

GUIDANCE ON TRANSPARENCY OF FEES INVOLVING PROPERTY SALES

Compliance with the Consumer Protection from Unfair Trading Regulations 2008

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The contents of this guidance does not constitute legal advice merely the application of the law as interpreted by the National Trading Standards Estate and Letting Agency Team; only a court of law can provide certainty.

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Introduction

This guidance supplements previous generic advice concerning the application of the Consumer Protection from Unfair Trading Regulations 2008 (“the CPR’s”) issued by the National Trading Standards Estate Agency Team (“NTSEAT”), as was, of Powys County Council - the UK’s lead enforcement authority for the Estate Agents Act 1979 (“the Act”).

This guidance specifically addresses the issue of transparency of fees, including referral fees, within the estate agency sector and should be regarded as replacing any earlier guidance on the point.

Where this guidance refers to an ‘estate agent’ this should be interpreted as a person engaging in estate agency work in accordance with section 1 of the Act.

Acknowledgement is provided for the contributions of the organisations listed in Appendix 5, who assisted in the preparation of this guidance.

Purpose and Scope of this guidance

This guidance seeks to consider the effect of the Estate Agents Act 1979 and the CPRs on opaque pricing generally – encompassing both referral fees and other practices.

This guidance has the support of the contributors named in Appendix 5 and it is anticipated that its use will be mandated in the redress providers’ respective Codes of Conduct and membership rules, and will be supported by sector approved forms and stationery; though as this is a guidance based on interpretation of existing law, compliance with it should be seen as an immediate priority.

Executive Summary

Failure to disclose referral arrangements may render an estate agent liable for criminal prosecution under the CPRs and/or action by NTSELAT for warning or prohibition under the Act.

Ultimately, only a court may decide whether any particular set of circumstances amounts to a breach of the CPRs. However, NTSELAT offers the following recommendations as a statement of desirable practice:

An estate agent should disclose in plain terms

- (a) The price of its services, including any “compulsory” extras; and
- (b) Where a referral arrangement exists, that it exists, and with whom; and
- (c) Where a transaction-specific referral fee is to be paid, its amount; and
- (d) Where a referral retainer exists, an estimate of the annual value of that retainer to the estate agent or its value per transaction; and
- (e) Where the referral is rewarded other than by payment, an assessment of the annual value of the reward or the value of the reward per transaction.

Disclosure should be made in writing, to a seller as part of standard terms and conditions and to buyers by being incorporated into or annexed with the property particulars **before** any ancillary services are promoted.

The disclosure must be made in a way which is clear, intelligible and unambiguous and have no lesser prominence in documentation than other important terms, conditions, or information.

The Estate Agents Act 1979

The Act makes specific provision (see Appendix 3) for disclosure of information to sellers. An estate agent is required to inform their client as to the client's liability to the agent, and as to the services which the agent is offering or intends to offer to a prospective purchaser, or which he knows a connected person or third party is offering or intends to offer to a prospective purchaser¹.

An estate agent is also required to give details of any payments due under the contract to the agent or another which do not comprise the agent's remuneration for estate agency work².

There is, however, no provision in the Act requiring disclosure of the fact of referral fees or their amount. Even in the case above, where third party fee disclosure to the seller is obligatory, there is no requirement that the agent specify what part of that payment they will receive as a referral fee.

The CPRs

The CPRs operate to ensure that consumers have appropriate information on which to make a "transactional decision" – which in this sector amounts to a decision whether or not to deal with an estate agent or other service provider.

A fuller analysis of the provisions of the CPRs is at Appendix 1.

Plainly the most important information in deciding whether to accept a service is the price of that service. Any practice by an estate agent which hides the real price of a service is capable of being found to be an unfair commercial practice under the CPRs – whether it is the price of the service the agent is themselves providing, or the price of a service they have recommended, as the existence and scope of such payments are "material information" which could affect a consumer's decision about whether, or not, to engage with an estate agent.

As to the latter, recent surveys have shown first, that it is common for solicitors, conveyancers and others to pay estate agents to refer sellers and buyers to them; and second, that consumers are largely unaware of the practice.

The Ministry of Housing, Communities and Local Government has expressed the view that unless the sector ensures transparency of referral fees, a complete ban on referral fees will be considered.

¹ S.18(1)(a), (2) of the Act

² S.18(2)(c) of the Act

Definition of referral fees

A definition of referral fees is set out in Appendix 2.

A traditional referral fee exists where an agent recommends (refers) another business to a seller or prospective buyer, and that business rewards the agent for the referral by way of money, gifts or any other form of benefit. The other business might offer preliminary services, such as photography, or something as fundamental as conveyancing.

