

# COMPETITION COMMITTEE



## Improving Competition in Real Estate Transactions

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## **FOREWORD**

This document comprises proceedings in the original languages of a Roundtable on Improving Competition in Real Estate Transactions, held by the Competition Committee in February 2007.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

## **PRÉFACE**

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur l'amélioration de la concurrence dans le cadre des transactions immobilières, qui s'est tenue en février 2007 dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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## EXECUTIVE SUMMARY

*by the Secretariat*

In light of written submissions, the background note and the oral discussion, the following points emerge:

### 1. **Direct consumer-to-consumer home sales**

*Consumers often lack the access to sales networks for selling homes themselves. But in countries with broad, commonly accepted networks for distributing information about properties being sold by their owner, as many as 50% of transactions occur with no intermediary between the buyer and seller.*

In most OECD countries, the vast majority of home sales occur with the help of a professional intermediary. It is often argued that sellers choose intermediaries because they have insufficient information about markets, prefer to avoid trouble involved with selling a home and judge that they will receive a higher price for the sale of their home by using an intermediary. However, these benefits of using a professional intermediary are likely overstated. In some countries, such as France, there is a viable and well accepted tradition of owners selling their own homes with as many as 50% of homes being sold directly by their owners without any professional intermediary. This high success of direct selling by owners is only possible because there is a well-known publication and Internet site that attracts a high number of potential buyers.

The presence of a viable for-sale-by-owner (FSBO) option helps to provide sellers and buyers with an alternative that can reduce the cost of a transaction by eliminating a sales commission. Moreover, the existence of a viable FSBO option can provide a constraint on the fees charged by professional intermediaries who realize that if their commissions are too high, sellers may seek to sell their properties on their own.

### 2. **Professional intermediaries for home sales**

*In most OECD countries, professional intermediaries typically fill the role of matching buyers with sellers, often in an environment of standards and norms that limit competition between professionals. Government intervention may be necessary to change certain standards and norms.*

In order to find a buyer, sellers typically engage the services of professional intermediaries. In some countries, buyers also engage services of a professional intermediary. The average fees charged by professional intermediaries vary substantially from one country to another, from as low as about 1% of transaction value to a height of as much as 15%. Fees can be negotiable, though this is less often the case when intermediaries have exclusive representation of a buyer or seller. While there is a surprising variety of average fee levels, for the most part, fees are typically contracted as a percentage of sales price. To many observers, this practice appears difficult to explain, as the effort (or cost) involved with selling a medium-priced home is largely equivalent to that involved with selling a cheaper home, while the intermediary price is much

higher with the medium-priced home. In short, it appears that prices diverge substantially from costs. One consequence of this is that when real estate prices rise quickly, the revenues to be earned by real estate intermediaries increase substantially, leading to an increased number of active real estate agents and a dissipation of excess profits.

Some observers suggest that professional intermediaries can develop a number of standards and norms that restrict competition between professionals. In fact, in many countries, trade associations for professional intermediaries once established fee schedules. Due to competition laws, most required or recommended fee schedules for selling intermediaries have disappeared. Yet the fees from the original price-fixing attempts remain largely in place.

In some countries, real estate professionals have developed joint databases that list housing for sale. These shared listings services usually are closed so that only recognised intermediaries can either post on them or receive full, direct access. The services include information on both homes for sale and actual sales prices for homes that were sold. The listing services permits selling agents to post information about properties for sale to a common database, including information on the commission to be paid to an intermediary bringing the ultimate buyer. For sellers, ensuring their property is shown on the shared listing service is often the only effective way to ensure a broad marketing of their property. However, the listing services can be governed in ways that limit competition. For example, listing services have attempted to limit access to intermediaries providing limited services to purchasers, and certain limits have been successfully challenged by government. When required to provide access to such intermediaries, listing services have attempted to restrict the ability of such intermediaries to gain access to listings, by giving sellers' intermediaries the ability to limit some of the access and redistribution rights of other intermediaries.

### **3. Minimum service requirements for selling intermediaries**

*Defining the minimum services to be delivered by real estate intermediaries merits careful government review, as many consumers prefer basic services with accompanying lower service prices.*

Intermediaries have further sought to establish government laws or regulations that limit the practice of "limited-service" intermediaries. "Limited-service" intermediaries may provide limited services, such as posting housing ads for a seller but referring all inquiries directly to the seller and not maintaining a storefront. The regulation of "limited service" intermediaries is a classic example of special interest legislation or regulation triumphing over the interests of consumers.

While the establishment of high ethical standards and appropriate technical knowledge is critical and an appropriate matter for regulation, the establishment of minimum standards of what must be provided by an intermediary will often exceed the services that many sellers or buyers would demand. Such regulations of minimum standards should be reviewed with great care, as they risk unduly restricting the products available to sellers and buyers. Such standards restrict competition and may help to maintain high fee levels for full-service intermediaries by reducing competition from alternative intermediate products.

#### 4. Internet marketing of homes

*The Internet has the potential to dramatically reduce the cost for buyers and sellers to identify each other. Professionals have often responded with anti-competitive restrictions that prevent access to or effective use of announcements over the Internet by other professionals or individuals.*

The Internet has the potential to host databases that aid buyers and sellers in finding their match to complete a housing transaction. Due to the low cost structure of a shared database distributed over the Internet, some have considered the Internet to provide a natural means for distributing information about homes for sale and for permitting sellers and buyers to avoid the use of expensive intermediaries. In practice, the Internet has developed into an important means of distributing information about homes for sale, with as many as 70% of home buyers using the Internet when searching for a home. Professional intermediaries use Internet sites to promote their own services. In addition larger Internet sites exist that aggregate advertisements from different intermediaries. In many places, the most popular Internet sites for housing searches are actually owned by an association of professional intermediaries, as in the United States with Realtor.com, or accept ads only when posted by registered real estate agents. Often posting a house for sale on the most popular Internet site creates much broader marketing for a home than posting it on smaller sites. In some countries, a given Internet site or database might have the economic characteristics of essential facilities.

#### 5. Costs of transferring control

*The process of transferring control from a seller to a buyer is highly regulated, and appropriately so, to ensure that the holding of title is legally clear. However, particularly when non-government employees are responsible for the process of transferring control, the transaction cost for changing beneficial ownership of property can be unnecessarily high.*

In all OECD countries, the process of transferring control of property from sellers to buyers is highly regulated. This helps to ensure that property rights are clearly defined, which has the follow-on effect of ensuring that mortgage lenders have collateral. If property rights are not clearly defined, mortgage lenders face much higher levels of risk and either mortgages are not available, as in many countries with poorly defined property rights, or very expensive. Regulations over the transfer of property thus serve a strong pro-market purpose.

The systems developed for ensuring the clarity of legal title vary considerably across the OECD. In an ongoing study, the European Commission reported that prices for conveyancing vary substantially across EU Members, with Latin notary regimes, which have both highly restrictive entry conditions in many countries and often set prices for performing their services, at the high end of costs. The Nordic countries, with the least regulation over who performs conveyancing, and Dutch deregulated notary system end up with fees on average of 0.56% or 0.54% of transaction value, while when lawyers serve as primary professionals for conveyancing, the average is 0.77% of transaction value, while traditional notary systems have the highest cost, with an average of 0.89%. It should be noted that these figures are averages and that one country with a lawyer system of conveyancing may have higher costs than certain other countries with a notary system. In the United Kingdom, solicitors initially held a legal monopoly over conveyancing, but this monopoly was eliminated through a reform that created a new qualification of licensed conveyancer. This competition between two types of professionals likely led to a fall in prices for conveyancing services.

**6. Minimum standards for mortgage information and lending requirements**

*Unrestricted competition between providers of mortgages, in absence of appropriate regulation and consumer information, can have unfortunate consequences for home purchasers as consumers obtain loans which impose high risks of default.*

Unrestricted competition between providers of mortgages is likely undesirable and can pose macroeconomic risks. Most countries have chosen to regulate the process of making offers, so that interest rates faced by consumers must be reported in comparable and pre-defined ways across institutions. Countries may require that consumer information be revealed in ways that are not overly-complicated for consumers. Often, countries impose lending requirements designed to ensure that households retain sufficient disposable income to cover their costs of living, even after paying debt, including mortgage debt. Other countries let market competition between lending entities determine the appropriate criteria for lending. Recently, lending criteria grew lax among some providers of sub-prime mortgages. Market supervision did not prevent highly risky lending practices.

**7. Brokered mortgages**

*Promoting brokered mortgages is likely to yield substantial benefits to home buyers over a system in which home buyers choose exclusively from a limited number of bank suppliers.*

In some countries mortgage brokers account for a high share of issued mortgages, such as the Netherlands where 60% of mortgages are sold indirectly. In other countries, such as France, the percentage of mortgages going through a broker is 12% of mortgages. The presence of brokers appears to help promote competition between banks and better offers to consumers for comparable terms of loans. In fact, in France, while banks often issue loans that are arranged through a broker, a branch will often refuse to give a walk-in client the same rate as obtained through brokers. Ensuring that brokers can continue to operate without extensive regulatory limits or undue licensing restrictions can help to ensure that consumers receive better loan terms.

## SYNTHÈSE

### *par le Secrétariat*

Compte tenu des contributions écrites, de la note de référence et des discussions orales, il est possible de formuler les remarques suivantes :

#### **1. Vente directe de logements entre consommateurs**

*Il manque souvent aux consommateurs l'accès à des réseaux leur permettant de vendre eux-mêmes leur logement. Toutefois, dans les pays où il existe de vastes réseaux acceptés par tous pour la diffusion d'informations concernant les biens vendus par leur propriétaire, jusqu'à 50 % des transactions ont lieu sans intermédiaire entre l'acheteur et le vendeur.*

Dans la plupart des pays de l'OCDE, la grande majorité des ventes de logements a lieu avec l'aide d'un intermédiaire professionnel. On soutient souvent que les vendeurs choisissent des intermédiaires parce qu'ils ne disposent pas d'informations suffisantes sur les marchés, préfèrent éviter les difficultés que comporte la vente d'un logement et pensent qu'ils en obtiendront un prix plus élevé en ayant recours à un intermédiaire. Toutefois, ces avantages du recours à un intermédiaire professionnel sont probablement surestimés. Dans certains pays, comme la France, il existe une tradition viable et bien acceptée de vente directe de logements par leurs propriétaires, puisque jusqu'à 50 % des logements sont ainsi vendus sans intermédiaire professionnel. Ce vif succès de la vente directe par les propriétaires n'est possible que parce qu'il existe une publication bien connue et un site Internet qui attire un grand nombre d'acheteurs potentiels.

L'existence d'une possibilité viable de vente entre particuliers (« For Sale by Owner ») contribue à fournir aux vendeurs et acheteurs une alternative qui permet de réduire le coût d'une transaction en supprimant le versement d'une commission sur le prix de vente. De plus, l'existence d'une option viable de vente entre particuliers peut exercer une pression sur les honoraires facturés par les intermédiaires professionnels qui sont conscients du fait que si leurs commissions sont trop élevées, les vendeurs risquent de chercher à vendre eux-mêmes leur bien.

#### **2. Intermédiaires professionnels pour les ventes de logements**

*Dans la plupart des pays de l'OCDE, les intermédiaires professionnels jouent généralement le rôle de mise en relation des vendeurs et des acheteurs, souvent dans un contexte de conditions et de normes qui limite la concurrence entre professionnels. L'intervention de l'État peut être nécessaire pour modifier certaines conditions et normes.*

Afin de trouver un acheteur, les vendeurs ont généralement recours aux services d'intermédiaires professionnels. Dans certains pays, les acheteurs aussi ont recours aux services de ces intermédiaires. Les commissions moyennes facturées par les intermédiaires professionnels varient sensiblement d'un pays à l'autre, entre le niveau assez faible d'environ 1 % de la valeur de la transaction et jusqu'à 15 % de cette valeur. Les commissions peuvent être négociables, bien que ce soit moins souvent le cas lorsque les intermédiaires disposent d'un droit de représentation

exclusif d'un acheteur ou d'un vendeur. Bien que le niveau moyen des commissions varie d'une manière surprenante, ces commissions sont généralement fixées par contrat en pourcentage du prix de vente. Pour beaucoup d'observateurs, cette pratique apparaît difficile à expliquer, car l'effort (ou le coût) correspondant à la vente d'un logement de prix moyen est, dans une large mesure, équivalent à celui qui correspond à la vente d'un logement meilleur marché, alors que le prix fixé par l'intermédiaire est beaucoup plus élevé pour un logement de prix moyen. En résumé, on constate une importante divergence entre les prix et les coûts. L'une des conséquences en est le fait que, lorsque les prix de l'immobilier augmentent rapidement, les recettes perçues par les intermédiaires immobiliers progressent sensiblement, ce qui se traduit par une augmentation du nombre d'agents immobiliers en activité et par une disparition des profits excédentaires.

Certains observateurs font observer que les intermédiaires professionnels peuvent mettre au point un certain nombre de conditions et de normes qui limitent la concurrence entre professionnels. En fait, dans de nombreux pays, les associations professionnelles d'intermédiaires ont déjà mis en place des barèmes de commissions. En raison de la législation relative à la concurrence, la plupart des barèmes de commissions obligatoires ou recommandées en cas de vente par des intermédiaires ont disparu. Pourtant, les commissions résultant des tentatives initiales de fixation des prix restent dans une large mesure en vigueur.

Dans certains pays, les professionnels de l'immobilier ont mis au point des bases de données conjointes qui établissent la liste des logements à vendre. Ces services de mise en commun de listes sont généralement verrouillés de telle manière que seuls les intermédiaires reconnus peuvent soit y insérer des informations soit disposer d'un accès direct et intégral à celles-ci. Ces services comportent des renseignements concernant à la fois les logements en vente et les prix de vente effectifs des logements qui ont été vendus. Les services de listage permettent aux agents chargés de la vente d'enregistrer dans une base de données commune des informations sur les biens à vendre, y compris des informations sur la commission à verser à un intermédiaire qui amène l'acheteur en dernier ressort. Pour les vendeurs, s'assurer que leur bien figure effectivement sur la liste commune est souvent le seul moyen effectif d'obtenir une commercialisation de ce bien sur une grande échelle. Toutefois, les services de listage peuvent être régis d'une manière qui limite la concurrence. Par exemple, ces services se sont efforcés de réserver l'accès aux intermédiaires qui fournissent des services limités aux acheteurs, et certaines limites ont été contestées avec succès par les pouvoirs publics. Lorsqu'ils sont tenus d'accorder l'accès à ces intermédiaires, les services de listage se sont efforcés de limiter les possibilités dont disposent ceux-ci pour obtenir l'accès aux listes en offrant aux intermédiaires des vendeurs la possibilité de limiter une partie des droits d'accès et de rediffusion des autres intermédiaires.

### **3. Obligations de service minimum pour les intermédiaires des vendeurs**

*La détermination des services minimums qui doivent être fournis par les intermédiaires immobiliers mérite un examen attentif des pouvoirs publics, dans la mesure où beaucoup de consommateurs préfèrent des services de base facturés à des prix plus faibles.*

Les intermédiaires se sont en outre efforcés d'obtenir des lois ou réglementations des pouvoirs publics qui limitent la pratique des intermédiaires « à services limités ». Les intermédiaires « à services limités » peuvent fournir des services restreints, tels que l'affichage d'annonces immobilières pour le compte d'un vendeur mais en transmettant directement toutes les demandes de renseignements aux vendeurs et sans tenir une boutique. La réglementation des intermédiaires « à services limités » constitue un exemple classique de législation ou de réglementation adoptée en fonction d'intérêts particuliers qui l'emportent sur les intérêts des consommateurs.

Si la fixation de normes éthiques strictes et l'exigence de connaissances techniques appropriées sont d'une importance essentielle et font à juste titre l'objet de réglementations, les normes minimales appliquées aux services qui doivent être rendus par un intermédiaire excéderont souvent le niveau de services que beaucoup de vendeurs ou d'acheteurs souhaiteraient obtenir. Ces réglementations concernant des normes minimales devraient être réexaminées avec beaucoup de soin car elles risquent d'occasionner des limitations injustifiées des produits fournis aux vendeurs et acheteurs. Ces normes limitent la concurrence et peuvent contribuer à maintenir des commissions élevées pour les intermédiaires qui offrent des services complets en réduisant la concurrence d'autres produits intermédiaires.

#### **4. Commercialisation de logements sur Internet**

*L'Internet permet de réduire d'une manière spectaculaire, pour les acheteurs et les vendeurs, le coût de leur identification réciproque. Les professionnels ont souvent réagi par des restrictions à la concurrence qui empêchent l'accès aux annonces sur Internet d'autres professionnels ou particuliers ou leur utilisation effective.*

L'Internet offre la possibilité d'accueillir des bases de données qui aident les acheteurs et les vendeurs à trouver des partenaires pour conclure une transaction immobilière. Étant donné le faible niveau des coûts d'une base de données partagée diffusée sur Internet, certains ont considéré que l'Internet fournissait un moyen naturel de diffuser des renseignements sur les logements à vendre et de permettre aux vendeurs et acheteurs d'éviter le recours à des intermédiaires coûteux. En pratique, l'Internet est devenu un important moyen de diffuser les informations sur les logements à vendre, le pourcentage d'acheteurs qui recourent à Internet pour rechercher un logement atteignant 70 %. Les intermédiaires professionnels utilisent les sites Internet pour promouvoir leurs propres services. En outre, il existe des sites Internet plus importants qui rassemblent des publicités de divers intermédiaires. Dans un grand nombre de pays, les sites Internet les plus répandus pour les recherches de logements sont en fait la propriété d'une association d'intermédiaires professionnels, comme c'est le cas aux États-Unis avec Realtor.com, ou n'acceptent des annonces que lorsqu'elles sont affichées par des agents immobiliers agréés. Souvent, l'enregistrement d'un logement à vendre sur le site Internet le plus répandu permet d'accéder à un marché beaucoup plus large pour ce logement que le fait de l'afficher sur des sites de moindre importance. Dans certains pays, un site Internet ou une base de données peut présenter les caractéristiques économiques d'installations essentielles.

#### **5. Coûts du transfert du contrôle**

*Le processus de transfert du contrôle d'un vendeur à un acheteur est strictement réglementé, ce qui est approprié, afin de faire en sorte que l'identité du détenteur du titre de propriété soit claire sur le plan juridique. Cependant, en particulier lorsque des salariés n'appartenant pas à l'administration sont responsables des procédures de transfert du contrôle, le coût de transaction occasionné par le changement du bénéficiaire effectif d'un bien peut être inutilement élevé.*

Dans tous les pays de l'OCDE, le processus de transfert du contrôle d'un bien des vendeurs aux acheteurs est strictement réglementé. Cela permet de s'assurer que les droits de propriété sont clairement définis et, par conséquent, que les fournisseurs de prêts hypothécaires disposent de garanties. Si les droits de propriété ne sont pas clairement définis, les fournisseurs de prêts hypothécaires doivent faire face à des risques plus importants et soit les hypothèques ne sont pas disponibles, comme c'est le cas dans de nombreux pays où les droits de propriété sont mal définis, soit elles sont très coûteuses. Les réglementations concernant le transfert de propriété ont donc pour objet de faire jouer les mécanismes du marché.

Les systèmes mis au point pour s'assurer de la clarté du titre légal varient considérablement selon les pays de l'OCDE. Dans une étude en cours, la Commission européenne a déclaré que les tarifs des mutations immobilières varient sensiblement selon les pays membres, les régimes latins, fondés sur le notariat, qui comportent des conditions d'entrée très restrictives dans de nombreux pays, fixant souvent les tarifs des services fournis à des niveaux qui se situent à l'extrémité supérieure en termes de coûts. Les pays nordiques, dans lesquels la réglementation concernant l'identité des responsables du transfert de propriété est la moins stricte ainsi que le système notarial déréglementé des Pays-Bas aboutissent à des commissions d'un montant moyen de 0.56 % ou 0.54 % de la valeur de la transaction, tandis que dans les cas où les avocats ont la responsabilité principale du transfert de propriété la moyenne s'établit à 0.77 % de la valeur de la transaction et que le coût le plus élevé est celui des systèmes traditionnels fondés sur le notariat, avec une moyenne de 0.89 %. Il y a lieu de noter que ces chiffres sont des moyennes et qu'un pays dans lequel les mutations immobilières sont assurées par les avocats peut avoir des coûts plus élevés que d'autres pays où ces mutations sont assurées par les notaires. Au Royaume-Uni, les notaires disposaient à l'origine d'un monopole légal de la transmission de propriété, mais ce monopole a été supprimé à la suite d'une réforme qui a créé une nouvelle spécialité de rédacteur d'actes translatifs de propriété. Cette concurrence entre deux types de professionnels a sans doute abouti à une baisse des prix des services de transfert de propriété.

## **6. Normes minimales concernant les informations relatives aux hypothèques et les conditions de prêt**

*Une concurrence sans limites entre les fournisseurs de prêts hypothécaires, en l'absence d'une réglementation appropriée et d'une information des consommateurs, peut avoir des conséquences dommageables pour les acquéreurs de logements dans la mesure où les consommateurs obtiennent des prêts qui leur font courir des risques élevés de défaut de paiement.*

Une concurrence sans limites entre fournisseurs de prêts hypothécaires est probablement peu souhaitable et peut donner lieu à des risques macroéconomiques. La plupart des pays ont décidé de réglementer le processus de formulation des offres, de sorte que les taux d'intérêts appliqués aux consommateurs doivent être déclarés selon des modalités comparables et déterminées à l'avance dans le cadre des différentes institutions. Les pays peuvent exiger que des informations soient communiquées aux consommateurs dans des conditions qui ne soient pas excessivement compliquées pour ces derniers. Souvent, les pays imposent des conditions en matière de prêts afin de s'assurer que les ménages conservent un revenu disponible suffisant pour maintenir leur train de vie, même après avoir payé leurs dettes, y compris les dettes hypothécaires. D'autres pays laissent la concurrence entre organismes prêteurs déterminer sur le marché les critères de prêt appropriés. Récemment, ces critères se sont assouplis parmi certains fournisseurs de prêts hypothécaires à risque. Le contrôle du marché n'a pas empêché des pratiques très risquées en matière de prêts.

## **7. Courtage en prêts hypothécaires**

*La promotion du courtage en prêts hypothécaires est susceptible de procurer des avantages considérables aux acquéreurs de logements par rapport à un système dans lequel le choix de ceux-ci est limité à un petit nombre de banques.*

Dans certains pays, les courtiers en prêts hypothécaires représentent une part importante des prêts accordés, notamment aux Pays-Bas où 60 % de ces prêts sont accordés d'une manière indirecte. Dans d'autres pays comme la France, le pourcentage des prêts hypothécaires qui passent par

l'intermédiaire d'un courtier est de 12 %. La présence de courtiers apparaît comme favorable à la concurrence entre banques et permet aux consommateurs de bénéficier de meilleures offres pour des prêts accordés dans des conditions comparables. En fait, en France, tandis que les banques offrent souvent des prêts qui sont négociés par l'intermédiaire d'un courtier, une succursale de banque refuse souvent d'accorder directement à un client le même taux que celui qu'il obtient par l'intermédiaire de courtiers. Faire en sorte que les courtiers puissent continuer à exercer leurs activités sans limitations réglementaires excessives ou restrictions injustifiées à l'octroi d'autorisations peut contribuer à permettre aux consommateurs de bénéficier de conditions de prêt plus avantageuses.



## IMPROVING COMPETITION IN REAL ESTATE TRANSACTIONS

### *Background Note by the Secretariat\**

#### 1. Introduction

Real estate transactions are typically the largest financial transactions that individuals undertake.<sup>1</sup> The transactions have three key elements that are common across OECD jurisdictions: the matching of buyers and sellers, the transfer of legal ownership of a property and the provision of mortgage finance.<sup>2</sup> Each of these elements has been a focus of competition policy concerns leading to government action. Where there are unnecessary anti-competitive restrictions on transactions, governments can and should take concrete steps to improve the transaction process, either through better legislative frameworks and regulations or through enforcement of competition law. Reviewing market conditions may be particularly important in jurisdictions that have not had active reviews of the sector in the past. The economic benefits to consumers from eliminating anti-competitive restrictions can be considerable.

Competition policy resources are necessarily limited. The rationale for focusing these limited resources on real estate transactions is that these transactions have significant macroeconomic importance. They are the means by which consumers obtain an important savings vehicle, ultimately representing one of the highest shares of family assets in median families.<sup>3</sup> The costs of a small upwards deviation from a competitive price for transactions services creates a large value distortion because of the aggregate size of the sector. Ensuring that transactions occur efficiently matters not just for short-term welfare, but also for growth because upwards-distorted costs likely *reduce* the value of homes which in turn would have a follow-on effect of reducing consumer spending.<sup>4</sup>

Transactions costs for buying and selling homes have a direct effect on labour mobility. When transaction costs are lower, workers are more willing to sell a home in order to move to another location. In contrast, when transaction costs are high, workers are less willing to sell an existing home, as the transaction cost may act as a counterweight against benefits of moving. Whether the mobility is across

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\* This paper has been prepared by Sean F. Ennis.

<sup>1</sup> For France, see Conseil de la concurrence, Decision 00-D-28 of 19 September, 2000. For the U.S., see Jackson (2005).

<sup>2</sup> In many non-OECD countries, mortgage finance is rare.

<sup>3</sup> Property wealth represents half or more than half of households' net wealth in two thirds of 15 selected OECD countries. The source of these data are detailed in Girouard, N., M. Kennedy, and C. André (2006), "Has the rise in debt made households more vulnerable?", *OECD Economics Department Working Papers*, No. 535.

<sup>4</sup> Catte et al (2004) shows that in countries with large, efficient and responsive mortgage markets, and particularly low barriers to home equity withdrawal, have increased consumption in response to housing price increases.

regions or within a region, labour mobility is important for ensuring that citizens can maximize their potential by moving to the location where they find better matches for their skills and aspirations.<sup>5</sup>

For most individuals, home-purchase transactions are infrequent. Because of the complexity and infrequency of such transactions, their personal knowledge of how best to perform them may be limited. In addition, errors can be costly and irremediable (e.g., a seller cannot recover losses from a lower than market sales price after the sale has closed.) Individuals often seek expert third-party advice for matching, finance and transferring title to property. Especially in the case of transfer of title, governments may mandate the use of licensed professionals, as the accurate functioning of title transfers is a fundamental feature of a property rights system and such services are credence goods, given that most acquirers cannot judge the quality of license transfer services.

In OECD countries, housing transactions typically occur with the aid of external financing. Housing loan payments constitute a large share of household revenue. Housing payments constitute between 15% and 25% of disposable income in a number of OECD countries.<sup>6</sup> Few (if any) other household purchases are of such significance. Governments often play a role in overseeing housing market finance because of the strong public interest in ensuring a well-functioning market, promoting social stability and preventing abusive lending practices. However, competition law enforcement in the area has been limited.

This issues paper addresses a number of key policy questions related to real estate transactions. By element of transaction, key questions are:

### **1.1 Matching**

- Do governmental, professional or related rules and regulations restrict the ability of agents to offer low-cost, no-luxury agency services?
- Are there governmental, professional or related rules or regulations that make it difficult for individuals to sell or purchase homes without an intermediary?

### **1.2 Transfer of control**

- Are roles reserved for certain professions that could be performed with equal reliability and safety by persons with a different, less extensive training?
- Do entry rules limit the number of practitioners who can verify and perform transactions?
- Do pricing rules fix the level of reimbursement of such practitioners, either de jure or de facto?

<sup>5</sup> See Vartia (2006) and EMF(2006) for sources that discuss the role of transaction cost in likely reducing mobility.

<sup>6</sup> Household debt service burden (principal and interest) of indebted households as a % of disposable income is presented in Figure 8 in Girouard, N., M. Kennedy, and C. André (2006), "Has the rise in debt made households more vulnerable?", *OECD Economics Department Working Papers*, No. 535. Not all indebted households have housing loans. To the extent that families with housing loans may have higher payments than those without, these figures may somewhat understate the typical home payment burden for those households with a home. In France, for example, the expense of reimbursing loans consumes about 30% of available revenue for those households who have purchased homes (Conseil de la concurrence, Decision 00-D-28 of 19 September, 2000.)

**1.3      *Home finance***

- Do non-banks have a substantial role in providing mortgages?
- Do mortgage lenders tie mortgages to other products, such as insurance or depository account services?

In order to focus the paper, it does not consider macroeconomic policy issues related to housing. These have been addressed extensively in other OECD work.<sup>1</sup> Further, this paper does not address extensive regulations that affect local, regional and national building of new dwellings. Thus this paper will not address supply conditions for new housing or rental housing. Finally, this paper does not focus on transactions for multi-unit homes or non-residential real estate. Such transactions are often governed by different arrangements for matching buyers with sellers and often involve large, sophisticated institutions that have the knowledge and means to ensure that transaction costs are not artificially high.

This paper focuses primarily on sales of single-unit residential dwelling transactions, such as houses or apartments (henceforth “homes”) purchased by buyers who plan to live in their home.<sup>2</sup>

There are potential weak links in competition at various stages of the home transaction process. Lack of competition can unnecessarily raise the cost of transactions, reducing consumer welfare and resulting in a misallocation of resources.

The paper proceeds by considering the main elements of the housing transaction process, first focusing on the matching of buyers and sellers, then focusing on the transfer of title and finally considering real estate financing. Within each element, the paper identifies competition policy concerns and relevant government experience.

## **2. Matching**

Matching is the process by which a buyer and a seller are connected and by which an agreement is reached over conditions of a home sale/purchase. Matches can be made either without a professional intermediary or through a professional intermediary, such as a real estate agent, a Latin notary<sup>3</sup> or an auction house. While many matches are actually sales within a family (e.g., from a parent to children), sales to neighbours and sales to acquaintances, the matches of interest for this paper are those between strangers. That is, the paper focuses on sales for which a seller’s personal network of acquaintances is not sufficient to generate the sale. Sellers often prefer to operate outside their network of acquaintances for a variety of reasons, one of the main ones being that extending the set of possible buyers typically results in a higher sales price for a home.

### **2.1 *Direct matching, intermediary matching and market structure***

The process of matching a buyer and seller differs substantially across OECD countries. In certain countries, the proportion of sales that are direct between a buyer and seller (with no intermediary making

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<sup>1</sup> For example, recent OECD work has shown that access to equity value in homes can provide an important contributor to growth, e.g. Catte et al (2004).

<sup>2</sup> While the extent to which home ownership is common varies significantly across OECD countries, home ownership by individuals is often encouraged by economic policymakers. As an indication of the variance in home ownership, in Austria, Germany, Sweden and Switzerland, owner-occupied housing accounts for less than 50% of units, while in Australia, Belgium, Iceland, Ireland and Spain, owner-occupied housing exceeds 70% of units. Data for a set of countries show a low of 39% (Sweden) and a high of 82% (Spain). See Erlandsen et al. (2006).

<sup>3</sup> A Latin notary is a professional who is responsible for overseeing property transactions and has other tasks related to estate planning. Latin notaries play an important role in property transactions in civil law countries of Europe, such as Germany, The Netherlands, Belgium, France and Italy, with exclusive rights to perform certain tasks. The profession began in northern Italy around 1100. A Latin notary is different from a notary public (the U.S. notary) who has much more limited responsibilities for registering agreements and documents.

the match) is large (approximately 50% in the case of France.) This “for-sale-by-owner” selling is henceforth called “direct” matching. In countries with developed direct matching, there are typically well-known and accepted publications and web-sites that facilitate the matching and often external sources for advice on valuation. Using these well-known means of publicity, sellers can expect to obtain largely the same (or better) reimbursement than they would through a real estate agent.<sup>4</sup> When direct sales constitute a large share of the market, an implicit constraint is placed on the cost of matching by intermediaries. If intermediaries set too high a price, a significant number of sellers (and buyers) may select direct matching. In contrast, when direct matching markets are poorly developed, sellers may feel that direct matching will result in a lower reimbursement to them than matching with an intermediary.<sup>5</sup> Direct matching will then place a much weaker constraint on pricing by intermediaries. In that case, the rules, customs and conduct related to intermediary transactions merit particularly close attention for the presence of anti-competitive restraints.<sup>6</sup>

The role of intermediaries has changed as a result of the Internet, which increases a buyer’s ability to perform quick searches over a wide selection of homes and across different agencies and potentially increases a seller’s abilities to find buyers directly, without an intermediary. The role of intermediaries has likely decreased somewhat as a result of the Internet. But many observers are surprised that the role of intermediaries has not decreased more dramatically, given the large technological change in search and promotion capabilities. Possible explanations for the remaining strong role of intermediaries include: consumer preferences for professional advice during transactions that are infrequent and potentially subject to costly errors, and difficulties of changing consumer habits. Another explanation is that restrictions on competition have aided real estate agents in fending off competition from new technologies.

