

**Government Response to the
Office of Fair Trading's (OFT)
Market Study on home buying
and selling**

JULY 2011

GOVERNMENT RESPONSE TO THE OFFICE OF FAIR TRADING MARKET STUDY ON HOME BUYING AND SELLING

Introduction

The Government welcomes the Office of Fair Trading's (OFT) thorough report on home buying and selling which was published on 18 February 2010 - ([copy attached](#)). The report covers the whole of the UK, while recognising that significant differences exist between the home buying and selling process in England, Wales and Northern Ireland and the process in Scotland.

The OFT found that the housing market remains dominated by traditional estate agents with weak competition between them on price. As property prices rise during housing booms, so do estate agents' fees. The OFT believes that innovation in this sector could have a dramatic impact on the cost of buying and selling a home, in particular through online services. The way current legislation, dating from 1979, is framed may be hindering the development of new business models, and needs reform to allow new entrants, such as those that only introduce private sellers and buyers to each other, are not burdened with inappropriate regulation.

Beyond this, the OFT has found that current legislation, as it applies to traditional estate agents, is comprehensive and wide-ranging, and it does not believe that any further regulation is necessary. Instead, the report says the focus should be on improving the enforcement of current rules to guard against serious breaches. The OFT has also recommended that the Government should consider additional rules around fees received by estate agents for referring buyers to providers of ancillary services such as mortgage advice, surveys, and conveyancing. The OFT believes this could cause an estate agent to favour one buyer over another, to the seller's disadvantage.

The OFT did not make any specific recommendations for Scotland, but considered that there was still scope to extend choice and improve the buying and selling experience for Scottish consumers. The OFT therefore considers that all the recommendations made in its report also apply to Scotland.

The OFT said it will also work to improve co-ordination between Trading Standards Services (TSS), OFT and the approved Ombudsmen's schemes for a more rapid, prioritised response to complaints about estate agents which raise serious concerns. The OFT also encourages more consumers to negotiate on commissions paid to estate agents.

The remainder of this paper looks in turn at each of the recommendations aimed at Government and sets out the Government's response. Recommendations 1-4 are directed at the Department for Business, Innovation and Skills (BIS), which is responsible for the regulation of estate agents. Recommendation 5 is directed at the Department for Communities and Local Government (DCLG), which is responsible for home buying and selling in England and Wales.

Government response

Recommendation 1: The definition of estate agent in the relevant legislation dates from 1979. This legislation may be hindering the development of new business models and should be updated as soon as possible. The Department for Business, Innovation and Skills (BIS) should consult on modernizing and simplifying the Estate Agents Act 1979 (EAA 79) to make it clear that it is targeted appropriately at businesses which undertake the activities which present risks to consumers which the original legislation was intended to mitigate.

The OFT would like to see more new business models enter the market (both estate agency services on the internet and non-estate agency private seller web-sites) to provide more competitive pressure on traditional estate agents with a high street presence. The Government could promote and encourage this process by amending the definition of "estate agency work" in section 1 of the Estate Agents Act 1979 (EAA 79)¹. The OFT considers the current definition to be very widely drawn and to cover activities not considered to be traditional estate agency work, and believes it is discouraging new business models from entering the market.

Businesses that simply publish adverts and disseminate information about the availability of property (newspapers and internet portals) are excluded from the provisions of EAA 79. But where a business does more than this, for example, receive and field queries from potential buyers or sellers, or provide a "for sale" board to facilitate that, they are likely to be caught by the Act's provisions. The OFT would like to see the legislation focus on activities that pose real risks to consumers, such as negotiating on behalf of sellers, and for the obligations in 1979 Act, not to apply to business models that act as passive intermediaries. The OFT believes that such a change will encourage the development of "for sale by owner" web-sites, and of a suitable scale to overcome concerns about the internet and access to portals.

