

Guidance for lettings professionals on consumer protection law

CMA response to the consultation

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1. Introduction

Background

- 1.1 In February 2013, the Office of Fair Trading (OFT), a predecessor organisation to the Competition and Markets Authority (CMA), published the findings of its lettings market review: *The lettings market – an OFT report* (OFT1479). This work was based on an analysis of 3,951 lettings complaints received by Consumer Direct¹ during 2011, set out in an OFT Intelligence Report.²
- 1.2 The OFT's Intelligence Report identified that the five main areas of complaint were issues relating to:
- fees and charges
 - letting agents providing poor service
 - security deposits
 - delayed and substandard repairs
 - unfair business practices.
- 1.3 The lettings market review concluded, among other things, that many of the problems appearing in the market could be dealt with by greater understanding of and compliance with existing consumer protection law.
- 1.4 For this reason, the OFT, and subsequently the CMA, decided to produce guidance to help lettings professionals comply with consumer protection law. The guidance is also intended to support consistent enforcement by local authority trading standards services (TSS) which, as the OFT identified in its market review, will most likely be best placed to take enforcement action (where appropriate), given the fragmented and localised nature of the lettings market. We have worked closely with TSS in preparing guidance and other support material to ensure that lettings professionals and TSS share a common understanding of the problems and the likely means of addressing these through Trading Standards' interventions.

¹ Now Citizen's Advice 'Advice Guide' www.adviceguide.org.uk

² Annexe D of OFT 1479. The OFT did not assume all complaints were valid, but instead took them as an indication of areas of customer dissatisfaction.

- 1.5 Together, improved compliance and enforcement can have real impact and will ultimately improve the way the lettings market functions.

Consultation

- 1.6 Between October and December 2013, the OFT conducted a [public consultation on draft guidance for lettings professionals on compliance with relevant consumer protection law](#).
- 1.7 The consultation was carried out in accordance with the [Cabinet Office Consultation Principles](#). The OFT notified stakeholders of the consultation by email and via a press release. During the consultation period the OFT held a series of events around the UK which were attended by a wide range of stakeholders including industry, trading standards officers and consumer groups. Further meetings were held with a small number of stakeholders during and after the consultation and a revised draft was shared with a few stakeholders (including industry bodies, government departments and TSS) for informal feedback. In March 2014 stakeholders were notified that the final version would be published as a CMA document in June 2014.
- 1.8 The bodies that provided formal responses to the public consultation are listed at Annex A. In all, 46 bodies sent responses.
- 1.9 This document summarises the main issues raised during the consultation process on the draft guidance.³ It also summarises the CMA's response to the comments, including the changes to the guidance that we have made to take account of them. The final version of the guidance is available from the publications section of GOV.UK: www.gov.uk/government/publications.
- 1.10 The CMA would like to thank all respondents for their constructive engagement in this consultation.

Next steps

- 1.11 We hope that the guidance will help lettings professionals to comply with the law and lead to better outcomes for consumers. The guidance is also intended to be of use to enforcers, in particular TSS who have lead enforcement responsibility for the majority of consumer protection law, and to

³ It has not been possible to set out CMA views for every comment received given the total number of response and comprehensive nature of some of the comments.

consumer advisors in understanding what trading practices are likely to be prohibited.

1.12 Where appropriate, and in accordance with the CMA's approach to the use of its consumer powers,⁴ we will take enforcement action against businesses that engage in practices that breach relevant consumer protection law. That said, we expect that in most cases where intervention or enforcement action is necessary, TSS would be the appropriate enforcers.

1.13 As well as publishing the final guidance the CMA will:

- produce a short document which sets out key principles to aid compliance at each stage of the lettings process (taken from the Executive Summary of the guidance)
- review the guidance as and when appropriate, in the light of changes in the law and other relevant factors. An electronic version containing any revisions made, will be made available on the GOV.UK website
- continue to work closely with TSS and the Trading Standards Institute on this issue.

⁴ For more information on the CMA's approach to the use of its consumer powers see the [CMA's consumer protection guidance on GOV.UK](#).

2. Response to consultation questions

- 2.1 The OFT's consultation on draft guidance for lettings professionals invited responses to the questions shown in bold below. The CMA's response to the main issues is included after each question.

Question 1 – Overall, is the draft guidance sufficiently clear and helpful?

