

Extract from Government response to Consultation on the Estate Agents Act and the Property Misdescriptions Act

Estate Agents Act 1979 (EAA),
Local Authority Trading Standards Service (LATSS)
Property Misdescriptions Act 1991 (PMA)
Trading Standards Institute (TSI),
Local Authorities Coordinators of Regulatory Services (LACORS)

<http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/r/12-1006-response-estate-agents-and-property-misdescriptions.pdf>

Over 400 responses were received from 271 organisations and individuals including traditional estate agents, private sales portals, trade and professional bodies, representatives of Local Authority Trading Standards and consumer bodies.

Estate agency respondents felt that the EAA enshrines best practice in the industry and key consumer protections, and does not present a burden for businesses that wish to comply with them. Nor did estate agency respondents think that the legislation proved a barrier to entry and pointed to existing online-only businesses acting within the scope of the EAA. They acknowledged, however, the relatively low number of such businesses currently in the market and considered that this was due mainly to consumer preference and the commercial difficulties of making a success of that type of business model rather than compliance with the legislation. Many called for more rather than less regulation of the estate agency industry and particularly for positive licensing of the business involved.

1.6.

Which? suggested that the number of estate agents operating was more likely to be determined by the state of the property market than by regulation acting as a barrier to entry. Which? commented that in 2004 it had set up a fake estate agency to demonstrate the lack of regulation governing the industry and had been able to go into business in a matter of days, without any training.

1.7.

Private sale portals disagreed, saying that the EAA posed a disproportionate burden if they were deemed to be within its scope. Some LATSS representatives thought that new businesses might perceive the regulations to be a disincentive to entering the market.

1.8.

Many respondents considered that private sales portals not providing advice to either party or otherwise getting actively involved in a particular sale should not be in scope of the EAA. However, there were differing views about whether these portals were currently in scope.

1.9.

Uncertainty as to the current scope was acknowledged by some respondents, including estate agents and trade bodies, who agreed the definition predated the internet, and that it was unwieldy and clarity would be welcome. A trade body in the house building sector said that its industry would welcome clarity.

1.10.

Some respondents, including estate agents and regulators, considered that the definition made clear that private sales portals were already exempt from the EAA, because they only engage in advertising. One estate agent took the view that the exemption for advertising meant that private sales portals were not caught by the EAA if they published advertisements

which included contact details for the seller, but they were if they did anything more to contribute to an introduction or a sale. Another thought that the breadth of the definition of estate agency work in S1 of the EAA meant that private sales portals were caught.

1.11.

The consequences of this uncertainty are:

If the business model was in scope, the private sales intermediary would either need to comply with the EAA (and PMA) with the costs involved or to operate without complying and potentially be open to enforcement action for acting illegally. The private sale portals consulted considered they were out of scope but agreed that the uncertainty of the situation was a deterrent to them wishing to expand their activities and to potential new entrants.

The major property marketing portals do not allow private sale portals to post details on their sites and portals felt this restricted their ability to compete with traditional estate agencies. This may be because of concerns that property details being provided by businesses not complying with the PMA might be inaccurate.

Private sales portals and LATSS referred to cases where consumers had been charged commission by estate agents under sole selling or sole agency contracts, for selling property through private sales portals. Guidance was issued by the OFT, TSI and LACORS in around 2009, following such cases, to provide clarity as to whether internet portals were estate agents. Private sales portal respondents commented that their business is still affected by suggestions that private sales portals may be considered to be estate agents (under the EAA) and thus may conflict with estate agents' sole agency contracts.

1.12.

There was agreement that the requirements of the PMA that property details should be checked for accuracy involved a significant amount of work for estate agents including training staff, checking details and inspections.

Question 4. The proposal is that businesses, such as online sites, that act simply as "passive intermediaries" offering a limited, low-risk service to buyers and sellers, whether or not they charge a fee, should be outside the scope of the EAA. What do you think the benefits and disadvantages of amending the scope of the EAA in this way would be?

Question 5. If the EAA was amended as proposed what activities should result in a business ceasing to be a "passive intermediary" and coming within the scope of the EAA?

Private sale portals thought that the benefits of the proposal would be to allow different business models to compete with one another on a more equal basis. Removing uncertainty about the scope of the legislation and hence whether or not some business models were acting within the law should also help the confidence of existing businesses and potential new entrants.

Which? expressed support for consumer choice but also the need to balance this with consumer protection, particularly as consumers may not distinguish between different business models.

Some trade bodies saw the merits in amending the EAA to provide clarity but felt that the amendment should be tightly defined and accompanied by clear guidance for all concerned. One respondent commented that there would be little impact, because private sales portals can already do the proposed activities outside of the EAA. Some enforcers thought simply changing the guidance would suffice, on the same basis.

Many estate agents thought that the proposal would create a two-tier estate agency industry and there were concerns that consumers would not have access to the redress mechanisms that are mandatory for estate agents engaging in residential work. These respondents appeared to misunderstand that the scope of the proposal was limited to businesses offering a passive intermediary service who would not be providing advice or getting involved in negotiations or other active agency roles. One private sale portal business had attempted to set up a voluntary code of conduct for similar businesses.

