

The lettings market

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Further annexes to this report are available as separate documents:

Annexe C – Legal Annexe

Annexe D – Intelligence Report

Annexe E – Stakeholder responses to the Intelligence Report

- 3.37 The Intelligence Report shows that some fees may be presented to the tenant at the point at which they are incurred and after they have paid a deposit or signed a tenancy agreement for a particular property. The complaints show that these fees include check-in fees, check-out fees and admin fees. Such complaints may indicate problems of a lack of information provided by letting agents on fees rather than a behavioural bias. As shown above, a behavioural bias may occur when fees are presented to tenants after they have decided to rent a particular property but are not contractually committed.
- 3.38 However, if fees are presented to the tenant after they have paid a deposit or signed a tenancy agreement, the tenant may be unable to switch. In these circumstances, it is the contract rather than any behavioural bias which means that the tenant does not switch. Tenants may find themselves frustrated or disappointed by the additional, unexpected, fees and find themselves unable to avoid paying them.

A lack of information regarding fees charged by letting agents to landlords during the contract period

- 3.39 A similar situation can also arise for landlords when they are unaware up-front of all the fees they may be charged by letting agents and the likelihood of incurring these fees. Landlords may be aware of the 'finding fee' and percentage management fee. However, the complaints data analysed in the Intelligence Report shows that landlords may be unaware up-front that there may be additional fees, such as renewal commission³⁸ or termination fees.³⁹ The complaints also show that landlords may only become aware of these fees at the point when they are incurred, which is after signing a contract with an agent. In these circumstances, the ability of landlords to compare the overall costs of renting their property

³⁸ Renewal commission refers to when the current tenants remain in the property after the initial term of the tenancy agreement.

³⁹ Termination fees refer to charges made if the landlord wishes to end the contract it has with the letting agent early.

through an agent and to compare contracts offered by different letting agents is reduced. There is, therefore, unlikely to be effective competitive pressure on fees that are not clear up-front. The complaints also show that landlords often feel disappointed or frustrated due to being locked in to the contract and unable to avoid paying the unexpected fees charged.⁴⁰

A lack of information regarding holding deposits

- 3.40 In addition to a lack of information regarding the charging of particular fees, there is also a lack of information regarding what some fees are for. In particular, the Intelligence Report shows that eight per cent of all complaints were made about holding deposits and a lack of transparency about what the holding deposit is for and the circumstances under which it would be refunded.
- 3.41 Letting agents sometimes take a holding deposit from prospective tenants to hold the property for the tenant while they conduct their credit checks and secure personal references to ensure the tenant is suitable. Taking a deposit can benefit the letting agent, the landlord and the prospective tenant by ensuring there is a commitment to the transaction while the administrative process is carried out.
- 3.42 However, the complaints regarding holding deposits (and, in particular, the lack of clarity regarding what the deposit is for and the circumstances under which it would be refunded) highlight the tenant as having a lack of information. This lack of clarity may prevent tenants from making an informed choice regarding whether to pay the deposit or not.
- 3.43 The Intelligence Report shows that complaints were received from tenants who had paid a holding deposit under the impression that they

⁴⁰ This could also have unwelcome knock-on effects for tenants in circumstances where, in order for the landlord to stop paying a renewal commission to an agent, the landlord chooses to evict the tenant introduced by that agent.

would get this deposit back, for example, if the tenant changed their mind or the property was not suitable. However, many of these complaints show that the tenant was unable to get the deposit refunded. As such, due to the lack of information, tenants may pay a holding deposit that they would not have paid if they had more information. Citizens Advice found that 60 per cent of the tenants they interviewed for their report had paid a non returnable holding deposit.⁴¹

- 3.44 In addition, the Intelligence Report shows that letting agents may take a holding deposit from more than one prospective tenant. This may increase the likelihood that one tenant will satisfy all of the pre-contract checks and take the property. However, in this situation a tenant may pass all of the pre-contract checks but may not receive the property.
- 3.45 Instead, the property may be allocated to another prospective tenant who similarly provided a deposit. A tenant who does not receive the property may experience significant disappointment and inconvenience if they were unaware that the agent had taken deposits from a number of prospective tenants and that they may not receive the property even if they passed all the checks. It is likely that tenants will expect to receive the property if they pass the pre-contract checks.
- 3.46 In addition, the Intelligence Report has shown that holding deposits may not always be refundable. In these situations, an individual who received neither the property nor a refunded deposit would be materially and unfairly disadvantaged by this practice.

The principal-agent problem

- 3.47 Information asymmetries may arise in this market due to landlords being unable to effectively monitor the quality of the letting agent when acting on their behalf. This may allow a letting agent to pursue its own goals

⁴¹ Citizens Advice Bureau (2009) *Let Down: CAB evidence on letting agents and their charges*, available at: www.citizensadvice.org.uk/let_down.htm

rather than those of a landlord, for whom they are acting as an agent. This is known as the principal-agent problem.

The principal-agent problem between the letting agent and landlord

- 3.48 A landlord will typically want to find high quality tenants to move in to the property as soon as possible to minimise voids in rental income. However, the landlord potentially faces a trade-off between the search for a high quality tenant and finding a tenant to move in as soon as possible.
- 3.49 A landlord may employ a letting agent to find suitable tenants for their property. The letting agent's incentives may differ slightly from those of the landlord. While the letting agent will similarly want to find tenants to move in as soon as possible, as it is paid a percentage of the rental income, it may not be as concerned with the quality of the tenant.
- 3.50 This misalignment of interests may lead to landlords receiving tenants of a lower quality than they would like or would expect. Indeed, complaints from landlords regarding the inadequate vetting of tenants by letting agents and the placing of unsuitable tenants in properties were received by Consumer Direct and are included in the Intelligence Report.
- 3.51 A letting agent may also be required to deal with any issues arising when tenants have problems with the property, or to identify and deal with tenants who are problematic (for example, not meeting the terms of the tenancy contract).
- 3.52 The willingness to pay ongoing fees to the letting agent by the landlord is likely to be partly based on the expectation of a good service when problems arise. However, if landlords and letting agents' post-contract interests do not coincide, then letting agents may provide a standard of post-contract service below that expected by the landlord.
- 3.53 Furthermore, landlords may find it difficult to observe the quality of the letting agent's service during the contract but before a problem arises.

The difficulty in assessing a letting agent's likely quality of service when a problem arises means that competition between letting agents to attract landlords may not ensure a high quality of service post-contract.

- 3.54 Complaints about poor service provided by letting agents accounted for 23 per cent of all the complaints considered in the Intelligence Report. Complaints received from landlords regarding poor service include instances where letting agents fail to chase rent arrears, fail to check inventories, fail to pass on rent within the required number of days or fail to carry out regular inspections of the landlord's property, which was a requirement in the management contract.
- 3.55 A similar issue can arise when the property requires work by a third party. It may be the responsibility of the letting agent to source quotes and oversee the standard of workmanship. The landlord will generally be seeking high quality work at the lowest available price. However, the agent may not have the same incentives as the landlord, as they do not benefit from maintaining or increasing the value of the property and do not incur the costs of the repairs.
- 3.56 In addition, the structure of fees for letting agents (an upfront fee and then a fixed percentage of the monthly rent for the lifetime of the tenancy) does not provide an incentive to minimise the cost and maximise the quality of third party work. Therefore, letting agents may put less effort into seeking quotes and overseeing the work than the level of effort the landlord would like to see and hence their interests may not be aligned.
- 3.57 Complaints received from landlords and analysed in the Intelligence Report include letting agents not following landlords' instructions and agents not carrying out work on the property on behalf of the landlord or providing poor quality work. For example, one complaint received was from a landlord who had allocated funds to the letting agent to make repairs following flood damage. However, the standard of repair carried out by the letting agent was not of a satisfactory standard.

- 3.58 Another way in which letting agents may not be sufficiently incentivised to provide good post-contract services arises due to the structure of the renewal commission often found in contracts between the letting agent and the landlord. These typically have a clause which provides the letting agent with a renewal commission each time the current tenant renews their agreement.
- 3.59 The Intelligence Report shows that complaints have been received from landlords stating that, even after the landlord terminates their contract with the letting agent, the agent will still charge the landlord renewal commission, as long as the landlord has the same tenants as the letting agent found. This may reduce the incentive of the landlord to switch letting agents, even if they receive poor service, and so poor performance would not be effectively punished. It is also likely to be legally complicated to end a contract with a letting agent due to poor service. This is because these contracts have minimum terms and do not typically provide a clause that allows the contract to be terminated due to poor service requiring reliance on legal arguments that may not be straightforward.

The principal-agent problems between the letting agent and tenant

- 3.60 The Intelligence Report shows that tenants also have complaints about the quality of service they receive from letting agents, including complaints about delayed or substandard repairs being undertaken.⁴² Citizens Advice also found that 73 per cent of the tenants they interviewed were dissatisfied with the service provided by the letting agent.⁴³ Although tenants will typically have a contract with the landlord, rather than the letting agent directly, tenants may expect that

⁴² 11.4 per cent of all complaints were from tenants regarding delayed or substandard repairs by the letting agent or landlord.

⁴³ Citizens Advice Bureau (2009) *Let Down: CAB evidence on letting agents and their charges*, available at: www.citizensadvice.org.uk/let_down.htm

the letting agent will be efficient in raising any issues they may have with the landlord, in order that they may be resolved in a timely way. However, if the letting agent is not notifying problems to the landlord in a timely way, this may explain some of the complaints from tenants about the quality of service of letting agents.

- 3.61 One such complaint in the Intelligence Report is from a tenant who states that they had contacted the letting agent about not having hot water and despite contacting the agent several times over a two month period, the problem was not rectified. It is important to note here that these complaints may actually arise because landlords, rather than agents, have not responded to complaints in a timely way. This creates confusion as the tenant may not know whether it is the letting agent or landlord that is responsible for the delay in repairs. Tenants may also be confused as to who is ultimately responsible for repairs in general, the letting agent or landlord.

Access to redress

- 3.62 The problems of poor post-contract services by letting agents are made more significant because a large proportion of letting agents, approximately 40 per cent, appear to have no formal redress mechanism.⁴⁴ If it is not possible for complaints to be raised with a trade body/association or ombudsman, then the letting agent may not face sufficient incentives to improve its standard of service and consumers will find it difficult to get redress.

Regulation and the devolved administrations

- 3.63 Bearing in mind the potential problems in the lettings market, described above, it is unsurprising that there are a number of government and industry led initiatives either in place or under contemplation, aimed at improving the situation in each nation.

⁴⁴ This is based on the TPO response to our Intelligence Report. See Chapter Four for more information.

3.64 The boxes below do not provide comprehensive information on the framework for each nation, but instead highlight some of the key features of each.

In England:

- There is no requirement for landlords or letting agents to be licensed.
- The Government has stated it has no plans to introduce further regulation of the lettings market.
- There are a number of voluntary codes such as those run by The Property Ombudsman (TPO), Ombudsman Services: Property, the Association of Residential Letting Agents (ARLA), and the Royal Institution of Chartered Surveyors (RICS). (See Annexe B for more information).
- The Government backs the SAFEagents scheme, a kite mark to signpost tenants and landlords to agents signed up to Client Money Protection Schemes.
- There are a number of accreditation schemes such as those run by the National Approved Letting Scheme and the National Landlord Association scheme.
- Landlords are required by law to protect tenant's security deposits in one of three recognised schemes.
- Landlords have a number of responsibilities relating to the physical condition of the properties they let, which can also be enforced by local authorities.
- Further applicable legislation is described in Annexe C.

In Scotland:

- Scotland has specific laws that apply to all types of private letting.⁴⁵ These broadly cover three areas:
 - management rights and responsibilities for both tenants and landlords
 - physical condition and safety of the property
 - money issues covering rents deposits and bills.
- Subject to parliamentary procedure, from May 2013 landlords will have a legal duty to provide new tenants with an information pack. The pack will contain information on the tenancy, the property, the landlord and the responsibility of tenants and landlords.⁴⁶
- The Scottish Government is currently consulting on the introduction of a new Housing Panel for Scotland to resolve housing disputes more quickly and easily.⁴⁷
- In November 2012, the Scottish Government introduced new legislation to clarify what 'upfront charges' can be levied.⁴⁸ All tenant charges, other than rent and a refundable deposit will be deemed illegal. This covers charges whether they are levied by a letting agent or directly by a landlord. The move follows a consultation launched earlier in 2012 on how to deal with unfair and illegal premiums.⁴⁹

⁴⁵ www.scotland.gov.uk/Topics/Built-Environment/Housing/privaterent/landlords/management/rules/laws

⁴⁶ www.scotland.gov.uk/Topics/Built-Environment/Housing/privaterent/tenants/tip

⁴⁷ www.scotland.gov.uk/Publications/2013/01/6589

⁴⁸ www.scotland.gov.uk/Topics/Built-Environment/Housing/privaterent/s32factsheet

⁴⁹ www.scotland.gov.uk/Publications/2012/04/2045

- All private landlords must register with their local authority to ensure that they are a 'fit and proper person' to let property.⁵⁰ It is an offence to let any house without being registered. It is also an offence if a landlord does not notify the local authority if they appoint an agent.
- Tenancy Deposit Schemes only came into force in July 2012.⁵¹ Landlords (or agents acting on their behalf) are legally required to lodge deposits with one of three schemes for the duration of the tenancy. This also includes a free adjudication process where disputes regarding the return of a deposit arise.
- A Private Rented Housing Panel⁵² (an independent body) assists tenants and landlords to resolve disputes. This includes forcing landlords to fulfil legal obligations such as doing necessary repairs.
- A national voluntary accreditation scheme, Landlord Accreditation Scotland, is open to private landlords and letting agents across Scotland.⁵³
- The owner of a property must obtain a House in Multiple Occupation (HMO) licence for any house or flat occupied by three or more unrelated people who share bathroom or kitchen facilities.⁵⁴

⁵⁰ www.scotland.gov.uk/Topics/Built-Environment/Housing/privaterent/landlords/registration

⁵¹ www.scotland.gov.uk/Topics/Built-Environment/Housing/privaterent/government/SGTD1

⁵² www.prhpscotland.gov.uk/prhp/1.html

⁵³ www.landlordaccreditationscotland.com/

⁵⁴ www.scotland.gov.uk/Topics/Built-Environment/Housing/privaterent/government/hmo

In Wales:

- The current legal framework is broadly the same as in England in that the lettings market is not licensed.
- Landlords have been required by law to protect tenants' deposits in one of three recognised schemes since 2007.⁵⁵
- In July 2011 the First Minister announced the Welsh Government's Legislative Programme for 2011- 2016 including an intention to legislate to 'Improve the quality of accommodation in the private rented sector'.
- In 2012 the Welsh Government consulted on a Housing White Paper.⁵⁶ It also published a supplementary consultation creating a better private rented sector,⁵⁷ which expands upon the proposals contained in the White Paper.
- The proposals are to introduce legislation which will establish a national mandatory registration and licensing scheme, based on the existing voluntary Landlord Accreditation Wales scheme.⁵⁸ This would be enforced by local authorities, and would include an online database of licensed landlords and management agents. The consultation responses will be used in developing policy instructions for the Housing Bill which is tabled for the Welsh Assembly in Autumn 2013

⁵⁵ www.gov.uk/tenancy-deposit-protection

⁵⁶ <http://wales.gov.uk/docs/desh/consultation/120706betterprivaterentsectoren.pdf>

⁵⁷ <http://wales.gov.uk/docs/desh/consultation/120706betterprivaterentsectoren.pdf>

⁵⁸ www.welshlandlords.org.uk

In Northern Ireland:

- Legislation was introduced in 2007 which provided a new structure for the Private Rented Sector in Northern Ireland.⁵⁹ Some of the main features of this are:
 - New tenancies are defined according to their fitness for human habitation – an unfit tenancy will be subject to rent control until it is made fit.
 - As well as having rent books, new tenants have to be supplied with a written statement of the terms of their tenancy.
 - Where a tenancy agreement fails to clarify repairing obligations, the law provides default terms.
- The Northern Ireland Assembly has approved legislation, expected to come into effect in 2013, to implement a Landlords Registration Scheme. This will create a register of all private landlords which will capture and maintain relevant and up to date information about private landlords and their tenancies. It will allow councils to carry out their regulatory role to enforce standards and improve tenancy management within the private rented sector.⁶⁰
- Although not currently in place, mandatory Tenancy Deposit Schemes will be introduced in April 2013.⁶¹ Four scheme administrators have been approved by the Department for Social Development.⁶²

⁵⁹ www.dsdni.gov.uk/index/hdiv-housing/private_rented_sector/private_rented_sector-pto.htm

⁶⁰ www.legislation.gov.uk/nidsr/2012/9780337988745

⁶¹ www.dsdni.gov.uk/index/hdiv-housing/private_rented_sector/tenancy-deposit.htm

⁶² www.northernireland.gov.uk/index/media-centre/news-departments/news-dsd/news-dsd-030213-mccausland-appoints-northern.htm

4 WHAT ISSUES NEED TO BE TACKLED?

OFT Intelligence Report

- 4.1 The OFT wants to make sure that its work in this market is intelligence led and focuses on issues of real concern to consumers and factors that may harm the effective working of the lettings market.
- 4.2 In order to inform our work and improve the OFT's understanding of the nature and scale of the problems consumers encounter in the lettings market we undertook a comprehensive study of complaints derived from the Consumer Direct database and produced an Intelligence Report.⁶³ The Intelligence Report, including the methodology of our analysis, can be found at Annexe D.
- 4.3 To prepare the Intelligence Report we reviewed a sample of 3,951 consumer complaints about letting agents made to Consumer Direct (CD) over a one year period from the 1 January 2011 to 31 December 2011. We were interested to find out the most complained about issues of concern to landlords and tenants in their dealings with letting agents. Although we did not make the assumption that all complaints were valid, the complaint data revealed where ordinary consumers are dissatisfied or perceive there to be problems, and thus where a solution may be required.
- 4.4 The five main areas and number of complaints raised by landlords and tenants about letting agents were:

- | | | |
|--|------------------|--------------------|
| • Fees and charges | 1,557 complaints | 30 per cent |
| • Agents providing poor service | 1,211 complaints | 23 per cent |
| • Security deposits | 1,015 complaints | 20 per cent |

⁶³ OFT Intelligence Report: Letting Agents, June 2012

- **Delayed and substandard repairs** 668 complaints **13 per cent**
- **Unfair business practices** 565 complaints **11 per cent**⁶⁴

- 4.5 The top three areas of concern constituted 73 per cent of overall CD lettings complaints analysed and 'fees and charges' and 'agents providing poor service' taken together account for over half of all complaints.
- 4.6 Consumer Direct data relates to England, Scotland and Wales. Of the complaints we analysed around 90 per cent related to England, eight per cent to Scotland and two per cent to Wales.
- 4.7 During the same period 19 consumer complaints about letting agents were received by Consumerline in Northern Ireland. Of these seven concerned misleading advertising, five refunds on deposits, four letting agents providing poor service, one about fees and charges and one about repairs.⁶⁵

Stakeholders' views on our Intelligence Report

- 4.8 We were keen to see if our analysis of and identification of the main problems was shared by other stakeholders so we circulated our Intelligence report to a number of stakeholders, as a follow up to our '*Fairness and transparency in letting agents' charges*' event held in September 2011. This group consisted of approximately 80 stakeholders, including letting agents, consumer groups, trade associations, and government departments.
- 4.9 Feedback on the report was positive and all of those who responded agreed with our overall findings and identification of the problems and issues tenants and landlords often face in their dealings with letting

⁶⁴ Total of 97 per cent due to a combination of rounding and exclusion of a small number of complaints where the complainants gave insufficient detail to categorise.

⁶⁵ One contact did not state the nature of the complaint.

agents.⁶⁶ In particular issues around fees and charges, deposits, and a failure to carry out repairs resonated with stakeholders' intelligence and findings.

- 4.10 The feedback we received is summarised below. We have, with their permission included the full responses of some stakeholders in Annexe E. In addition to providing feedback on the Intelligence Report, some stakeholders commented on wider issues such as the need for tighter regulation of the market.
- 4.11 Citizens Advice (CitA) confirmed that problems with letting agents have continued to feature regularly in feedback from bureaux, and that it promotes the merits of the SAFEAgent⁶⁷ scheme to bureaux.
- 4.12 Which? has worked with CitA to analyse their evidence on complaints about lettings agents and also published a Report.⁶⁸ The report echoed many of the findings of OFT's report and found that issues with repairs, non-refund of holding deposits, excessive or unexpected fees and charges, failure to protect deposits, illegal practices, agents failing to carry out their responsibilities and ongoing renewal commissions featured among complaint issues.
- 4.13 More recently Which? has published '*Renting roulette, consumer experience of the lettings market*'. Amongst other things, this report

⁶⁶ Those who responded were: Tower Hamlets Trading Standards Service, Royal Institution of Chartered Surveyors (RICS), Which?, The Property Ombudsman (TPO), National Federation of Property Professionals (NFoPP), Citizens Advice (CitA) and one representative of a group of letting agents.