- 2.2 The majority of respondents, while providing suggestions as to how particular elements of the guidance could be changed or refined, welcomed the guidance and thought that in general terms it was clear and helpful. Some, however, felt that the document did not provide businesses with sufficient clarity about the application of consumer protection law for lettings professionals. The main concerns related to the format of the guidance, rather than its content. Many respondents felt that, at over 100 pages, the guidance was simply too long to be sufficiently accessible to its target audience. Similarly, some respondents felt that the format rendered the document unnecessarily repetitive in places.

CMA response

- 2.3 We have taken on board feedback about the format of the guidance and have taken a number of measures to address this. See the response to questions 9 and 10 below for further details.

Question 2 – Does the draft guidance have any significant omissions? If so, what's missing?

- 2.4 Respondents made a number of suggestions. Some believed the guidance would benefit from explicit reference to a range of additional laws that lettings professionals need to be aware of, predominantly specific pieces of housing law.
- 2.5 Other respondents thought that the guidance lacked sufficient detail about how consumer protection law would be enforced in the lettings sector once guidance had been published.

CMA response

- 2.6 While we have been mindful of the view of many respondents that the draft guidance was too long, we have given full consideration to the range of additional information stakeholders have suggested including. The aim of this document is to provide guidance on the consumer protection laws enforced by

the CMA and TSS. As such, the guidance is not intended to provide letting professionals with a comprehensive directory of all applicable law.

- 2.7 In order to help clarify the purpose and scope of the guidance we have moved most references to laws that fall outside of the CMA's remit, including housing law, from the main body of the guidance to an annex titled 'Some relevant housing law'. This annex is intended to signpost readers to a range of relevant information from alternative sources, including information about housing law in each nation of the UK. We have retained some references to laws that fall outside of the remit of TSS and CMA in the main body of the guidance only where compliance with them is inextricably linked to compliance with consumer law. For example, it could be both a misleading omission under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and a breach of housing law to fail to inform a tenant about security deposit requirements.
- 2.8 In response to several suggestions we have added an executive summary to further improve the accessibility of the guidance. This includes an overview of the key principles that lettings professionals should be aware of to help them comply at each stage of the lettings process.
- 2.9 The purpose of the document is to provide lettings professionals with guidance on compliance with the law. It is not, therefore, the appropriate forum for setting out a strategy for enforcement of consumer protection law in the lettings market, although chapter 10 does include some information on the circumstances in which enforcers might be likely to take enforcement action. As set out in paragraph 1.12 above, we expect that in most cases, where intervention or enforcement action is necessary, TSS may be best placed to act.

Question 3 – Do any parts of the guidance need clarification and, if so, in what respect?

- 2.10 A number of respondents felt that further clarity was required as to which parts of the guidance were relevant to letting agents and which parts applied to landlords with some even calling for different versions for each audience.
- 2.11 A number of respondents raised concerns that the OFT was seeking to go beyond legislation and established case law in relation to its position on the status of landlords and an agent's right to renewal commission. Some stakeholders asked for greater clarity about when a landlord should be considered to be a 'professional' or a 'consumer,' given case law such as the

Foxtons case.⁵ Respondents also argued that it should not be assumed that an agent's level of service automatically decreases throughout the life of a contract.

- 2.12 Some stakeholders called for greater clarity on what constitutes a reasonable amount of time for an agent to carry out repairs during a tenancy.

CMA response

- 2.13 Due to the large potential for crossover between the roles of letting agent and landlord we purposely chose to position the document as guidance for 'lettings professionals' generally (we give examples of who this is likely to apply to in chapter 1 of the guidance). Not all points listed in the guidance apply to every lettings professional, since the range of services they offer may differ. We expect lettings professionals to be able to identify which sections are relevant to them. However, if we have identified a section as being particularly relevant to one specific audience, we have highlighted it.
- 2.14 We stand by our position on the status of landlords as set out in the draft guidance. Ultimately, whether or not an individual landlord is acting in the course of a business or as a consumer will come down to a question of fact and degree. We have included a summary of the CMA's view on this in chapter 3 to further highlight the importance of this point. We have maintained the line on renewal commission that we took in the draft guidance which is based on the outcome of the Foxtons case. However, we have attempted to make clearer our view that it is fair for agents to charge a fee in circumstances where a landlord explicitly instructs them to carry out a service.
- 2.15 As our draft guidance set out, what constitutes a reasonable amount of time in which to carry out repairs during a tenancy will depend on the facts of the case. It has therefore not been possible to elaborate on our draft guidance to any great extent. We have, however, included mention of the fact that it is unlikely to be considered reasonable if an agent permits undue delay in carrying out repairs.