Additionally, referrals to associated companies, whether under the same roof or not, such as financial advisers, mortgage providers, etc. may still constitute a referral where consideration is passed between the companies.

The status of the connected service provider must be made explicit to the consumer irrespective of their status of being the buyer or seller.

Application of the CPRs: examples

Example One: The traditional referral fee:

An estate agent routinely refers sellers to a conveyancer, which pays the estate agent a fixed fee for every referral. Neither the fact of the referral fee nor its amount are disclosed by the estate agent.

This is potentially a misleading omission on the part of the estate agent; a proportion of what appears to be the fee for conveyancing is, in fact, a referral fee. This has a strong potential to affect a consumer's decision whether to purchase that service or to look elsewhere.

It is no answer to rely on the obligations of other professionals - for example solicitors or licensed conveyancers – to itemise referral fees. Not only do not all potential referral business have such an obligation, the misleading commercial practice occurs when the consumer is, by the misleading omission, diverted or prevented from making an informed choice.

In the same way, nor is it an answer for an estate agent themselves to declare the referral fee *after* the consumer has taken the decision to proceed. Timing is crucial. Failure to make a required disclosure in a *timely fashion* is itself capable of being a misleading omission. It must be remembered that the *transactional decision* is not necessarily the decision to buy or sell or not to buy or sell an interest in land but can equally be the consumer's decision to accept the recommended service.

RECOMMENDED ACTION

The estate agent should declare the fact of the referral arrangement, and the fixed fee they will receive, in its contract with the seller. They should also make it clear that the consumer can choose to source this service from another provider

“We always refer sellers to XY Conveyancers. It is your decision whether you choose to deal with XY Conveyancers. Should you decide to use XY Conveyancers you should know that we would receive a referral fee of £300 from them for recommending you to them.

Example Two: The retainer:

An estate agent routinely refers potential purchasers to a conveyancing solicitor, which pays the estate agent an annual fixed retainer irrespective of cases referred.

This is equally a potentially a misleading omission on the part of the estate agent; again a proportion of what appears to be a conveyancing fee is in fact a referral fee, regardless of the fact that the actual proportion cannot be easily discerned.

Another feature of this example is that it involves *purchasers*. It is certainly possible that a consumer may choose not to deal with an estate agent who operates on a referral basis. Disclosure of these terms should be made at an early stage, to allow the consumer that choice.

RECOMMENDED ACTION

The estate agent should declare the fact of the referral arrangement, with an assessment of the annual or averaged per-transaction value to the agent of the arrangement. The estate agent should also make it clear that the consumer can choose to source the conveyancing service from another provider.

“We routinely refer potential purchasers to XY LLC. It is your decision whether you choose to deal with XY LLC. In making that decision, you should know that we receive an annual payment benefits from XY LLC, equating to approximately £XXX per referral.”

To ensure the disclosure is timely, it should be made as part of the property particulars, whether paper, electronic, or hosted.

Example Three: Intangible benefits:

An estate agent refers all sellers and confirmed purchasers to a removal company. No retainer is paid, but the owners of the removal company provide benefits to the estate agent e.g. personally make a contribution to the estate agent's children's school fees or provides tickets and hospitality to sporting events.

Few people move house often, and the practicalities of moving often take a back seat to the emotional attachment to the idea of a new property. Moving services are too often an afterthought for many, who may well take a lifeline of a recommendation by an estate agent. Any recommendation may well mean that a consumer decides not to seek other quotes or shop around, for the sake of ease. If they might have done so knowing the estate agent's connection with the moving company, that is a transactional decision affected.

RECOMMENDED ACTION

While it may be unrealistic for the estate agent to quantify their benefit from this arrangement, they should at least declare the fact of their connection with the moving company.

"We routinely refer clients to XY Moving Ltd.. It is your decision whether you choose to deal with XY Moving Ltd. In making that decision, you should know that we receive gratuities from XY Moving Ltd worth approximately £xxx per annum."

So far as sellers are concerned, this should be in the contract; so far as buyers, in the particulars.

Example Four: Variable Gifts

An estate agent refers all potential purchasers to a financial adviser (FA) for "proceedability" checks. There is no financial arrangement between them but an understanding that the estate agent will receive a case of Champagne every Christmas; and, if the financial advisor seeks a particular product at any stage during the year, a case of Krug Champagne. Both understand that the Krug is paid for from the commission the FA receives from the sale, and the FA declares his commission to the consumer.

It is important to focus in this example on what the CPRs are for: to ensure that consumers make an informed choice. The consumer may have been able to acquire the financial product

recommended at a lower commission rate if they dealt with a different FA or directly with the financial institution.