Often sellers (or buyers) prefer to rely on external agents to take responsibility for the matching process. Intermediaries have:

- Market expertise;
- Advisory expertise;
- Access to a wide variety of information services (such as listing services and individual contacts) that are not available to an individual seller; and
- Expertise in negotiating and sales.

The precise services provided vary from country to country, but the volume of commerce of intermediaries is consequential. Estimates of total 2004 residential real estate commissions in just one country, the U.S., range from 61 billion USD to 96.6 billion USD.<sup>7</sup>

In this paper, intermediaries are referred to as “real estate agents”.<sup>8</sup> In the UK, real estate agency involves “introducing to someone else a person who wishes to buy, sell or lease land or property, and being

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<sup>4</sup> However, with direct sales, sellers must play a much more active role in selling a home and negotiating its sale. In countries where buyers do not have an agent, there may be little difference between the effort involved in direct and intermediary sales.

<sup>5</sup> In some countries, intermediaries are used for more than 90% of sales.

<sup>6</sup> A 50% rate of sales through direct matching would indicate that direct matching is relatively common. A 20% rate of sales through direct matching may indicate that direct matching is relatively uncommon.

<sup>7</sup> See Hahn, Litan and Gurman (2006).

involved in negotiating the subsequent deal. The work must be in the course of business, whether as employer or employee, and as a result of instructions from a client. The land or property may be commercial, industrial, agricultural or residential. This does not include acting as a letting agent.” (OFT)

In most countries, there is an intermediary for the seller but typically not for the buyer. In contrast, in some countries, such as the U.S., there is often a separate buyer agent and seller agent (dual agency). In a dual agency system, the buyer’s agent serves as an information gateway for buyers. The buyer’s agent combines information from other agents about properties for sale, and thus reduces the search costs of consumers. The buyer’s agent also provides useful consulting services to buyers and may organize visits in series, for example when a buyer comes from out of town and needs to make many visits quickly. The buyer’s agent then receives a fee for the work. In the U.S., where dual agency is the norm, this fee comes out of the sales price of the home and is divided with the seller’s agent, often amounting to about 50% of the total commission.<sup>9</sup>

FTC (1983) notes that while price and contract features in the U.S. exhibit a high degree of rigidity, some of the standard contributing factors to market power are not present in the real estate brokerage industry. Single firms rarely account for a significant share of sales and new agents and brokers can enter relatively freely into most markets. Thus there is a fragmented industry structure. However, a number of characteristics of the industry could aid in maintaining high, non-competitive prices. These include:

- Inelastic industry demand;
- Ease of detection of discounting; and
- Necessity of cooperation.

*Inelastic industry demand* is present to the extent that a price fall in commissions (from lower commissions) will not result in a corresponding percentage gain in total industry demand. The FTC states that “While we know of no formal estimate of demand elasticity for residential real estate brokerage, industry observers feel it is small.” Inelastic demand implies that total industry sales will not increase significantly from a lowering of commissions so the net business to be gained from lowering prices would be lower than in sectors with highly elastic demand.

*Ease of detection of discount brokers* exists in a number of OECD countries, notably when there are distinct brokers for buyers and sellers, as they must communicate directly in order to divide up commissions. Ease of detection can also arise when agent commissions are reported in government filings related to real estate transactions.<sup>10</sup> Note that posted commission rates, available in windows of agencies, may provide a maximum of commission rates rather than an indication of actual commission rates, as negotiated rates for a transaction may be lower in the initial agreement with an agent to sell or buy, or may be negotiated lower during the process of sale, whether directly or through rebates.

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<sup>8</sup> In some countries, a defined real estate profession exists but other professionals (such as notaries) can serve the same functions. The term real estate agent is used for simplicity because licensed real estate agents constitute the main intermediaries across the OECD. The use of the term should not be interpreted to suggest that, in any given country, all intermediaries are in fact real estate agents.

<sup>9</sup> Oddly, the real estate brokers consider that the buyer’s agent has a fiduciary duty solely to the seller, arguing that the buyer’s agent is a subagent of the seller.

<sup>10</sup> Not all countries have such filings.

*The need for cooperation* is high in the real estate sector when there is dual agency. In FTC (1983) 81% of sales of homes involved a broker. 92% of the time, when an agent was involved, the home was listed on the multiple listing service, which gives other brokers access to the listing. Ultimately, 53% of sales involved brokers from two different firms. Particularly for small firms, the existence of cooperative databases such as listing services provides a valuable function of giving such firms broad access to information about products for sale, reducing the disadvantage to being a small brokerage from the perspective of buyers and sellers.

The following sections of the paper will:

- Discuss pricing and price rigidities that exist for matching;
- Focus on competitive restraints that may affect the Internet and shared listing services; and
- Show how self-dealing and bid-rigging can enter into real estate transactions.

## 2.2 *Matching intermediary fees and price rigidities*

Intermediary fees vary substantially across countries, as shown in Table 1 which presents total matching fees paid by both buyer and seller. Mean or mode fees vary substantially from one country to another. The extent to which agent fees are standard also varies. However, it appears that the variation across countries is much greater than the variation within a country.

**Table 1. Matching Intermediary Fees for Residential Real Estate: 1999**

Country	Amount	Transaction Characteristics
Argentina	6%	3% paid by buyer, 3% paid by seller. Does not require buyer broker.
Australia	5% on first 18000 AUD, 2.5% thereafter	Properties often sold through auction system
Belgium	3%	
Brazil	5% (less on higher priced properties)	
Canada	3-6% commission	
Denmark	2-4%	Buyer pays commission, transfer tax of 25%
Finland	5% on condos, 3-4% on single family homes	
France		Only 50% of property is sold with a real estate agent
Germany	3-6%	
Greece	4%	Buyer and seller responsible for 2% each
Hong Kong	1%	Paid by seller
Indonesia	5%	Paid by either buyer or seller
Ireland	1.5-2.0% in cities, 2-3% in small towns	
Israel	4%	Equally split between buyer and seller
Italy	4-6%	Each party pays 2-3%

Japan	3%	
Mexico	5-10%	
Netherlands	1.5-2.0 %	Seller pays fees, broker represents either the seller or buyer, not both
Norway	2-3%	Broker represents both parties
Russia	5-10%	
Singapore	1.5-2.0 %	
Spain	5%	
Sweden	5%	
United Kingdom	1-2% (less in very competitive areas)	
United States	6-7%	

Source: Delcours and Miller (2002). The table presents generalizations of complex and highly varied transaction patterns

A number of analysts have argued that the commission fees in the U.S. are particularly high given other characteristics of the market. Delcours and Miller (2002) suggest that modal commissions in the U.S. are unduly high, given the level of efficiency and other factors in the U.S. market compared to markets in other countries. Hahn, Litan and Gurman (2006, p. 89) suggest that U.S. commission fees are 1.5-2.5% above the average for developed countries, based on the figures reported in Delcours and Miller (2002). It might be suggested that real estate agents, through their lobbying activities coordinated by their associations, organize collusion through setting up rules that make price competition difficult. Lande and Marvel (2000) argue that an important form of collusion, and one that explains many court decisions, is collusion to set up rules that reduce the intensity of competition.

Table 1 is organized by showing percentage commissions. Most agency commissions are indeed based on a percentage of the selling price, as are many taxes and transaction fees. As a result, the commission for selling a 300 000 EUR home would typically be about three times that for selling a 100 000 EUR home. This is despite the fact that the effort of selling a small home and a larger home will likely be similar. These may be considered cross-sectional pricing rigidities. On the one hand, perhaps it is a mistake to suggest that the effort to sell a small home is similar to that for selling a large home.<sup>11</sup> On the other hand, if the effort and advertising costs are similar, it is difficult to explain why the prices do not reflect the costs. "If the market were truly competitive, as suggested by the structural analysis, we would expect competition to ensure that fees adjusted to reflect costs."<sup>12</sup> (NERA (2004)) However, it is worth noting that if selling agents were paid solely a fixed fee, they would have little incentive to maximize selling price. Giving them a portion of sales means they receive a higher commission as price goes up, thus giving them an incentive to negotiate higher sales prices for the sellers.<sup>13</sup> Notably, some new services that

<sup>11</sup> A 2004 study for the OFT by NERA found that "...the evidence pointed to absolute fees rising sharply for higher value properties. There was little evidence that these increases are cost-related. There appear, therefore, to be rigidities in price setting by estate agents."

<sup>12</sup> One possible explanation is that individual agents may specialize, so that more talented agents tend to handle more expensive homes and less talented agents less expensive homes. More talented agents would expect to receive higher commissions, so the percentage commission structure may help to accomplish this.

<sup>13</sup> Some observers have noted that this incentive mechanism is not strong. Leviit and Syverson (2005) examine the difference in sales price and length on market between homes owned and sold by agents and homes sold by agents with no financial interest in the home. They find that when agents own the home they are selling, the time on the market is greater and the sales price, adjusting for other factors, about 3.7% higher. Consequently, agents are apparently not maximising gains to sellers. This may be because, even though agent commissions increase with sales price, they do not increase sufficiently to justify the risk of

are promoting themselves as low cost do feature fixed fees: sell-it-yourself services.<sup>14</sup> Such services are growing, but in many countries they have not yet achieved high penetration.<sup>15</sup>

Even when percentage fees are not particularly high, there can be concern with practices of real estate intermediaries. A NERA study performed for the OFT found that there are rigidities in price setting across estate agents, with fees being much higher for higher valued properties and fees as a percentage of property value when property values make quick upward movements (dynamic price rigidities). An OFT study on commission arrangements suggests that the real estate market merits further review while noting that prices in excess of costs are not necessarily a concern in two-sided markets, following Rochet and Tirole (2003). (DotEcon (2007))

The cross-sectional and dynamic price rigidities could be explained as focal point collusion. Focal point collusion occurs when market participants have a standard rate that serves as a point of coalescence, becoming a standard or rule of thumb. The NERA report suggests that, after examining changes in structural conditions in six local markets, strong forms of tacit collusion seem “unlikely to be sustainable”. They do find however that the convention of quoting commissions as a percentage of sales price is indicative of “at least some ‘understanding’ between market participants.” The 1983 US FTC report examines practice across the United States in detail. It found that, for the most part, total commission rates were either 6% or 7%, depending on the geographic area. They could not find a cost basis or other market characteristics that explained why some markets would have 6% rates and others would have 7%.<sup>16</sup> After reviewing extensive cross-sectional and historical evidence, the US FTC states that “Available statistics, therefore, strongly suggest that forces other than free competition are affecting the level at which commission rates are set.” (FTC (1983) p. 64)

Historically, commission rates were often established by recommended price schedules, sometimes distributed by real estate associations, sometimes by listing services. In the UK, for example, prior to a 1970 order, national and local associations had fee schedules for sellers “which were typically tapered from 5% to 1.5% or were fixed between 1.5-2.5%.” These fee schedules were allegedly “recommended,” but the associations also had rules forbidding price competition. The average commission rates varied across markets, but they were relatively stable in local markets. Such schedules could be enforced through non-cooperation. That is, brokers that were charging reduced commissions would not receive the same levels of cooperation as brokers charging the “standard” commission. A 1970 order by the UK government banned fee schedules for real estate brokers. By 1979, commission rates in the South of England had fallen from 2.8% to 2% and those in the North from 2.3% to 1.8%.

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hard bargaining with buyers that may lead more buyers to go elsewhere. They suggest the contractual form “badly misaligns” agent and home-seller incentives.

<sup>14</sup> However, to gain access to a multiple listing service, ForSaleByOwner.com does require, for example, that buyer’s agents be offered 2-3% of the sales price. (It’s fee for selling is much lower. It offers a variety of different plans, most of which involve a fixed fee for acting as a selling agent. This fee would typically fall below 0.5% of the sales price.)

<sup>15</sup> Consultants to the U.S. National Association of Realtors have estimated that “discount, full-service brokerages, Internet-oriented full-service brokerages, broker referral services, and other nontraditional brokerage models collectively represented buyers and sellers in less than 2 percent of all real estate brokerage transactions in 2003.” (GAO, 2005)

<sup>16</sup> FTC (1983) states that “there is evidence that, in many communities, schedules or recommended commission rates circulated openly until recently.” (p. 32)

There appear to be a number of factors that can inhibit price competition within the matching process. Factors that can limit competition or foster cooperation include government regulations, professional rules and, of increasing importance, listing service rules, such as:

- Rules that prohibit minimum service brokers;
- Rules that suggest or require price schedules;
- Rules that permit listing agents to withhold their listings from brokers of their choice;
- Rules that forbid agents from offering rebate to customers;
- Rules that permit a home to be placed on a listing service only with an exclusive sales agreement with the listing agent;
- Rules that permit selling brokers offer lower reimbursements for bringing them a client to discount brokers from full-service brokers;
- Rules that involve listing services recommending commission rates or division of commission and fees;
- Rules that make it difficult for individuals to sell their own home; and
- No information provided to the seller of commissions paid by the buyer.

Some observers might argue that high fees are not, in and of themselves, harmful if they do not significantly reduce the number of transactions or result in an allocation different from one that would exist with lower fees.<sup>17</sup> However, there is a significant resource allocation problem that arises from high fees. Hsieh and Moretti (2002) show that, with constant percentage commissions in the U.S., free entry to become a real estate agent results in a much higher entry of real estate agents into cities with high prices than low prices. That is, where the revenue from selling a home increases, more agents enter and compete away the rents. This is argued to be inefficient because “the productivity of a real estate agent (houses sold per hour worked) falls” and the real wage remains unchanged. Hsieh and Moretti argue that “higher commission fees in more expensive cities are dissipated by excessive entry of brokers.” The high commission distorts labour supply decisions.

### **2.3 *Promotion, the Internet and listing services***

Newspapers have historically served as a major publicity mechanism for homes for sale. These have not only promoted homes, but have also advertised open houses at which time a home is open for visits from many different potential buyers. Increasingly, printed newspapers are becoming less important for advertising homes, while the Internet is increasing in popularity. Internet sites run with databases that provide basic information about a home for sale. Strengths include:

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<sup>17</sup> That is, high commissions may imply lower value of homes for owners. But under a total welfare analysis, this may be considered as non-critical. Rather, what would be important would be an allocation of housing or matching of buyers and sellers that led buyers with low willingness to pay to end up with homes when other buyers had a higher willingness to pay.

- Low search costs
  - Searchability to identify homes that meet customized purchaser criteria;
  - Easy-to-view colour pictures or videos that reduce unhelpful visits;
- Low cost of operation
- Expanding exposure of sellers' properties to potential buyers

The Internet has become an increasingly common means of advertising homes for sale and has the potential to disrupt older patterns of real estate matching. For many buyers, it represents an ideal medium for initial search and, for many sellers, an ideal means of reaching buyers at low cost. However, network effects can be strong in home sale sites. Absent price differentials between homes on different sites, potential buyers will typically search the sites with the highest volume of announcements before those with lower volumes. A high percentage of buyers report searching on the Internet for homes for sale.<sup>1</sup> In some countries there is one predominant Internet site that shows homes for sale. In such cases, gaining access to that mechanism of distribution can be an important element of home selling. At times, the most popular site is restricted so that only licensed real estate professionals can post homes for sale.<sup>2</sup> This is the case in France, for example, with seloger.com or the U.S. with Realtor.com. However, alternative, less widely-used sites have open advertising policies.

The Internet provides a database of homes for sale. In some countries, agents share much more extensive information about homes for sale among themselves, not using public Internet access. These agent-only databases are referred to as shared listing services.<sup>3</sup> Shared listing services are joint ventures created by competing brokers. These listing services would typically provide much more detailed, and sometimes confidential, data than is shown on a public Internet site. However, in principle they provide many of the same benefits to buyers and sellers as could be provided by Internet sites. However they provide additional information that is of value to agents who represent buyers, such as the size of the commission and the likely commission for a buyer's agent. Shared listing services increase the need for coordination between agents. Shared listing services have a number of potential benefits:

- “They expand the potential exposure of sellers' properties to a larger number of buyers;
- Reduce the search costs for those buyers;
- Lessen the losses for brokers from lost investment; and
- Diminish somewhat the competitive difference among brokers in terms of any advantage that accrues to a superior ability to attract new listings.” (FTC, 1983)

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<sup>1</sup> The U.S. National Association of Realtors reports from a survey that 70% of home buyers use the Internet when searching for a home.

<sup>2</sup> In France, seloger.com, the leading Internet site, has this feature. In the U.S., Realtor.com, a service of the National Association of Realtors, is the leading site and it translates approximately 95% of “multiple listing service” announcements into announcements on the site. Rules for MLS postings vary by locality (each locality has its own MLS) but a standard rule is that listings must be made by licensed, local real estate agents.

<sup>3</sup> At times, they are referred to as Multiple Listing Services or cooperative listing services.

Expanding the number of potential buyers who find out about a home for sale is important from the seller's perspective. Ortalo-Magne and Merlo (2005) examine a dataset of highly-detailed sales information on about 800 UK homes and find that "the more potential buyers visit a property, the higher the probability a buyer makes an offer." (p. 31) Given that buyer's willingness to pay for the same home differ, a seller will seek to find the buyer with the highest willingness to pay. If buyers had identical valuations, reaching the broadest universe possible of potential buyers would not be necessary. However, buyer valuations do differ significantly because homes are unique goods with a variety of features that some buyers will find more valuable than others. Ortalo-Magne and Merlo (2005) find that the more offers are made for a home, "the broader the interval they cover relative to listing price". To the extent that there is significant variation among buyers as to exactly how much they would be willing to pay for a property, the seller wants to find the buyer with the highest willingness-to-pay for the home. Thus from the seller's perspective, there is significant value to reaching a large number of potential buyers. Shared listing services accomplish this objective, especially to the extent they are broadly used within a community.<sup>4</sup>

Buyers, in turn, wish to reduce their costs of search while at the same time having access to a broad variety of properties for sale, allowing them to most closely match the property they seek with their own values. Gaining access to a broadly used listing service permits them to expand the set of properties they consider, thus increasing the likelihood of a good match.

Listing services are often associated with increased levels of exclusive sales, whether as a result of a listing service rule that simply states exclusivity is required or simply through practice, as agents using listing services are more frequently able to negotiate an exclusive arrangement with sellers. Under exclusivity, brokers who invest in advertising and other services related to a home are likely ultimately to benefit from such advertising by serving as the selling broker. Note that while duplicative advertising may be considered wasteful, an implication of duplicative advertising is that multiple agents are attempting to sell a home.<sup>5</sup> Such a situation can provide a benefit to sellers. Sellers have a much greater ability to negotiate commissions downwards at the offer stage of a sale when the offering agent does not have an exclusive listing and knows that if the offer is not followed by an agreement, there is a strong likelihood the agent will not be the selling agent and thus will receive no commission.

If brokers do not cooperate to share their listings through a shared listing service, two possible market extremes may develop to minimize the search costs. In one extreme, sellers will seek to list their properties with many brokers and buyers will have to visit relatively few brokers to gain a good sample of homes for sale. At the other extreme, sellers will list their properties with few or just one broker and buyers have to visit relatively many brokers in order to gain a good sample of homes for sale. If many brokers list a property, no individual broker will have the incentive to devote significant financial resources to trying to sell it (such as marketing expenses for colour advertisements) because each individual broker may have a small chance of being the successful broker.<sup>6</sup>

In countries where shared listing services are commonly used, they can be essential for obtaining the best prices for a home. In the U.S., for example, the shared listing service is called the Multiple Listing Service. According to a US FTC report, "The Multiple Listing Service is the primary source of information

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<sup>4</sup> Other seller behaviours could also result in broad reach, such as contracting with multiple agents to represent the home sale, providing a commission to only the winning seller.

<sup>5</sup> While under non-exclusivity, agents may not engage in ideal advertising, they may do a better job of serving the seller's interest by promoting a property to potential buyers. If an agent has a long exclusive on one property and no exclusive on another, the agent may prefer to sell the non-exclusive property first, given the likelihood that delaying a sale on that property could lead other agents to make the sale.

<sup>6</sup> Note that such concerns about lost investment can easily be covered by contract that stipulates sellers will pay all expenses associated with marketing the home, whether the agent is the successful seller or not.

about the prices of competing homes, the prices at which other homes have been sold, and in most communities, an essential marketing tool. In no community can sellers get direct access to this facility.”<sup>7</sup> (FTC 1983 p 29.) Databases like these exist in many OECD countries, including Australia, The Netherlands and, increasingly, others. Even when such services are not widespread, in some countries, such as France, real estate agents are experimenting with the introduction of shared listing services. One reason French estate agents are interested in a shared listing service is that it increases the extent to which selling agents have exclusive contracts with sellers. Initial reports suggest that introduction of a shared listing service increases the frequency of exclusive listings by a seller by 40%.

When a shared listing service is the predominant means of providing information about houses for sale, the practices of shared listing services can be the subject of competition law concerns. Rules of shared listing services can affect the ability of discount brokers to offer their services and attract clients. Box 1 describes some of the elements of a recent case that is under litigation.

**Box 1. Competition law case on listing services: U.S. v. National Association of Realtors**

One important issue for shared listing services is whether all agents have access to the listings and can use listings in ways that fit their business model. In the past, in order to see listings from a shared listing service, home purchasers typically had to visit a real estate agent’s office or physically receive listing information (e.g., by mail, fax or email.) In a recent case, the U.S. Department of Justice has alleged that a national association of real estate brokers introduced policies that allowed shared listing services to provide limited access to brokers who operate password-protected Internet sites enabling the brokers’ customers to review listings on the Internet.<sup>8</sup> These Virtual Office Websites (VOWs) are an increasingly popular option in the delivery of brokerage services, but a number of brokers expressed concern that such sites would place downward pressure on their commission rates. The National Association of Realtors developed policies for Multiple Listing Services that permitted member brokers to “opt out” of giving VOWs access to their listings. The result was that web-based competitors’ customers could not review the same Multiple Listing Service listings as those that traditional brokers would provide to their customers on the grounds that it would constitute an unreasonable restraint on competition in the brokerage service markets, with resulting effects of:

- Suppressing technological innovation;
- Reducing competition on price and quality;
- Restricting efficient cooperation among brokers;
- Making express or tacit collusion more likely; and
- Raising barriers to entry.

The case has not yet been tried. It provides an important illustration of listing service behaviour that may cause concern to a government and harm to consumers.

The need for cooperation through listing services can impact commission stability (when there are buying and selling brokers):

“...maximizing the sales price usually requires maximizing the exposure of the property. The MLS [Multiple Listing Service] is generally used by brokers to do this. However, effective use of the MLS also requires giving the cooperating brokers the incentive to show the home. At a given price and in a given time period, a property listed on the MLS at the prevailing commission rate and split has a higher

<sup>7</sup> Note that even with the advent of the Internet, the Multiple Listing Service remains the primary origin of information, in part because the most successful U.S. real estate Internet site (realtor.com) is based primarily on aggregating selected information from the local Multiple Listing Services.

<sup>8</sup> US v National Association of Realtors. Civil Action No. 05C-5140.

probability of selling than if that same property were listed at a lower commission rate and split. Alternative, discount brokers as a group have a substantially lower cooperative sale rate and overall sales-to-listing ratio than do the traditional brokers in their communities. This may account for the opinions of industry spokesman that, while discount brokers have always existed to some degree in rising sellers' markets, they seldom survive recessions.

"Brokers' short-run profit maximizing interest relates to the amount of the split they will obtain if they are the procuring cause in the sale of the particular house. For example, a "discount" broker who charges 4 percent and splits 50/50 with the cooperating broker is, in effect, offering the cooperating broker 2 percent. A "traditional" broker who charges 6 percent and splits 50/50 is, in effect, offering the cooperating broker 3 percent of the transaction if he or she procures the buyer. From the cooperating broker's point of view, the traditional broker in this example is paying him or her 50 percent more than the discount broker. In many cases, the differential is even greater. These differentials in the potential incomes of brokers who are dealing with prospective buyers appear to influence the showing patterns of such brokers. Brokers appear to steer buyers toward the house listed by the traditional, full-commission broker. This tendency can be corrected for if a "discount" broker is prepared to offer a cooperating broker a "standard" percentage and absorb the entire reduction in commission him or herself. This, of course, severely limits the amount of the discount which a broker can offer and still cover operating costs." (FTC(1983, pp. 39-40)

## 2.4 *Self-dealing and bid-rigging*

The mechanism of sale through intermediaries (such as real estate agents, Latin notaries and auction houses) differs across countries. Intermediaries can use a variety of mechanisms, including private sale (one-on-one negotiating) and auction mechanisms. Private sales are the primary mechanism used in OECD countries. Auction mechanisms have often been associated with distress sales (such as repossessions) so frequently have not been a preferred mechanism. However, at times, auctions have accounted for a large portion of sales.<sup>9</sup>

Private sales and auction sales can both be subject to restraints on competition through self-dealing or bid-rigging.

In private sales, intermediaries may represent a seller but not open the home to fully competitive sale. Agents may conspire to sell a home below its market value and arrange for themselves or associates to purchase the home in order to obtain the benefits of the full value for themselves or associates. Such self-dealing by real estate agents is typically contrary to the rules of real estate associations and violates an agent's fiduciary obligations as an agent to a seller.

In auction sales, buyers have been accused of bid-rigging. There is little evidence that such bid-rigging is common in home auctions, though it can occur, particularly in specialized auctions with few bidders, such as auctions to recover unpaid taxes on abandoned properties or foreclosure auctions for non-repayment of loans.<sup>10</sup>

<sup>9</sup> For instance, in Sydney, Australia, about 50% of transactions were by auction during a recent boom market, while Brisbane experienced a lower, but still significant, 20-30% share. Auctions may deliver superior returns to one-on-one negotiating. Ashenfelter and Genovese (1992) find that auctions deliver prices 13% higher for equivalent properties in one set of U.S. transactions, while Newell et al. (1993) suggested auction prices are 3.6% higher in Sydney than in transactions by private treaty.

<sup>10</sup> Since 1995, the U.S. Department of Justice has prosecuted bid-rigging in a number of locations, including Brooklyn, New York and northern Virginia. As many as 13 conspirators have been alleged to have entered agreements over a long period of time not to bid against each other at real estate foreclosure auctions. In

## 2.5 *Policies to improve competition in the matching process*

In general, governments have limited their role in determining matching schemes rules. However, to the extent elements of a matching scheme act as an unreasonable restraint on competition, governments may have a significant role to play in this area. Governments may consider taking action if there are clear market failures and if the steps the government could take would likely result in an improved outcome.<sup>11</sup> The main steps a government can take to promote an efficient and competitive matching market are to:

Review rules of shared listing services and challenge rules that restrain competition

- Ensuring that listing services do not recommend prices or serve as a price co-ordinating mechanism;
- Ensuring that rules for listing do not unduly prevent competition by, for example, penalizing low cost service providers whether directly (by forbidding their participation) or indirectly (by permitting other agents to avoid giving listings to low cost service providers or media conducive to low-cost service providers, such as the Internet; and
- Eliminating exclusivity rules that a property can only be listed by one agent.<sup>12</sup>

Optimize government regulations or professional rules to enhance ability and incentive to compete

- Preventing minimum service requirements either in government regulations or professional rules;
- Ensuring that brokers can give rebates of their commissions directly to the buyer or seller; and
- Ensuring the brokers can advertise their prices.

One of the best ways to limit the harmful effects of anti-competitive rules of agents, their professional associations or governments is to ensure that individuals are able to sell their own homes with relative ease and at prices close to those they would achieve through an agent.

Most countries permit individuals to sell their own homes and to advertise their homes for sale without having a real estate license. This is not to say the process of direct matching is unregulated. Often, there are rules on release of information about known faults or invisible faults that will be equally binding on direct sales and intermediary sales. Nonetheless, the legality of direct sales is typically beyond question.

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Northern Virginia, some individuals found guilty served jail terms between 5 and 7 months. In addition, U.S. states have been active in prosecuting bid-rigging, including North Carolina that prosecuted more than 20 individuals for repeated bid-rigging in foreclosure auctions.

<sup>11</sup> The U.S. antitrust agencies have a long history of action in the area of real estate matching dating back to litigation in the 1960s and 1970s over price schedules to more recent activities, such as letters and other advocacy to state legislatures considering laws that would prevent rebates or outlaw low-service real estate agents. In *U.S. v Kentucky Real Estate Commission*, the Antitrust Division argued that the Real Estate Commission's ban on offering consumers cash rebates or other inducements constituted an unreasonable restraint on trade.

<sup>12</sup> While there can be benefits to exclusivity, exclusivity does not appear to be necessary to the operation of a shared listing service, as some shared listing services do not include exclusivity. One effect of exclusivity is to reduce the ability of the seller to negotiate down the commission in negotiations over an offer.

The main avenues by which direct sales may be limited are in markets where direct matching is uncommon. In such markets, means of promotion for direct sales may be limited. Access to listing services may be prevented by regulations of a shared listing service.<sup>13</sup> Access to the most popular web-sites may also be limited. Publications and websites may limit direct advertising, for example in response to a threatened advertising boycott by intermediaries.

Government's can protect consumers by ensuring that a reasonable and feasible direct sale option exists for sellers by:

- Giving individuals the legal right to advertise and market their home to find purchasers; and
- Ensure that individuals have access to sufficient media or promotional possibilities so that they are not at a compelling disadvantage to real estate professionals when marketing their own home.

### **3. Transfer of Control**

The formal process of transfer of ownership is a highly regulated process in most countries. The regulation is considered necessary because of the strong public interest in ensuring property rights are well-defined and cheaply enforced. Confidence in property rights promotes sales and investment in property. The alternative purely private mechanisms to oversee transfer of ownership might be subject to a higher rate of "fraudulent" transactions (i.e., a buyer paying for a home for which the purported seller does not have full property rights.) The court-based resolution of disputes over fraudulent transactions may prove time consuming, expensive and not result in full restitution of buyer payments.<sup>14</sup> During the course of litigation, buyers of fraudulent property could be left with no homes and a large debt.

The transfer of control process has a number of features that vary, to some extent, by country. Generally, it:

- Ensures that sellers have appropriate legal title prior to a sale;
- Ensures that any state-mandated taxes on transactions are paid;
- Ensures that any seller debts guaranteed by the property are paid off during the course of the transaction;
- Registers the new owner with tax authorities who may administer recurring taxes based on property ownership;
- Ensures that buyers obtain legal title; and
- Ensures that any financing put in place for the buyer receives appropriate guarantees in case of non-payment (notably, title and the right to sell the property).

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<sup>13</sup> A shared listing service may be the property of a real estate agent association, for example, that does not permit non-members to have access. Associations may impose such limits in order to prevent competition from non-agents. They may also have quality standards for listings that are most easily enforced through restrictive access. The key question then may be whether the listing service requires substantial payments by direct sellers to a listing agent or permits free negotiation for such listings.

<sup>14</sup> Tracking and arresting fraudulent transactors may prove difficult, as such transactors may seek to evade law enforcement officials.

Often, a single profession has the right to carry out conveyancing transactions. In a number of European countries, for example, Latin notaries have this exclusive right. In these countries, all property transactions must occur through the medium of a Latin notary. They often have a fee schedule determined through historical custom and entry limits to the profession. In other countries, conveyancing occurred exclusively through lawyers or solicitors. One possible reform in such situations is to allow persons with appropriate training (but who are not members of the selected profession) to have the right to perform conveyancing transactions.<sup>15</sup>

One reason to pursue reform is that fees differ sharply across countries for services that appear comparable, suggesting that fees may be non-competitive manner in some countries. Given a political will to avoid regulation of such fees, increasing competition between providers is often seen as a way to ensure lower fees and greater choice for consumers. As an illustration, Table 2 shows fees for notaries/solicitors in selected European countries. The fees are divided into those that are related to the house purchase and those related to a mortgage loan.<sup>16</sup> In this simple ten-country comparison, the total fees for a transaction vary from 0.6% of the property value to 4.0%.

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<sup>15</sup> The European Commission has commissioned an ongoing independent economic study into the European Conveyancing Services market, which is considering the impact of restrictive professional regulation on the functioning of this market in terms of price, choice, quality and speed. This study is expected to be finalised at the end of March /early April 2007.

<sup>16</sup> Generally, the house purchase fees would be incurred even in absence of a loan and the mortgage loan fees would be incurred even in absence of change in beneficial ownership of a property (e.g., in a refinancing.) Note that the actual fees may, in some cases, vary substantially from one provider to another within a country.