⁶⁷ www.safeagents.co.uk

⁶⁸ Which? and Citizens Advice Bureaux (CAB) Complaints Analysis, August 2012. CABs record every client enquiry they advise upon in a single database. In 2011-12 CABs in England and Wales advised on 5,181 enquiries relating to letting agents. CAB staff also recorded qualitative case studies about cases which they believe highlight an underlying social problem. Which? looked at 181 of the qualitative case studies recorded May 2011- May 2012 and drew out key themes.

identifies some of the main problems relating to holding and security deposits, poor customer service, and opaque and variable fees.

- 4.14 The National Federation of Property Professionals (NFoPP) agreed that the issues identified by the OFT's report are well known to be the significant problems in the market. However, NFoPP also flagged notice periods and the lack of clarity about how to end an agreement as being significant issues and recommends this problem should be tackled by legislation. They also recommend that the contractual paperwork exchanged between landlords and tenants should explain the legal process required to comply with consumer protection rights in tenancy agreements. NFoPP have also responded to the HM Treasury Review of the Money Laundering Regulations 2007 by saying letting agents should be covered by the Regulations.
- 4.15 The Royal Institution of Chartered Surveyors (RICS) considered that the Intelligence Report is an accurate analysis of the source complaints about letting agents, and recognises that there are lessons to learn in identifying the principle causes of consumer detriment. In addition RICS responded that it sees the main cause of the problem being that there is inconsistency in the statutory framework for letting agents compared with sales agents. There are no statutory minimum professional standards and there is no mandatory requirement for lettings agents to be a member of a redress scheme. This has implications for consumer protection because consumers cannot distinguish good agents from bad. RICS also notes that a number of Local Authorities, the Welsh Assembly and the Greater London Authority, are looking to introduce some form of licensing or registration of landlords, letting agents or both, along similar lines to those in Scotland. RICS considers that there is a need for simpler, more targeted regulation covering both sales and lettings agents, consistently applied across the UK.
- 4.16 The Property Ombudsman (TPO) analysed its own complaints against the criteria set out by OFT in the Intelligence report and found that the same

issues were in evidence. The TPO data for 1 January 2011 to 31 December 2011 is shown in Table 4.1, below.⁶⁹

Table 4.1 – TPO complaints data (2011)

	England	Scotland	Wales	N. Ireland	UK Total
Agents providing poor service (OFT Category 2)	5,039 (47%)	479 (4%)	277 (3%)	21	5,816 (54%)
Fees and charges (OFT Category 1)	1,728 (16%)	128 (1%)	63 (1%)	0	1,919 (18%)
Unfair business practices (OFT Category 5)	1,266 (12%)	121 (1%)	75 (1%)	5	1,467 (14%)
Security deposits (OFT Category 3)	665 (6%)	74 (1%)	22	5	766 (7%)
Delayed and substandard repairs (OFT category 4)	589 (6%)	57 (1%)	33	2	681 (7%)
Totals	9,287 (87%)	859 (8%)	470 (5%)	33	10,649

Source: TPO

Excludes a small number of complaints where the complainants gave insufficient detail to categories. Percentages have been rounded to the nearest percentage point.

⁶⁹ 'OFT category' relates to those used in the Intelligence Report.

- 4.17 Both sets of data show that the top two issues (albeit in different order) reported to CD and TPO are about 'agents providing poor service' and 'fees and charges'.
- 4.18 However, in respect of 'agents providing poor customer service', TPO considers that consumers are expecting a higher level of service than that actually agreed. From TPO's experience the agent may fail to communicate the level of service clearly to the consumer.
- 4.19 In its response TPO also stated that it estimates, based on the information it holds, that 64 per cent of letting agents trading in the UK have voluntarily registered with TPO lettings scheme and voluntarily follow the TPO Code of Practice. TPO pointed out this leaves 36 per cent of letting agents who are operating under their own set of standards and which, therefore may present a greater threat to consumers, because consumers who use a non-regulated letting agent do not have a route to a free redress mechanism.
- 4.20 TPO made a number of recommendations including that: the Estate Agents Act 1979 be amended to include letting agents, and that in the absence of a formally structured regulatory regime an 'Industry Council' be formed with the key objective of ensuring that all consumers understand the value of signing up to an agent who is a member of a redress scheme. TPO also state that having only one redress scheme, instead of the current system of two approved schemes under CEARA – TPO and Ombudsman Services Property (OSP), would reduce confusion for consumers about who to contact when they have a dispute with an agent.
- 4.21 The TPO also commissioned Professor Michael Ball of Reading University to prepare a paper entitled '*Regulating residential lettings agents: the issues and options*',⁷⁰ with a view to raising industry standards.

⁷⁰ www.tpos.co.uk/news-12.htm

- 4.22 Tower Hamlets Trading Standards reported that they had conducted an investigation into letting agents based on complaints they received between January 2010 and January 2012.⁷¹ Their findings indicate that a significant number of agents are ignoring their professional obligation relating to deposits. Tower Hamlets recommend that letting agents should be advised that all fees and charges should be clearly stated and displayed in the office and on the agents' website. They believe there needs to be more transparency around fees and charges, which should be fair, and reported that membership of TPO was relatively high among letting agents.
- 4.23 One respondent, the Chairman of the Chancellors Group of Estate Agents, wondered if it was possible to establish whether the agents being complained about (Consumer Direct data) were members of professional bodies that regulate their members, such as RICS and ARLA. They also queried to what extent complaints were about matters that the agent actually had control over, or whether the complaints mainly related to matters that are the responsibility of the landlord. For example they were concerned that broken appliances are the responsibility of the landlord and not the agent under the Housing Act, and where there are tenancy deposit disputes, these should be referred to the appropriate TDS. Likewise, where there are disputes regarding unpaid rent, this is a contractual matter between the landlord and the tenant. In addition, the agent recommended minimum standards for consumers, which they argue could be achieved if letting agents came under the same regulations as estate agents.

⁷¹ Tower Hamlets Trading Standards *An investigation into letting agents in Tower Hamlets Interim Report, May 2012*. Of the 30 agents about whom complaints were received, one was being investigated by another authority, eight had closed down and moved out of the area, and four did not respond. Agents were interviewed using a questionnaire based on the TPO Code of Practice for letting agents and concentrated on full management contracts. Tower Hamlets were looking at compliance with the CPRs.

Existing law and the challenges it presents

- 4.24 In addition to the issues identified as problematic through our complaints analysis and feedback from stakeholders, we believe that the existing law may in some circumstances present problems.
- 4.25 Consumer protection law is based on the relationship between a 'trader' and a 'consumer'. This means that traders have special responsibilities when dealing with consumers, which do not exist where two traders, or two consumers, are dealing with each other. Generally a person is a 'trader' when they are acting in the course of a business, trade or profession, and they are a 'consumer' where they are acting for purposes outside their business, trade or profession'. There has been much legal argument about where, in specific cases, the line should be drawn.
- 4.26 Private landlords can be and frequently are professionals for the purposes of consumer legislation. All landlords who are companies, and individuals who let numerous properties, or who operate professionally, fall into this group. But though consumer landlords may not account for most tenancies this does not mean that they are few in number. Many private citizens from time to time let their home, or parts of it, on a non-professional basis. A significant proportion of landlords are, therefore, considered to be consumers, at any rate in their dealings with traders and professionals such as letting agents and solicitors.
- 4.27 Whilst it is possible to take a view on when a landlord is a consumer and when a trader, there is no clear marker as to where the line falls. In practice this means that there is a lack of clarity regarding important rights and obligations leading to uncertainty for landlords, agents and tenants.
- 4.28 The issues we have identified from the complaints evidence are covered in more detail in the 'Tackling the issues' chapter (Chapter Six). Where appropriate we have set out our views on how we think these issues could be dealt with and our recommendations are set out in Chapter Seven.

5 THE CONSUMER LEGAL FRAMEWORK

5.1 In this chapter we discuss a number of aspects of the legal framework that applies to the lettings sector. The legal framework can be seen as encompassing two areas of law, broadly housing law, which applies to the landlord and tenant relationship and sets out the rights and duties of the parties to a lease,⁷² and consumer protection law (including protection to traders), which applies to economic transactions generally. This law of economic transactions could be described as:

- Laws that apply to certain contracts generally, and which may imply terms into contracts.⁷³
- Laws and rules that apply to letting agents (in particular codes that agents may join, but also some specific legislation).⁷⁴
- Laws that apply, in some respects, where both parties are acting in the course of their business, trade or profession.⁷⁵
- Laws that give special protection where one of the parties is acting for purposes outside their business, trade or profession, that is, they are a consumer.⁷⁶

⁷² For example, the Housing Act 1985. Housing law is a devolved matter, and so there are some significant divergences emerging between the way this is treated by the different nations of the UK.

⁷³ For example, the Supply of Goods and Services Act 1982.

⁷⁴ For example, the Accommodation Agencies Act 1953 is a relevant law; the Property Ombudsman Code for Lettings is an example of rules that bind agents if they are members of the scheme. Agents also owe duties to their Principal (usually landlords) under the laws of agency.

⁷⁵ For example, the Business Protection from Misleading Marketing Regulations 2008 (BPRs).

⁷⁶ For example, the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR).

- 5.2 In this section we describe the effect of a number of laws enforced by the OFT, namely the Consumer Protection from Unfair Trading Regulations 2008, Business Protection from Misleading Marketing Regulations 2008, Unfair Terms in Consumer Contracts Regulations 1999 and Supply of Goods and Services Act 1982. We give some more detail on housing law in Annexe C, where we also provide a fuller list of the laws that appear to us to be most relevant in this sector.
- 5.3 We consider that many of the issues revealed by the complaints material we have analysed could be resolved by greater compliance with this legislation. In this report we set out how this legal framework operates in general terms, in order to prepare the ground for our consultation on how the law applies in detail. We set out in the next chapter on 'Tackling the Issues' some of our preliminary views how these laws might apply to the specific issues, which we want to consider further in guidance, on which we intend to consult.
- 5.4 **This section therefore is not and should not be taken as guidance on the application of the law as to how we think professionals in this field are required to act** and this report should not be used to assist interpretation or compliance with the law. Anyone who is concerned about whether practices are in accordance with the law should seek independent legal advice. Ultimately only a court can state what the law requires.

The application of consumer law

- 5.5 The Consumer Protection from Unfair Trading Regulations 2008, and Unfair Terms in Consumer Contract Regulations 1999 apply where one party is a consumer and the other is a professional. The Supply of Goods and Services Act 1982 implies terms into all contracts, but these can be excluded where both parties are professionals. The Business Protection

from Misleading Marketing Regulations 2008 apply where both parties are professionals.⁷⁷

- 5.6 Generally speaking, we would consider it likely that most tenants are consumers, whereas most agents are likely to be acting in the course of business. In addition the law has recognised that at least a significant proportion of private landlords are consumers in the context of their dealings with letting agents. This recognises the reality that private citizens who from time to time let their home, or parts of it, on a non-professional basis have the same vulnerabilities in terms of bargaining position in dealing with businesses as any other consumers.⁷⁸
- 5.7 We believe that the market works best if agents comply consistently with the requirements of consumer protection when dealing with landlords, unless the landlord is manifestly a corporate entity or running a multi-property business. Likewise, we think that it is best if **all** landlords comply with the requirements of consumer protection in their dealings with private tenants.

Enforcement and guidance material

- 5.8 The CPRs and BPRs create criminal offences that can be prosecuted by the OFT and Trading Standards Services. The BPRs and UTCCRs can be enforced by the OFT, TSS and a number of other enforcers by means of seeking an injunction. Where there is harm to the collective interests of consumers, the CPRs, UTCCRs and the 1982 Act can all be enforced by the OFT and Trading Standards Services under Part 8 of the Enterprise

⁷⁷ In addition there are other areas of law that apply where both parties are professionals, including general contract law, Unfair Contract Terms Act and the law of Misrepresentation. These are likely to be relevant to professionals engaged in this sector.

⁷⁸ See *OFT v Foxtons* [2009] EWHC 1681 (Ch) para 28.

Act 2002.⁷⁹ The Enterprise Act also sets out a range of investigation powers available to enforcers.

- 5.9 The OFT has previously produced general guidance on the Consumer Protection from Unfair Trading Regulations 2008 (CPRs), the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs) and the Business Protection from Misleading Marketing Regulations 2008.
- 5.10 The summaries below are based on this published material, which sets out the OFT's views in full. The aim of the summaries is to give a reference point to the Regulations, which we enforce, for the purpose of reading this chapter of the report. They are not comprehensive and should not be relied upon to assist with the interpretation or application of the law. Further information on key terms mentioned in this section of the report (such as Unfair Terms, Misleading Actions, and Misleading Omissions) can be found in OFT guidance documents.
- 5.11 There is also a guidance document specifically dealing with contract terms used in tenancy agreements, which we are planning to review and update after publishing this report.⁸⁰
- 5.12 Links to all of this guidance and the legislation itself can be found in Annexe C of this report.

⁷⁹ Part 8 of the Enterprise Act 2002 enables specified enforcers to apply to the courts for an Enforcement Order to stop a business from breaching certain legislation, where the breach harms the collective interests of consumers. Such breaches are known as either 'domestic infringements' or 'Community infringements'. Where there is harm to the collective interests of consumers, the CPRs, UTCCRs (covered by the Community infringements provisions) and 1982 Act (covered by the domestic infringement provisions) can all be enforced by the OFT and Trading Standards Services under the Enterprise Act 2002. For more information see www.offt.gov.uk/about-the-offt/legal-powers/legal/enterprise-act/part8/

⁸⁰ OFT Guidance on unfair terms in tenancy agreements (OFT356).

The Consumer Protection from Unfair Trading Regulations 2008⁸¹

5.13 The CPRs apply to business to consumer commercial practices. These are activities by a trader (such as a letting agent) which are directly connected with the promotion, sale or supply of a product to or from consumers.⁸² A product is defined in the CPRs as any goods or services and includes immovable property, rights and obligations, and it need not be supplied by 'the trader' in question. So the product could be a leasehold interest in a property being advertised to potential tenants or other services that an agent may wish to offer to potential tenants or consumer landlords.

5.14 The CPRs prohibit a number of unfair commercial practices. In particular, Schedule 1 to the CPRs lists 31 banned practices that are prohibited in all circumstances. A number of these are, we think, of direct potential relevance to letting agents and (in some cases) landlords operating in the lettings sector.⁸³ These are:

(1) Claiming to be a signatory to a code of conduct when the trader is not.

(2) Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation. These are relevant given the existence of professional bodies of which agents may be members.

⁸¹ This section should be read in conjunction with the OFT's *Guidance on the Consumer Protection from Unfair Trading Regulations*, where we set out in general terms how those regulations apply, and give a general description of the key concepts such as transactional decision, average consumer and commercial practice. See www.offt.gov.uk/shared_offt/business_leaflets/cpregs/oft1008.pdf

⁸² Practices covered include any act, omission, course of conduct, representation or commercial communication (including advertising and marketing).

⁸³ The numbers in brackets denote the number of the banned practice within the Schedule

(4) Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when the trader, the commercial practice or the product have not, or making such a claim without complying with the terms of the approval, endorsement or authorisation. This is important where an agent is a member of a professional scheme.

(5) Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising). This is relevant in contexts where agents may not be confident that they have sufficient properties on their books at an advertised rent level to meet the likely demand.

(6) Making an invitation to purchase products at a specified price and then refusing to show the advertised item to consumers with the intention of promoting a different product (this is sometimes known as bait and switch). This could be relevant where a property continues to be advertised in order to attract customers, when it has already been taken.

(7) Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice. This could for example be relevant to statements made to potential tenants about whether there is interest in a property from other potential tenants.

(9) Stating or otherwise creating the impression that a product can legally be sold when it cannot.

(10) Presenting rights given to consumers in law as a distinctive feature of the trader's offer.

(18) Passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions. This could be relevant to statements made to a potential tenant about rents purportedly paid for similar properties in the same area.

(22) Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.

(24) Creating the impression that the consumer cannot leave the premises until a contract is formed.

(25) Conducting personal visits to the consumer's home, ignoring the consumer's request to leave or not to return, except in circumstances and to the extent justified, under the law, to enforce a contractual obligation. This has potential relevance where visits are paid to tenants' homes in order to collect rent.

(26) Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under the law to enforce a contractual obligation. This is also potentially relevant to methods used to collect unpaid sums of money.

5.15 The CPRs also prohibit practices which are misleading (by action or omission), aggressive, or lacking in professional diligence, where this is likely to have an impact on the transactional decision-making of the average consumer (or, where relevant, the average targeted or vulnerable consumer).⁸⁴ Each of these terms is discussed below.

⁸⁴ Regulation 5-7 of the CPRs prohibit commercial practices which are misleading (whether by action or omission) or aggressive, and which cause or are likely to cause the average consumer to take a transactional decision he would not have otherwise taken.

Regulation 3 contains a general prohibition of unfair commercial practices. A commercial is unfair if it is not professional diligent and it materially distorts, or is likely to materially distort the economic behaviour of the average consumer.

Transactional decision

- 5.16 The CPRs define a transactional decision as, 'any decision taken by a consumer, whether it is to act or refrain from acting, concerning – (a) whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product, or (b) whether, how and on what terms to exercise a contractual right in relation to a product.'
- 5.17 Below we use 'take a different decision' as a short-hand for a transactional decision that an average consumer would not have taken otherwise.
- 5.18 Transactional decision is an important concept covering a wide range of decisions that have been or may be taken by consumers in relation to products. This is wide in chronological scope, covering decisions taken before, during and after a contract is formed. For example, in the context of lettings, a transactional decision could include decisions to sign a lease, but also decisions before and after this moment.⁸⁵ Earlier decisions by a tenant could by way of example include contacting a letting agent and viewing a property. Later decisions by a tenant could include agreeing to pay a sum of money to the landlord or agent and seeking to enforce their rights under a lease.
- 5.19 Where a landlord is a consumer, transactional decisions by them could include by way of example agreeing to let a property with an agent and agreeing to a particular tenant.

Average consumer

- 5.20 The CPRs prohibit a commercial practice only where it impacts on the decision making of the **average consumer** to whom it is directed. The starting point for assessment is a consumer who is reasonably well informed, reasonably observant and circumspect, taking into account

⁸⁵ For a fuller discussion of transactional decision, see paragraph 14.23 of OFT1008 *Consumer protection from unfair trading*.

social, cultural and linguistic factors.⁸⁶ Also, as appropriate, the average consumer can also mean the average targeted or vulnerable consumer.

5.21 There may be times when professionals' commercial practices are **targeted** at a particular group of consumers, and if so, the assessment will be based on the characteristics of the average member of this group. Indications of whether a group is targeted might be found in the way advertising is placed, the language of a commercial communication, the nature of the product and the context. Examples could be advertising directed at overseas students or people who are on Benefits or moving from overseas. These groups are likely to have special characteristics of which account may need to be taken, such as language barriers, limited awareness of legal rights and lack of wider experience. Further, there are likely to be times when professionals are dealing with consumers who are **vulnerable**. Consumers are only (within the meaning of the CPRs) treated as vulnerable, to a practice or to an underlying product, if they are vulnerable because of infirmity, age or credulity.⁸⁷ For example, special care may be needed where a prospective tenant is disabled, young or in distressing circumstances.

Misleading conduct

5.22 A practice can mislead by action or omission or both. These prohibitions aim to ensure that consumers get from traders, in a clear and timely fashion, the information they need to make informed decisions relating to products. In addition, in some commercial practices (referred to as

⁸⁶ 'Average' does not mean a statistically average consumer. The concept does not refer to actual consumers, and there is no requirement to show evidence of actual consumers being affected by an unfair commercial practice.

⁸⁷ The average vulnerable consumer test applies where practices impact on a 'clearly identifiable group of consumers is particularly vulnerable to the practice or to the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee' and 'where the practice is likely to materially distort the economic behaviour of only that group.'

'invitations to purchase') certain specific information must be given to consumers, unless apparent from the context.

- 5.23 Generally, commercial practices are likely to mislead where certain key information is false, or if it is presented in a deceptive way (even if it is factually correct) (**misleading actions**),⁸⁸ or if important (**material**) information that the consumer needs to have, in the context, in order to make an informed decision is not given clearly (**misleading omissions**).⁸⁹ In assessing whether a practice is misleading, it is appropriate to consider **misleading actions** and **omissions** together.
- 5.24 In the context of lettings, examples of key information, relevant to whether there has been a misleading action, are likely to include the date that the property will be available, the description and dimensions of the property, any sums of money payable under the lease, and any code that the letting agent is a member of. Statements may also be made about the legal rights and obligations of the parties. Such information may also be given in the context of disputes, for instance as to whether a term is enforceable or whether the landlord is going to take court action in connection with rent arrears.
- 5.25 Which information is material, for the purposes of considering whether there is a misleading omission, will depend on the circumstances, but it is broadly speaking the information that the consumer needs in order to take an informed transactional decision, at the time of that decision. Information that is required by law is likely to be **material**. Examples of **material information** in the letting context could include sums of money

⁸⁸ These are actions that are misleading by containing false information or deceiving or being likely to deceive the average consumer (even if the information they contain is factually correct), and the false information, or deception, relates to one or more pieces of information in a (wide ranging) list (Regulations 5(4) and 5(5) CPRs), and the average consumer takes, or is likely to take, a different decision as a result.