RECOMMENDED ACTION

Obviously no estate agent would want to greet a potential seller by announcing they are measuring their value in potential Champagne; equally obviously the fact of the referral arrangement should be disclosed as well as an assessment of its value.

“We routinely refer all potential purchasers to XY FA Ltd. It is your decision whether you choose to deal with XY FA Ltd. In making that decision, you should know that we receive benefits from XY FA Ltd worth between £200 and £1500 per annum.”

Example Five: Opaque Pricing

An estate agency charges an initial fixed fee for marketing a property for sale. The seller is invited to use a “partner” for additional services (such as conveyancing) for a further fee. Should the seller decline to use this partner, the consumer is charged a fee of a different description by the estate agency.

This situation potentially reveals the following unfair commercial practices:

- (a) A misleading action, as the initial statement of the price is false, given that the seller will always pay more than the “fixed fee” if they accepted the offer for their property. Price is perhaps the feature most likely to affect the taking of a transactional decision;
- (b) A misleading omission, as the extra fee payable on exercising the option not to use the “partner” service is not made plain at the outset;
- (c) A breach of the requirement to act with professional diligence, as to fail to observe the statutory duty under the Act to tell clients what they will owe would certainly amount to a failure to meet the standard of special care and skill required.

RECOMMENDED ACTION

The estate agent should not declare the marketing price to be the “fixed fee” as that amount will only be payable if the seller does not accept any offer. Where additional services fees are fixed, it is legitimate to advertise the additional services inclusive price as the fixed fee. Where additional services fees vary per transaction, it is legitimate to advertise the non-use fee inclusive price as the fixed fee. In both scenarios the agent should declare any association with the “partner” company.

Fixed additional services fee:

“Our fixed fee of £1200 (inc VAT), includes XXX services provided by XY Ltd. Should you choose not to use XY Ltd, our fixed fee will be £1000 (inc VAT), which includes a fee for not using XY Ltd’s services. If your property does not progress beyond the offer stage, you will be charged our fixed marketing fee of £800 (inc VAT). [XY Ltd. is a wholly owned subsidiary of this estate agency.]”

Variable additional services fee:

“Our fixed marketing fee is £800 (inc VAT). After acceptance of an offer, you will also be required to pay for XXX services provided XY Ltd. The fee for these services will vary depending on the transaction. As a guide, the average additional cost of XY Ltd’s services is £400 (inc VAT). Should you choose not to use XY Ltd, our fixed marketing fee will be £1000 (inc VAT), which includes a fee for not using XY Ltd’s services. [XY Ltd. Is a wholly owned subsidiary of this estate agency.]”

It is strongly recommended estate agents use the pro-forma declaration, at Appendix 4, when disclosing referral fees.

The seller should be handed one completed form identifying referral fees as a consequence of referring them. A separate form should be handed to the buyer identifying any referrals likewise applicable. Keep copies of the referral forms form for both seller and buyer on the property file.

Appendix 1 - The Consumer Protection from Unfair Trading Regulations 2008 - (“the CPR’s”)

The CPRs govern relationships between businesses and consumers. They prohibit and criminalise certain unfair commercial practices including:

- (a) Misleading actions
- (b) Misleading omissions
- (c) Actions which contravene the requirements of professional diligence.

In the event of a proven breach of the CPRs, the lead enforcement authority has power to pursue warning and prohibition orders under the Act.

A commercial practice is a misleading action if it contains *false information* as to specified matters (including the *price*); or if its overall presentation in any way *deceives* or *is likely to deceive* the average consumer in relation to the specified matters **and** it *causes* or *is likely to cause* the average consumer to take a *transactional decision* he would not have taken otherwise.

A commercial practice is a misleading omission if it *omits or hides material information*, or *presents material information in a manner which is unclear, unintelligible, ambiguous or untimely*, **and** as a result, it *causes* or *is likely to cause* the average consumer to take a *transactional decision* he would not have taken otherwise.

For these purposes, *material information* is the information the consumer needs to take an *informed transactional decision*, and a *transactional decision* means 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 product³; or
- (b) Whether, how and on what terms to exercise a contractual right in relation to a product.

A commercial practice contravenes the requirements of professional diligence if it *fails to meet the standard of special care and skill* which a trader may reasonably be expected to exercise towards consumers; and will be an unfair commercial practice if it *materially distorts* or *is likely materially to distort* the *economic behaviour of the average consumer*.

To “materially distort the economic behavior” of an average consumer means to appreciably impair their ability to make an informed decision, thereby causing them to take a transactional decision they would not have taken otherwise.