**Table 2. Solicitor/Notary Costs in Selected European Countries, 2004**

Country	Typical property value (EUR)	Costs related to home purchase	Costs related to mortgage loan	Total solicitor/notary costs
BE	100 000	2.2%	1.6%	3.8%
DK	188 172	0.5%	0.1%	0.6%
DE	277 000	0.5%	0.2%	0.7%
GR	140 000	2.2%	0.0%	2.2%
ES	135 000	0.4%	0.4%	0.8%
FR	168 000	1.2%	0.9%	2.1%
IT	150 000	2.0%	2.0%	4.0%
HU	40 000	1.0%	0.4%	1.4%
PL	34 771	1.0%	0.0%	1.0%
UK	164 789	0.4%	0.5%	0.9%

Source: EMF (2006). Typical transaction size is not necessarily mean or median transaction size. Percentage costs are with respect to the typical transaction size used for a given country, as reported by country experts. One country is left out because of reported 0 costs.

Introducing reform over the professions that can legally oversee transactions can be difficult and controversial. Three main types of reform have been pursued in this area:

- Opening access to the activity to an appropriately trained profession that is not the historically dominant profession;
- Opening access to the historically dominant profession; and
- Eliminating common fee schedules or recommendations.

These will be discussed in sequence.

### **3.1 *Eliminating a profession's exclusive right to convey***

Eliminating a profession's exclusive right to transfer control of property is perhaps the most obvious solution to destabilize potentially high pricing of entrenched professions. In some countries, such as the UK, conveyancing used to be the exclusive domain of one profession, that of solicitors. Solicitors have broad and time-consuming training that primarily concerns non-conveyancing. The training often extended to a 5 year period, including the period of apprenticeship. A number of reports by the Monopoly and Mergers Commission examined conveyancing and found fees for conveyancing were high, given the limited time needed to perform conveyancing. Moreover, rates were rarely negotiated. In the late 1980s, authorization to provide conveyancing services was expanded to permit professionals besides solicitors,

notably including licensed conveyancers who would have much more focused and shorter training than solicitors. Prior to the introduction of licensed conveyancers, solicitors' fees began to fall for conveyancing, perhaps in part because of the publicity over high prices. (Love and Stephen (1997)) Stephen et al. (1993) examined pricing among a sample of solicitors in 1989. They found that where licensed conveyancers were most active, solicitors' quoted fees were lowest. They later found some mixed evidence on fee developments, however, suggesting that perhaps there had been accommodation between licensed conveyancers and solicitors after entry. At the same time, according to the UK's Department of Constitutional Affairs (2003), "the conveyancing market is no longer a monopoly and is already competitive: (prices fell significantly in the 1990s when the solicitors' monopoly was broken by enabling licensed conveyancers to operate in the market. Providers are now ready to give fixed quotes to consumers who may shop around." In recent years, online companies have started to offer conveyancing services.

In other countries, conveyancing remains an exclusive right of one profession, notably for Latin notaries. The European commission has previously questioned the exclusive right to perform conveyancing accorded to the Latin notary profession. It has also urged that advertising restrictions and restrictions on prices be removed.<sup>1</sup> Van den Bergh and Montangie (2006) have suggested that revision of entry restrictions and price regulation merits cost benefit analysis, arguing that the European Commission does not provide convincing evidence of rent-seeking by professions and that net impacts of existing reforms are difficult to assess.

At times, professions that are not historically entrenched may seek to develop exclusivity for themselves. In the United States, a recent effort by the American Bar Association to develop a model definition of the practice of law could result in real estate closing services being considered the practice of law. Given that the model definition could be incorporated into state laws that forbid the practice of law by those who are not lawyers, such a definition could result in the loss of competition between lawyers and lay persons. The US antitrust agencies submitted a detailed letter to the American Bar Association outlining their concerns regarding the proposed definition. The letter suggested that:

The Model Definition may hurt consumers by denying them the right to choose a lay service provider that offers a combination of services or form of service that better meets individual consumer needs...In real estate closings, some non-lawyer services also compete with attorneys on the basis of convenience to close loans at nontraditional times (such as evenings or weekends) and locations (such as the consumer's home). Moreover, closing loans by mail or the Internet utilizing lay services is a common practice for consumers buying property or refinancing loans in some states. For these consumers, an overly broad definition of the practice of law, prohibiting lay closings, could raise costs and erect significant barriers to electronic commerce if enacted in these states. (Joint Agencies, 2002)

### **3.2 *Opening access to the profession***

Some professions responsible for conveyancing impose fixed limits on the number of professionals who can practice.<sup>2</sup> These limits exist for the notary profession in a number of countries, for example. In Belgium, for example, the Notary Act allows a maximum of "one notary per 5 000 in districts with 75 000 inhabitants; per 6 000 inhabitants in districts with 75 000 to 150 000 inhabitants; per 7 000 inhabitants in districts with 150 000 to 250 000 inhabitants." (Kuypers et al. (2005)) In Germany, notary establishment is not based on population but on the number of notarial acts in a geographic area. One objective of some

<sup>1</sup> See the European Commission's 2005 report on professions.

<sup>2</sup> These limits do not necessarily restrict the number of transactions that can be handled, as notaries in France, for example, can take on a large number of associates, with one firm having as many as 200 employees. So firm size can adjust to demand, even if the number of firms is fixed.

reforms has been to lift the restrictions on establishment of notaries. The Netherlands is the country that has done the most to lift restrictions on establishment. While numerical limits were eliminated, there has not been a great number of appointments of new notarial offices. (Kuypers et al. (2005)) Some restrictions remain in place, notably limiting entry and maintaining the exclusive right of notaries to transfer control of property. While geographic limits on establishment of notarial offices have been eliminated, one requirement for entry is that prospective new notaries file a business plan approved by a “special committee” of the new, public notarial oversight body. Little entry has occurred.<sup>3</sup>

### 3.3 *Eliminating common fee schedules or recommendations*

Common fee schedules have existed for conveyancing services in a number of countries. Some jurisdictions have taken actions to eliminate such schedules. In Jersey, for example, an island dependency of the British crown, conveyancing transactions were subject to a scale fee of one percent of the consideration for the sale or purchase of property.<sup>4</sup> The standard fee had been in place since 1954. The Law Society had “declined applications from individual lawyers to charge less than one percent of the scale fee.” The competition authority in Jersey therefore contacted the Law Society to inform them that the scale fee “would most likely be in contravention of the [competition] law’s prohibition on price fixing agreements.” The scale fee “had both the object and effect of fixing the price that lawyers charged for conveyancing services in Jersey” according to the competition authority. The Law Society chose to eliminate the scale fee. (JCRA (2005)) Qualitative observations suggest that the fees for transactions have since been reduced.

Common fee practices continue to exist in a number of countries. For example, in France, notaries have a standard 1% fee on transactions. If both buyer and seller have a notary, the fee is split between them, but if both parties use the same notary, the fee goes entirely to the notary.

Little cross-country evidence exists on the impact of moving away from common fee practices. In the Netherlands, notary fees were completely liberalized.<sup>5</sup> Kuypers et al (2005) state that “average fees for real estate services have decreased but still include high profit margins” based on two reports that examined price developments in the Netherlands after the notarial profession was liberalized. However, the CPB also finds a slight change in quality of services. In 1995, notaries in more competitive areas had lower rates of corrections in the public record of transactions, while in 2003, notaries in more competitive areas did not have lower rate of corrections compared to notaries in concentrated areas.<sup>6</sup> This suggested that competition actually led to a slight increase in the number of corrections in competitive areas, an indicator that slightly lower quality may have followed the introduction of competition. (Nahuis and Noailly (2005))

Table 3. shows developments in average fees between 1999, when the liberalization occurred, and 2004. Liberalization of fees was followed by an increased dispersion of fees, with average fees considerably lower for high-value real estate transactions and slightly lower for lower-value home transactions.<sup>7</sup>

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<sup>3</sup> In addition, the mandatory work placement for junior notaries doubled from three to six years.

<sup>4</sup> Exceptions were allowed in certain cases, e.g. for first time home buyers.

<sup>5</sup> One exception was that maximum fees were installed for services to low income families.

<sup>6</sup> Corrections can be construed as an indicator of quality. More corrections would be associated with more errors in initially registered transactions and, hence an indication of lower quality.

<sup>7</sup> The average fee for conveying a “yard” actually increased, the initial fee having been quite low.

**Table 3. Notary fees in the Netherlands: 1999-2004**

	October 1999 (fixed fee)	April 2002 (average fee)	Change 1999- 2002	September 2004 (average fee)	Change (2002- 2004)
	EUR	EUR	%	EUR	%
Mortgage + conveyance (113 500)	1779	1733	-3	1599	-7
Mortgage + conveyance (245 000)	2196	2098	-4	1817	-13
Mortgage + conveyance (363 000)	3554	3007	-15	2284	-21
Conveyance yard	280	499	78	578	24
	3554	3007	-15	2284	-21

Source: Kuijpers et al (2005), based on data from two other papers. (Data corrected from Kuijpers et al (2005) original version.)

While average fees declined after the Dutch liberalization, the dispersion of fees between cheapest and most expensive notaries increased. For example, for a mortgage + conveyance (113 500 EUR), the average fee for the lowest priced 5% of notaries fell from 1871 EUR to 1194 EUR, while the average fee of the most expensive 5% of notaries went from 4054 to 3859. Kluers et al (2005) report that about 45% of notary offices followed the same pricing strategy as under regulated fees, 28% became “price fighters” 25% based their fees on costs and 2% charged “particularly high fees.” Consumers with low-value transactions who searched for low fees were able to reduce their fee costs substantially compared with the pre-liberalization period.

#### **4. Housing Finance**

Housing loans are commonly used by purchasers during the process of purchasing a home and are a key element of the overall transaction process. There are a variety of competition concerns that have been expressed about housing loans. On one extreme, cartels among lenders have been observed. On the other, when the lending environment is very competitive, consumers have difficulty differentiating between the benefits of different loan offers and identifying the best loan offer. In these instances, governments may wish to ensure that information from loan offers is simple and easily comparable and that consumers will actually use the information appropriately. Three main concerns are discussed here:

- Cartels;
- Tying of housing finance to other products; and
- The provision of information for competitive comparisons.

##### **4.1 Cartels**

Cartel activity has been discovered in more than one OECD country over various aspects of mortgage finance. In the 1980s, UK mortgages were issued by building societies and not banks. Building societies

were constrained in their potential lending activity by the level of their deposits. If deposits were insufficient to meet the capital requirements borrowers had to “queue” for loans. Interest rates were set by the Building Society Association. This cartel broke down when banks were permitted to issue mortgages in 1980.

Cartel activity need not focus exclusively on rate setting. In France, cartel activity related to a “non-aggression pact” was discovered and prosecuted by the French Competition Council. “In a context of sharply falling interest rates, the main banks concluded a “non-aggression pact” whereby each of them undertook not to poach the customers of other banks by offering to renegotiate their mortgages. They were thus in a stronger position to resist the requests from their own customers to renegotiate their mortgages since the latter were unable to go to other banks.” (OECD (2000)) This case is described further in Box 2.

### **Box 2. French banks mortgage loan conspiracy**

During the 1980s, mortgages had a typical duration of 10-20 years, most being at fixed rates of interest. Loans could, in general, be reimbursed in advance of their termination date as long as at least 10% of the initial amount of the loan was paid. Lenders had the right to demand a fee for closing a loan that could not exceed, at the most, 6 months of interest payments or 3% of the capital remaining to be paid.

From a high interest rate of approximately 20% at the beginning of the 1980s, interest rates fell significantly, stabilizing around 12% in 1985 and then falling to 7.5-9% until the end of 1992. After a fall in interest rates of this order, borrowers with at least 5-7 years left to run on their fixed rate loans would benefit financially from renegotiating their loans with their existing lenders or taking out a new loan, with a new lender, that would reimburse their initial loans. For banks with the existing, high-interest loans, renegotiating loans would lead to a substantial decline in profits from the loans. Banks recognized that they had a large stock of loans potentially subject to renegotiation. For some banks, as much as 40-60% of their standard mortgage loans were loans for which borrowers would be best off after renegotiation.

A number of documents from banks cite or evidence a national agreement among banks in which each bank network committed not to propose housing loans to clients of other networks. Other documents found in the course of the investigation instructed loan officers not to conduct any offensive actions to attract clients, even if such loans would otherwise be profitable, and that loan officers were requested to report information about loans that were being paid by other banks to the central offices of the initial lender banks which, at times, then contacted directly competitors that appeared to have deviated from the agreement. In at least some cases of identified deviations, the initial lending bank contacted the new lending bank with citations of particular cases that appeared to violate the agreement.

The French Competition Council stated that, although banking was subject to specific regulation, it was nonetheless subject to competition law. The allegations did not involve fixing mortgage rates per se but rather a conspiracy not to compete for clients. The conspiracy is alleged to have caused significant harm to clients, for whom the inability to renegotiate loans would have been costly. The penalties imposed on 9 different banking establishments totalled FF 1.14 billion (Decision No.00-D-28).

One of the most effective ways of addressing concerns about potential cartel activity, as suggested by the UK experience, is to remove the structural conditions that permit cartels to thrive. For example, it is possible to extend the set of institutions that can interface with consumers for the provision of housing loans. House loan “brokers” can offer a substantial alternative to more traditional means of mortgage finance. Potentially, brokers can be important for promoting competition on rates with existing banks or other loan originators. Alternately, permitting loan providers from outside of the country to deliver housing loans, if such providers are appropriately regulated in their home jurisdiction, can be beneficial to borrowers.

## 4.2 *Tying of housing loans to other products*

In some countries, housing loans are tied to the purchase of non-housing products, such as depository accounts with salaries or insurance products. That is, a bank may provide a loan only if it has the depository account that receives the borrower(s)' salary or wages. In the European Commission's recent Interim Report II on Current Accounts and Related Services, tying is identified as a common practice. "47 per cent of banks' mortgage customers were required to take out a current account, whereas 58 per cent of SMEs taking out a loan also had to accept a current account. This practice increases the breadth of a consumer's relationship with one bank and hence increases the costs involved in moving their business to an alternative provider."

Two Israeli researchers have stated that for mortgage products, Israeli banks acted as a cartel.<sup>8</sup> The Israeli banking sector is highly concentrated, with the 5 largest banks controlling 91% of the mortgage banking capital in Israel, as of 1996. Banks required customers obtaining mortgages to purchase related products, notably life insurance. The banks would then keep approximately 50% of payments as an intermediation commission and give the remainder to the insurance companies. (Institute for Advanced Studies, 1998)

The tying of loans to other products offered by the banks may have legitimate justification. For example, in some countries, the delay for banks to repossess a dwelling after non-payment of mortgage loans exceeds two years. In such cases, the banks may be more willing to make loans when they have a guaranteed knowledge of ongoing income, for example through the requirement that salary payments be directed to a current account at the lending bank.<sup>9</sup> When the price of the tied product is revealed after consumers have made a commitment to a bank, however, there is not an adequate opportunity for competitive forces to operate with respect to the tied product.

## 4.3 *Loan information*

In order to ensure that consumers can easily compare different lending offers, the use of a standard disclosure of an officially defined net annual percentage rate for the loan can be useful. A borrower can take such percentage rates, and compare them across lenders, providing borrowers with useful information.<sup>10</sup> Providing consumers with simple and comparable information about complex products promotes more vigorous competition among housing loan providers.

However, governments need to be careful about exactly what information is provided to consumers. A recent US FTC study demonstrates how information disclosures can, at times, lead consumers to make worse choices about home loans than in absence of such disclosures. See Box 3. Research on effects of different possible disclosures on consumer decision making can help to ensure that disclosures promote competition over important terms of a mortgage.

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<sup>8</sup> Ezra Sadan and David Levhari.

<sup>9</sup> If there is a requirement to hold insurance, though, it is unclear why the bank should be the exclusive conduit for the purchase of such insurance.

<sup>10</sup> Such information will not always be decisive. For example, comparing fixed rate loans to variable rate loans requires predictions about future interest rate movements that are typically beyond the capability of most consumers.

### Box 3. Experimental tests of information disclosures: FTC study

The study occurred in the context of apparently misleading information being provided by mortgage brokers about their compensation, or commissions, from loans. The US Department of Housing and Urban Development therefore proposed a new standard for reporting of broker loans that would require a clear statement of total commissions to brokers. However, for direct lenders (such as banks), no such statement would be required. Therefore, in comparing loans from brokers to those of direct lenders, consumers compare loan information that would have different variables. For the broker, there would be a statement of net loan cost and, in addition, a statement of the payment that the broker receives in excess of the borrowing rate (the yield spread premium), while for the direct lender, there would be a statement of net loan cost.<sup>11</sup>

In a controlled experiment, Lacko and Pappalardo (2004) examined the effect of such asymmetric disclosure on quality of consumer decision making. They presented over 500 recent mortgage customers with requests to examine different loan offers and evaluate them. Most customers were presented with disclosures that simulated the difference between broker and direct lender offers. They were then asked to state which loan was cheaper and which loan they would choose.

They designated a portion of the potential customers as a control group. These customers did not receive asymmetric disclosure of commissions. They were shown the same offers as the other groups, but without the commission paid to the broker. About 90% of the time, the control group identified the less expensive loan accurately and chose the less expensive loan. Thus, even with the simple reporting form information that allows a relatively direct comparison of loan costs, about 10% of consumers did not correctly identify the cheaper loan.

When additional information was disclosed to consumers about broker commissions, but not about direct lender commissions, “The disclosures caused a significant proportion of respondents to choose more expensive loans by mistake and caused a substantial bias against broker loans even when the broker loans cost the same or less than direct lender loans.” The authors tested three different disclosure proposals against each other, but always maintained the asymmetric disclosure between brokers and direct lenders. They found that, when the broker loans were cheaper, consumers identified the cheapest loans only 71%, 72% and 63%, with an average decrease of 21.6% accuracy across the three groups compared to the control groups. The disclosures caused a large and significant bias against broker loans.<sup>12</sup>

## 5. Conclusion

Ensuring that competition thrives in real estate transactions is of critical importance because real estate transactions result in the primary single item of consumer expenditure. Thus even a small percentage change in the cost of such transactions has large consequences. For example, if real estate agent commissions are 10% above the competitive level across OECD countries, the annual loss to consumers is in the range of 10 billion USD.

Governments, including competition authorities, can take positive steps to promote competition in real estate transactions. Potential goals of such actions can include:

<sup>11</sup> The yield spread premium is, in effect, a commission paid from the loan originator to the broker, not necessarily visible to the borrower, but resulting in a higher cost of the loan to the borrower, as the originator would price the yield spread premium into the offer to a borrower.

<sup>12</sup> In another test, when broker and direct lender loans were equally costly, consumers recognized the equal costs 95-99% of the time in control groups with no disclosure, but with the disclosures, were biased significantly against the broker loans by the disclosure of the broker commissions.

- Ensuring that discount service providers operate freely and with the same access to information and same legal status as other, traditional service providers and that discount service providers have the ability to advertise and price without restraint;
- Ensuring that individuals can engage in direct matching to sell their home in ways that do not disadvantage them compared to intermediary matching;
- Ensuring that competition law enforcement against cartels and bid-rigging in real estate transactions is vigorous; and
- Ensuring that consumers are provided with relevant, unbiased and truthful information relevant to their decision-making and that this information is provided to consumers before commitments are made.

Areas where government focus is likely most valuable include:

- Professional regulation (whether by governments or associations) relating to:
  - Exclusive rights, such as an exclusive ability to perform a transfer or serve as a real estate intermediary, especially when there are strict entry limits to the profession or common understandings regarding price of services;
  - Price (such as fixing or recommending fee schedules, preventing rebates to consumers);
  - Defining minimum service provision, especially for real estate intermediary services, where customers are capable of performing many tasks without an intermediary;
  - Professional establishment requirements that may limit the ability of new professional offices to open and, in effect, ensure windfall profits for those who already hold an office;
- Rules for access to and use of information on shared listing services or web-sites; and
- Rules governing the types of firms that can originate and broker mortgages.

Up until now, relatively few governments have taken strong steps to ensure vigorous competition in real estate transactions. The momentum appears to be moving towards more vigorous oversight and review of potentially anticompetitive restraints relating to real estate transactions. To the extent that there are large anti-competitive restraints in the real estate transaction process, reducing these restraints will likely create substantial consumer benefits.

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## AMÉLIORATION DE LA CONCURRENCE DANS LE CADRE DES TRANSACTIONS IMMOBILIÈRES

*Note de Référence par le Secrétariat\**

### 1. Introduction

Les opérations immobilières représentent le plus souvent pour les particuliers les opérations financières les plus importantes<sup>1</sup>. Ces opérations comportent les mêmes trois phases principales dans tous les pays membres de l'OCDE : la mise en contact de l'acheteur avec le vendeur, le transfert de la propriété en droit et l'apport d'un financement hypothécaire<sup>2</sup>. Les efforts politiques en matière de concurrence ont porté tour à tour sur chacune de ces phases et conduit à l'adoption de mesures publiques. Lorsque des restrictions anticoncurrentielles s'appliquent indûment aux opérations, les pouvoirs publics peuvent et doivent arrêter des mesures concrètes en vue de renforcer le processus opérationnel qui passent par l'amélioration du cadre législatif et réglementaire ou l'application du droit de la concurrence. Il peut être particulièrement important pour les pays qui ne l'ont jamais fait activement de procéder à un examen des conditions du marché. Les retombées économiques pour les consommateurs de l'élimination des restrictions anticoncurrentielles peuvent être considérables.

Les ressources politiques en matière de concurrence sont, par la force des choses, limitées. La place importante qu'occupent en macroéconomie les opérations immobilières justifie que leur soient allouées ces ressources limitées. Ces opérations procurent un véhicule d'épargne important aux consommateurs, représentant en définitive une des parts importantes de l'avoir familial des familles moyennes<sup>3</sup>. Le coût lié à une légère déviation à la hausse par rapport à un prix de concurrence pour des services afférents à une opération entraîne une distorsion importante de la valeur en raison de la taille globale du secteur. Il est important de veiller au déroulement efficace des opérations non seulement pour préserver le bien-être à court terme, mais aussi pour assurer la croissance, les coûts biaisés à la hausse *réduisant* vraisemblablement la valeur des résidences, ce qui aurait pour effet de réduire les dépenses de consommation<sup>4</sup>.

Les coûts de transaction à l'achat et à la vente de maisons ont une incidence directe sur la mobilité du travail. Les travailleurs sont davantage disposés à vendre leur résidence pour s'installer ailleurs si les coûts

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\* Ce rapport a été préparé par Sean F. Ennis.

<sup>1</sup> Pour ce qui est de la France, voir Conseil de la concurrence, Décision no 00-D-28 du 19 septembre 2000. Pour ce qui est des Etats-Unis, voir Jackson (2005).

<sup>2</sup> Dans plusieurs pays non-membres de l'OCDE, le financement hypothécaire est rare.

<sup>3</sup> La propriété représente au moins la moitié de l'avoir net des ménages dans les deux tiers des 15 pays membres de l'OCDE ciblés. La source de ces données est explicitée dans Girouard, N., M. Kennedy, et C. André (2006), "Has the rise in debt made households more vulnerable?", OECD Economics Department Working Papers, no 535.

<sup>4</sup> Catte et autres (2004) constatent dans les pays dont le marché hypothécaire est important, efficace et réceptif et où il est assez facile d'effectuer des prélèvements sur l'avoir propre foncier, une consommation accrue en réponse aux augmentations du prix des logements.

de transaction sont faibles. Au contraire, ils sont moins enclins à vendre leur résidence si les coûts sont élevés, ceux-ci pouvant agir en contrepoids des avantages découlant du déménagement. La mobilité du travail, qu'il s'agisse de mobilité au sein d'une région ou d'une région à l'autre, est importante pour s'assurer que les citoyens puissent maximiser leur potentiel en se rendant là où leurs aptitudes et aspirations particulières sont reconnues<sup>5</sup>.

La plupart des particuliers n'achètent que rarement une résidence. Du fait de la complexité et de la rareté de ces opérations, ils peuvent ne pas bien connaître la meilleure façon de les mener à bien. En plus, les erreurs peuvent être aussi coûteuses qu'irréremédiables (par exemple, un vendeur ne pourra après la clôture de la vente récupérer la perte occasionnée par un prix inférieur au prix sur le marché). Les particuliers sollicitent souvent l'avis d'experts externes pour trouver une propriété ou un acheteur, assurer le financement et transférer le titre. Surtout pour ce qui concerne le transfert des titres, les pouvoirs publics peuvent exiger l'intervention de professionnels agréés, le bon déroulement des transferts de titres étant fondamental à tout régime de droits fonciers et ces services constituant des produits de confiance dans la mesure où la plupart des acheteurs ne peuvent en juger la qualité.

Dans les pays membres de l'OCDE, les opérations immobilières se font d'ordinaire grâce à un financement externe. Le remboursement des emprunts immobiliers compte pour une large part du revenu des ménages. Dans plusieurs pays membres de l'OCDE, les remboursements au titre de l'immobilier varient entre 15 et 25 % du revenu disponible<sup>6</sup>. Les ménages n'effectuent que rarement, voire jamais, d'autres achats d'une telle importance. Les pouvoirs publics encadrent souvent le financement du secteur résidentiel au vu de l'importance pour le public d'assurer le bon fonctionnement du marché, promouvoir la stabilité sociale et prévenir les pratiques de prêt abusives. Toutefois, l'application du droit de la concurrence dans ce secteur est mitigée.

La présente note de réflexion étudie un certain nombre d'enjeux importants des opérations immobilières. Il s'agit, pour chacune des phases opérationnelles, des enjeux suivants :

### **1.1 Mise en contact**

- Les mesures réglementaires, l'autorégulation ou d'autres règles ou règlements analogues restreignent-ils la capacité des agents à offrir des services simples, à prix modiques ?
- Existe-t-il des mesures réglementaires, une autorégulation ou d'autres règles ou règlements analogues faisant en sorte qui rendent difficile la vente ou l'achat par un particulier d'une résidence sans intermédiaire ?

<sup>5</sup> Vartia (2006) et FHE(2006) énumèrent des références dans lesquelles on examine l'incidence des coûts de transaction en termes de réduction de la mobilité.

<sup>6</sup> La charge du service de la dette (capital et intérêts) des ménages endettés en pourcentage du revenu disponible est présentée dans la figure 8, dans Girouard, N., M. Kennedy et C. André (2006), "Has the rise in debt made households more vulnerable?", *OECD Economics Department Working Papers*, n° 535. Les ménages ne sont pas tous débiteurs au titre de crédits immobiliers. Dans la mesure où les paiements des familles ayant un emprunt immobilier peuvent être plus élevés que ceux des autres familles, ces chiffres sont susceptibles d'être moindres que la charge de remboursement des emprunts immobiliers réelle type des ménages qui sont propriétaires d'une résidence. En France, par exemple, la charge de remboursement des emprunts représente environ 30 % du revenu disponible des ménages ayant acheté une résidence (Conseil de la concurrence, Décision n° 00-D-28 du 19 septembre 2000).

## 1.2 *Transfert du contrôle*

- Certaines fonctions sont-elles réservées à certaines professions alors qu'elles pourraient de façon tout aussi fiable et sûre être remplies par des personnes ayant reçu une autre formation, moins exhaustive ?
- Des règles d'admissibilité à la profession limitent-elles le nombre de praticiens à pouvoir vérifier et exécuter les opérations ?
- Des règles de fixation des prix déterminent-elles la rémunération de ces praticiens, de droit ou de fait ?

## 1.3 *Financement résidentiel*

- Des entités autres que des banques occupent-elles une place importante sur le marché de l'offre de financement hypothécaire ?
- Les prêteurs hypothécaires lient-ils les crédits hypothécaires à d'autres produits, par exemple, une assurance ou des comptes d'épargne ?

La note, pour demeurer ciblée, n'examine pas les enjeux macroéconomiques de l'immobilier résidentiel. D'autres travaux de l'OCDE les ont amplement couverts<sup>7</sup>. Elle ne s'intéresse pas davantage à la réglementation exhaustive entourant la construction locale, régionale et nationale de nouveaux logements. Ainsi, elle ne s'attarde pas aux conditions de l'offre de nouveaux logements ou de logements locatifs. Enfin, elle n'étudie pas les opérations relatives aux habitations à logements multiples ou à l'immobilier non résidentiel. Ces opérations font souvent l'objet d'autres techniques de mise en contact des acheteurs et des vendeurs et impliquent souvent de grandes institutions complexes disposant des connaissances et des moyens nécessaires pour veiller à ce que les coûts de transaction ne soient pas artificiellement élevés.

Il est principalement question dans la note des ventes d'habitations résidentielles à logement unique, par exemple une maison ou un appartement (ci-après, les « résidences »), achetées par des personnes qui prévoient y vivre<sup>8</sup>.

La concurrence peut ne pas bien fonctionner à diverses étapes du processus opérationnel visant une résidence. L'absence de concurrence peut exercer une pression à la hausse induite sur les coûts de transaction, ce qui affectera le bien-être des consommateurs et débouchera sur une mauvaise répartition des ressources.

La note examine ensuite les phases principales du processus opérationnel visant une résidence, abordant tour à tour la mise en contact des acheteurs et des vendeurs, le transfert du titre et le financement immobilier. Pour chacune des phases, il est fait état des enjeux touchant la concurrence ainsi que de l'expérience des pouvoirs publics concernés.

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<sup>7</sup> Par exemple, de récents travaux de l'OCDE ont montré que la possibilité d'accéder à la valeur nette de la résidence peut contribuer de manière importante à la croissance, notamment Catta et autres (2004).

<sup>8</sup> Si la mesure dans laquelle la propriété de la résidence est courante varie considérablement d'un pays membre de l'OCDE à l'autre, les responsables des orientations politiques l'encouragent souvent. Les données suivantes illustrent bien cette variance : en Autriche, en Allemagne, en Suède et en Suisse, seules 50 % des unités sont occupées par leurs propriétaires, tandis qu'en Australie, en Belgique, en Islande, en Irlande et en Espagne, les occupants sont propriétaires de leur unité en proportion de plus de 70 %. Parmi les pays visés, le taux le plus bas est constaté en Suède (39 %) et le plus élevé, en Espagne (82 %). Voir Erlandsen et autres (2006).

## 2. Mise en Contact

La mise en contact est le processus consistant à mettre l'acheteur et le vendeur en relation puis à conclure un accord sur les conditions de la vente et de l'achat d'une résidence. Les mises en contact peuvent être effectuées avec ou sans intermédiaire professionnel, par exemple, un agent immobilier, un notaire latin<sup>9</sup> ou une maison d'encan. Beaucoup de mises en contact se font en réalité entre membres d'une même famille (par exemple, dans le cas de la vente par un parent à un enfant), voisins ou connaissances. Le présent document s'intéresse toutefois uniquement aux mises en contact d'étrangers. C'est-à-dire qu'il s'est fixé pour priorité les situations dans lesquelles le réseau de relations personnelles du vendeur ne réussit pas à assurer la vente. Les vendeurs préfèrent souvent ne pas faire appel à leur réseau pour diverses raisons, notamment parce que l'élargissement du bassin d'acheteurs potentiels est susceptible d'aboutir à un meilleur prix de vente pour la résidence.

### 2.1 *Mise en contact directe et par intermédiaire et structure du marché*

Le processus consistant à mettre un vendeur et un acheteur en contact diffère considérablement d'un pays membre de l'OCDE à l'autre. Dans certains pays, la proportion des ventes qui s'effectuent directement entre acheteur et vendeur (sans intermédiaire pour les mettre en contact) est importante (environ 50 % en France). On appelle ci-après « mise en contact directe » ces ventes effectuées « par le propriétaire ». Dans les pays où la mise en contact directe est courante, il existe d'ordinaire des publications et sites Internet réputés et acceptés faciliteraient la mise en contact et souvent, des sources externes de conseils en matière d'évaluation. Grâce à ces moyens de publicité bien connus, les vendeurs peuvent s'attendre à obtenir une aussi bonne (voire meilleure) récupération qu'avec l'aide d'un agent immobilier<sup>10</sup>. Lorsque les ventes directes comptent pour une part importante du marché, les coûts de la mise en contact par un intermédiaire sont implicitement limités. Si les intermédiaires fixent un prix trop élevé, un nombre important de vendeurs (et d'acheteurs) peut opter pour la mise en contact directe. Par contraste, si le marché de la mise en contact directe n'est pas très développé, les vendeurs peuvent croire que la récupération qu'ils en tireront sera moins importante que celle que leur apporterait la mise en contact par un intermédiaire<sup>11</sup>. La mise en contact directe exercera une pression beaucoup plus limitée sur les prix pratiqués par les intermédiaires. En pareil cas, il faut scruter attentivement les règles, les pratiques et la conduite qui entourent les opérations réalisées par des intermédiaires pour déceler la présence de restrictions anticoncurrentielles<sup>12</sup>.

