

Department Of Trade And Industry

Consumer and Competition Policy Directorate

## **GOVERNMENT RESPONSE TO THE OFFICE OF FAIR TRADING REPORT ON ESTATE AGENTS**

On 23 March, the Government welcomed the publication of the Office of Fair Trading's (OFT's) comprehensive analysis of the estate agency market in England and Wales and the effectiveness of the Estate Agents Act 1979. The Government now propose a package of measures building on and strengthening OFT's proposals. We plan to give enforcers the regulatory tools they need to tackle rogue agents without unnecessarily driving up costs to house sellers, and to provide a cost-effective means by which consumers may win any justified compensation from estate agents through a free independent redress mechanism such as an Ombudsman scheme.

The Government intend to use the Housing Bill presently before Parliament to provide for such a redress mechanism.

Estate agents have a key role in the housing market. For most people buying a house is the most expensive purchase they ever make. It is vital that this market works well and that consumers are adequately protected against unfair practices. Our proposals will mean that consumers have better information, that enforcement activity is directed on those agents who deliberately flout the law and that industry schemes to provide redress are available within a competitive environment.

The key elements of the Government's proposals are:

- A consultation document later this year on how the OFT's proposals could be brought into effect and what more could be done to strengthen the regulation of estate agents.
- Taking a power in the Housing Bill to require estate agents to belong to any industry redress scheme approved for the purpose by the Secretary of State. The power would be linked with marketing homes with Home Information Packs (HIPs) and its exercise would be subject to detailed evaluation and consultation once Government and industry have drawn up detailed proposals.
- Working with stakeholders to develop methods to evaluate trends in consumer detriment in this market and the case for an industry qualification and national quality standards for estate agents.

In their report, the OFT concluded that the estate agency market works well in many respects and the market structure is competitive, with businesses able to enter and exit the market with ease. But consumers could make average savings of around £300 on each house sale if they did more to shop around and negotiate fees.

However, the report highlighted significant consumer dissatisfaction with estate agents' services, ranging from serious uncorrected abuses which the Estate Agents Act should deter (for example, failure to pass on offers or declare a personal interest) to, more commonly, quality of service issues (for example, delays and inadequate communication). Much of estate agency business is conducted orally with relatively little documentation so the process is not transparent and it is consequently difficult for enforcers to detect and substantiate that abuse has occurred in order that it might be dealt with.

OFT's broad approach to the problems they have found in the market is

- **to ensure a baseline of protection for consumers by making the present regulatory regime more enforceable.** The OFT recommend that estate agents should be required to maintain written records of offers, that these should have to be copied to those making the offer as well as sellers, and that the enforcement agencies are given enhanced powers to access these when there are reasonable grounds to suspect that the Act has been breached. Breach of statutory undertakings given under the Enterprise Act 2002 should become "trigger" events enabling enforcement action, and the OFT should be able to ban a person who has committed certain offences, not just when he has been convicted of them (as is currently the case).
- **to promote quality of service and redress beyond minimum standards by creating incentives for members of the industry to sign up to recognised Codes of Practice with free systems of redress.** The Consumer Code of Practice of the Ombudsman for Estate Agents Company Ltd (OEA) has now completed Stage One of the OFT approval process (the code is meeting the OFT's core criteria on paper) and is seeking to complete Stage Two of the process (it will need to show the code is functioning effectively in practice) in order to obtain OFT approval. However, at present it only covers around 40% of agents. Whilst the OFT hopes their promotion of the Scheme - should it be approved - will boost its

membership and profile, the OFT recommend that powers should be obtained to establish a statutory redress mechanism in the event that voluntary methods do not realise the anticipated improvements.

OFT's recommendations also cover such matters as making the statutory terms used in estate agency contracts clearer, extending the definition of an estate agent's personal interest in a deal and bringing the definition of estate agency in the Act up to date.