⁸⁹ This occurs when practices omit or hide material information, or provide it in an unclear, unintelligible, ambiguous or untimely manner, and the average consumer takes, or is likely to take, a different decision as a result.

that the tenant will be required to pay before and after they have signed the lease and particular restrictions on the use of the property.

5.26 Where a commercial practice is an **invitation to purchase**,⁹⁰ the CPRs deem certain information to be 'material' where the traders make invitations to purchase (subject to the same considerations about the context and the limitations of the communication medium as apply to misleading omissions generally) including information on such matters as the main characteristics of property, the identity and address of the trader, and the price they need to pay. An **invitation to purchase** is a broad concept that is relevant whenever the consumer is given information on the property, and the price, in a way that enables them to decide whether to go ahead with the transaction. For example the question of what constitutes an **invitation to purchase** is likely to be relevant where an advert sets out the key features of a property and the rent to be charged. This is a matter which we intend to discuss further and consult on when drafting our forthcoming guidance.

Aggressive practices

5.27 The CPRs also prohibit commercial practices that are **aggressive** - namely if in its factual context, the commercial practice is likely significantly to impair the consumer's freedom of choice or conduct in relation to the product, through the use of oppressive means. Such means could include physical force, abusive or threatening language, threats to take action that cannot legally be taken, putting obstacles in the way of a consumer exercising their rights, abusing a position of power, and exploiting some misfortune or circumstance which could impair the consumer's judgement.⁹¹

⁹⁰ The CPRs define an invitation to purchase as 'a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of that commercial communication and thereby enables the consumer to make a purchase'.

⁹¹ A practice is aggressive if in its factual context, the commercial practice is likely significantly to impair the consumer's freedom of choice or conduct in relation to the product, through the

- 5.28 In the context of lettings, there is a risk of **aggressive practices** occurring in particular where a tenant has fallen behind with their rent, for example where an agent makes visits to the home, or communicates to tenants what the consequences of failing to pay on time could be. In these circumstances there is also scope for misleading statements being made to the tenant, for example about what steps are likely to be taken against them.

The General Prohibition/Professional diligence

- 5.29 Generally commercial practices may be lacking in professional diligence where the trader acts in a way that is below the standard of skill and care that is commensurate with honest market practice or good faith, to be expected in their field, and this conduct appreciably impairs the consumer's ability to take an informed decision.
- 5.30 In the field of lettings, when assessing whether this provision is infringed, it is likely to be relevant to take into account the legal duties that apply to traders when supplying services, and to landlords in letting out their properties. It may also be relevant to consider the standards set down in professional codes.

use of harassment, coercion or undue influence. The effects of the practice must be to cause or likely to cause the consumer to take a different decision as a result. The CPRs list factors which shall be taken into account when determining whether a commercial practice is aggressive (it is not necessary for all of these factors to be present), which include abusive or threatening language or behaviour, threats to take action that cannot legally be taken, putting onerous or disproportionate non-contractual obstacles in the way of a consumer exercising their rights and exploiting any specific misfortune or circumstance, of such gravity as to impair the consumer's judgment, of which the trader is aware, to influence the consumer's decision with regard to the product.

The Business Protection from Misleading Marketing Regulations 2008 (BPRs)

- 5.31 The BPRs prohibit businesses from using misleading advertising with other traders and set out conditions under which comparative advertising, to consumers and business, is permitted.
- 5.32 The BPRs will apply for example to an agent in their dealings with a professional landlord.
- 5.33 'Advertising' is defined broadly as any form of representation made in connection with a trade, business, craft or profession in order to promote the supply or transfer of a product. Products are defined as goods, services, intangible rights and obligations (such as cancellation rights and cash back offers) and immovable property. The regulations cover advertising as commonly understood, such as broadcast, billboards and print advertising. They also cover other marketing and promotional activities such as oral representations, details in catalogues or websites and descriptions on packaging.
- 5.34 Advertising is misleading if:
- it deceives, or is likely to deceive the traders it addresses or reaches
 - and the deception is likely to affect the 'economic behaviour' of those traders or
 - as a result of the above effect on traders it injures or is likely to injure a competitor in some way.
- 5.35 In the context of lettings, there is scope for misrepresentation about the fees that landlords are to be expected to pay and the level of service they are going to receive. Omission to mention significant relevant information can also make statements misleading even though they are literally true. In the context of letting agency contracts, fees being taken from tenants, or the existence of surprising terms in the contract, could amount to the sort of information which needs to be mentioned to

ensure that statements are not misleading, and should be included in our guidance work.

- 5.36 The BPRs also regulate the use of comparative advertisements, whether addressed to consumers or business or both. A comparative advertisement is one that, in any way, identifies a competitor or products offered by a competitor. In such circumstances it must meet certain conditions in order to be compliant with the regulations. Identifying a competitor or a competitor's product can occur explicitly or by implication.

Unfair Terms in Consumer Contracts Regulations 1999 ('UTCCRs')

- 5.37 The UTCCRs apply in relation to contracts concluded between traders and consumers subject to some exceptions. They require terms in these contracts to be in plain intelligible language, meaning that they must be legible, and set out clearly what the consumer's rights and obligations under the contract are, so that the consumer can understand their nature and effect. Terms should be in plain English, and should not use property-specific jargon or terminology without explanation. Even if a clause would be clear to a property specialist or a lawyer it may be unfair if it is likely to mislead, or be unintelligible to, a consumer.
- 5.38 Terms which describe the main subject matter of the contract and the price or remuneration to be paid, provided they are in plain, intelligible language may only be assessed for fairness in a limited way.
- 5.39 Generally, other terms must be fair, meaning they do not cause a significant imbalance in the rights and obligations of the parties, to the detriment of the consumer, contrary to good faith. The assessment of fairness is carried out having regard to the nature of the goods or services to be supplied, and all the circumstances attending the conclusion of the contract. The term under challenge is considered in the context of the contract as a whole.
- 5.40 Good faith has generally been taken by the courts to represent a requirement of fair and open dealing. It follows from this that the terms

within a tenancy agreement or other contract should be expressed fully, clearly and legibly containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer, who, in the lettings context, may be either a tenant or a landlord. Fair dealing requires that the stronger party should not, whether deliberately or unconsciously, take advantage of the consumer's weaker bargaining position, including his or her needs, lack of resource, lack of experience or unfamiliarity with the subject matter of the contract. Schedule 2 to the UTCCRs contains an indicative and non exhaustive list of terms that may be unfair. An unfair term is not binding on the consumer, and may not be included in a contract, recommended or enforced.

5.41 As indicated above, the OFT has produced guidance on the application of the UTCCRs, as well as specific guidance on the application of the UTCCRs to assured and assured shorthold tenancies in England and Wales, *OFT Guidance on unfair terms in tenancy agreements*. We will be reviewing and updating this document. The current draft includes some examples of potentially unfair terms such as:

- exclusions of the landlord's liability for causing death or personal injury
- transferring the landlord's statutory repairing obligations onto the tenant
- clauses that allow the landlord or his agent to determine whether the tenant is in breach of the contract
- clauses that require a tenant to pay an excessive 'penalty' charge for a breach
- wholly unreasonable restrictions on day-to-day use of the property.

5.42 In our forthcoming guidance we intend to consider in more detail the application of the UTCCRs to issues such as surprising commissions or charges, and exclusions of liability for repairs.

The Supply of Goods and Services Act 1982 ('1982 Act')

5.43 This Act implies terms into contracts for the provision of services. It is important to consider this law because these contracts would include a contract for a letting agent's services (to a landlord or a tenant) as well as a tenancy, under which one of the parties agrees to provide services. The Act implies a term that the service will be carried out with reasonable care and skill and within a reasonable time, unless agreed otherwise.

6 TACKLING THE ISSUES

- 6.1 In this chapter we set out how we think the market could work more efficiently in the current legal framework. We do not set out our thinking on what is required by the law as such, but rather set out what we think would make the market work well having regard to the potential for the law to assist that objective. We consider that improved compliance with existing legislation, in particular consumer protection type legislation would help to improve the overall functioning of the market, and deal with a number of the issues identified in the complaints material. In addition some aspects of the legal framework mean that there are risks to professionals depending on how they act.
- 6.2 This chapter is of most relevance to policy makers, and those who want to be involved in the discussions around the future of the lettings market. It is not designed to provide guidance to individual professionals or consumers as to what their rights or obligations are.
- 6.3 It is important to note therefore that **this chapter in particular should not be taken as our guidance as to how we think professionals in this field are required to act** and this report should not be used to assist interpretation or compliance with the law. Only a court can state what the law requires, and anyone who is concerned about whether practices are in accordance with the law should seek independent legal advice.
- 6.4 In relation to those areas that we enforce (primarily CPRs, BPRs and UTCCRs) we will produce guidance on how we think the law applies to the activities of both letting agents and also landlords. We will also update our existing *Guidance on unfair terms in tenancy agreements* document. We are interested in stakeholders' views as to the content of both of these documents as the main aim of this guidance will be to help letting agents and landlords comply with the legislation that we enforce.
- 6.5 This chapter of the lettings report gives an indication of our initial views on the **type of issues** that such future guidance could cover, but as highlighted above, it **should not** be considered to be guidance itself.

- 6.6 This report generally works from the assumption that a letting agent is involved in the marketing and/or managing of properties. However we are aware that there are many instances of landlords advertising and/or managing their own properties without an agent's assistance. We think that this report is relevant to the issues that arise in this context as well, in that the same consumer protection legal framework generally applies to landlords as it does to agents, in addition to the laws that specifically apply to all landlords.
- 6.7 In this section we set out our thinking specifically on the problems identified in the Intelligence Report and subsequent stakeholder feedback. For each of the issues identified we set out the 'OFT view' and 'Legal risk to professionals', and we explain below the purpose of providing these two perspectives.
- 6.8 To do this we have structured our views in line with the four main stages in which tenants and landlords interact with agencies as highlighted in the flowchart in Chapter Three.

Stage 1: Agents' interaction with landlords from marketing their services until signing a contract with an agent.

Stage 2: Agents' interaction with tenants and landlords from marketing the property until the start of a lease.

Stage 3: During the life of a lease.

Stage 4: At the end of the lease.

- 6.9 Problems have been linked to a particular stage on the basis that tenants or landlords encounter difficulties and report problems at that time.
- 6.10 Our overall conclusion is that pre-contractual conduct is key in preventing problems which are reported as occurring later in the process.

6.11 A summary of the issues covered at each stage is shown in the table below.

Table 6.1 – Summary of issues

Stage	Issue/problem
One	<ul style="list-style-type: none"> • Unclear pre-contract information • Landlords knowing what fees charged to tenants • Surprising fees charged to landlords • Lack of clarity about the nature of the service on offer
Two	<ul style="list-style-type: none"> • Unexpected charges to tenants • Excessive fees to tenants • Pre-tenancy checks • Guarantor requirements • Agents retaining pre-tenancy holding deposits • Failure or delay in the agent finding the tenant a property • False information in advertising • Fraudulent activity and rent scams • Agents not using a tenancy deposit scheme
Three	<ul style="list-style-type: none"> • Landlords charged surprising fees • Surprising commissions • Agents providing landlords with a poor service • Delayed or substandard repairs by the landlord or agent • Surprising charges to tenants after the lease is signed • Harassment of the tenant • Agents not contactable or gone out of business • Unfair Business practices by agents

Stage	Issue/problem
Four	<ul style="list-style-type: none"> • Surprising termination fees charged to landlords • Disputes about notice periods • Agents' non refund of security deposit

6.12 The OFT's analysis in relation to each key area of complaint is summarised in this document (under the title '**OFT view**'), together with some discussion of relevant laws (including those enforced by the OFT) under the title '**Legal risks to professionals**').

6.13 Our analysis under **OFT view** includes, as appropriate, economic analysis and identifying the practices that we consider would be found in a well functioning market. It is not a legal analysis and should not be viewed as providing guidelines to help compliance with the law. When we go on to draft our Guidance, we will consider the detailed relevance of the legal provisions discussed under the title Legal risks to professionals. As drafted our comments here are not intended to be a definitive or exhaustive list of the areas of law which professionals in the lettings market should be aware of nor do we attempt here to lay down guidelines as to when an offence or breach of the civil law could arise.

6.14 Some, but of course not all, market problems could be alleviated by empowering landlords and tenants so they feel confident in their dealings with letting agents. There are some key points landlords and tenants could bear in mind, and questions they could ask as set out in the sample 'quick guides' we have included at Annexe A.

Stage one: Agents' interaction with landlords from marketing their services until signing a contract with an agent

Unclear Pre-contract information

- 6.15 Our analysis of complaints shows that very few issues are actually reported by landlords as being problematic at this stage. Usually, it is only after landlords have signed a contract with a letting agent, or after a landlord has found a tenant themselves, that problems come to light. The complaint evidence that we have analysed illustrates that most difficulties arise once the property has been let to a tenant or when the landlord wants to renew or terminate a contract with the agent.
- 6.16 However, as discussed earlier in Chapter Three, landlords may find it difficult to assess the quality of a letting agent's service before contracting with them and may only be able to assess their quality once a problem arises. Therefore, competition between letting agents at the pre-contract stage may not ensure that landlords will enjoy a high quality of service after signing a contract with a particular letting agent. This also underlines why it is so damaging for landlords when problems do arise later: they may be locked into a contract with the agent that it can be costly and time-consuming to get out of.

OFT view

- 6.17 In a healthy lettings market, we think that providing landlords with clear and easily understandable information about what service the agent proposes to provide and how much the landlord is going to pay (for example in marketing and sales documents and brochures provided by agents) before they sign a contract with a letting agent would help to prevent many of the problems (legal or otherwise) which are reported as occurring later in the process. It would also assist landlords to find an agent that is right for them, by enabling them to compare the services offered by different letting agents.

Legal risks to professionals

- 6.18 Failing to provide pre-contract information in a clear, understandable manner may have undesirable legal consequences for the agent. When developing our proposed guidance we will explore the relevance of, in particular (a) the UTCCRs which require that written terms are in plain, intelligible language and under which terms in a contract may be unfair, and therefore not binding on a consumer, and (b) the CPRs, which prohibit misleading omissions and statements. Where the landlord is a business, the BPRs and general contract law apply to their dealings with a letting agent, to provide protection comparable to, but more limited than, that which safeguards consumers

Fees charged to tenants

- 6.19 Our evidence shows that landlords consider they tend to have insufficient information about the fees the agent intends to charge the prospective tenant, for example for carrying out pre-tenancy checks or for conducting visits. There is also a risk that agents might not tell landlords they are intending to offer any other paid-for services to tenants, or may receive commission for services that may be provided by third parties to the tenant.

OFT view

- 6.20 The nature of this market means that agents might make charges to both tenants and landlords. This creates a potential conflict of interest, where it is not transparent, in particular because the landlord expects the agent to be acting solely in the landlord's interest. The landlord is likely to be interested in any sums of money that the agent is charging potential tenants, because such fees could dissuade tenants from renting the landlord's property and also because this information is likely to influence the landlord's assessment of how much he is willing to pay the agent. We think therefore that it would be best for agents to make all such fees transparent.

Legal risks to professionals

- 6.21 We consider there are legal risks for agents in not informing the landlords they are working for about the level of the fees they are intending to charge tenants. One of the issues we may particularly consider in preparing guidance is whether and in what circumstances such an omission could be considered to constitute a misleading omission, or be misleading to business.
- 6.22 It may also be noted (although this is mainly relevant to private law rather than consumer enforcement work) that under English common law, agents owe duties to the landlord they are working for, including the duty not to put themselves into a position where their interests are in conflict, to disclose all material facts to the landlord, to refrain from divulging confidential information to third parties (such as potential tenants) and not to make any secret profit, but to account for any money belonging to the landlord that is under the agent's control. More information on this is included in Annexe C.

Surprising fees charged to landlords

- 6.23 The complaint evidence demonstrates that landlords are not always aware that the agent may not offer simply a tenant-finding service but may require the landlord to pay for a minimum additional service of rent collection over the lifetime of the tenancy, or other commissions. Further, where the terms offered by agents vary, landlords may not always understand the precise nature of the obligations in the contract and in any other documents presented to them at the time of negotiations.

OFT view

- 6.24 In our view, we think this problem arises because agents do not draw attention (or draw insufficient attention) to these charges either in the contract documentation or in promotional brochures and advertising.

- 6.25 The fees that the landlord pays to an agent are a very important part of the contract. In a healthy lettings market, agents would make clear what they are expecting to be paid and for what. As we set out in Chapter Three of the report, the ability of landlords to compare the overall costs of renting their property through an agent, through comparing the fees and services offered by different letting agents, is reduced if fees are not made clear up-front. This may reduce the effective competitive pressure on fees that are not clear up-front. Even if these additional charges did not impact on the search activities of landlords, the complaint data shows that landlords often feel frustrated and disappointed due to incurring charges which they did not expect but cannot be avoided once a contract has been signed.
- 6.26 Therefore, we think that the market works best if fees are brought to the landlord's attention early on in the process, and well before they are presented with the agency's contract for signature. We also think the complaints evidence is consistent with the view that fees that are dispersed throughout the contract are often hard for landlords to assess and understand. We consider that in order to avoid problems of all kinds, legal and otherwise, these fees ideally should be set out and described in a straightforward, easy to read tariff of charges that is given to prospective landlords with the agent's promotional material.
- 6.27 Where charges are relatively onerous, greater clarity is particularly desirable. Onerous charges include those that operate on a mandatory and continuing basis, such as renewal commission, and so called third party renewal commission. Similarly concerns will be greater where charges, though operating on a one-off basis, are particularly large, as in the case of 'sales commission' clauses, under which landlords are required to pay an estate agency fee if they sell the property to the tenant.
- 6.28 In terms of how far it is desirable to highlight or 'flag' any particular charges, it is likely that greater clarity is needed the further the charge is from the forefront of the consumer's mind when contracting with an agent. It is likely that the landlord will be focusing most on the main fees directly payable if and when a property is let for example. The landlord is

likely to focus less on ancillary charges (see below), and charges that operate on a future contingency, as renewal commission does, particularly where the contingency involved may be only a remote possibility at the time of contracting, such as sale to the tenant.

Legal risks to professionals

- 6.29 Amongst the issues we may particularly consider in preparing guidance is how far, and in what circumstances, there are specific legal risks for agents who do not take steps to highlight or 'flag' (as described above) certain kinds of charges.
- 6.30 Our guidance will make reference to the High Court decision in *Foxtons*⁹² which shows that, at any rate where agents deal with customers who may not all be traders or professionals, there is potential for risk in relation to the UTCCRs. We talk more about these fees under stage three of the process below. There are also particular issues to be considered in connection with termination charges and this is covered in more detail in stage four below.
- 6.31 We also think it will be appropriate for us to consider in our guidance whether failure to flag such charges could constitute a misleading omission. There is clearly wider legal risk, even where consumers are not involved, having regard to the ordinary law of contract, or the BPRs, in practices involving hiding or concealing the fact that the service on offer involves mandatory ongoing charges at all.
- 6.32 Legal risks may also arise from a situation where the agent gives the impression that their service is focused on 'finding a tenant' when in fact they wish to charge fees that fall due after the initial creation of the tenancy.

⁹² *OFT v Foxtons Ltd* [2009] EWHC 1681 (Ch) and the OFT's webpage on our work www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/foxtons/

Nature of the service on offer

- 6.33 Our analysis of the complaint evidence reveals that it is not always clear to landlords (or tenants) what level of service the agent is going to carry out for the headline price agreed, and what will be done only for an additional fee. Examples of additional fees we have seen include those for providing a lease, call out charges, serving notices, drafting a memorandum of renewal, and handling a security deposit.

OFT view

- 6.34 In many markets we have seen that the use of dripped prices (where the whole amount the customer will pay is spread out into smaller sums revealed over time), has a number of consequences for customers (such as tenants and landlords). This is discussed more fully in Chapter Three.
- 6.35 Dripped prices are harder for customers to assess and consumers may overly focus on the price that they receive up-front and which they believe is most important. In such circumstances, consumers' reassessment of value based on additional fees is likely to be impaired. Therefore, additional fees charged by letting agents, which are not presented up-front, may not be exposed to effective competitive pressure. Consequently people may end up paying more than they expected, or wanted to, and may not get the deal that is best for them.
- 6.36 The effect of dripped pricing is worse where the service on offer is described in a way that misleads the customer about what they are going to get, or where any 'headline' fee itself is described in a way that suggests it is inclusive. For example, if a letting agent describes their service as 'full management' for a stated percentage fee, landlords may reasonably expect this to cover call outs, inspections and similar, as well as the provision of the lease itself. They may not reasonably expect to find these charged for separately or the additional charges spread out throughout the service agreement.
- 6.37 Where a service is described in a misleading or inaccurate way, this is likely to mean that the landlord may not get the product that they think

they are contracting to get. This will impede the operation of the market, since, in such circumstances, the landlord might have decided to purchase a different product, or to negotiate on the price. For example, if an agent charges a fee for 'drawing up' a lease for the landlord, it may be that the landlord would be likely to expect this to be a lease which reflected their particular instructions and preferences, rather than a standard lease that the agent simply prints off, particularly when 'the print out' does not reflect the landlord's requirements. The landlord may be willing to pay a certain amount for one kind of service but not as much for another. Similarly, where the agent charges a fee for 'familiarisation' with a lease that the landlord supplies, we think that landlords may reasonably expect some actual familiarisation by the agent to take place.