Question 4 – Are any parts of the guidance unnecessary?

- 2.16 Some respondents felt it was inevitable that certain parts of the guidance would be unnecessary for any individual lettings professional, given that different laws apply in each nation of the UK. A small number of stakeholders suggested versions of the guidance could be produced for each jurisdiction in

⁵ [2009] EWHC 1681 (Ch)

order to allow for a more concise discussion of the issues directly relevant to each nation. Similarly, some respondents suggested that adding an appendix for each nation might address this issue.

- 2.17 A number of respondents suggested that the message about the importance of fee transparency was heavily laboured.

CMA response

- 2.18 We remain of the view that there is sufficient common ground in the law across the UK to render multiple versions of the guidance unnecessary. We were also keen to avoid making any format changes that might consequently lengthen what is already a substantial guidance document. We have sought to address stakeholder concerns about this issue by further highlighting in the body of the text those instances where specific obligations apply to a particular nation. In annex A we have also set out by category some of the relevant housing law for each nation of the UK.
- 2.19 We acknowledge that several sections of the guidance deal with the importance of providing clear, upfront information about fees. It would have been possible to combine more of this material in one section had we opted for a thematic approach to the structure of the document. However, given the positive feedback we have received on structuring the guidance around the lettings 'journey' we were keen to retain this so references to fee transparency still feature in all relevant sections of the document.

Question 5 – Are the illustrative examples useful? Are there better ones that we should use instead or as well?

- 2.20 The vast majority of respondents agreed that the use of illustrative examples was helpful in providing lettings professionals with greater clarity on the application of relevant law in a lettings context.
- 2.21 Some stakeholders felt that fewer illustrative examples would help to reduce the overall size of the guidance without detracting from its usefulness. Others suggested the use of more in-depth case studies. Again in relation to devolved law, some stakeholders called for nation-specific examples.

CMA response

- 2.22 We agree that in certain sections of the guidance the large number of examples of potentially non-compliant behaviour may have been counterproductive. We have therefore reduced the number of examples with a view to ensuring that those we have retained accurately reflect the live issues

that stakeholders have brought to our attention during consultation and those the OFT identified in its Intelligence Review.

Question 6 – Are the practical steps we recommend letting professionals take reasonable? What changes would you suggest?

2.23 On the whole respondents felt that the steps we suggested lettings professionals take to help them comply with the law are reasonable. However, some stakeholders did raise concerns about the practicality of a number of proposed steps. Some questioned the view that agents should pass on rent and other money collected to the landlord within five working days, pointing out that money cannot be passed on before receipt of cleared funds. Some stakeholders were concerned that it would be difficult to calculate certain VAT-inclusive prices and raised concerns about the cost of compliance given that the VAT rate is subject to change. Other respondents raised concerns about the suggestion that tenants should be able to provide their own reference checks.

CMA response

2.24 It is important that landlords receive the money they are due in a timely fashion to enable them to cover their liabilities. We accept, however, that it may not be possible on all occasions for agents to pass money on within five working days. We have modified the guidance on this point to state that in our view, landlords should generally be able to expect payment within five working days of receipt of cleared funds, but where a longer period for payment is unavoidable for practical reasons, for instance because of a firm's banking arrangements or the configuration of its computer software, this should be flagged to landlords before they sign up to the contract. We also state that we would expect all agents' systems to permit rents to be paid within one calendar month of receipt of cleared funds at the outside.

2.25 We gave careful consideration to some stakeholders' concerns that requiring lettings professionals to provide VAT-inclusive prices across the board could result in higher compliance costs given that updated paperwork would need to be produced should the rate of VAT change. On balance, we consider that the law requires prices to be stated inclusive of VAT, and that it is possible for agents to present prices inclusively. We also felt that the benefits of providing consumers with a single price (that was not subject to any additional calculation) outweighed any potential cost implications for business especially given that historically changes in the rate of VAT have taken place relatively infrequently. We have therefore maintained this view in the guidance.

2.26 We have taken on board respondents' concerns about tenants providing their own credit references. While our concern is with tenants potentially being charged multiple times for what is essentially the same information, we accept that this arrangement could carry an unacceptable degree of risk for letting professionals in their dealings with the small minority of tenants that may have dishonest or fraudulent intentions. We have therefore removed reference to this from the guidance. We have tried to make clear that agents should provide potential tenants with clear information about any pre-tenancy check, and its costs. We also continue to believe that this is an area where greater portability would be highly desirable. It remains an area that we consider the government and industry should give detailed consideration to reforming.