Le rôle des intermédiaires a changé avec l'avènement d'Internet, qui permet davantage à un acheteur d'effectuer des recherches rapides parmi un vaste éventail de résidences et auprès de différentes agences, et est susceptible de permettre à un vendeur de trouver plus efficacement des acheteurs directement, sans

<sup>9</sup> Un notaire latin est un professionnel qui est chargé de superviser les opérations sur propriétés et auquel incombent d'autres tâches en matière de planification successorale. Les notaires latins jouent un rôle clé dans les opérations visant des propriétés dans les pays de tradition juridique romano-germanique d'Europe, par exemple, l'Allemagne, les Pays-Bas, la Belgique, la France et l'Italie et jouissent du droit exclusif d'accomplir certaines tâches. La profession est née en Italie du nord vers l'an 1100. Un notaire latin est différent d'un notaire public (le notaire des Etats-Unis), dont les responsabilités sont beaucoup moins étendues en matière d'enregistrement de contrats et de documents.

<sup>10</sup> Toutefois, dans le cadre de ventes directes, les vendeurs doivent participer beaucoup plus activement à la vente et à la négociation en vue de la vente d'une résidence. Dans les pays où les acheteurs ne sont pas représentés par un agent, les efforts investis dans une vente directe et dans une vente par un intermédiaire peuvent être sensiblement les mêmes.

<sup>11</sup> Dans certains pays, on a recours à des intermédiaires pour plus de 90 % des ventes.

<sup>12</sup> Un taux de ventes réalisées par mise en contact directe correspondant à 50 % indique que celle-ci est assez répandue. Un taux de 20 % peut indiquer que la mise en contact directe est relativement inhabituelle.

intermédiaire. Les intermédiaires voient vraisemblablement leur rôle diminuer dans la foulée d'Internet. Mais plusieurs observateurs s'étonnent du fait que ce rôle n'ait pas diminué davantage considérant l'évolution technologique des capacités de recherche et de promotion. Le rôle encore important des intermédiaires s'explique peut-être par le désir des consommateurs d'obtenir des conseils professionnels lorsqu'il s'agit d'opérations occasionnelles et susceptibles d'entraîner des erreurs coûteuses et par la difficulté de changer les habitudes de consommation. Il est aussi possible que des entraves à la concurrence aient aidé les agents immobiliers à éloigner la concurrence synonyme des nouvelles technologies.

Souvent, le vendeur (ou l'acheteur) préfère charger un agent de la mise en contact. Les intermédiaires :

- connaissent le marché ;
- agissent comme experts conseils ;
- ont accès à un vaste éventail de services d'information (par exemple, des services d'inscription et des relations personnelles) dont ne dispose pas le vendeur particulier ;
- ont l'expérience de la négociation et des ventes.

Les services exacts qui sont fournis varient d'un pays à l'autre, mais le volume des activités commerciales des intermédiaires est important. On estime que les commissions versées aux Etats-Unis seulement dans le secteur de l'immobilier résidentiel en 2004 s'échelonnent entre 61 milliards et 96,6 milliards de dollars américains<sup>13</sup>.

Dans la présente note, les intermédiaires sont appelés « agents immobiliers »<sup>14</sup>. Au Royaume-Uni, le travail de l'agent immobilier consiste à mettre une personne en relation avec une autre personne qui souhaite acheter, vendre ou louer un terrain ou une propriété, et à participer à la négociation de l'entente subséquente. Le travail doit s'effectuer dans le cadre d'une entreprise, en tant qu'employeur ou en tant qu'employé, et conformément aux instructions données par un client. Il peut s'agir d'un terrain (ou d'une propriété) commercial, industriel, agricole ou résidentiel. Ces fonctions excluent celles d'un agent de location (d'après l'OFT).

Dans la plupart des pays, le vendeur est représenté par un intermédiaire, mais d'ordinaire, l'acheteur ne l'est pas. Par contraste, dans certains pays, dont les Etats-Unis, deux intermédiaires différents interviennent, l'un pour l'acheteur et l'autre pour le vendeur (double représentation). Dans un système de double représentation, l'agent de l'acheteur est mandaté pour obtenir des renseignements, qu'il recueille auprès d'autres agents sur des propriétés à vendre, ce qui réduit ainsi les coûts de recherche pour les consommateurs. L'agent de l'acheteur lui donne aussi des conseils utiles et peut organiser des visites en série, par exemple si l'acheteur vient de l'extérieur et doit concentrer ses visites sur une courte période. L'agent de l'acheteur reçoit alors une commission pour son travail. Aux Etats-Unis, où la double

<sup>13</sup> Voir Hahn, Litan et Gurman (2006).

<sup>14</sup> Dans certains pays, la profession d'agent immobilier est définie mais d'autres professionnels (par exemple, les notaires) peuvent exercer les mêmes activités. Le terme « agent immobilier » est utilisé à des fins de convenance, les intermédiaires les plus courants dans les pays membres de l'OCDE étant les agents immobiliers agréés. L'emploi de ce terme ne doit pas être interprété comme signifiant que dans un pays donné, tous les intermédiaires sont de fait des agents immobiliers.

représentation constitue la norme, cette commission provient du prix de vente de la résidence et est partagée avec l'agent du vendeur, souvent en proportion d'environ 50 % de la commission totale<sup>15</sup>.

Il est noté dans FTC (1983) que si le prix et les modalités contractuelles, aux Etats-Unis, sont très rigides, certains des facteurs contribuant normalement à la création d'une position dominante sur le marché ne sont pas présents dans le secteur du courtage immobilier. Il est rare qu'une entreprise particulière puisse s'attribuer une part importante des ventes et il est relativement facile pour de nouveaux agents et courtiers de percer la plupart des marchés. La structure du secteur est ainsi fragmentée. Toutefois, plusieurs caractéristiques du secteur sont susceptibles de contribuer à maintenir des prix non concurrentiels élevés, notamment :

- le manque d'élasticité de la demande dans le secteur ;
- la transparence des escomptes ;
- la nécessité de coopérer.

Il y a *manque d'élasticité de la demande dans le secteur* dans la mesure où une chute de la taille des commissions (du fait de faibles commissions) n'occasionnera pas une hausse correspondante du pourcentage de la demande totale de l'industrie). La FTC affirme que bien qu'à sa connaissance, l'élasticité de la demande de courtage immobilier résidentiel n'a pas fait l'objet d'estimations officielles, les observateurs du secteur la jugent faible. Le manque d'élasticité de la demande indique que les ventes totales du secteur n'augmenteront pas de façon importante si les commissions chutent, de sorte que l'accroissement net des affaires occasionné par une chute des prix serait moins important que dans des secteurs à forte élasticité de la demande.

Il y a *transparence des escomptes* dans plusieurs pays membres de l'OCDE, notamment si tant l'acheteur que le vendeur sont représentés par chacun leur agent, puisque ces agents doivent échanger directement pour se partager la commission. La transparence peut aussi découler de la divulgation des commissions des agents dans les déclarations devant être produites auprès du gouvernement concernant les opérations immobilières<sup>16</sup>. Il convient de noter que le taux des commissions affiché par les agences peut indiquer un taux maximal des commissions plutôt que leur taux effectif. Des taux inférieurs peuvent être négociés pour une opération donnée dans le contrat initialement conclu avec l'agent en vue d'acheter ou de vendre ou en cours de transaction, directement ou par le truchement d'une remise.

*La nécessité de coopérer* est grande dans le secteur immobilier en cas de double représentation. Selon la FTC (1983) 81 % des ventes de résidences étaient réalisées par l'intermédiaire d'un courtier. Dans 92 % des cas où un agent participait, la résidence avait été inscrite à un service interagences qui permet aux autres agents de consulter l'inscription. En définitive, 53 % des ventes réalisées impliquaient des agents de deux agences différentes. Surtout pour les petites agences, l'existence de bases de données coopératives telles un service interagences est très utile en ce sens qu'elle leur donne un libre accès à des renseignements sur les produits à vendre, ce qui estompe l'inconvénient de leur petite taille aux yeux des acheteurs et des vendeurs.

Les sections suivantes du document :

- examinent la fixation des prix et leur rigidité s'agissant de la mise en contact ;

<sup>15</sup> Curieusement, les courtiers immobiliers considèrent que l'agent de l'acheteur n'a d'obligation fiduciaire qu'envers le vendeur, en qualité présumée de sous-mandataire du vendeur.

<sup>16</sup> De telles déclarations n'existent pas dans tous les pays.

- s'attardent aux entraves à la concurrence susceptibles d'affecter les services fournis sur Internet et les services interagences ;
- montrent que les opérations immobilières peuvent donner lieu à des opérations entre initiés ou de la collusion.

## 2.2 *Commission des intermédiaires et rigidité des prix s'agissant de la mise en contact*

La commission des intermédiaires varie considérablement d'un pays à l'autre, comme le montre le tableau 1, qui présente les commissions totales versées tant par l'acheteur que le vendeur pour la mise en contact. La commission moyenne varie énormément. La mesure dans laquelle la commission des agents est standardisée varie aussi. Il semble toutefois que ce soit le cas bien plus d'un pays à l'autre qu'à l'intérieur d'un même pays.

**Tableau 1. Commission des intermédiaires s'agissant de la mise en contact dans le secteur immobilier résidentiel : 1999**

Pays	Montant	Caractéristiques des opérations
Argentine	6 %	3 % payés par l'acheteur, 3 % payés par le vendeur. L'acheteur n'est pas tenu de se faire représenter.
Australie	5 % sur les premiers 18 000 AUD, 2,5 % par la suite	Les propriétés sont souvent vendues par encan.
Belgique	3 %	
Brésil	5 % (moindre pour les propriétés à prix supérieur)	
Canada	Commission de 3 à 6 %	
Danemark	De 2 à 4 %	L'acheteur paie la commission, droits de mutation de 25 %
Finlande	5 % sur les condos, 3 à 4 % sur les maisons unifamiliales	
France		Seuls 50 % des propriétés sont vendus par l'intermédiaire d'agents immobiliers
Allemagne	De 3 à 6 %	
Grèce	4 %	L'acheteur et le vendeur paient chacun 2 %
Hong Kong	1 %	Payée par le vendeur
Indonésie	5 %	Payés par l'acheteur ou le vendeur
Irlande	De 1,5 à 2,0 % dans les grandes villes, de 2 à 3 % dans les petites villes	
Israël	4 %	Partagée également entre le vendeur et l'acheteur
Italie	De 4 à 6 %	Chacune des parties paie de 2 à 3 %
Japon	3 %	

Mexique	De 5 à 10 %	
Pays-Bas	De 1,5 à 2,0 %	Le vendeur paie la commission, l'agent représente ou le vendeur ou l'acheteur, mais pas les deux
Norvège	De 2 à 3 %	Le courtier représente les deux parties
Russie	De 5 à 10 %	
Singapour	De 1,5 à 2,0 %	
Espagne	5 %	
Suède	5 %	
Royaume-Uni	De 1 à 2 % (moindre dans des secteurs très concurrentiels)	
États-Unis	De 6 à 7 %	

Source : Delcours et Miller (2002). Le tableau présente en survol des types d'opérations complexes et très diversifiés.

Plusieurs analystes ont fait valoir que les commissions sont particulièrement élevées aux États-Unis au vu de certaines autres caractéristiques du marché. Delcours et Miller (2002) sont d'avis que les commissions modales sont indûment élevées aux États-Unis considérant le degré d'efficacité et certains autres facteurs du marché des États-Unis par comparaison aux marchés d'autres pays. Selon Hahn, Litan et Gurman (2006, p. 89), les commissions, aux États-Unis, sont supérieures de 1,5 % à 2,5 % à la moyenne observée dans les pays développés, selon les chiffres publiés dans Delcours et Miller (2002). On peut prétendre que les agents immobiliers, en raison des activités de lobbying coordonnées par leurs associations, font preuve de collusion en imposant des règles qui font obstacle à la concurrence des prix. De l'avis de Lande et Marvel (2000), une forme importante de collusion, qui serait à l'origine de plusieurs décisions judiciaires, consiste à mettre des règles en place pour réduire l'intensité de la concurrence.

Le tableau 1 présente le pourcentage des commissions. La rémunération de la plupart des agences est en effet calculée en tant que pourcentage du prix de vente, comme le sont plusieurs impôts et droits afférents aux opérations. Ainsi, la commission générée par la vente d'une résidence de 300 000 euros représenterait d'ordinaire trois fois celle que génère la vente d'une résidence de 100 000 euros, et ce, même si la vente d'une résidence modeste et celle d'une résidence plus cossue nécessiteraient sensiblement les mêmes efforts. On peut alors parler de rigidité transversale des prix. Mais peut-être est-il faux de dire que l'effort de vente d'un domicile modeste équivaut à celui d'un domicile plus important<sup>17</sup>. Par ailleurs, si l'effort et les coûts de publicité sont analogues, on peut difficilement expliquer pourquoi les prix ne reflètent pas les coûts. Si le marché était réellement concurrentiel, selon NERA (2004), comme l'indique l'analyse des structures, on pourrait s'attendre à ce que la concurrence assure des commissions qui reflètent les coûts<sup>18</sup>. Il est toutefois intéressant de noter que si l'agent du vendeur ne recevait qu'une commission fixe, il aurait fort peu intérêt à maximiser le prix de vente. Le sacrifice d'une partie du produit de la vente se traduit par une commission fluctuant à la hausse en fonction de l'augmentation du prix, ce qui incite l'agent à négocier un prix de vente supérieur pour le vendeur<sup>19</sup>. À noter, certains nouveaux services font la

<sup>17</sup> Une étude réalisée par NERA en 2004 pour le compte de l'OFT constatait l'évidence d'une hausse marquée des commissions absolues lorsqu'il s'agissait de propriétés d'une valeur importante. Aucune indication ne permettait de conclure que ces augmentations avaient un rapport avec les coûts. Il semblait donc que la détermination des prix par les agents immobiliers montrait certaines rigidités.

<sup>18</sup> Ce pourrait être parce que les agents peuvent chacun se spécialiser, de sorte qu'ils se voient confiées les résidences de valeur élevée et les moins talentueux sont chargés des résidences plus modestes. Les agents plus talentueux s'attendraient à obtenir une meilleure commission et le calcul de celle-ci en fonction d'un pourcentage serait à même de réaliser cet objectif.

<sup>19</sup> Certains observateurs ont noté le manque d'efficacité de ce mécanisme d'incitation. Leviit et Syverson (2005) étudient la différence entre prix de vente et délais de vente pour les résidences vendues par des

promotion de services à prix modique et imputent des commissions fixes : il s'agit des services de vente directe par le propriétaire<sup>20</sup>. Ces services sont en expansion, mais n'ont pas encore, dans plusieurs pays, pénétré profondément le marché<sup>21</sup>.

Même si le pourcentage de la commission n'est pas particulièrement élevé, les pratiques des intermédiaires immobiliers peuvent être source de préoccupations. Une étude réalisée par NERA pour le compte de l'OFT a conclu que la fixation des prix entre agents immobiliers fait preuve de rigidités, les commissions étant nettement plus élevées pour les propriétés dont la valeur est élevée et correspondant à un pourcentage de la valeur de la propriété lorsque la valeur des propriétés augmente soudainement (rigidités dynamiques des prix). Une étude réalisée par l'OFT sur les mécanismes de commissions laisse entendre que le marché immobilier devrait être examiné de plus près et note que les prix supérieurs aux coûts ne sont pas forcément inquiétants lorsqu'il y a cotation dans les deux sens, comme l'avaient fait remarquer Rochet et Tirole (2003) (DotEcon (2007)).

Les rigidités transversales et dynamiques des prix peuvent être assimilées à de la collusion de référence. Il y a collusion de référence lorsque les participants à un marché adoptent un taux normalisé qui sert de point de coalescence, devenant une norme ou une règle empirique. Le rapport publié par NERA indique, après examen des changements des conditions structurelles de six marchés locaux, qu'une forme importante de collusion tacite ne serait vraisemblablement pas viable. Les auteurs estiment cependant que la convention consistant à fixer la commission à un pourcentage du prix de vente indique qu'il existe pour le moins une certaine forme d'entente entre les participants au marché. Le rapport délivré par la FTC des Etats-Unis en 1983 étudie en profondeur les pratiques adoptées dans l'ensemble des Etats-Unis. Il y est conclu que les taux globaux des commissions s'élevaient principalement à 6 % ou 7 %, selon le secteur géographique. Aucun facteur de coût ni aucune caractéristique du marché n'a permis d'expliquer pourquoi certains marchés supportaient un taux de 6 % et d'autres, un taux de 7 %<sup>22</sup>. Après avoir examiné des données historiques et transversales exhaustives, la FTC des Etats-Unis affirme que les statistiques disponibles indiquent assez clairement que des forces autres que la concurrence libre affectent le niveau auquel sont fixés les taux des commissions (FTC (1983), p. 64).

Traditionnellement, le taux des commissions était souvent établi en fonction de barèmes des prix recommandés, distribués parfois par des associations de l'immobilier, parfois par des services

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agents qui en sont propriétaires et les domiciles vendus par des agents n'y ayant aucun intérêt financier. Ils ont conclu que lorsque les agents sont propriétaires des résidences qu'ils vendent, le délai de vente est plus long et le prix de vente, compte tenu de certains autres facteurs, est plus élevé d'environ 3,7 %. Les agents ne semblent donc pas maximiser les profits des vendeurs, peut-être du fait que même si les commissions augmentent en proportion du prix de vente, cette augmentation ne compense pas le risque de faire fuir un plus grand nombre d'acheteurs en négociant serré. Selon les auteurs, le formulaire contractuel créerait un décalage important entre les intérêts de l'agent et ceux du vendeur du domicile.

<sup>20</sup> Toutefois, ForSaleByOwner.com n'exige pas, notamment pour qu'il puisse accéder au service interagences, que l'agent d'un acheteur se voit offrir une commission de 2 à 3 % du prix de vente. (Les honoraires demandés sont nettement inférieurs. Il offre plusieurs options différentes, une rémunération fixe étant demandée pour agir à titre d'agent du vendeur. Cette rémunération s'élève d'ordinaire à moins de 0,5 % du prix de vente).

<sup>21</sup> Des consultants de la National Association of Realtors des États-Unis ont estimé que les courtiers traditionnels à commissions réduites, les courtiers traditionnels axés sur Internet, les courtiers offrant un service de présentation et autres modèles de courtage non traditionnels représentaient collectivement les acheteurs et les vendeurs en 2003 dans moins de deux pour cent de l'ensemble des opérations de courtage immobilier (GAO, 2005).

<sup>22</sup> On affirme dans FTC (1983) avoir constaté dans plusieurs communautés que des grilles tarifaires ou des taux de commissions recommandés circulaient ouvertement peu auparavant (p. 32).

d'inscriptions. Au Royaume-Uni, par exemple, avant la délivrance en 1970 d'une ordonnance, les associations nationales et locales préparaient des grilles tarifaires à l'intention des vendeurs, où les commissions diminuaient progressivement de 5 % à 1,5 % ou, fixes, oscillaient de 1,5 % à 2,5 %. Ces grilles tarifaires devaient être « recommandées », mais les associations appliquaient aussi des règles prohibant la concurrence des prix. Les taux moyens des commissions variaient d'un marché à l'autre, mais demeuraient relativement stables à l'intérieur des marchés locaux. C'est en marchandant la coopération que ces grilles pouvaient être imposées. C'est-à-dire que les courtiers qui imputaient des commissions réduites bénéficiaient d'une coopération moins soutenue que celle offerte aux courtiers imputant la commission « normale ». Une ordonnance émise par le gouvernement britannique en 1970 a interdit aux courtiers immobiliers d'utiliser des grilles tarifaires. En 1979, le taux des commissions imputées dans le sud de l'Angleterre avait chuté de 2,8 % à 2,0 % et celui du nord était passé de 2,3 % à 1,8 %.

Plusieurs facteurs semblent susceptibles d'entraver la concurrence des prix s'agissant du processus de mise en contact. On compte parmi les facteurs pouvant restreindre la concurrence ou encourager la coopération la réglementation publique, l'autorégulation et, de plus en plus, les règles appliquées par les services d'inscription, notamment :

- Les règles interdisant les courtiers de barèmes des prix ;
- Les règles qui proposent ou exigent l'utilisation de grilles tarifaires ;
- Les règles qui permettent aux agents inscripteurs de ne pas communiquer leurs inscriptions à certains courtiers, à leur choix ;
- Les règles qui interdisent aux agents d'offrir une remise aux clients ;
- Les règles qui permettent qu'un agent inscrive une propriété assortie d'un contrat lui réservant l'exclusivité de la vente ;
- Les règles qui permettent à l'agent du vendeur d'offrir une récupération moindre lorsqu'il lui présente un client pour réduire la commission des courtiers traditionnels ;
- Les règles selon lesquelles les services d'inscription recommandent le taux des commissions ou du partage des commissions et de la rémunération ;
- Les règles faisant en sorte qu'il soit difficile pour un particulier de vendre sa propre résidence ;
- Le fait de ne pas informer le vendeur des commissions versées par l'acheteur.

Certains observateurs pourraient prétendre qu'une rémunération élevée n'est pas en soi dommageable si elle ne réduit pas sensiblement le nombre d'opérations ou ne donne pas lieu à une allocation différente de celle qui découlerait d'une rémunération moindre<sup>23</sup>. Une rémunération élevée présente toutefois un problème sérieux pour l'allocation des ressources. Hsieh et Moretti (2002) démontrent que, compte tenu des pourcentages constants des commissions aux Etats-Unis, l'accès libre à la profession fait en sorte

<sup>23</sup>

C'est-à-dire que des commissions élevées peuvent réduire la valeur des résidences pour les propriétaires, ce qui pourrait toutefois être sans importance aux fins d'une analyse du bien-être total. Ce qui importerait plutôt serait une allocation du logement ou une mise en contact des acheteurs et des vendeurs qui fasse en sorte que des acheteurs peu disposés à déboursier le fassent pour obtenir une résidence lorsque d'autres acheteurs sont davantage disposés à déboursier.

d'accroître le nombre d'agents immobiliers à un rythme nettement plus important dans les villes où des prix élevés sont constatés que dans les autres villes. C'est-à-dire que lorsque le revenu généré par la vente d'un domicile augmente, il y a plus de nouveaux venus pour se disputer les profits. Il s'agirait d'une inefficience en ce sens que la productivité d'un agent immobilier (maisons vendues par heure de travail) chute alors que la rémunération réelle reste stable. Hsieh et Moretti prétendent que les commissions accrues dans les villes coûteuses sont dispersées en raison du nombre excessif d'agents. La commission élevée fausse les décisions affectant l'offre de main d'œuvre.

### 2.3 *La promotion, l'Internet et les services d'inscription*

Les journaux constituent traditionnellement un outil publicitaire important lorsqu'il s'agit de vendre une résidence. Non seulement font-ils la promotion des résidences, mais ils annoncent les visites libres de maisons, à l'occasion desquelles une résidence est ouverte aux visites de plusieurs acheteurs potentiels différents. La presse imprimée est de moins en moins utilisée pour annoncer les résidences, alors que l'Internet croît en popularité. Les sites Internet s'appuient sur des bases de données fournissant les renseignements de base sur une résidence à vendre. Ses forces sont notamment :

- La réduction des coûts de recherche :
  - La possibilité d'effectuer des recherches pour cibler les domiciles satisfaisant aux critères personnels de l'acheteur,
  - Les photos couleur ou les enregistrements vidéo qui réduisent le nombre de visites inutiles ;
- Des coûts de fonctionnement faibles ;
- L'exposition de la propriété du vendeur à un nombre accru d'acheteurs potentiels.

L'Internet est de plus en plus utilisé pour annoncer les domiciles à vendre et est susceptible de bouleverser les méthodes classiques de mise en contact dans le secteur immobilier. Il représente pour beaucoup d'acheteurs l'outil idéal pour effectuer une première recherche et, pour plusieurs vendeurs, une façon idéale de joindre à peu de frais les acheteurs. Toutefois, l'effet de la mise en réseau peut se révéler important s'agissant des sites de vente de résidences. Faisant abstraction des différences de prix entre les domiciles affichés sur différents sites, les acheteurs éventuels feront d'ordinaire leur recherche d'abord sur les sites contenant le plus d'annonces, puis sur les autres. Un pourcentage élevé d'acheteurs déclare rechercher un domicile à vendre sur Internet<sup>24</sup>. Dans certains pays, les résidences à vendre sont affichées sur un site principal. En pareil cas, le fait d'avoir accès à ce mécanisme de diffusion peut constituer un élément clé de la vente de résidences. Le site le plus populaire est parfois restreint de manière à ce que seuls les professionnels immobiliers agréés puissent y afficher des résidences à vendre<sup>25</sup>. C'est le cas notamment du site seloger.com, en France, et du site Realtor.com, aux Etats-Unis. D'autres sites moins couramment utilisés ont cependant une approche libérale de la publicité.

<sup>24</sup> Aux États-Unis, la National Association of Realtors a constaté à la suite d'une enquête que 70 % des acheteurs de résidence ont recours à l'Internet pour chercher une maison.

<sup>25</sup> C'est le cas, en France, du site Internet principal seloger.com. Aux États-Unis, le site Realtor.com, qui est un service offert par la National Association of Realtors, est le site principal et il y transpose environ 95 % des annonces paraissant sur les services interagences (*multiple listing service* ou MLS). Les règles applicables aux fiches MLS varient selon la localité (chaque localité dispose de son propre MLS), mais une règle exige habituellement que les inscriptions soient faites par des agents immobiliers locaux agréés.

L'Internet forme une base de données pour les résidences à vendre. Dans certains pays, les agents se transmettent hors Internet beaucoup plus de renseignements sur les résidences à vendre. On appelle ces bases de données réservées aux agents des services d'inscription partagés<sup>26</sup>. Ceux-ci permettent généralement d'obtenir des renseignements beaucoup plus détaillés, voire confidentiels, au regard de ceux qui figurent habituellement sur un site Internet public. En principe, ils offrent plusieurs des avantages que procurent les sites Internet aux acheteurs et aux vendeurs. Ils offrent toutefois des renseignements utiles aux agents représentant les acheteurs, par exemple l'ampleur de la commission et la commission probable pour l'agent d'un acheteur. Les services d'inscription partagés accentuent la nécessité d'une coordination entre agents. Ces services peuvent procurer les avantages suivants :

- Ils permettent aux vendeurs d'exposer un plus grand nombre d'acheteurs à leurs propriétés ;
- Ils diminuent les coûts de recherche engagés par les acheteurs ;
- Ils amoindrissent les pertes subies par les courtiers en cas de perte de leur investissement ;
- Ils réduisent l'écart concurrentiel entre courtiers qui découle de l'avantage que procure une capacité plus grande d'attirer de nouvelles inscriptions (FTC, 1983).

L'augmentation du nombre d'acheteurs potentiels ayant connaissance d'une résidence à vendre est importante du point de vue du vendeur. Ortalo-Magne et Merlo (2005) ont étudié un ensemble de données comportant des renseignements très détaillés sur les ventes d'environ 800 domiciles au Royaume-Uni et sont parvenus à la conclusion que la probabilité qu'un acheteur fasse une offre est directement proportionnelle au nombre d'acheteurs potentiels qui visitent une propriété (p. 31). Étant donné que chaque acheteur est disposé à payer pour une même résidence une somme différente, un vendeur cherchera à trouver l'acheteur disposé à payer la plus forte somme. Si l'évaluation de tous les acheteurs était identique, il serait inutile de toucher le plus grand nombre possible d'acheteurs. Toutefois, les évaluations des acheteurs diffèrent sensiblement du fait de la singularité des résidences, qui comportent de nombreuses caractéristiques dont la valeur diffère pour chaque acheteur. Ortalo-Magne et Merlo (2005) ont conclu que plus il y a d'offres pour une résidence, plus l'écart entre le prix des offres varie par rapport au prix de vente inscrit. Dans la mesure où l'écart entre ce que chaque acheteur est disposé à payer pour une propriété est important, le vendeur souhaite trouver l'acheteur qui est disposé à payer le montant le plus élevé pour la résidence. La possibilité d'atteindre un nombre élevé d'acheteurs potentiels a donc beaucoup de valeur aux yeux du vendeur. Les services d'inscription partagés permettent de réaliser cet objectif, surtout s'ils sont largement utilisés par la communauté<sup>27</sup>.

Les acheteurs, quant à eux, souhaitent réduire les coûts de leur recherche tout en ayant accès à un vaste éventail de propriétés à vendre, ce qui leur permet de cibler la propriété qu'ils recherchent en fonction de leurs propres critères. Le fait d'avoir accès à un service d'inscription largement utilisé leur offre la possibilité d'examiner un plus grand nombre de propriétés et augmente leurs chances de trouver ce qu'ils cherchent.

Les services d'inscription sont souvent associés à un nombre plus élevé de ventes exclusives, soit en raison de l'application par le service concerné d'une règle instituant l'exclusivité, soit par l'effet de la pratique, les agents ayant recours à de tels services étant plus souvent en mesure de négocier un contrat exclusif avec les vendeurs. Dans un contexte d'exclusivité, les courtiers qui engagent des dépenses de

<sup>26</sup> On les appelle parfois « services interagences » ou « services d'inscription coopératifs ».

<sup>27</sup> Le vendeur peut avoir recours à d'autres méthodes qui augmentent la diffusion, par exemple, donner un mandat à plusieurs agents pour la vente de sa résidence, ne versant une commission qu'à l'agent qui réalise la vente.

publicité et achètent d'autres services à l'égard d'une résidence tireront vraisemblablement profit en fin de parcours, en tant que courtier de vente, de la publicité effectuée. Il convient de noter que si les annonces multiples paraissent excessives, elles supposent que plusieurs agents essaient de vendre la résidence<sup>28</sup>. La situation peut être avantageuse pour les vendeurs ; ils sont en bien meilleure position pour négocier les commissions à la baisse au moment de la présentation d'une offre si l'agent qui présente l'offre n'a pas l'exclusivité de l'inscription et sait que si l'offre n'aboutit pas à un accord, il ne sera vraisemblablement pas l'agent de vente et ne recevra par conséquent aucune commission.

Si les courtiers ne coopèrent pas pour partager leurs inscriptions par le truchement d'un service d'inscription partagé, le marché peut en être affecté de l'une ou l'autre de deux façons opposées, s'agissant des efforts de minimisation des coûts de recherche. À un bout du spectre, les vendeurs tenteront d'inscrire leurs propriétés auprès de plusieurs courtiers et les acheteurs ne devront visiter qu'un nombre relativement limité de courtiers pour couvrir un bon nombre des propriétés à vendre. À l'autre bout du spectre, les vendeurs n'inscriront leurs propriétés qu'auprès d'un nombre restreint de courtiers ou d'un seul courtier et les acheteurs doivent se mettre en relation avec un nombre relativement élevé de courtiers pour couvrir un bon nombre des propriétés à vendre. Si plusieurs courtiers inscrivent une propriété, aucun d'entre eux n'aura intérêt à investir des sommes importantes pour essayer de la vendre (par exemple, engager des dépenses de commercialisation pour des annonces couleur), chaque courtier n'ayant que peu de chances d'être celui qui l'emporte<sup>29</sup>.

Dans les pays où les services d'inscription partagés sont couramment utilisés, ils peuvent être essentiels pour obtenir une résidence au meilleur prix. Aux États-Unis, par exemple, les services d'inscription partagés s'appellent « services interagences » (*Multiple Listing Service*). Selon un rapport de la FTC des États-Unis, les services interagences constituent la principale source de renseignements concernant les prix des résidences comparables, le prix auquel d'autres résidences se sont vendues et, dans la plupart des communautés, un outil de commercialisation clé. Il n'est dans aucune communauté permis aux vendeurs d'avoir accès direct à ce système<sup>30</sup> (FTC 1983, p. 29). Des bases de données analogues existent dans plusieurs pays membres de l'OCDE, notamment l'Australie et les Pays-Bas, et de plus en plus d'autres pays. Même lorsque de tels services ne sont pas répandus, il arrive dans certains pays, comme la France, que les agents immobiliers testent de nouveaux services d'inscription partagés. Les agents immobiliers français s'intéressent à ce type de services notamment parce qu'ils multiplient les mandats qui leur sont donnés en exclusivité par les vendeurs. On a constaté à ce jour que l'instauration d'un service d'inscription partagé augmente de 40 % la fréquence des inscriptions exclusives effectuées par les vendeurs.

Lorsqu'un service d'inscription partagée est le moyen utilisé principalement pour fournir des renseignements sur les maisons à vendre, les pratiques adoptées par un tel service peuvent faire l'objet de certaines inquiétudes au regard du droit de la concurrence. Les règles appliquées par les services

<sup>28</sup> Si, en l'absence d'exclusivité, les agents peuvent négliger la publicité, il est possible qu'ils servent mieux les intérêts du vendeur en faisant la promotion d'une propriété auprès d'acheteurs éventuels. Si un agent détient un mandat exclusif à long terme pour une propriété donnée et n'a pas l'exclusivité à l'égard d'une autre, il peut préférer vendre cette dernière d'abord, étant donné qu'un retard peut laisser à d'autres la chance de réaliser la vente.