Legal risks to professionals

- 6.38 As indicated above not giving due prominence to charges is an area that we will consider further in the context of devising guidance. Including considerations of the UTCCRs, we will consider for guidance the issue of a surprising ancillary charge, which may be buried in small print in a contract concluded with a consumer and letting agent. This is a fact sensitive issue – that is, it would be considered by a court in all the circumstances of the particular case. In relation to complaints about not appreciating the nature of the charges or services, we will also consider the potential applicability of the BPRs to agent's dealings, when only business landlords are involved, and the separate criteria (for example, misleading actions or omissions) under the CPRs.
- 6.39 The way a service is described is likely also to be relevant to any assessment that may need to be undertaken during or after the currency of the contract, for instance in the context of a dispute, as to whether the agent has provided the service in accordance with the contract, and with reasonable care and skill under the 1982 Act.

Stage two: Agents' interaction with tenants and landlords from marketing the property until the start of any lease

6.40 Our Intelligence Report and feedback from stakeholders identify that the main issues reported by tenants at this stage are:

- unexpected or excessive fees (1), (2), (3), (4)⁹³
- failure or delay in agent finding the tenant a flat/house (11)
- advertising misrepresentation/providing false information (17)
- rent scams/fraudulent activity (19)
- agents not using a Tenancy Deposit Scheme (13).

Unexpected charges to tenants

6.41 Our Intelligence Report shows that almost 10 per cent of all reported complaints analysed relate to agents/landlords charging tenants fees they didn't expect to pay. Many of these relate to **drip pricing** of charges before a tenant moves into a property, although they also occur during, and at the end, of the lease.

6.42 The Intelligence Report provides specific examples of the types of problems tenants encounter to do with fees and charges.⁹⁴ In summary, they include things such as:

- issues around 'drip pricing' by agents

⁹³ Including the following: agents charging tenants a fee they didn't expect to pay (1), agents retaining pre-tenancy holding deposits (2), tenants requesting advice about fairness of charges (3), excessive charging for services for example, reference/credit checks (4). Consumer Direct was also contacted by tenants seeking advice on whether a fee was considered to be fair. Whilst these may be enquiries rather than complaints, it indicates that tenants are surprised by fees and are not clear on what charges they are expected to pay.

⁹⁴ See Intelligence Report complaint types (1), (3) and (4)

- hidden fees and charges in the small print of contracts
- queries about the size of fees in the main contract or lease
- fees that appear to lack purpose and which the tenant finds surprising or hard to understand
- high charges before the start of the lease such as for credit checks
- guarantors' requirements are not reasonable or transparent.

6.43 Some complaints, such as those about unexpected or excessive charges also become apparent once a tenant has started renting a property and could also be included in stage three below.

6.44 In addition to the rent they pay, tenants may incur a number of charges during the lifetime of the tenancy agreement. These include holding deposits, pre-tenancy checks, registration fees, administration fees, check in fees, deposit handling fees, tenancy agreement fees, renewal fees, check out fees etc. These additional fees may be presented to the tenants after they have already been presented with some up-front fees. As noted above, this is known as drip pricing. The amount of transparency generally given to these fees appears to vary.

OFT view

6.45 A lack of transparency about the fees a letting agent will charge tenants may mean that these fees are not exposed to effective competitive pressure. In addition, tenants are likely to be relatively less sensitive to fees if these are presented after they have informed the letting agent or landlord that they would like to rent a particular property (and have possibly paid a holding deposit). Therefore, a tenant may take a property or enter a contract to find a property with a letting agent, when they would not have done so if they had been able to compare up-front the total costs of entering contracts or renting properties from different letting agents.

- 6.46 The OFT has previously considered this issue in its study on the advertising of prices,⁹⁵ and its response to the Which? super-complaint on payment surcharges.⁹⁶ The OFT considers drip pricing to be a harmful pricing practice, because of the increasing commitment a person feels as they progress through the shopping process. This commitment, and the potential harm, is increased if they have already incurred costs or contractual liabilities.
- 6.47 Tenants may sign up with, or search for properties listed by, several different local letting agents. This means that, if charges are not transparent and upfront, tenants will find it hard to compare the actual cost of renting different properties, where agents charge different sums.
- 6.48 We think that the market would work better if agents and landlords were much clearer, up front, with tenants about how much the tenant will be charged, and what the charges are for. Ideally all mandatory fees would be included by all agents in the advertising of the property along with information about rent and security deposit.
- 6.49 This optimal position would enable tenants to assess the amount of money required to rent a particular property, meaning that they are more likely be able to make informed choices about which property to rent. Our concerns are not limited to the unfair effect on individual consumers of having to pay more than they expect. Such charges can also reduce the beneficial effects of competition on prices overall because consumers cannot easily compare prices, thereby reducing the business 'incentives' to offer lower prices overall.

⁹⁵ This study is available at www.offt.gov.uk/shared_offt/market-studies/AoP/OFT1291.pdf

⁹⁶ *Payment Surcharges – Response to the Which? Super-complaint*, July 2012

Legal risks to professionals⁹⁷

- 6.50 Private residential tenants are likely to be consumers in almost all circumstances for the purposes of the CPRs and UTCCRs. If they are presented with misleading pricing information or charges, the agent or landlord who is advertising the property risks infringing the CPRs' misleading action and misleading omission provisions. This is clearly a fact sensitive issue – whether any breach of law occurs will depend on all the circumstances. When drafting our guidance, we will consider the risks of agents breaching the CPRs (and other legislation that we enforce) if they do not provide in an appropriate and timely manner charges, in addition to rent, which tenants will be required to pay in order to rent the property.⁹⁸

Excessive fees

- 6.51 Fees that tenants complain of as surprisingly high include fees to register with an agent, reference and credit check fees, as well as cleaning and check out fees. Often it appears to be unclear to tenants what actually the agent does for the money, or why the fee is at a certain level.
- 6.52 Sometimes provisions for payments are contained in the tenancy agreement itself. Tenancies also often contain restrictions on the use the tenant can make of the property, or lay down rules about how the tenant must treat the property.

⁹⁷ This section discusses some of the consumer law provisions enforced by the OFT. It is important to bear in mind that in Scotland all charges to tenants, except rent and refundable security deposit, have been prohibited.

⁹⁸ It is relevant in this context to consider the Invitation to Purchase provisions of the CPRs, which deem certain pricing information to be material, where advertising or some other commercial communication indicates characteristics of the product and the price in a way that enables the consumer to make a transactional decision for example, to decide whether they wish to rent a property. The information required, subject to context considerations, includes price information.

OFT view

- 6.53 Some of the surprise tenants feel is probably because they were not given adequate notice of a charge in good time up front. In other cases, it is because the fee appears to the tenant to be simply too high. This might in itself be an indication of failures in the market, for instance, that there may be insufficient competition on such charges, perhaps partially due to lack of transparency or, because of the nature of the charge (for example, it is too remote or is contingent upon the occurrence of some future event), the tenant did not take it into account when deciding to rent the property.
- 6.54 In a healthy lettings market, we consider that it would avoid problems of all kinds, legal and otherwise, if agents and landlords take the time to explain fully what charges are for, and what work they are actually going to do for the money. Being clear about this reassures tenants that the money is well spent, and also facilitates competition if the fee is indeed higher than other professionals might be charging.
- 6.55 The transparency of terms is relevant in particular where charges are applied after the conclusion of the contact. Where charges are surprising or unduly high, we think it is likely to be a problem where they are not set out transparently in the contract. In our market study on *Consumer Understanding of Contracts*, we said we were concerned about 'complex, deferred or contingent charges exceeding efficient costs'. Consumers expect firms to make money on the main elements of the deal and not to profit from small print charges.⁹⁹ From a market perspective, we are concerned not just because high charges contained in the small print may cause hardship to vulnerable consumers, but also because these charges are unlikely to be subject to effective competition, and they may be an attempt to profit by hiding the term from consumers.¹⁰⁰ Further, especially where information is revealed late

⁹⁹ OFT1312 p8

¹⁰⁰ See OFT 1312 paragraphs 3.4 to 3.17 and 5.15 to 5.18 (and especially 5.16)

in the sales process, consumers often find it difficult to process cost figures appropriately.¹⁰¹

- 6.56 In our view the fact that charges may be contained in a tenancy or other contract does not necessarily resolve these market problems, if they are not set out clearly up front. This is because consumers often do not read contracts, either because they expect them to be simply 'standard' contracts, or because they feel under pressure not to read the contract.¹⁰² We think it is therefore reasonable to work on the assumption that tenants in general are unlikely to study the terms of the lease in great detail.
- 6.57 As explained elsewhere, we believe that in an ideal market, post contract fees would be given prominence and would also ideally be set out in a clear tariff of charges which would be supplied to the tenant as soon as possible, for example with the particulars of any property.
- 6.58 For some charges however, it is our view that steps to improve transparency alone may not ensure that they are subject to the correcting forces of competition, and so they may remain disproportionately high. This could be for instance, where, at the time of entering a contract, the charges are difficult to predict by virtue of their remoteness or because they are incurred on the occurrence of some future event which may or may not take place.

Legal risks to professionals

- 6.59 In the case of registration fees, it is relevant to note that the Accommodation Agencies Act 1953 makes it an offence to demand or accept money for registering the name or requirements of anyone

¹⁰¹ See OFT1312 paragraphs 3.31 to 3.49

¹⁰² See OFT 1312 paragraphs 3.20 to 3.30

looking to rent a property. It is also an offence to demand or accept money for the supplying the details of the property.¹⁰³

6.60 How the CPRs and UTCCRs apply to post contract charges to tenants, such as renewal fees, check out fees and cleaning fees, is a matter that we intend to consider in more detail when formulating guidance. For example we will consider the misleading actions provisions of the CPRs, in the context of an agent describing what services they are charging for, or relevant features of the property and the misleading omissions provisions of the CPRs, which are relevant where charges are not given sufficient prominence, and the UTCCRs, which can apply to charges contained in small print, and which provide that unfair terms are not enforceable against consumers.

6.61 We note at this stage however that the OFT has produced guidance on fairness of terms in tenancy agreements, which is designed to help landlords and letting agents to meet the requirements of those Regulations.¹⁰⁴

Pre-tenancy checks

6.62 A particular charge that appears to be quite frequent is a fee the agent asks the tenant to pay in order to check their suitability to rent the property. This is a service that the agent carries out to discharge their

¹⁰³ See section 1(1)(a) and (b) to the 1953 Act. Note that the 1953 Act has been specified as being covered by the domestic infringement provisions contained within Part 8 of the Enterprise Act.

¹⁰⁴ www.offt.gov.uk/OFTwork/publications/publication-categories/guidance/unfair-terms-consumer/oft356 See for example paragraph 3.58 on disguised penalties, and paragraph 4.7 where unreasonable and unexpected charges are covered ‘... But terms that themselves directly impose charges may be open to objection, if through lack of reasonableness and transparency, they too can result in unanticipated financial burdens for tenants. We do not regard ancillary payment obligations as transparent unless either they conform to what a reasonable person would expect to find in a tenancy agreement or they are drawn as clearly and fully to the tenant’s attention as the obligation to pay rent itself – that is, rather than appearing ordinary in the body of the contract.’

duty to the landlord to ensure that they only select suitable tenants, rather than a service that is primarily for the tenant's benefit.

OFT view

- 6.63 Fees in respect of references and credit checks appear to vary significantly between agents, and this may be indicative of a problem in the market. In principle, we can see that the quality of pre-tenancy checks, and the databases upon which they are based, could vary. A more thorough check could cost more than a less detailed check. Different landlords could have different requirements (for example some landlords may not want, or be able to let to, tenants on housing benefit, and special checks may be needed if a tenant is coming from abroad).
- 6.64 Ultimately we believe that what the landlord wants is a tenant who pays their rent and adheres to the covenants in the tenancy agreement. Identifying such a tenant depends to some extent on the quality of the information that the agent accesses to carry out the pre-tenancy check. Similarly, it is in the tenant's interest to know what databases the agent is searching, so that they can check that the information about them is accurate.
- 6.65 Therefore we would not say that all pre-tenancy checks should necessarily be the same price. However in order for there to be a healthy market in which all customers can make genuine choices, we think it is important that agents are clear with landlords and tenants about what exactly they are going to check for, and provide information about the databases used.
- 6.66 However it is not clear to us that the divergences in charge for pre-tenancy checks necessarily arise from any real distinction in the quality of service provided, in every case.
- 6.67 First, where charges are revealed to tenants some way into the letting process, there may not be effective competition on the fees, perhaps by that stage the tenant is already committed to the transaction.

- 6.68 Second, where landlords or tenants do not have a clear idea of what the agent actually does for a pre-tenancy check, it is likely to be difficult for them to judge what the appropriate price might be.
- 6.69 Third, there may not be effective controls on the amount of the charge, because the interests of the landlord, tenant and agent are not aligned in this matter. While the landlord may prefer a rigorous check, there is reduced likelihood of close supervision of the quality of the check where the landlord does not pay, or where the landlord is not able easily to identify the steps the agent proposes to take. Where the landlord does not know how much the tenant is paying, this could also hinder an assessment of quality, since to some extent the level of the charge could be taken as a proxy for the quality of the check. The tenant is also unlikely to be able to act as a restraint on the level of the price, because the check operates as a hurdle that they must overcome in order to rent the property they want, and therefore the tenant has a very weak bargaining position. Since neither the tenant nor the landlord is in a position to control the price of the check, the agent may have a strong incentive to profit from it.
- 6.70 With a focus upon market considerations, we think that there would be greater competition on pre-tenancy check fees if these were disclosed by all agents up front to tenants, as we suggest in our comments on drip pricing. While tenants are not likely to be able to shop around for a different provider of this service alone, it is an important component of the total cost to the tenant in securing a property. This means that, if one agent charges a high sum to carry out pre-tenancy checks, tenants might decide to choose a property being marketed by a different agent.
- 6.71 We also think that there may be more fundamental problems with the way that pre-tenancy checks are conducted and paid for, which we think that government and the industry should give further thought to. In terms of the way the market could work, it seems to us that it may be more efficient and reduce costs all round if tenants were able to supply certain key information about themselves. This is especially so if this information is all the agent is going to look at, for example a certified copy of a passport and an up to date credit reference agency file print

out. It seems to us that this may also assist tenants to shop around across agents. We think that the industry should give more thought to whether pre-tenancy checks could be standardised more, so that tenants can self certify more, and can make use of a check by one agent if they wish to shop with a different agent as well.

Legal risks to professionals

- 6.72 Transparency issues regarding the provision of information to tenants (for example, in the context of the CPRs) and landlords (for example, in the context of the BPRs and CPRs) on pre-tenancy checks is an issue that we will consider further in the context of our proposed guidance for letting agents. Issues that we think may be important to consider further include statements made to landlords or tenants about the need for or quality of a reference check as well as statements made to landlords that they will find a good quality tenant. The application of the law in such cases will be clearly fact sensitive.

Guarantor requirements

- 6.73 Sometimes landlords or their agents ask for a guarantor to sign the lease in order to let to a particular tenant. This is likely to be where there is a risk that the tenant will for some reason be unable to pay the rent. We have seen complaints by guarantors that they feel they are being pursued aggressively by agents for payments of rent.

OFT view

- 6.74 In principle we think that in a healthy market, it would be best practice to require a guarantor as a last resort, rather than a routine requirement. However, where a guarantor is added to a lease, it is an important obligation. Our complaint evidence indicates that not all guarantors appreciate all of the implications of being a guarantor.
- 6.75 Taking a common sense approach to the market, we think this highlights the fact that statements that agents make to potential guarantors are likely to be important, so that they understand that they are taking on

full responsibility for the payment of rent, and may be pursued for payment if the tenant falls into arrears, and they are not under the impression that being a guarantor is merely a 'formality' or similar.

- 6.76 One of the issues that we want to discuss with interested parties in the context of our sample 'quick guides' for tenants is how better use of information sources could help tenants and their guarantors to have a clearer awareness of what this role entails.

Legal risks to professionals

- 6.77 In our proposed letting guidance we will consider the applicability of the legislation that we enforce in the context of letting agents' conduct regarding guarantors including the provision of guidance on possible breaches of the CPRs, particularly in the context of where the guarantor may be misled.

Agents retaining pre-tenancy holding deposits

- 6.78 Agents and landlords often require a 'pre-contract' or holding deposit to reserve a property. Agents usually agree to take a property off the market in exchange for this fee and, in some instances, it is also used to undertake reference and credit checks. Reported problems include:¹⁰⁵
- lack of clarity about what the pre-tenancy holding deposit is for
 - agents making misleading verbal statements about the circumstances in which the holding deposit will be returned
 - unreasonable refusal to refund the deposit.

¹⁰⁵ See Intelligence Report complaint type (2)

OFT view

- 6.79 As shown in Chapter Three a holding deposit may be useful in the market to signal to the letting agent/landlord that the tenant has a genuine interest in renting the property, and that therefore it is safe to stop marketing the property to other prospective tenants. This can, therefore, have benefits for tenants, landlords and letting agents.
- 6.80 However, as discussed previously, tenants can be negatively impacted if in fact a holding deposit may be taken from more than one prospective tenant, and the tenant was unaware of this. In these situations, even if the tenant passes all pre-contract checks, the property may be allocated to another prospective tenant who similarly paid a deposit. The tenant that did not receive the property may experience significant disappointment and inconvenience, for example if they had stopped looking for a property.
- 6.81 The complaint evidence indicates that there may sometimes be a lack of clarity regarding the circumstances under which the holding deposit will be refunded and what the deposit is for. For example, it is not always clear to tenants how deposits are calculated, or on what basis a proportion or the whole of the deposit is retained if the tenant decides not to proceed with the letting.
- 6.82 Leaving aside consideration of any legal obligations, we think that the market works best where agents make clear as soon as possible up front what any holding deposit is for, how much it is and in what circumstances it will be refunded, so that tenants can make genuine choices about whether to pay it, or to go to a different agent.
- 6.83 Again without considering for our purposes here what the law may or may not require, we do not think it is generally good practice to take a deposit before the tenant has had a chance to view the property, but if a deposit is taken, we think that it is best if it is fully refunded if the tenant decides not to proceed following the viewing. This will help to

ensure that the tenant is free to look for another property and therefore assist competition in the market.¹⁰⁶

Legal risks to professionals

- 6.84 In our proposed guidance, we intend to consider compliance issues relating to the taking of and return of holding deposits. We will consider for instance the applicability of the UTCCRs, CPRs and the Accommodation Agencies Act 1953,¹⁰⁷ to the practice of taking holding deposits.
- 6.85 In our guidance on unfair terms in tenancy agreements we have already considered some of these issues. The current draft states that contract terms may be considered unfair if provision is made for holding deposits to be 'non refundable' in any circumstances (see paragraph 3.41).
- 6.86 This piece of guidance also sets out some of the factors that landlords and agents should bear in mind when deciding whether a deposit is refundable, such as whether it is designed to compensate them for an actual loss caused by the tenant (such as where the tenant has withdrawn at a late stage or has given false or misleading information).¹⁰⁸
- 6.87 When discussing terms that potentially unfairly allow the supplier to cancel without a refund,¹⁰⁹ this guidance provides that where there has been no breach of the agreement by the tenant and it is the landlord

¹⁰⁶ There may be special considerations where a tenant is moving from overseas, and therefore has no chance to view the property before attempting to secure it with a deposit.

¹⁰⁷ The 1953 Act has been specified as a domestic infringement for the purposes of Part 8 of the Enterprise Act 2002

¹⁰⁸ See the OFT's *Guidance on Unfair Terms in Tenancy Agreements* (OFT356) para 3.42-3.43

¹⁰⁹ Schedule 2, paragraph 1 (f) of the UTCCRs states that terms may be unfair if they have the object or effect of '... permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract.'

who chooses not to proceed with the tenancy, for instance where the tenancy does not go ahead because the tenant fails the verifying or screening process used by the landlord or agent, then terms are under strong suspicion of unfairness, if they do not make provision for all pre payments to be refunded in full.

6.88 This is because landlords or agents have very wide discretion in deciding who to let their property to and therefore there is scope for them to enjoy unlimited discretion to refuse the tenancy, and so to unfairly retain the deposit. The guidance states, '... we would expect there to be a full refund of all pre-payments where there has been no breach of the agreement by the tenant and the landlord chooses not to proceed with the tenancy, whether or not the landlord views the tenant's references as satisfactory' (paragraph 3.69).¹¹⁰

6.89 As we have already said, this Guidance will be reviewed and updated, but the text illustrates what we have said about these issues.

Failure or delay in agent finding the tenant a flat/house

6.90 The issue here is where the property is not ready on an agreed date and who should take responsibility for this. Examples of difficulties tenants experience include:¹¹¹

- agents make promises to the tenant but then fail to provide a property
- delays in properties being ready for occupation on an agreed date.

