

Estate agency market in England and Wales

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Full list of documents available on the estate agency study

Main report	Estate agency market in England and Wales	In hard copy from orderline (free of charge) and on web
Annexe A	Consumer survey	Web only
Annexe B	Business survey	Web only
Annexe C	International research	Web only
Annexe D	Competition case studies	Web only
Academic paper	The economic process of buying and selling	Web only
Orderline number	0870 60 60 321	
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CONTENTS

<i>Chapter</i>		<i>Page</i>
PART I: MAIN REPORT		
1	Summary and conclusions	1
2	Methodology	12
3	Estate agency in England and Wales	15
4	Competition between estate agents	36
5	Consumer satisfaction	54
6	Regulation of the estate agency sector	67
7	Improving standards	101
PART II: BACKGROUND INFORMATION		
1	Economic efficiency of the home buying and selling process	120
2	Data on competition	122

PART I: MAIN REPORT

1 SUMMARY AND CONCLUSIONS

Introduction

- 1.1 This market study investigates how well the residential estate agency market is working for consumers and makes recommendations to address the shortcomings identified.

Background

THE HOUSING MARKET

- 1.2 For most people, their property is their single biggest financial asset. The average price of a property in England and Wales, in the fourth quarter of 2003, was nearly £164,000.
- 1.3 We estimate estate agents' revenue from the sale of residential property in England and Wales in 2002 at over £2.5 billion. Between 1998 and 2002, there was an increase in the number of residential property transactions in England and Wales of nearly 19 per cent, from 1.22 to 1.45 million. Because property prices rose sharply over the period, the increase in the values of transactions was proportionately even greater. In 2002, total property transactions were some £185 billion, nearly 80 per cent higher in real terms than in 1998.

The role of Estate Agents

- 1.4 Estate agents play a central role in the property market. Their core business is in introducing buyers and sellers of property to each other. Over nine out of ten people buying and selling a home in England and Wales use an estate agent. Agents may also liaise on behalf of clients with third parties involved in the sale of a property, such as lawyers or

surveyors, or offer other services, such as financial products, conveyancing, valuations and appraisals.

OUR FINDINGS

- 1.5 We have found no obvious competition problems in relation to the structure of the market. The market is not highly concentrated, and there are healthy levels of entry and exit. However, price competition is limited, with sellers' concerns centring on factors other than fees, such as the sale price of their property. Consumers can and do benefit from shopping around and negotiating on fees. This should be encouraged. Over time we would expect such behaviour to increase pressure on estate agents to provide better services and more competitive fees.
- 1.6 Consumers are not happy with the services they receive from estate agents. The industry itself is taking steps to help deal with these concerns through improved codes of practice. We welcome this insofar as it will help to raise standards and provide for redress for serious complaints.
- 1.7 Such moves should be reinforced by more effective enforcement powers, under the Estate Agents Act, to deal with serious offences. The Act needs to be brought up to date and made more effective. Doing so should help reassure consumers that unacceptable behaviour is dealt with.
- 1.8 The following sections spell out these findings in greater detail.

Competition between estate agents

- 1.9 Competition between agents takes place at the local level. Around 90 per cent of sellers choose an agent located within five miles of their property. Local markets are, in general, not highly concentrated. Moreover, the markets are dynamic, with a large number of new agents setting up in business successfully, and established businesses being forced out by competitive pressures. These factors lead us to conclude that, overall, there are no structural competition problems.

1.10 However, price competition in the sector is weak. Estate agents' fees are typically set as a fixed percentage of the realised sale value of the property. There is limited evidence of agents breaking out of this convention. There is widespread use of 'pricing points', with the vast majority of fees being set at about one per cent, 1.25 per cent, 1.5 per cent, 1.75 per cent or two per cent. Average fees charged rise in proportion with sales value, and this does not reflect the costs incurred.

1.11 This pricing behaviour reflects a lack of effective price competition which can be explained by three factors:

- Sellers are concerned with the net return they receive on the sale of their property. This will be affected, not just by the fee they incur from the estate agent, but by the sale value achieved. An agent's reputation for achieving high sales values is therefore an important determinant of choice between estate agents, as is the estate agent's valuation of the property. The importance of factors other than fees in determining the net return may limit the extent to which consumers shop around between agents for lower fees.
- Because fees are set on the basis of individual agreements between agent and seller, competitive pressure depends in good part on sellers shopping around and negotiating. However, only around half of sellers obtain quotes from more than one agent. In our consumer survey, those people who did shop around and negotiate fees, paid on average 14 per cent lower fees than those who did neither. For a property of average value, this level of difference would currently represent a potential saving of about £300.
- Having fees quoted as percentages rather than absolute amounts may also result in some consumers not fully appreciating the size of the fee they will eventually have to pay at the time they appoint an agent.

1.12 We will therefore undertake an information campaign to raise consumer awareness of the benefits of shopping around before choosing an estate agent and of negotiating fee rates. Greater shopping around and negotiating by consumers will increase competitive pressures on estate agents and result in better value for money in terms of both lower prices

and higher service quality. It should also help consumers assess more realistically the true valuation of their property by providing them with more estimates.

- 1.13 We recommend that agents should provide – and consumers should demand – quotes both in percentage terms and as an absolute amount calculated on the basis of the recommended selling price. We also recommend that estate agency bodies add such a requirement to their codes of practice.

Consumer concerns

- 1.14 Estate agency is a sector widely associated with high levels of consumer dissatisfaction. Our research supports this finding, with a quarter of sellers saying that they were dissatisfied with the service provided by the estate agent that sold their home.

- 1.15 Buying and selling a property is a stressful process. This is because of the size of the transaction, the effort involved, and the fact that it is often linked to a major 'life event'. As a result, it is likely that estate agents will attract criticism on some occasions when it is not entirely justified.

- 1.16 Allowing for this, however, it is clear that many consumers have legitimate bases for their grievances:

- In our survey 21 per cent of sellers and 23 per cent of buyers said that they had experienced a serious problem with an agent, and were able to identify specific practices to support their view. These included a small number of very serious examples such as failure to pass on offers, suggestions that a buyer would be more likely to be successful if they also used the financial services offered by the agent, and failure by the agent to declare a personal interest.
- The Ombudsman for Estate Agents scheme covers only a minority of estate agents. While many complaints to the scheme are about relatively minor matters, a number are more serious; including

complaints relating to communication of offers to both buyers and sellers, conflicts of interest and showing an unfair bias towards one of the parties.

- In 2002 the OFT received 212 complaints directly, of which 60 per cent related to an alleged breach of the Estate Agents Act. Serious areas of complaint included failure to pass on offers, failure to declare a personal interest and failure to provide required information to clients.

1.17 Given the size and nature of the transactions involved, it is essential that consumers have a greater degree of confidence in those who operate within this sector.

Areas for action

1.18 To address these issues we believe that action is needed in the following areas:

- **Ensuring a baseline level of protection** to consumers so that minimum standards of behaviour are enforced effectively across the industry.
- **Promoting quality of service and redress** beyond minimum standards by creating incentives for members of the industry to sign up to recognised Codes of Practice.

Ensuring basic standards of consumer protection

1.19 The Estate Agents Act 1979 is intended to regulate the work of estate agents so that both buyers and sellers of property are treated honestly and fairly. It covers activities such as how offers should be handled, the information agents must provide to clients and the way in which certain terms must be explained if used in estate agency contracts.

1.20 The Act imposes a 'negative licensing' regime in which an agent shown to have breached certain provisions of the Act, and/or to have been convicted of certain criminal offences, may be banned from continuing in

estate agency work. As such, the Act should effectively set the minimum standards of behaviour across the industry.

1.21 The Enterprise Act 2002 introduced significant powers enabling the OFT and Trading Standards Service (TSS) to seek undertakings and obtain injunctions quickly to bring to an end conduct that is in breach of the Estate Agents Act and other consumer protection legislation. This potentially enables the OFT and the TSS to tackle certain behaviours in a more effective way than previously.

1.22 In practice, however, there are significant constraints on the effective application of the current legislation:

- **The Act needs to be made more enforceable** – a number of the practices, which the Act is intended to address, cannot be dealt with very effectively for a variety of reasons. For example, much of the buying and selling process is conducted orally meaning little documentation is produced which can be used as evidence when investigating alleged infringements of the Act.
- **The Act needs modernising** - it is now nearly 25 years old and does not adequately address all issues in today's property market.

1.23 Furthermore, contract terms need to be made clearer and easier to understand. Our work has shown that the statutory contract terms that are set out in the Act can be difficult for people to understand. In some cases, this can mean people owe estate agents fees when they were not aware that any were due.

THE ENFORCEABILITY OF THE ACT

1.24 To take effective action in key areas of the Act, such as ensuring that the offer process works transparently and honestly, access to evidence needs to be improved. Ensuring the efficacy of the offer process is an important aim of the Act. In particular, agents are required to pass on offers to the vendor promptly and in writing. Nevertheless, there remains a good deal of consumer concern around how offers are dealt with by

estate agents. Anecdotal evidence suggests that some agents withhold offers for various reasons.

- 1.25 Currently, because there are no requirements for agents to keep administrative records of offers received and passed on to vendors, it is very difficult for the OFT and the TSS to substantiate complaints relating to matters of this kind. A more robust method of record keeping should be required so that a clear audit trail is available to the OFT and the TSS. This would help deter malpractice in the first place.
- 1.26 Secondly, the effective reach of the Act has been reduced as a result of changes in the practices of various enforcement agencies. In the past, certain enforcement agencies were more likely to bring criminal convictions for serious breaches of legislation. More recently, civil or informal action has tended to be taken as a more cost effective alternative. This shift in wider enforcement practice has implications for the enforceability of the Estate Agents Act because certain criminal convictions can trigger a consideration of an individual's fitness to practice estate agency work. With less criminal prosecutions, the threshold for this trigger is being met less often.
- 1.27 To improve the enforceability of the Act, it needs to be possible to consider the fitness of agents where specified offences have been committed, regardless of whether the offender is the subject of a successful prosecution.

UPDATING THE ACT

- 1.28 Business methods within the market have changed significantly since the Act was introduced in 1979. At present, there is a lack of clarity in the industry as to whether some newer business models such as some internet enterprises and certain types of property retailers are considered to be estate agents for the purposes of the Act. Where companies offer a range of services beyond simply advertising to buy or sell homes and which cover what would be seen as estate agency services, consumers need to be assured that they are protected by the Act.

UNDERSTANDABLE CONTRACT TERMS

- 1.29 Our research shows that many people do not sufficiently understand the statutory contract terms employed by many estate agents. For example, seven per cent of sellers were unable to say what sort of contract they had signed, and 24 per cent did not know how long their contract was valid for. Moreover, because these terms are set out in the Act and Regulations made under it, the OFT's ability to scrutinise these issues is restricted.
- 1.30 This is worrying because terms used in the contract place obligations on the consumer. In some situations, this can lead to remuneration being due at unexpected times or can leave consumers liable for more expense than they anticipated. We believe that both the terms and duration of contracts must be made clearer so that consumers are fully aware of the implications when signing a contract.

RECOMMENDATIONS

- 1.31 We consequently believe that a number of revisions are required to the Act to ensure that it effectively provides a baseline standard of consumer protection across the industry. Our recommendations include the following:
- The Act is modernised to ensure that it encompasses all ways business is conducted in this sector;
 - Estate agents should be required to maintain effective administrative records for a specified period of time in order to create a transaction audit trail which will facilitate the investigation of complaints;
 - Estate agents should be required to provide appropriate administrative documents on site to OFT and TSS officers who have reasonable grounds to suspect that the agent has breached the Act.
 - The Act should be amended to require contract terms to be presented more clearly.

1.32 These measures would better protect consumers from dishonest estate agents by improving the enforceability of the legislation and would facilitate the gathering of better evidence in the investigation of complaints. Agents would also be better able to deal with ill-founded complaints.

Strengthening incentives to raise quality and provide for redress

1.33 The high levels of consumer dissatisfaction with the services of estate agents show the need for improved quality and higher standards. The OFT recognises the scope for self-regulation, by means of effective consumer codes of practices, to address this. There is a number of existing voluntary codes of practice that aim to set good standards of service by members and provide redress in certain circumstances. At present, these suffer from limited membership and awareness amongst the public is low.

1.34 To increase the effectiveness of voluntary codes of practice, the OFT has established the Consumer Codes Approval Scheme (CCAS). The scheme gives OFT approval to codes that meet certain key criteria such as raising standards of customer service, availability of low cost, independent redress, and assurance of compliance by members. Where a code of practice achieves approval, businesses operating to that code will qualify to use a distinctive OFT logo that will be actively promoted to consumers. This will help consumers to identify businesses that adhere to certain standards.

1.35 The availability of low cost, independent redress mechanisms is particularly important as these:

- Enable consumers to pursue their legal rights. For services such as estate agency, it is difficult for a consumer to take independent action e.g. by taking the service back for a refund or boycotting the agent in future.
- Create incentives for businesses to provide good service. This is particularly important in estate agency as house purchase and sale

occur relatively infrequently so that reputational incentives, created by consumers choosing not to use the agent again, are less effective.

- Deal in a proportionate manner with a wide range of non-critical problems that would be difficult to legislate for.

- 1.36 There are a number of voluntary codes in the sector which aim to set standards of service for members. At present, the code established by the Ombudsman for Estate Agents Company Ltd (OEA Company Ltd) provides a redress mechanism which is free to consumers and covers approximately 36 per cent of the industry. This code has been submitted for approval under the CCAS and has achieved Stage One status. The Royal Institution of Chartered Surveyors' (RICS) code of practice provides independent redress through an arbitration scheme, which carries a fee for consumers. They are currently piloting an ombudsman scheme in Scotland, which may be rolled out to the rest of the UK if successful. The National Association of Estate Agents (NAEA) also has a code of practice that sets standards for members. At present, the NAEA provides redress through a mediation service that charges consumers for the use of its services.
- 1.37 For the majority of consumers whose agents are not members of a scheme there are few options for gaining redress. Compensation can be gained through the courts, but this can be expensive.
- 1.38 The alternative to the provision of independent redress through voluntary schemes would be the establishment of a statutory redress scheme.

Statutory redress

- 1.39 A statutory redress mechanism would ensure redress was available for buyers and sellers in the event of a complaint against any agent. This would provide independent dispute resolution for all consumers in the market. It would also help overcome the problems consumers report about not knowing who to complain to and believing that complaints would be ineffective. Similar schemes already exist in the form of statutory ombudsmen for a number of sectors including the National

Health Service, local government, banking, pensions, telecommunications and housing.

- 1.40 A requirement to provide compensation should create incentives to improve quality of service. However, a statutory redress mechanism would not raise standards directly in the same way as would an OFT approved code of practice. It would be able to compensate consumers for losses whether these occurred due to illegal activity by estate agents or legal but poor quality of service. However, its ability to raise standards above this level would be limited compared with codes of conduct.

Recommendation

- 1.41 Currently there are important efforts by the industry to establish codes of practice which would include mechanisms to facilitate consumer compensation.
- 1.42 These are moving some way to addressing the issues we have identified. There remains, however, a problem of low coverage by the existing schemes. Our first preference is for the industry to increase access to low-cost redress mechanisms by opting into recognised schemes voluntarily. This is because voluntary action, if effective, has the potential for improving standards to a greater degree than a statutory scheme. In addition, the immediate introduction of a statutory scheme could create an unnecessary regulatory burden if the industry is placed to achieve similar outcomes through voluntary action. Failing that, it will be necessary to consider introducing a statutory scheme.
- 1.43 We therefore recommend that the industry improves service quality and means of redress by developing codes of practice that meet the requirements for OFT approval. The OFT is committed to raising awareness of the benefits of compliant codes of practice and will encourage agents who are outside such schemes to join.
- 1.44 We also recommend that powers should be obtained to establish a statutory redress mechanism in the event that voluntary codes of practice do not realise the desired improvements in benefits to consumers.

2 METHODOLOGY

Introduction

- 2.1 This market study, launched on 11 June 2002, aimed to determine whether the market is working well for consumers in their role as buyers and sellers of residential property and, if not, to propose ways in which any shortcomings might be remedied. We have not considered the market for rented residential property.
- 2.2 The main focus of this study has been on England and Wales, although much of the analysis also covered Northern Ireland.¹ We decided to exclude Scotland from the main part of the analysis as a significant proportion of transactions make use of the sealed bid system, and the Scottish market had been the subject of a recent Monopolies and Mergers Commission report.³ Some of our recommendations, if implemented, would however have an impact across the whole of the UK. In making these recommendations, we have consulted with officials in Scotland and Northern Ireland and taken into account the circumstances of those markets.
- 2.3 The study covered:
- The nature and effectiveness of competition in the market
 - Reasons behind the reported high levels of consumer dissatisfaction
 - How well the Estate Agents Act 1979 is working to protect consumers
 - Comparisons with markets in other countries, including Scotland

¹ Northern Ireland was not covered in the case studies and the consumer survey.

³ 'Solicitors' estate agency services in Scotland: a report on the supply of residential estate agency service in Scotland', Monopolies and Mergers Commission', 1997.

2.4 We also looked at whether consumers had enough information to make informed decisions when using the services of an estate agent. Buying and selling a home is something most people do rarely and we wanted to check that consumers had a sufficient understanding of the estate agent's role or whether there was a need for more and better information.

Research

2.5 During this study we:

- Consulted widely with members of the industry ranging from small businesses to large national chains, internet property portals and affinity groups. We also consulted with representative bodies including the National Association of Estate Agents (NAEA), the Royal Institution of Chartered Surveyors (RICS) and the former Independent Association of Estate Agents (IAEA). To get a better understanding of the Scottish market we met the solicitor property centres in Edinburgh and Glasgow.
- Carried out surveys of nearly 2000 consumers who had a recent experience of buying or selling their home and invited some 3000 estate agency offices selected at random to complete a detailed questionnaire.
- Commissioned an international study looking at how estate agency markets work in Scotland, Ireland, the Netherlands, Denmark, the USA and Australia.
- Commissioned case studies to evaluate how well competition is working in the market.
- Carried out an evaluation of how the Estate Agents Act 1979 was operating and analysed estate agency cases dealt with by the Contract Regulation Unit in the OFT.⁴

⁴ The Contract Regulation Unit enforces the Unfair Terms in Consumer Contract Regulations 1999 (UTCCRs) and considers complaints about unfair terms in consumer contracts. Where we consider terms to be unfair we take action to secure the deletion or revision of the terms.

- Carried out a financial analysis of profitability
- Commissioned economic analysis to look at the offer and bidding process.
- Commissioned local area case studies to assess the effectiveness of competition.

2.6 We also discussed our emerging findings with officials of the Scottish Executive and the Northern Ireland Assembly to test whether recommendations made on the legislation (which covers the whole of the UK) were sound.

2.7 The following chapters provide background to the estate agency market in England and Wales and outline market problems found and our proposed remedies. Details of relevant research carried out can be found in the annexes of this report. The studies we commissioned are the responsibility of the authors concerned and any views expressed in them are those of the authors and not necessarily of the OFT. The views of the OFT are expressed in this report, which has been written with the benefit of having seen these studies.

3 ESTATE AGENCY IN ENGLAND AND WALES

Introduction

- 3.1 This chapter provides factual information on the home buying and selling process and the role within this of the estate agent. It provides data on the residential property market including trends in the volume and value of sales and property prices. In addition to providing detailed background on the role of estate agents, it provides information on the number and ownership of estate agencies and the value of estate agency businesses. It also contains other information relevant to the issues considered as part of our study.
- 3.2 There are around 11,000 estate agencies in England and Wales with total fees from residential sales in 2002 estimated to be over £2.5 billion. The vast majority of the 1.45 million residential property transactions in 2002 were through estate agents with only about six per cent of those selling a home not using an agent.

The residential property market

- 3.3 Estate agents sell and rent out property for clients. The demand for their services is therefore directly related to activity in the property market.
- 3.4 The level of owner occupation affects the demand for estate agents services for the sale of residential property. Owner occupation increased from 57 per cent of households in 1981 to 71 per cent in 2001/2002⁵ for England (with a similar figure for Wales⁶). Some 29 per cent of households owned their home outright and 42 per cent were buying their home with a mortgage. For the UK as a whole, owner-occupiers accounted for a slightly lower proportion (68 per cent) in 2000/2001.⁷

⁵ Sources: 1981 DOE Labour Force Survey Housing Trailer
2001/2002 ODPM Survey of English Housing

⁶ Source: Statistics for Wales

⁷ Social Trends 2003-Table 10.7

- 3.5 People move for different reasons. Those who own their house outright may wish to move to a smaller or cheaper home, or a better area. Personal factors are also involved (e.g. divorce/separation).
- 3.6 The volume of residential property sales handled by estate agents is influenced by the extent to which people move house and move from rented accommodation to buying their own home. For those who move, the most common types of move are from one owned property to another or from one privately rented property to another⁸. Movement into owner occupied properties was mainly by households who had been existing owner-occupiers. Of those owner-occupiers who owned their home outright, 62 per cent had moved from a home they also owned outright and 25 per cent had a mortgage on their previous home.
- 3.7 Of those who owned their property with a mortgage. Fifty-three per cent had a mortgage on their previous property, 24 per cent had previously rented privately, 17 per cent were new households⁹, and three per cent had owned the previous property outright. Table 3.1 provides a complete breakdown for owner- occupiers owning their property outright and with a mortgage according to the previous tenure of the household.