Question 7 – Are there any parts where you disagree with our understanding of the law?

2.27 Stakeholders did bring to our attention a small number of concerns with our interpretation of the law. These related predominantly to housing law matters. For example, some raised concerns that we stated that lettings professionals should accept notice by SMS, where they have this facility, as long as it clearly sets out the tenant's intentions.

CMA response

2.28 We have modified the guidance in respect of accepting notice by SMS. The guidance now states that lettings professionals should make clear what form of notice they are willing to accept. However, we flag that the definition of 'in writing' is an area where case law is likely to develop given technological advances such as SMS messaging and social media and that lettings professionals should keep up to date with case decisions to help ensure they comply with the law.

2.29 We maintain our view however that waiting until the end of a tenancy to inform the tenant they have given notice in an incorrect format may constitute a misleading omission, or be contrary to professional diligence under the CPRs (unless the lettings professional is content to allow the tenant to leave on the date they intend).

Question 8 – Does this document provide sufficient guidance in relation to professionals’ treatment of vulnerable consumers, and in particular those covered by equalities and anti-discrimination legislation?

- 2.30 Some respondents felt that the document provided sufficient guidance in this area while others wanted more. Some respondents suggested that the guidance would benefit from explicit references to certain equalities and anti-discrimination legislation, including the Equality Act 2010. Others called for additional guidance on vulnerable consumers, including a definition and examples.
- 2.31 There were also calls for a particular focus on the government’s proposal to require private landlords to carry out immigration checks on potential tenants.

CMA response

- 2.32 The CMA is keen to ensure that this document focuses on those areas of law that fall within its remit. We have therefore limited our guidance on this issue to dealing with consumers who may be, for the purposes of the CPRs, considered particularly vulnerable to a commercial practice.
- 2.33 The guidance only covers law which is in force at the time of drafting. Should the government’s proposal in relation to immigration checks become law and this impacts directly on the consumer protection law set out in the guidance, then the guidance may be amended to signpost landlords to appropriate guidance, during any subsequent revision.

Question 9 – Is the draft guidance in the right format and length for the intended audience?

- 2.34 Most respondents welcomed the overall structure of the guidance, which is based on the journey from when an agent advertises its services to a landlord through to the end of a tenancy agreement. However, many stakeholders felt that the document was simply too long to be sufficiently accessible to its target audience. Similarly, some respondents felt that the chosen format rendered the document unnecessarily repetitive in places.
- 2.35 Most stakeholders commented that it was important to include an overview of the legal framework within which lettings professionals operate in order to provide context. However, a number of stakeholders suggested that positioning relatively lengthy, complex legal material up front could make the document less accessible to lettings professionals.

CMA response

- 2.36 We have taken on board feedback about the format of the guidance and have taken a number of measures to address this. This includes removing duplicated points (where possible) and moving most of the housing law content, which to a large extent falls outside of the CMA's remit, from the main body of the guidance to an annex that is designed to signpost readers to appropriate information sources. This has reduced the length of the 'Overview of the legislation' chapter which now focusses more squarely on the consumer laws enforced by the CMA. At the request of respondents we have also added an executive summary which adds to the overall length of the document, but draws together some key principles to aid compliance.

Question 10 – Is the draft guidance sufficiently user friendly for the intended audience?

- 2.37 This question attracted similar comments about format, and in particular, the length of the guidance. It was also suggested that the guidance would benefit from additional cross-referencing and a greater emphasis on key points and summaries.
- 2.38 A number of respondents also called on the OFT (now CMA) to produce consumer-facing guidance for private landlords and tenants.

CMA response

- 2.39 We have included a brief overview at the beginning of each of the main chapters to provide a summary of the key principles lettings professionals should consider at each stage of the 'lettings journey' and also set these out in the executive summary. We have placed the illustrative examples of potential breaches in boxes to help distinguish these from the main text. Further, we have included a more comprehensive index to help readers identify specific topics in the guidance and also put key terms explained in chapter 3 in bold throughout the guidance.
- 2.40 The guidance is not intended to inform consumers of their rights and obligations in the lettings process. Other agencies are better placed to do this and have already produced helpful material. Information on how to access some of this information is included in annexe B of *The lettings market – an OFT report*.

Question 11 – What suggestions do you have on ways to improve the guidance?

- 2.41 The majority of feedback related to the format and usability of the guidance and has been covered in responses to the other questions.