In terms of the affects on consumer detriment, concerns were also raised about private sales resulting in bogus house viewings, predatory buyers preying on vulnerable sellers, private sellers not being subject to legal duties in terms of properly describing their properties, the lack of a redress scheme and sellers or buyers not achieving appropriate price for their sale/purchase. On the other hand, some felt that such risks are inherent in private sales.

Most respondents considered that the types of activities that were not appropriate for private sale portals if they were operating outside the EAA included: personal advice about a particular sale, preparing particulars, carrying out a physical inspection of a house, valuations, arranging viewings, arranging finance, handling deposits, negotiations on the sale and involvement in post-completion activities.

There were differing views on whether a private sale portal should be able to provide For Sale boards. All thought that providing a board for the seller to put their own details on was compatible with a passive role and some thought that providing board branded by the intermediary and with the internet address of the site where the property details could be obtained was also compatible. Some felt that the passive role should not include telephone contact with a prospective buyer as there was a risk of influencing the buyer. Others were not concerned by this so long as the telephone contact was restricted to transmitting the same information as was available on the site.

Question 6. What do you estimate the likely effects of the proposed change to be on the operational costs and profitability of individual firms or the industry as a whole?

Some of those who responded to this question thought that the proposal might boost competition in the sector although they were not able to quantify this. Most of the many estate agents who responded were strongly of the view that consumers preferred the traditional “holistic” service they provided and that it was consumer preference rather than the legislation that resulted in the current very low market penetration of alternative business models such as private sale portals. On the other hand, many of them feared that the proposed deregulation would put traditional estate agents at a disadvantage and that they would lose out.

Question 7. Would the purpose of the proposed change be best served by amending the definition of “estate agency work” ie the activities within the scope of the EAA (S1.1) or by amending the set of activities which are exceptions to the EAA (S1.2, 1.3 and 1.4)?

Of the respondents who had views about this, most did not support an amendment at all. However, some suggested the definition should be the focus as this would provide a clearer and more comprehensive effect. Others who favoured amending the exceptions thought that the central concept in the EAA of an estate agent being someone making an introduction was a useful one and widely understood and should be retained.

Question 8. What, if any, beneficial or detrimental effects might the proposed change have on consumers?

While some (as per Question 4 above) felt the proposal would reduce consumer protection, others thought that the CPRs provided adequate protection and that removing barriers to new business entrants would lead to greater competition and consumer choice and to higher standards and lower prices. Other benefits could be greater consumer awareness of the home buying and selling process and the tools that were available. For example, how to research current prices of similar

properties in a particular area as well as the different business models for buying and selling that were available.

Private sales portals felt the proposal would increase competition and drive down costs in the industry and provide increased choice for the consumer.

Many respondents of all types were concerned that consumers might have difficulty selling privately because of a lack of knowledge and experience in negotiating with the risk of chains breaking down. Trade bodies felt that consumers would need to be given sufficient information about the services offered by “passive intermediaries” to make an informed decision when choosing how to sell their home.

The Scottish Trading Standards (SCOTTS) were satisfied that the protections of the CPRS 2008 would be sufficient to regulate the passive intermediaries and ensure adequate consumer protections.

Question 9. Could there be unintended consequences of the proposed change and if so, what?

Some, particularly traditional estate agents, felt there would be an increased risk of unscrupulous operators seeing an opportunity in the proposal to take advantage of unsuspecting consumers. Others felt that existing legislation including the CPRs and the Fraud Act were sufficient protection. Many were concerned about the decline of the traditional high street estate agent and jobs being lost with a knock on effect of the high street suffering. However many recognised in their responses that consumers did still prefer the face-to-face contact and the local knowledge and having someone to negotiate on their behalf. This would not be affected as the narrow exemption would not allow for exempt businesses to offer advice.

1.27.

Other key issues raised by the trade bodies were that private sales portals would be exempt also from the MLRs, on the basis that the EAA definition of “estate agency work” is incorporated in the MLRs. They felt that the risk of money laundering was high when establishing non face to face business relationships. One trade body suggested that the amendment would lead to more potential prosecutions under the Proceeds of Crime Act 2002 (POCA), as private sales portals would not be covered by the MLRs but could still be prosecuted under POCA.

Question 10. Would there be particular issues about implementing the proposal in Scotland, Wales or Northern Ireland?

Many respondents either had no comment or were unable to comment. A few felt that in Scotland, there were fewer problems generally in home buying and selling and that the proposal would give some benefits to consumers in terms of greater competition and choice. SCOTTS did not regard estate agency as source of major problems but thought that there might be marginal benefits from the proposed amendment.

Question 11. Are there any other points you wish to make about this proposed change?

Other issues raised were outwith the scope of the consultation and included property lettings not being in scope of the EAA, positive licensing for estate agents and the potential advantages of a market where agents could act for a buyer as well as a seller.

Some respondents felt that the consultation should have detailed the proposed amendment and the activities which were proposed to be in and out of scope, to enable them to respond more fully. A number of estate agents were concerned that they only became aware of the consultation towards the end of the consultation period and that the consultation period should have been longer with greater effort to engage estate agents.