TABLE 3.1: HOUSEHOLDS RESIDENT UNDER ONE YEAR: PREVIOUS TENURE BY CURRENT TENURE, 2001/02

Previous tenure	Owned outright	Owned with mortgage
New household	3	17
Owned outright	62	3
Owned with a mortgage	25	53
Rented from a local authority	1	2
Rented from a registered social landlord	1	2
Rented privately	9	24

Source: Survey of English Housing, Office of the Deputy Prime Minister

⁸ Survey of English Housing, Office of the Deputy Prime Minister

⁹ Where the household reference person was not the household reference person at their previous address

The volume and value of residential property transactions

- 3.8 The overall volume of estate agents' residential property sales business varies with the total volume of property transactions and fluctuates significantly with the property cycle. There is also considerable regional variation in the volume of property transactions, providing a much higher volume of business in some parts of the country than others.
- 3.9 A survey of property transactions in England and Wales showed that there were 1.45 million residential property transactions in 2002 worth¹⁰ nearly £184.9 billion. Table 3.2 shows the volume and value of residential property transactions for each of the years 1998 to 2002.

TABLE 3.2: RESIDENTIAL PROPERTY TRANSACTIONS IN ENGLAND AND WALES 1998 TO 2002¹¹

	Number (thousands)	Year-on-year change (%)	Value (£million)	Year-on- year change (%)
1998	1,220		96,415	
1999	1,368	12.1	124,303	28.9
2000	1,327	-3.0	129,443	4.1
2001	1,343	1.2	154,070	19.0
2002	1,450	8.0	184,876	20.0

Source: Inland Revenue

REGIONAL ANALYSIS OF PROPERTY TRANSACTIONS

- 3.10 An analysis of the number of transactions by region for 2000 to 2002 is shown in table 3.3. The South East of England (excluding London) accounted for nearly 18 per cent of the total transactions for England and Wales in 2002, with the North West and London accounting for some 13 per cent each.

¹⁰ Source: Inland Revenue

¹¹ Residential property transactions consist mainly of home purchases but also include other transactions which cannot be regarded as purchases for owner occupation e.g. the separate purchase of a private garage or the purchase of the freehold by the leaseholder

TABLE 3.3: ANALYSIS OF THE NUMBER OF RESIDENTIAL PROPERTY TRANSACTIONS IN ENGLAND AND WALES BY REGION 2000 TO 2002 (Thousands)

	2000	2001	2002
North East	54	39	52
North West	173	194	197
Yorkshire & Humberside	127	130	134
East Midlands	103	98	114
West Midlands	123	107	126
East of England	147	134	149
London	195	188	192
South East	211	240	259
South West	137	146	162
Wales	56	67	65
Total	1,327	1,343	1450

Source: Inland Revenue

3.11 Table 3.4 analyses the value of residential property transactions in 2000 to 2002 in England and Wales. In 2002, London and the south east of England accounted for nearly 46 per cent of residential property sales by value. By contrast, the North East accounted for only 2.1 per cent and Wales for 2.7 per cent.

**TABLE 3.4: ANALYSIS OF THE VALUE OF RESIDENTIAL PROPERTY
TRANSACTIONS IN ENGLAND AND WALES BY REGION 2000 TO
2002 (£MILLION)**

	2000	2001	2002
North East	2,998	2,617	3,808
North West	11,209	13,582	15,303
Yorkshire and Humberside	7,949	8,033	10,921
East Midlands	7,577	7,954	10,346
West Midlands	9,516	9,624	12,633
East of England	14,963	17,075	20,539
London	31,089	37,503	40,695
South East	27,252	36,140	43,839
South West	13,360	16,924	21,535
Wales	3,531	4,618	5,058
Total	129,443	154,070	184,876

Source: Inland Revenue

Residential property prices

3.12 The average price of all residential property sold in England and Wales increased from an average of £68,469 in 1995 to £155,554 in 2003, or some 127 per cent. Table 3.5 indicates average residential property prices in England and Wales for each of the years 1995 to 2003.

TABLE 3.5: AVERAGE RESIDENTIAL PROPERTY PRICES IN ENGLAND AND WALES FROM 1995 TO 2003

Year	Average price (£)	% increase on previous year
1995	68,469	-
1996	71,805	4.9
1997	78,584	9.4
1998	84,769	7.9
1999	94,634	11.6
2000	108,055	14.2
2001	119,275	10.4
2002	138,170	15.8
2003	155,554	12.6

Source: Land Registry

3.13 Average residential property prices vary significantly between different regions. At the fourth quarter 2003, average prices ranged from £102,074 in the North, the lowest priced region, up to £260,658 in the highest priced region, Greater London. The average price for England and Wales as a whole was nearly £164,000. Table 3.6 gives average residential property prices by region at the fourth quarter 2003.

TABLE 3.6: AVERAGE RESIDENTIAL PROPERTY PRICES BY REGION AT THE FOURTH QUARTER 2003

Region	Average price (£)
East Anglia	155,364
East Midlands	132,893
Greater London	260,658
North	102,074
North West	110,135
South East	205,109
South West	176,092
Wales	111,272
West Midlands	139,227
Yorkshire & Humberside	112,350
England and Wales	163,584

Source: Land Registry

The home buying and selling process

- 3.14 Our study focuses on the role of estate agents in buying and selling property. Their responsibilities are primarily to market properties on behalf of sellers and act as intermediaries between sellers and potential buyers. Other professionals besides estate agents are involved in the process.
- 3.15 Estate agents' work focuses on events up to the point where an offer has been made and accepted. Once an offer has been accepted, both buyer and seller will normally instruct solicitors to prepare for exchange of contracts. The respective solicitors will also carry out searches and other work on behalf of their clients prior to an exchange of contracts at which point the final price and sale conditions are agreed. The majority of buyers also need to approach a bank or building society at this stage for a mortgage. When contracts are exchanged a date for completion of the sale is confirmed by the respective solicitors.
- 3.16 The process may also involve the buyer arranging a survey on the property. Currently this is optional: many buyers rely on a survey undertaken on behalf of their mortgage lender. Under proposals included in the Housing Bill, there would be a legal requirement for the production of a home condition report (HCR) as part of a new home information pack (HIP) before any property was marketed. In addition to the HCR, the HIP would contain other documentation essential to a sale. The HIP would be made available to potential buyers.
- 3.17 While it was not the main focus of our market study, we commissioned a small study by economic consultants to identify whether the current contractual arrangements between buyers and sellers gave rise to any inefficiencies. We also asked them to analyse potential costs and benefits of the introduction of the proposed HIP. This study¹² found that:
- The current system of flexible contractual arrangements is likely to be economically more efficient than would be a system that makes it mandatory that contracts must be binding at the point an offer on a property is accepted.

¹² See Part II: Background Information, for a fuller summary of the report by Oeconomica

- The proposed HIP could create benefits through forcing all sellers to be better prepared, in particular if long chains of buyers and sellers are frequent. However, these benefits must be weighed up against the inefficiencies that are created by imposing an additional flat cost on all potential sellers.

- 3.18 The home buying and selling process in Scotland differs from that outlined above. The most significant difference is that a prospective buyer makes a formal and legally binding offer at the outset. Accordingly, under the Scottish system, preparatory work such as valuation and surveys and organisation of finance, must be carried out before the offer is made.
- 3.19 Where more than one potential buyer registers an interest with the sellers' agent, a sale is normally made on the basis of competitive bids against the asking price. Sealed bids are submitted by a closing date set by the seller's agent. The bids are opened by the agent who then advises the client as to which is most acceptable.

The estate agent's role

- 3.20 The principal role of estate agents is to act for clients in marketing residential property and undertake related activities to obtain offers. Many estate agents also offer associated services which may include financial services, conveyancing, valuations and surveys and the sale of properties by auction. Many estate agents also provide home letting and property management services but these are outside the scope of our study.
- 3.21 A survey of recent home buyers¹³ showed that much of the time taken to buy a home was spent finding the right property. Typically, this took about 67 days,¹⁴ although the mean period for all respondents was roughly twice as long at 136 days. Almost a quarter (23 per cent) of buyers took six months or more to find their new home.

¹³ Undertaken as part of a report for the Department of the Environment, Transport and the Regions in 1998 into easier home buying and selling (Key research on easier home buying and selling)

¹⁴ Median

3.22 After being contacted by a potential new client, estate agents generally visit the property, and assess the asking price at which they advise the vendor to market the property. This assessment is usually based on the estate agent's local knowledge of recent similar sales in the area, taking into account specific differences between the properties.

Contracts

3.23 The types of contract offered by estate agents include sole agency agreements, joint sole agency agreements, multiple agency agreements; and sole selling rights. The majority of contracts are on a sole agency basis. Of the respondents to the OFT sellers survey, three quarters had a sole agency contract and only three per cent multiple agency. A further 15 per cent had a contract giving the agent sole selling rights.

3.24 A **sole agency agreement** gives the agency with whom the vendor has contracted the sole right to sell the property for the period of the contract: no other agent may be used. This does not however prevent the seller themselves finding a buyer. The contract is normally for a minimum period, or in the event that the property is not sold by that agent, until such time as the vendor terminates the contract in writing. The lengths of such contracts vary. For 45 per cent, the contract was less than three months, for 25 per cent it was between three and six months and, in six per cent of cases, more than six months. Nearly a quarter of respondents did not know the length of the contract.

3.25 With a **joint sole agency agreement** two agencies are jointly given exclusive rights to sell the property. A **multiple agency agreement** permits the vendor to market the property through a number of agencies. As only the agent that sells the property receives the fee, the average fee level for multiple agency agreements is higher. Each agent takes a greater risk that they will not recover the costs involved in marketing the property. **Sole selling rights** give the estate agent exclusive rights to sell the property. A fee will be incurred whether or not the buyer is introduced by the estate agent, even if the seller finds a buyer themselves.

- 3.26 The average fee rates for sole agency agreements and sole selling rights are generally lower than for multiple agency agreements. This reflects the fact that for the former types of agreement the estate agent has a higher probability of making a sale and receiving the fee. Our survey supported this finding. Fees are usually due on exchange of contracts but paid on completion of a sale.
- 3.27 On accepting instructions from a client, the estate agent will normally send a letter giving details of the contractual agreement including the fees to be charged. Before a client enters into a contract, under the Estate Agents Act 1979, the agent is required to give the client:
- Particulars of the circumstances in which the client will become liable to pay remuneration,
 - The amount of the remuneration or how it will be calculated.

Marketing

- 3.28 Estate agency staff produce written particulars of the property for circulation to appropriate buyers registered with them. These particulars can range from a single sheet in many cases to a detailed brochure, depending on the price and type of property involved. Estate agents specialising in very expensive and exclusive properties tend to produce more elaborate material. Estate agents may also make immediate contact with those buyers on their books with a likely interest in a property to save time and reduce the chances that such purchasers will buy a property from another agent in the meantime.
- 3.29 With the growth in use of the internet, many estate agents now have their own website and will place on the site particulars of individual properties they have for sale. The OFT survey of recent buyers found that 37 per cent of respondents had searched the internet for properties for sale, although only nine per cent found the house that they eventually bought as the result of an internet search.

- 3.30 In producing property particulars and in giving information by other means, estate agents must have regard to the Property Misdescriptions Act 1991.
- 3.31 Marketing of properties also frequently includes an advertisement in the local or national press, often in a special property section. Some estate agents have indicated that with the growth in the use of the internet they have reduced their newspaper advertising. However, regular advertising in the local press by estate agents not only sells specific properties but also attracts interest from sellers who are looking for an estate agent. It is therefore likely to remain important unless the internet also takes over this role. NERA found in case studies undertaken for OFT that there was a tendency for estate agents to advertise most when they have fewer properties on their books, in order to attract more custom.
- 3.32 The display of 'for sale' boards is controlled in principle through planning regulations, with local planning authorities having responsibility for enforcement. The law restricts the size of a 'for sale' board. If a board is displayed where there is no property for sale, this constitutes a misleading advertisement and action can be taken under the Control of Misleading Advertisements Regulations 1988 and/or the Trade Descriptions Act 1968.
- 3.33 There is an incentive for estate agents to have more boards within a locality than the properties they are selling. Doing so can raise their profile in the area and increase the number of sellers they attract. One practice used by some estate agents is to make boards available to local groups to publicise local events. Use of estate agents' boards in this way also provides additional publicity and can create the impression that the estate agent is acting for more clients than is actually the case.
- 3.34 Practices surrounding the use of sale boards, in particular, so called 'fly-boarding' (erecting boards in the absence of receiving authority to sell the property), is an area of concern. Some estate agents appear to be contravening the law in order to try to push their local presence in some areas in order to gain a larger amount of business.

Offers

- 3.35 As offers are received for a particular property these are passed on by the estate agent to the seller. The Estate Agents (Undesirable Practices) (No. 2) Order 1991 requires the estate agent to pass on **all** offers to the client promptly and in writing. The only exception is if the seller has informed the estate agent in writing that they do not want to receive details of particular offers. The choice of which offer to accept is a matter for the seller who will not necessarily take the highest one. A buyer who does not have a property to sell may be more attractive to some sellers than another buyer not in this position. If the contract with the estate agent contains a 'ready, willing and able purchaser' clause then, provided an estate agent puts forward an offer from such a purchaser for the full purchase price, the agent will be entitled to the agreed commission whether or not the offer is accepted.
- 3.36 Once an offer has been accepted, estate agents will often cease marketing the property. They may continue to do so, however. One reason is the risk that the potential buyer will withdraw before completion of the sale and another is that the seller wishes to avoid selling the property for a lower price than they could otherwise obtain. Continuing to market the property, despite having accepted an offer, can give rise to 'gazumping'. This term is often used to describe the situation where a seller, having accepted an offer for the property from one potential purchaser, subsequently reneges on this by accepting another, higher, offer from another potential purchaser before contracts have been exchanged with the first potential purchaser.

Financial advice and sale of financial products

- 3.37 The contact that estate agents have with home buyers, and to a lesser extent sellers, provides an opportunity to sell financial products, in particular mortgages but also other financial products including home and life insurance and income protection plans. Estate agency provides an effective distribution route for financial products and is, we understand, one reason why some banks and building societies acquired estate agency businesses.

- 3.38 Twenty-nine per cent of respondents to the OFT buyers survey were offered financial advice by the estate agent, of which about a third subsequently obtained financial products from the estate agent or the estate agent's financial adviser. Of the products purchased, 90 per cent obtained a mortgage, 30 per cent life insurance and 11 per cent house/contents insurance.
- 3.39 The sale of financial products allows estate agents to diversify their earnings, which historically are subject to significant fluctuation over the property cycle. Some estate agents act as brokers for mortgages and other financial products, selling other companies' products for commission. Others, with an interest in financial services, tend to sell their own products.
- 3.40 The sale of financial products to home buyers could give estate agents an incentive to favour some potential buyers over others in putting forward offers to client sellers and in providing advice to sellers on which of the offers they accept. Under the Estate Agents Act 1979 and the Estate Agents (Undesirable Practices) Order 1991 made under the Act, if an estate agent provides services to a buyer, including arranging a loan or other financial service on which it will earn commission, the seller must promptly be informed in writing that this is the case. Nevertheless, eight per cent of respondents to the consumer survey said that the estate agent had implied that their offer would receive favourable treatment if they obtained a mortgage through them, or unfavourable treatment if they did not.

Other services

- 3.41 Other services provided by estate agents include undertaking conveyancing and surveys and home valuations. Some estate agents may also be qualified surveyors who can prepare survey reports on the condition of a property and advise on necessary repairs.
- 3.42 Estate agents also offer some residential properties for sale by auction. Auctions are used where a quick sale is required (as is often the case in relation to properties repossessed by companies providing mortgage

finance), where properties are particularly attractive or renovation is necessary.

Number and ownership of estate agents

3.43 There are no official figures for the number of estate agents but a recent research report¹⁵ estimated¹⁶ that there were just over 12,000 estate agency offices in the UK in 2002. However, estimates of the total number of estate agents vary considerably. Our own estimate of the number of agencies in England and Wales is just under 11,000. A number of the largest estate agency chains are owned by financial institutions. Of the top ten estate agency businesses, seven are part of larger groups and own over 20 per cent of the estimated total estate agency branches in the UK. These groups have grown mainly by acquisition of local firms of estate agents which often continue to trade under their existing name. Other aspects of the business such as the layout and furnishings in offices tend to be standardised.

3.44 The Countrywide Assured Group is by far the largest chain of estate agents with 865 offices at January 2004, although this represents only about a seven per cent share of the number of estate agents offices nationally. The next largest, Connells Estate Agents has 487 offices and Halifax Estate Agencies 341. Table 3.7 lists those chains of estate agents with 50 or more offices which account for about a quarter of estate agents offices in the UK.

¹⁵ Estate Agents Market Report 2003 Key Note

¹⁶ Based on earlier industry estimates including by the NAEA

TABLE 3.7: NUMBER OF ESTATE AGENCY OFFICES FOR THE LARGEST GROUPS (50 OR MORE OFFICES) AT JANUARY 2004

Group	Number of offices
Countrywide Assured	865
Connells Estate Agents	487
Halifax Estate Agency	341
Bradford & Bingley Estate Agents	307
Your Move	291
Spicerhaart	236
Reeds Rains	133
Arun Estates	120
Kingleigh Folkard & Hayward	66
Winkworth	58
Hamptons International	55
Chancellors Estate Agents	52

Source: Survey of Estate Agents by Estate Agency News (EAN) published in EAN February 2004

3.45 In addition to the larger estate agency groups, there are large numbers of small independent estate agents who operate in local areas and own only a few offices or a single estate agency office. A growing trend is for smaller estate agents, while remaining independent, to belong to affinity groups with other independent estate agents. This enables their properties to be marketed not only through their own offices but also through those of the other group members. Some affinity groups also provide benefits in terms of marketing their services under a common brand while retaining their company name. Table 3.8 lists those affinity groups in existence at January 2004 with more than 100 offices.

TABLE 3.8: NUMBER OF ESTATE AGENTS OFFICES IN AFFINITY GROUPS AND FRANCHISE OPERATIONS AT JANUARY 2004¹⁷

Affinity group	Number of offices
NAEA Homelink Network	836
Home Sale Network (Cendant)	742
The Guild of Professional Estate Agents	714
movewithus	673
The TEAM Association	550
Mayfair Office	342
The London Office	184
Legal & General Franchising	118

Source: Survey of estate agents by Estate Agency News (EAN) published in EAN February 2004

3.46 Offices tend to be small, employing typically about five people, with not much variation from region to region¹⁸. Estate agents' clients generally sell property locally. Estate agents serving more rural areas generally have a higher proportion of clients selling properties over a wider area.

3.47 The OFT survey of sellers found that, for a third of respondents, the estate agent's office used was less than a mile from the property sold, for just under a third, more than one but less than two miles, and for just under a quarter, it was between two miles and five miles. Table 3.9 provides a breakdown of respondents' properties from the estate agent's office.

¹⁷ Included are affinity groups with more than 100 offices

¹⁸ OFT survey of estate agents

TABLE 3.9: DISTANCE BETWEEN THE OFFICE OF THE ESTATE AGENT USED AND THE PROPERTY SOLD

Distance from property	% of respondents
Less than a mile	33
More than 1 mile but less than 2	31
More than 2 miles but less than 5 miles	23
More than 5 miles but less than 10 miles	9
10 miles or more	3

Source: OFT survey of Recent House Sellers

3.48 The majority of estate agents sell a wide range of properties both in terms of size and price. Some agents sell only, or mainly, properties above a certain value. Some larger and/or more expensive properties require different methods of marketing e.g. glossy brochures providing more extensive property details. Advertisements for such properties may be placed in national newspapers and countryside/county magazines. Some agents are seen to be better placed to sell some types of property than others, showing a degree of specialization in the market.

Value of estate agents' business

3.49 The survey of sellers undertaken by the OFT indicated an average fee paid of 1.45 per cent. Applying this figure to the value of total residential property transactions in 2002, with a reduction of six per cent to allow for those properties not sold through estate agents gives a total figure for estate agents fees from residential sales in England and Wales of over £2.5 billion.

3.50 Other sources of revenue are fees from mortgage and insurance sales, lettings and property management (including sundry auction sales) and valuations and surveys. A recent report ¹⁹ estimated the value of these services for the UK at £1.5 billion in 2002²⁰. Nearly 90 per cent was accounted for by fees from sales of financial products.

