of control are perceived as the least efficient.

Should a draft law on estate agency be considered in the future, representatives of the industry and of consumers would naturally have to be properly involved and consulted. However, the agenda should not to be allowed to be dominated or led by the industry itself as significant vested interests are involved. Any suggestion to hijack the initiative towards soft law in the shape of a code of practice or self-regulation should be immediately rejected. The new regulatory set up should actively safeguard competition and consumer choice and not inadvertently promote closed shops or cartels.

1 Some of the views expressed in this paper have already appeared in a letter by the author published in the Consumer Affairs Column, The Times, 26th September 2004

2 A novel by Luigi Pirandello

3 This paper is not concerned with the efficiency or effectiveness of such regulatory regimes, unless otherwise stated.

4 The Psychology Profession Act 2004, Act No. X of 2004

5 See Part II of the Consumer Affairs Act 1994 which sets out the statutory responsibilities of the Director of Consumer Affairs

6 See Part III of the Consumer Affairs Act 1994. However, this Tribunal cannot hear disputes where the value of the dispute exceeds LM1500

7 DOI publications 1991

8 At that time, Dr Michael Frendo was serving as the first ever Parliamentary Secretary with specific responsibility for consumer protection.

9 The 1991 White Paper laid the foundations for significant consumer legislation in subsequent years, particularly the Consumer Affairs Act passed by Parliament in 1994 and brought into force in 1996.

10 This refers to a Council-that-never-was envisaged as the new administrative and central structure for consumer protection in the White Paper. Instead, the following year, the then Minister L. Gatt chose to immediately set up a new government department dedicated to the promotion of consumer interests, namely the Department of Consumer Affairs, which still exists today.