There have been calls for the introduction of a positive licensing system as a way of improving standards and increasing protection in this market. The OFT specifically addressed the question of whether positive licensing, which could include a fitness test and training or competence requirements, would improve regulation in this market. They reject it for a number of reasons:

- A requirement for estate agents to obtain licences before they engage in business would not deal with the main identified causes of serious problems in this market. These tend to concern the way existing agents conduct their business and are consequently unlikely to be detected by a screening test in advance of granting a licence.
- Estate agents clearly need to understand their obligations under the legislation but their role is primarily that of salesmen and intermediaries. Evidence from cases where estate agents have been banned suggests that misconduct results from a lack of integrity rather than deficiencies in their knowledge or expertise.
- Positive licensing would adversely affect the benefits consumers receive in terms of downward pressure on prices which results from the ease with which new businesses can enter the market and increase competition. It would also be costly to administer and these costs would ultimately be passed on to consumers in the form of higher fees.

OFT's conclusion is that positive licensing would raise costs and inhibit competition without delivering enough improvements to justify this. In their view, a more effectively enforced negative licensing system combined with the OFT's new powers under the Enterprise Act will be effective in dealing with malpractice.

In considering our response to the OFT's report, the Government have consulted stakeholders and taken into account the representations we have received. We will continue to consult fully as we take this work forward.

In large measure, the Government agree with the OFT's analysis which identifies a number of clear problems and the case for action to deal with these. We believe that their recommendations potentially offer an effective and proportionate basis for tackling the problems they have identified in this sector.

However, we believe that it may be necessary to go beyond the OFT's proposals in tackling consumer detriment in this market. In particular we wish to take further views on the question of enforcement and to see what can be done to build on OFT's initial analysis. It is clear that amendments to the legislation are necessary to improve protection in this area. The Government are therefore proposing to consult later this year on a package of measures which will bring about real improvements in this sector. Our proposals will cover:

- Making estate agents dealings with consumers more transparent by requiring them to copy to buyers the written offers they have passed on to sellers and to keep clear and comprehensive records of each property transaction. This will give consumers more confidence that they are being treated fairly.
- Giving the OFT and local Trading Standards Departments the comprehensive armoury of regulatory tools they need to investigate consumer complaints properly, address unfair practices and drive the rogues out of the market. We will look at whether they should have powers to demand the on-site production of administration records, files and copies of correspondence when they have reasonable grounds to suspect estate agents have not complied with the provisions of the Estate Agents Act.
- Allowing enforcement action to be taken where specified offences have been committed, regardless of whether or not the offenders have been successfully prosecuted.
- Widening the range of circumstances in which OFT can consider the fitness of agents and the range of sanctions available to them.

- Widening the circumstances in which estate agents have to disclose their personal interest in property transactions.
- Modernising the Estate Agents Act so it is relevant to developments in estate agency practices, such as internet enterprises, and making it clear that consumers are protected.
- Making estate agency contracts more transparent so consumers have a better understanding of their liabilities and are not ambushed by clauses in small print or unclear language.
- Making it easier for the OFT and Trading Standards Officers to addressing flyboarding abuses by requiring agents to identify specific properties on “for sale” boards.
- Encouraging estate agents to improve quality of service by subscribing to and developing codes of practice that will meet the standards required to obtain OFT approval.

In addition, an OFT consumer information campaign will alert consumers to how they can get best value for their money by shopping around, negotiating fees and checking whether agents subscribe to consumer codes of practice, such as the OEA’s Code of Practice.

In the Consultation Document, we will also raise whether there are other ways going beyond the OFT’s recommendations in which enforcement could be improved e.g. whether some of OFT’s powers could be delegated to local authorities, whether OFT’s internal procedures for dealing with cases involving estate agents can be streamlined, and what could be done to improve communications between the OEA, the OFT and other relevant bodies to facilitate enforcement action being taken when there are serious complaints about estate agents. And we will work with the OFT and Trading Standards to ensure that the best use is made of their new enforcement powers. Updating the regulatory system on its own will not be sufficient to tackle unscrupulous behaviour unless it is effectively and speedily enforced and problems in this sector are prioritized and the necessary resources allocated to them. We are confident that the OFT and local Trading Standards Offices will rise to this challenge but we will want to work with them so that consumers benefit from real improvements in behaviour in this sector.