³ Regulation 2 of the CPR’s defines “product” as meaning any goods or service and includes immovable property, rights and obligations

Appendix 2 – Circumstances when a referral fee arises

For the purposes of this guidance, a referral fee will arise where either

- (a) An estate agent refers business to another person and is paid or has been paid for the referral; or
- (b) Business is referred to the estate agent, and the estate agent pays or has paid for the referral; or
- (c) An estate agent
 - (i) arranges for another person to provide services to the estate agent's client or a potential purchaser of property, and
 - (ii) the estate agent is paid or has been paid for making the arrangement.

Business is referred if—

- (a) a person provides information to another,
- (b) it is information that a provider of services would need to make an offer to the seller or potential buyer of property to provide relevant services, and
- (c) the person providing the information is not the seller or potential buyer of property.

References to payment include references both to money, whether by way of transaction-specific fee or by way of retainer, and other consideration. In this way a referral fee does not have to be a transaction-specific payment but encompasses retainers and gift-giving.

Appendix 3 – Section 18 Estate Agents Act 1979

18 Information to clients of prospective liabilities.

- (1) Subject to subsection (2) below, before any person (in this section referred to as “the client”) enters into a contract with another (in this section referred to as “the agent”) under which the agent will engage in estate agency work on behalf of the client, the agent shall give the client—
 - (a) the information specified in subsection (2) below; and
 - (b) any additional information which may be prescribed under subsection (4) below.
- (2) The following is the information to be given under subsection (1)(a) above—
 - (a) particulars of the circumstances in which the client will become liable to pay remuneration to the agent for carrying out estate agency work;
 - (b) particulars of the amount of the agent’s remuneration for carrying out estate agency work or, if that amount is not ascertainable at the time the information is given, particulars of the manner in which the remuneration will be calculated;
 - (c) particulars of any payments which do not form part of the agent’s remuneration for carrying out estate agency work or a contract or pre-contract deposit but which, under the contract referred to in subsection (1) above, will or may in certain circumstances be payable by the client to the agent or any other person and particulars of the circumstances in which any such payments will become payable; and
 - (d) particulars of the amount of any payment falling within paragraph (c) above or, if that amount is not ascertainable at the time the information is given, an estimate of that amount together with particulars of the manner in which it will be calculated.
- (3) If, at any time after the client and the agent have entered into such a contract as is referred to in subsection (1) above, the parties are agreed that the terms of the contract should be varied so far as they relate to the carrying out of estate agency work or any payment falling within subsection (2)(c) above, the agent shall give the client details of any changes which, at the time the statement is given, fall to be made in the information which was given to the client under subsection (1) above before the contract was entered into

Referral Fee Disclosure
COMPLETE A SEPARATE FORM FOR EACH REFERRAL

As well as your obligation to pay our commission or fees we may also receive a commission, payment, fee, or other reward or other benefit (known as a Referral Fee) from ancillary service providers for recommending their service to you.

We believe you may benefit from using the services of _____⁴, the Provider, who are _____⁵.

Declaration	Y/N
We recommend sellers and/or potential buyers use the services of the Provider. Should you decide to use the services of the Provider you should know that we would expect to receive a referral fee of £ _____ from them for recommending you to them.	
We recommend potential sellers and/or potential buyers use the services of the Provider. Should you decide to use the services of the Provider you should know that we expect to receive an annual payment benefits from them equating to approximately £ _____ per referral.	
We recommend sellers and/or potential buyers use the services of the Provider. You should know that we expect to receive gratuities from the Provider worth approximately £ _____ per annum.	
We recommend sellers and/or potential buyers use the services of the Provider. In deciding to use the Provider, you should know that we expect to receive benefits from the Provider worth between £ _____ and £ _____ per annum.	
Our fixed fee of £ _____ includes services provided by the Provider. Should you choose not to the Provider, our fixed fee will be £ _____, which includes a fee for not using their services. If your property does not progress beyond the offer stage, you will be charged our fixed marketing fee of £ _____.	
Our fixed marketing fee is £ _____. After acceptance of an offer, you will also be required to pay for services supplied by the Provider. The fee for these services will vary depending on the transaction. As a guide, the average additional cost of the Provider's services is £ _____. Should you choose not to use the Provider, our fixed marketing fee will be £ _____, which includes a fee for not using the Provider's services.	
The Provider Is a wholly owned subsidiary of this estate agency or both this estate agency and the Provider are part of the same group of companies.	

You are not under any obligation to use the services of any of the recommended providers, though should you accept our recommendation the provider is expected to pay us the corresponding Referral Fee. The Referral fee is separate from your obligation to pay our own fees or commission.

⁴ Name of the company being referred

⁵ The nature of the business of the company being referred.

Appendix 5 - Contributors