¹⁹ Estate Agents Market Report 2003 Key Note

²⁰ Lettings and property management, including sundry auction sales, are for high street agencies only and thus exclude specialist surveyors, property management companies and the public sector

Property portals

- 3.51 The growth in use of the internet by estate agents in recent years has led also to the growth of businesses providing property portals. These are large internet websites displaying property details on behalf of a number of subscriber estate agents. Portals are accessed by potential buyers and sellers. They enable buyers to search for properties prior to visiting estate agents and enable potential sellers to identify local estate agents selling property similar to theirs.
- 3.52 A number of portals, including Asserta, Prime Location and Rightmove, are owned by groups of estate agents, but access is provided to other estate agents. Fish4homes is owned by many of the major local newspaper groups. With one exception, Prime Location, the portal providers do not prevent user estate agents also using other sites. Prime Location is the fourth largest portal site.²¹ The majority of the portals do not permit private individuals to advertise their property if they do not use an estate agent.
- 3.53 All estate agents using the portal are charged a fee. The fee charged by most of the portals is a standard amount for each office per month, regardless of the number of properties advertised, although at least one charges per property advertised. The most significant property portals are:
- Assertahome.com
 - Fish4homes.co.uk
 - Homes-on-line.com
 - Homesonview.co.uk
 - Primelocation.com
 - Propertyfinder.co.uk
 - Rightmove.co.uk
 - Teamprop.co.uk

²¹ Based on figures for numbers of visitors published in Estate Agency News for July 2003

- Ukpropertyshop.co.uk
- Vebra.com
- Yourmove.co.uk
- Findaproperty.com

Fees

3.54 Buying and selling a home give rise to a number of transaction costs. These include estate agents' fees, stamp duty on sales, solicitors' charges for conveyancing, surveys, and charges for removals. A survey of moving costs in 2003²² put the total cost of moving from a £150,000 house to a £200,000 house (including both selling and buying costs) at typically £6,379. Estate agents fees represented nearly a third of the total at £2,013. Table 3.10 provides a breakdown of these costs.

TABLE 3.10: TYPICAL COST OF MOVING FROM A £150,000 TO A £200,000 HOUSE IN ENGLAND AND WALES IN 2003

Nature of cost	£
Estate agents	2,013
Stamp duty	2,000
Buying solicitors	637
Selling solicitors	553
Removals	456
Homebuyers survey	400
Searches	170
Land registration	150
Total	6,379

Source: Woolwich Annual Cost of Moving Survey 2003 (compiled by the University of Greenwich School of Architecture and Construction)

3.55 For most estate agents, the fee charged to sellers for their services is based on a percentage of the price at which the property actually sells. This will vary with the type of contract that the client opts for and, to

²² The Woolwich Annual Cost of Moving Survey 2003- Compiled by the University of Greenwich School of Architecture and Construction

some extent, with their assessment of how easy they consider it will be to achieve an early sale. A property that is expected to sell very quickly may attract a lower fee. A very small proportion of estate agents charge a flat fee, but many more charge a minimum fee (which is effectively a flat fee) for lower priced properties. In effect, this device allows estate agents to charge higher percentage rates to owners of low value properties. Some estate agents may also provide details of their fees as a specific amount, rather than as a percentage of the selling price, on the grounds that clients can understand more easily what they will be paying.

- 3.56 The percentage fee charged by some estate agents is inclusive of advertising costs, while others charge an additional fee for advertising the property. Where advertising is charged for directly, some estate agents may earn commission from the newspapers and other media they use. Some estate agents will charge clients for the advertising costs whether or not they succeed in selling the property. While estate agents will generally only charge fees when a successful sale is made, within the terms of the contract, some agents will make a charge to defray costs in the event that an instruction is withdrawn by the client.

Sales methods other than use of an estate agent

- 3.57 Those selling their own property can if they choose make use of the services of specialist internet website providers to advertise the property, undertaking other services performed by an estate agent themselves. Internet property advertisers generally make a standard charge for advertising on the site, payable whether or not a buyer is found.
- 3.58 Asked in the survey of estate agents about the strength of competition from specialist internet sites, 29 per cent of respondents said that they had had some impact and three per cent that they provided strong competition. The majority of respondents considered that the situation was unlikely to change in the near future. Just over a third thought that competition from internet sites would strengthen but over three quarters thought the situation would not change significantly, as long as estate agents embraced new technology.

- 3.59 For over 30 years, the Edinburgh Solicitors' Property Centre (ESPC) has been marketing property on behalf of member solicitors in Edinburgh and east central Scotland. In recent years, it has also established a similar service in certain areas of England.
- 3.60 As in Scotland, the Solicitors Property Shop (SPS) markets properties on behalf of member solicitors who are acting for clients who have commissioned them to sell their property, instead of an estate agent, and handle their conveyancing.
- 3.61 The first SPS office in England opened in Darlington in 1998, with a showroom opening in Newcastle in early 1999. Further property showrooms opened in 2001 in Halifax and Sheffield and in 2002, a Midlands office was established. The company now has a membership of over 50 solicitor firms across Yorkshire, the Midlands, Greater Manchester and the North East.

4 COMPETITION BETWEEN ESTATE AGENTS

Introduction

- 4.1 This chapter analyses the competitive situation in estate agency using data from our surveys of recent home sellers and estate agents and using information on the dynamic nature of local competition obtained by NERA from six local case studies.
- 4.2 Our main finding is that competition between estate agents centres on non-price factors: price competition itself is not very strong. This is despite local estate agency markets not being highly concentrated. However, sellers can, and often do, obtain better fees by shopping around between agents. We found no evidence that estate agents are making excessive profits over the housing cycle.

Summary

- 4.3 Estate agency markets are generally not highly concentrated and there is a substantial amount of entry and churn (replacement of agents by new ones). The local case studies found total market shares for the four largest firms locally ranging from 44 per cent up to 81 per cent by value. Estate agents that responded to the estate agents' survey considered they typically had 10 competitors.
- 4.4 In terms of pricing behaviour, estate agents' fees are typically set as a percentage of realized sale value. Sellers responding to our survey paid, on average, a fee rate of 1.45 per cent. However, there is much variation in the percentage fee rates charged, and substantial use of pricing points. The vast majority of fee rates are set at about 1 per cent, 1.25 per cent, 1.5 per cent, 1.75 per cent or 2 per cent. Different types of agents have similar fee levels and structures.
- 4.5 There is no significant difference in average fee rates across different property price bands. Translated into absolute fees this implies, on average, proportionately higher fees on higher priced properties. The average fee paid by those respondents to the sellers' survey with

properties of less than £100,000 was £1,095 compared with at the other extreme an average fee of £5,609 for those with properties of £300,000 or more. These higher fees for higher value properties are only partially explained by the higher costs involved in selling such properties.

4.6 This pricing behaviour reflects a lack of vigorous price competition which can be explained by three factors.

- Sellers are concerned with the net return they achieve on the sale of their property. This will be affected, not just by the fee they incur from the estate agent, but by the sale value achieved. An agent's reputation for achieving high sales values is therefore an important determinant of choice between estate agents, as is the estate agent's valuation of the property. The importance of these factors may limit the extent to which consumers shop around between agents for lower fees.
- Because fees are set on the basis of individual agreements, between the agent and the seller, a central driving force to competition is the seller shopping around and negotiating. Our research, however, found that only around half of sellers obtained quotes from more than one agent. Those who did shop around and negotiate fees, paid on average 14 per cent lower fees than those who did neither. However, it needs to be recognised that other factors such as the experience of the seller and marketability of the property concerned will affect the scope for effective negotiation. For a property of average value, this level of difference would currently represent a potential saving of about £300.
- The almost universal fee structure for estate agents based on a standard percentage of the property price, generally at intervals of 0.25 per cent, provides pricing points. Having fees quoted as percentages rather than absolute amounts may also result in some consumers not fully appreciating the size of the fee they will eventually have to pay at the time they appoint an agent.

- 4.7 We will undertake an information campaign to raise consumer awareness of the benefits of shopping around before choosing an estate agent and negotiation on fee rates. Greater shopping around and negotiation by consumers will increase competitive pressures on estate agents and result in better value for money in terms of both lower prices and higher service quality. It should also help consumers assess more realistically the true value of their property by providing them with more estimates.
- 4.8 We recommend that agents should provide – and consumers should demand – quotes both in percentage terms and as an absolute amount calculated on the basis of the recommended selling price. We also recommend that estate agency bodies add such a requirement to their codes of practice.

The nature of the market

Estate agents' services

- 4.9 Details of the services provided by estate agents are outlined in chapter 3. Estate agents generally offer very similar types of service although some specialise in more up-market properties while others may choose to concentrate on smaller lower priced properties. NERA identified from their case studies that even within relatively small areas some agents get a higher proportion of their instructions from some localities than others. Some differences also result from whether a local estate agent is part of a chain or is an independent agent with only one or a few offices (which account for the majority of estate agencies). Each type offers different customers real or perceived advantages.
- 4.10 Advertising and branding are also used by agents to seek to influence their local reputation. Like other sectors, estate agents want to enhance the reputation of their business as a means of attracting customers. They use various means to do so including adverts in the local property press, leafleting of houses and use of sale boards including, in some cases, erection of boards in the absence of authority to do so (so called fly-boarding).

- 4.11 Companies offering to advertise properties on internet websites, but which do not provide other services offered by estate agents, do not compete directly with them because the majority of people using an agent require the involvement of their agent in the whole sales process, including arranging viewings and receiving offers on the property.
- 4.12 Solicitors Property Centres are in competition with estate agents, in Scotland and a few areas in England, where they have been introduced by the Edinburgh Solicitors Property Centre (see chapter 3). They are not, however, generally found within England and Wales.

Market structure

- 4.13 The structure of the estate agency market is not one that is commonly associated with competition problems. It is relatively unconcentrated, barriers to entry are low and there is significant evidence of churn.

Level of concentration

- 4.14 Estate agency markets are very local (see chapter 3). Eighty-seven per cent of sellers in our survey chose an estate agent within five miles of the property, and the average distance between the estate agent's office and the property was 2.6 miles. Estate agents responding to our survey stated their furthest competitor was on average four miles away (although the figure was 14 miles for specialist agents): the median distance was just one mile.
- 4.15 Even within these relatively local markets, however, we did not find evidence of very high concentration. In their detailed case study work, NERA found a moderate level of concentration in the six local areas they examined. In two of the areas, the largest firms had shares (by numbers of properties) of over a quarter, although in the other areas the largest firm had a much lower share. The four largest firms had total market shares ranging from 44 per cent up to 81 per cent (by value) in the six areas. Table 4.1 shows the sum of the market shares for the largest four firms, both by value and number of properties for each of the case study areas. Only in the case of Leeds, Harehills are the figures especially high but in that case it is likely to reflect the particularly small size and

geographic segregation of the area. Estate agents responding to our survey considered they typically had 10 competitors²³. The average figure for the number of competitors²⁴ was 14.

TABLE 4.1: LEVEL OF CONCENTRATION IN EACH LOCAL AREA

	Four firm share (by value of the listed properties) %	Four firm share (by number of properties) %
Cardiff, southwest	69	72
Coventry	44	37
Leeds, Harehills	81	83
Balham	57	49
Northwich	58	58
Winchester	48	46

Source: NERA calculations from property lists

Entry and exit

4.16 With relatively low sunk costs²⁵, and the absence of any licensing requirements or need for any formal qualifications, it is fairly easy to set up as an estate agent. Most estate agents have an office but even this is not essential. Experience of estate agency can be acquired as an employee of an existing agent before establishing a business. As staff loyalty appears to be very low (to judge from the high turnover reported by stakeholders) it is often not difficult for new entrants to acquire experienced staff.

4.17 Agents need to establish a local reputation if they are to remain in the market in the longer term and compete for business. Estate agents will often go about attracting clients by initially offering low fees, and possibly waiving them altogether. Once agents have begun advertising in

²³ Median figure

²⁴ This figure was, however, influenced by a number of very high figures from certain respondents

²⁵ Expenditure on specific inputs to the business that cannot be resold or used for an alternative purpose should the business close

the local press and erecting boards, this establishes a presence that then starts to attract further clients.

- 4.18 The analysis undertaken by NERA supported the argument that estate agency is not subject to significant entry barriers and that there had been significant entry.
- 4.19 NERA found there had been significant changes in the agents present in each of the case study markets since the early 1990s. With the exception of Cardiff, the total number of agents had varied over the cycle by 20 per cent or more.
- 4.20 NERA also looked at the level of churn (the extent of replacement of existing businesses by new ones) in the market by comparing the number of agents that had been in the market for the whole of the sample period (in most cases ten years) with the median number of estate agents over that period. In none of the case study areas did the number of estate agents that had survived throughout the period account for more than 50 per cent (of the median number of agents located in the area). In three instances, Leeds, Balham and Coventry, the proportion was lower than a third. It is clear that all the local markets studied had been subject to a high level of churn over a period of a decade.
- 4.21 Although entry is relatively easy, the fact that it can take time to build up a reputation means that we do not observe hit and run entry. NERA found that increasing property prices, and the resulting higher level of returns to incumbent estate agents, do not attract significant entry to estate agency of the 'hit and run' type who enter in response to high prices and leave when the market turns down.

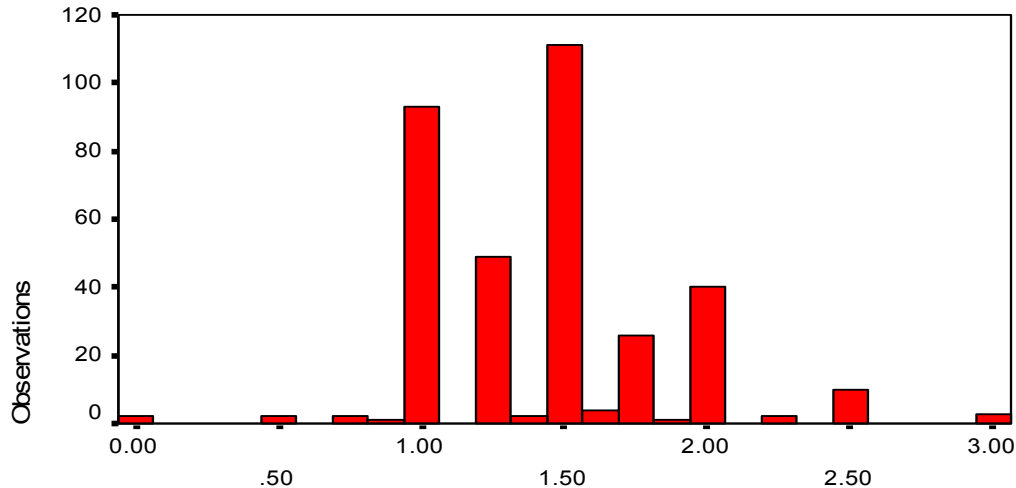
Pricing behaviour

- 4.22 Fees are generally set as a percentage of the realized sale price and the average fees charged rise proportionately with the price of the property. These higher fees do not reflect proportionately higher costs.

Fee structure

- 4.23 Estate agents' fees are typically set as a percentage of realized sale value. NERA found that different types of agents have similar fee structures.
- 4.24 Sellers responding to our survey paid, on average, a fee rate of 1.45 per cent. However, there is much variation in the percentage fee rates charged, both nationally (as is clear from the following figure) and within local areas (as NERA find in their case studies). As the following figure demonstrates, there is substantial use of pricing points. The vast majority of fee rates are set at about one per cent, 1.25 per cent, 1.5 per cent, 1.75 per cent or two per cent.

FIGURE 4.1: HISTOGRAM OF PERCENTAGE FEE RATES CHARGED BY ESTATE AGENTS²⁶



Source: OFT survey of sellers.

Aggregate fee date

4.25 While there is substantial variation in fee rates charged, we found average percentage fee rates do not differ significantly between different property price bands, as is clear from the following table. The only exception is the lowest property price band, for which many agents charge a minimum fee, resulting in a higher average percentage fee. This broadly linear relationship between fees and property values was supported by the NERA case studies (other than in Coventry).

4.26 This implies that the average fee paid by those selling higher value houses is, in general, substantially higher than those selling lower priced houses. The average fee paid by those respondents to the sellers' survey with properties of less than £100,000 was £1,095 compared with at the other extreme an average fee of £5,609 for those with properties of £300,000 or more.

²⁶ This figure only includes fees for those sellers who did not negotiate fees, and where the sellers told us their fee rate as a percentage (rather than as a lump sum). However, even including these sellers within our sample, we find that 73 per cent of respondents to our sellers' survey paid a percentage fee rate of close to one per cent, 1.25 per cent, 1.5 per cent, 1.75 per cent or two per cent .

TABLE 4.2: AVERAGE FEES BY PROPERTY PRICE BAND

Price band	Average fees paid (%)	Average fees paid (£)
Less than £100,000	1.64	1,095
£100,000 or more, but less than £200,000	1.40	2,032
£200,000 or more but less than £300,000	1.40	3,414
£300,000 or more	1.35	5,609
Total	1.45	2,525

Source: OFT survey of sellers

4.27 We also found (as shown in the table below) limited variation in average fee rates across regions.

TABLE 4.3: AVERAGE FEES PAID BY REGION

Region	Average fees paid (%)
North east	1.5
North west	1.4
Midlands	1.4
South west	1.5
South east	1.5
Wales	1.7

Source: OFT survey of sellers

Fees and costs

4.28 These higher fees for higher value properties can only be partially explained by higher costs of selling these properties.

4.29 Estate agents have both fixed (including office space) and variable costs (those vary according to the volume of business they transact) both of which they need to recover from fees. The main variable costs incurred by estate agents in marketing properties for individual clients are staff time and advertising. These do not vary substantially between properties

of different values although the commission element of what staff earn will be related to the value of the property they sell.

4.30 Estate agency staff will generally be paid a basic salary plus commission on sales usually related to the value of their sales. Marketing individual properties will therefore result in costs for the agent in paying basic salaries for staff time devoted to that property. The activities of estate agency staff in marketing individual properties and acting for clients as sales are progressed are outlined in chapter 3. Estate agency staff spend time on the following activities:

- Making an initial visit to undertake a market appraisal and advise the potential client on a price at which to market the property.
- Once contracted by the client, taking room measurements and other details and taking photographs for the property particulars.
- Producing and circulating property particulars and contacting buyers listed with the agent with a potential interest.
- Time in arranging and attending viewings.
- Handling offers received on properties, and liaison with clients, buyers' solicitors and others.

4.31 Agents will also incur costs in advertising properties in local newspapers. Advertisements for some properties may include an interior as well as an exterior view of the property and, in some cases, views from the property. The majority of the property portals charge for advertising per estate agency office so the cost to the agent will not vary between properties. Estate agents will also incur costs for arranging for sale boards to be erected outside properties but the cost should be the same for different properties.

4.32 Marketing of very high priced 'exclusive' properties often involves the agent arranging for the production of sales brochures and advertising in more specialist publications and possibly national newspapers. However,

clients are frequently charged separately for the cost of such material and advertising.

- 4.33 Overall, there is likely to be some variation in the costs involved in the sale of individual properties and the sale of larger properties may give rise to some additional costs. Estate agents' costs, are not, however, proportionately related to the size or price of the property in the way that the fees they charge are. Some elements of estate agents' services will take a bit longer for larger properties but estate agents do not generally appear to undertake a significantly greater amount of work in selling such properties compared with those that are lower priced.
- 4.34 In assessing whether this is evidence of weakness in price competition, we need also to recognise that it is not unreasonable for fixed costs to be allocated across sales. One argument could be that the most effective way for agents to cover their fixed costs is to charge a premium over variable costs to those sellers willing to pay (those with the highest value properties) and those who do not negotiate. Given that it is not obvious that there is a high incidence of fixed costs in this industry, we do not believe that this is an adequate explanation for the weakness in price competition.

Estate agents' profitability over the housing cycle

- 4.35 We have not found evidence that estate agents are making excessive profits over the full housing cycle (see chart at Part II – Data on competition). The data shows that periods of high profitability during the up-swing in the housing market have been followed by periods of much lower profitability or losses. This pattern of profits is consistent with entry into this market being fairly easy, such that in the long-term excess profits are eroded, but, hit-and-run entry being difficult, such that there may appear to be excessive profits at some points in the cycle.

Pricing behaviour explained

- 4.36 The pricing behaviour observed in this market suggests relatively weak competition on fees, despite the lack of high concentration in local

markets and low barriers to entry. Possible reasons for this weak price competition include the importance of non-price competition, a lack of shopping around and negotiation and the use of a traditional 'ad valorem' fee structure with fixed pricing points.

Non-price competition

- 4.37 There was evidence both from our own surveys and from the NERA case studies of significant non-price competition between agents. Sellers will usually wish to achieve the maximum possible price for their property within a certain period of time they find acceptable. This is one reason why factors other than the agents' fees are more influential in many people's choice of agent. The overall return from selling a property depends both on the fees charged and the selling price. Therefore, competition between agents relates not only to their fees but also to their perceived ability to achieve a higher selling price than other agents.
- 4.38 The most significant factors influencing sellers' initial choice of agent mentioned by respondents to the OFT survey of sellers were reputation/recommendation from friends or relations (28 per cent), size of fees (21 per cent), professionalism of the staff (21 per cent), proximity to property (14 per cent) and used before (13 per cent). An important factor is that sellers are looking for an agent who will maximize their overall return from the sale taking into account the price they obtain and the amount of the agent's fee. Indeed, we found that, of those sellers who get two or more fee quotes from different estate agents, only around three-quarters chose the lowest quote, with one-quarter choosing a more expensive estate agent.²⁷
- 4.39 The reputation of an estate agent is important in influencing the sellers' choice since an agent with a good reputation will generally be expected to make more effort to achieve the highest possible price for their client. It is, however, difficult in practice for potential sellers to assess whether or not the reputation of an agent is an accurate guide to the service they provide and whether that agent will obtain a higher price for the property than other agents. This is particularly acute since most people's use of agents is infrequent: when they come to sell their property, it may be for

²⁷ Source: OFT survey of sellers

the first time or they may not recall their last experience of using an agent if done more than a few years ago (see chapter 3). Circumstances in the market may also have changed, and the seller's experience may be irrelevant if he or she is selling in a completely different area than before.