OFT view

6.91 We think that the market works best when statements that the landlord or their agent makes about the date on which the property will be ready

¹¹⁰ See OFT 356 paragraphs 3.68-3.69 & 3.41-43

¹¹¹ See Intelligence Report complaint type (11)

are considered carefully and are based on a genuine assessment of what is likely to happen.

- 6.92 Sometimes circumstances arise whereby the property is not ready on the agreed date, perhaps because refurbishment works are delayed or there are problems with existing tenants leaving. We think that a key starting point to helping solving problems of all kinds (legal or otherwise) is for good communication between the agent and the tenant. However there may be occasions where this is not sufficient, for example where the tenant is moving out of somewhere else, and where therefore the tenant suffers financial loss, as well as significant inconvenience if the move in date is delayed.

Legal risks to professionals

- 6.93 With reference to the CPRs and UTCCRs, we will consider further the issues of making false statements (for example about the availability of the property, or the tenant's rights if it is not ready) and of the inclusion of terms that could change the normal position seen by the law (such as where one party is in fundamental breach of contract).

Advertising misrepresentation/providing false information

- 6.94 Complaints on this issue arise both before a tenant moves into a property, and once they have taken possession. Problems encountered include:¹¹²
- Advertising descriptions that may mislead through false descriptions, for example property location, room size, furniture included.
 - Advertising the rent at a lower rate than that actually charged.

¹¹² See Intelligence Report complaint type (17)

OFT view

- 6.95 Before signing a tenancy agreement we think it is likely that prospective tenants would most usually inspect the property and satisfy themselves that the state of the property meets their requirements. However there may be circumstances where the tenant does not do so, such as where they are relocating from some distance away, or they are a student with a limited opportunity to inspect the property prior to signing a lease.
- 6.96 Putting aside any legal considerations, we consider that to describe the property in an inaccurate or otherwise misleading way is poor practice and could harm competitors, since such descriptions could act as a 'hook' to get potential tenants to the agent, for them then to be shown other properties instead.
- 6.97 The sorts of actions that could interfere with the market include:
- Descriptions of the property that are inaccurate, or which do not include information potential tenants need.
 - Mistakes in advertising about the amount of the rent, or whether the property is furnished.
 - Excessive use of small print or other qualifying statements, which contradict headline claims about the property.
 - Statements given about the property in response to specific queries the tenant may make, but which are not true.
- 6.98 What we think best enables the market to work well is where the whole of the property and common parts are available for inspection to potential tenants, with any defects or other factors that could have an impact on their decision to rent the property being apparent rather than concealed.

Legal risks to professionals

- 6.99 The CPRs prohibit traders from using unfair commercial practices to consumer including those occurring before a contract has been made. Such practices include misleading omissions and actions that either do or are likely to cause the consumer to take a different decision. In addition advertisements that are inaccurate could be the subject to ASA adjudications.
- 6.100 We will go into more detail on what we consider to be misleading in advertisements in our guidance on the sector.

Rent scams/fraudulent activity

- 6.101 There are cases of tenants (and landlords) paying money to people purporting to be genuine letting agents, only to find they are fraudsters who fail to provide any service whatsoever. The most common problems are online advance fee frauds where nonexistent properties are offered for lease and prospective tenants are asked to wire deposits via money transfer agencies.¹¹³

OFT view

- 6.102 We think that these types of complaints underline the importance reliable and accessible means for landlords and tenants to assess quality up front – such as codes of conduct which provide protection of client money when things go wrong. This requires code logos to be sufficiently policed so that they are not used by non-members, lists of members to be accessible to the public and members to adhere properly to the requirements of the codes they have signed up to.
- 6.103 However where the levels of cover offered by the different schemes differ, landlords and tenants may not be clear enough on what protection they have. One of the issues that we want to discuss with interested

¹¹³ See Intelligence Report complaint type (19)

parties in the context of our 'quick guides' for tenants and landlords is how better use of information sources could help tenants and landlords understand and compare different codes. More information on such schemes and codes can be found in Annexe B.

- 6.104 We also think there are important messages to flag to tenants around being cautious when dealing with an agent or landlord if they have not physically seen the property that is said to be available. For example, in our sample 'quick guide' for tenants we have flagged a message about tenants not sending money to people they don't know. This is the sort of message we want to discuss with interested parties in the context of our 'quick guides', so we and other stakeholders can help protect tenants from being exposed to unnecessary risks in this area.
- 6.105 Additionally, we think any industry or additional Government initiatives to encourage more widespread participation in client money protection schemes would be beneficial.

Legal risks to professionals

- 6.106 Where someone is pretending to be a letting agent in order to take a tenant's or landlord's money, it is likely that the criminal law will be relevant and it may be appropriate for a local Trading Standards Service or the police to consider bringing a prosecution. Whilst our proposed guidance will be directed at assisting genuine letting agents meet their obligations under the legislation that we enforce, we will consider whether our guidance should flag up these types of issues for completeness.

Agents not using a Tenancy Deposit Scheme

- 6.107 Landlords and tenants both report problems in this area.¹¹⁴ Although problems do come to light during the lease, sometimes it is only when it

¹¹⁴ See Intelligence Report complaint type (13)

is terminated that tenants and landlords discover the deposit hasn't been protected. Issues reported include where:

- The landlord relied on the agent to place the deposit in one of the government backed schemes but they did not.
- The agent has become insolvent or closed down branches, and the deposit has not been protected.
- The agent gave the impression the deposit had been protected in a scheme but it was not.

OFT view

6.108 The Housing Act 2004 introduced a compulsory scheme under which landlords in England and Wales granting assured shorthold tenancies must deal with security deposits in a certain way.¹¹⁵ We set out the requirements of the scheme in some more detail in Annexe C.

6.109 There is no obligation for the landlord or agent to take a deposit but, since 6th April 2007, where one is taken, they must protect it with a government authorised protection scheme.¹¹⁶

6.110 It is our understanding that a landlord is ultimately responsible for ensuring that the security deposit he or she takes from a tenant in respect of an assured shorthold tenancy is protected and that the statutory requirements of tenancy deposit protection are met. However, agents who are engaged in collecting a deposit can also be held liable for breach of their obligations, and required to pay compensation to the tenant.

¹¹⁵ Tenancy Deposit Schemes were introduced in Scotland in July 2012 and will become mandatory in Northern Ireland in 2013

¹¹⁶ There are three schemes in England and Wales. See Annexe B for more information as requirements differ across the UK

- 6.111 Complaints indicate that there are still instances of deposits not being protected. Sometimes this may be because the landlord is not aware of the obligation, or believes the agent has protected the deposit, when this is not the case. It seem to us that in a healthy lettings market, it is common sense to reach the conclusion that the agent has an important role to play in making sure that the landlord understands the legal responsibilities in letting out a property.
- 6.112 As discussed, it is already a mandatory requirement to use a tenancy deposit scheme. However, we think that greater transparency about this requirement (both for landlords and tenants) would be helpful. If landlords know about their obligations (even when they have instructed an agent) and tenants know about their rights, they should be able to engage more effectively in satisfying themselves that the deposit has indeed been protected where there is any doubt. This would be a useful step in preventing some disputes from arising.
- 6.113 These will be issues that we think it would be useful to discuss with interested parties in relation to our 'quick guides' for tenants and landlords, in order to see if better use of information sources can help to reduce the problems in this area.

Legal risks to professionals

- 6.114 Failing properly to secure a deposit exposes landlords and their agents to the risk of having to pay substantial compensation to the tenant (amongst other things).
- 6.115 In our proposed guidance, we will set out how our powers could potentially tackle the issues raised above, for example untruthful statements made by agents concerning whether they have been or will be protected.

Stage three: During the life of a contract or tenancy

6.116 Our analysis and comments from stakeholders confirm that many problematic areas experienced by both tenants and landlords only come to light once a landlord has signed a contract with an agent or when a tenant has moved into a property.

6.117 Difficulties reported by landlords include:

- landlord fees and charges (including renewal commission) (5) and (7)
- agents providing a poor service to landlords (8), (9), (16).¹¹⁷

6.118 Problems tenants reported include:

- delayed or substandard repairs by the agent or landlord (15)
- surprising charges after the lease is signed (1)
- harassment by agent or landlord (20).

6.119 Problems encountered by both tenants and landlords include:

- agents not contactable/gone out of business (10)
- unfair business practices (18).

Surprising fees and charges to landlords

6.120 Some landlords contacted Consumer Direct to seek advice about the fairness of charges and fees levied by agents after they had entered into a contract.¹¹⁸ Examples include:

¹¹⁷ This includes agents not fulfilling their contractual obligations/providing poor service to landlords (8), agents not passing on the tenant's rent to the landlord (9), agents not undertaking repairs for the landlord as per contract (16)

¹¹⁸ See Intelligence Report complaint type (5)

- termination fees where the landlord feels the agent is not providing a satisfactory service
- mandatory additional services
- issues around refund of the introduction fee where the tenant leaves before the end of a lease.

6.121 A specific type of charge which we know can be problematic is a renewal commission fee.¹¹⁹ This has certain similarities with termination fees, but we deal with this type of fee separately since it gives rise to particular issues.

OFT view

6.122 As we set out in relation to stage one above, we feel that if a landlord cannot properly assess their total liabilities under a contract this may have adverse effects upon the market, that is, on competition.

6.123 Landlords who are unaware of all of the fees charged by letting agents before signing a contract and the likelihood of incurring these fees will be unable to assess the overall cost of renting their property through a letting agent. Landlords, therefore, may not be in a position to be able to compare the 'overall' price of one contract against another. In these circumstances landlords may take a contract that they may not otherwise have taken had they been able to compare contracts. For the same reasons, it is a problem if agents make charges that are not provided for in the contract.

¹¹⁹ See Intelligence Report complaint type (7). We would include in this the related commission of third party renewal commission, which applies where the original landlord has sold the property, and the purchaser renews or grants a tenancy to a tenant the agent introduced to the original landlord. In such circumstances the original landlord must pay the commission. We would also include sale commission, which applies where the landlord sells the property to a person who the agent had introduced as a tenant.

6.124 A further cause relates to principal-agent problems. It is difficult for landlords always to identify which agents are going to provide a good quality service up front, and, the interests of the agent and the landlord do not always coincide. For example:

- Where work is required to the landlord's property and this is the responsibility of the agent to arrange and oversee, the landlord may expect high quality work at the lowest available cost. However, the agent may not have the same incentives as the landlord because they do not benefit from increasing or maintaining the value of the property and do not incur the costs, which are passed on to the landlord.
- Similarly, if the agent is going to receive renewal commission in any event, on the basis of the introduction of the tenant, they may not have any financial incentive to provide a particularly good management service.

6.125 Areas that could in our view cause problems to competition in the lettings market include:

- Contracts that are structured in a way that makes it hard for landlords to identify their liabilities clearly.
- Contracts that don't make clear how the landlord can dispense with the agent's services and stop paying fees, since this makes switching between letting agents more difficult.
- Contracts that require the landlord to continue paying even where the agent does not comply with the contract, or supply services with reasonable care and skill.

Legal risks to professionals

6.126 Depending on the context, failing to make fees and charges clear to landlords may be misleading. Whilst drafting our proposed guidance for letting agents, we will consider the kind of unfair trading practices or conduct specific to letting agents that may breach the CPRs (when

practices are directed at landlords who may not all be traders or professionals) or BPRs (where consumers are not involved).

- 6.127 The UTCCRs will also need to be considered as standard terms used against consumers by letting agents, which potentially exclude liability for the provision of a poor service, may be regarded as unfair (we discuss the issues around commission fees further below).
- 6.128 When drafting guidance, it will also be relevant for us to take note of the fact that the Supply of Goods and Services Act 1982, which implies a term into a service contract of reasonable skill and care, is listed as a domestic infringement for the purpose of action, that harms the collective interests of consumers under Part 8 of the Enterprise Act 2002.

Renewal commission, third party renewal commission and sales commission

- 6.129 **Renewal commission** is where the landlord is charged a fee when a tenant, and in some cases an occupant or other party introduced by the tenant, remains in occupancy after the initial minimum term of the tenancy and where the agent is not asked to provide any additional service in exchange. The complaint evidence that we have analysed shows that sometimes landlords are unaware of this fee, or do not expect it to be applied in certain circumstances, such as when they no longer use the agent's services or the tenant has left the property, or where the agent does no work relating to the renewal.
- 6.130 **Third party renewal commission** is charged where the landlord has sold the property to someone else, but the same tenants remain in occupation. Similar issues arise as in relation to renewal commission, except that the outgoing landlord has no control over whether the incoming landlord renews the lease or not.
- 6.131 **Sales commission** is sometimes included in lettings contracts, to require the landlord to pay commission to the agent in the event that they sell

the property to the tenant, even where the agent is not involved in bringing about the sale.

OFT view

- 6.132 From a purely market perspective as opposed to a legal one, we consider that **renewal commission** is potentially problematic because while landlords generally expect to pay a fee to the agent for finding a tenant initially, we think that they find it surprising if commission is also payable on renewal, unless the agent is specifically instructed to negotiate the renewal, or to carry out other services (such as where the agent is collecting rent or else managing the property). We think that a term requiring payment of renewal commission in circumstances where the agent is not instructed or does no work for the landlord at the time of renewal is very surprising indeed, in particular where the commission continues at the same rate as initial commission or continues to be paid indefinitely.
- 6.133 The complaint evidence indicates that landlords expect that they would be able to dis-instruct the agent at some point, without having to evict the tenant or buy themselves out of the contract (for example where there is a fundamental breach of the contract, the agent is otherwise providing a poor service, or where the landlord has identified a cheaper agent). Therefore, we have concerns that this type of commission may prevent landlords from switching letting agents. In particular, they may expose the landlord to liability for double commission, if they instruct another agent to manage the property whilst the contract continues with the initial agent. It is not helpful for tenants' stability that they are liable to be evicted in circumstances where the landlord wishes to reduce costs by using a better or cheaper agent, or managing the property himself.
- 6.134 The complaint evidence also indicates that landlords may not fully appreciate the complete range of circumstances in which renewal commission could be payable under their contracts, for example, where unspecified associates of the original tenant are in occupation, or where the tenant leaves the property and returns at some later date.

- 6.135 Some agents argue that renewal commission is, in substance, remuneration for the 'income stream' that they provide the landlord with in bringing them and the tenant together. However we have not seen examples of agents' services being marketed on this basis. Further, we would expect that if what the landlord was purchasing was an 'income stream' the agent's entitlement to commission would be directly dependent on the tenant actually paying rent, which is not generally the case in the contracts we have seen. Therefore we think it is unlikely that an agent's service in finding a tenant would generally be viewed by landlords as providing them with an 'income stream' or similar. Misalignment of consumer expectations and the reality of what is on offer has obvious implications for the ability of consumers to make informed choices between competing products.
- 6.136 In relation to **third party renewal commission**, we think that this is problematic for similar reasons to renewal commission, but in addition it creates further problems in terms of alignment of the product with the consumer's likely expectations. The incoming landlord may not wish to use the outgoing landlord's agent, whereas there might be many advantages to all parties for the property to be sold with a sitting tenant (if both buyer and seller are buy-to-let landlords for example).
- 6.137 In relation to **sales commission**, in a well functioning market, to help ensure that estate agents can compete on the quality of their services and prices in relation to sales, we see no proper basis for such terms being in a lettings contract. Complaint evidence and common sense alike confirm that when entering the contract, the landlord is normally looking for a letting agent to find them a tenant (and possibly to manage the letting as well), not an estate agent.

Legal risks to professionals

- 6.138 The OFT has successfully taken action against a letting agent, Foxtons (Office of Fair Trading v Foxtons Ltd [2009] EWHC 1681 (Ch)) using these commission terms with landlords who may not all be traders or professionals, and we have already set out our views on the implication

of the Foxtons Judgment in our Foxtons Questions & Answers available on our website.¹²⁰

6.139 In that document we state:

'The OFT's view is that the Judgment in Foxtons' case sets out the law and contains key principles which apply to other letting agents' contracts with consumers. In the OFT's view, therefore, other letting agents should not be using sales commission and third party renewal commission terms in letting contracts with consumers. Renewal commission terms, where used, should be transparent, clearly set out and given appropriate prominence both in the contract and any accompanying promotional literature and sales practice used by the agent.'

6.140 It is relevant to note that the TPO Lettings Code has already taken steps to address a number of the OFT's concerns in this areas, by requiring that members' terms of business must:

- 'Actively flag any entitlement to renewal commission and the scale of charges that will apply.'
- 'Make clear that a liability to renewal commission will only arise where you are instructed to renew the tenancy or where the landlord has otherwise specifically agreed to your entitlement.'
- 'Not include any liability to pay renewal commission where the property is sold to another landlord who retains the existing tenant.'
- 'Not require payment of a commission in circumstances where the tenant agrees to purchase the property unless this is subject to a separate sales agreement.'¹²¹

¹²⁰ www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/foxtons/qandas

6.141 In light of the Foxton's Judgment, we will consider further these issues when drafting our guidance for letting agents. Our considerations will take into account not only the UTCCRs but also explore the relevance of other legislation that we can enforce when practices are directed at landlords who may not all be traders such as the CPRs as well as the BPRs, when consumers are not involved.

Agents providing poor service to landlords

6.142 Landlords can sometimes experience disappointment or frustration when they believe the agent is not providing an appropriate service.¹²² Agents not passing on the tenant's rent to the landlord¹²³ and not undertaking repairs for the landlord as per the contract¹²⁴ could be considered sub-categories of this complaint heading. Reported problems include:

- Agents failing to provide services set out in the contract including property inspections, repairs, obtaining certificates, checking inventories, chasing rent arrears.
- Agents providing a poor service including negligent work, inadequate vetting.
- Agents failing to pass on rent.
- Agents collecting a management fee and doing no work for the landlord, or the quality of work is poor.

¹²¹ The Property Ombudsman Code of Practice Lettings paragraph 3(j).

www.tpos.co.uk/downloads/IEL02-3%20Code%20of%20Practice%20for%20Residential%20Letting%20Agents.pdf

¹²² See Intelligence Report complaint type (8)

¹²³ See Intelligence Report complaint type (9)

¹²⁴ See Intelligence Report complaint type (16)

OFT view

- 6.143 As the areas of complaint cover a wide range of issues, we have considered the OFT's views under a number of headings. These are, the contract, managing the property and rent collection.
- 6.144 In respect of the contract, putting aside any legal considerations, we consider that many of these reported problems could be avoided in this market if all agents' contracts set down, in marketing material and contracts, in plain English and exceptionally clearly, what the agent will and will not do for the landlord. This would help the landlord to easily understand what his rights under the contract are. It is also clear from the complaint evidence in this sector and, also drawing on our understanding of customer behaviour in other markets generally, that many landlords are also likely to be particularly influenced by oral statements that agents make during the sales process.
- 6.145 The complaint evidence that we have reviewed indicates that the following areas are reported by landlords (of all kinds) to be particularly problematic:
- Where the agent gives the landlord the impression that the service he is willing to provide is more extensive than it really is.
 - Where the contract does make clear what the agent will do, but the agent does not comply with their duties, without giving an explanation to the landlord.
- 6.146 In respect of managing the property, our review of the complaint evidence indicates that landlords generally expect their agents to possess a fairly high degree of skill in terms of understanding the regulations and other laws that apply to letting, and also in dealing with problems as they arise.
- 6.147 For example, the complaint evidence indicates that this is likely to include identifying and handling minor repair works that need to be done. It is also likely to include protecting the landlord's interests vis a vis the

tenant, which will cover issues relating to rent collection and dealing with any tenant's breach of the lease in accordance with the law.

6.148 As discussed in Chapter Three, information asymmetries may arise due to landlords being unable to effectively monitor the quality of the letting agent when acting on their behalf. This may allow a letting agent to pursue their own goals rather than those of the landlord, for whom they are acting as an agent (which are described as principal-agent problems). Therefore, competition between letting agents to attract landlords may not ensure a high quality of service post-contract, such as the management of the property. This can lead to practical problems such as where

- The landlord expects the agent to resolve issues that arise from the tenant, but the agent does not view it as his responsibility.
- The landlord expects the agent to keep him informed about breaches of the tenancy agreement by the tenant, but the agent does not do so, meaning that the landlord is not able to consider what steps to take to protect his position.

6.149 Rent collection is sometimes carried out as part of a management contract, or as an optional service under a let only contract. The complaints show that there are times when agents do not pass the rent on to the landlord in what landlords consider to be a timely manner or as agreed. In general, in the context of debt collecting, we have said that it is reasonable for money collected to be passed on within five working days of receipt.¹²⁵ The complaints evidence also indicates that landlords generally expect agents, who are collecting the rent, to keep them informed where the tenant falls into arrears, as well as take steps to encourage payment. This is an area where the interests of tenants and

¹²⁵ www.ofc.gov.uk/shared_ofc/business_leaflets/consumer_credit/OFT664Rev.pdf - section 3.9(g) footnote 44.

landlords are not fully aligned, since while the landlord wants payment in full, promptly, there may be many reasons why the tenant finds this difficult. In such a situation the agent plays an important role in taking appropriate steps to seek to secure payment. Consumer enforcement agencies are likely to consider that the position of the tenant as a vulnerable consumer in such circumstances needs to be respected, such that any pressure to pay is reasonable, and the tenant is not misled about their rights.