<sup>29</sup> Il est à noter que ces préoccupations concernant la perte d'un investissement peuvent être résolues s'il est disposé contractuellement que les vendeurs acquitteront toutes les dépenses liées à la commercialisation de la résidence, que l'agent réalise ou non la vente.

<sup>30</sup> Remarquer que même avec l'avènement de l'Internet, les services interagences demeurent la source principale d'informations, en partie du fait que le site Internet le plus populaire aux États-Unis (realtor.com) consiste principalement en un amalgame de données en provenance des services interagences locaux.

d'inscription partagés peuvent empêcher les courtiers à escompte d'offrir leurs services et d'attirer des clients. L'encadré 1 décrit certaines des particularités d'une affaire récemment portée devant les tribunaux.

**Encadré 1. Droit de la concurrence - Affaire relative aux services d'inscription :  
États-Unis c. National Association of Realtors**

Il est important pour les services d'inscription partagés de savoir si les agents à escompte peuvent avoir accès aux inscriptions et les utiliser dans le cadre d'un modèle d'escompte. Par le passé, pour consulter des inscriptions faites auprès d'un service d'inscription partagé, les acheteurs de domiciles devaient généralement se rendre au bureau d'un agent immobilier ou recevoir matériellement les renseignements relatifs à une inscription (par exemple, par la poste). Dans une affaire récente aux États-Unis, le département de la Justice des États-Unis a prétendu qu'une association nationale de courtiers immobiliers avait adopté des politiques conçues pour veiller à ce que les services d'inscription partagés ne donnent qu'un accès limité aux courtiers à escompte qui exploitent des sites Internet protégés par mot de passe permettant aux clients de ces courtiers de visionner les inscriptions sur Internet<sup>31</sup>. Ces bureaux virtuels sur Internet servent de plus en plus à rendre des services de courtage, mais plusieurs courtiers ont exprimé la crainte que ces sites exercent une pression à la baisse sur les taux de leurs commissions. La National Association of Realtors avait élaboré des politiques à l'intention des services interagences qui permettaient aux courtiers d'un service d'inscription de « refuser » que les bureaux virtuels aient accès à leurs inscriptions. Ainsi, les clients du concurrent Internet ne pouvaient passer en revue les mêmes inscriptions du service interagences que les clients des courtiers traditionnels. Le département de la Justice des États-Unis a institué une poursuite pour s'élever contre ce comportement. La National Association of Realtors a réagi en adoptant une disposition permettant le refus plus général aux termes de laquelle chaque courtier pouvait interdire que ses inscriptions soient communiquées par Internet sans son approbation. Le département de la Justice a modifié sa poursuite pour qu'elle vise également ce comportement au motif que celui-ci limiterait de façon déraisonnable la concurrence sur le marché des services de courtage, avec les résultats suivants :

- La répression de l'innovation technologique ;
- La réduction de la concurrence quant aux prix et à la qualité ;
- Des entraves à la coopération efficace entre courtiers ;
- L'augmentation du risque de collusion expresse ou tacite ;
- Des obstacles à l'entrée sur le marché.

L'affaire n'a pas encore été entendue par les tribunaux. Elle constitue une illustration saillante des comportements d'un service d'inscription susceptibles de préoccuper les pouvoirs publics et de nuire aux consommateurs.

La nécessité de coopérer par le truchement d'un service d'inscription peut avoir une incidence sur la stabilité des commissions (en présence d'agents du vendeur et de l'acheteur) :

« [TRADUCTION]...la maximisation du prix de vente suppose en général la maximisation de l'exposition de la propriété. Les courtiers ont habituellement recours au service interagences (*Multiple Listing Service* ou MLS) pour y parvenir. Toutefois, le recours effectif à MLS nécessite également que les courtiers aient intérêt à montrer la résidence. À un prix donné et pour une durée déterminée, une propriété inscrite sur MLS dont le taux de commission et la part à donner en partage correspondent à ceux qui sont pratiqués sur le marché a plus de chances d'être vendue que si elle est inscrite à un taux de commission et moyennant une part en partage moindres. Les courtiers non traditionnels à escompte, en tant que groupe, montrent un taux de ventes coopératif et un ratio ventes/inscriptions global sensiblement inférieurs à ceux des courtiers traditionnels de leurs communautés. Il s'agit peut-être de la

<sup>31</sup>

Etats-Unis c. National Association of Realtors. Civil Action No. 05C-5140.

raison pour laquelle les commentateurs du secteur sont d'avis que, si les courtiers à escompte ont dans une certaine mesure toujours existé en situation de marchés vendeurs en hausse, ils survivent rarement aux récessions.

L'intérêt des courtiers à maximiser leurs bénéfices à court terme est fonction de la part qu'ils obtiennent s'ils occasionnent la vente d'une maison donnée. Par exemple, un courtier « à escompte » qui demande une commission de 4 % et en donne 50 % au courtier coopérant offre de fait à ce dernier une commission de 2 %. Un courtier « traditionnel » qui demande une commission de 6 % et en partage la moitié offre de fait au courtier coopérant une commission de 3 % du prix de l'opération si ce dernier emmène un acheteur. Du point de vue de l'agent coopérant, le courtier traditionnel, dans notre exemple, lui verse 50 % de plus que le courtier à escompte. Dans plusieurs cas, l'écart est encore plus important. Ces différences de revenu potentiel pour les courtiers traitant avec des acheteurs potentiels semblent influencer sur les visites qu'ils organisent. Les courtiers semblent diriger les acheteurs vers les maisons inscrites par des courtiers traditionnels à commission non escomptée. Cette tendance peut être corrigée si un courtier « à escompte » est disposé à offrir au courtier coopérant un pourcentage « normal » et absorber lui-même la totalité de la réduction de la commission. Le montant de l'escompte qu'un courtier peut offrir en est bien entendu considérablement limité s'il veut couvrir ses coûts d'exploitation » (FTC(1983), p. 39 à 40).

## 2.4 *Opérations entre initiés et collusion*

Le mécanisme de vente par intermédiaires (tels les agents immobiliers, les notaires latins et les maisons d'encan) diffère d'un pays à l'autre. Les intermédiaires peuvent avoir recours à divers mécanismes, y compris la vente privée (négociation bilatérale) et la mise à l'encan. Ce sont les ventes privées qui constituent le mécanisme principal dans les pays membres de l'OCDE. La mise à l'encan a fréquemment été associée aux ventes sur saisie-gagerie (par exemple, en cas de reprise de possession) de sorte qu'on leur préfère souvent un autre mécanisme. Il est cependant parfois arrivé que des encans comptent pour une partie importante des ventes réalisées<sup>32</sup>.

Aussi bien les ventes privées que les ventes à l'encan peuvent faire l'objet d'opérations entre initiés et de collusion.

S'agissant des ventes privées, les intermédiaires peuvent représenter un vendeur mais ne pas organiser la vente réellement concurrentielle de la maison. Les agents peuvent conspirer pour vendre la maison à un prix inférieur au prix sur le marché et s'arranger entre eux ou avec des partenaires pour acheter la maison afin d'obtenir l'avantage de la pleine valeur, pour eux-mêmes ou leurs partenaires. Pareilles opérations entre initiés sont d'ordinaire contraires aux règles appliquées par les associations immobilières et enfreignent l'obligation fiduciaire des agents en tant qu'agents du vendeur.

S'agissant des ventes à l'encan, il est arrivé que des acheteurs soient accusés de collusion. Rien ne permet d'affirmer que ce type de collusion est courant dans le cadre d'encans de maisons, même s'il peut se produire, surtout en cas d'encans spécialisés auxquels participent un nombre restreint d'enchérisseurs,

<sup>32</sup>

Par exemple, à Sydney, en Australie, environ 50 % des opérations ont été réalisées par encan lors d'une récente emballée du marché, alors qu'à Brisbane, cette proportion, moins élevée mais encore importante, se situait entre 20 et 30 %. Les encans permettent parfois d'obtenir des rendements supérieurs à ceux que procurerait la négociation bilatérale. Ashenfelter et Genovese (1992) ont conclu que les encans permettent d'obtenir des prix supérieurs de 13 % pour des propriétés équivalentes dans le cadre d'un ensemble d'opérations réalisées aux Etats-Unis, alors que Newell et autres (1993) étaient d'avis que les prix obtenus à l'encan étaient à Sydney supérieurs de 3,6 % à ceux obtenus dans le cadre d'opérations privées.

par exemple, les encans visant à récupérer les impôts et taxes impayés sur des propriétés abandonnées et les encans après forclusion en cas de non-remboursement d'un prêt<sup>33</sup>.

## 2.5 *Politiques visant à favoriser la concurrence s'agissant de la mise en contact*

De façon générale, les pouvoirs publics se sont limités à établir des règles visant la mise en contact. Toutefois, dans la mesure où certaines particularités d'un mécanisme de mise en contact constituent des entraves à la concurrence, les pouvoirs publics peuvent décider d'intervenir en cas de déficiences évidentes du marché, si les mesures qu'ils sont à même d'arrêter sont susceptibles d'avoir un effet positif<sup>34</sup>. Les principales mesures pouvant être arrêtées par les pouvoirs publics en vue de promouvoir un marché de la mise en contact efficace et concurrentielle sont les suivantes :

Examiner les règles appliquées par les services d'inscription partagés et contester celles qui constituent des entraves à la concurrence :

- Veiller à ce que les services d'inscription ne recommandent pas de prix ou ne fassent pas office de mécanismes de coordination des prix,
- S'assurer que les règles applicables en matière d'inscription ne fassent pas indûment obstacle à la concurrence, par exemple, en pénalisant les fournisseurs de services à escompte directement (leur interdisant de participer) ou indirectement (permettant aux autres agents de ne pas leur communiquer leurs inscriptions ou de ne pas afficher celles-ci sur des médias qui les favorisent, tel Internet),
- Éliminer les règles d'exclusivité permettant qu'une propriété soit inscrite par un seul agent<sup>35</sup> ;

Optimiser la réglementation publique ou l'autorégulation pour renforcer la capacité et l'intérêt à livrer concurrence :

- Empêcher que des services minimums soient exigés par la réglementation publique ou l'autorégulation,

<sup>33</sup> Depuis 1995, le département de la Justice des Etats-Unis a institué des poursuites pour collusion dans plusieurs endroits, notamment à Brooklyn, à New York et dans le nord de la Virginie. Jusqu'à 13 conspirateurs ont été accusés de s'être entendus sur une longue période pour ne pas enchérir les uns contre les autres lors d'encans immobiliers tenus après forclusion. Dans le nord de la Virginie, certaines personnes trouvées coupables ont dû passer de 5 à 7 mois en prison. De plus, certains États américains ont institué plusieurs poursuites pour collusion, notamment la Caroline du Nord, où 20 personnes ont été poursuivies pour collusion répétée lors d'encans après forclusion.

<sup>34</sup> Les organismes antitrust des Etats-Unis sont depuis longtemps actifs dans le domaine de la mise en contact en matière immobilière, ayant engagé des poursuites dans les années 1960 et 1970 concernant les barèmes des prix et envoyant aujourd'hui des lettres et faisant d'autres intercessions auprès de la législature des États envisageant l'adoption de lois qui interdiraient l'octroi de remises ou rendraient hors la loi les agents immobiliers à escompte. Dans l'affaire Etats-Unis c. Kentucky Real Estate Commission, la Division antitrust a fait valoir que l'interdiction faite par la Real Estate Commission d'offrir des remises en argent ou d'autres incitatifs constituait une entrave déraisonnable au commerce.

<sup>35</sup> S'il peut y avoir des avantages à l'exclusivité, celle-ci ne semble pas être nécessaire au fonctionnement d'un service d'inscription partagé, certains de ces services ne prévoyant pas l'exclusivité. Celle-ci a notamment pour effet de réduire la capacité du vendeur de négocier la commission à la baisse dans le cadre des négociations entourant une offre.

- Veiller à ce que les courtiers puissent accorder directement à l'acheteur ou au vendeur une remise de leur commission,
- S'assurer que les courtiers puissent afficher leurs prix.

L'une des meilleures façons de limiter les effets nuisibles de règles anticoncurrentielles adoptées par les agents, leurs associations professionnelles ou les pouvoirs publics consiste à veiller à ce qu'il soit permis aux particuliers de vendre eux-mêmes sans trop de difficultés leur résidence, à un prix analogue à celui qu'ils obtiendraient par l'intermédiaire d'un agent.

La plupart des pays permettent aux particuliers de vendre eux-mêmes leur résidence et de l'annoncer sans détenir un permis d'agent immobilier. Ce qui n'équivaut pas à absence d'une réglementation applicable à la procédure de mise en contact. Des règles entourent souvent la divulgation des vices connus ou cachés et elles sont contraignantes que la vente soit réalisée directement ou par un intermédiaire. Néanmoins, il ne fait d'ordinaire aucun doute que la vente directe est légale.

C'est surtout sur les marchés où la mise en contact directe est inusitée qu'on assiste à la limitation des ventes directes. Les outils de promotion disponibles sur le marché pour les mises en contact directes sont limités. L'accès à des services d'inscription peut être refusé par application des règlements adoptés par un service d'inscription partagé<sup>36</sup>. L'accès aux sites Internet les plus populaires peut aussi être restreint. Les publications et les sites Internet peuvent restreindre la publicité directe, par exemple en réponse à la menace d'un boycott de la publicité par les intermédiaires.

Les pouvoirs publics peuvent protéger les consommateurs en veillant à ce qu'il soit possible pour les vendeurs d'effectuer une vente directe :

- S'ils donnent aux particuliers le droit d'annoncer et de commercialiser leur domicile à la recherche d'acheteurs ;
- S'ils veillent à ce que les particuliers aient accès à des médias ou des véhicules de promotion adéquats, pour qu'ils ne soient pas désavantagés de façon marquée par rapport aux professionnels immobiliers lorsqu'il s'agit de commercialiser leurs propres résidences.

### **3. Transfert du Contrôle**

La procédure officielle de transfert de la propriété est très réglementée dans la plupart des pays. La réglementation est considérée nécessaire au vu de l'importance pour le public d'assurer que les droits de propriété soient bien définis et qu'il ne soit pas onéreux de les faire valoir. La confiance qu'inspire le droit de propriété promouvoit les ventes de propriétés et l'investissement. Les mécanismes de remplacement purement privés qui visent à contrôler le transfert de la propriété peuvent donner lieu à un taux plus élevé d'opérations « frauduleuses » (c'est-à-dire, une situation dans laquelle l'acheteur achète une résidence dont le vendeur ne détient pas les pleins droits de propriété). Le règlement judiciaire des différends nés d'opérations frauduleuses peut être long et coûteux, et l'acheteur peut ne pas se voir rembourser la totalité

<sup>36</sup>

Un service d'inscription partagé peut être la propriété d'une association d'agents immobiliers, par exemple, qui ne donne pas accès aux non-membres. Les associations peuvent imposer de telles restrictions pour faire obstacle à la concurrence livrée par les non-agents. Elles peuvent aussi avoir adopté des normes de qualité applicables aux inscriptions, plus faciles à imposer si l'accès est restreint. La question clé est alors celle de savoir si le service d'inscription exige que le vendeur autonome effectue un paiement substantiel à un agent inscripteur ou permet que l'inscription du vendeur soit librement négociée.

des sommes versées<sup>37</sup>. Pendant que dure le litige, les acheteurs d'une propriété frauduleuse risquent de se retrouver sans domicile et avec une dette importante.

La procédure de transfert de contrôle comporte un certain nombre d'éléments qui varient, dans une certaine mesure, d'un pays à l'autre. De façon générale, on :

- veille à ce que les vendeurs détiennent un titre légal adéquat avant la vente ;
- assure le paiement des taxes et impôts levés par un État à l'égard de l'opération ;
- assure que les dettes du vendeur pour lesquelles la propriété sert de garantie soient remboursées en cours d'opération ;
- enregistre le nouveau propriétaire auprès des autorités fiscales pouvant administrer des impôts périodiques qui sont fonction de la propriété du domicile ;
- assure que les acheteurs obtiennent le titre légal ;
- veille à ce que le financement mis en place par l'acheteur soit assorti des garanties appropriées en cas de non-paiement (notamment, le titre et le droit de vendre la propriété).

Il arrive fréquemment que seuls les membres d'une profession donnée aient le droit d'exécuter l'acte de transfert. Dans plusieurs pays d'Europe, par exemple, ce sont les notaires latins qui sont nantis de ce droit. Dans ces pays, toutes les opérations afférentes à des immeubles doivent être réalisées par l'intermédiaire d'un notaire latin. Souvent, la profession s'est dotée d'une grille tarifaire établie suivant la pratique antérieure et impose des restrictions à l'entrée. Dans d'autres pays, l'acte de transfert est exécuté par des avocats ou des avoués. Il est possible d'opérer une réforme de ces régimes en donnant à des personnes ayant reçu une formation adéquate (mais qui ne sont pas membres d'une profession désignée) le droit d'exécuter les actes de transfert<sup>38</sup>.

L'une des raisons de procéder à une réforme est que les honoraires diffèrent considérablement d'un pays à l'autre pour des services en apparence comparables, ce qui indique que les honoraires pourraient être établis dans certains pays d'une manière non concurrentielle. Comme il y a réticence politique à réglementer ce secteur, on estime souvent que l'augmentation de la concurrence entre fournisseurs pourra rajuster les honoraires à la baisse et offrir un meilleur choix aux consommateurs. À titre d'exemple, le tableau 2 présente les honoraires imputés par les notaires et avoués dans divers pays d'Europe. Les honoraires sont répartis entre ceux qui se rapportent à l'achat d'une maison et ceux qui se rapportent à un prêt hypothécaire<sup>39</sup>. Dans cette comparaison simple de la pratique en cours dans dix pays, les honoraires liés aux opérations varient de 0,6 % à 4,0 % de la valeur de la propriété.

<sup>37</sup> Il peut se révéler difficile de repérer et d'arraisonner les parties à une opération frauduleuse, ces personnes étant susceptibles d'éviter les représentants de la loi.

<sup>38</sup> La Commission européenne a commandé une étude économique indépendante du marché des services d'exécution d'actes de transfert en Europe. Cette étude, en cours de préparation, examine l'incidence d'une réglementation professionnelle restrictive sur le fonctionnement de ce marché en termes de prix, de choix, de qualité et de vitesse. Elle devrait être finalisée à la fin du mois de mars ou au début du mois d'avril 2007.

<sup>39</sup> De façon générale, les frais liés à l'achat d'une maison seraient engagés même en l'absence d'un prêt et les frais liés à un prêt hypothécaire seraient engagés même en l'absence d'un changement de la propriété.

**Tableau 2. Frais de notaire/d'avoué dans certains pays d'Europe – 2004**

Pays	Valeur représentative de la propriété (EUR)	Frais liés à l'achat d'une résidence	Frais liés à un prêt hypothécaire	Frais de notaire/d'avoué totaux
BE	100 000	2,2 %	1,6 %	3,8 %
DK	188 172	0,5 %	0,1 %	0,6 %
DE	277 000	0,5 %	0,2 %	0,7 %
GR	140 000	2,2 %	0,0 %	2,2 %
ES	135 000	0,4 %	0,4 %	0,8 %
FR	168 000	1,2 %	0,9 %	2,1 %
IT	150 000	2,0 %	2,0 %	4,0 %
HU	40 000	1,0 %	0,4 %	1,4 %
PL	34 771	1,0 %	0,0 %	1,0 %
UK	164 789	0,4 %	0,5 %	0,9 %

Source : FHE (2006). La valeur représentative de l'opération ne correspond pas nécessairement à la valeur moyenne ou médiane des opérations. Les coûts sont exprimés en pourcentage de la valeur représentative de l'opération utilisée pour chaque pays, selon les données transmises par les experts du pays. Il n'a pas été tenu compte d'un pays particulier, qui avait fait état de coûts nuls.

Une réforme des professions qui peuvent légalement encadrer les opérations peut se révéler difficile et controversée. Trois types de réforme ont été mis en œuvre dans ce domaine :

- L'ouverture de l'activité aux membres d'une profession autre que la profession traditionnellement dominante qui auront reçu une formation adéquate ;
- La libéralisation de l'accès à la profession traditionnellement dominante ;
- L'élimination des grilles tarifaires ou recommandations communes.

Ces réformes sont examinées dans la rubrique suivante.

### **3.1 L'élimination du droit exclusif des membres d'une profession d'exécuter les actes de transfert**

L'élimination du droit exclusif des membres d'une profession de transférer le contrôle d'une propriété constitue peut-être la façon la plus évidente de déstabiliser les prix potentiellement élevés imposés par les professions bien campées. Dans certains pays, par exemple au Royaume-Uni, le pouvoir d'exécuter les actes de transfert appartenait exclusivement aux membres d'une seule profession, soit les avoués. Ceux-ci

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effective de la maison (par exemple, en cas de refinancement). Noter que les frais réels peuvent, dans certains cas, varier considérablement d'un fournisseur à l'autre à l'intérieur d'un même pays.

doivent acquérir une formation exhaustive et longue dont l'essentiel n'a rien à voir avec l'exécution d'actes de transfert. La formation dure souvent plus de cinq ans, y compris la période d'apprentissage. Les honoraires perçus pour l'exécution des actes de transfert ont fait l'objet de plusieurs rapports émanant de la commission des monopoles et des fusions (*Monopoly and Mergers Commission*), dans lesquels on a conclu que ces honoraires étaient élevés, compte tenu du peu de temps que ces services nécessitaient. De plus, les taux étaient rarement négociés. À la fin des années 1980, on a permis à des professionnels autres que les avoués d'exécuter des actes de transfert, notamment des praticiens de l'immobilier agréés qui recevaient une formation nettement plus ciblée et courte que celle des avoués. Avant l'avènement des praticiens de l'immobilier agréés, les honoraires des avoués avaient commencé à chuter, peut-être en partie à cause de la publicité que leur avaient valu les prix élevés (Love et Stephen (1997)). Stephen et autres (1993) ont examiné l'échelle des prix pratiqués par un échantillon d'avoués en 1989. Ils ont constaté que là où les praticiens de l'immobilier agréés étaient le plus actifs, les honoraires demandés par les avoués étaient les moins importants. Des informations mitigées sur l'évolution des honoraires leur ont cependant par la suite laissé croire qu'il y avait peut-être eu entente entre les avoués et les praticiens de l'immobilier agréés après l'accession au marché de ceux-ci. Dans le même temps, selon le ministère des affaires constitutionnelles du Royaume-Uni (*Department of Constitutional Affairs* (2003)), le marché de l'exécution des actes de transfert ne constitue plus un monopole et est déjà concurrentiel (les prix ont chuté sensiblement dans les années 1990, quand le monopole des avoués a été brisé par l'ouverture du marché aux praticiens de l'immobilier agréés). Les fournisseurs sont maintenant prêts à donner un prix fixe aux consommateurs qui font le tour du marché. Des entreprises en ligne ont commencé ces dernières années à offrir des services d'exécution des actes de transfert.

Dans d'autres pays, le droit d'exécuter les actes de transfert reste exclusif aux membres d'une seule profession, notamment les notaires latins. La Commission européenne a précédemment contesté le droit exclusif accordé aux notaires latins d'exécuter les actes de transfert. Elle a aussi demandé instamment que les restrictions en matière de publicité et de prix soient levées<sup>40</sup>. Van den Bergh et Montangie (2006) sont d'avis que la révision des conditions d'entrée et de la réglementation en matière de prix devrait faire l'objet d'une analyse des coûts et des bénéfices. Ils font valoir que la Commission européenne ne démontre pas que les professions cherchent à maximiser les profits et qu'il est difficile d'évaluer l'incidence nette des réformes déjà mises en œuvre.

Il arrive parfois que des professions non campées historiquement cherchent à obtenir l'exclusivité pour elles-mêmes. Aux États-Unis, les efforts récents de l'American Bar Association pour établir une définition modèle de la pratique du droit pourraient faire en sorte d'inclure les services d'exécution des opérations immobilières dans la pratique du droit. Étant donné que la définition modèle pourrait être intégrée dans la législation des États interdisant la pratique du droit à quiconque n'est pas avocat, une telle définition pourrait éliminer la concurrence entre avocats et profanes. Les organismes antitrust des États-Unis ont envoyé une lettre détaillée à l'American Bar Association faisant état des inquiétudes que leur inspire la définition proposée. La lettre faisait valoir ce qui suit :

[TRADUCTION] La définition modèle peut nuire aux consommateurs en leur enlevant le droit de choisir un fournisseur de service profane offrant un ensemble ou une forme de services qui conviendrait mieux aux besoins particuliers de chaque consommateur... Au chapitre de l'exécution des opérations immobilières, certains services non composés d'avocats font également concurrence à ceux-ci du fait qu'il est plus pratique de conclure un prêt à des heures (par exemple, le soir ou les week-ends) et des endroits (par exemple, à la résidence du consommateur) inhabituels. De plus, les consommateurs qui achètent une propriété ou procèdent à un refinancement ont souvent recours dans certains États à des profanes pour conclure un prêt par la poste ou par Internet. Pour ces consommateurs, une définition par trop large de la pratique du droit, faisant en sorte d'interdire

<sup>40</sup>

Voir le rapport de 2005 de la Commission européenne sur les professions.

l'exécution des opérations par des profanes, pourrait se traduire si elle était adoptée dans ces États par une augmentation des coûts et des obstacles au commerce électronique (Organismes conjoints, 2002)

### 3.2 *Libéralisation de l'accès à la profession*

Certaines professions chargées de l'exécution des actes de transfert fixent des limites au nombre de personnes pouvant pratiquer la profession<sup>41</sup>. De telles limites sont imposées par exemple dans plusieurs pays pour ce qui est du notariat. En Belgique, notamment, la Loi sur le Notariat permet qu'il y ait « dans les arrondissements judiciaires qui ont une population inférieure à 75.000 habitants, un notaire au plus par 5.000 habitants ; dans les arrondissements judiciaires qui ont une population inférieure à 150.000 habitants et supérieure à 75.000 habitants, un notaire au plus par 6.000 habitants ; dans les arrondissements judiciaires qui ont une population inférieure à 250.000 habitants et supérieure à 150.000 habitants, un notaire au plus par 7.000 habitants » (Kuypers et autres (2005)). En Allemagne, l'établissement des notaires n'est pas fonction de la population mais du nombre d'actes notariés exécutés dans une région donnée. Certaines réformes avaient notamment pour objectif de lever les restrictions à l'établissement des notaires. Ce sont les Pays-Bas qui en ont levé le plus. Mais si les limites en termes de nombre ont été retirées, il n'y a pas eu beaucoup de nominations de nouveaux cabinets de notaires (Kuypers et autres (2005)). Certaines restrictions continuent de s'appliquer, notamment l'accession limitée à la profession et le droit exclusif accordé aux notaires de transférer le contrôle de la propriété. Si les limites géographiques à l'établissement des cabinets de notaires ont été éliminées, les nouveaux candidats doivent pour accéder à la profession produire un plan d'affaires approuvé par un « comité spécial » formé par le nouvel organisme de surveillance du notariat. Peu de candidats ont été admis<sup>42</sup>.

### 3.3 *L'élimination des grilles tarifaires et des recommandations communes*

Des grilles tarifaires communes applicables aux services d'exécution d'actes de transfert sont en vigueur dans plusieurs pays. Certaines juridictions ont pris des mesures en vue de les éliminer. À Jersey, par exemple, une île dépendance de la Couronne britannique, l'exécution des actes de transfert était assujettie à des honoraires proportionnels de un pour cent de la considération versée lors de la vente ou de l'achat d'une propriété<sup>43</sup>. Ces honoraires normaux étaient applicables depuis 1954. Le Barreau avait refusé d'accéder à la demande présentée par certains avocats d'imputer des honoraires inférieurs aux honoraires proportionnels de un pour cent. Le bureau de la concurrence de Jersey a par conséquent communiqué avec le Barreau pour l'informer que les honoraires proportionnels enfrenaient plus que probablement l'interdiction faite par la législation [en matière de concurrence] de conclure un accord de concertation sur les prix. Selon le bureau de la concurrence, les honoraires proportionnels avaient aussi bien pour objet que pour effet de fixer le prix demandé par les avocats pour exécuter les actes de transfert à Jersey. Le Barreau a choisi d'éliminer les honoraires proportionnels (JCRA (2005)). Des observations qualitatives portent à croire que les honoraires liés aux opérations ont depuis diminué.

Les pratiques d'honoraires communs ont encore cours dans plusieurs pays. En France, par exemple, les notaires appliquent aux opérations des honoraires standard de 1 %. Si l'acheteur et le vendeur ont chacun leur notaire, les deux notaires se partagent les honoraires, mais si les deux parties utilisent le même

<sup>41</sup> Ces limites ne restreignent pas forcément le nombre d'opérations qui peuvent être réalisées, les notaires français, par exemple, pouvant avoir plusieurs assistants, un des cabinets comptant même 200 employés. La taille du cabinet peut ainsi se modeler à la demande, même si le nombre de cabinets est fixe.

<sup>42</sup> De plus, la période obligatoire de placement professionnel pour les jeunes notaires a doublé, passant de trois à six ans.

<sup>43</sup> Des exceptions étaient prévues dans certains cas, par exemple, pour les acheteurs d'une première maison.

notaire, les honoraires lui reviennent entièrement. Il n'y a que peu d'informations sur l'incidence de l'élimination des pratiques d'honoraires communs. Aux Pays-Bas, les honoraires des notaires ont été entièrement libéralisés<sup>44</sup>. Selon Kuypers et autres (2005), dont les conclusions se fondent sur deux rapports ayant examiné l'évolution des prix aux Pays-Bas après la libéralisation du notariat, les honoraires moyens exigés pour les services liés à l'immobilier ont diminué, mais comportent encore une marge de profit importante. Le CPB constate cependant aussi une légère altération de la qualité des services. En 1995, les notaires œuvrant dans des zones concurrentielles faisaient montre de taux inférieurs de corrections dans les registres publics des opérations, alors qu'en 2003, les taux de corrections des notaires œuvrant dans des zones concurrentielles n'étaient pas moins élevés que ceux des notaires établis dans des zones à forte concentration<sup>45</sup>. Ainsi pouvait-on croire que la concurrence débouchait sur une légère augmentation du nombre de corrections dans les zones concurrentielles, ce qui indique que la qualité aurait légèrement diminué après l'ouverture à la concurrence (Nahuis et Noailly (2005))

Le tableau 3 présente l'évolution des honoraires moyens entre 1999, moment de la libéralisation, et 2004. La libéralisation des honoraires a été suivie d'une augmentation de la fluctuation des honoraires, les honoraires moyens étant considérablement moindres pour les opérations immobilières de valeur importante et légèrement moindres pour les opérations concernant des maisons plus modestes<sup>46</sup>.

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<sup>44</sup> L'une des exceptions était une limite supérieure imposée aux honoraires exigés des familles à faible revenu.

<sup>45</sup> Les corrections peuvent être utilisées comme mesure de la qualité. Le nombre de corrections serait directement proportionnel au nombre d'erreurs commises au moment de l'enregistrement initial des transactions et serait indicatif d'une moins bonne qualité.

<sup>46</sup> Les honoraires moyens pour exécuter l'acte de transfert d'un « yard » ont de fait augmenté puisque les honoraires initiaux étaient assez bas.

**Tableau 3. Honoraires des notaires aux Pays-Bas de 1999 à 2004**

	Octobre 1999 (honoraires fixes)	Avril 2002 (honoraires moyens)	Variation de 1999 à 2002	Septembre 2004 (honoraires moyens)	Variation (de 2002 à 2004)
	EUR	EUR	%	EUR	%
Hypothèque + acte de transfert (113 500)	1779	1733	-3	1599	-7
Hypothèque + acte de transfert (245 000)	2196	2098	-4	1817	-13
Hypothèque + acte de transfert (363 000)	3554	3007	-15	2284	-21
Acte de transfert d'un « yard »	280	499	78	578	24
	3554	3007	-15	2284	-21

Source : Kuypers et autres (2005), selon les données contenues dans deux autres documents. (Données en provenance de Kuypers et autres (2005), version originale, corrigées.)