- 4.40 Both our survey of estate agents and the NERA case studies found that various forms of advertising through local newspapers and other publications, leafleting of houses and use of boards were significant in achieving local presence. NERA found that many agents believe that once an agent is well established in an area, and its boards and level of activity are visible to potential sellers, this is likely to provide competitive advantage over less well-known agents. Advertising is also used to emphasise both real differences between agents and to seek to enhance the agent's reputation.
- 4.41 NERA found that agents compete strongly to attract customers 'through the door'. Once they have done this, the impression they create and their appraisal of the price at which the property should sell is important in influencing whether or not they are instructed to sell the property.
- 4.42 When asked in the estate agents' survey about methods employed to advertise or promote their businesses, respondents favoured local options though a high proportion also mentioned having their own internet sites. Table 4.4 outlines the responses to this question.

TABLE 4.4: METHODS USED TO ADVERTISE OR PROMOTE BUSINESS

	% responding (Base = 518)
For sale boards	99
Advertising in local newspapers	96
Own internet site	90
Leafleting	77
Sponsoring local events	63
Advertising in specialist property magazines	58
Advertising in national newspapers	32
Seminars	7

Source: OFT survey of estate agents

- 4.43 Another factor influencing an estate agent's reputation with individual customers is the type of agent itself. Some sellers will prefer to use a small independent agent generally dealing directly with the owner of the agency. Other consumers will go for an agent in a national chain with a well-known brand image. We were told, however, that branding and reputation in estate agency is primarily local, and national chains that acquire local firms usually retain the existing name where this has an established good reputation. Dual branding can give a larger group the advantage of retaining an existing name while benefiting from identifying it as part of a larger group.
- 4.44 The importance of non-price factors in the customer's decision regarding choice of estate agent implies that the consumer's choice may not be particularly sensitive to the differences in commission rates charged by different agents, relative to differences on other, non-price, factors.²⁸
- 4.45 This means that customers have a much lower incentive to shop around with regard to commission charges than would otherwise be the case.
- 4.46 In turn, as a result, estate agents themselves may have little incentive to compete on commission rates. Instead, competition, to the extent that it takes place, can be expected to relate to non-price factors, and in particular, to perceptions of quality by the consumers. This could include the degree of advertising undertaken, the office location or the quality of staff recruitment.

Lack of shopping around and negotiation

- 4.47 Nearly two-fifths of respondents to the sellers' survey said they had not shopped around before choosing an agent; just over three-fifths having done so. Those consumers who do shop around generally seek quotes

²⁸ Take the example where the demand choice is governed by only two variables, the valuation and the percentage fee. If a house is valued at £200,000 and the commission fee is one per cent, the value to the seller would be £198,000. Were the valuation to be one per cent lower, assuming the same percentage fee, the value to the seller would be £198,000 - £1,980 = £196,020. On the other hand, if the commission rate was one per cent higher, i.e. 1.01 per cent, while the valuation remained at £200,000, the overall value would be only £197,980.

from a relatively small number of agents reducing the potential impact which competition between agents has on fees. The largest proportion (51 per cent) obtained only one quote and the smallest proportion (2 per cent) five quotes. Table 4.5 gives a breakdown for the number of quotes obtained by respondents.

TABLE 4.5: NUMBER OF QUOTES OBTAINED BY SELLERS

Number of quotes	Percentage of respondents (Base = 933)
1	51
2	22
3	22
4	4
5	2

Source: OFT survey of sellers

4.48 Almost half of those using an estate agent said that they had tried to negotiate fees with their chosen agent and of those who had done so around four out of five were successful in obtaining a reduction on the initial quote. There was a greater tendency to negotiate fees the higher the price of the property. Thirty-one per cent of those selling property of less than £60,000 had tried to negotiate fees compared with 43 per cent of those selling properties of between £60,000 and £150,000 and 57 per cent of those with properties of over £150,000. There were, however, only a small number of respondents to our survey selling properties of less than £60,000.

4.49 Looking at average fees, depending on whether sellers shopped around or negotiated, the range of average fees was:

- Did not shop around or negotiate 1.58 per cent
- Did not shop around but did negotiate 1.42 per cent
- Shopped around but did not negotiate 1.40 per cent
- Shopped around and negotiated 1.36 per cent

4.50 Because fees are set on the basis of individual agreements, between the agent and the seller, a central driving force to competition is the seller shopping around and negotiating.

Traditional fee structure

4.51 The impact of shopping around and negotiation of fees charged may be limited by the continuation of an almost universal fee structure for estate agents based on a standard percentage of the property price, set at intervals of generally 0.25 per cent. There is usually no reduction in the percentage paid by a client as the price of the property increases²⁹.

Conclusion

4.52 Competition between estate agents on fees appears to be relatively weak, although shopping around and negotiation can have an important impact on fees. There is significant non-price competition between agents aimed at enhancing their reputation. Entry into the market can also erode any super-normal profits. It is not clear, however, that either entry or non-price competition really benefits consumers since neither necessarily feeds through to lower fee rates or higher property sales values.

Recommendations

CONSUMER SHOPPING AROUND AND NEGOTIATION OF FEES

4.53 Our consumer survey shows that a significant minority of consumers are not currently shopping around before selecting an estate agent to sell their property and half do not try to negotiate on fees. By shopping around and talking to a number of prospective agents, consumers should benefit from the larger number of agents who give them advice on the price at which the property might be expected to sell. This helps in deciding the price at which the property should go on the market and reduces the risk of the property being put on the market at a much higher or lower price than it is likely to achieve.

²⁹ With the exception of properties in the lowest price band for which percentage fees are on average higher than other bands to ensure a minimum fee to the agent.

- 4.54 In shopping around, consumers also need to test the basis of the market appraisals (valuations) provided by individual agents by asking the basis on which they have arrived at the value given and whether the agent has sold similar properties in the area in recent weeks, and, if so, what for?
- 4.55 By obtaining quotes from a number of agents prospective sellers can compare fees and take these into account with other factors before choosing an agent. Involving a number of agents also provides greater leverage when seeking to negotiate fees with any individual agent.
- 4.56 By trying to negotiate fees with agents, many more consumers should benefit from reductions in fees currently enjoyed by most of those consumers who do negotiate with their agent.
- 4.57 We will undertake an information campaign to raise consumer awareness of the benefits of shopping around before choosing an estate agent and negotiation on fee rates. Greater shopping around and negotiation by consumers will increase competitive pressures on estate agents and result in better value for money in terms of both lower prices and higher service quality. It should also help consumers assess more realistically the true valuation of their property by providing them with more estimates.

Fee information

- 4.58 The fee system for estate agents, based on a percentage of the selling price of the property, provides agents with a greater incentive to achieve a higher price for a property than if clients were charged a flat fee regardless of the selling price. The normal use of percentages rather than absolute amounts in quoting fees does however encourage pricing points and percentages are known from other research to be confusing to some consumers. Some agents already provide information on fees to clients as absolute amounts for this reason. A small change in percentage fees can amount to a significant amount in absolute terms.

4.59 We recommend that agents should provide – and consumers should demand–quotes both in percentage terms and as an absolute amount calculated on the basis of the recommended selling price. We also recommend that estate agency bodies add such a requirement to their codes of practice.

5 CONSUMER SATISFACTION

Introduction

- 5.1 This chapter sets out the evidence available on the level of customer dissatisfaction, the nature of problems arising in the sector and the approach of consumers towards finding solutions to their complaints. It then examines the types of complaints currently received by independent bodies such as the OFT, the Ombudsman for Estate Agents (OEA) and the Royal Institution of Chartered Surveyors (RICS).
- 5.2 The information presented in this chapter was used as the basis for the detailed analysis of systematic shortcomings in the sector and the recommended changes presented in chapters 6 and 7 on the current regulations in the market and improving standards through industry codes of practice. Chapter 4, which examines competition in the estate agency market, presents evidence on how consumers choose an estate agent and their understanding of the transaction process.

Summary

- 5.3 Research commissioned by the OFT found that nearly three quarters of sellers thought that their estate agents had provided a satisfactory level of service. However, the remainder had experienced a variety of problems and, in general, had not been able to resolve these to their satisfaction.
- 5.4 Amongst sellers, the major areas of dissatisfaction with estate agents were the feeling that agents offered poor value for money (38 per cent of sellers interviewed), poor communication by the agent (19 per cent dissatisfied with how they had been kept informed) and delays in the sale (about 14 per cent blaming their agents for sales taking longer than expected).
- 5.5 A slightly lower proportion of buyers than sellers stated that they were satisfied overall with the service received from estate agents (72 per cent of buyers compared with 74 per cent of sellers). A substantial proportion

(24 per cent) of buyers felt that communication from the agent was poor, and about six per cent thought the agent was responsible for a prolonged transaction process. Although fewer than one per cent of buyers thought that they had lost a house because their offer was not passed on, this is a particularly serious issue as it represents a potential breach of the law.

- 5.6 This pattern of complaints was broadly reflected in the complaints received by the OEA, RICS and NAEA. Complaints to the OFT generally concerned potential infringements of the Estate Agents Act.
- 5.7 Twenty-one per cent of sellers and 23 per cent of buyers interviewed thought that they had grounds for complaint. Of these, 71 per cent of sellers and 55 per cent of buyers actually complained. In the majority of cases, nothing happened or the complaint was not resolved to their satisfaction.

Background

- 5.8 Our research finds that for nearly three quarters of buyers and sellers, estate agents had provided an adequate level of service. However, the remaining quarter of consumers said that they had experienced a variety of problems and, in general, had not been able to resolve these to their satisfaction.
- 5.9 Some of the problems reported by consumers involved alleged breaches of the Estate Agents Act, and some were due to poor service. In a number of cases problems appear to have arisen due to consumers not fully understanding the role of estate agents or having high expectations that were not met. For the most part, consumers had either not been able to resolve their problems or had been deterred from seeking resolution by their low expectations of success.
- 5.10 In comparison to the dissatisfaction levels indicated in our consumer survey³⁰, the number of complaints reported to the OFT and others appears low. However, the survey also shows that only a small percentage of people who experience a problem actually go on to make a formal complaint and, of those that do, only a small minority do so to the

³⁰ The Estate Agency Market, WirthlinEurope 2003 for OFT.

OFT, TSS (Trading Standards Service) or another independent body. This issue is discussed in greater depth in chapter 7.

- 5.11 Another significant point when considering data on complaints is that the majority of the buying and selling transaction is conducted verbally with the estate agent being the only party with full information at all stages. Very little written documentation is produced throughout the process. This may create a situation where consumers are either not aware whether or not an agent is treating them unfairly or not in a position to prove it. It is likely, therefore, that the complaints received by independent bodies are not a representative sample of consumer detriment overall.

Information sources

- 5.12 The OFT is responsible for regulating the estate agency sector, primarily under the provisions of the Estate Agents Act 1979 (the 'Act'). It does not involve itself in individual disputes or provide redress but investigates complaints to protect the interests of consumers as a whole.
- 5.13 The OFT receives complaints from a variety of sources including consumers, businesses and Trading Standards offices. In 2002, it opened 212 cases as a result of such complaints. We carried out an analysis of these cases to gain an understanding of the problems consumers are experiencing when using the services of estate agents.
- 5.14 To obtain a wider view of customer satisfaction the OFT commissioned a consumer study from WirthlinEurope³¹.
- 5.15 WirthlinEurope undertook 1000 telephone interviews with recent home buyers, 976 interviews with recent house sellers who had used an agent, and 58 interviews with recent sellers who had not used an agent. The sample was taken from a self-selecting group of recent buyers and sellers that responded to an invitation from the Land Registry to participate in the survey. Respondents, who were drawn from five regions in England and Wales, represented a wide cross section of age groups and socio-

³¹"Annexe A.

economic groups. Thirty-four per cent of respondents were first time buyers and 32 per cent were first time sellers.

5.16 The study found that one in five sellers and almost one in four buyers believed they had experienced a serious problem with an estate agent they had dealt with during their house selling or buying experience. Of these, 71 per cent of sellers and 55 per cent of buyers made a complaint, mostly to the estate agent in question. A high proportion were dissatisfied with the way it was handled. However, nearly three quarters of buyers and sellers were broadly satisfied with the estate agent who handled their transaction³². This suggests that the majority of transactions are reasonably managed by agents, though in a significant minority of instances, clients have cause for complaint and the system of complaint handling is not acting effectively to address these cases.

Seller's levels of satisfaction

5.17 Amongst sellers, the major areas of dissatisfaction with estate agents were the feeling that agents offered poor value for money (38 per cent of sellers interviewed), poor communication by the agent (19 per cent of sellers interviewed very dissatisfied with how they had been kept informed) and delays in the sale (about 14 per cent of sellers interviewed blaming their agents for sales taking longer than expected). More detailed concerns were as follows:

- Seven per cent of sellers claimed not to have been made aware of their own or their agents' obligations, and 24 per cent did not know the duration of their contract;
- Of the 15 per cent that chose to terminate the contract, only 18 per cent were unable to do so successfully;
- For about a third of customers, the service did not meet expectations. The main failings were the manner of staff (10 per cent very dissatisfied), poor advice on pricing (nine per cent very dissatisfied), a lack of viewings (10 per cent very dissatisfied), difficulty in contacting the agent (11 per cent very dissatisfied), not keeping the seller

³² 34 per cent of sellers and 32 per cent of buyers were very satisfied with their estate agent.

involved (19 per cent very dissatisfied) and not escorting viewers (15 per cent very dissatisfied). From our consumer survey it is not possible to assess whether the expectations held by sellers were reasonable; in particular the lack of viewings may reflect upon the property or the property market rather than the agent.

- Sixty per cent of sellers felt that the selling process took longer than they had expected. In 23 per cent of cases, this was thought to be due to the agent.
- Twenty per cent of sellers thought the valuation by agents was inaccurate. However, on average, a property's selling price was 98.3 per cent of the initial valuation.

Buyers' levels of satisfaction

- 5.18 A slightly lower proportion of buyers than sellers stated that they were satisfied with the service received from estate agents (72 per cent of buyers compared with 74 per cent of sellers).
- 5.19 A substantial proportion (24 per cent) of buyers felt that communication from the agent was poor, and about six per cent thought the agent was responsible for a prolonged transaction process. Although fewer than one per cent of buyers thought that they had lost a house because their offer was not passed on, this is a particularly serious issue as it represents a legislative breach as opposed to poor quality service by agents.
- 5.20 In a number of areas of dissatisfaction estate agents acted in a manner that **could** take advantage of the buyer, though it is difficult to assess from survey evidence whether any harm was caused. For example, 29 per cent of buyers were offered mortgages, independent financial advice or insurance through the agent. In a small proportion of cases, buyers understood the agent to have implied that the buyer would be disadvantaged by not taking the product offered. Eighteen per cent of buyers sought advice from the agent on what to offer for a property, despite the potential conflict of interest of the agent being employed by the seller.

5.21 Some responses from buyers indicated that they were unaware that the estate agent was the agent of the seller. Some expressed dissatisfaction that they were not offered advice on price, though the agent could potentially be in breach of his duty to his client in giving this advice.

5.22 Further concerns of buyers were as follows:

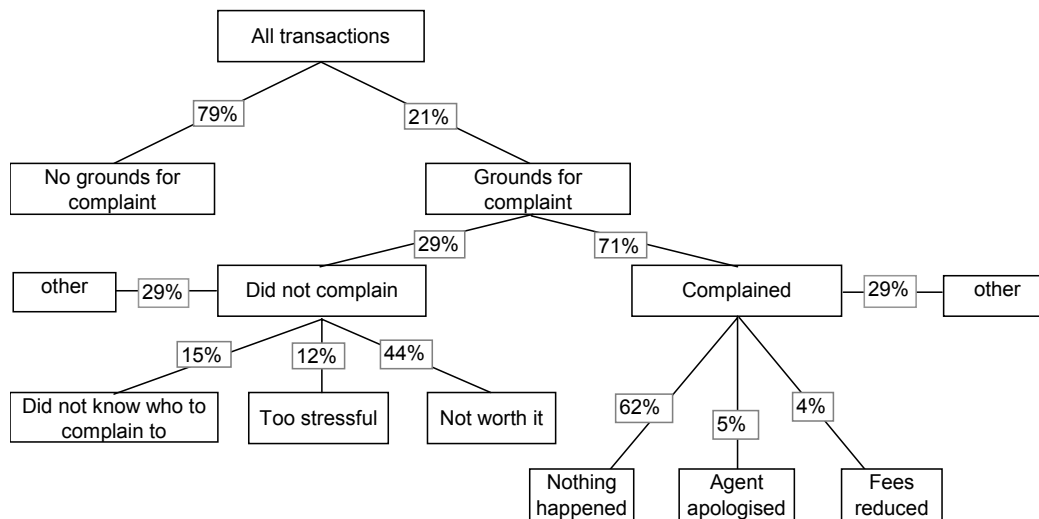
- An estimated 10 per cent of buyers thought that their offer was unsuccessful due to the agent. Of these people about a fifth thought the agent had provided poor information, a further fifth thought that the agent had communicated poorly, about a tenth thought the agent had been dishonest and some four per cent thought that the offer had not been passed on.
- Of the 95 per cent of buyers that expected mailings of properties, 18 per cent did not receive these.
- Of the 74 per cent that expected telephone calls with details of properties, 17 per cent did not receive calls.
- Of the 63 per cent that expected advice on the property's condition, 24 per cent did not receive such advice.

Response to poor service

5.23 The sections above discuss seller and buyer dissatisfaction with the services provided with estate agents. Following their transaction 21 per cent of sellers and 23 per cent of buyers interviewed thought they had grounds for complaint. This section examines the overall level of complaints. Current mechanisms for resolving complaints and possible improvements to these are discussed in chapter 7 on improving standards.

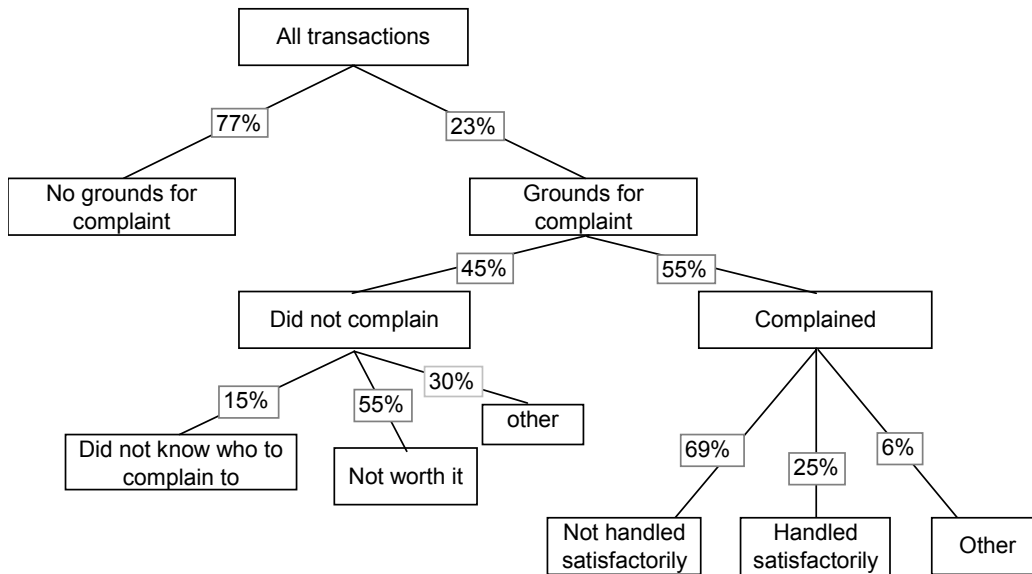
5.24 FIGURE 5.1 below shows the information obtained by the survey, described previously, concerning **sellers'** experiences of complaining.

FIGURE 5.1: DATA ON SELLERS' COMPLAINTS ABOUT AGENTS IN THE TRANSACTION PROCESS



5.25 Eighty-five per cent of sellers surveyed only dealt with one agent, hence the statistics above apply to their experiences with that one agent. **Buyers** sign up with an average of five agents and the complaints depicted in FIGURE 5.2 sets out the experiences of buyers in making complaints.

FIGURE 5.2: DATA ON BUYERS' COMPLAINTS ABOUT AGENTS IN THE TRANSACTION PROCESS



5.26 The information above both for buyers and sellers indicates that, although problems do not occur with the majority of transactions, where they do consumers do not always make a complaint. Much of the reluctance to complain is due to the fact that consumers do not think it is worth it – a view largely supported by finding that complaints when made are generally not regarded as having been satisfactorily handled.