The Government have noted calls for positive licensing of estate agents but we agree with OFT’s analysis that this is not justified. We believe that

stakeholders have underestimated the potential impact of OFT's recommendations as an overall package for addressing mischief in this sector. These recommendations can address the most serious problems without imposing unnecessary costs on businesses or inhibiting competition (both of which would result in higher fees). But we are also committed to going beyond the OFT's proposals, for example in making it possible to require estate agents to belong to an industry redress system.

The Government agree that access to free, independent redress is important in the estate agency sector and offers a proportionate means of dealing with consumer complaints about quality of service issues. The OEA is currently seeking approval for its Consumer Code of Practice from the OFT which would enable member agencies to demonstrate a clear commitment to higher standards.

The Government are concerned, however, that by itself this would leave many consumers unable to obtain redress without resort to the courts. Housing markets are local so a seller may not have the option of engaging an estate agent who subscribes to a redress scheme. A buyer who wants a particular property may also have no choice as he will have to deal with the estate agent or agents selected by the seller.

The Government are also conscious that with the introduction from 2007 of HIPs as provided in the Housing Bill estate agents may well play an increasingly pivotal role in housing transactions. On the other hand, the Government are concerned that any redress scheme should not impose an unnecessary burden on the industry or significantly increase barriers to entry, neither of which would be in consumers' interests. Proposals for a redress scheme need to be reconciled with the fact that there are no positive licensing arrangements for estate agents.

The Government also accept that there are advantages in redress arrangements being run by the industry rather than the state. The Government believe that a way of reconciling these different considerations is for Parliament to provide a power to require estate agents to belong to any redress scheme approved for that purpose by the Secretary of State. Under the proposed arrangements, enforcement would fall under the present statutory arrangements in the Estate Agents Act: that is, that Act would apply to breach of the duty to belong to the scheme as it currently applies to a person who has engaged in an undesirable practice under the Act, so that enforcement action, including prohibition from acting as an estate agent, could be taken against any estate agent who failed to comply with the duty. The Government consider that the

Housing Bill represents an opportunity to deal with this matter and propose to bring forward amendments to the Bill during the Committee stage in another place to provide for such arrangements. In recognition of the fact that this is a new proposal on which the Government have yet to consult, we would not propose to exercise the power until it was clear what industry scheme or schemes would seek recognition, what arrangements they would have for providing redress including the fees they would charge estate agents, consultation had been carried out on the detailed arrangements and a full Regulatory Impact Assessment had been done. Subject to those considerations, the Government hope that the arrangements will be brought into effect before the introduction of HIPs in 2007.

We encourage those in the industry who wish to do so to subscribe to more wide-ranging codes of practice and to seek approval under the OFT's Consumer Codes Approval Scheme.

Turning to other steps the Government intend to take in respect of this market, we want to improve the evidence base so as to gain a better picture of just how much consumer detriment there is in this market and how much our proposals improve it. We plan to invite the main stakeholders to join us in trying to devise a methodology for this. Such a better evidence base might establish the need take further steps in future.

We also plan to work with stakeholders on the scope for devising and promoting a recognised qualification for estate agents. We see benefit in this as something that, if properly done, could provide a career incentive to raise standards. We also note that the British Standards Institute, the UK National Standards Body, is considering developing a service quality Standard and associated Kitemark for the provision of residential estate agency services and we shall follow with interest progress on this.

Consumers deserve a better deal from estate agents than, as the OFT's report shows, in many cases they have got. The Government's proposals will go a long way to providing consumers in this vital market with a much better deal.

22 July 2004