Legal risks to professionals

- 6.150 Rent collection is an issue we will want to specifically cover in our guidance, since this is an area where it may be difficult for agents always to see clearly how they should behave towards tenants who have fallen behind with their rent, while at the same time carrying out their duties towards the landlord.
- 6.151 We also intend to consider the potential problems that may be faced by landlords in context of conduct that may potentially amount to a community or domestic infringement as defined under Part 8 of the Enterprise Act, for example in relation to:
- The Supply of Goods and Services Act 1982 (which implies the following terms into contracts for a service by a supplier, that the work will be carried out with reasonable care and skill and that, where no time for the work has been agreed, it will be carried out within a reasonable time).
 - Rules of law (including breach of contract for the supply of services to a consumer and breach of a duty of care owed to a consumer under the law of tort).
 - Terms used by agents with customers who may not all be traders or professionals which exclude liability for poor service give rise to a risk in relation to the UTCCRs.
- 6.152 Of course, there is also wider risk for agents when consumers are not involved, having regard for instance to the ordinary law of contract and

the Supply of Goods and Services Act 1982. Where businesses only are involved, not consumers, these provisions will be relevant to private actions but will not give rise to any potential risk in relation to consumer enforcement).

Delayed or substandard repairs by the agent or landlord

6.153 This category attracted the second highest number¹²⁶ of all complaints reported to Consumer Direct, and so represents a significant area that needs tackling.¹²⁷ Complaints commonly include:¹²⁸

- the landlord or agent said they would undertake repairs but they have not
- the landlord has failed in his responsibilities to maintain the property
- damage to the tenant's own belongings.

OFT view

6.154 When considering consumer's behaviour it seems, in our view, reasonable to assume that tenants are more often than not focused on the attributes of a property when looking for a place to rent. However, from the complaints that we have reviewed we consider that it is common sense to conclude that the way a landlord or their agent deals with problems that arise, or otherwise interacts with the tenant, are also important factors that have a significant impact on the tenant's welfare.

6.155 Tenants are generally unable to observe the quality of a landlord's/letting agent's services before a problem arises, and therefore their services

¹²⁶ 11.4 per cent of reported complaints analysed

¹²⁷ In Scotland a Private Rented Housing Panel assists tenants and landlords to resolve disputes. This includes forcing landlords to fulfil legal obligations such as doing necessary repairs.

¹²⁸ See Intelligence Report complaints type (15)

may not be exposed to sufficient competitive pressure. This issue is particularly acute if the agent has made any representations to the tenant, during the course of marketing the property, about the level of service the agent is likely to provide, or particular work that will be carried out.

- 6.156 In these circumstances, it can then be very costly for the tenant to extricate themselves from the arrangement, given that it is time consuming to identify alternative accommodation, and there may be disputes about deposits and notice periods.
- 6.157 In a healthy functioning market, it is our view that tenants would be able to predict broadly the quality of service they are likely to receive, which would then correlate with the service that they do receive. We believe the legal framework that applies to lettings and contracts generally contributes to setting expectations, in that tenants generally expect their landlord and his agent to comply with the law.
- 6.158 Particular areas that we think the complaint evidence indicates could give rise to problems of all kinds, legal and otherwise, include:
- Where work is or has to be carried out inside the property.
 - Not meeting timescales for carrying out work in the property.
 - Where the landlord or agent states that the property would be in a particular condition.
 - Where the property is let with furniture in place, there could be potential for problems and misunderstandings if items of furniture are not of the type or quality which the tenant had hoped for or expected.
 - In the event that an item included in the letting breaks down.
 - Where work is carried out, providing inaccurate information to tenants about the length of time the work will take to complete.

6.159 However, we acknowledge that it is also possible for tenants to sometimes have overly high expectations, for instance around areas where the landlord does not have a legal duty to act, but which causes the tenant inconvenience.

Legal risks to professionals

6.160 Normally all landlords of residential property have a statutory duty to ensure that the structure and exterior of property are in reasonable repair and that certain major installations are in working order. They are responsible for the safety of gas and electrical appliances supplied and the fire safety of fixtures and furnishings that go with the tenancy. We set out in a little more detail what these duties are in Annexe C.

6.161 The law in this area is complex though, and we believe that a number of complaints occur where the parties are not clear who has the obligation to fix a problem when it arises. Accordingly, one of the issues that we want to discuss with interested parties in the context of our 'quick guides' for tenants and landlords is how better use of information sources could help each side to have a clearer understanding of who is likely to be responsible for carrying out a repair.

6.162 We will consider the legal risks that exist under the laws that we enforce, in more detail in our proposed guidance for letting agents. Albeit clearly fact sensitive, areas that we will consider in more detail include

- Risks of including terms in tenancies that attempt to transfer landlords' repairing duties to the tenant.
- Risks around false statements made by agents, before the tenancy is signed, as to what state the property will be in.
- What application the CPRs have to situations where furniture displayed with the property is not in good working order.
- Risks associated with failing to carry out repair work during the tenancy with reasonable skill and care.

Surprising charges to tenants after the lease is signed

6.163 A number of complaints relate to charges that agents say tenants must pay after they have already moved in. Some of these appear not to be reflected in any agreement that the tenant has signed.¹²⁹ Examples include:

- Problems where agents purport to change the terms of the agreement and charge an administration fee.
- Problems when the agent charges a surprising fee and the tenant cannot get out of the contract and where there is no break clause.

OFT view

6.164 Our understanding is that in general the contractual relationship is between the tenant and the landlord, and the agent merely administers any payments by the tenant on behalf of the landlord. We think it is quite rare for a tenant to enter into a contract with the agent. However the complaint evidence illustrates that tenants are not always clear what their relationship with the agent is, and this may mean that the tenant pays money that the agent is not otherwise entitled to, for example payments for rent collection, administration or inspection visits.

6.165 This might be the case where there is no provision in the tenancy agreement for the payment or where tenants believe that they are paying for services provided by the agent acting on their behalf. In other cases, there may be provision in the tenancy for payment for permission (such as a change in occupation), but the amount charged is very high. This may be because the agent or landlord does not have a clear grasp of what is a reasonable sum.

6.166 One of the issues that we want to discuss with interested parties in the context of our sample 'quick guides' for tenants is how information

¹²⁹ See Intelligence Report complaint type (1)

sources could help tenants to understand better when they should challenge an assertion that they must pay money.

Legal risks to professionals

6.167 These and similar issues will be explored further when we draft guidance for letting agents, particularly in the context of the CPRs (for example misleading actions and omissions in relation to charges where there is no clear contractual basis for the fee) and the UTCCRs, for example which cover disguised penalties and terms that potentially unfairly allow the supplier to impose unfair financial burdens, see paragraphs 3.58 and paragraphs 4.2 to 4.8 of the Guidance on unfair terms in tenancy agreements . We also intend to review our guidance on unfair terms in tenancy agreements.

Harassment of tenant by professionals

6.168 Some tenants have complained about heavy handed or improper conduct by landlords or their agents, particularly in circumstances where rent has not been paid or instances where the tenant's quiet enjoyment has been interfered with.¹³⁰ Examples include:

- The tenant or tenant's family is put under pressure to pay outstanding rent, in particular in the context of difficulties with housing benefit, or other debts that they may not actually owe.
- The guarantor may be held responsible in ways that were unclear to them in the contract.
- Landlords or agents interfering with the tenant's quiet enjoyment for no good reason.

¹³⁰ See Intelligence Report complaint type (20)

OFT view

- 6.169 Where rent is unpaid, this obviously causes inconvenience and potentially financial problems for landlords. It is also a ground for repossession of the property and so is obviously of importance to tenants that they prioritise payment of rent. Ultimately there are court processes that the landlord can (and in some cases must) invoke in order to regain possession of the property, and recovery of arrears. In our view the market works best if disputes can be resolved informally, but where such efforts fail, landlords and their agents make use of these appropriate formal processes rather than resorting to debt collection techniques which could be seen as heavy handed.
- 6.170 However, there are situations where genuine difficulties arise. The issue of recovery of debts is something that we have looked at, in the context of consumer credit debts, in some detail, and we have produced guidance on how professionals should act.¹³¹ The applicability of such guidance to the context of collecting rent arrears is a matter we could consider further.

Legal risks to professionals

- 6.171 In our *Guidance on unfair terms in tenancy agreements*, we have dealt with some of the issues mentioned above. For instance in the context of terms, which potentially unfairly exclude liability for failure to perform contractual obligations we discuss rights of entry to the property. We state:

'We would object to a provision giving the landlord an excessive right to enter the rented property. Under any kind of lease or tenancy, a landlord is required by common law to allow his tenants 'exclusive possession' and 'quiet enjoyment' of the premises during the tenancy. In other words, tenants must be free from unwarranted intrusion by anyone, including the landlord. Landlords are unfairly disregarding that basic

¹³¹ www.ofc.gov.uk/shared_ofc/business_leaflets/consumer_credit/OFT664Rev.pdf

obligation if they reserve a right to enter the property without giving reasonable notice or getting the tenant's consent, except for good reason.' (paragraph 3.32).

'The same principles apply to terms giving excessive rights to the landlord to demand access for prospective new tenants or purchasers to view the premises.' (paragraph 3.33)

'A term dealing with rights of entry is unlikely to be challenged if it reflects the ordinary legal position. This recognises that a landlord who is responsible for carrying out repairs to the property needs reasonable access for two specific purposes: firstly, in order to check whether repairs are necessary, and secondly, to carry them out. Reasonable access means access at reasonable times, and with at least 24 hours notice in writing, unless there are exceptional circumstances.' (paragraph 3.34, footnotes not reproduced here)

- 6.172 As well as reviewing the above guidance and considering the UTCCRs in the context of our guidance for letting agents, whilst drafting our new guidance we will also consider the relevance of the other legislation, which we enforce and in particular the misleading and aggressive practices provisions of the CPRs. The CPRs prohibit commercial practices which by harassment, coercion (including physical force) or undue influence, significantly impair, or are likely to significantly impair, the consumer's freedom of choice or conduct concerning the product and the consumer takes, or is likely to take, a different decision as a result. We need to consider when drafting guidance how certain trading practices may potentially breach this provision, particularly in the context of any debt collection including rent.

Agents not contactable/gone out of business

- 6.173 Both landlords and tenants report instances where agents are not contactable or have gone out of business.¹³² This can be closely

¹³² See Intelligence Report complaint type (10)

connected to complaints around rent not being passed to the landlord on time and also the loss of a tenant's deposit.

OFT view

- 6.174 The crux of this problem is in our view how agents treat landlords' and tenants' money that they are holding, and in particular whether it is kept in a separate client account, or mixed with general funds. However, putting aside any potential legal consequences such as failing to meet the statutory obligations imposed by the tenancy deposit scheme, mixing funds creates real practical risks for landlords and tenants. Where rent or (security or holding) deposits are paid into an account also containing the agent's own money, it is impossible to secure the money in the event that the agent becomes insolvent.
- 6.175 We think that some landlords and tenants might be surprised if they knew that the agent was using their money in this way or, at least, feel misled if they believed that their money would be kept safe, when no provisions were actually made.
- 6.176 A number of agents are members of schemes which protect landlords' and tenants' money through client money protection schemes, and we support this initiative.

Legal risks to professionals

- 6.177 We will consider these types of issues when drafting our proposed letting guidance in the context of the legislation that we enforce including the CPRs. For example, in relation to the CPRs, albeit clearly fact sensitive, our considerations may include drafting guidance covering potential examples of breaches of the misleading provisions, for example in relation to false statements as to how the money is held, and whether agents should be transparent when money is not held in a client account, and the professional diligence provisions, which we will consider further particularly in the context of the holding of security deposits. In relation to representations directed at professional landlords only, when drafting guidance, we will consider the BPRs.

Unfair business practices

6.178 The OFT's Intelligence Report outlines some practices which appear to be illegal or unprofessional, some of which have an impact on the landlord's or tenant's financial position.¹³³ These can occur at all stages of the lettings process, but are mostly identified at this stage. Issues included in this category are:

- Various underhand or unprofessional activities by agents.
- Agents adopting business practices which breach the terms of the contract.
- Agents may be acting fraudulently or intending to deceive.

6.179 Our Intelligence Report shows, for example, that some agents gave oral assurances to tenants that certain repairs in properties would be carried out which were never performed, that the property was insured by the landlord when this was not the case or that they provided descriptions of the property orally and in writing which were grossly inaccurate.

6.180 Other complaints concerned agents not placing security deposits into a statutory scheme, and then not refunding deposits to tenants, and falsely representing themselves as belonging to a code of conduct or a redress scheme. In some cases agents have been accused of fraudulent acts such as forgeries on documents.

OFT view

6.181 We consider that agents have an important role to play in driving an effective lettings market, both in terms of the fundamental service they provide in bringing landlords and tenants together, and in driving high standards through their knowledge of the law and good practice. Poor practice of this sort damages the market, in that it weakens consumer

¹³³ See Intelligence Report complaint type (18)

confidence in using letting agents. This in turn could lead to under consumption of letting agents' services. This risks creating a reduction in professionalism in the sector and could also lead to properties being allocated to tenants less efficiently.

6.182 We consider therefore that it is important that serious malpractice is tackled, and that consumers of agents' services (both landlords and tenants) are able up front to identify agents that they can trust.

6.183 Agents can also do their part to improve trust and raise standards in the market by taking extra care in terms of tenant/landlord relations. For instance we consider that to avoid problems of all kinds (legal or otherwise) such good practice would include

- Taking the time to explain face to face very clearly and early on in the letting process to tenants and landlords what services, such as inventory checks, repair services, sub contracting services, come at an extra charge.
- Ensuring that the landlord has specifically agreed to all expenses before they are incurred.
- Keeping their relationships with workmen under constant review.
- Having due regard to the tenant's interests.

Legal risks to professionals

6.184 This is a very wide category. Unfair trading practices expose agents to many kinds of legal risk ranging from prosecution to private civil claims such as breach of contract.

6.185 As discussed elsewhere, in drafting guidance for letting agents we will consider including examples of trading practices that could breach the legislation that we enforce, including the CPRs, BPRs (where only business landlords are involved) and UTCCRs. Areas that we will want to consider for guidance include the extent to which agents need to be transparent both with landlords about their relationships with workmen

they instruct, and with potential tenants about what work the landlord is actually likely to agree to do.

Stage four: At the end of the contract or lease

6.186 There are overlaps between some of the issues which are reported at stages two and three and those reported at the end of the lease, but we have not repeated issues here that have been covered elsewhere in this chapter.

6.187 Difficulties that usually come to light at this stage are:

- Surprising termination fees charged to landlords (6).
- Disputes about notice periods (14).
- Agents non-refunding security deposit (12).

Surprising termination fees charged to landlords

6.188 In some instances, our complaint evidence indicates that landlords are dissatisfied with an agent's service and decide to terminate the contract. This may be even before a tenant has been found, where for example the agent has taken a long time to get one, or it may be because the agent has been providing a poor management service. It is only on termination that the landlord becomes aware of some of the fees they have to pay,¹³⁴ such as termination fees which have not been transparent in pre-contract material.

OFT view

6.189 There are particular issues around renewal commission, which can be perceived by some landlords as a form of penalty for switching agents, and we discuss these at stage three above. As discussed in Chapter

¹³⁴ See Intelligence Report complaint type (6)

Three, termination charges may reduce the incentive of the landlord to switch letting agents, even if they receive poor service.

6.190 We think that competition can be distorted where termination fees and commission terms have the effect of preventing landlords from exercising genuine choices to switch agents when problems arise during the course of the contract, for instance, where the service provided is poor or the service is not of the kind that the landlord was led to understand would be provided before entering the contract.

Legal risks to professionals

6.191 When drafting our proposed letting guidance, the issue of termination fees will need to be considered in the context of the legislation that we enforce. Such analysis will include UTCCRs considerations for standard contracts used with landlord customers who are not all traders or professionals. It is of note that the UTCCRs provide that terms may be unfair if they have the object or effect of requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation (see paragraph 1(e) of Schedule 2 of the UTCCRs).

Disputes about notice periods

6.192 Complaints by tenants in this category arise both during the life of the lease and once it has been terminated. Given the link between security deposits and notice periods, there are often disputes about how much money is deducted from the deposit. Sometimes disputes happen after the termination of the contract. Types of complaints include:¹³⁵

- Notice periods not being clearly and transparently set out in the lease.
- Disputes about whether notice procedures have been followed in line with the terms of the contract.

¹³⁵ See Intelligence Report complaint type (14)

- Excessively long notice periods in the contract.

OFT view

- 6.193 Our complaint evidence indicates that there are particular issues about the length of the notice, the date of the notice, the form of the notice and resolving disputes about the notice.
- 6.194 In relation to the length of the notice, our understanding is that housing law in England and Wales lays down rules which govern when notices must be given (such as for example a restriction on the landlord ending an assured shorthold tenancy within its first six months, and requiring the landlord to give at least two months' notice to end the tenancy on a date after this.¹³⁶ Generally, we understand that tenants must give at least one month's notice if the tenancy has become a monthly periodic tenancy, but otherwise are usually expected to remain for the fixed term). Because the law is relatively complicated on this area, we would like to consider whether use of information sources, such as the 'quick guides' we have drafted, could help tenants to avoid giving notices that are not the right length.
- 6.195 In relation to the date of the notice, sometimes there are disputes about when the notice under a periodic tenancy must be given, with agents saying that tenants have given their notice on the wrong date. We think that in a healthy market it is important that in order to avoid misunderstanding and disputes of all kinds landlords, their agents and tenants have a clear understanding of when notices have to be served. For example, it appears that tenants often think that they can give one month's notice to leave at any time, when the landlord expects the notice to expire on the last day of the period (at the time when the rent falls due). One of the issues that we want to discuss with interested parties in the context of our sample 'quick guides' for tenants is how

¹³⁶ The notice may be given before the end of the minimum term, but possession cannot take place until the minimum term has expired.

better use of information sources could help the reduce misunderstandings about the date on which notice must be given.

- 6.196 In relation to the form of the notice, our analysis of the complaints, which we have considered indicate that there are also disputes where tenants complain that they told the agent orally that they were leaving, and the agent subsequently claiming that this is not sufficient. Leaving aside what housing law may require for these sorts of formal notices, we do not think it is good for the market if agents do not correct an error of this nature, and only later inform the tenant that a further form of notice is required. The result of doing so is likely to be that the tenant ends up being asked to pay more rent, even though they believe they gave sufficient notice, and consequently they effectively buy a further period of occupation when they do not want it.
- 6.197 Where there is a dispute about the notice, this is likely to be resolved through the mechanism of the security deposit, where the landlord may claim a portion of the deposit to compensate for the lack of proper notice by the tenant. However such disputes are resolved, it is likely to be disappointing for either the landlord or the tenant, to take up time and to delay the recovery of the deposit. It seems to us that where the dispute is about the date, length or form of the notice, this generally could have been avoided by appropriate transparency, and clearly the letting agent has scope to play a part in averting such disputes. Common sense would suggest that such a part could usefully be played by making sure that the parties to the tenancy agreement are aware of what is required of them, and where any obvious errors are nonetheless made by the tenant or landlord in the process of giving notice, taking reasonable steps to correct these at an early rather than a late stage.

Legal risks to professionals

- 6.198 When drafting our guidance, we will consider the kind of issues, which are revealed by complaint evidence, in the context of the legislation that we enforce. This includes whether the CPRs (for instance the misleading act and omissions and aggressive practice provisions), which are fact

sensitive, principal based provisions, require agents to act in a particular way when another party makes a mistake during the notice process.

- 6.199 The UTCCRs are also of relevance. As with the CPRs, how they apply in any particular case depends on the facts and all the circumstances of that case, but it is worth highlighting here what is said our current guidance on unfair terms in tenancy agreements (which we intend to review) on over long notice periods. As indicated previously the focus of the guidance is on assured shorthold tenancies in England and Wales. Please note that the footnotes to the guidance's text have not been reproduced here.