Si les honoraires moyens ont chuté après la libéralisation opérée aux Pays-Bas, les fluctuations des honoraires entre notaires pratiquant les prix les moins élevés et notaires pratiquant les prix les plus élevés ont quant à elles augmenté. Par exemple, pour un prêt hypothécaire assorti de l'exécution d'un acte de transfert (de 113 500 euros), les honoraires moyens pour les 5 % de notaires pratiquant les honoraires les moins élevés ont chuté de 1871 euros à 1194 euros, tandis que les honoraires moyens pour les 5 % des notaires pratiquant les honoraires les plus élevés ont diminué de 4054 à 3859 euros. Kluers et autres (2005) indiquent qu'environ 45 % des cabinets de notaires adoptaient la même stratégie de fixation des prix que lorsque les honoraires étaient réglementés, 28 % livraient une guerre des prix, 25 % calculaient leurs honoraires en fonction des coûts et 2 % exigeaient des « honoraires particulièrement élevés ». Les consommateurs dont l'opération était modeste qui cherchaient à payer des honoraires bas pouvaient réduire sensiblement les coûts engagés au titre des honoraires par rapport à la période antérieure à la libéralisation.

#### **4. Financement Résidentiel**

Les crédits immobiliers sont souvent utilisés par les acheteurs au cours du processus d'achat d'une maison et constituent un élément essentiel de l'opération globale. Toute une série de préoccupations a été exprimée au sujet des crédits immobiliers. On a constaté, à un bout du spectre, la formation de cartels entre prêteurs. À l'opposé, lorsque le secteur des prêts est très concurrentiel, les consommateurs ont peine à différencier les avantages que procurent les divers prêts offerts et à déterminer lequel est préférable. En pareils cas, les pouvoirs publics peuvent souhaiter s'assurer que les renseignements concernant les prêts offerts restent simples et soient faciles à comparer et que les consommateurs utiliseront ces renseignements de façon appropriée. Le présent document aborde trois préoccupations centrales :

- Les cartels ;
- L'association du financement résidentiel à d'autres produits ;
- La fourniture de renseignements permettant la comparaison en contexte concurrentiel.

#### **4.1 Cartels**

Des activités collusoires ont été décelées dans plus d'un pays membre de l'OCDE en ce qui concerne divers aspects du financement hypothécaire. Dans les années 1980, les prêts hypothécaires étaient consentis au Royaume-Uni par des mutuelles d'épargne et de construction et non des banques. Les mutuelles d'épargne et de construction voyaient leurs activités de prêts limitées par l'ampleur des dépôts qui leur étaient confiés. Si les dépôts n'étaient pas suffisants pour satisfaire aux besoins en capital, les emprunteurs devaient se mettre sur une liste d'attente pour obtenir un prêt. Les taux d'intérêt étaient établis par les associations d'épargne immobilière. Ce cartel s'est effondré lorsque les banques ont obtenu la permission de consentir des prêts hypothécaires en 1980.

Il n'est pas nécessaire que les activités collusoires portent exclusivement sur la fixation des taux. En France, un cartel se rapportant à un « pacte de non-agression » a été mis au jour et a fait l'objet de poursuites par le Conseil de la concurrence de la France. « Dans un contexte de forte baisse des taux d'intérêt, les principaux établissements de la place avaient conclu entre eux un “pacte de non-agression interbanque”. En vertu de cet accord, chacun d'eux s'interdisait de faire des propositions aux clients des autres banques pour la renégociation des emprunts immobiliers. Chacun des membres de l'entente se donnait ainsi les moyens de mieux résister aux demandes de renégociation émanant de ses propres clients puisque ceux-ci étaient privés de la possibilité de faire jouer la concurrence en se tournant vers un autre établissement » (OECD (2000)). Cette affaire est décrite plus en détail dans l'encadré 2.

#### **Encadré 2. La conspiration des banques françaises autour des prêts hypothécaires**

Au cours des années 1980, les prêts hypothécaires avaient une durée typique de 10 à 20 ans et la plupart étaient assortis de taux d'intérêt fixes. Les prêts pouvaient en général donner lieu à un remboursement anticipé si au moins 10 % du montant initial du prêt avait été remboursé. Les prêteurs avaient le droit d'exiger des frais pour la fermeture d'un prêt qui ne pouvaient excéder l'équivalent de six mois d'intérêts ou au maximum 3 % des capitaux restant à rembourser.

Les taux d'intérêt à long terme des crédits immobiliers, après avoir culminé au début des années 1980 à environ 20 %, ont chuté considérablement pour se stabiliser autour de 12 % en 1985 jusqu'à la fin de 1992, date à laquelle ils ont enregistré à nouveau une baisse et se sont situés à un niveau compris entre 7,5 et 9 %. Après une chute de taux de cet ordre, les emprunteurs dont les prêts à durée déterminée avaient encore une durée supérieure de cinq à sept ans avaient avantage soit à obtenir un réaménagement des conditions de leur prêt auprès de leur banque, soit à négocier un nouvel emprunt avec un nouveau prêteur pour rembourser leur emprunt initial. Pour les banques ayant accordé les prêts à taux élevés existants, une renégociation de ces prêts aurait entraîné une baisse importante des recettes obtenues des opérations de crédit. Les banques ont reconnu que la proportion de leur stock de prêts immobiliers composée de contrats susceptibles d'être renégociés était importante. Pour certaines d'entre elles, même, les prêts que les emprunteurs auraient intérêt à renégocier représentaient de 40 à 60 % du stock de prêts immobiliers.

Divers documents émanant de banques citent ou démontrent l'existence d'un accord à l'échelle nationale entre les banques aux termes duquel chaque réseau bancaire s'engageait à ne pas proposer de crédits immobiliers aux clients des autres réseaux. D'autres documents découverts en cours d'enquête instruisaient les responsables des prêts de s'abstenir de toute action offensive pour attirer la clientèle,

même si les prêts visés avaient par ailleurs été profitables, et d'informer les bureaux principaux des prêteurs initiaux des prêts qui étaient remboursés par d'autres banques, ces bureaux principaux contactant parfois directement le concurrent qui semblait ne pas avoir respecté l'accord. Il est arrivé, dans certains cas au moins de non-respect établi, que le prêteur initial communique avec la nouvelle banque pour porter à son attention des cas précis de violation apparente de l'accord.

Le Conseil de la concurrence de la France a statué que, si le secteur bancaire était assujéti à une réglementation particulière, il n'en demeurerait pas moins assujéti à la législation en matière de concurrence. Les allégations ne concernaient pas la fixation des taux d'emprunt hypothécaires en tant que tels, mais plutôt une conspiration visant à ne pas livrer concurrence pour la clientèle. La conspiration aurait été considérablement dommageable pour les clients, pour lesquels l'impossibilité de renégocier les prêts aurait été onéreuse. Les pénalités imposées à neuf différents établissements bancaires se sont élevées à 1,14 milliard de francs français (décision n° 00-D-28).

L'une des façons les plus efficaces de régler les problèmes liés à d'éventuelles activités collusoires, comme le porte à croire l'expérience du Royaume-Uni, consiste à éliminer les conditions structurelles permettant aux cartels de prospérer. Par exemple, il est possible d'élargir l'éventail des institutions pouvant interagir avec les consommateurs pour fournir des prêts immobiliers. Les « courtiers » de crédits immobiliers peuvent offrir une solution de rechange intéressante aux voies traditionnelles d'obtention de prêts immobiliers. Les courtiers peuvent avoir une influence significative sur la concurrence des taux d'intérêt pratiqués par les banques ou les autres prêteurs en place. Par ailleurs, le fait de permettre à des prêteurs étrangers de consentir des prêts immobiliers, s'ils font l'objet chez eux d'une réglementation appropriée, peut bénéficier aux emprunteurs.

#### **4.2 Association des prêts immobiliers à d'autres produits**

Dans certains pays, l'octroi de prêts immobiliers est lié à l'achat de produits non immobiliers, par exemple, un compte d'épargne dans lequel est déposé le salaire ou des produits d'assurance. C'est-à-dire qu'une banque peut ne consentir un prêt que si un compte d'épargne est ouvert dans lequel l'emprunteur verse son salaire ou sa rémunération. Dans le récent rapport provisoire de la Commission européenne intitulé « Interim Report II on Current Accounts and Related Services », on estime que les ventes liées sont pratique courante. Ainsi, 47 % des clients hypothécaires des banques auraient été tenus d'ouvrir un compte courant, et 58 % des PME contractant un emprunt auraient aussi dû accepter de le faire. Cette pratique resserrerait la relation du client avec une banque et augmenterait ainsi les coûts qu'il devrait engager pour changer de fournisseur.

Deux chercheurs israéliens ont affirmé qu'en ce qui concerne les produits hypothécaires, les banques israéliennes ont eu un comportement collusoire<sup>1</sup>. Le secteur bancaire en Israël est très concentré, les 5 banques les plus importantes contrôlant 91 % du capital bancaire hypothécaire au pays en date de 1996. Les banques exigeaient que les consommateurs souhaitant obtenir un prêt hypothécaire achètent des produits connexes, notamment une assurance-vie. Les banques retenaient ensuite environ 50 % des versements à titre de commission d'intermédiation et remettaient le solde aux compagnies d'assurances (Institut des hautes études, 1998).

Le rattachement des prêts à d'autres produits offerts par les banques peut avoir une justification légitime. Par exemple, dans certains pays, la banque peut mettre plus de deux ans à reprendre possession d'une résidence pour cause de non-remboursement du prêt hypothécaire. En pareils cas, les banques peuvent être plus enclines à consentir des prêts si elles sont assurées d'une entrée de fonds, par exemple, si

<sup>1</sup> Ezra Sadan et David Levhari.

le salaire doit être versé directement dans un compte courant ouvert à la banque prêteuse<sup>2</sup>. Lorsque le prix du produit lié est révélé après que le client se soit engagé auprès d'une banque, toutefois, les forces concurrentielles ne peuvent jouer de façon adéquate pour ce qui est de ce produit.

#### 4.3 Renseignements concernant le prêt

Pour veiller à ce que les consommateurs puissent aisément comparer les divers prêts offerts, il peut être utile d'avoir recours à la publication normative d'un taux annuel net, exprimé en pourcentage et défini officiellement, pour le prêt. L'emprunteur peut comparer ce taux en pourcentage à ceux qu'offrent les divers prêteurs, ce qui peut lui être très utile<sup>3</sup>. La mise à la disposition des consommateurs d'informations simples et comparables sur des produits complexes stimule la concurrence entre les prêteurs immobiliers.

Les pouvoirs publics doivent toutefois se montrer prudents s'agissant des informations qui sont fournies aux consommateurs. Une étude récente de la FTC des États-Unis montre que les informations divulguées peuvent dans certains cas conduire le consommateur à prendre une moins bonne décision en matière de prêt immobilier que celle qu'il aurait prise en l'absence de divulgation. Voir l'encadré 3. Des recherches portant sur l'effet que pourraient avoir sur la décision du consommateur diverses divulgations possibles peuvent aider à assurer que les divulgations stimulent la concurrence quant aux modalités importantes des prêts hypothécaires.

#### **Box 3. Mise à l'épreuve expérimentale de la communication d'informations – étude réalisée par le FTC**

L'étude a été réalisée dans le contexte d'informations en apparence fallacieuses données par des courtiers hypothécaires concernant la rémunération ou les commissions reçues à l'égard de prêts. Le département du Logement et de l'Urbanisme des États-Unis a par conséquent proposé qu'une nouvelle norme de déclaration relative aux prêts mis en place par les courtiers oblige ceux-ci à déclarer clairement les commissions reçues. Les prêteurs directs (les banques, par exemple) ne seront toutefois pas tenus de faire cette déclaration. Par conséquent, lorsque les consommateurs compareront les prêts obtenus par l'intermédiaire de courtiers et ceux consentis directement par des prêteurs, ils compareront des données différentes. Un prêt par l'intermédiaire d'un courtier serait assorti d'un état du coût net du prêt en plus de la déclaration de la rémunération reçue par le courtier en sus du taux d'emprunt (la prime pour écart de rendement), alors qu'un prêt consenti directement par un prêteur serait assorti d'un état du coût net du prêt<sup>4</sup>.

Lacko et Pappalardo (2004) ont examiné, dans le cadre d'une expérience de contrôle, l'effet de la communication asymétrique sur la qualité de la prise de décision du consommateur. Ils ont demandé à plus de 500 consommateurs ayant récemment contracté un emprunt hypothécaire d'examiner différents crédits offerts et de les évaluer. La plupart des consommateurs ont reçu des informations calquant les différences existant entre les crédits offerts par un courtier et ceux offerts directement par un prêteur. On leur a ensuite demandé d'indiquer le prêt le moins coûteux et celui qu'ils choisiraient.

<sup>2</sup> Si l'assurance est obligatoire, on se demande cependant pourquoi la banque devrait en être le fournisseur exclusif.

<sup>3</sup> Ces informations ne seront pas toujours décisives. Par exemple, la comparaison des prêts à taux fixe avec les prêts à taux variables nécessite des pronostics quant aux fluctuations futures des taux d'intérêts qui excèdent d'ordinaire les capacités de la plupart des consommateurs.

<sup>4</sup> La prime pour écart de rendement constitue de fait une commission versée par le prêteur effectif au courtier, dont l'emprunteur n'a pas nécessairement connaissance, mais qui donne lieu à une augmentation des coûts liés au prêt pour ce dernier, le prêteur effectif intégrant cette prime au prix des crédits offerts à l'emprunteur.

Les chercheurs ont désigné une partie des consommateurs potentiels comme groupe de contrôle. Ces consommateurs n'ont pas reçu la communication asymétrique des commissions. On leur a présenté, comme aux autres groupes, les mêmes offres, mais sans informations concernant la commission reçue par le courtier. Le groupe de contrôle a correctement repéré le prêt le moins coûteux et l'a choisi dans 90 % des cas. Ainsi, même avec uniquement les informations de base qui permettent une comparaison relativement directe des coûts liés au prêt, seuls 10 % environ des consommateurs n'ont pas identifié correctement le prêt le moins coûteux.

Lorsque des informations supplémentaires étaient communiquées aux consommateurs concernant la commission du courtier, mais qu'aucunes ne l'étaient concernant la commission du prêteur direct, les informations communiquées ont incité plusieurs répondants à choisir par erreur des prêts plus coûteux et suscité un préjugé défavorable contre les prêts obtenus par l'intermédiaire d'un courtier même si le coût de ces prêts était identique, voire inférieur, à celui des prêts consentis directement par un prêteur. Les auteurs ont mis à l'épreuve trois propositions différentes de communication des informations, les opposant les unes aux autres, tout en maintenant la communication asymétrique des informations concernant les courtiers et les prêteurs directs. Ils ont constaté que lorsque les prêts obtenus par l'intermédiaire de courtiers étaient plus économiques, les consommateurs ne les repéraient que dans 71 %, 72 % et 63 %, la perte moyenne d'exactitude des trois groupes réunis au regard du groupe de contrôle s'élevant à 21,6 %. La communication des informations causait un parti pris important contre les prêts obtenus par l'intermédiaire d'un courtier<sup>5</sup>.

## 5. Conclusion

Il est crucial que s'épanouisse la concurrence en ce qui concerne les opérations immobilières, celles-ci générant la dépense la plus importante des ménages. Ainsi, la plus petite oscillation du pourcentage des coûts s'y rapportant peut avoir d'énormes conséquences. Par exemple, si les commissions gagnées par les agents immobiliers sont de 10 % supérieures au niveau concurrentiel prévalant dans les pays membres de l'OCDE, la perte annuelle pour les consommateurs se chiffre aux environs de 10 milliards de dollars américains.

Les pouvoirs publics, y compris les autorités de la concurrence, peuvent arrêter des mesures bien précises pour promouvoir la concurrence en ce qui concerne les opérations immobilières. Les objectifs de ces mesures seraient notamment les suivants :

- Veiller à ce que les fournisseurs de services à escompte puissent œuvrer librement et aient le même accès à l'information et soient dotés du même statut juridique que les fournisseurs traditionnels et qu'ils puissent faire de la publicité et fixer leurs prix sans contraintes ;
- Faire en sorte que les particuliers puissent réaliser eux-mêmes la mise en contact pour vendre leur résidence sans être désavantagés par rapport à une mise en contact réalisée par un intermédiaire ;
- Assurer l'application vigoureuse du droit de la concurrence s'agissant des cartels et de la collusion concernant les opérations immobilières ;

<sup>5</sup>

Dans le cadre d'une autre mise à l'épreuve où les coûts liés aux prêts obtenus par l'intermédiaire d'un courtier et aux prêts consentis directement par un prêteur étaient identiques, les consommateurs des groupes de contrôle n'ayant pas reçu d'informations ont su le voir dans 95 à 99 % des cas, alors que ceux qui avaient reçu des informations avaient un préjugé défavorable marqué contre les prêts obtenus par l'intermédiaire d'un courtier du fait de la connaissance d'une commission versée à ce dernier.

- Veiller à ce que les consommateurs reçoivent, avant de s'engager, des informations pertinentes, impartiales et véridiques leur permettant de prendre une décision.

Les domaines dans lesquels une intervention des pouvoirs publics pourrait s'envisager sont notamment :

- La réglementation professionnelle (par les pouvoirs publics ou les associations) se rapportant :
  - aux droits exclusifs, telle la capacité exclusive d'exécuter un transfert ou d'agir comme intermédiaire immobilier, surtout lorsque l'accès à la profession est particulièrement restreint ou il existe des ententes relatives aux prix des services,
  - aux prix (par exemple, l'imposition ou la recommandation d'une grille tarifaire, l'interdiction d'accorder une remise aux clients),
  - à la détermination des services minimums à offrir, particulièrement s'agissant des services d'intermédiaire immobilier, alors que les clients peuvent accomplir plusieurs tâches par eux-mêmes,
  - à des exigences liées à l'établissement des professionnels pouvant limiter l'habileté des nouveaux venus à ouvrir un bureau et, de fait, assurer des gains fortuits à ceux qui ont déjà un bureau ;
- Les règles entourant l'accès à l'information divulguée par des services d'inscription partagés ou sur des sites Internet et son utilisation ;
- Les règles applicables aux types d'entreprises qui peuvent consentir des prêts hypothécaires ou en faire la commercialisation.

À ce jour, relativement peu de pouvoirs publics ont arrêté des mesures agressives pour stimuler vigoureusement la concurrence en ce qui concerne les opérations immobilières. Il semble y avoir une tendance à un contrôle plus strict et à un examen des restrictions éventuellement anticoncurrentielles encombrant les opérations immobilières. Dans la mesure où ces opérations font l'objet de restrictions anticoncurrentielles importantes, la réduction de ces restrictions entraînera vraisemblablement des avantages de taille pour les consommateurs.

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## CANADA

### 1. Introduction

Vigorous, healthy, stable and robust are words currently used to describe the Canadian residential real estate market<sup>1</sup>. The residential real estate market saw significant activity in 2006; it was a year in which home ownership reached record levels.<sup>2</sup> Many Canadians dream of owning their own home, and for nearly two-thirds of Canadians, that dream is a reality.<sup>3</sup> Therefore, it is almost inevitable that most Canadians, if they have not already done so, will come into contact with the real estate industry at some point in their lives. Whether that experience is good or bad, the considerable expense associated with home ownership means that any contact with the real estate industry will undoubtedly have a significant and lasting impact on consumers. As a result of the substantial resources invested in home ownership and the sheer number of Canadians impacted, regardless of their socio-economic background and geographic location, the Canadian Competition Bureau (the “Bureau”) has a keen interest in the real estate industry.

### 2. Regulation of the Real Estate Brokerage Industry

In Canada, real estate brokerage falls under provincial jurisdiction, and each province has its own mechanism for the regulation of the real estate brokerage industry, including the licensing or registration of real estate professionals. There is a variety of regulatory models in place across the country. These include: government regulation, shared responsibility or co-regulation between government and the industry, and self-regulation on the part of the industry. In general, each province or territory has a regulatory body that is responsible for regulating business practices, setting standards of conduct and protecting consumers affected by the real estate brokerage industry. It is through the use of legislation, regulations, rules, codes of conduct and policies that the goals of regulation are achieved.<sup>4</sup>

Since each province or territory has its own unique regulatory scheme, the rules and regulations that apply to the real estate brokerage industry differ across the country. There are, however, some fundamental characteristics that are found in each jurisdiction. For example, each jurisdiction requires that a person who trades in real estate for an occupation be licenced or registered with the regulatory body, except for those whom the legislation specifically exempts, such as an executor or trustee selling real estate under the terms of a will or settlement. In addition, the registration or licence requirement does not apply to a person who buys or sells their own home. Rather, it applies to a person who is acting for another person in a real estate transaction. Therefore, a person is not required to use a real estate professional when

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<sup>1</sup> For the purposes of this paper, all references to the real estate industry in Canada refer only to the resale residential real estate brokerage industry.

<sup>2</sup> [www.royallepage.ca](http://www.royallepage.ca), Canada’s Housing Market Remains Strong as 2006 Closes, House Prices Forecast to Increase by 6.5% in 2007.

<sup>3</sup> Canadian Housing Observer 2006, Fourth In A Yearly Series (Canada: Canadian Mortgage and Housing Corporation, 2006) at 47 [hereinafter CMHC Report].

<sup>4</sup> [www.canadianregulators.ca](http://www.canadianregulators.ca)

they are trading in real estate. However, in Canada, licensed real estate professionals are the only people who can be hired to represent third parties in a real estate transaction generally.

One of the responsibilities of the regulatory body in each jurisdiction is to determine the necessary educational requirements that must be met before a person can be authorized to trade in real estate. Each jurisdiction has its own required training and examinations before a person will be granted a licence. Although regulators in each jurisdiction have similar examinations for prospective licensees, traditionally, agents moving from one province or territory to another have been required to take the courses and exams required for registration in the new jurisdiction. In addition, some jurisdictions impose other conditions on obtaining or maintaining a licence to trade in real estate, such as a residency requirement or showing completion of continuing education courses.<sup>5</sup> The rules and regulations imposed by the various regulatory regimes may result in barriers to entry into the real estate profession. The Bureau's study on professions, discussed below, will attempt to assess the impact such rules and regulations have on the real estate industry.

In Canada, there also exists another level of unofficial oversight that applies to the real estate brokerage industry outside of the provincial or territorial legislation and licensing requirements. This form of industry oversight is administered through a national organization, provincial or territorial associations, and local real estate boards. This system does not administer specific legislation; rather, it allows for the organization of real estate professionals and promotes the cooperation of members in real estate transactions, while at the same time, requiring its members to adhere to specific rules and codes of conduct, as a condition of membership. Some conditions of membership include: not disparaging other members and respecting contractual relationships other members have with clients.

There are three distinct levels of voluntary industry organization in the Canadian real estate brokerage industry found under the purview of the Canadian Real Estate Association ("CREA"). CREA is the national association and is mandated to represent the national perspective of the real estate brokerage industry. Its membership includes the various provincial and territorial associations as well as the local real estate boards. CREA is responsible for the development and maintenance of a national Code of Ethics, Privacy Code and Standards of Business Practice. It also provides arbitration services for disputes between provincial or territorial associations, or between members from different provinces.

One of the most significant roles CREA has is with respect to the Multiple Listing Service® (or "MLS®") and REALTOR® trademarks. CREA owns the MLS® trademark and has a proprietary interest in the REALTOR® trademark in Canada. As a result, only members of CREA may refer to themselves as REALTORS® and have access to the MLS®. Therefore, not all real estate professionals are REALTORS®; however, all REALTORS® are licensed real estate professionals.

Another level of the voluntary industry organization that exists in Canada is the provincial or territorial association. The association at this level is responsible for processing membership applications in areas where there is no local board and resolving disputes between boards or members from different boards in the same province. In addition, the provincial or territorial association develops and implements political action activities at the provincial level and may play a role in the education of members in the province or territory.

The local real estate board is the third level of voluntary industry organization in Canada. It is the primary point for processing membership applications from real estate professionals. The local real estate board develops and implements regulations that support CREA's national policies and is responsible for

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<sup>5</sup> This information is obtained from a general review of the legislation and rules that apply to the real estate industry in Canada.

the enforcement of CREA's Code of Ethics and Standards of Business Practice. The local board also provides an arbitration service to resolve disputes between individual members, and determines membership prerequisites, including the planning of seminars and workshops. However, perhaps the most significant function of the local real estate board, as it pertains to REALTORS® and the general public, is its operation of the MLS® system.<sup>6</sup> It is because of the access to the MLS® that comes with membership in a real estate board that most brokers, though they are not legally required to do so, belong to real estate boards.

### 3. Matching

The MLS®, is a network that is widely used by CREA's members in order to facilitate the matching of buyers and sellers of residential real estate. Members of the local real estate board pay for the MLS® system which provides other members of the real estate board with detailed information about the properties available for sale. Each board or association operates its separate local MLS® system, but these are frequently interlinked through agreements among the boards and associations.

The listing information that is available on the MLS® includes: pictures, asking price, offered commission rates, neighbourhood pricing data, room-by-room measurements and specifics on the property condition, renovations, property zoning and rental rates. CREA members can also access the sales history of a home in order to see how many times the property has changed hands and at what prices through the MLS®. The MLS® database is a key tool utilized by real estate professionals in Canada because it provides an ongoing inventory of available properties and ensures maximum exposure of properties listed for sale. This member-based network encourages a high degree of cooperation among competitors in order to effect the purchase and sale of residential real estate.<sup>7</sup>

The intermediary representing the seller is known as the listing broker and the relationship between the seller and listing broker is governed by the listing agreement. A traditional MLS® listing agreement will set out the services that the real estate agent will provide. These can include: research and advice regarding an appropriate asking price; preparation of the listing agreement and appropriate disclosure documents; determination of the offer to cooperating agents; posting to the Brokers' MLS® site and to the Public MLS® site; additional advertising which may include newspapers, online auction sites, flyers and open houses; appointment coordination; negotiating advice; closing services including coordination of the parties' solicitors; and payment of sub-agents.

Current CREA rules impact the terms of listing agreements reached between CREA members and sellers. The rules require that members of CREA remain an agent of the seller throughout the term of the listing contract. As part of that agency relationship, the rule requires the member to be responsible for the accuracy of the information contained in the listing agreement. The rules also specify that the mere posting of property information on the MLS® is not sufficient to satisfy the agency requirement.

The various local boards and associations which are responsible for implementing CREA's rules at the regional level each have their own rules that apply to the local MLS®. These rules and the interpretations adopted by the boards and associations also impact the way in which matching occurs between buyers and sellers of residential real estate.

The listing agreement also sets out the commission rate or fee that is payable upon the successful sale of the property. As part of the commission structure, the listing agreement indicates what rate or amount

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<sup>6</sup> <http://www.crea.ca>

<sup>7</sup> <http://www.crea.ca>

of the commission will be shared with a co-operating broker. Current CREA rules indicate that any listing contract submitted to the MLS® must contain an offer of remuneration sharing to a cooperating broker that is greater than zero.

The internet has had a significant impact on the way the MLS® is used in Canada. Previously, MLS® listings were only accessible to members of the public through a real estate brokerage. Now, there is a public version of the MLS® which is available to the general public at [www.mls.ca](http://www.mls.ca). The public version, however, is a limited version of the MLS® compared to that which is available to real estate brokers. Members of the general public may search the public version of the MLS® to get an overview of the properties available for sale; however, they will have to contact a REALTOR® in order to obtain the more specific property information available on the broker-only version of the MLS®.

As more Canadians consider buying or selling residential real estate without engaging a professional intermediary, or by performing some of the tasks in the transaction process themselves and limiting the role of a professional intermediary, the internet may play a role in the development and promulgation of business models designed to assist in that endeavour.

#### **4. Legal Obligations**

The Canadian legal system recognizes that certain relationships entail fiduciary obligations. Real estate professionals, when acting as agents for buyers and sellers of real estate, have traditionally been held to owe their clients fiduciary obligations. The basic duty of a fiduciary is to always act in a client's best interest. Accordingly, as fiduciaries, real estate professionals in Canada have the following obligations: loyalty to their client; avoiding all conflicts of interest; and acting only in their client's interest.

In addition to the general legal obligations that exist by virtue of being a fiduciary, each regulatory regime imposes additional obligations on real estate professionals licensed in that jurisdiction. The nature and number of obligations vary depending on the regulatory regime; however, most regimes oblige persons licensed to trade in real estate to meet certain standards, such as in the preparation and delivery of documents, disclosure of transaction costs and the handling of transaction moneys.<sup>8</sup>

The issues of agency and corresponding obligations are core issues in the Canadian real estate industry today. It arises in cases of dual agency, where one agent is representing both the buyer and seller in a single transaction. In addition, since the commission to the co-operating broker is paid by the seller, legal issues have arisen as to when the co-operating broker owes his or her fiduciary obligations to the buyer, and when to the seller.

#### **5. Matching Intermediary Fees**

Commission rates and fees in the real estate brokerage industry are not set by any provincial or federal law. As previously indicated, the listing agreement between the seller and real estate agent will include the fees that will be paid for the services of the real estate intermediaries. The fees charged usually follow a trend and vary from region to region according to the differences in the local markets. For the most part, fees are generally a commission expressed as a percentage of the sale price and are payable upon the successful completion of the real estate transaction. It is important to note that home buyers and sellers are free to negotiate the commission they are prepared to pay in exchange for real estate services.

All of the legislation governing the real estate brokerage industry in Canada provides that the remuneration to be paid to an agent in relation to a real estate transaction must be a fixed amount or a

<sup>8</sup> Agency Task Force Report at 15.

commission based on the sale price of the property. However, Ontario legislation specifically states that remuneration cannot be both a commission and a flat fee.

## 6. Trends in the Real Estate Brokerage Industry

The internet is playing an increasingly important role in real estate transactions in Canada. As Canadians become more computer savvy, they are using the internet as a major source of information about properties for sale. In 2001, a report indicated that Canadians cite the internet second only to newspapers as their preferred source of information when researching the purchase or sale of a home.<sup>9</sup> In 2005, an estimated 9.2 million adult Canadians used the internet to window shop for goods and services. Real estate was one of the items individuals searched for; 16 per cent of internet shoppers reported browsing online for real estate during 2005.<sup>10</sup>

Another trend that can be observed in the Canadian real estate brokerage industry, is an attempt by real estate brokerages to differentiate the service offerings available to the public. For example, traditionally, the listing agreement provided that the real estate professional would provide the whole range of services required to sell a property. This would include: taking photographs, hosting open houses, and negotiating on behalf of the seller. Recently, some brokerages are giving consumers the option of determining which services they would like to receive and adjusting the price accordingly. These “à la carte” offerings may require the clients to host their own open houses or play a more active role in the sale of their property.

Finally, some brokers in Canada are lowering their commission rate as a means to compete with other real estate professionals. They are offering the full complement of services that traditionally accompany a real estate transaction; however, they are advertising commission rates that are lower than the rate typically charged in the region where they are operating.

## 7. Previous Bureau Involvement with the Real Estate Industry

As a result of the size of the real estate industry and its direct impact on major purchases by consumers, the Bureau gives a high priority to real estate issues. Consequently, over the years, the Bureau has had significant interaction with the industry across the country. The Bureau’s involvement with the real estate industry has involved both the criminal and civil provisions of the *Competition Act*<sup>11</sup> (the “Act”).

There are a number of criminal provisions in the Act that may apply to the real estate industry. These include: conspiracy (section 45), price maintenance (section 61) and false or misleading representations (section 52).

When business competitors agree: on the prices that they will charge their customers; not to compete for certain customers; not to compete in a particular product or geographic market; or to prevent or impede other businesses from competing in a market; they may be committing a criminal offence known as conspiracy, under section 45 of the Act.

<sup>9</sup> <http://www.royallepage.ca> “Increasing Number of Canadians Embracing Technology in Residential Real Estate Process, Royal LePage Poll”, February 28, 2001.

<sup>10</sup> <http://www.statscan.ca> “The Daily- E-commerce: Shopping on the Internet”, November 1, 2006.

<sup>11</sup> *Competition Act*, R.S.C. 1985, c.C-34.

Section 61 of the Act addresses price maintenance. Price maintenance occurs when a businessperson: by making a threat, a promise or an agreement, attempts to influence upward, or to discourage the reduction of, the prices charged by another businessperson, such as a customer or competitor; refuses to supply a product to, or discriminates against, another businessperson because of that other person's low pricing policy; attempts to induce a supplier to engage in price maintenance.

Advertising in the real estate industry is subject to the sections of the Act dealing with false or misleading representations. In Canada, all representations, in any form whatsoever, that are false or misleading in a material respect are subject to the Act. If the representations were made knowingly or recklessly, they will fall under section 52 of the Act. A representation is deemed to be material if it could influence a consumer to buy or use the product or service advertised.

One of the most significant and far-reaching interactions the Bureau has had with the real estate industry resulted in the 1988 Real Estate Prohibition Order (the "Prohibition Order" or the "Order"). The Prohibition Order came into existence following an investigation which had uncovered evidence of anti-competitive conduct at the local real estate board level. The conduct discovered included: attempts to standardize commission rates and splits; unreasonable restrictions on advertising; prohibitions against offering incentives to list or purchase property through a member; and unwarranted requirements for board membership. The Prohibition Order applied directly to CREA and nine specific boards, and indirectly to all CREA member boards and associations through a series of bilateral competition law agreements. CREA had not engaged in any of the impugned behaviour, but rather, during the investigation it approached the Bureau to negotiate on behalf of the various local boards. As a result, the terms of the Prohibition Order applied to the real estate brokerage industry throughout Canada, and were not restricted to those boards investigated for the specific conduct.