5.27 In addition, a significant proportion of consumers do not know who to complain to. One typical interview respondent said,

'I never complained before and I wouldn't have known who to complain to or how to go about it...'

5.28 This information gained from the consumer survey suggests that the problems reported to the OFT are only a small sample of problems arising in the sector.

Complaints

5.29 Of those who do complain, our study found that 81 per cent of buyers and 89 per cent of sellers made the complaint to the agent. It is therefore difficult to obtain national data on the nature of complaints that are made. This section collates the information that we have from the division of the OFT that receives complaints relating to estate agency, and the three industry organisations that handle complaints about their members.

Cases presented to the OFT

5.30 A wide range of cases were presented to the OFT concerning the services provided by estate agents. In 2002, 58 per cent of cases related to an alleged breach of the Estate Agents Act. Table 5.1 identifies the alleged breaches of the Act that were reported to the OFT, as a percentage of total *complaints* to the OFT concerning estate agency.

TABLE 5.1: COMPLAINTS TO THE OFT CONCERNING ESTATE AGENCY

Alleged breach	% of total cases 2002
Misrepresentation (e.g. giving a client misleading information about the status of a buyer)	9%
Not declaring a personal interest in the transaction	10%
Failure to pass on offers	17%
Failure to provide information required under Section 18 (e.g. the cost of services payable by a client)	10%
Conviction for specified offences (e.g. a breach of the Trade Descriptions Act ³³)	3%
Discrimination (e.g. for not purchasing financial products)	4%
Interest on clients money/ deposits	4%
Other	1%
Total of above	58%

³³ There is a wide range of specified offences that can lead to the issuing of prohibition orders. For a full list, see *The Estate Agency Guide*, Office of Fair Trading, OFT 031.

- 5.31 Of 123 cases of alleged breaches of the Act investigated in 2002, just over 10 per cent merited serious consideration as to the fitness of the individuals concerned to continue as estate agents. In other cases, no **evidence** of a breach was found, though this will to some degree reflect the difficulties in obtaining evidence to substantiate allegations discussed in chapter 6.
- 5.32 Complaints were also made to the OFT relating to issues that are not regulated by the Act. These included difficulties in obtaining information from an agent, poor quality of service and difficulties with contracts. These were similar to the issues that arose in our consumer survey.

Cases presented to the ombudsman for estate agents

- 5.33 Table 5.2 below sets out the information received from the Ombudsman for Estate Agents Company Ltd (OEA) on the complaints that were submitted to them in 2002.

TABLE 5.2: COMPLAINTS TO THE OEA, 2002

	No. of complaints made by buyers	No. of complaints made by sellers
Maladministration ³⁴	705	991
Commission/fees	23	693
Sales Particulars ³⁵	155	267
Viewings ³⁶	28	149
Communication of offers – Buyers	226	13
Buyers finances ³⁷	12	161
Initial valuation for sale	17	152
Sale boards	2	69
Conflict of interest ³⁸	36	50
Communication of offers – Sellers	81	80
Keys	10	58
Unfair bias towards other party	17	37
Offer of services	40	7
Discrimination	6	1
Racial	4	0
Gender	0	5
Disability	1	0

³⁴ “Maladministration” is used by the OEA as a catchall category for any type of communication failure which could not be allocated under a different category.

³⁵ Complaints about “Sales Particulars” involve factual inaccuracies such as; incorrectly stating room or garden size, claiming that the property has a certain feature when it does not, or failing to refer to a right of way over the property concerned.

³⁶ Where either the agent or viewer does not turn up to an appointment or the seller has to conduct all the viewings despite the agent's promise to accompany viewers. Another common complaint is the lack of feedback from the agent to the seller following a viewing.

³⁷ Involves the failure of the agent to accurately ascertain the buyer's finances to purchase the property by asking the right questions and reporting the situation to the seller.

³⁸ Difficult situations can arise when, for example, the agent selling the property has also sold a financial product (mortgage) to the potential buyer or when a member of the agent's staff wants to buy a property being sold through the agency itself. A conflict of interest can also arise where a member of the agent's staff is selling his/her own property through that agent.

5.34 The OEA categorisation of complaints and that used in our consumer survey differ, making it difficult to assess whether the two data sources cover areas of complaint in similar proportions

Cases presented to the national association of estate agents

5.35 The NAEA provided us with a summary of their complaints data. The key aspects of this were:

- Most complaints were classified as breaches of the Estate Agents Act or actions caught by the Undesirable Practices Order.
- The next highest category of complaint was for poor service.
- Complaints concerning the description of property accounted for 2.5 per cent of the total.
- A large number of complaints arose from situations where there had been poor communication between the parties.

Cases presented to the royal institution for chartered surveyors

5.36 The RICS identified the following as their most common complaints:

- Instructions - Terms and conditions not given or not explained;
- Marketing - Misleading sales information, unaccompanied property viewings and inactivity;
- Offers - Not passed on, being passed on after another buyer's offer has been accepted, significantly below the valuation provided by the agent;
- Conflicts - Agents not declaring their personal interest in the transaction; and
- Completion - More than one agent claiming a fee for a sale, or similar local houses selling for a significantly different price.

5.37 Due to its wide scope, the RICS also receives complaints about other parts of the property transaction process, such as surveying.

Conclusion

- 5.38 The chapter finds that for nearly three quarters of buyers and sellers estate agents had provided an adequate level of service. However, the remainder had experienced a variety of problems.
- 5.39 Some of the problems reported by consumers involved alleged breaches of the Estate Agents Act, and some were due to poor service. In a number of cases problems appear to have arisen due to consumers not fully understanding the role of estate agents or having unrealistically high expectations that were not met. For the most part, consumers had either not been able to resolve their problems or had been deterred from seeking resolution by their low expectation of success.

6 REGULATION OF THE ESTATE AGENCY SECTOR

Introduction

- 6.1 In this chapter, we examine the effectiveness of existing regulation of the estate agency sector. Our analysis identifies several shortcomings in the legislation that restrict the ability of the OFT and the Trading Standards Service (TSS) to take effective enforcement action.
- 6.2 We also present a series of recommendations for legislative change to facilitate more effective enforcement action to be taken against those who break the law. Lastly, against this backdrop, we consider the case for introducing a positive licensing regime for estate agents.

Summary

- 6.3 Levels of consumer dissatisfaction with estate agency services remain high suggesting the Estate Agents Act 1979 and associated secondary legislation have not had the impact on the sector that was intended.
- 6.4 Our analysis identified several shortcomings in the legislation that are restricting the ability of the OFT and the TSS to take effective enforcement action. These arise for a number of reasons, many of which stem from the fact that there have been major changes in the market, and in enforcement practices, since the Act was introduced.
- 6.5 Certain features of the buying and selling process and current administrative practices contribute to further issues such as a lack of transparency and create difficulties in obtaining evidence when investigating alleged legislative breaches. These have the effect of hampering enforcement action. We also found that many people sign estate agency contracts without being fully aware of the terms and conditions. This can have serious cost implications for consumers, both in terms of time and money.
- 6.6 The Enterprise Act 2002 introduced significant new powers enabling the OFT and the TSS to seek undertakings and obtain injunctions quickly to bring to an end conduct that is in breach of consumer protection

legislation. This potentially enables the OFT and TSS to tackle certain behaviours in a more efficient way than previously.

- 6.7 To address the issues we have identified, we propose that a package of legislative changes be adopted to modernise the Act to enable regulation of the estate agency sector to be more effective and to ensure that the new powers in the Enterprise Act pull across effectively into the estate agent sector.
- 6.8 We do not consider that these changes will prove onerous to businesses. Indeed, some of our proposals reflect elements of trade bodies' codes of practice which many agents currently follow. Nor do the recommendations seek to significantly increase the powers of the OFT or TSS. Rather, they form a tool-kit that will facilitate more effective application of the existing provisions. The intention is to strengthen the existing system of negative licensing to ensure that unfit agents are removed from the sector, while allowing for proportionate and efficient enforcement action to be taken to remedy misconduct where the agent's general fitness is otherwise not in question.
- 6.9 The chapter also considers the case for regulating the estate agency sector by means of a positive licensing system. It concludes with our reasons for why we favour maintaining the current system of negative licensing at the present time.

The current system of regulating the estate agency sector

- 6.10 The UK estate agency sector is subject to a variety of consumer protection legislation but is primarily regulated by the Estate Agents Act 1979 (the Act) and associated secondary legislation.
- 6.11 The Act was the first legislation to address estate agency work specifically. It prescribes the information that must be given to clients and how the offer process should be conducted. It also sets out other requirements on the way in which agents must conduct their business

with the overall aim of protecting consumers when using an estate agent to buy or sell property.³⁹

- 6.12 The Act also establishes the general duty of the OFT to superintend the enforcement of the Act and to protect consumers' interests by keeping the estate agency sector under review.⁴⁰
- 6.13 As part of this duty, the OFT investigates complaints about estate agents. Several possible actions can be taken following receipt of a complaint, depending on the nature of the conduct identified.
- 6.14 An informal letter may be sent, advising the agent to stop or modify his behaviour. Although this does not have any statutory basis, it reminds the agent of his obligations under the Act and the consequences of not complying with the law.
- 6.15 Alternatively, a formal prohibition or warning order may be issued. Prohibition orders have a statutory basis and may be issued in respect of specified breaches of the Act or convictions, if the OFT is satisfied that the person is unfit to be an estate agent. Such an order can ban someone from all, or some aspects of, estate agency work.
- 6.16 A warning order can be made in a narrower range of circumstances. These are where the agent has failed to comply with certain provisions of the Act, but do not include convictions for the criminal offences which merit considering the imposition of a prohibition order. If the recipient of a warning order commits further similar breaches, the OFT would give serious consideration to making a prohibition order against him.
- 6.17 Prohibition and warning orders under the Act are made against 'any person' which, according to the Interpretation Act 1978, 'includes a body of persons corporate or unincorporated.' Consequently, orders can be made against partnerships or limited companies as well as against individual estate agents. The nature of many of the offences and breaches under the Act is such that in many circumstances they will

³⁹ For a summary of the requirements, see also *The Estate Agents Guide*, OFT, oft 031

⁴⁰ Section 24 of the Act requires the OFT to have regard to 'the national interest and the interest of persons engaged in estate agency work and consumers'

more appropriately lead to orders being made against individual agents rather than a whole estate agency business. However, in certain circumstances, it is appropriate to consider the fitness of the business as a whole to conduct estate agency work. This will particularly be the case where the individual agents responsible for the legislative breaches are the 'controlling minds' of the particular estate agency business.

- 6.18 OFT enforcement officers make a recommendation as to whether a prohibition or warning order should be made to an adjudicator. The adjudicator hears representations from the agent and then takes the decision. There is a right of appeal to the Secretary of State from a decision by the OFT to impose a prohibition or warning order.
- 6.19 Since the summer of 2003, the OFT has also had the option of taking enforcement action under the Enterprise Act. Part 8 of the Enterprise Act is intended to provide for more effective, consistent, co-ordinated and proportionate enforcement of consumer protection legislation in the UK. Its introduction increases the range of enforcement tools available to the OFT and the TSS to prevent unlawful practices.
- 6.20 Under the Enterprise Act, 'undertakings' can be sought from businesses, including estate agents, in the form of a binding promise to cease infringements and not to commit any similar infringements in the future or, alternatively, injunctive action in the form of a court order can be taken. Such action can be against infringements of a wide range of consumer protection legislation under circumstances in which the 'collective interests of consumers have been harmed'.
- 6.21 The Enterprise Act provides an alternative to banning or warning orders under circumstances in which such action would be disproportionate in respect of the conduct identified. These new enforcement powers complement the regulatory controls already administered by the OFT under the existing regime. However, the ability to use these powers may be constrained where misconduct by agents cannot be substantiated as constituting a breach of the provisions of the Estate Agents Act. This is discussed in more detail later in the chapter.

6.22 We have analysed the cases that we have dealt with at the OFT and also discussed with representatives from the TSS their own experiences in enforcing the Estate Agents Act. The assessment below is based on that analysis together with other research carried out as part of this study.

The assessment of the Act is structured under three themes:

- The enforceability of the Act;
- The extent to which the Act needs modernising to reflect different ways of doing business in the sector;
- The treatment of contract terms within the Act.

6.23 The chapter now looks at each of these areas in turn.

Improving the enforceability of the Act

6.24 In the period 1999 to 2003, the OFT made 25 prohibition orders and one warning order⁴¹ and in the last three years of the period on average issued around 80 informal warning or advisory letters.⁴² Over 90 per cent of the prohibition order cases were based, at least in part, on criminal convictions and in almost all of these, the conviction related to theft, fraud or related matters.⁴³ Where informal warnings or advisory letters were sent to estate agents, they generally concerned suspected undesirable practices, as defined by the Act, but where the evidence and / or the seriousness of the infringements, was insufficient to support formal action.

6.25 The number of actions taken by the OFT against estate agents has varied over the years. The 10-year period between the mid 1980s and mid 1990s saw prohibition orders being made at two to three times the level of the last five year period. This is largely a reflection of a significant

⁴¹ Of these, 17 agents were subsequently banned and one was warned. Four cases were overturned on appeal with directions received from the Secretary of State to set aside prohibition orders and to issue warning orders. Four cases are still subject to appeal as of February 2004.

⁴² Data is not available for the full five-year period.

⁴³ These types of offences being trigger events under S3(1)(a)(i) of the Act.

reduction in the number of cases of mortgage fraud in the last five years relative to the number of such cases during the preceding property boom period. Over the last two years, the incidence of prohibition orders has increased by 50 per cent relative to the previous three years in part reflecting an OFT policy change to create a dedicated estate agents investigation team.

- 6.26 Banning an agent from the market is a severe sanction and will only ever be used in a small minority of cases. However, bearing in mind the number of estate agents, and the evidence of consumer complaints set out in chapter 5, the level of regulatory action appears to be relatively low and ineffective in addressing some important causes of consumer detriment. This apparently low level of regulatory activity is primarily the consequence of weaknesses in the legislation which have placed constraints on the enforcement of its provisions and the range of problems that can be tackled. These issues will be explored in greater detail throughout this chapter. This section assesses the enforceability of the current regulatory framework.

Ensuring the offer process works transparently and openly

- 6.27 There is a potential lack of transparency in the process of making and receiving offers. Because communication between buyer and seller is generally conducted entirely via the estate agent, there is considerable scope for some form of miscommunication. This can cause real problems for both buyers and sellers.
- 6.28 Much of the process of buying and selling may be carried out via the agent on an oral basis, so neither buyer nor seller can guarantee to have access to all the necessary information at all stages. This can make it difficult for consumers to identify if an agent is treating them unfairly. As a consequence, misconduct and/or failures by agents to carry out their duties and responsibilities may go unseen and therefore unreported to the appropriate enforcement authorities.
- 6.29 Distorting the offer process can potentially harm sellers and buyers. For sellers, withheld offers can represent missed opportunities. There are a

number of reasons why agents might withhold offers, amongst the most serious being 'ring-fencing' the sale for personal gain.

- 6.30 It can also harm buyers. There is the possibility for agents to suggest to a potential buyer that a higher offer has been received, when this is not the case. If this stimulates a potential buyer to submit an increased offer, this benefits the seller and the estate agent, but not the potential buyer who can do little to verify the validity of other offers. There is anecdotal evidence that some agents withhold offers from certain potential buyers, for example those who do not wish to purchase financial products from the agent.
- 6.31 The legislation makes it an undesirable practice for an agent to fail to pass on accurate details of all offers to sellers, promptly and in writing, unless instructed otherwise by the seller. However, failing to pass on an offer is one of the most frequent estate agency related complaints received by the OFT. In 2002, such complaints accounted for 17 per cent of the total caseload dealt with by the OFT enforcement team.
- 6.32 Despite the number of cases investigated, the OFT has rarely been able to substantiate an infringement of this sort because of the lack of substantive evidence.
- 6.33 The main reason for this is the difficulty in assembling the necessary evidence to substantiate an infringement. A certain threshold of evidence is required before enforcement action can be taken. However, as much of the offer process is carried out on a verbal basis, there are often no written records to present as evidence.
- 6.34 Moreover, in the absence of a requirement on agents to maintain records of offers made and passed on, it cannot be guaranteed that this information will be forthcoming in the course of an investigation in lieu of possible regulatory action.
- 6.35 To ensure greater transparency in the house-buying process, there needs to be a better audit trail of property transactions.

- 6.36 The current requirement permits agents not to pass on all offers of certain types if the seller has stipulated that he does not wish to receive them, for example, offers below a certain value. Our experience of dealing with complaints has indicated that there is often a misunderstanding between agents and their clients as to the kind of offers which the seller does and does not wish to receive.
- 6.37 The consequence of such a misunderstanding may lead to the seller being deprived of the opportunity to consider an offer which they may have found acceptable and, correspondingly, a potential purchaser may be deprived of the opportunity of purchasing a property which they desire. Our experience further suggests that sellers often change their minds as to what they might consider to be an acceptable offer during the period of time that their property is being marketed.
- 6.38 Consequently, we recommend that the requirement for sellers to be given written copies of **all** offers received by the agent should be extended such that it should also include offers of a kind which the agent may consider that the seller has indicated would be likely to be unacceptable. This may include offers believed to be below a minimum acceptable value stipulated by the vendor and/or offers from a potential purchaser who is involved 'in a chain', where the seller has stipulated that he is seeking a quick sale.
- 6.39 We recommend that as a complement to the above, the requirement to pass on all offers to sellers in writing should be further extended such that agents are also required to provide potential **buyers** with a duplicate written copy of the offer letter sent to the seller.
- 6.40 In order to be able to substantiate whether or not agents are fulfilling these requirements, they should be additionally required to keep clear records of all offers made and passed on to clients and potential purchasers. A maximum time for keeping such records would need to be set.
- 6.41 This documentation could be used to help either substantiate or dismiss allegations in the course of an investigation by the OFT or the TSS.

Failure by agents to provide sellers with written copies of **all** offers, potential buyers with duplicate copies of their own offers, and to maintain adequate administrative records substantiating that these requirements have been adhered to, for a designated period, could be added to the list of undesirable practices in secondary legislation and would be grounds for the OFT to consider taking action against the agent concerned.

- 6.42 Such requirements would ensure that all parties involved in a property transaction have better information. It should also further deter agents from withholding offers or fictitiously suggesting they had received higher offers. TSS representatives say that such a requirement would help them considerably when attempting to substantiate or dismiss consumer complaints relating to the offer process.
- 6.43 The introduction of these requirements is necessary if the operation of the market is to be improved for both buyers and sellers through greater transparency. Documentation should be able to be produced easily and at relatively little cost and, in many circumstances, emails could be an acceptable and rapid form of simultaneously communicating with both sellers and potential buyers.
- 6.44 Alongside improved records, enforcement bodies need improved powers to obtain such information. The OFT has the power under the Act to request the provision of information from estate agents by written notice. However, co-operation with such requests may not always be immediately forthcoming. Refusal or wilful failure to comply with such a notice is a criminal offence, but bringing a prosecution is time, cost and resource intensive.
- 6.45 Moreover, during the time taken to bring a successful prosecution, there is the increased possibility of concealing, destroying or manipulating evidence of the original infringement. Our experience of undertaking enforcement work has shown that businesses are often more likely to cooperate with an on-site request for documents and information than with a written request by letter or notice.

- 6.46 The OFT and the TSS currently have powers to enter the business premises of estate agents and to seize documents, but only when there are reasonable grounds to suspect that certain criminal offences have been committed under the Act. The OFT and the TSS currently have no specific power to enter estate agents premises and request sight of documents to investigate alleged infringements of the Act that do not amount to offences but may be relevant to considerations of the agent's fitness.
- 6.47 To facilitate effective enforcement action we recommend that consideration be given to trading standards officers and designated OFT officers being given enhanced powers to require the on-site production of administrative records, files and copies of correspondence, when they have reasonable grounds to suspect that an agent has not complied with the provisions of the Act.
- 6.48 Alongside this, any failure to co-operate with an on-site request to view files and other administrative records should be an offence in accordance with the existing provisions of the Act.⁴⁴
- 6.49 We believe that this proposal is a necessary and proportionate response to the difficulties associated with obtaining robust evidence of what tend to be predominantly 'verbal infringements'. This power would be a necessary complement to a requirement to maintain administrative records substantiating that these requirements have been met.
- 6.50 This package of powers and legal requirements should serve to improve the functioning of the market by providing greater transparency to the whole process. It will also allow for more effective enforcement action to be taken under circumstances where agents fail to meet their responsibilities.
- 6.51 In addition to this, it will assist agents to defend themselves against false or vexatious allegations of misconduct by consumers. The OFT receives a number of complaints about estate agents which prove to be false or

⁴⁴ Section 27 of the Act makes it an offence for any person, without reasonable cause, to fail to give an authorised officer other assistance or information he may reasonably require in performing his functions under the Act.

vexatious. However, defending such allegations in the absence of documentary or other supporting evidence often proves as difficult and time-consuming for the agents concerned as substantiating legitimate complaints proves to be for the OFT and the TSS. The implementation of these recommendations should considerably assist the ability of innocent agents to rebut such allegations quickly and effectively.