CMA response

- 2.42 In addition to the changes described in addressing the points raised at questions nine and 10, one key improvement we have made is the inclusion of an executive summary. Amongst other things this is intended to summarise the key principles lettings professionals need to consider to help them to comply with consumer protection law.

Question 12 – Do you agree with the proposal to put this guidance for lettings professionals to the CMA board for adoption by the CMA?

- 2.43 Some respondents were content with this approach, provided their comments and suggestions were taken on board. Some expressed concern that the guidance might be ‘rushed through’ before the OFT ceased to operate and that this might lead to stakeholder comments not being fully considered. Comments were also made about the sequencing of publication with other government initiatives.

CMA response

- 2.44 In March 2014 it was decided that the guidance would be published as a CMA document. This ensured sufficient time was available in which to give full consideration to stakeholders’ views. The CMA and TSI share the role of working with business to drive up standards through clarifying legal obligations.⁶ The CMA focusses on issues that appear to be problematic across a market and so was keen to publish guidance to contribute to making the lettings market work well for consumers, businesses and the economy.

⁶ The CMA primarily provides guidance to business on specific issues identified in the course of our market studies, the Unfair Terms in Consumer Contracts Regulations 1999 and issues where our particular knowledge of the market makes us best placed to advise business. Other business guidance on consumer law is produced by the TSI and more information on this is available on the [TSI website](#).

Question 13 – What do you suggest will be the best ways to disseminate the final guidance to those who need to see it?

- 2.45 Respondents offered a range of suggestions, including placing the revised guidance on the OFT website and DirectGov, distributing it to businesses registered with redress schemes or that are members of a professional body or trade association, through TSS and via regional training sessions.

CMA response

- 2.46 We have issued a press notice to announce the publication of the guidance. Both the press notice and the guidance can be downloaded from www.gov.uk and are available via the CMA home page. We have circulated links to these documents to a wide range of stakeholders, including to all of those who responded to the consultation, via an electronic bulletin. We will also promote the guidance via other methods such as social media, speaking at a small number of events and articles in appropriate publications. We are very grateful to those organisations that have offered to assist in the dissemination of the guidance amongst their respective memberships.

Question 14 – Are there any further comments you wish to make?

- 2.47 Respondents made a range of observations. Some were concerned that no impact assessment was carried out alongside the guidance. Others were concerned about the timing of the publication of the guidance given that a number of other initiatives and legislative changes that will impact on the lettings sector are in the pipeline.

CMA response

- 2.48 It is standard practice for government to carry out an impact assessment when it is considering the introduction of a new piece of legislation. The purpose of this document is to provide explanatory guidance to assist compliance with a number of existing consumer protection laws. It was therefore unnecessary for either the OFT or the CMA to carry out an impact assessment as part of this consultation process.
- 2.49 The CMA acknowledges that a number of other initiatives including the Tenants Charter, a Code of Practice for those managing property in the private rented sector, and the statutory redress scheme all potentially impact upon and overlap to varying degrees with our guidance document. There are also proposals under discussion for new legislation to require letting agents to publish fees in a tariff, possibly via the Consumer Rights Bill (currently going through Parliament). We have made every effort to future proof the current

version of the guidance as far as possible. As mentioned in paragraph 1.13 the CMA will review the guidance as and when appropriate, in the light of changes in the law and other relevant factors.

3. List of respondents

Aberdeen City Council
Advertising Standards Authority
Association of Residential Letting Agents
Barbon Insurance
Bidonmyhouse
Bristol Trading Standards Services
British Property Federation
Broughton Property Management
Chancellors
Chartered Institute of Housing
Citizens Advice Northern Ireland
Dwr Cymru Welsh Water
East Lothian Trading Standards Service
Enfield Council
Experian
Featherstone Leigh
Housing Rights Service
Independent Network of Estate Agents
Islington Trading Standards Service
Kinleigh Folkard & Hayward
Law Society
Leaders
Leeds University Union
LetRisks
LetScotland
LSL Legal Services
Make Ur Move
Mr Alex Williamson
Mr Paul Harmsworth
National Trading Standards Board
National Union of Students
Ofgem
Ombudsman Services
Residential Landlords Association
Royal Institute of Chartered Surveyors
Savills
Scottish Association of Landlords
Shelter
Shelter Scotland
Stonewall
The Dispute Service Ltd (Tenancy Deposit Scheme)

The Property Ombudsman
Touchstone Residential
Trading Standards Institute
West Midlands making the Best Use of Stock Group
West of England Local Authorities Private Sector Housing Departments