The terms of the Prohibition Order touched upon a number of specified offences under the Act. In particular, the Order prohibited the following: fixing or controlling commission rates or fees posted on the MLS® or other listing services; restricting the advertisement of rates and fees in any independent publication, or influencing the type of advertising accepted by independent publishers; restricting the offering of incentives to home owners; or unwarranted requirements for membership in local real estate boards.

Although the Prohibition Order has since expired, CREA has adopted a Pledge of Competition and Principles of Competition that embodies the spirit of the 1988 Prohibition Order. Despite the existence of these documents, the Bureau continues to have concerns about CREA's existing rules, as well as those of local boards, that serve to exclude entry-only listing brokerages and limited service brokerages from MLS® or otherwise restrict the ability of consumers to obtain the variety of relationships that they want with a broker.

In 1994, a national real estate company and its regional vice-president were convicted in a contested price maintenance case for attempting to influence upwards the commission rates charged by a discount real estate agent to home sellers. These parties were also convicted for discriminating against real estate agents who offered home sellers lower commission rates.

In 2000, the Bureau announced that the Notaries Association of Rivière-du-Loup had pleaded guilty to one count of conspiracy to fix the prices of real estate notary services offered in specific regions in the Province of Quebec. The Notaries Association fixed the prices to be charged for notarized real estate transactions, and these fees were then applied by the notaries. Consumers were directly impacted by these actions because notaries in Quebec are the only professionals who have the right to draw up real estate transactions. Therefore, consumers buying or selling real estate were obliged to utilize the services of

notaries and pay artificially inflated prices. The Association was levied a fine of \$25,000 and was subject to a prohibition order whose purpose was to prevent and prohibit the commission of similar new offences.

In 2003, the Bureau announced that it had settled a price maintenance case with a major real estate brokerage firm. The parties agreed to a binding court order which required a change in their policies to allow the advertising of commission rates or fees. The Consent Order prohibited the company from: adopting a policy or engaging in acts which prohibit their franchisees or their sales associates from setting independent commission rates or advertising such rates; attempting to influence commission rates upwards by any means; and pressuring independent publishers to refuse advertising from any franchisee or sales associate because of the commission rates advertised.

In addition to the criminal provisions outlined above, several civil provisions under the Act may be applied to the real estate industry, including misrepresentation to the public (section 74.01) and abuse of dominant position (section 79).

Similar to section 52, section 74.01 addresses false or misleading representations and would apply to advertising in the real estate industry.

Section 79, the abuse of dominant position provision, is another section of the Act that applies to the real estate industry. The Act outlines three necessary elements, all of which must be met, to conclude that an abuse of dominant position has occurred. Firstly, it must be that one or more persons substantially or completely control, throughout Canada or any part thereof, a class or species of business. Secondly, that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and lastly that the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

In 2006, the Bureau considered specific rules governing the real estate brokerage industry in the province of Alberta. The Real Estate Council of Alberta ("RECA") regulates the real estate industry in Alberta. Previously, RECA had rules that prevented real estate brokers from offering cash incentives and referral fees as a mechanism by which brokers could attract customers. The Bureau was concerned that the rules were having, or were likely to have, *inter alia*, the following effects in Alberta: the suppression of price competition in the provision of real estate brokerage services; the limitation of products (including services) available to buyers and sellers of real property; and/or the erection of barriers to entry in the provision of real estate brokerage services by companies that offer inducements or referrals. The Bureau was of the view that, absent a consumer protection issue, creating an additional source or element of competition in the marketplace could only serve to make the industry more dynamic and ultimately benefit consumers. In this case, as there was no valid business justification for these rules, the Bureau felt that those restrictions were anti-competitive.

The Bureau had the opportunity to discuss those restrictions with RECA, and following consultations with the real estate industry in Alberta, RECA announced its decision to eliminate the rules prohibiting brokers from offering cash incentives to buyers and to remove restrictions on the payment of referral fees in certain circumstances. As a result, brokers in Alberta are now free to offer cash rebates on the sale of a home to buyers as a means of competing for their business. Through the use of referral fees, they will also have access to greater means of identifying prospective buyers and sellers of residential real estate. These rule changes will promote more vigorous competition for real estate services in Alberta.

## **8. Current Issues with Respect to the Real Estate Industry**

The various rules and regulations that pertain to the real estate profession in Canada may raise potential competition concerns. One such concern relates to the disciplinary structure established by the

various regulatory regimes. Most of the disciplinary committees are composed of industry members who are still active in the industry. When a decision is being made by the disciplinary panel, especially if it relates to those industry members introducing new business models, or perhaps advertising lower commissions, there may be an apprehension of bias.

Furthermore, the disciplinary process in the real estate industry is complaint-driven. Therefore, the possibility exists that real estate agents offering discounted commissions, or other non-traditional service offerings, may be subject to more complaints from their competitors because of their business models. As a result, discounters and non-traditional brokers may have a greater proportion of their advertisements and/or service offerings subject to scrutiny than those operating in traditional full-service brokerages. Even if the ultimate conclusion is that the behaviour complained of is deserving of disciplinary sanction, the fact remains that discounters and non-traditional brokers may be disproportionately subjected to discipline as a result of the complaint-driven nature of the disciplinary process.

Another issue that arises in terms of professional rules and regulations pertains to the agency requirement in real estate transactions. The continuous agency relationship mandated by CREA, depending on what it entails, could amount to a minimum service requirement. The Bureau views any minimum service requirement as potentially anti-competitive. Competitive market forces should determine the variety of service offerings. From this variety of offerings, consumers can choose those that best meet their individual tastes and preferences. Restricting the scope and duration of the relationship between broker and seller can impede the entry and expansion of innovative services, limit consumer choice, and prevent price competition from low cost alternatives to full service brokers. Competition unrestrained by minimum service requirements will provide consumers with the benefits of competitive prices and product choices, including the range of prices and service levels that best respond to consumers' preferences. Interfering with the competitive process distorts market outcomes and leads to higher prices for consumers.

In order to better understand how the rules and regulations impact the real estate profession, in addition to other professions, the Bureau is currently involved in a comprehensive study of accountants, lawyers, optometrists/opticians, pharmacists and real estate agents in Canada. The study will examine the extent to which these self-regulated professions use restrictive practices to control entry into their profession and/or control the conduct of members. Such restrictions would include barriers to entry into the market (i.e. barriers to accreditation and movement of employees), the ability of related professions to offer competing services, business structure and type of practice (i.e. limits on office location, size, minimum services and equipment), mandatory or "suggested" fee schedules and advertising restrictions. The study is based on the Bureau's own research of the legislation, regulations and codes of practice governing a range of professional services. The Bureau also sent questionnaires to professional associations, colleges, and boards. Participation in the study was voluntary, even though the study did rely heavily on the questionnaire responses received. The Bureau hired economic experts to assist us assess the economic effects on competition of the various types of restrictions. If possible, the experts will analyse the impact of the restriction relative to similar restrictions imposed by other professions and relative to similar restrictions imposed by the same profession within different jurisdictions. In May 2007, the Bureau will ask the professional bodies involved in the study to comment on the accuracy of our summary of the regulations. Following the consultation process, the Bureau will publish a final report in the fall of this year. The final report will analyse the source and objective of the restrictions found, and address whether alternative less restrictive means of achieving the same objective might be desired.

In addition to the potential competition concerns that exist with respect to the real estate industry, there are other related industries on the periphery of real estate transactions in which competition issues may arise.

In Canada, home buyers who have less than a 25 per cent down payment are required to buy mortgage insurance to protect their lender from default. At the end of September 2006, approximately 42 per cent of home buyers were in the position that necessitated the purchase of mortgage insurance. Previously, there was only one supplier of mortgage insurance, a Crown corporation called the Canadian Mortgage and Housing Corporation (“CMHC”). By virtue of CMHC’s being a Crown corporation, it had a government-backed guarantee. The Government of Canada has recently given similar guarantees to other mortgage insurers in order to allow them to compete in this industry.

As a result of the increased competition in the mortgage insurance industry, there have been changes observed in the rates charged to consumers. Instead of simply applying a preset premium on the amount borrowed, insurers are now factoring in the borrower’s credit score in a way that can lower the cost of coverage. The use of risk-based pricing seems to be a result of increasing competition in the business of providing mortgage insurance.<sup>12</sup>

Title insurance is a growing industry; however, there are currently a limited number of firms operating in Canada. As more and more home buyers desire the peace of mind that comes with title insurance, we may see demand increase over the next few years.

## 9. Conclusion

The Canadian residential real estate market has been very strong in recent years and that strength is forecasted to continue into the foreseeable future. The specific characteristics of the real estate industry vary depending on the region, however, in all jurisdictions in Canada, real estate professionals require authorization from the provincial or territorial regulator before they can represent third parties in real estate transactions. In addition to the system of formal regulation that exists, there is also a voluntary industry organization that impacts the real estate industry across the country.

Emerging trends such as the growing use of the internet, “à la carte” offerings, and discount brokers have provided consumers with the ability to choose from a variety of relationships that they want with a broker. However, current restrictions may create an environment where the possibility of anti-competitive behaviour exists. As a result of the significant impact the real estate industry has on consumers across the country, the Bureau has been, and will continue to be, very interested in real estate issues in Canada.

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R. Carrick, “Home buyers get a break on mortgage insurance” *The Globe and Mail* (30 November 2006) B20.



## **CZECH REPUBLIC**

### **1. Introduction**

The present contribution of the Office for the Protection of Competition (hereafter only “Office”) deals with the description and following evaluation of the legal control of conveyance of real estate and providing real-estate service in the Czech Republic in terms of competition, viz. from the following two points of view.

The first part is devoted to the legal form of the conveyance of right of ownership of real estate, on the one hand according to the present legal form, and on the other hand according to the new draft of the legal form. The high tolerance of the present legal form is pointed out, as the written form of the contract with the expression of consent of the parties on the same document is sufficient to observe the terms laid down in the respective legal regulations for conveyance of real estate, without requiring any other involvement of public authority or professional association (e.g. notary record, consultations with a lawyer etc.). In terms of competition such a legal form is very favourable. On the other hand, the legal form for the conveyance of real estate included in the draft of the new Civil Code introduces the obligatory form of public instrument and hence also obligatory exploitation of the services of a notary. This may be seen as restricting competition because other subjects will be excluded from providing services consisting in drawing up documents on conveyance of real estate, e.g. lawyers, who at the present time provide such services. Therefore the Office enforces to maintain the principle of the present legal form.

The second part of the contribution monitors the market of providing real estate services in the Czech Republic in terms of the legal regulations and decision-making activities of the Office. According to the legal order of the Czech Republic, real estate activities are a free business and to be engaged in this trade no special professional qualification is required. The legal form again is very liberal and poses no significant barriers for entering the respective branch. Analysis of the decision-making practice of the Office shows that there is an abundance of undertakings on the real estate market with a very low market share making this environment highly competitive.

### **2. Conveyance of right of ownership of real estate in the CR**

#### **2.1 *Conveyance of right of ownership of real estate according to the present legal form***

In Czech legislation we understand real estates as land and buildings connected to earth on solid foundations. Everything else is chattel personal. By conveyance of real estate the right of ownership is acquired based on declaration of will (i.e. purchase, donation, exchange contract etc.).

If the right of ownership is acquired by contract, it is important to distinguish whether the legal order admits that the contract has translation or obligation effects. In the former case conveyance of right of ownership is based on the contract, in the latter the contract is a mere legal fact giving rise to an obligation to convey the right of ownership; conveyance proper takes place by another legal fact, e.g. registration in the Land Registry.

### 2.1.1 *Aside – Land Registry in the Czech Republic*

The Land Registry of the Czech Republic is a file of data of real estates in the Czech Republic including their inventory, description, and geometry and position. Part of the Registry is records of rights of ownership and other property rights, as well as other rights on real estates set by the act. It is a source of information, which serves to protect the rights on real estates, for tax and fee purposes, to protect the environment, agricultural and forest land resources, mineral resources, historic landmarks, for regional development, to value real estates, for scientific, economic and statistical purposes and to create more information systems.

It is kept as an information system about the territory of the Czech Republic, primarily computer-based, where the basic regional unit is the cadastral region and the documents are:

- a) file of geodetic information, which includes the cadastral map (including the numeric expression in the specified cadastral territories),
- b) file of descriptive information, which includes data on cadastral territories, plots of land, buildings, flats and non-residential premises, proprietors and other authorised persons, legal relations and rights and facts as provided by law.

The Land Register Offices provide the data from the Land Registry in the form of public instruments; everybody has remote access to the computer files by means of the computer network into the central data base. Inspection of the Land Registry offers free-of-charge selection of information about the land and buildings registered in the cadastre, including information on their ownership and information about the state of some proceedings at the Land Register Offices.

In this way, via the Land Register Office, which is a public service body executing state administration of the land registry, the state enters into legal relations in real estate to ensure that the right of ownership and other property rights are transparent. On the basis of the principle of tablatore, who and when became the owner of a certain real estate or subject of other property rights towards this real estate is defined and at the same time outwardly released to third parties. Discrepancies between the real state and this register occur only in cases when the entry was made on the basis of a void document.

### 2.1.2 *Acquisition of right of ownership by registration in the Land Registry (so-called tablatore principle)*

If the real estate, which is the object of record in the Land Registry, is conveyed, the right of ownership is acquired by registration (so-called tablatore) in the Land Registry, unless provided otherwise; on principle the contract has an obligatory effect. By registration we mean an entry in the cadastral documents. Permission is permitted by decision of the Land Registry.

Registration proceedings are instituted on motion. The motion for registration of right of ownership or other property right in the Land Registry may be filed by any party unlimited in time. It is however particularly in the interest of the acquirer of the real estate to make the registration as soon as possible. The parties to the proceedings are parties of that legal act, on the basis of which the right is to be entered in the Land Registry (nobody else, even if in any other way touched by this act, e.g. if his/her pre-emptive right was violated). The proceedings are instituted on the day of delivery of the written motion to the Land Registry. The motion shall contain the prescribed particulars. If not, the Land Registry shall invite the submitter to remove the deficiencies in the motion in a specified reasonable time. If the submitter complies, the Land Registry will decide that the registration can be entered; failing which the motion will be declined. Until the decision of the Land Registry is made on the registration of the right of ownership in

the Land Registry, parties to the contract under articles. For instance the seller is obliged to hand over the object of the purchase to the buyer and to convey to the buyer the right of ownership of the real estate; on the other hand the buyer is obliged to pay the seller the purchase price.

No remedial measure is admissible against the decision permitting the registration, neither any legal action in administrative justice. If the Land Registry denies the motion for registration, it shall deliver the decision on denial of registration to all partners to the contract or to other authorised persons. Remedial measures against this decision are admissible. If the Land Registry does not allow an appeal against the submitted remedial measure in full extent, the court makes the decision. The legal effects of registration begin on the basis of a final and conclusive decision on its permission on the date when the motion was delivered to the Land Registry.

The motion for entry into the Land Register is liable to an administrative charge in the amount of 500 CZK (ca 17 EURO).

### 2.1.3 *Form of contract on the conveyance of real estate*

For contracts on the conveyance of real estate the law lays down an obligatory written form. Czech law distinguishes the simple written form and stricter written form, i.e. the form of an official (notary) record. To conclude a valid contract on conveyance of real estate the simple written form is sufficient and the statements of the parties must be on the same document. The written form of the contract naturally includes own signatures of the parties.

No legal regulation imposes on the parties to the contract an obligation to provide the documents with a verified signature. However in proceedings on permission of registration the Land Registry must find out if the original contract indeed contains the written manifestation of will of the persons stipulated in the contract, with special regard to persons whose right based on the contract expires or is limited. The Land Registry considers the manifestation of will of the persons as established if:

- their own signatures on the original contract were officially verified under special legislative act,<sup>1</sup> or
- the contract was made up by notary record, or
- the contract was made up by a lawyer who explicitly confirmed that the contracting parties, whose identity he/she established, had signed the contract before him/her (in this case the Land Registry checks whether the person who signed the document and explicitly confirmed the identity and authenticity of the signatures of the contracting parties is the lawyer registered in the list of the Bar Association), or
- the legal entity submitted a signature card identical with the signature on the contract and if business companies also submitted the abstract of the trade register (the signature on the signature card must be officially verified), or
- the party to the contract recognises the authenticity of the signature before the Land Registry.

<sup>1</sup>

In addition to the notary, the verification of the authenticity of a signature is also in the scope of power of the Ministry for the Interior, regional authorities, local authorities of communities with extended power, local authorities, authorities of city districts and districts of cities or towns divided by legislative regulation and district authorities of the capital city Prague a list of which is specified by delegated legislation.

According to the present legal form the obligatory condition for the validity of the contract on conveyance of real estate is the written form with manifestation of will of the parties on the same document. For failing to observe the legal written form of contracts on conveyance of real estate sanctions are given in the form of their absolute invalidity.

The contracting parties may, as mentioned above, draw up this contract themselves; when conveying real estate in the Czech Republic the service of a notary or other juridical profession is not necessary. In terms of competition this regulation is seen as very positive. The freedom of choice not only speeds up these acts but also reduces the fee and makes them more attractive.

## **2.2 *Conveyance of real estate according to the draft of the new Civil Code***

### **2.2.1 *Principle of recording***

The new legal form of the Civil Code, which is ongoing, proposes to abandon the so-called tablatore principle for acquisition of the right of ownership. According to the draft the right of ownership shall be acquired only on the basis of a contract regarding the real estate and no entry in the Land Registry shall be necessary for the creation of the right of ownership. The new legal form imposes an obligation on who acquired the right of ownership of real estate entered in the Land Registry, to put forward without undue delay entry of such a right in the Land Register. This entry shall be merely declaratory and not constitutive. The new legal form considerably reduces the pressure on parties to the contract on conveyance of real estate to have the change of the owner marked out in the Land Registry, which might cause discrepancies between reality and registration and eventually to a lower credibility of the public land records.

### **2.2.2 *Form of the contract on conveyance of real estate***

The ongoing new legal form requires the form of a public instrument for legal proceedings instituting or conveying the right of real estate, as well as for legal proceedings changing or revoking such a right. This would mean abandoning the present situation when anybody could draw up public records on real estate by himself. In practice, according to the new legal form, it would be obligatory to employ the service of a notary when conveying real estate. In terms of competition such a solution is not beneficial because it excludes the possibility of employing other juridical professions, namely lawyers, in association with the conveyance of real estate.

## **2.3 *Conclusion***

In terms of competition, the present situation in the legal form of conveyance of real estate is very friendly. Anybody can draw his/her own contract on conveyance of real estate, or can exploit the service e.g. of a lawyer or notary. Necessary is only the written form with the manifestation of the parties on one document. The new legal form of the Civil Code will institute the obligatory form of public record for conveyance of real estate, thereby the obligatory service of a notary. This solution would lead to a restraint in competition having negative consequences.

## **3. *The market of real estate service in the Czech Republic***

### **3.1 *Legal regulation of the real estate business market***

Real estate activities in the Czech Republic are subject to the Trade Act, which distinguishes two categories of trade – trade subject to declaration and permitted trade. The trade certification of the former becomes effective on registration at the local Trade Licence Office (or at a later date stated in the registration as the day of launching the business) providing that the applicant satisfies the general conditions and qualification requirements. In terms of various qualification requirements the Act divides

the trade subject to declaration into vocational, qualified and unqualified, while permitted trade requires special qualification and the applicant may not carry out trade until after acquiring the legal power of decision granting a licence. Since the Act does not require professional or any other qualification to carry out real estate activities, it is unqualified trade. Therefore to obtain a licence it is necessary to satisfy only the general conditions for carrying out trade by physical persons, i.e.

- age of 18 years,
- qualification for legal acts, having no criminal record,
- the fact that the physical person, if doing or had been doing business in the Czech Republic, has no arrears of tax from this business on his/her personal account,
- the fact that the physical person, if doing or had been doing business in the Czech Republic, has no arrears of premium payment for social security and contribution to the state employment policy,
- the fact that the physical person, if doing or had been doing business in the Czech Republic, has no arrears of premium payment for public health insurance.

### **3.2 Prohibited contracts on the real estate market**

In its activities the Office for the Protection of Competition has dealt with cases of real estate agencies several times. In association with the distortion of competition in the form of a prohibited contract the Office rendered the decision “*Association of real estate agencies*”.<sup>2</sup> Party to the proceedings was the Association of Real Estate Agencies of the Czech Republic (hereafter “ARK”), unincorporated association registered with the Ministry for Internal Affairs. The ARK was instituted in 1991 by a number of real estate agencies from various parts of the Czech Republic. At present, ARK is the largest professional association of professionals, businesspeople and others operating on the real estate market of the Czech Republic. Membership counts ca 200 real estate agencies. At the time of making the decision on the case the total number of ARK members on the relevant market was 191, i.e. ca 2.8 % of the total number of active real estate agencies. Factually the relevant market was specified as a market for providing real estate services, in terms of geography over the entire territory of the Czech Republic. When defining the share of ARK on the relevant market the Office based on the overall income of real estate agencies in the CR; in 2001 this share was ca 3.2%.

The decision of the Office was directed against the provision of article II of the Operation Code adopted by the ARK general assembly on 23 January 1993. This article contained the recommended commission rate for sale, purchase, renting and administration of real estate. The Operation Code was drawn up as obligatory for all real estate agencies, legal entities and physical persons who are ARK members. All members were acquainted with the Operation Code and they complied with it. The Operation Code was also released on the ARK Internet pages. The Office declared that competition had been distorted by specifying recommended commission rates for sale, purchase, renting and administration of real estate. In this way the rates for these services were indirectly determined restricting competition among members, which distorted competition on the real estate service market, consequently also the conduct of real estate agencies, which had not been associated.

The Office declared that the consequence of this decision of the ARK general assembly to accept the recommended commission rates was that by specifying the commission rates the ARK members had been

<sup>2</sup> Decision S 158/03-6000/05-ORP of 20 October 2003.

influenced. When evaluating the impact of the decision on the relevant market the Office also considered that fact that also the rates of non-member real estate agencies ranged within these recommended commission rates; and also the fact that the Operation Code, which contained the recommended commission rates was effective as of 1 January 1993, i.e. in the period when the real estate market was being formed. This was also confirmed by a participant to the proceedings who stated that the commission rates were recommended on the basis of experience from abroad, because in the early 1990's we had no internal information. In consequence this fact considerably affected primarily the emerging real estate agencies, which had no experience at the beginning of their activities in providing real estate services and the impact of the ARK decision was that it had a greater effect on the market.

### **3.3 *Review of concentrations on the real estate market***

In 2001-2005 the Office handled ca 30 cases of approved mergers of undertakings on the real estate market, which is ca 5 % of the total number of all the considered mergers. In all the cases concerning the real estate market the Office permitted the merger of the undertakings. The reasons for this were the very low market shares of the merging undertakings on the relevant markets of the Czech Republic. In all cases the Office reached the conclusion that the mergers would not increase their market power to such an extent as to allow them to behave independently of the other undertakings or customers on the relevant markets in the CR, therefore that they would not win a dominant position, the consequence of which could be substantial distortion of competition in the Czech Republic.

When defining the relevant market the focus of the Office was on activities carried out in the Czech Republic by undertakings, over whom control should have been gained due to the merger, and particularly those undertakings whose activities overlapped with activities of the proposing party.

In the majority of cases concerning mergers on the real estate market the Office defined the factually relevant market as the market of renting non-residential premises. The relevant market of renting non-residential premises can be further divided according to how these non-residential premises will be exploited, for instance the market of renting floor space, market of renting hotel space and market of renting office space. With regard to the very low market share of the merging companies both on the overall market of renting non-residential premises and in the market segments, the Office proceeded to specify the relevant markets in greater detail only in a few cases. In geographical terms the capital city of Prague was usually defined as a relevant market. Here the competitive conditions are sufficiently homogeneous and distinctly distinguishable from other territories, namely in terms of rates for renting non-residential premises, which are comparatively the same on the territory of Prague, but distinctly differ from rates in other towns or regions of the Czech Republic. In ca two cases the relevant market was defined as the market of developer activities (purchase of land, building or restoration of older buildings, financing and implementation of a design) on the territory of Prague.

The share of merging undertakings on these specified relevant markets in most cases did not exceed 1%. The exception was a merger, the consequence of which was that the company HCEPP II controlled by a company from Luxembourg, could win the opportunity to control the Czech joint-stock company Komerční zóna Rudná ("KZ Rudná"), at that time controlled by the German company Viterra GDP. The relevant market was defined as the market of renting logistic stores and distribution centres at European standard A on the whole territory of the Czech Republic. Of the merging undertakings only KZ Rudná operated on the defined relevant market with a market share not exceeding 10%. However, the Office declared that the market was still in a stage of expansion and that it could be assumed that in the future the space of logistic stores and distribution centres would increase and thus the market share of KZ Rudná would decrease. At the same time other undertakings operated on the market, which were capable of maintaining effective competition.

In terms of the market share more important were transactions due to which the Czech company Americká 33, subsidiary of the company from Luxembourg, would have gained shares representing a 100% share in the registered capital of the Czech company IPB Real to date owned by the Czech Consolidation Agency. On the developer market on the territory of Prague, which had been defined as a relevant market, namely IPB Real was active having a market share not exceeding 15%. However the Office stated that there are many competitors on the defined market. Besides there are no serious barriers preventing to enter this market and it can therefore be considered as competitive from the point of view of competition.

As concerns the overlapping of activities of the merging undertakings, the proportion of horizontal and conglomerate mergers on the real estate market in the given period was balanced.

### **3.4 Conclusion**

From the above we can conclude that the real estate market in the Czech Republic is extremely competitive. It is obvious from the very liberal legal form of providing real estate activities as well as from the decision-making practice of the Office. The market share of undertakings on the relevant market is very low and there are no significant barriers on this market preventing effective competition. This fact was reflected especially in decision of the Office regarding the permission of mergers. In 2001-2005 the Office accepted approximately 30 proposals for mergers of undertakings in the area of the real estate market and all the mergers were permitted. Due to the fact that services interchangeable with services provided by the undertakings were freely accessible on the market it was concluded that the permitted mergers would not have a negative impact on the clients of such services.

## **4. Market with real estates intended for housing**

In the Czech Republic the situation in the area of rented flat control is very specific, in consequence of which we may see a certain deformation on the market of real estate intended for housing, as shall be described further on.

### **4.1 Rent control in the Czech Republic**

The rent for flats, to which the tenant obtained the right of use for an indefinite term before 1992, is called "non-arranged tenancy"; in such cases the rent had been established before the economic reforms, which took place in the Czech Republic in the 1990's and reflected completely different economic conditions. The Civil Code, which gives the general definition of rent, had a specific regulation for these cases enabling unilateral increase in the rent on the basis of the Regulations of the respective ministry. This is what we call rent control.

In residential lease contracts concluded after 1992 it was possible to determine the market rent, or to stipulate the mechanism of specifying the amount. Therefore rent control does not apply in these cases and is based only on the current market conditions; this is what we call market rent.

According to the last census conducted in 2001, in the Czech Republic there were 1,092,950 tenement flats. Since then about 75,000 flats have been built, but only 10% of them are flats intended for commercial renting. The number of rent-controlled flats is now approximately 750,000, i.e. one fifth of the housing stock. Hence only about 350,000 flats are on the free market. The difference between market and controlled rent is enormous. In small towns or towns where the unemployment rate is high, the difference between controlled and market rent amounts to tens per cent, in the larger towns, and in Prague particularly, it amounts to hundreds per cent.

In 2001 the Constitutional Court repealed rent control enabling unilateral increase as unconstitutional and until last year no new legal form had been adopted; during this entire period controlled rent had not been increased at all and this led to a further gap between market and controlled rent. The Constitutional Court actually called upon the general courts to deal with the individual actions of the owners of the flats and to establish the rent themselves. However in practice the courts did not accept this decision.

The act on unilateral increase in flat rent came into effect as late as 31 March 2006. According to this act the controlled rent is to increase from January 2007 to 2010 by an average of 14.2% every year. The increase in rent shall be based on a tabular chart, which again is based on averaged prices of real estate in the respective localities with the objective of reaching in 2010 a rent, the annual average of which would correspond to 5% of the price of the real estate (in some parts of Prague it would be less). Expressed in per cent, we expect the rent to increase according to the locality and range between 0 and 24.7% a year (Prague). It is assumed that it will be possible to achieve the target price of the monthly rent for 1 m<sup>2</sup> of floor space before 1 January 2010; the first possibility to increase rent was set down for 1 January 2007. The aim of the act on unilateral rent increase was to remove price deformations caused by long-term rent control and beginning 2011 to create conditions to apply a contractual approach to rent. From 1 January 2011 the relations between the tenant and landlord should be based on the Civil Code only and not on specific regulations and then the differences between market and controlled rent should cease to exist.

It is expected that the new act will remove all price and legal deformations in the area of rented housing, including unfair practice of the black market and gradual improvement in the entire rented sector. The results of the application of the act in the relatively short time of its existence showed that approximately two thirds of the communities took advantage of the opportunity to increase rent as of 1 January. The rent was raised mostly by the maximal possible amount. In houses where the rent is state-controlled the tenants have to pay on average nearly 19% more than in the previous year; in Prague as much as 35% more. In spite of the positive responses to the new act it has also been reproached, mostly pointing out that the target value of monthly rent will not be the actual market price because the applied average of the value of the real estate of the respective locality may not correspond to its real value. In some localities the target price will remain to be much below the costs, in others it will not.

#### **4.2      *Impacts on competition***

It has not yet been possible for competition in the area of real estates intended for permanent housing to develop fully. This fact had a negative impact on the market of rented housing, which is divided in an unsubstantiated way into two parts, dramatically differing in rent. The consequence of a rent, which is profoundly below the market level, is that it reduces the value of the tenement for its owner (and due to the deformation of the market with such flats) and is no motivation for those who live in these rent-controlled flats to acquire their own housing, which deforms the housing market.

The new act on unilateral increase in rent should help to remove such problems.

## FRANCE

### 1. Frequency of Transactions

*Please provide an indicator of the average length of time between transactions for residential homes (such as how long the average household remains in an owned home). Discuss the factors that may result in low or high individual willingness to sell and buy homes. Please indicate the percentage of households that own their primary residences*

La durée moyenne des négociations lors d'une transaction immobilière est de trois mois. 57% des Français sont propriétaires de leur résidence principale. Le pourcentage des primo-accédants sur le total des acheteurs était en France de 59 % en 2003 (données Fnaim) et tend à décroître.

Les motivations poussant à la vente ou à l'achat de biens immobiliers sont, pour l'essentiel, liées à des facteurs externes au marché de l'immobilier que sont la mobilité professionnelle ou l'agrandissement de la famille. Selon l'observatoire national des marchés de l'immobilier, 62 % des changements de résidence est en effet lié à des causes professionnelles. Nous ne disposons pas de données précises sur les paramètres susceptible de stimuler le niveau des transactions. Il est toutefois possible de citer des éléments généraux bien connus tels que le niveau des taux d'intérêt par exemple.

Le Prix moyen de la résidence est de 250 000 euros avec un prix moyen du m<sup>2</sup> de 3029 euros en 2006.

### 2. Matching

#### 2.1 *Matching with no intermediaries*

En France 52% des transactions immobilières sont réalisées entre particuliers.

#### 2.2 *Mechanism of matching with intermediaries*

Plus de la moitié des transactions immobilières s'effectue entre les particuliers et l'authentification de la vente s'effectue chez le notaire. La profession d'agent immobilier fait l'objet d'une réglementation particulière.

*What services or tasks are typically provided by real estate intermediaries?*

Les services fournis par l'agent immobilier peuvent inclure l'estimation et l'évaluation du bien immobilier, la recherche d'un bien à acquérir ou, inversement d'un acheteur susceptible d'acquérir un bien en vente, l'organisation des visites de logements, la mise en relation avec d'autres professionnels de l'immobilier (diagnostics en particulier), le conseil, l'organisation de la mise en vente-la publicité commerciale en vitrine dans les revues commerciales ou professionnelles et sur Internet. Enfin, l'agent immobilier peut, dans le cadre d'une transaction immobilière, rédiger la promesse de vente.

*What are the legal obligations of a real estate intermediary*

La profession d'agent immobilier est réglementée. L'exercice de la profession est soumis à la détention d'une carte professionnelle, d'une garantie financière et d'une assurance professionnelle. La rémunération de l'agent immobilier est libre. L'agent immobilier doit toutefois offrir sa prestation dans le cadre d'un contrat écrit et est soumis à des règles de publicité de prix.