Overlong notice periods

An unreasonably long notice period for termination of an assured periodic tenancy agreement can lead to tenants paying for accommodation they no longer want or need. This is likely if tenants have to give notice long before they are able to predict their future needs. If tenants are required to give notice well before they would naturally be considering it, they could easily forget to give notice at the right time. (paragraph 3.74)

Significant problems obviously do not arise where periodic tenancies run (as they commonly do) for short periods, such as from week to week or month to month, but may occur where they run for a longer time, such as six months or more. (paragraph 3.75)

The unfair effect of a long notice period may be more severe because of the law regarding rights to 'assign' the tenancy (see Chapter Four, Group 18(d)). This type of periodic tenant may have no right to find a satisfactory substitute to assign the obligation to pay rent. If forced to move after the opportunity to give notice to quit has passed, he may find himself with no choice but to pay rent for a substantial period, even though someone suitable is willing to take his place. (paragraph 3.76)

Overlong period for renewal

Some tenants enter a fixed term tenancy on the understanding that it is likely to be renewable (providing all obligations have been observed). In such cases, a term requiring the tenant to give an excessive period of notice to indicate a wish to renew may also be open to challenge for the reasons explained above. (paragraph 3.77)

Notice not required for fixed term agreements

A tenant is not required to give notice to bring the tenancy to an end at the end of the fixed term. That is because a fixed term agreement comes to an end at the end of the fixed term, and no periodic tenancy will arise if the tenant then leaves. We appreciate that landlords will want to ensure that their properties are not left empty between tenancies, but object to terms that impose a contractual obligation on the tenant to give notice in order for the tenancy to be terminated at the end of the fixed term. This could allow the landlord to impose a substantial financial penalty on tenants who do not realise that notice is not required, by requiring them to pay rent for a period after the end of the fixed term. Terms such as this are not necessary to protect landlords from the possibility that their property will be left empty, as the law allows landlords to recover possession at the end of the fixed term by serving at least two months' notice, and they could do so where their current tenant fails to indicate when asked whether they intend to stay on. The landlord and tenant could of course still agree to a renewal of the tenancy even after such notice was served. (paragraph 3.78)

Agents' non refund of security deposit

- 6.200 This area of complaints accounted for the biggest category of reported issues when Consumer Direct data was analysed for the Intelligence

Report.¹³⁷ It is sometimes linked to complaints in the 'disputes about notice periods' category above. Reported problems include:¹³⁸

- Disputes over who has the security deposit.
- Disputes over what repair work the tenant should pay for, and what work has in fact been carried out.

OFT view

- 6.201 We refer to in stage two above the statutory requirements to protect security deposits. This is an important statutory protection for tenants, with tenants having access to the courts if the statutory obligations aimed at protecting their deposits are breached. This is an area where we think it would be worth local authorities considering whether it would be appropriate to focus more resource on enforcing.
- 6.202 Where the deposit has not been protected, statute provides for a number of consequences, including restrictions on the landlord's ability to regain possession by serving a notice only, and enabling the tenant to apply to the court for an order requiring the landlord to protect the deposit and pay additional money to the tenant.
- 6.203 The complaints that we have seen suggest that both landlords and tenants are often unaware of these provisions, and so do not take the steps they could to protect themselves. In particular, complaints show that landlords seem to be unaware that they can be required to repay the deposit where the agent has failed to protect it, and tenants appear to be unaware that they can seek this recourse. This leads to frustration and disappointment, as well as financial hardship.
- 6.204 One of the issues that we want to discuss with interested parties in the context of our sample 'quick guides' for tenants and landlords is how

¹³⁷ 12.7 per cent of reported complaints

¹³⁸ See Intelligence Report complaint type (12)

better use of information sources could help all parties to be better aware of their rights and obligations in relation to protecting the security deposit.

- 6.205 In respect of repair works, at the end of the lease, it is usual for the landlord or their agent to inspect the property and check the inventory, and prepare the property for the next tenant. However, sometimes the landlord/agent seeks to pass some of the costs onto the outgoing tenant.
- 6.206 The complaints indicate that in a number of cases, the basis for the tenant having been required to pay these costs was unclear to the tenant. We think this is a problem, since if there is no prior agreement to be responsible for these costs, the tenant will be surprised and possibly also financially inconvenienced. There is also a risk that the tenant believes they have a legal obligation to pay, when in fact they don't.
- 6.207 Putting aside any legal considerations, where there is a term that requires the tenant to pay for repairs, we think that for the market to work well, the obligation needs to be set out sufficiently clearly for the tenant to be able to understand what their liability may be. To the extent that there may be a fundamental difficulty in achieving real and meaningful transparency and about such charges at the outset of the agreement, and thus informed consumer choice, we think there may be an issue for government and the courts around whether they ought to allow for recovery of money that is greater than the actual cost incurred by the landlord, for example the cost of fixing damage caused by the tenant.
- 6.208 Disputes of all kinds can also arise where the tenant believes that the landlord has not complied with their repairing obligations during the lease. The complaint evidence indicates that problems in this market may arise because the issue of what actually the landlord is obliged to do is not always straightforward, and tenants may assume that any work they feel needs doing, is work that the landlord is obliged to carry out. One of the issues that we want to discuss with interested parties in the context of our 'quick guides' for tenants and landlords is how better

use of information sources could help the reduce misunderstandings about where the obligation to carry out repairs lies.

Legal risks to professionals

6.209 We will consider the types of issues raised above in the context of our powers when drafting our proposed guidance. Areas that we will want to consider under the CPRs include:

- Where inaccurate statements are made to tenants about the landlord's repairing obligation under the lease, which could have the effect of dissuading the tenant from challenging charges they are presented with.
- Where tenants are potentially misled about the consequences of failing to protect their security deposit.

6.210 In relation to the proposed guidance and our review of the OFT *Guidance on unfair terms in tenancy agreements* (OFT356), it is worth highlighting the discussion of terms which pose potentially unreasonable ancillary obligations and restrictions on tenants in the tenancy guidance. For instance, at paragraph 4.52 we state:

'We take the view that in short fixed term agreements, such as one for a year or less, a standard term making the tenant liable to redecorate the property regardless of whether the tenant has done something to make it necessary may be regarded as unfair. The potential effect of such a term is to require tenants to return the property in a better condition than that in which they received it and for landlords to benefit considerably at the tenants' expense. We do not object to terms requiring tenants to redecorate or pay for redecoration where they have caused deterioration to the décor at the property beyond what could be described as fair wear and tear.'

6.211 In our proposed guidance, we will also consider terms which prevent the tenant from recovering damages from the landlord in relation to breaches of the landlord's obligations, by way of set off for example.

7 KEY FEATURES AND NEXT STEPS

- 7.1 We believe it is important to consider what a healthy lettings market looks like to help identify what changes, if any, may be needed. In our view any market is healthy where active consumers (here, tenants) make informed choices from fair-trading businesses (here, landlords). In a healthy lettings market agents play an important role as intermediaries, bringing together informed tenants and fair-trading landlords to match supply and demand efficiently, and competition between agents (and from other sources) ensures landlords and tenants are clear up-front regarding the structure and level of fees they may be charged for this. But when demand outstrips supply in the lettings market, incentives on landlords to provide high-quality lettings and on agents to be customer-focused are not as strong.
- 7.2 In a healthy lettings market, landlords and tenants will also receive the desired level of quality from the letting agent, at a price they are willing and able to pay. Landlords and tenants should be able to judge the level of quality they will receive before signing a contract or starting a tenancy agreement.
- 7.3 It is our view that participants in the market should also have access to an adequate redress mechanism so that any problems that may arise are dealt with quickly and easily. In addition, there would need to be clarity about the level of protection such a redress scheme provides, so that all participants in the market understand what their position is if things should go wrong, and they can plan accordingly.
- 7.4 Although there have already been a number of legislative and industry led initiatives that aim at tackling many of the problems we have identified in this report, there is a general lack of consistency at many levels in the lettings market. Across the UK, there are differences in law, licensing requirements, and industry initiatives. This divergence results in tenants, landlords and letting agents having to deal with different regimes based on geographical location for example. This may lead to uncertainties around rights and responsibilities and present obstacles to potential investors in the lettings market. This could hinder competition

as well as create added complexity where professionals wish to operate across borders within the UK.

- 7.5 Based on our analysis set out in this report we think an effective lettings market requires five key features.

Key features of a lettings market

1. Better compliance with legislation already in existence and in particular **better up front information**: agents should provide landlords and tenants with full information of the charges payable including when they are payable, how they are calculated and what they are for. In the OFT's view in order to avoid problems of all kinds, legal and otherwise, these fees should ideally be set out and described in a **clear tariff of charges** at the start of the process, and certainly before any contract is signed.
2. Initiatives which make it easier for landlords and tenants to **assess quality** and compare one agent's services against another, such as recognised logos which signify minimum standards are met.¹³⁹ Our view is that, it would be beneficial to consider introduction of a **general redress mechanism** so landlords and tenants can sort out problems when they occur.¹⁴⁰
3. **More consistency within the industry** so that common principles are applied throughout the industry, for example agreement on how tenants are considered for suitability, what information is used for pre tenancy checks, and which of this information the tenant can supply themselves.

¹³⁹ This is particularly important in relation to client money protection, where schemes are not consistent in the level of cover they require of members.

¹⁴⁰ We would include disputes both between the agent and landlord or tenant, and between the landlord and the tenant.

Key features of a lettings market (continued)

4. **Mechanisms which protect money:** more widespread use of client money protection mechanisms and better compliance with the mandatory Tenancy Deposit Protection Schemes. We think that greater awareness of these requirements would be helpful, so any additional steps the UK Government, industry and consumer groups can take to raise awareness would be particularly useful.
5. The fragmented nature of the market requires **an agreed enforcement strategy**, to identify where enforcers should focus their efforts, such as protecting consumers who are most vulnerable and tackling agents who could be considered a higher risk, especially in relation to problems that will not be solved by established industry schemes.

Better compliance

- 7.6 We think that **better compliance with existing laws**, including consumer protection legislation such as the CPRs, UTCCRs and BPRs, will address many (but not all) of the issues we have identified as problematic.
- 7.7 In order to support better compliance with consumer protection law we will also produce and consult on two pieces of guidance:
- 1) A document which will provide UTCCRs/CPRs/BPRs guidance for letting agents.
 - 2) A revised version of the OFT '*Guidance on unfair terms in tenancy agreements*' (OFT 356).
- 7.8 The first document will be informed by the views we have set out in the 'Tackling the issues' chapter of this report and stakeholder input. It is

intended to complement the existing OFT '*Guidance on property sales*' (OFT 1364) and could take a similar format. While this will be aimed mainly at letting agents, we think it will also be useful to professional landlords.

- 7.9 The second document was originally published in 2005 and we think that given the work we have undertaken in the lettings sector since then, now is a good time to review this guidance. We want to make sure it is still fit for purpose and a useful document for landlords, letting agents and other suppliers of standard or model terms in tenancy agreements, plus those who are responsible for enforcing the UTCCRs. We also want to make sure it is sufficiently accessible to tenants and their advisors.
- 7.10 We are keen to hear views and suggestions from stakeholders to help shape these documents and ensure both are informative and user friendly.

A clear tariff of charges

- 7.11 Providing clear information to tenants and landlords as soon as possible and certainly **before** they commit to renting a property or enter into a contract with an agent will mean that they know what fees and charges they will be expected to pay throughout the **whole** process. Clarity on what is provided in return for the fee or charge is also essential in a healthy market to making sure tenants and landlords are able to make informed decisions as to whether they want to rent a particular property or use a particular letting agent.
- 7.12 There are of course different ways in which traders can comply with the transparency requirements in legislation and provide this sort of information. These requirements are not formal or prescriptive, and the OFT cannot prescribe how this is done. However, we do consider that problems of all kinds, legal and otherwise, could be avoided if this sort of information was provided in a clear '**tariff of fees and charges**'. We think this could be a very user friendly document if it were written in plain English and set out all of the charges the tenant (or landlord) can

expect to pay throughout the whole process, and explains what service is provided in return for the fees and charges.

- 7.13 We think any such document would have the biggest impact if it were given to a prospective tenant or landlord right at the start of the process, that is, when a landlord is considering using a letting agent to find a tenant/let out their property and when a tenant is looking around to see what properties are available.

Key point

Whilst the law does not prescribe that traders must in all circumstances provide information as a 'tariff of fees and charges', consumer law is clear that key information must be given in a way that (depending on the circumstances) is sufficiently clear and comprehensive so that consumers can make appropriate decisions about the product on offer. In any case, given the complexity of charges which often appear in this sector, we think it could be considered best practice for agents to provide tenants and landlords with this type of document and would welcome any move by individual traders or the industry as a whole to provide information in this format.

Better awareness of rights and responsibilities

- 7.14 There appears to be a problem that landlords and tenants are not always fully aware of their rights and responsibilities. We think that this can lead to frustration where another party's performance does not match expectations, and can also mean that disputes occur which could otherwise be avoided. Letting agents play an important role in ensuring that landlords and tenants are properly informed of the legal position that applies to their letting. However we think that tenants and landlords would benefit from a review of the accessibility of information that is available to them.

- 7.15 Based on what businesses have told us about their approach to compliance (Drivers of Compliance Research¹⁴¹) and other work, the OFT has developed a number of tools to help businesses comply with consumer protection legislation.
- 7.16 Two examples which have been successful with businesses are the Sales of Goods Act and the Distance Selling Hubs.¹⁴² These help retailers and business support organisations to understand the law and how it applies to them simply and easily. The hubs are accessible and contain case studies and training materials relevant to businesses. This approach recognises that the majority of businesses who are aware of these laws want to comply, but sometimes they need help and support.
- 7.17 The UTCCRs is an area of consumer law which can cause consumers harm if businesses are unaware of what a makes a good contract and how it can protect both their business and their customers (OFT Guidance 311). Recent OFT research across a broad range of business sectors and support organisations, including the lettings sector, has suggested that there is role for a UTCCRs hub which will help businesses understand these regulations better and help them comply with the law.
- 7.18 The OFT is currently developing the UTCCRs hub which will be introduced to businesses as an online resource in April 2013.

¹⁴¹ *Drivers of compliance and non compliance with consumer law*, OFT, May 2010

¹⁴² www.of.gov.uk/business-advice/treating-customers-fairly/sogahome and www.of.gov.uk/business-advice/treating-customers-fairly/dshome

Key points

In addition to producing this report, which includes some practical help to aid compliance the OFT will also:

- Produce the two pieces of Guidance outlined above.
- Launch a UTCCRs Hub, similar to our existing DSRs and SOGA hubs.
- Continue discussions with other agencies who might be interested in working together to jointly produce final versions of the sample 'quick guides' for tenants and landlords included in this report.

Providing access to redress and assessing quality

- 7.19 There is no legal requirement for letting agents or landlords to be a member of an industry body or code of practice, but there are a number of self-regulatory schemes within the lettings market which play an important role in driving up standards. More detailed information on these schemes is provided in Annexe B.
- 7.20 We would like to see a market where agents and landlords provide a high level of service, and tenants have realistic expectations, and that as a result of this there would be less use of existing redress schemes, as these are normally only used when something goes wrong.
- 7.21 We know many agents strive to provide a good service, but there will undoubtedly be some issues that require third party intervention to reach a resolution. In our view any mechanism which puts right any harm is a valuable, practical tool. In many cases having access to redress mechanisms will result in much better outcomes for all parties, compared to more heavy handed enforcement action.
- 7.22 Different self-regulatory schemes have different requirements for membership, and may use different remedies. For example, some

Ombudsman schemes¹⁴³ will not offer recompense if an agent steals clients' money (that is, they do not have Client Money Protection), they only offer redress where there is a service issue. In addition, some set out clearly the sanctions they can impose on members as a result of a complaint, whereas others do not. Different schemes also have different in-house complaint handling procedures for members. Some schemes set strict deadlines for members dealing with complaints in-house, whereas others do not. This means that it's not always easy for consumers to compare the elements of each scheme.

7.23 The sorts of things consumers may want to know are:

- If an agent is a member of a code, does this automatically mean they provide mechanisms to redress?
- If an agent belongs to more than one scheme does it mean they offer greater all-round protection than another?
- Do all schemes offer client money protection?
- Are there things I need to be aware of if an agent or landlord isn't part of any self regulatory scheme?
- How does one scheme compare against another?

7.24 Whilst members of schemes may use logos or badges as marketing tools to differentiate themselves from those who are not, we think more could be done to make it clearer what these logos actually mean, so consumers can more easily assess and compare quality.

¹⁴³ The Property Ombudsman (TPO), and Ombudsman Services: Property, do not offer Client Money Protection or require it as a mandatory requirement of their membership that agents are part of a Client Money Protection scheme.

Key points

We think it would be useful for the UK Government to consider whether it would be **beneficial to require agents to sign up to a code of practice, or join a redress scheme**, and give some thought to what sanctions would be required to support this obligation. Whilst such a requirement may have obvious benefits in terms of providing redress, there would also be implications such as the financial burdens this might place on business (and attendant potential increase in costs for consumers and reduction in competition). We think it is also important to consider this in light of the European Commission's draft Directive on alternative dispute resolution for consumer disputes (Directive on consumer ADR) and a draft Regulation on online dispute resolution for consumer disputes (Regulation on consumer ODR).

We would also welcome any UK Government and industry discussions about whether more could be done for landlords and tenants to **understand and compare** what existing codes offer, so they can more easily make informed choices and know what to look for when trying to find a good letting agent.

More consistency within industry

- 7.25 We think there is real scope for industry bodies to work together to formulate agreed principles, and that this could be mutually beneficial for both consumers and industry.
- 7.26 As we mention above, industry could agree on more consistency on the layout of any tariff of fees and charges to be given to prospective clients. Another area where there could be more consistency is around how tenants are vetted prior to renting a property.
- 7.27 There will be some information (indeed possibly most of the information) that agents collect for reference and credit checking purposes that is the same no matter what agent a tenant uses. If industry was able to agree

what criteria would be used to assess suitability, this criteria could be shared with landlords and tenants ahead of any vetting checks being made. Transparency of what is being checked would reduce risks to agents of failing to comply with consumer protection legislation, and would mean that tenants and landlords would know exactly what criteria had to be met to pass any vetting check.

- 7.28 We also think there would be clear benefits to the market if tenants were able to re-use pre-tenancy checks within a reasonable period of time, if they go to another agent. Currently, if the tenant has to have a fresh check each time they tried to rent a property, this represents a fairly sizeable expense.

Key points

We would like industry bodies to think about the **feasibility of** introducing **common principles** to achieve more consistency, so tenants' experience in the renting process is more predictable, and it is easier to shop around for properties, while not inhibiting beneficial innovation.

We also think it would be useful for UK Government and industry to think about the feasibility of 'portable' reference checks, so that consumers could provide and reuse reference and credit checks, instead of paying for this service each time they try to secure a property.

Mechanisms which protect money

- 7.29 There is already a compulsory scheme under which private landlords in England and Wales granting assured shorthold tenancies must, if taking a security deposit, lodge it in one of three tenancy deposit protection schemes.¹⁴⁴ We fully support this scheme, and consider that it creates a

¹⁴⁴ Tenancy Deposit Schemes were introduced in Scotland in July 2012 and will become mandatory in Northern Ireland in 2013.

structure that provides very good protection for tenants' and landlords' interests in relation to security deposits.

- 7.30 The problems that our analysis of Consumer Direct complaints identified were that there were reported instances of deposits not being placed in the scheme and there are disputes over how much of the deposit is deducted for things like repair work.
- 7.31 We think making sure landlords, agents and tenants fully understand the requirements and protections of tenancy deposit schemes will prevent many of the types of complaints we have seen and we have included information on this in our sample 'quick guides' attached at Annexe A to help raise awareness.
- 7.32 Additionally, if agents comply with existing consumer protection legislation and ensure they give clear information on things such as notice periods and charges tenants may face during the life of the lease, then there are also likely to be far fewer disputes around what money is returned to a tenant at the end of a tenancy.
- 7.33 There also appears to be a general lack of clarity on the part of tenants and landlords as to what repair work each is obliged to carry out, and who should pay for it. This is an area that is beyond the scope of our work here, since it is very complex and the law relating to repair is fairly extensive. However we think that landlords should be more aware of the repair duties that are placed on them by statute, and we also think that tenancy agreements should not contain unfair terms which place an undue burden on tenants to carry out repairs.
- 7.34 In contrast to the mandatory requirements relating to tenancy deposit schemes, agents are not specifically required by law to use Client Money Protection (CMP) Schemes (for example to cover rent collected, or other money held temporarily on behalf of a landlord or tenant).
- 7.35 Some agents choose to join these schemes so they have an official mechanism to look after clients' money. The Association of Residential Landlords Association (ARLA), National Approved Lettings Scheme (NALS), Royal Institution of Chartered Surveyors (RICS) and National

Association of Estate Agents (NAEA) operate recognised Client Money Protection (CMP) Schemes. There are common criteria among these organisations, for example, mandatory Personal Indemnity Insurance, defined accounting standards and independent redress through an Ombudsman scheme.

- 7.36 This means that if money paid to a letting agent is mishandled, it is possible to make a claim, for example if a letting agent goes into liquidation.
- 7.37 SAFEagent is a UK Government backed campaign which signposts consumers to agents who are part of recognised Client Money Protection Schemes. SAFEagent does not in itself provide CMP. SAFEagent is an effective marketing tool as it differentiates its members from agents who are not signed up to CMP. More information on SAFEagent can be found in Annexe B.

Key points

It is already a mandatory requirement to use a Tenancy Deposit Scheme. We think greater transparency about this requirement would be helpful, so any additional steps the UK Government, industry and consumer groups can take to raise awareness about this would be particularly useful.

Initiatives to raise awareness of landlords' duties towards their tenants (and tenants' duties under their lease) would be useful in preventing some disputes from arising.

Additionally, we think any industry or additional Government initiatives to encourage more widespread participation in client money protection schemes would be beneficial.