The Government is keen to see innovation in markets as it provides better service and choice for consumers. The Government will therefore consider the OFT's recommendation to amend the definition of estate agency work as part of a limited review of estate agents legislation on the basis that we think it is sensible for activities that do not pose a risk to consumers to be outside the scope of EAA 79. However, we will need to balance the benefits to consumers from increased competition with the risks of reduced consumer protection. Consumers need to know who they are dealing with and what level of protection they have. Consumers that do not use an estate agent are not covered by the protections in the 1979 Act, which now include access to free and independent redress for residential sales. If different business models can be properly signposted, consumers will be able to make an informed choice between a bespoke agency driven approach with all the protections of EAA 79

¹ The OFT's Estate Agency Guide for businesses states that you are an estate agent (subject to some exceptions including solicitors) if you introduce and/or negotiate with people who want to buy or sell freehold or leasehold property (or their Scottish equivalents) including commercial and agricultural property; you do this in the course of business; and you act on instructions from a client.

and a stripped down passive approach with reduced protection. They should also benefit from increased competition. Greater choice will also provide increased value for buyers.

Recommendation 2: Government should consider consulting with the industry and Trading Standards Services (TSS) on including a generic power to inspect premises for compliance with relevant legislation as part of its review of TSS powers.

Section 11 of EAA 79 gives enforcers powers to enter estate agents' premises and inspect books and documents, but only when they have reasonable cause to suspect an agent has committed an offence, or a breach of EAA 79, and/or carried out a practice deemed "undesirable" by the Secretary of State. While enforcers can enter premises to investigate a complaint, consumers may be unaware that a breach has occurred so not report it to Trading Standards. The OFT argues that introducing a general power to inspect for compliance under EAA 79 will overcome this information hurdle. The OFT believes this will lead to an increase in inspections, or the possibility of inspections, creating a deterrent effect and higher rates of detection.

A hurdle of "reasonable suspicion" can protect businesses from unnecessary inspections and the perception of unfair or random treatment. However, the entry and inspection powers in EAA 79 are more restrictive on enforcers than other consumer legislation, for example the Property Misdescriptions Act 1991 and Consumer Protection from Unfair Trading Regulations 2008 allow enforcers to enter premises to determine whether an offence has been committed. However, as with EAA 79, their powers to inspect books and documents are restricted to circumstances where reasonable grounds for suspecting an offence must exist.

The BIS review of Trading Standards powers is looking to develop, so far as is practicable, a single set of generic consumer protection powers for Trading Standards. The objective is to bring together current powers that are scattered across a number of different pieces of consumer legislation, help improve consistency in the way that TSS deal with business, and provide clarity and transparency for all businesses. BIS will consider the OFT recommendation when the TSS review is completed. A consultation on the review is expected towards the end of 2011.

Recommendation 3: Government should consider revision of relevant legislation to increase the sanctions for breach of a Prohibition Order, and to integrate the Prohibition regime more closely into the other statutory sanctions available now and in the future.

EAA 79 gives the OFT, as an enforcement body under the Act, the power to issue warning and prohibition orders to agents who breach certain provisions of the Act and associated secondary legislation. After conducting a fitness test, the OFT can ultimately prohibit those persons it considers unfit to carry on doing estate agency work. Any person who fails to comply with a

prohibition order commits an offence and is liable on summary conviction to a fine of £5,000. On conviction on indictment a higher fine can be imposed.

The OFT would like to see the sanction for a breach of a prohibition order increased to a “headline” figure that would have a deterrent effect. The Government’s has concerns about the proliferation of unnecessary criminal offences and increases in criminal sanctions, and a strong evidential case is required before such changes are approved. On balance, the Government does not believe the OFT has made a convincing enough case to consider further the need for increased sanctions.

Recommendation 4: As part of its work on the future of estate agency regulation, Government should consider further whether the potential for conflicts of interest should be removed, including a ban on referral payments.

In the market study report, the OFT described a hypothetical situation whereby the payment of referral fees may give an estate agent a financial incentive to prefer some buyers over another and act against the interest of the client. The scenario described was that of an agent recommending a lower offer if the commission from the lower offer combined with a referral fee was bigger than the commission from a higher offer. The OFT recommended the Government should consider banning estate agents from earning income from ancillary services sold to buyers, but said that it did not have sufficient evidence to say which of its possible remedies² would be proportionate.

A number of protections addressing transparency issues brought about by referral fees already exist in legislation, but disclosure of a fee alone may not always alert the seller to the existence of the possibility of bias.

Banning buyer side referral fees would impact poorly on estate agents. The OFT think it likely that 10-20% of estate agents’ income comes from ancillary services. Assuming that half of this comes from buyers, a ban would reduce estate agents’ income by 5-10%. We would expect agent’s commissions to rise to fill the gap. Banning referral fees would also be very disruptive.