Limitations to the reach of the Act

6.52 Given the level of consumer concern in this sector, it is essential that the Act enables effective action to be taken. There are, however, a number of important areas where this is not the case:

- The way the Act is currently framed, requiring 'trigger events' to occur, limits the ability to consider agents' fitness and as a result to tackle activities in certain areas although they are recognised as misconduct.
- Certain areas of misconduct which clearly act against the consumers' interests are not recognised sufficiently, or at all, in the Act
- The range of possible sanctions available under the Act is not wide enough always to be able to bring an appropriate proportionate response to different types of misconduct.

6.53 We now consider each of these in turn.

The ability to consider fitness

6.54 Under the Act, the OFT may consider the fitness of agents to continue to engage in estate agency work if they are convicted of certain offences. These include a number of offences specified by order of the Secretary of State and cover a wide range of legislation other than the Estate Agents Act.⁴⁵ Convictions for serious offences may result in someone being banned from engaging in estate agency work altogether.

⁴⁵ The Estate Agents (Specified Offences) (No.2) Order 1991, Statutory Instrument 1991 1091.

- 6.55 For example, an agent's fitness could fall for consideration under circumstances in which he has been convicted of an offence involving fraud or other dishonesty, even though the conduct in question may not have been engaged in during his work as an estate agent.
- 6.56 However, the OFT is able to use this power only if an agent is **convicted** of the offence. Difficulties arise because it is increasingly common for enforcement authorities to address breaches of legislation by means other than bringing prosecutions. Civil or informal remedies are widely favoured in many cases as they are significantly less time, cost, and resource intensive. During the four year period from 2000 to 2003, the OFT was notified by local authority trading standards departments of, on average, 41 per cent fewer intended prosecutions for breaches of various consumer protection legislation than during the period 1994 to 1997⁴⁶.
- 6.57 Consequently, if estate agents commit offences that call their fitness into question but, are not actually prosecuted and subsequently convicted, the OFT is unable to take any further action based on those offences under the provisions of the Act.
- 6.58 Under certain circumstances, the OFT can seek to address misconduct by obtaining statutory undertakings from the agent or by using its injunctive powers under the Enterprise Act. These powers allow the OFT, amongst other things, to stop an agent from continuing to engage in conduct that infringes the Estate Agents Act. However, where the misconduct in question represents clear evidence that the agent is unfit to be engaging in estate agency work at all, the OFT does not have the power under the Enterprise Act to ban the agent and, in the absence of a conviction, will not be able to bring the Estate Agents Act to bear.
- 6.59 We therefore recommend that the Estate Agents Act be amended to allow the OFT to consider the fitness of an agent who has **committed** certain types of offences specified in the Act, including those specified by the Secretary of State in secondary legislation. This would remove the

⁴⁶ This data represents notifications of intended prosecutions for offences under the Fair Trading Act 1973, the Consumer Credit Act 1974, the Consumer Protection Act 1987 and the Trade Descriptions Act 1968.

requirement for a successful prosecution to have been brought in the first instance, allowing a greater number of cases to be considered.

- 6.60 There would be safeguards to this. OFT enforcement officers would require substantive evidence that an offence had been committed before recommending to an adjudicator that consideration should be given to making an order against an agent. For example, this may be evidence that the agent had received a formal caution from the police in respect of having committed a relevant offence. The OFT would publish guidance as to what it considered would constitute evidence of an offence having been committed.
- 6.61 A related point is the sanctions which can be brought against estate agents that are found to be in breach of statutory undertakings. As set out above, under the Enterprise Act, undertakings can be sought from an agent in the form of a binding promise to cease infringements and not commit any similar infringements in the future. This is an important option for tackling misconduct that does not necessarily call into question the overall fitness of the agent.
- 6.62 At present, however, a breach of such an undertaking is not a 'trigger' event under the Act and consequently does not constitute grounds for considering fitness. This could result in a situation where individuals who are unfit to be estate agents can continue to act on behalf of consumers wishing to buy or sell property.
- 6.63 To address this, we recommend that the Act be amended so that an agent breaching statutory undertakings made to the OFT or the courts becomes a 'trigger' event. The OFT would then have grounds to consider whether firms or individuals who have breached such undertakings are fit to continue working in this sector.
- 6.64 This change would potentially allow the OFT to take action under the negative licensing regime in respect of matters that currently fall outside of its scope.⁴⁷ For example, a breach of Enterprise Act undertakings by an agent in respect of 'flyboarding', based on a breach of the Control of

⁴⁷ Positive and negative licensing is discussed in more detail at the end of this chapter.

Misleading Advertising Regulations 1988, would become grounds for considering the fitness of the agent.⁴⁸

- 6.65 We similarly recommend that it be made possible to consider the fitness of an agent under the Act if the agent is found to be in contempt, having previously provided undertakings to the court, or been subject to an Enforcement Order.

RECOGNISING OTHER AREAS OF MISCONDUCT

- 6.66 There is widespread concern amongst consumers about quality of service issues, as shown in chapter 5 and reflected in the related complaints received by the OFT about estate agents. Such complaints may not always concern what are currently 'unlawful' activities by the estate agent but rather instances of unsuitable or inappropriate business practices. Although these issues can have a significant impact on consumers, the OFT is currently unable to take such matters into account when considering whether or not an agent is fit to engage in estate agency work.

- 6.67 There is a balance to be drawn here between setting reasonable minimum standards, and going beyond that, thereby preventing different agents offering different standards. Recognising this, we recommend that consideration should be given to extending the OFT's ability to consider the fitness of agents in respect of a wider range of undesirable business practices than is currently the case. This could be achieved by the Secretary of State adding to the undesirable practices currently stipulated in secondary legislation or, alternatively, by the OFT being granted a wider power to consider the fitness of agents who have engaged in unfair or improper business practices.⁴⁹ This is particularly important in respect of practices whereby agents fail to comply with minimum acceptable standards and which result in the most consumer detriment.

⁴⁸ The practice of 'flyboarding' involves agents erecting 'for sale' boards on land or outside properties in the absence of any instructions from a client. It occurs in some cities where many agents compete over a small area

⁴⁹ The OFT can already apply similar considerations in respect of consumer credit licence holders under the Consumer Credit Act 1974.

6.68 An example of the quality of service issues that we have identified during our study as being of particular concern to consumers is the practice whereby agents fail to communicate to prospective buyers, who have recently made offers which have not been rejected, that better offers have been received.

6.69 There are other areas of misconduct that may require legislative change in order that they might be addressed more effectively or, indeed, at all. In particular:

- Declaring a personal interest
- The identification of flyboarding.

6.70 These are now discussed below

DECLARING A PERSONAL INTEREST

6.71 The Act and related secondary legislation currently require agents to disclose any personal interest they have '**in any land**'. This means any beneficial interest they, or certain persons connected with them, have in the land or in the **proceeds of a sale** of such an interest. However, we do not consider that these provisions go far enough in addressing all possible misconduct that may relate to the agent's personal interest in property transactions.

6.72 In particular, although the current legislative provisions may cover interest that an agent may have in the proceeds of a particular sale, occasions may arise where agents receive incentive payments which are related to- but outside of- the **proceeds of a specific sale** that may indirectly impact on the property transaction. This would cover such matters as 'thank you' payments made to agents by buyers or sellers above and beyond fees specifically stipulated in the contract of sale or purchase.

6.73 Consequently, we recommend that the scope of the provisions be widened to capture **any personal interest** an agent or any person connected with him, derives from **any element of a property transaction and/or interconnected transactions**, in the course of estate agency work.

IDENTIFYING FLYBOARDING

6.74 'For sale' boards are an important means for agents to demonstrate their presence in the market. Over 98 per cent of agents in our survey used them as a method of advertising their business. The boards give an indication of the number of properties agents have on their books and their success in achieving sales.

6.75 If agents erect boards where they do not have property for sale, they create a misleading image of their relative success in selling properties in the area. This practice, known as 'flyboarding', increases the likelihood that potential sellers of property may contract with this particular agent rather than others.

6.76 Consumers rarely complain to the OFT or TSS about this practice. However, both receive complaints from estate agents about their competitors erecting flyboards, alleging such conduct distorts competition and as a result has a detrimental effect on their own business.

6.77 Flyboarding can be addressed under both the Trade Descriptions Act 1968 and the Control of Misleading Advertising Regulations 1988. However, the real difficulty in taking enforcement action against agents who erect flyboards lies in identifying when and where it is taking place. It is very difficult to distinguish between genuine boards that are advertising properties for sale and those that are not.

6.78 For this reason, we recommend that agents should be required to identify the **specific** property in question on their 'for sale' boards.⁵⁰ With this greater transparency, if a flyboard is erected adjacent to a consumer's

⁵⁰ Should a seller not wish to have their property identified, they can choose not to have a board erected, as is their current right.

property on common land or outside a block of flats, it will be easily identifiable as an unauthorised board. This is likely to lead to the prompt removal of the board and a complaint being made to the agent concerned and/or the local trading standards office. The negative publicity that could result from any subsequent enforcement action should act as a significant deterrent to agents engaging in this practice in the first instance.

- 6.79 We do not consider that this requirement would be an excessive burden on business. In the majority of cases, the boards need only show the number of the property in question. Some agents already identify the specific property for sale on their boards and this mirrors the existing requirements of the Ombudsman's code of practice.

Enabling proportionate regulation and enforcement

WARNING ORDERS FOR OFFENCES

- 6.80 At present, the OFT can issue an agent with a formal warning order for breaching certain provisions of the Act and/or the Undesirable Practices Order. If a further similar breach is committed, the OFT may consider proceeding directly to issuing a prohibition order, banning the agent from working in estate agency.
- 6.81 The OFT has dealt with a number of cases where an agent has been convicted of offences under other legislation, including offences specified by Order of the Secretary of State.⁵¹ Where the agent has been convicted of a specified offence, the Act allows the OFT to consider whether or not there are grounds for issuing the agent with a prohibition order. However, there is currently no provision to allow consideration to be given instead to issuing a warning order in cases where the conviction is not considered serious enough to merit banning the agent from engaging in estate agency work.

⁵¹ The Estate Agents (Specified Offences) (No.2) Order 1991, Statutory Instrument 1991 No. 1091

- 6.82 In appropriate circumstances, for example, cases involving convictions for offences under the Trade Descriptions Act, the misconduct could alternatively be addressed by the issuing of an informal warning letter. Another alternative might be obtaining statutory undertakings under the Enterprise Act, assuming that there is harm to the collective interests of consumers. However, it would be advantageous to have the flexibility of being able to issue a formal warning order under the Act where the **fitness** of the agent to continue in estate agency work is the key consideration.
- 6.83 Consequently, we recommend that the OFT should be given discretion to consider issuing a warning order to an estate agent who is found to have committed certain offences including those specified in secondary legislation by Order of the Secretary of State. We further recommend that the OFT should be able to give consideration to issuing a warning order to an estate agent in respect of other matters where currently only a prohibition order can be issued.

INJUNCTIVE ACTION AND UNDERTAKINGS

- 6.84 The Government introduced the Enterprise Act in 2002. Part 8 of the Enterprise Act is intended to provide for more effective, consistent, co-ordinated and proportionate enforcement of consumer protection legislation in the UK. It increases the range of enforcement tools available to the OFT and the TSS to prevent unlawful practices, including those which occur in estate agency.
- 6.85 Under Part 8, the OFT can seek undertakings from businesses for infringing a wide range of consumer protection legislation such as the Consumer Protection Act, Property Misdescriptions Act and the Estate Agents Act, where the infringement harms the collective interests of consumers.
- 6.86 If an agent gives statutory undertakings to the OFT, he is making a binding promise to cease the misconduct identified and not to repeat it in the future. If he breaches the undertakings, consideration will be given

to seeking an Enforcement Order from the courts. This allows for the mischief to be brought to an end by means of injunctive action.

- 6.87 Under circumstances in which intended proceedings are to be brought against a business, the court may accept an undertaking from the business instead of making an Enforcement Order. A subsequent breach of an undertaking to the court, or of an Enforcement Order, could result in contempt of court proceedings and the possibility of a prison sentence.
- 6.88 The Enterprise Act provides an alternative to regulatory action under the negative licensing system in circumstances where banning an agent would be disproportionate and inappropriate and where informal action may not achieve the desired result.
- 6.89 The OFT and the TSS share the power under the Enterprise Act to take action against unlawful conduct. These new Enterprise Act powers offer the OFT and the TSS the fastest, most proportionate and effective means of bringing acts of unlawful conduct by agents to an end under circumstances in which the general fitness of the agent to engage in estate agency work is otherwise not in question.
- 6.90 However, it is essential that the ability to use these powers effectively should not be constrained because it cannot be substantiated that an agent's misconduct meets the criteria to constitute a breach of the somewhat inflexible provisions of the Estate Agents Act. This would frustrate the ability of the OFT and the TSS to enforce the provisions of the Enterprise Act in the estate agency sector. It would also be contrary to the intentions of the Government to provide for more consistent and effective enforcement of consumer protection legislation.
- 6.91 Amending the Estate Agents Act is necessary if we are to ensure that the consumer protection provisions in the Enterprise Act can be applied most effectively in the estate agency sector and in accordance with Government policy.

Modernising the Act

6.92 The property market has seen the emergence of business methods that were not in existence when the Act was introduced in 1979. The provisions of the Act apply to businesses that, under the definition in the Act, are engaging in 'estate agency work'. However, when new business methods emerge it may not always be clear whether these are covered by the Act. This can result in confusion both amongst consumers and estate agents and potentially frustrate the effective enforcement of the provisions of the Act if apparent legislative breaches are identified.

6.93 Recent developments in the estate agency sector have included:

- The growth of the internet-based retailers
- Property retailers employing the use of option contracts.

Internet-based retailers

6.94 The growth of the internet is having an impact on the residential property market. In 1998, just nine per cent of households had access to the internet from home but this had risen to 48 per cent by 2003⁵². The internet is increasingly used to search for, and purchase, goods and services including property services. Many estate agents recognise the importance of this trend and have their own dedicated websites or share one of the property portals.

6.95 The growth of the internet has also provided opportunities for businesses to offer alternative methods of selling residential property. Internet-based property retailers may allow consumers to sell their home at a lower price than through a traditional high street estate agent since their costs may be lower. Generally, a one-off fee is charged instead of a percentage-based commission.

⁵² Source: National Statistics website – www.statistics.gov.uk. Crown Copyright material is reproduced by permission of the Controller of HMSO.

- 6.96 It is important that consumers who buy and sell their homes via the internet should be afforded the same levels of protection in law as those who use the services of a traditional high street estate agent. However, if internet-based property retailers provide services that go beyond simply providing an advertising medium, and are in effect, acting as estate agents, they are subject to the provisions of the Act and related secondary legislation.⁵³
- 6.97 Some internet-based property retailers offer a range of services from advertising property online and in local press to erecting 'for sale' boards. Although the services provided may tend to be very similar to those of a traditional estate agent, such retailers have been known to claim to be simply advertisers of property or 'property services' businesses. They do not consider themselves estate agents or that their business practices are subject to the provisions of, and protections afforded by, the Act.
- 6.98 We are aware of consumer complaints arising when a seller, who has signed a sole agency contract with a traditional estate agency, then uses the services of an internet-based property retailer. The sole agency contract obliges the seller to pay the agent commission if the seller sells his property through another estate agent, although he is free to sell privately. This is discussed further later in the chapter.
- 6.99 If the seller is given the impression by the internet-based property retailer that it is not an estate agent, he may assume that no commission will be payable to the original agent if he sells his property over the internet. However, we are aware of agents having pursued their clients for payment under the terms of their sole agency contracts when the client has sold his property via an internet-based property retailer.
- 6.100 The OFT considers that where internet property retailers offer a range of services beyond simply advertising, they are likely to be acting as estate agents and consequently, subject to the provisions of the Act. The OFT has provided its view on such matters to consumers, traditional estate

⁵³ Section 1 (4) of the Act states that the Act does not apply to the publication of advertisements or the dissemination of information by a person who does no other acts which fall within section 1 of the Act.

agents and to those who sell property over the internet and, in doing so, has enabled a number of disputes in this area to be resolved.

6.101 If the OFT obtains evidence of any such businesses advertising themselves as not being estate agents under circumstances in which we consider that they are engaging in estate agency work, we will consider taking appropriate action.

Option Contracts

6.102 Another business model that has emerged in recent years is that of property retailers who employ the use of option contracts. Option contracts contain terms not normally found in traditional estate agency contracts. Based on complaints received by the OFT and the TSS, it is clear that consumers sometimes appear unaware of the potential implications of entering into such a contract as opposed to contracting with a traditional estate agent.

6.103 The option contract may offer the seller a certain guaranteed price for their property by giving the retailer the option of purchasing the property at that price. However, the option will, in general, only be exercised if the retailer can find a sub-buyer who is willing to pay them a higher price.

6.104 By signing up to an option contract, the consumer may bear the risk of fluctuations in the property market. If the value of the property rises during the contract period, and the property retailer exercises its option to purchase the property, the seller may only be entitled to the previously agreed selling price. If the value of the property falls during the contract period, the property retailer may have difficulty attracting a potential sub-buyer who is willing to meet the sale price for the property. Consequently, he may seek to negotiate a new option contract where the seller receives a lower price while the retailer maintains the same margin.

6.105 The difference between the price paid by the sub-buyer and the price that the property retailer has guaranteed to the original seller, minus costs,

represents the retailer's margin. This margin may be considerably higher than that generally earned on commission by traditional estate agents.

- 6.106 Some consumers who have been in contact with the OFT following employing the services of one of these companies have advised us that they believed that they were contracting with traditional high street estate agents. This impression may have been gained because the businesses concerned were operating from high street outlets that appeared to the consumers indistinguishable from outlets used by traditional estate agents.
- 6.107 As with internet-based property retailers, it is important consumers who buy and sell their homes via businesses that employ the use of option contracts are afforded the same levels of protection in law as those who use the services of a traditional estate agent.
- 6.108 If the OFT obtains evidence of any such businesses advertising themselves as not being estate agents, under circumstances in which we consider that they are engaging in estate agency work, we will consider taking appropriate action.
- 6.109 Overall, although the OFT is yet to encounter business methods which it considers are not subject to the provisions of the Estate Agents Act but should be, it is to be recognised that some uncertainty will remain until this view has been tested in the courts. Furthermore, it is not possible to be fully confident that future business methods can be firmly placed within the coverage of the Act.
- 6.110 In the current Housing Bill, the Office of the Deputy Prime Minister is proposing an alternative definition of what constitutes 'acting as an estate agent'. The purpose behind introducing this new definition is to ensure that everyone involved in marketing properties is required to provide a Home Information Pack, regardless of whether or not they consider themselves to be engaging in estate agency work. This could create a two-tier system whereby the regulation of those who provide Home Information Packs may be wider in scope than the regulation of those who provide estate agency services under the Estate Agents Act.

6.112 We therefore recommend that consideration be given to redefining what constitutes acting as an estate agent for the purposes of the Act. This is necessary to ensure that consumers buying and selling property by non-traditional means are afforded the same protections in law as those who employ the services of traditional estate agents.

Contract Terms

6.113 Our consumer survey found that many people do not sufficiently understand the contract terms they have entered into with their estate agent. For example, seven per cent were unable to say what sort of contract they had signed, and 24 per cent did not know how long their contract was valid for.

6.114 This is worrying because terms used in the contract place obligations on the consumer. In some situations, this can lead to remuneration being due at unexpected times or can leave consumers liable for substantially more expense than they anticipated. It is, therefore, important that contracts are made clearer so that consumers are fully aware of the implications when entering into an agreement.

6.115 The Act sets out certain statutory definitions of terms for estate agency contracts. The Estate Agents (Provision of Information) Regulations 1991 (the 'Provisions') impose a requirement on estate agents to use specified language to explain certain statutory terms when used in agency contracts. The intention of this is to ensure that the terms are explained in a consistent manner and that consumers fully understand their meaning and the subsequent implications if they sign a contract containing such terms.

6.116 However, the evidence indicates that these statutory requirements have not been successful in achieving the hoped for transparency and clarity. The language used does not explain clearly enough the client's rights, the agent's obligations in the transaction, or when payment is due.

6.117 Under the Unfair Terms in Consumer Contract Regulations 1999 (UTCCRs), the OFT can take regulatory action to prevent the use of

contract terms it believes are unfair to consumers. However, the UTCCRs do not apply to terms which reflect mandatory statutory or regulatory provisions and so we cannot challenge those estate agency terms that are often of most concern. Also, core terms, those terms which relate to the definition of the main subject matter of the contract or to the adequacy of the price or remuneration as against the goods or services supplied, cannot be assessed for fairness provided they meet the requirement of being in plain, intelligible language.

6.118 Specifically, the three statutory definitions required by the Provisions appear to create particular difficulties for consumers. These are:

- 'sole agency'
- 'sole selling rights'
- 'ready, willing and able purchaser'.