An agreed enforcement strategy

- 7.38 The lettings market is very fragmented and comprises a huge spectrum of traders, from landlords operating as businesses on a small scale through to large multinational letting agents. Of these some are members of accredited schemes and codes of practice, but others are not.
- 7.39 Whilst we know that many of the businesses trading in this sector want to and do comply with consumer protection legislation, inevitably there will be some which do not and in some instances enforcement action will be necessary. When this happens, the fragmented nature of the market can make enforcement challenging.
- 7.40 We have asked Trading Standards Services about their enforcement experience in the lettings market. A number of successful prosecutions have been taken under the Enterprise Act 2002 (EA02), Consumer Protection from Unfair Trading Regulations (CPRs), Trade Descriptions Act (TDA) and Fraud Act. Some Services also reported they have been using their resources to provide advice to traders rather than take enforcement action.
- 7.41 The OFT already has a published Statement of Enforcement Principles.¹⁴⁵ We think it would be helpful to discuss the specifics of the lettings market within these wider principles, and to talk to Trading Standards Services about how enforcement efforts can be focused to have maximum impact. This may for example be to protect consumers who are most vulnerable or to tackle problems that cannot be solved by existing industry solutions such as codes of practice. It could also be to agree consistent interpretations of how consumer protection laws apply to letting agents, perhaps through the medium of OFT guidance on the law.
- 7.42 It is the OFT's view that in most cases local TSS are best placed to investigate breaches of consumer law by individual letting agents or

¹⁴⁵ www.offt.gov.uk/OFTwork/policy/statement-consumer-enforcement

landlords, many of whom have a local/regional presence, and to take action in respect of those breaches. This is because local TSS have in-depth knowledge of local markets, businesses and housing issues. Coupled with their wider fair trading functions, such as business advice on compliance, they are often able to secure quick behavioural change from individual traders and to achieve resolution for consumers. However, it should also be recognised that local TSS are under significant funding pressures.

Key point

The OFT will discuss and agree an enforcement strategy with Trading Standards Services for traders who do not comply with the law.

Coverage provided by consumer protection legislation

7.43 Earlier in the report we explain that private landlords can be and frequently are professionals for the purposes of consumer legislation and that whilst it is possible to take a view on when a landlord is a consumer and when a trader, there is no clear marker as to where the line falls. In practice this means that there is a lack of clarity regarding important rights and obligations leading to uncertainty for landlords, agents and tenants.¹⁴⁶ This is an area that we think the government should consider clarifying through legislation.

7.44 The problems that we have observed in the market can be solved to a great extent by applying the protections set down in consumer protection law. We believe therefore that the market works best if agents comply consistently with the requirements of consumer protection when dealing with landlords, unless the landlord is manifestly

¹⁴⁶ In some cases there may also be an actual gap, meaning that there is not an appropriate tool to deal with a problem.

a corporate entity or running a multi-property business. Likewise, we think that it is best if **all** landlords comply with the requirements of consumer protection in their dealings with private tenants. In this way, all parties should be treated fairly, and do not run the risk of infringing consumer protection law.

Key point

We think it would be useful for the UK Government to consider whether the level of consumer protection law coverage is right in the context of the lettings market, and if not whether any legislative changes should be made to deal with this. This could be in the context of a wider review of consumer protection law and should include assessment of the effectiveness and benefits of the reforms enacted by the devolved administrations, in order to consider whether any aspects of these would be appropriate in England. However, any changes must be assessed carefully against the risk that they might aggravate the already problematic supply side problems leading to increased consumer detriment.

A SAMPLE QUICK GUIDES

There is already a lot of existing material designed to help tenants and landlords, such as 'top tips' and other guidance documents.

In this Annexe we set out some of the key things we think tenants and landlords would find useful to think about during the letting process, which we've identified whilst producing this report and our Intelligence Report. We also think that it would be useful for all parties to have easy access to comprehensive and authoritative sources of information about their rights and responsibilities. We have put together a list of useful information sources in Annexe B.

Rather than add to the plethora of existing material our aim is to jointly produce agreed and final versions of this type of document. We have started some discussion on this, but welcome views from all those involved in producing this material.

These documents have been drafted as an example based on the legal framework in England and Wales. Any future final versions would of course need to reflect the different frameworks in the devolved administrations, in addition to ensuring the content and format is user friendly.

Tenants' top tips to renting property

Renting a property?

Make sure you understand the letting process so you can ask the right questions and know what to expect from the landlord and, if you are using one, the letting agent.

The most common tenancy agreement for private tenants renting residential property is called an Assured Shorthold Tenancy (AST). Under an AST there is an initial fixed period of time, during which the tenant can't be asked to leave, unless they breach the agreement in a serious way. After this the tenant can keep on living in the property, but the tenancy can be ended by either party giving a specified notice period, as set out in the tenancy agreement. Here are some top tips to help you at each stage.

Planning your property search and looking for properties

- Take some time to find out more about the letting process. For example, check your rights and responsibilities at www.gov.uk/private-renting/your-rights-and-responsibilities and look for guidance such as the 'Housing Guide' under www.adviceguide.org.uk
- Think about your property requirements so you can explain clearly to a letting agent what you are looking for, and they can show you suitable properties.
- Consider what your budget will cover. As well as monthly rent and a security deposit you may be asked to pay other sums of money for things like reference checks and drawing up the tenancy agreement. Be ready to ask questions about such costs.
- Keep a copy of any advertisement you find for a property you are interested in and take it with you when visiting agents. Check that the terms advertised, such as rental rates, match those you are being asked to agree, for example rents and any service charges.

Going property hunting

- If you deal with a letting agent, check if they are a member of a Code of Practice or industry body and ask what this actually means in practice. Look out for the SAFEagent logo when you are choosing a letting agent. An agent displaying this logo is a member of a professional body and must maintain certain standards of practice, be part of a redress scheme (a scheme that deals with complaints) and use a recognised deposit protection scheme.
- Ask the landlord or the agent for a breakdown of all fees payable in addition to the rent, such as agent fees and other charges such as reference checks or 'inventory check out' fees, how they will be calculated and when they are payable. Do this as soon as you can and certainly before you pay over any money or sign your tenancy agreement.
- Be very cautious about paying any money, for example, a deposit, before you have inspected the property.
- When you view the property, make sure you see all of it. Ask the landlord or agent about anything you are unsure of.
- Ask yourself whether it matches your requirements, and does it match how it was described in the advertisement?

Paying money

- You may be asked to provide a sum of money described either as a 'holding deposit', a 'holding fee' or similar term. Whether you use an agent or deal with the landlord directly, before paying a deposit:
 - Check with them the nature and purpose of this sum of money, for example, what you will get for paying it.
 - Confirm that your chosen property will actually be taken off the market and check how and when this will be done.
 - Ask about the circumstances in which the money will be refunded. Ensure that you are happy with those terms before you agree to them. Ask for them to be put in writing so you and the landlord or agent are clear what was agreed.

- Do not send any money to someone you do not know.
- Paying by credit card may offer more protection.
- Make sure you obtain a receipt for the payment you've made.
- If pre-tenancy checks on your credit history and references are required, ask the landlord or letting agent to provide details of what they are checking for, whether you are expected to pay for these checks and if so, how much they will cost. Ask if you can get any of the information yourself, as this may save you money.
- When you sign the tenancy agreement, you may be asked to pay a security deposit. In England and Wales if the tenancy is an AST agreement the landlord or agent must register the deposit securely under a deposit protection scheme. The scheme must be government approved. There are currently three different deposit protection schemes available. Ask the letting agent, or landlord, which deposit protection scheme they intend to use.

The tenancy agreement

- Confirm key dates such as the start date of the tenancy agreement, the date the rent should be paid and when and how you or the landlord have to give notice, in order to bring the tenancy to an end. These should be set out in the tenancy agreement.
- Read the tenancy agreement and all its terms carefully and understand what you will and won't get. Before you sign, check:
 - What the landlord is agreeing to do and how they will do it.
 - What you are expected or required to do and how.
 - Are there any restrictions on what you can do with the property?
 - What happens if you have a problem with the property – who should you notify or complain to and what will they do?
- Challenge any terms you think would be unfair to you and do not feel pressurised into signing the agreement if you are unhappy with its terms. The OFT Tenancy Guidance may be useful and can be found at:

www.offt.gov.uk/shared_offt/reports/unfair_contract_terms/oft356.pdf . The letting agent or landlord should take steps to ensure the terms within the agreement are fair to you.

- If you have requested work to be done or specific items of furniture, make sure you have the landlord's written agreement that they will do or provide this before you sign the tenancy agreement.
- If the landlord or agent carries out an inventory of the property's fittings and furnishings before you move in, make sure you take part in this. Point out any existing damage or wear and tear to the fittings or furniture. Make sure the inventory document reflects this and keep a copy of the inventory safely.
- Keep a copy of the signed tenancy agreement safely.

During the tenancy

- If you have an AST, check your deposit has been protected in a government authorised deposit protection scheme. In England and Wales, your landlord or the agent must protect the deposit within 30 days of receiving it and must provide information to you and to any person you agreed would pay the deposit on your behalf.
- If you have a problem during the tenancy agreement (for example if you report a problem that is not dealt with, or you feel work should be done and it is not, or you are not happy with the landlord or the agent), there are places you can go to for advice. A useful starting place is Citizens Advice. www.adviceguide.org.uk/common_problems_with_renting

The end of the tenancy agreement

- Check the tenancy agreement to confirm when you need to give notice. If in doubt, ask the agent or landlord to explain the notice period.
- Check the property's inventory if you have one. You should try to be present for any inventory carried out before you move out. Discuss the fittings, furniture or the state of the property generally with the landlord or agent, and discuss whether they have been damaged. Make sure you see what is noted on the inventory document and ask for a copy of the inventory.

- Confirm the process to recover your security deposit. Know who to go to if you have any problems getting your money back.

Where to go for further information/help

www.ofc.gov.uk (See Annexe B of the Report)

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Landlords' top tips when using a letting or management agent

If you plan to use a letting and/or management agent to let and/or manage your property, make sure that you understand the letting process so that you can ask an agent the right questions.

Here are some tips to help you at each stage of the process.

Choosing a letting agent

- Take some time to find out more about the letting process. For example, check your rights and responsibilities, and information on private renting such as your obligations to your tenants at www.gov.uk/government/publications/top-tips-for-landlords-assured-shorthold-tenancies
- Think about whether you want the agent just to find you a tenant, or also to collect the rent or manage the property.
- Explain your letting requirements clearly to an agent, for example what type of tenant you want to let your property to and any restrictions on the property's use.
- Check to see if the letting agent is a member of a Code of Practice or industry body and ask what this actually means in practice. The SAFEagent logo means they are a member of a professional body with client money protection and must maintain certain standards of practice, be part of a redress scheme and use a recognised deposit protection scheme.

Before signing an agreement with a letting or management agent

- Examine the terms and conditions of the letting or managing contract and make sure you are happy they match your requirements. Pay attention to the following:
 - What service will the agent provide to a) find a tenant b) get the lease agreed c) manage your property after a tenant has moved in? Does this match your requirements?

- Know exactly what you will be paying for and time periods for payment.
- Confirm with the agent the type of tenant they are likely to find for your property, the charges tenants will pay and the tenancy agreement to be used.
- Will the agent collect money from the tenant for you? If so, how is your money protected if something goes wrong?
- If a security deposit is taken from a tenant when they rent your property, will the agent register this on your behalf, or do you need to do it?
- If you use the agent to manage the property, check the service the agent will provide. Be clear what the agent will be responsible for, and what your responsibilities will be.
- If the agent is responsible for repairs, check who they will use. Ask how additional costs will be calculated.
- What happens if you are not happy with the agent's services, if you want to change agent or start managing the property yourself? Check the terms of ending the contract with the agent and on what terms fees and penalties are charged.
- If you are not happy with a term in the agreement, you may want to challenge it. Some terms may be unfair, and so not binding on you, but it is best to get the agreement clear from the outset. To find out more about unfair terms look at the OFT's Unfair Terms in Consumer Contracts Guidance (www.offt.gov.uk).

Once you have signed the agreement with your agent

- Don't be afraid to check that the agent is providing the level of service you have agreed.
- Know where to go for help for any issues you cannot resolve directly with the agent. For example, professional industry bodies and ombudsman schemes might be able to help.

Where to go for further information/help

www.ofst.gov.uk See Annexe B of the Report)

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B WHERE TO GO FOR MORE INFORMATION

Association of Residential Letting Agents (ARLA)

ARLA is a voluntary self-regulating trade body for residential letting agents in the UK. Consumers can check on ARLA's website to establish whether their letting agent is a member. ARLA's website also provides information for consumers about the lettings process. ARLA is a member of The Property Ombudsman Scheme.

www.arla.co.uk

Information for tenants: www.arla.co.uk/information/tenants

Information for landlords: www.arla.co.uk/information/landlords

Citizens Advice

The Citizens Advice website has a wide range of information about renting a property including a fact sheet with information on what charges a letting agent can make and a checklist of points tenants should ask before registering with an agency and signing a tenancy agreement. Citizens Advice also gives free confidential and impartial advice to help consumers solve problems.

www.adviceguide.org.uk/england/housing_e/housing_renting_a_home_e.htm

To use the Citizens Advice Consumer Service call: 08454 040506 or visit www.adviceguide.org.uk

There are separate pages for consumers in Scotland, Wales and Northern Ireland:

www.adviceguide.org.uk/scotland/housing_s/housing_renting_a_home_s.htm

www.adviceguide.org.uk/wales/housing_w/housing_renting_a_home_e.htm

www.adviceguide.org.uk/nireland/housing_ni/housing_renting_a_home_e.htm

To use the Citizens Advice Consumer Service call: **08454 040506** or visit www.adviceguide.org.uk.

Consumerline

Consumer advice in Northern Ireland is available via Consumerline.

www.consumerline.org/

Department for Communities and Local Government (DCLG)

DCLG content is now included within the GOV.UK website (see below)

GOV.UK (this has replaced Directgov)

GOV.UK, the government's website provides information about private renting for tenants and landlords, such as what landlords' and tenants' rights and responsibilities are, repairs, rent increases and settling disputes. It also provides information about deposit protection schemes.

www.gov.uk/browse/housing/owning-renting-property

Some of the guidance available for tenants includes:

www.gov.uk/government/publications/top-tips-for-tenants-assured-shorthold-tenancies

www.gov.uk/government/publications/assured-and-assured-shorthold-tenancies-a-guide-for-tenants

Some of the guidance available for landlords includes:

www.gov.uk/government/publications/top-tips-for-landlords-assured-shorthold-tenancies

www.gov.uk/government/publications/assured-and-assured-shorthold-tenancies-a-guide-for-landlords

www.gov.uk/government/publications/housing-health-and-safety-rating-system-guidance-for-landlords-and-property-related-professionals

Housing advice NI

The Housing Rights Service produces housing advice NI which offers independent housing advice and information to the public in Northern Ireland. This includes advice for tenants on finding a new home, taking on a new tenancy and basic legal rights.

www.renting.housingadviceni.org/prs/advice-for-tenants.html

Landlords Association for Northern Ireland (LANI)

LANI is an association whose members are involved in renting private residential accommodation in Northern Ireland.

www.lani.org.uk

Landlord Accreditation Wales

The Landlord Accreditation Wales website contains information for tenants, landlords and agents. Landlords and agents can use the website to find out more about the Landlord Accreditation Wales scheme and sign up to be a member of it.

www.welshlandlords.org.uk

National Approved Letting Scheme (NALS)

The NALS logo signposts an independent licensing scheme for letting and managing agents. The NALS website offers an online search facility to find your nearest NALS agent. NALS provides tenants and landlords with information about the levels of service they can expect from NALS licensed firms. NALS is also a member of The Property Ombudsman Scheme.

www.nalscheme.co.uk

www.nalscheme.co.uk/landlords-tenants/t-nals-service-standards

National Landlords Association (NLA)

The NLA is an association for private residential landlords in the UK. Its aim is to promote good practice amongst its members. The NLA provides an online facility to check whether a landlord is a member. It also provides online guides for landlords, agents and tenants, setting out what good practice means.

www.landlords.org.uk

NLA guide to renting for tenants:

www.landlords.org.uk/tenants/guide-to-renting

NLA membership information for landlords:

www.landlords.org.uk/membership

Northern Ireland Housing Executive

The Housing Executive provides guidelines for tenants and landlords on renting privately.

www.nihe.gov.uk/index/advice/renting_privately.htm

Northern Ireland Executive

The Department for Social Development has produced a number of guidance documents for both landlords and tenants. There is also a list of relevant Northern Ireland Legislation.

www.dsdni.gov.uk/index/hdiv-housing/private_rented_sector/hdiv-private-rented-sector-publications.htm

Ombudsmen Services: Property (OS-P)

OS-P can consider complaints about letting agents who are members of the scheme. Where appropriate there is provision for remedies and redress in respect of disputes that form the subject matter of unresolved complaints and disputes.

www.ombudsman-services.org/property.html

Private Rented Housing Panel (PRHP) Scotland

PRHP assists tenants and landlords resolve disputes. It can force landlords to do necessary repairs and provides guidance for tenants and landlords on repairs.

www.prhpscotland.gov.uk/prhp/1.html

Royal Institution of Chartered Surveyors (RICS)

RICS provides an online guide for landlords on how to let property. This guide explains the basic legal jargon and practical issues involved in letting a flat or a house. RICS also provides a complaint procedure for disputes. Letting agents regulated by RICS follow the industry standards set out in the Blue Book. They also provide an online guide which sets out the roles and responsibilities for letting agents, landlords and tenants.

www.rics.org/uk/about-rics

www.rics.org/uk/knowledge/more-services/guides-advice/consumer-guides/letting-a-property-guide

SAFEagent

SAFEagent is a kite-mark promoted by DCLG which aims to raise awareness of the financial risk of using uninsured letting agents. All agents signposted and signed up to the SAFEagent scheme are covered by existing client money protection schemes and deposit protection schemes. This means that all client money is held separately from the operating funds of the firm. There are several client money protection schemes in the sector. These are currently operated by the Association of Residential Letting Agents (ARLA), the Law Society, National Approved Letting Scheme (NALS), and the Royal Institute of Chartered Surveyors (RICS) to which agents voluntarily belong.

www.safeagents.co.uk

Scottish Association of Landlords (SAL)

SAL represents the interests of all landlords and letting agents throughout Scotland. They provide information, training and advice to their members.

www.scottishlandlords.com

Scottish Government

The Scottish Government provides information for tenants and landlords in Scotland on their rights and responsibilities regarding management issues, maintenance, handling of rents and deposits and landlord registration.

www.scotland.gov.uk/Topics/Built-Environment/Housing/privaterent

Scottish Government has also published a summary of the laws that apply to all types of letting in Scotland.

www.scotland.gov.uk/Topics/Built-Environment/Housing/privaterent/landlords/management/rules/laws

Shelter

Shelter provides information about the lettings process for tenants on their websites. http://england.shelter.org.uk/get_advice/renting_and_leasehold

Shelter also provides an online checking system where by inserting a postcode, tenancy start date and deposit amount, tenants can check whether their deposit has been properly protected.

http://england.shelter.org.uk/get_advice/paying_for_a_home/tenancy_deposits/deposit_protection_and_tenancy_deposit_schemes

Shelter Scotland

http://scotland.shelter.org.uk/housing_issues/home_ownership_and_private_renting

Shelter Cymru

www.sheltercymru.org.uk/get/advice-display.aspx?Parentid=2&table=2&pageid=36&subcat=54

Shelter Northern Ireland

www.shelterni.org

Tenancy Deposit Protection schemes

By law all tenancy deposits in Scotland, England and Wales must be protected in a tenancy deposit scheme. Landlords are required to protect deposits with one of the government backed schemes within 30 days of receiving it. More information on each scheme can be found via the links below.

Tenancy Deposit Solutions Ltd (TDSL) www.mydeposits.co.uk

The Deposit Protection Service (DPS) www.depositprotection.com

The Tenancy Deposit Scheme (TDS) www.tds.gb.com

Letting Protection Service Scotland www.lettingprotectionscotland.com

SafeDeposits Scotland www.safedepositsscotland.com

My deposits Scotland www.mydepositsscotland.co.uk

The Property Ombudsman (TPO)

The Property Ombudsman (TPO) provides a Code of Practice for Letting Agents and an Ombudsman redress scheme for complaints. Using an agent who is registered with TPO provides certain safeguards. The Code of Practice is mandatory for all TPO Members offering residential letting and/or management services.

www.tpos.co.uk

The TPO provides consumer advice leaflets for landlords and tenants which can be download from its website.

www.tpos.co.uk/consumer_guide_rents.htm

Welsh Government

The Welsh Government has recently completed a consultation on a White Paper on housing. This focused on modernising the private rented sector:

<http://wales.gov.uk/consultations/housingcommunity/proposalprivaterentsector/?lang=en>

Welsh Tenants Federation

The Welsh Tenants Federation is a representative voice for tenants in Wales and provides information on issues affecting tenants.

www.welshtenants.org.uk

Which?

The Which? website provides information on renting a property, including advice on how to find a property, what questions to ask a letting agent or landlord and explanations about tenancy deposit schemes and letting agreements.

www.which.co.uk/money/mortgages-and-property/guides/renting-a-home