Work in adjacent markets does not support banning fees in this sector. The Legal Services Board for England and Wales recently published a consultation setting out its plans for dealing with referral fees in a number of sectors including the conveyancing market. It accepted arguments put forward by the Legal Services Consumer Panel for England and Wales that there is insufficient evidence to ban the payment of referral fees by lawyers. This has parallels with the estate agency market as a decision to prevent lawyers paying referral fees for conveyancing work would have the same effect as a ban on estate agents accepting referral fees from lawyers. The Financial Services Authority recently announced that from the end of 2012 it will ban financial advisers in the UK from receiving commission for selling retail

² The OFT also considered preventing sales negotiators from benefiting directly from buyer referrals and strengthening disclosure requirements and/or improving the visibility of disclosure.

investment products, but the ban will not apply to mortgages and general insurance products.

On balance, the Government does not think that the OFT has produced a convincing enough case to commit resources to look at the issue of buyer side referral fees in more detail. Only if there is clear and robust evidence of consumer detriment, will we consider the OFT's recommendations further. We would, however, be interested to hear the views of stakeholders on this issue.

Recommendation 5: The Department for Communities and Local Government (DCLG)³ should consider whether any lessons can be learned for the rest of the United Kingdom from the Scottish Government's interim review of the Home Report⁴.

Home buying and selling is a devolved matter. The response to this recommendation is that of the UK Government and is not intended to reflect the position of the current Scottish Government which may take a different view to that set out below.

At the time the OFT made this recommendation, sellers in England and Wales were still under a legal requirement to provide a Home Information Pack (HIP) when marketing a residential property for sale.

The OFT study was unable to attribute a significant positive or negative impact on home buying and selling to the introduction of HIPs in England and Wales. In any case, HIPs were suspended on 21 May 2010 and all requirements relating to HIPs have ceased to apply to responsible persons – either a seller or their estate agent. The Localism Bill, currently going through parliament, will repeal Part 5 of the Housing Act 2004, thereby abolishing HIPs.

The suspension of HIPs has reduced the hassle and cost of selling a home in England and Wales by removing a layer of expensive and unnecessary regulation from the process. Reports from industry suggest that new listings increased by a third in the week following suspension.

The Home Report was introduced in Scotland in December 2008. However it is worth noting that the drivers for this were specific to the way the property market operates in Scotland. Key objectives were: improving awareness of property condition by providing information upfront; cutting the cost to buyers, by removing the need to commission multiple surveys on successive properties in a buoyant market; and addressing the potential of artificially low asking prices by providing an independent valuation at the start of the marketing process. The Scottish Government undertook an interim review of Home Reports to evaluate their progress over one year against their policy objectives and to identify any modifications needed to smooth their implementation. The report was published in 2010.

³ OFT's recommendation was to BIS, but responsibility for home buying and selling in England and Wales lies with DCLG.

⁴ <http://www.scotland.gov.uk/Resource/Doc/325986/0105049.pdf>

Although as with Home Reports, HIPs were required to include energy efficiency information and a property information questionnaire; there were also some key differences. The Home Report must include a mandatory property condition report (known as the ‘Single Survey’) whereas the Home Condition Report was a voluntary rather than mandatory component of the HIP. Additionally the HIP was required by law to include both a search of the local land charges register and a “local enquiries” search (known as Con29), neither of which are required for the Home Report.

Next steps

The Government will carry out a limited review of estate agents legislation in 2011. It will consider the case for modernizing and simplifying the definition of “estate agency work” in section 1 of EAA 79 so that it is targeted at businesses which undertake activities that present risks to consumers.

The Government will consider the case for giving Trading Standards a generic power to inspect estate agents’ premises for compliance with relevant legislation when its wider review of TSS powers is completed.

Although the UK Government currently has no plans for further reform of the home buying and selling process in England and Wales, we do recognise that people will continue to have ideas as to how the process could be improved. We are supportive of a voluntary industry led approach to improving the consumer experience and believe that the key driver for this will be the market led development of innovative products, which consumers find useful and want to purchase. We are also keen to see the take up of e-conveyancing and the innovative use of technology.

Whilst the regulation of estate agents is a reserved matter, the way in which houses are bought and sold is a devolved matter for the Scottish Parliament. Any decisions to change the way in which property is bought and sold in Scotland would be for the Scottish Ministers to propose.

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Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

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