'Sole agency'

6.119 This type of agreement gives a single agent the right to sell a client's property. If another agent finds a buyer and is paid commission, the seller is still liable for the original agent's fee. Although only one agent has the right to sell the property, it does not prevent the seller finding a buyer himself. However, if the estate agent originally introduced the buyer, or had negotiations with the buyer, the client is liable to pay the agent's fees as set out in the contract.

6.120 The term is intended to protect estate agents from abuse by consumers bypassing the 'no sale, no fee' arrangement by selling privately to a buyer found by the agent, without paying commission.

6.121 However, the statutory 'sole agency' definition includes the words 'if at any time unconditional contracts for the sale of the property are exchanged'. Consumers therefore could be held liable to pay agency fees even where they have withdrawn that property from sale by that agent and it is several months or years before a sale eventually goes ahead under another agreement. Some contracts may continue until a sale is

arranged through the agent, but the statutory wording means that the consumer's liability to pay fees is open ended where the agent introduced or had negotiations with the eventual purchaser during the contract period. We have concerns that there is no time limit on this liability.

'Sole selling rights'

6.122 A similar issue applies to the 'sole selling rights' term. Under this term, the agent is the only person who has the right to sell the property for the duration of the contract. This means that the agent is entitled to a commission payment when that client's property is sold during the contract period, regardless of whether or not the agent introduces the buyer. Under a 'no sale, no fee' agreement, this condition provides protection to the agent in a similar manner to the sole agency arrangement.

6.123 Under the statutory wording, however, there is no time limit on when the agent may be remunerated. Consumers can, as a result, be liable to pay commission after the contract period has expired, where the eventual purchaser was introduced during the contract period or where the agent had negotiations with them. Again, we have concerns that there is no time limit on this liability.

'Ready, willing and able purchaser'

6.124 The 'ready, willing and able' term obliges the client to pay the agent commission if the latter introduces a buyer who is willing and able to proceed unconditionally with the purchase. This can have major financial implications for sellers as commission is payable when a 'ready, willing and able purchaser' is introduced by the agent but the seller subsequently withdraws, even if this withdrawal is due to unforeseen and/or justifiable reasons.

6.125 Our survey revealed that around 90 per cent of agents offer 'sole agency' agreements, nearly a quarter of which include the 'ready, willing and able purchaser' term. More than a quarter offer clients 'sole selling rights' contracts. This indicates that a significant proportion of

consumers who sell their property through an estate agent may be affected by the conditions attached to one or more of these terms.

- 6.126 The rights and obligations of both parties, the period within which commission is payable and the duration of agreements should be transparent in all contracts.
- 6.127 We consequently recommend that the specification of these terms in the Provisions be reviewed and they should be amended to reflect modern best practice and to address the problems we have identified. Statutory terms must be clear and fair so that consumers can fully understand the significance of signing a contract that contains them. The Provisions should require that statutory terms be given greater prominence than that currently required by the Regulations⁵⁴. There should also be a statutory time limit placed on consumers' liabilities under sole agency or sole selling rights contracts.
- 6.128 Any further explanation of the terms should be given prominence within the contract itself in a similar manner to the 'health warnings' in agreements regulated under the Consumer Credit Act. Estate agency contracts should be written in plain English and consumers given a full opportunity to become aware of all the obligations before they enter into an agreement so that the fees due can be negotiated.

Licensing of Estate Agents

- 6.129 The Estate Agents Act is intended to set a baseline level of protection for consumers. In effect, the Act introduces certain minimum standards of business conduct by its requirements on such matters as handling client money, personal interests in transactions and the practices which have been identified as undesirable. By providing the means to ban people or businesses from continuing to engage in estate agency work, the Act, in effect, creates a negative licensing regime. With a few exceptions, such as individuals who are subject to bankruptcy orders, it allows for anyone

⁵⁴ Section 6 of the Estate Agents (Provision of Information) Regulations 1991 currently requires the wording of the explanation of the statutory terms to 'be given no less prominence than that given to any other information in the document setting out the terms of the contract'.

to enter the estate agency sector, while providing a means of addressing specified types of misconduct once they are operating.

6.130 A number of organisations consider that the industry would be more effectively regulated if there were a positive requirement to hold a licence before an individual or business is permitted to set up as an estate agent. Proponents of this view have argued that it would

- be more proportionate to the risks and in line with the approach adopted overseas and for regulation of the UK consumer credit market
- enable the imposition of competence or training requirements on estate agents which would increase the level of professionalism in the sector raising standards and averting misconduct.
- provide means of addressing misconduct before it happens instead of after the event.

A proportionate approach to regulating Estate Agents

6.131 Positive licensing is not a commonplace approach to safeguarding consumer's welfare in the UK, but our review of overseas regulation reveals that it is used in a number of other countries. Our international comparison study, which looked at the USA, Australia, Denmark, Ireland, Scotland and the Netherlands, found that the majority of them employ a form of positive registration or licensing for estate agents. However, most countries do not have legislation comparable to the Estate Agents Act that applies specifically to the regulation of estate agents. Nor was there any clear correlation between a positive licensing regime approach and consumer complaint levels. Those countries with positive licensing regimes also had high levels of complaints. A summary of the findings of the international study is set out in Annexe C.

6.132 The question is whether a positive licensing regime would, on balance, offer additional benefits to consumers such as to justify its' introduction as an alternative means of regulating the sector – given the fact that

positive licensing overseas has not led to low levels of consumer complaint.

- 6.133 All forms of licensing, whether negative or positive, represent an increase in regulation, but the conditions or minimum standards that are applied to assess fitness to trade can vary widely in their complexity and scope in both forms of licensing. Some systems regulate individuals based on minimum standards of education, experience or business competence while others simply screen out those with criminal convictions or other adverse indicators of their fitness.
- 6.134 The higher degree of regulation found in licensing systems comes at a cost, because businesses will have to operate in a way which is consistent with licensing requirements. In a positive licensing system, they will usually have to meet the direct administrative cost of the licensing authority through a licence fee. The overall cost depends on the character and scope of the regulatory requirements imposed by the licensing system.
- 6.135 The costs to business associated with a licensing system and the use of a positive licensing approach may also act as a barrier to, or inhibit, market entry. Whether this leads to any dampening on competitive activity depends on a number of factors including the character and appropriateness of the controls introduced by the licensing arrangements. For example, the positive licensing system applied in the consumer credit area has not prevented the development of the largest and most dynamic consumer credit market in the European Union. Clearly, however, unnecessary regulatory controls or controls that are out of proportion to the problems to be dealt with, will raise business costs and ultimately consumer costs.
- 6.136 Whether licensing (positive or negative) can be justified as an appropriate and proportionate approach to regulation will depend on the nature and seriousness of the risk to consumer welfare in the market in question. Earlier in this chapter we have discussed a number of market problems and suggested that with the new Enterprise Act powers, which provide us with a new mechanism to tackle unlawful activity, and some

strengthening of the Act, a negative licensing approach will be sufficient to provide the required level of regulation in this market.

6.137 The comparisons drawn with regulation of consumer credit also have to be handled with some care because there are a number of important differences between these markets. Although the infrequency and high value of house transactions puts this activity in a high risk category it is doubtful if the risks are generally as high as in relation to consumer credit activity. This is for a number of reasons,

- The degree of consumer understanding around financial products tends to be substantially below that about property. This is partly due to the fact that financial products are often complex in nature, but also simply because consumer knowledge in relation to financial products is low.
- All loans are risky because of uncertainty about future events and an individual's ability to repay.
- Whereas in consumer credit the consumer relies almost entirely on the advice given by their lender or selling broker, in buying or selling a house the consumer is generally protected by additional professional assistance from solicitors, mortgage companies and surveyors.

Competence and training requirements

6.138 It is argued that placing training requirements on individuals who want to become estate agents would address misconduct and improve overall standards across the industry. Our international study shows that those countries that have positive licensing regimes generally impose such training conditions. They are also required in a number of UK markets e.g. doctors, lawyers and financial advisers.

6.139 We do not however regard these as persuasive arguments for a number of reasons.

- Training requirements in overseas jurisdictions have not universally led to low levels of consumer complaint.
- There is clearly the need for some training of estate agents to ensure compliance with the minimum standards required by the working of the Act, but the range and complexity of these requirements is not such as to justify a regulatory requirement for this.
- Training and competence requirements do have a role to play where the level of technical knowledge required to operate at a basic level is extensive. However, the role of an estate agent is primarily that of sales, customer service and co-ordination between clients and potential buyers; functions, which, in themselves, do not require such technical knowledge.
- Where there have been grounds to ban estate agents this has generally been the result of conduct which suggests a lack of integrity on their part rather than a lack of knowledge or expertise in the work.

Preventing unfit persons from becoming estate agents

6.140 An obvious advantage of a positive licensing system is that it would allow the OFT to prevent unfit persons, to the extent that they can be identified, from lawfully starting up as an estate agent. A decision not to licence an individual must, however, be based on evidence relating to actual behaviour and this inevitably means that a control of this kind cannot provide certainty or complete protection.

6.141 The key issue is whether there is the evidence to suggest that the absence of this kind of gatekeeper control is currently allowing unfit individuals to set up as estate agents and, if so, whether the scale and seriousness of the problem sufficient to justify the additional costs and burden of a positive licensing system.

6.142 This report has identified certain problems in the market but they relate to conduct by existing estate agents in ways that are specific to estate agency business. It follows that individuals seeking to become estate agents will not generally have a track record that provides an accurate

signal in relation to the sorts of behaviour that a positive licensing regime would be trying to filter out.

- 6.143 It might, however, be argued that a positive licensing regime allied to a criminal record check would enable the OFT to filter out a large proportion of unfit persons from setting up as agent. In this context, it is to be recognised that, over the last five years, in 95 per cent of case where an agent has been banned, a key element of the evidence has been a recent conviction for fraud, theft, violence or some other similar serious matter. It might, therefore, be argued that stopping such individuals from becoming agents would go a considerable way to addressing areas of concern.
- 6.144 The question here is whether introducing a positive licensing regime based on a criminal record check would yield sufficient additional benefits, above and beyond the current system, to offset the costs of the system. The sorts of behaviour that have been discussed in this report as being of major concern to consumers of estate agency services such as passing on offers would not, however, be addressed to any material extent by a control of this kind because there is no evidence that they are systematically correlated with a previous criminal history.
- 6.145 Taken together, therefore, our assessment is that the arguments for positive licensing in consumer credit do not pull across to justify a similar regime being applied to estate agency. What needs to be done can be achieved by using the OFT's new powers under the Enterprise Act and by improvements to the Act and the existing negative licensing approach.

Conclusion and summary of recommendations

- 6.146 This chapter has looked at the regulations affecting estate agents, and in particular, has examined the Estate Agents Act in terms of its effectiveness in ensuring a baseline level of protection to consumers. Our conclusion is that the Act is currently limited as a means of achieving this goal. With the recommendations we have made enacted, however, it would provide a strong basis for an effective negative licensing regime

that would deter agents from misconduct, and help to address key areas of consumer concern.

6.147 In summary our recommendations are:

- To require estate agents to pass on copies of all offers in writing to sellers and relevant duplicates to potential buyers and to maintain comprehensive administrative records and systems in order to improve the audit trail relating to a property transaction.
- To provide trading standards officers and OFT officials with the power to require the on-site production of administrative records, files and copies of correspondence from estate agents when they have reasonable grounds to suspect that an agent has not complied with the provisions of the Act.
- To allow enforcement action to be taken where specified offences have been identified as having been **committed**, regardless of whether or not the offenders have been the subject of a successful prosecution.
- To give consideration to allowing the fitness of agents to be considered under a wider range of circumstances than is currently the case.
- To require agents to disclose any personal interest they, or persons connected with them, have in any aspect of a single property transaction and/or interconnected transactions.
- To require agents to identify on 'for sale' boards the specific property in question in order to assist the OFT and the TSS in the identification of 'flyboarding'
- To provide the OFT with a discretionary power to issue a warning order where an estate agent has committed a specified offence and when taking account of other matters that apply when making a prohibition order

- To consider redefining what constitutes acting as an estate agent for the purposes of the Act.
- To review the specification of 'sole selling rights', 'sole agency agreement' and 'ready, willing and able purchaser' to ensure that the statutory terms are clear and fair and given greater prominence in estate agency contracts.

7 IMPROVING STANDARDS

Introduction

- 7.1 This chapter examines issues relating to the quality of service beyond the basic standards of consumer protection that can be provided by the Estate Agents Act.

Summary

- 7.2 In many markets, consumers learn about the quality of the item or service they are purchasing through repeating the transaction a number of times. However, most people buy and sell houses infrequently. They therefore have little experience of the quality of service provided by a particular estate agent. The market therefore has limited power to penalise the poor service provided by some estate agents.
- 7.3 Quality of service can be improved either by setting higher standards for estate agents, or by requiring agents to provide compensation for poor service, thereby providing them with the incentive to ensure good service.
- 7.4 At present, a number of estate agents are members of schemes with codes of practice that promote higher standards of service by setting rules for behaviour by members.
- 7.5 For such voluntary codes of practice to be effective, consumers must be aware of codes, and must want and be able to use code membership as a basis for their choice of agent, i.e. agents that follow a code of practice need to be available in the consumer's area. Evidence suggests that most consumers do not currently base their choice of agency on membership of a code.
- 7.6 A crucial feature of voluntary codes is the availability of an independent redress mechanism in the event of a complaint being made that cannot be resolved between the consumer and the agent. For independent redress to be effective, the cost of accessing it should be low relative to the magnitude of the grievance and agent's fees. At present,

independent redress that is free to consumers is available for only approximately 36 per cent of transactions.

- 7.7 The OFT's Consumer Codes Approval Scheme seeks to strengthen voluntary codes by approving and promoting codes that meet certain core criteria, such as standards on disciplining members who breach the code, availability of low cost independent redress, and assurance of compliance by members. OFT promotion will assist with consumer awareness of codes which, in turn, should generate benefits for member businesses.
- 7.8 This approach is considered to be more flexible and more proportionate than the raising of standards through statute. Given the breadth of dissatisfaction expressed by consumers, it would be difficult to prescribe desired service, for example, communication with agency staff. In addition, compliance and enforcement costs would be increased.
- 7.9 An independent redress mechanism enables consumers to pursue their legal rights, creates the incentive for the agent to provide good service and provides a proportionate penalty for non-critical poor service. The CCAS would ensure that low cost independent redress was available, if required, for transactions involving members of approved schemes. However, there are risks that approved codes do not achieve the desired level of coverage or consumer awareness, or that compliance difficulties emerge.
- 7.10 We therefore recommend that the industry seek to improve service quality and means of independent redress by developing codes of practice that meet requirements for OFT approval. We also recommend that awareness of these codes is raised and that agents are encouraged to join. We further recommend that powers should be obtained to establish a statutory redress mechanism in the event that voluntary codes of practice do not realise the desired improvements in service to consumers.

The current approach to quality assurance

- 7.11 Chapter 5 on customer satisfaction described the current view of estate agents held by home buyers and sellers. Our consumer survey found that nearly three quarters of buyers and sellers felt that estate agents had provided a satisfactory level of service. However, other people had experienced a variety of problems. In general, they had not been able to resolve these. A significant proportion did not complain, and of those who did, the majority considered their complaints were not handled satisfactorily.
- 7.12 As noted above, a basic level of consumer protection is provided by the Estate Agents Act by enabling action to be taken against companies or individuals that have breached its provisions.⁵⁵ Quality can be further improved by:
- The setting of higher standards of service for customers, and;
 - Estate agents making available a system of redress for dissatisfied customers.
- 7.13 Estate agents can set themselves higher standards to reduce the instances of poor service. To ensure that these standards are effective, they need to be promoted among agency staff and actively enforced. Alternatively, higher standards can be imposed through statute.
- 7.14 An independent redress system makes compensation available to consumers who have legitimate complaints about agents. As well as providing compensation for financial loss or stress, this also gives estate agents a strong incentive to prevent problems arising in the first place, and, where they do, to resolve them early.
- 7.15 At present, a number of estate agents are members of schemes with codes of practice that promote higher standards of service. These include an internal complaints handling procedure. Where disputes cannot be

⁵⁵ The OFT, which is responsible for enforcing the Act, can prevent a person from acting as an estate agent but it cannot provide redress to individuals that have suffered as a result of actions by this agent. Action taken by the OFT is in the public interest for customers at large.

resolved with the agent, two of the existing codes provide access to an independent system of complaint and redress. However, only one of the schemes provides free access to such independent redress. Hence, the coverage of low cost redress is currently around 36 per cent.

- 7.16 The following section looks at the approach to providing good quality service by agents that are not members of any quality of service scheme, and then describes the three organisations that set standards for member estate agents; these are the Ombudsman for Estate Agents, the Royal Institution of Chartered Surveyors and the National Association of Estate Agents.

Quality control by the agent

- 7.17 Estate agents who are not members of standard setting bodies may set their own codes of practice and provide their staff with what they consider to be appropriate training and direction. A consumer making a one-off transaction is unlikely to be able to judge the quality of such an agent in advance.
- 7.18 The extent of the problems experienced by sellers suggests that they do not have sufficient information to make informed decisions about the quality of service an agent offers, other than by recommendation. Market forces are, therefore, not as effective as they could be in reducing demand for agents providing poor service. Buyers, by tending to choose properties rather than agents, do not use their choice of agent in a way that creates incentives for good service or punishes poor service.
- 7.19 When problems do arise, a low proportion of dissatisfied customers actually complain. Of those that do, 89 per cent complain to the agent with five per cent of these taking their complaint to the branch manager⁵⁶. For complaints about agents that do not participate in a code of practice this is the main way in which complaints can be made. There are two problems with this approach. First, there is a low level of satisfaction with the response to complaints, as described above. Secondly, some consumers are concerned that the agent could act

⁵⁶ This information was obtained from the consumer satisfaction survey commissioned by the OFT, described in chapter 5.

against their interests if they make a complaint. Interview respondents made the following comments:

'They didn't do anything. They wiped their hands of the problem.'
and

'I felt that if I complained during the sale it would go against my interests, I just wanted an easy life and was unaware of any procedures.'

- 7.20 Where there are serious unresolved concerns, consumers can use the court system to seek redress for losses incurred as a result. However, using the court system is expensive and can be time consuming for the consumer. Court action may well be disproportionate in many cases. As a consequence, this approach is of limited use for most complainants. Furthermore, it does not create a strong incentive for agents to improve service standards, and thereby avoid such complaints in the first place.

Ombudsman for Estate Agents Scheme

- 7.21 The purpose of the Ombudsman for Estate Agents (OEA) Scheme is to deal with disputes between Member Agents and actual or potential buyers and sellers of residential property that cannot be settled by the two parties. The Scheme is set up as a Limited Company - the day-to-day business of which is run by the OEA Board. The investigation into disputes is carried out by an independent Ombudsman employed by the OEA Board. In order to preserve his independence, the Ombudsman reports to the OEA Council. The Scheme is designed so that all complaints start and finish with the independent Ombudsman and his Office. Neither the Board nor the Council have any involvement with the complaints the Ombudsman deals with.
- 7.22 The Scheme has been in operation since 1990 and has been open to all estate agents since January 2000. Membership is voluntary and each Member Agent pays an annual subscription of £105 + VAT per office. As of January 2004 there were around 794 members representing 4,331 offices. This is approximately 36 per cent of the estate agency offices in the UK. In 2004 the regional distribution of members was as follows;

TABLE 7.1: BREAKDOWN OF OEA MEMBERSHIP IN JANUARY 2004 BY REGION

Region	No. of OEA Offices
England	4,248
Scotland	54
Northern Ireland	16
Wales	13
Total	4,331

7.23 The OEA Company is also responsible for operating the Residential Estate Agency Code of Practice for the Ombudsman for Estate Agents Scheme (OEA Code).

7.24 The OEA Code has been submitted for approval under the OFT's Consumer Codes Approval Scheme (CCAS)⁵⁷.

7.25 Some examples of quality of service issues that the OEA Code covers are:

- guidance for Member Agents on the use of fairer, clearer contract provisions,
- consumer surveys aimed at testing levels of Code compliance and consumer satisfaction, and
- a disciplinary council to deal with members who do not deliver the promises in the Code.

7.26 The Code provides consumers with free access to its redress system, through the OEA Scheme, which is able to determine appropriate financial compensation through the Ombudsman's recommendations which are binding on all Member Agents. Compensation to the

⁵⁷ For more information on the CCAS see 'OFT approved codes v non-approved codes'. Further information on Codes of Practice is available from the leaflet "Inspire consumer confidence" produced by the OFT and "Core criteria for consumer codes of practice", OFT 2002 (<http://www.of.gov.uk/Business/Codes/default.htm>).

complainant takes into account two components – provided the Ombudsman is satisfied that they are caused (in whole or in part) by the actions or inactions of the Member Agent concerned - actual proven financial losses, and undue and avoidable stress and inconvenience.

7.27 The total number of cases closed by the OEA Scheme in 2003 was 583, 62 per cent (360) of which were found in favour of the complainant, and 38 per cent found in favour of Member Agents. Of those found in favour of the complainant, the OEA made compensation awards in the following ranges:⁵⁸

TABLE 7.2: COMPENSATION AWARDS MADE BY THE OEA IN 2003

Compensation range	No. of complainants
£0 – £99	41
£100 – £499	254
£500 – £ 999	41
£1,000 – £ 2,999	17
Over £3,000	7

7.28 It is believed that only some eight OEA recommendations have been challenged in court over the 14 years of the Scheme’s existence. None of the challenges has been successful in securing a higher award - suggesting that the awards set by the OEA represent adequate compensation to consumers.

Royal Institution of Chartered Surveyors

7.29 The Royal Institution of Chartered Surveyors (RICS) is a professional body set up by Royal Charter whose members are chartered and technical surveyors or are studying towards professional surveying qualifications.

7.30 Membership is individual rather than by company. At present the RICS has approximately 10,000 members who practise estate agency work with firms who are registered as chartered surveyors.

⁵⁸ Figures provided by OEA Limited.

- 7.31 All RICS members have to comply with its Royal Charter, the Bye-Laws and the Rules of Conduct. In addition, the RICS adopted the provisions of the OEA code of practice and expects its members who work in estate agency to abide by these if they are members of the OEA Scheme. The RICS actively monitors compliance with those rules that offer public protection, e.g. compliance with the requirement to have professional indemnity insurance, compliance with members' accounts rules and compliance with continuing professional development rules.
- 7.32 The RICS Rules of Conduct requires all members to have an internal complaints handling procedure. In the event that a dispute cannot be resolved with the agent internally, the consumer can resort to arbitration directly via the Surveyors Arbitration Scheme. This procedure is governed by the Arbitration Act 1996 and decisions by the arbitrator are enforceable in the same way as an order of the court. The decision of the arbitrator is binding on both parties and the consumer cannot take further action through the courts except in the cases specified by the Arbitration Act 1996. Use of the Surveyors Arbitration Scheme currently costs £100 + VAT for consumers and can be used for claims up to £50,000.
- 7.33 Throughout 2004, the RICS is piloting an Ombudsman Scheme in Scotland which deals with disputes people may have with its members in relation to property in Scotland. The Scheme is free to use and the Ombudsman can award up to £25,000 compensation as well as £500 for immaterial damages. Once the result of the pilot has been evaluated, the RICS aims to roll out the Scheme to all its members.
- 7.34 The RICS can deal with complaints about conduct standards and breaches of RICS regulations through its disciplinary procedures. If a complaint is upheld, and a RICS member is found to be in breach of the rules of conduct, the disciplinary board has the power to suspend, fine (£5000 per breach) or expel the member. The board hearings are held in public and its decisions are published.

National Association of Estate Agents

- 7.35 Membership of the National Association of Estate Agents (NAEA) consists of individual estate agents, approximately half of whom are principals, partners or directors of estate agency practices. The current number of individual members is in the region of 9,500 with around five to 10 per cent of those not working in the field of estate agency.⁵⁹
- 7.36 The NAEA's standards of service are set out in the NAEA Residential Estate Agency Code of Practice which was adopted in January 1997 and the Rules of Conduct most recently updated in January 2003. These are mandatory for all members. The code of practice and rules govern conduct in the areas concerning the information provided to consumers, terms of contracts with consumers, the use of for sale boards, the handling of offers, client's money (consumer accounts and deposits) and conflicts of interest.
- 7.37 The NAEA recommends all members who are principals, partners or directors to have an internal complaints handling procedure. In the event that a dispute cannot be resolved with the agent internally, the consumer can invoke the complaints handling procedure of the NAEA.
- 7.38 If the member is found guilty of breaching the Rules of Conduct or the code of practice, the NAEA has a series of disciplinary powers which it can use against the member agent. The main sanctions are a caution, formal warning, or a reference to a disciplinary tribunal. If the member is found guilty of breaching Rules of Conduct or the code of practice by the disciplinary tribunal, the penalty could be a fine for each individual breach, suspension or expulsion from the NAEA.
- 7.39 The NAEA has no authority over its members to order financial compensation to be paid to a complainant. Any consumer who has a dispute with an agent who is a member of the NAEA would have to either go through the mediation service or bring an action through the courts. The mediation service has power to recommend total or partial refund of the member's commission fee only. Access to this service is not free. Both the consumer and estate agent must pay £125 + VAT to

⁵⁹ Membership figure provided by NAEA.

take a dispute through the system and both parties must agree to be bound by the mediator's decision.

Assessment of the current approach to quality assurance

- 7.40 For voluntary codes of practice to be effective, consumers must be aware of codes and must want and be able to use this as a basis for their choice of agent. That means agents that follow a code of practice need to be available in the consumer's area.
- 7.41 Our survey found that only 44 per cent of sellers knew whether their agent was a member of any trade association and of these only a third knew which this was⁶⁰. This low level of awareness means that sellers do not currently base their choice of agent on membership of a scheme that has a code of practice. This reduces the effectiveness of the code because consumers may not demand the standards of service set by the code, and may not complain when the agent fails to provide this standard of service.
- 7.42 The lack of focus by sellers on the code has an adverse impact on house buyers as they tend to register with all the agents covering the area they want to live in, (73 per cent gave this reason for their choice of agent) or choose those with a good range of properties (19 per cent), rather than choosing a specific agent on the basis of its reputation or scheme membership.
- 7.43 A crucial feature of voluntary codes is the availability of a independent redress mechanism in the event of a complaint being made that cannot be resolved between the consumer and the agent. An independent redress mechanism enables consumers to pursue their legal rights, creates the incentive for the agent to provide good service and gives credibility to the code of practice. For independent redress to be effective, the cost of accessing it should be low relative to the magnitude of the grievance and agents' fees. OEA members offer the OEA

⁶⁰ A significant proportion of sellers (28 per cent) said they based the choice of agent on their knowledge of the agent's reputation, though they may not be able to judge this easily. The size of fees (21 per cent), the professionalism of staff (18 per cent) and the proximity to property (14 per cent) are also determinants of the choice of agent.

independent redress mechanism at zero cost to consumers. The RICS are currently piloting a similar scheme in Scotland. If this initiative were to go ahead coverage of free to access independent redress in the industry would increase substantially.

Options for improving service

7.44 In the absence of active changes, the overall quality of service in the industry is unlikely to improve rapidly as it is a mature industry. The existing industry codes of practice may gain some wider credence but this process will take time because of low consumer demand for schemes (due to low awareness) and low coverage.

7.45 In this section, we examine options for improving service to consumers of estate agency services. These are to:

- Continue to encourage voluntary codes of practice through the CCAS.
- Raise standards through statute.
- Establish statutory redress system.

Recognise industry codes of practice

7.46 Recognised industry codes of practice provide low cost, independent redress mechanisms for consumers as well as providing incentives for good service, thus reducing the need for redress.

7.47 To achieve a higher level of coverage, the OFT could continue to encourage and work with existing and new industry organisations to assist them to achieve recognition of their codes of practice. This would mean continuing to work with the OEA Company Ltd as it progresses to Stage Two Approval and encouraging the codes established by the NAEA and the RICS to proceed towards OFT recognition.

7.48 Industry and the OFT could both work to promote consumer awareness of codes of practice. The OFT intends to market the Consumer Codes Approval Scheme and the OFT Approved Code logo. Although this would

not be specific to estate agents, consumers should become aware of the logo across a range of goods and services and recognise it as a mark of quality. At the time code approval is granted to a consumer code of practice, the OFT could work with the scheme to promote the code for estate agents in particular.

What can voluntary codes of practice achieve?

- 7.49 Voluntary codes of practice have the potential to deliver real benefits to consumers and reduce consumer detriment, by providing an effective but lighter touch alternative to statutory regulation. By involving industry participants in tackling sector specific problems, it builds upon industry expertise and legitimate self-interest in addressing malpractice or poor standards in the relevant market place. Over time it should lead to increased standards of customer care across industry sectors as these voluntary standards are increasingly adopted and exceeded in order to attract and retain customers.
- 7.50 Voluntary codes of practice should also be able to give consumers benefits above and beyond those available through the law. Good codes should set out clearly what the consumer can expect from member businesses under the law, and what additional benefits the code will provide, notably in customer service.
- 7.51 Effective codes, those that have high recognition among consumers and are well enforced, should also help to marginalise rogue traders within a sector. Whole sectors of business can suffer through the behaviour of the rogue element which can damage consumer confidence. Such traders are unlikely to subscribe to codes of practice, allowing consumers a better chance of avoiding them.

OFT Approved codes

- 7.52 The Consumer Codes Approval Scheme (CCAS), is founded upon new powers conferred on the OFT by the Enterprise Act 2002. Its aim is to achieve effective voluntary codes governing business dealings with consumers. There are two interdependent stages. At Stage One the code

sponsor, through negotiations with the OFT, develops a code of practice that meets certain specified core criteria. At Stage Two, code sponsors demonstrate that their code is actually delivering on that promise.

Relevant core criteria include;

- the code sponsor has a significant influence on its sector
- the code includes measures directed at removing or easing consumer concerns and undesirable trading practices arising within the sector,
- code members' staff know about the code and that compliance with it is mandatory,
- the code covers, where applicable, advertising, pre-contractual information, delivery dates, cancellation rights, guarantees, fair contracts, protection of deposits, after sales service provisions and assistance for vulnerable consumers,
- a system for dealing with complaints in a speedy, accessible and user friendly manner exists, including the availability of a low cost alternative redress mechanism
- consumer bodies have been consulted throughout the preparation, operation and monitoring of the code,
- code sponsors monitor compliance and have independent disciplinary procedures for dealing with non-compliance, and
- code sponsors and members ensure that the public are aware of the benefits of the code.

7.53 The members of code sponsors that successfully complete the two-stage process will display an 'OFT Approved Code' logo which will be marketed as a quality indicator by the OFT. The OEA Code has achieved Stage One status under the CCAS and the OEA Company hopes that its code will be OFT approved in 2004.

7.54 The OFT's promotion will provide clear benefits for businesses. A code of practice that indicates high standards of customer service can be a very effective way for businesses to attract and retain customers. It enables them to send out clear messages to consumers about what they should expect and it allows them to differentiate themselves from others who may not aspire to such high standards. OFT promotion will mean increased consumer awareness of approved codes.

Key Issues for Codes

7.55 There are three main concerns which could influence the effectiveness of codes in this area.

1. Coverage of the CCAS.

It is important to the success of the scheme that coverage within a sector reaches a critical mass within a reasonable time-frame. An approved code will be of limited value if consumers have difficulty identifying traders that are signed up to it. As house buyers and sellers tend only to use local estate agents a good geographical spread of membership is also important to ensure that consumers have access to a code member.

2. Levels of consumer awareness

It is important that the OFT and code sponsors alike ensure that they create a good level of consumer awareness of its benefits. The OFT is committed to a strong promotional campaign to ensure this is achieved. However, responsibility also rests with code sponsors to ensure that their members make appropriate efforts to publicise the benefits of the code themselves. The OFT expects that businesses will have a commercial interest in complying with this requirement.

3. Levels of code compliance

OFT approval will only be granted to codes that can prove they are delivering benefits to consumers. This requirement to provide

evidence of sufficiently high code compliance levels is an ongoing one. Sponsors of approved codes will have to convince the OFT on an ongoing basis that their codes are continuing to deliver and the OFT can withdraw its approval for failing codes.

Raise standards through statute

- 7.56 It would be possible to raise standards in the sector by introducing regulations that place further requirements on the way estate agents behave. Chapter 6 discusses the options for amending the Estate Agents Act and provides recommendations. Here we discuss the merits of introducing tighter regulations on estate agent behaviour with the aim of imposing standards above the basic level of protection provided by the Estate Agents Act.
- 7.57 Regulation could address a number of areas of consumer dissatisfaction such as requiring escorted visits, setting conditions for agents to contact or be available to consumers, prescribing processes for informing sellers or setting the timescale for the process. The advantages of such regulations are that they would set out higher quality standards that would be applicable to all consumers. The OFT would continue its role in enforcement.
- 7.58 However, there are a range of disadvantages with this approach:
- For a number of the areas of dissatisfaction it is difficult to prescribe what should happen, for example, the manner of staff;
 - Where regulations can be prescribed, they may be difficult to enforce;
 - Regulations are less effective at adapting to changes in the sector and consumer demand whereas codes of practice can offer greater flexibility;
 - An increase in regulation would increase compliance costs for the sector. These would be passed on to all consumers in the form of higher fees, whether or not a particular consumer desired the increase in standards;

- Enforcement costs would increase; and
- Regulation would penalise poor practice but would not compensate consumers who had suffered poor service.

Introduce a statutory redress system

7.59 At present, some consumers have access to redress in cases where agents are found to have provided poor service to consumers. However, a high proportion of consumers do not have this option. To ensure the availability of a complaint and redress mechanism for every transaction in the industry, a statutory redress system could be established.

7.60 A redress system could be established that is mandatory for estate agents and consumers to use in the event of a complaint arising that could not be resolved between the parties involved. Such schemes already exist in the form of statutory ombudsmen for a number of sectors including the National Health Service, local and central government and housing.

7.61 A statutory redress mechanism would ensure redress was available for buyers and sellers in the event of a complaint against any agent. This would overcome the problem consumers report about not knowing who to complain to and believing that complaints would be ineffective.

7.62 However, a statutory redress system would not set higher standards for quality of service, per se, but would be able to compensate consumers for losses whether these occurred due to breaches of the law by estate agents or legal, but poor quality, service.

7.63 The advantages of a statutory redress system / ombudsman are as follows:

- Consumers all have access to compensation where poor service has resulted in high levels of stress or financial loss.
- Incentives are created across the industry to achieve high standards of service. This improvement in standards does not require the use of

regulations which specify behaviour and could, on occasion, prevent parties determining their own standard of service.

Use a combination of measures

7.64 It is feasible to use a combination of the measures above. The boxes below give two examples of methods currently used to protect consumers in the banking and telecommunications sectors.

THE TELECOMS SECTOR

Public communications providers (PSP) are required by Ofcom to join a dispute resolution mechanism. At present the mechanisms available are private bodies rather than a statutory ombudsman. However, if these private bodies are not thought to be effective, Ofcom has the powers under the Communications Act 2003 to establish a statutory ombudsman.

The two bodies currently approved by Ofcom are the Office of the Telecommunications Ombudsman (Otel) and the Chartered Institute of Arbitrators. These bodies only offer dispute resolution services and do not seek to establish codes of practice for members. Their services are free to consumers and they can determine appropriate compensation for financial and non financial losses. As it is a statutory requirement that PSPs are members of these bodies, the bodies are not permitted to cancel membership (as this would prevent a PSP from trading); however they are required to inform Ofcomm of complaints arising from illegal behaviour.

The Chartered Institute of Arbitrators also provides adjudication services for the RICS, as discussed earlier, as well as the Royal Mail, the travel industry and the National House Building Council. Its decisions are binding on the PSP if the consumer accepts the decision within six weeks, otherwise it is not binding on either party. Otel's decisions are binding on the PSP but consumers have the right to appeal decisions to the courts.

THE BANKING SECTOR

In this sector a statutory ombudsman and voluntary codes of practice co-exist. (Powers also exist for regulation of the areas currently covered by codes.)

The Financial Ombudsman was established under the Financial Services and Markets Act 2000 and its rules are set out in the Financial Services Authority's Handbook. Its services are free to all consumers who have complaints with all businesses regulated by the Financial Services Authority (FSA) and any other business that has voluntarily joined the ombudsman scheme. Complaints may concern poor quality of service provision as well as illegal activity by financial service companies. In determining a case the Ombudsman takes into account what is "fair and reasonable", relevant laws and regulatory rules, any code of practice (whether or not the business is signed up to the code) and good industry practice. In settling a dispute the ombudsman may require the business to make compensation payments covering actual financial loss and distress/inconvenience; these are not penalties. If either the consumer or the financial institution involved is unhappy with the ombudsman's determination, it may still take the matter to court.

The Banking Code is a voluntary code established in 1991. At present 99% of businesses offering banking services are members. The Code sets standards for matters such as interest rate changes, account switching, credit card statements and branch closures. Compliance is verified through self-audit, visits by Code staff and mystery shopping. If concerns arise through this monitoring, more in depth investigations are undertaken. Penalties are used to deter poor service and engender consumer confidence. These may take the form of requiring changes of practice, publishing information on breaches or cancelling membership.

The Financial Ombudsman is not required to provide information to regulatory and self-regulatory bodies though, subject to privacy laws, it may choose to do this if major problems are being revealed through complaints. The Ombudsman also contributes to consultations on the Banking Code.

Conclusions and recommendations

7.65 Given the extent of consumer dissatisfaction with the service provided by some estate agents we have considered the methods for improving the quality of service and providing redress where consumers have suffered from poor service. In particular, we have examined both statutory and voluntary approaches.

7.66 At the present time there are important efforts by industry to establish and gain OFT approval for codes of practice which would lead to higher standards of service and provide mechanisms to facilitate consumer compensation. The introduction of a statutory scheme could place an unnecessary regulatory burden on the industry if the industry is placed to achieve similar outcomes through voluntary action. However, in recognition of the risks that approved codes do not achieve the desired level of coverage or consumer awareness, or that compliance difficulties emerge, it is important that some form of statutory redress mechanism could be introduced.

7.67 Based on the analysis presented, we recommend that the following approach is adopted:

To raise quality in the industry by encouraging and approving codes of practice that meet OFT requirements, raising awareness of these codes and encouraging agents to join.

To obtain powers to establish a statutory redress mechanism in the event that voluntary codes of practice do not realise the desired improvements in benefits to consumers. A review of this would be held in two years' time.

PART II: BACKGROUND INFORMATION

1 ECONOMIC EFFICIENCY OF THE HOME BUYING AND SELLING PROCESS

- 1.1 Given the impact which the legal process for buying and selling a home has on consumers we commissioned economic consultants (Oeconomica) to undertake an economic assessment of the home buying offer and contract process in England and Wales to identify whether the current system gave rise to any inefficiencies. We also asked them to analyse potential costs and benefits of the introduction of the proposed Home Information Pack (HIP).
- 1.2 Oeconomica concluded that the current contractual system was preferable to any mandatory scheme making contracts more binding at the point that an offer is accepted by a seller. Sellers can already choose whether to demand a deposit and buyers and sellers can make an agreement more binding. Because sellers rarely opt for binding agreements, the private benefits of making the agreement more binding clearly outweigh the private costs.
- 1.3 In the absence of binding agreements, both parties can continue to search for better deals, while waiting for the completion of their original agreement. While cancelling an initial agreement has a negative impact on the existing counterpart, there is typically a new counterpart waiting to gain from the newly arranged transaction. If a new transaction is more attractive as it creates more value, e.g. as the property is more suitable for the buyer, then the cancellation of the original agreement can be, on balance, beneficial.
- 1.4 In the presence of chains, mandatory deposits can also lead to an inefficient lock-in into a broken or delayed chain. While more binding contracts may have the benefit of reducing opportunistic behaviour, they have the drawback of reducing the parties' flexibility if more suitable opportunities arise or if the current transaction is seriously delayed as

part of a stalled chain. By encouraging or mandating deposits, incidences of gazumping and gazundering could be reduced but this might not overall improve economic efficiency.

- 1.5 In relation to the mandatory HIP Oeconomica concluded that its benefits crucially depend on the prevalence and length of chains of buyers and sellers. A mandatory HIP would impose on sellers the obligation to prepare all legal documents and searches, as well as possibly a survey on the condition of the property, before marketing the property. As the respective costs are unilaterally borne by the seller up-front, individual sellers may not be prepared voluntarily to provide an HIP. However, the presence of an HIP might create benefits for other market participants, i.e. potential buyers of this property as well as other buyers and sellers in the same chain. An individual seller will not take these positive effects ('externalities') into account when deciding whether or not to provide a HIP.
- 1.6 In order for the benefits of an HIP to outweigh the inefficiencies arising from lower market participation by sellers and, thereby, reduced market liquidity, chains must be long and occur frequently. This in turn should be more likely when property values are high compared to average incomes, moving temporarily to rented accommodation is highly costly and bridging loans are not easily available.

2 DATA ON COMPETITION

TABLE 2.1: DEVELOPMENT OF NUMBER OF AGENTS LISTED OVER THE SAMPLE PERIOD

Area	No of agencies listed at start	Max number listed over sample	Min number listed over sample	Number listed at end	% difference between max and minimum (as % of agencies at start)
Cardiff	84	84	78	82	7
Coventry	38	48	38	40	23
Leeds	137	142	121	126	16
Balham	36	39	31	41	23
Northwich	10	12	9	12	29
Winchester	18	20	16	19	22

Source: Yellow Pages

TABLE 2.2: LONGEVITY OF ESTATE AGENTS

Area	Median number of estate agents in the cycle	Number of estate agents present throughout the sample period	Proportion of median estate agent numbers which have outlived the sample (%)
Winchester	18	9	50
Northwich	10.5	5	48
Cardiff	81	38	47
Leeds	131.5	42	32
Balham	35	11	31
Coventry	43	12	28

Source: NERA calculations from Yellow Pages

TABLE 2.3

Estate Agent Profitability and Changes to the Value of the Housing Market (England & Wales)