*Please state whether agents are rarely/sometimes/frequently/typically/most commonly given an exclusive right to sell?*

Les agents immobiliers peuvent avoir un mandat exclusif ou un mandat simple (possibilité de mandater plusieurs agences pour la même mission). Depuis 2002, le recours à un mandat exclusif semble de moins en moins fréquent, le mandat simple étant préféré par les vendeurs dans environ 75 % des cas.

### **2.3 Matching intermediary fees**

*What is the typical announced fee for matching from agents (as a % of total home price)?*

La rémunération de l'agent immobilier est une commission correspondant généralement à un pourcentage du montant de la transaction. Il peut aussi proposer un forfait de transaction mais cette pratique n'a pas la faveur des professionnels dans le contexte actuel de marché haussier. Ce pourcentage varie actuellement dans une fourchette de 9 à 15%. Selon la profession, les taux de commission n'ont pas connu une forte augmentation compte tenu la tension actuelle sur le marché résultant d'une offre de logements largement insuffisante par rapport à la demande actuelle

*To what extent are agent fees negotiable? What are the typical actual fees for matching (as a % of total home price)? What has been the trend over the last five years? What are the typical fees in the national currency for an "average" home sale? What has been the trend over the last five years?*

La DGCCRF ne dispose pas d'éléments particuliers sur ce point.

### **2.4 Role of professional association rules, governmental rules and listing rules**

L'essentiel des règles sont de nature législative ou réglementaire. Les transactions immobilières sont fortement réglementées par la loi, et tombent sous le coup des dispositions générales du code de la consommation et le code du commerce. Le commerce électronique fait l'objet de réglementations spécifiques et d'une surveillance mise en place par la DGCCRF.

Les professionnels ont rédigé et conclu une charte professionnelle « des modes alternatifs de règlement des conflits en matière immobilière ». Cette charte est mise en œuvre depuis juillet 2006. Elle fixe une procédure de règlement des litiges entre professionnels et consommateurs. 11000 entreprises, soit environ un tiers des agences ont signé cette charte. Le fait pour un professionnel de signer la charte (engagement contractuel facultatif) peut le conduire à être sanctionné par une commission disciplinaire en cas de non-respect de ses dispositions.. Les sanctions prévues sont l'avertissement, le blâme et la radiation des membres signataires de ladite charte.

## **3. Transfer of Control**

### **3.1 Transfer regulations**

Les règles de transferts de la propriété immobilière sont d'ordre public en France. Le notaire est l'officier public ministériel qui détient en monopole cette activité.

## 4. Housing Loans

### 4.1 *Role of non-banks in housing lending*

L'attribution de prêts immobiliers est, aux termes des dispositions du Code monétaire et financier, de la compétence exclusive des établissements financiers. Ceci n'empêche pas que des intermédiaires en opérations bancaires spécialisés dans la recherche de prêts aux meilleures conditions (courtiers en prêts immobiliers) interviennent sur ce marché.

Ces intermédiaires procèdent à une analyse préalable et individualisée de la situation des emprunteurs et leur proposent une ou plusieurs solutions de financement à conclure auprès d'un organisme prêteur. Les résultats obtenus permettent de déboucher sur des taux légèrement inférieurs à ceux consentis par les réseaux bancaires. Ces intermédiaires peuvent percevoir des commissions, sous deux conditions :

- aucun frais ne doit être acquitté par le candidat emprunteur avant que son prêt ne lui soit accordé,
- l'intermédiaire doit afficher très clairement, notamment dans les publicités qu'il pourrait être amené à faire, les mandats des organismes financiers qu'il détient.

Une enquête, ayant pour objectif de contrôler l'activité des intermédiaires en opérations bancaires a été réalisée par la Direction générale de la concurrence, consommation et répression des fraudes du Ministère de l'économie et des finances au cours du 2ème trimestre 2006. 125 contrôles ont ainsi été effectués dans 21 départements. Deux marchés étaient concernés souvent couverts par des opérateurs distincts :

- celui de la restructuration de prêts,
- celui du courtage en crédit immobilier.

Le courtage en crédit immobilier concerne une clientèle recherchant une mise en concurrence rapide des différents établissements prêteurs, à l'occasion d'un achat ou d'une renégociation du taux du crédit en cours. Ce marché connaît en France un essor très rapide, le recours à un intermédiaire pour obtenir un prêt devenant une pratique de plus en plus courante.

Des dispositions du Code monétaire et financier encadrent cette activité. L'enquête a confirmé que les courtiers spécialisés dans l'offre de crédits immobiliers bénéficient de mandats réguliers délivrés par de nombreux établissements bancaires.

Des manquements ont en revanche été relevés au regard des règles relatives à la publicité mentionnées dans l'article L.321-2 du code de la consommation (indication dans les messages publicitaires des noms et coordonnées des établissements les ayant mandatés).

Toutefois les résultats de l'enquête attestent que les courtiers exercent, dans leur très grande majorité, leur activité avec sérieux.

### 4.2 *Tying of housing loans to other products*

La fourniture de prêts immobiliers est une activité extrêmement concurrentielle sur le marché français. Le taux des prêts à taux fixes à 15 ans se maintient actuellement en dessous du taux de rémunération des obligations d'Etat à 10 ans. L'incitation à coupler cette activité, faiblement rentable, avec d'autres, plus rémunératrices, est donc très forte.

Bien qu'aucune obligation légale ou réglementaire n'existe dans ce domaine, il arrive très fréquemment que les banques tentent de conditionner l'attribution du crédit par l'ouverture préalable d'un compte courant sur lequel serait domicilié une part non négligeable du revenu du ménage candidat à l'emprunt. Il s'agit d'une clause léonine. Plusieurs établissements financiers continuent toutefois à la proposer compte tenu du caractère très lucratif de l'activité de banque de détail par rapport à la fourniture d'un prêt immobilier.

## HUNGARY

### 1. General characteristics of the market, frequency of transactions

There are about 150.000 changes in homes on a yearly basis in Hungary, but only a two-third of these alterations will be realized in the form of a 'real estate transaction', according to data provided by the Hungarian Central Statistical Office (CSO). This means that every year, there are 95.000 homes transferred on the real estate market.<sup>1</sup> Although there is no official indicator available for that, one can compute that a residential home will change ownership once in every 27.2 years and a change involving a transaction on real estate markets happens every 43.9 years (the total number of residential homes divided by real estate transactions in a given year).

The percentage of households owning their primary residences in Hungary is quite high. According to 2005 data, of the 4.17 million residences 3.64 millions were inhabited by their owners. This leaves with the fact that over 87% of the residences are owned by their inhabitants. A further 0.21 million residences (5%) were decided to be left temporarily empty by their private owners. Renting a flat is not very popular in Hungary: only 6% of the homes are rented by households, with slightly more than a half of that having a private owner, the rest being in municipal property. The proportion of secondary residences is about 0,5%.

There has been a huge boom in residential home prices in Hungary, which can at least partially explained by government subsidization policy.<sup>2</sup> In 1999, the average price of a residential home was 3.4 million HUF, which has almost tripled in four years, reaching 9.3 million HUF by 2003. (The total inflation rate was a mere 32% in the given years, compared to the 270% in the case of real estates.) The average growth rate in prices is even surpassed by larger towns and especially in the capital of the country: in Budapest average square meter prices amount to 1200-5500 euro.

### 2. Matching

There are no reliable information sources available for matching in Hungary. According to the CSO, the agencies that were capable of providing information in this respect, the professional intermediaries are not interested in providing data that can be made publicly available. This can be explained by the fact, that the limited market transparency is a significant source of market power for them. The information provided below is therefore based at least partly on anecdotal evidence, newspaper articles or analyses published by real estate agents themselves, latter often also with a marketing perspective.

The most common intermediaries in Hungary are real estate agencies. There are numerous undertakings active on the market, their size range from one-man enterprises to multi-town networks with the largest company having over 60 offices located in different regions. Their most common activity is to act as an intermediary for the seller, an intermediary for the buyer is less frequently used.

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<sup>1</sup> *Current situation in the residential home sector 1999-2005 Hungarian Central Statistical Office, October, 2006*

<sup>2</sup> See Point 17

The real estate intermediaries offer services mostly in the field of information providing, advertising and negotiating. Based on their general expertise, they inform the seller about the recent demand and price tendencies in the area, and help the seller to formulate an adequate price basis. In the field of marketing, together with offering the real estate in question for their existing clients, the intermediaries place advertisements aimed directly at the seller's home into various media. These advertisements are often published with pictures, which are taken by the agents of the intermediary. The potential buyers then meet these agents and negotiate a price with them, which should finally be approved by the buyer. Services more extensive than the ones listed here (making homes more attractive) are rather uncharacteristic for the Hungarian market.

Internet is a widely used source for marketing the services of real estate intermediaries. The largest intermediaries have well-developed websites, capitalizing on the fact that advertising with pictures is relatively cheap using this method. Further to these, there are independent sites publishing advertisements about homes offered by various intermediaries, and these sites are used extensively. Due to the fact that internet penetration is limited in the country, other forms of advertisements are used commonly as well. The most important of them is printed press, but leaflets and street posters are also commonly used.

It is relatively seldom, that real estate intermediaries are granted an exclusive right to sell. Most of the consumers dislike to be locked in for several months with a single intermediary. That is why exclusive contracts are only used to a limited extent on the market.

There have been some initiations from the side of market players to introduce some regulations to the matching sector. These initiations were triggered by the appearance of new players offering low quality service. As a result of the boom in the industry, there have been numerous new agents entering the industry, that did not possess the necessary qualifications for the work and their reliability was also sometimes questionable. To restore confidence in real estate matching, industry players wanted to introduce extensive self-regulation with entry barriers. This plan, however, was not supported by regulators, since it has included some anti-competitive practices, and not the right measures to solve consumer protection problems.

The typical announced fee for matching varies between 3-5%. In almost every case it is the seller who pays the intermediation fee. As a result of the growing number of transactions in recent years, matching fees are hardly negotiable, especially when larger intermediaries are involved.

There are no governmental restrictions on offering low-cost, no-luxury agency service, neither are there regulatory obstacles that make it difficult for individuals to sell their own homes. Individuals have basically the same marketing channels available as professional intermediaries. Scale economies may, however, result in significantly higher costs for advertisements by agents.

### **3. Transfer of control**

As in most countries, the transfer of ownership is a highly regulated process in Hungary as well. A sale and purchase agreement is only valid in Hungary in a written form, and with the signing of an attorney-at-law.

Attorneys seem to capitalize on this condition: the price of the service by an attorney has remained constant at 1% of transaction value over time, although the number of attorneys has grown rapidly, and the amount paid has also increased steadily due to booming real estate prices. The number of attorneys is not limited in the country. However, one has to be a member of the chamber of attorneys, having passed a second exam after graduation from the university and having gained three years of professional experience. Another profession that profits extensively from real estate transfer are notaries, however, this is only the

case if purchasing on loan. The loan granting financial institutions normally rely on the services of notaries to ensure a form for the loan contract that makes it directly enforceable in the case of a non-performing loan. Although this service is for the interest of the credit institution it is the consumer that pays the price for the activity performed by the notary.

There are taxes imposed on real estate transactions. The most important of these taxes is the duty imposed on the onerous transfer of residential property. The rate of this duty for each housing unit is 2% up to 4 million HUF and an additional 6% for the portion of the market value above 4 million HUF.<sup>3</sup> It has to be mentioned, however, that these rates have not been changed since the act has been passed in the Parliament in 1990, which results in the fact that the more favorable 2% rate is generally only applicable to a small proportion of the property transferred, whereas in 1990 it covered the whole price of an average home.

Re-investing funds into real estate is favored by the legal prescriptions in a number of ways. As for the duties discussed above, if a private individual buyer sells his other residential property within a period of one year preceding or following the purchase, the basis of the duty is the difference between the market values of the properties purchased and sold.

The seller has to pay general income tax if he does not re-invest the money into real estate within a given time period. The rate of this income tax on the income from the transfer of real property is 25 per cent. If the seller decides to re-invest the money into real estate, the tax is refunded to the seller on the part of the income that was used for housing purposes (within the 12 months preceding and the 60 months following the date on which the income was acquired).<sup>4</sup>

#### **4. Housing loans**

Home loans can only be granted by financial institutions that have the necessary permission from the sector supervisory authority. The already improving market situation has taken another significant upturn at the beginning of 2001 with the introduction of government subsidized home loans. These loans aimed to significantly reduce the interest rate of home loans thereby making them accessible for a wide range of consumers. By the middle of 2004, the stock of home loans multiplied nine times compared to the beginning of 2001. The significant role of government subsidization in home loans is illustrated by the fact that their proportion was 95% of all home loans in 2003. The reduction in the home credit interest rate was achieved by limiting the maximum amount of interest rate and other fees charged to consumers, while banks were compensated by government subsidies. The rules of government subsidization have changed a couple of times since 2001, mostly to the reduction of the subsidies available, but housing loans is still a vivid industry in Hungary.

Market actors on the demand side of the home loan market are credit institutions (commercial banks and mortgage loan companies, saving cooperatives and home savings and loans associations) and, rather theoretically, insurance companies. For offering a certain type of subsidized loan, the participation of a mortgage loan company is indispensable. As a result of this, commercial banks and savings cooperatives had to enter into a co-operation agreement with mortgage loan companies, of which only three are active on the Hungarian market, which is not very favorable for competition.

The Hungarian Competition Authority carried out a sector investigation in housing loans in 2005. The market was characterized by the increasing dominance of commercial banks in the stock of home loans, exceeding a 90% share. Despite the increasing number of competitors, market concentration in general has

<sup>3</sup> Section 21 of the Act 93 in 1990 on Duties.

<sup>4</sup> For more details see Section 63 of Act 117 in 1995 on Personal Income Tax

increased during the examined period; the value of the Herfindahl-Hirschman Index calculated from home loans data has increased from 1887 at the end of 2002 to 2268 at the end of 2003 and to 2351 at the end of the first half of 2004. Almost 83% of home loans are concentrated to nine banks.

A major finding of the investigation is that market transparency is very limited on the market. Banks use different types of extra costs which make it difficult for consumers to compare the products offered. The most striking feature of extra costs in connection with home loans is the great variety of labeling. The name, quantity, introduction and cancellation of extra costs vary from institution to institution, depending on the product and pricing policy of the bank. In comparison to handling costs, the most important common feature of extra costs is that they do not represent a permanent burden on the debtor for the whole duration of the credit, although some of them may be recurring in time. Another feature is their variety: some of them are given in a percentage form, others in absolute numbers, while some form different combinations of both (minimum and maximum levels), which makes their comparability questionable.

As a limitation in government subsidization became more and more apparent, foreign currency loans became more and more popular in financing real estate purchases. From 2004 onwards, loans denominated in Swiss Franc became predominant in the Hungarian housing loan sector. Starting from a very low basis, foreign currency denominated loans quickly surpassed the HUF loans in new transactions: in the first half of 2006, 64% of the housing loans were granted in foreign currency (72% in value).<sup>5</sup> At the end of 2005, more than a half of the total credit granted in Hungary was granted in foreign currency, however this growth is not fueled by housing loans any more, since its growth rate has dropped significantly, with consumer credits leading the way.<sup>6</sup>

Tying became a quite significant problem in the Hungarian market, as most credit institutions obliged their contractual partners to open a current account as well. Given the fact that most credit institutions require some kind of payment card contract for a current account, this double tying may result in regular extra costs for the debtor (fees for current account, annual fees for cards and transaction fees). Credit institutions commonly use housing loans as an acquisition product in a sense that they tried to persuade the debtor to open a current account through which they try to sell a whole range of product to the consumer. Credit institutions also try to sell insurance products as well. Although there is no formal obligation to enter into an insurance contract with the loan provider, belonging to the same group as the loan provider can clearly represent a competition advantage for insurance companies.

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<sup>5</sup> *Housing loans, first half of 2006, Hungarian Central Statistical Office, October, 2006*

<sup>6</sup> *Report on the activity in the supervised sectors, Hungarian Financial Supervisory Authority November, 2006*

## ITALY

### 1. Introduction

Property transactions are very important in the life of individuals. For most people property is their single biggest financial asset. It is also a transaction that most people perform just once or twice in a lifetime. Finding the right property involves high search and transaction costs in a situation of imperfect information. The transaction is complex from a legal, financial and fiscal point of view. These are some of the reasons why, although it is possible to buy a property without intermediation, there is a market for intermediation services.

Since brokers act as intermediaries between sellers and buyers the real estate market can be seen as a bilateral market where brokers act as market makers allowing the matching of potential sellers and potential buyers. Both the sellers and the buyers matching opportunities are improved if the broker provides more alternatives. However each group (sellers and buyers) has negative externalities when the number of participants on its side increases. Some of the features observed in the market, such as the fact that real estate agents fees are set as a percentage of the sale value of the property or the exclusivity in the contract between the seller and the agent, might be a response to problems of free riding or moral hazard. While a fixed fee would diminish the agent's incentives to sell the property at the highest possible price, a fee based, for example, on the number of visitors brought to visit the property, might induce the agent to bring visitors also to properties that have not the buyer's required characteristics. Indeed a fee set as a percentage of the property sale value might align the incentives of the seller, the buyer and the agent.

Although there are differences created by local practices, agents fees may be paid by sellers, by buyers or by both. If sellers are asked to pay, they negotiate the fee ex-ante; then, if the agent sells the property at the agreed upon price, the fee is paid without questions. On the other hand the buyer fee is negotiated ex-post, once the buyer is found, and, according to the elasticity of his demand, discounts may be granted or not. Fees do not reflect costs (fixed costs, including office space, and variable costs, staff time and advertising), but are set as a percentage of the value of the property. There is not much competition on the way real estate agencies are chosen, despite the fact that markets are not concentrated. The reason is probably that sellers choose their agent on the basis of the minimum price for the property that the agent guarantees or on the basis of proximity considerations.

The emerging use of the Internet will probably reduce the uncertainty about property pricing, leading both sellers to greater care in their choice of an agent and increase the negotiating power of buyers.

### 2. The Italian housing market

One of the salient features of the Italian housing market is the high rate of ownership. According to 2005 data 73% of Italian households live in their own houses or apartments<sup>1</sup>. There are several reasons for the high homeownership rate. Some of the reasons might be linked to the social structure: relative stability of the Italian family, low geographical mobility, low cost of higher education (which enables people to

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<sup>1</sup> Source: Databank Report on Real Estate Market, 2006.

save or invest in housing)<sup>2</sup>. Quite favorable taxation of property ownership for the house of residency: imputed rents (which are taxed) are calculated as percentage of administrative property values which are much below market values.

The Italian property market has been constantly growing in the last few years. In 2005 there have been 835.000 transactions for a value of more than 90.000 million euros. Compared to the data of 1998 this represents a 37% increase<sup>3</sup>. The low interest rates have contributed to this market increase, generated by the demand of residential homes as well as a form of financial investment, also for households and small investors. House prices have been rising steeply with an 87% growth in the period 1998- 2006 (57.2% in constant prices)<sup>4</sup>.

### 3. Matching. The role of Estate Agents

In Italy about 50% of real estate market transactions are carried out without intermediation<sup>5</sup>. Owners who want to sell their property can simply post an “on sale” board on the building or put an announcement in local newspapers. Direct matching transactions usually take place on the basis of family or personal acquaintances, while the use of new technologies is still limited. Internet sites devoted to real estates transactions where sellers can directly advertise their property are not very common<sup>6</sup>.

Although direct selling is widespread in Italy, there is also a large market for real estate intermediation services. There are, in fact, about 31.000 registered real estate agents.

The rules governing access to the market for real estate agents are established in law n. 39/1989, as amended by law n. 57/2001. In order to operate as an agent it is necessary to register with the local Chamber of Commerce<sup>7</sup>. The requirements for registration are: possession of a secondary school diploma and completion of a training course, organized by the local Chamber of Commerce, that implies a final exam<sup>8</sup>. The law also establishes an incompatibility for real estate agents with other economic activities<sup>9</sup>.

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<sup>2</sup> Credit Market Constraints and Labor Market Decisions Del Boca, Daniela; Lusardi, Annamaria; Labour Economics, December 2003, v. 10, issue n. 6, pp. 681-703

<sup>3</sup> Source: Osservatorio sul mercato immobiliare, Camera di Commercio e Università L. Bocconi, Milano

<sup>4</sup> Source: Nomisma, The Italian Property Market in 2006.

<sup>5</sup> Estimate from Cerved Business Information Report on the market of real estate intermediation, July 2005.

<sup>6</sup> A section of the Italian eBay website devoted to real estate transactions has just been introduced (<http://case-appartamenti.ebay.it/>) and it is therefore too early to say whether it will be as successful as other sections of the site. At the moment there are still very few properties that can be viewed and auctioned on the site.

<sup>7</sup> The Chambers of Commerce are local public regulatory bodies that perform a role of support and promotion of the general interests of the local firms. They are organized in Commissions and Technical Committees. Professional associations of different economic sectors (among which real estate agents) have their representatives in some of the Commissions. The three main associations representing real estate agents have their representatives in the Commissions that hold the register of real estate agents at the local level.

<sup>8</sup> The government is, at the moment, proposing a reform that should remove all restrictions to access to the real estate profession. In particular in the project of the government, all the requirements would be eliminated and in order to start an activity as an estate agent it would be sufficient to register to the local Chamber of Commerce.

Despite these restrictions, however, there do not seem to be serious competitive problems concerning access by agents, according to the data showing the consistent increase in the number of registered real estate agents of the last few years. The market has been very dynamic and the increasing number of transactions has generated an expansion in real estate services. From 1998 to 2004 the number of real estate agencies increased from about 20.000 to 31.000 (+55%)<sup>10</sup>.

Many agencies choose to enter the market by affiliating to a franchised network. Franchise networks started operating in Italy in the 80's and there are now three or four franchised networks that operate at a national level (Pirelli RE, Tecnocasa, Gabetti, Remax). The participants to the network share the agency brand, the dataset on sale properties and the advertising campaigns at the national level. The advantages of belonging to a network can be considerable for an individual agent in a country, like Italy, where multiple listing services do not exist. Besides, although the legal barriers to entry in the market are low there can be reputational barriers that might make it difficult for agents to operate individually especially in big cities. Although these networks have been growing concentration is still very low.

Estate agents are chosen by sellers and usually work for the seller on an exclusive basis. They provide surveys and valuations of the property, advertising (usually on local or specialized press), organize visits to the property for potential buyers and provide intermediation services in helping both parties to reach an agreement. Agencies have expanded the services offered to buyers and most of them have agreements with banks or financial intermediaries for offering financial products (mortgages). Some of them can also offer assistance in some of the legal steps required in transferring the property (through solicitors or notaries) and professional services of architects and engineers for the restructuring of the property.

Although the most important networks have developed their Internet sites and there are some portals (such, for example, [www.casa.it](http://www.casa.it)) that collect and provide data on properties by different agencies, internet advertising is still in its infancy. The information on the websites is limited and not very different from that available on the press (a brief description of the features of the property and contact information of the agent). Very seldom pictures or plans of the house are shown. However, following the example of other countries, the use of the Internet might further develop in the future.

The commission fees in Italy are always set as a fixed percentage of the realized sale value of the property. Both the seller and the buyer pay a fee to the agent and the typical value is 2-3% of the property sale value (on both sides). From a legal point of view the right of the agent to a fee for his services is established in article 1755 of the Italian Civil Code. The article also provides that in the absence of an agreement between the parties in a real estate transaction the fee can be calculated by the Court using an equity criterion. The law n. 39/89, regulating real estate agents services, has provided that the amount of the fees and the repartition between the parties is, in the absence of an agreement, determined by the governing bodies of the Chambers of Commerce, where the professional associations of the real estate agents are represented, on the basis of collected data of local custom fees. These data are collected by technical committees of the Chambers of Commerce and the professional associations are involved in the collection<sup>11</sup>.

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<sup>9</sup> The Italian Competition Authority pointed out that this restriction does not appear justified in the Advocacy Report (AS173), April 29, 1999 "Report on several norms limiting or distorting competition", Bulletin n.17/99.

<sup>10</sup> Source: Cerved Business Information, Boom immobiliare: E gli intermediari? Fotografia di un settore in crescita, July 2005.

<sup>11</sup> The restrictions involved in the collection of data on locally applied fees have been pointed out by the Italian Competition Authority in an Opinion on the collection of data of custom fees for real estate services, AS337, 11/04/06, in Bulletin n. 13/06.

These provisions may explain why the applied fees in the Italian market for real estate services appear fairly uniform. The role of real estate associations in setting the fees and its collusive effects, together with other restrictions set by the three main national associations have been investigated in a proceeding by the Italian Competition Authority.

Although collusion, through professional associations, might be one of the main explanation for the uniformity of the applied fees and for the fact that fees are requested both to the seller and to the buyer, some characteristics on the demand side can also contribute to the limited price competition observed in real estate services. First of all, real estate transactions are not frequent and this determines a limited information on the price of intermediation. Furthermore demand can be relatively inelastic to the price of intermediation services that amount only to a small part of the transaction's total price. Very often the parties realize the exact amount of the fees they have to pay to real estate agents only at the conclusion of the transaction. The buyer plays no role in the choice of the agent, and the seller often chooses on factors different from price (such as reputation, proximity to the property, etc.). Finally, one should consider the lack of transparency that characterizes the market: sellers and buyers are usually not informed by agents about the amount of money requested to the other party.

#### **4. Transfer of control**

Real property transactions are usually complex, involving different stages. The Italian law requires all contracts involving the transfer of real property to be in writing. The first formal step is the written proposal, that takes the property out of the market for a specified period of time during which the buyer can conduct the necessary checks on the property. After the proposal from the buyer has been formally accepted a preliminary contract is usually formalized, where the parties agree on the terms and conditions of purchase at some future specified date in the offices of a local notary. The preliminary contract will be the basis upon which the final deed of sale will be drafted by the notary and executed by the parties. Once this deed has been signed by both parties the property has finally and irrevocably changed of hands. The notary is responsible for registering, within 20 days, the change of ownership at the Land Registry and at the Agency of the Territory.

The purchase and sale of real estate property in Italy must necessarily occur with the assistance of an Italian based notary<sup>12</sup>. The notary is a public official who is legally empowered by the law to witness, validate, and register deeds and contracts for the sale and purchase of Italian property. The activity and functions of the notary are regulated by the law. The notary, although usually selected by the buyer, should be independent and impartial and charges fees based on the value of the transactions.

Given the nature and the complexity of real estate transactions regulation of the transfer might be justified by the need to give certainties on property rights. However, there are competitive restrictions involved in reserving to a single profession the right to carry out conveyancing transactions. The access to the notary profession is restricted (not only is the access regulated but the number of notaries is predetermined and each notary has minimum service obligations in the area to which she is assigned).

The notary fees had to be set within a range established by law. With respect to property transactions the fee schedules implied values ranging from 2 to 4 percent of the property declared price. With the Law n. 248 of August 2006 the notaries fees, as those of other professional services, have been liberalized and can now be freely established among the parties.

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<sup>12</sup> In Italy, as in other civil law countries, Latin notaries have several public functions.

## 5. Housing loans

Competition in mortgages has been developing in recent years. Until the 80's, compared to most other European countries, the Italian mortgage market was characterized by restrictive lending policies<sup>13</sup>. The restrictions that prevented the development of the market concerned the existence of regulatory restriction on the loan to value cap that, until 1980 was 50% of the estimated property value. The loan to value cap was increased to 75% in 1980 and to 80% in 1993. This ceiling is now abolished. Furthermore until the beginning of the 90's, only specialised credit institutions were responsible for mortgages. The deregulation process completed with the 1993 Banking Law made way for the universal banking model, which produced a significant increase in the number of banks and other intermediaries offering mortgages.

The distribution of mortgages in Italy is mainly bank branch-driven, although an increasingly important role is played by the leading national real estate agencies, which have established stable links with banks. Recent regulation issued by the Bank of Italy allows financial companies to promote and distribute mortgage loans by signing agreements with banks. In 2004, post offices also started to distribute mortgage loans. Placement by independent advisers and direct purchase of mortgages by phone or Internet still account for only a small share of the market because by law mortgage contracts must be stipulated in front of a notary.

Foreign banks have played an important role in boosting competition in the Italian mortgage market. In particular the entry of British and German mortgage specialists in the late 1990's introduced new products and put pressure on the large domestic banking groups which reacted by taking advantage of their large customer base and branch networks. At present the market share of foreign banks is about 4% in terms of outstanding mortgage loans<sup>14</sup>.

As a result of these changes the range of products offered in the mortgage market has expanded considerably over the last ten years. Banks offer a variety of mortgages with interest rates that can be fixed, variable, mixed (allowing the borrower to switch from fixed to variable and vice versa at a specified date). Contracts generally range from five to twenty years, although longer maturities are granted subject to additional conditions. Prompted by the developments in the property market, bank lending to households for house purchases increased on average by 24% a year between 1998 and 2000. In 2006 63% of new owners obtained a mortgage. The average amount and length of mortgages has increased (averages where 120.000 euros and 26 years for contracts stipulated in 2006)<sup>15</sup>.

The main difficulty for consumers in taking advantage of the more competitive environment can be the complexity of the products and, therefore the difficulty in obtaining information and comparing different offers. Information over the Internet is increasing and there are several specialized Internet sites that provide the possibility of comparing products by different banks<sup>16</sup>.

A recent reform, introduced new provisions that may affect the mortgage market. Banks will not be allowed to ask for closing fees when clients want to anticipate the termination of the contract and they must allow the possibility of transferring the mortgage to another subject<sup>17</sup>.

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<sup>13</sup> A reason for financial institutions to ration credit can be found in the Italian complicated and lengthy system to take possession of property on defaulting loans.

<sup>14</sup> Banks of International Settlements, Working Paper, 2005 [www.bis.org/publ/wgpapers/cgfs26gobbi.pdf](http://www.bis.org/publ/wgpapers/cgfs26gobbi.pdf)

<sup>15</sup> Il Sole 24 Ore, 23/01/2007.

<sup>16</sup> A site providing useful information is [www.mutuionline.it](http://www.mutuionline.it)

<sup>17</sup> Decree n. 7 of January 31 2007.

## 6. Antitrust Interventions in Real Estate Market

### 6.1 *Code of conduct of the -Italian Federation of Professional Real Estate Agents*<sup>18</sup>

In March 2004 the Authority concluded an investigation concerning certain provisions of three trade associations' codes of conduct. In particular, the codes of conduct of the Italian Federation of Professional Real Estate Agents (FIAIP), the Italian Federation of Business Mediators (FIMAA) and of the National Association of Business Agents and Mediators (ANAMA) contained: a specification of minimum commissions charged when providing real estate intermediation services; a non-competition clause among associates; and a ban on advertising free real estate intermediation services.

In the course of the investigation, the Authority ascertained that the codes of conduct promoted by these associations banned members from accepting clients who were already dealing with another firm, irrespective of the fact that the contract was exclusive or not. The Authority decided that these clauses, which had to be respected by all associated members and were enforced by various forms of internal and external monitoring and fines, limited freedom of choice for consumers, who were prevented from using services of more than one real estate agent at a time, and were therefore deprived of the benefits in terms of quality and price of services offered. Further, the Authority ascertained that the FIMAA code of conduct contained a general ban on advertising free services, while in November 2003 ANAMA had approved a code of conduct in which these bans on advertisement were eliminated. In its decisions, the Authority concluded that these bans affected marketing strategies, limiting price and discount strategies.

### 6.2 *Opinion on the collection of data of custom fees for real estate services*<sup>19</sup>

In April 2006 the Italian Competition Authority issued an opinion on the collection of data by Chambers of Commerce on fees actually paid by customers for real estate services. This collection of data is necessary in order to provide a point of reference for the Courts when the parties do not reach an agreement. The Authority suggested that associations of real estate agents should not participate in the technical committees that collect the data. In fact these committees have not limited their activity to the collection of historical data, but have given indication to agents as to the "optimal" value of the requested fees. According to the Authority, data on real estate agents fees should be collected by an independent agency such as ISTAT (the National Institute of Statistics) and should follow the usual statistical standards applied to surveys. Furthermore the communication of the results of the survey should not contain any expression that might induce the agents operating in the market to suppose that these surveyed fees are suggested or required minimum fees.

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<sup>18</sup> Italian Competition Authority, decision no. 13035, 25/03/04, I502, Bulletin no. 13/04

<sup>19</sup> Italian Competition Authority, Opinion on the collection of data of custom fees for real estate services, AS 337, 11/04/06, Bulletin n. 13/06.

## JAPAN

### 1. **Percentage of owned houses, etc.**

#### *1.1 Percentage of owned houses*

Out of the 46,863 thousand principal households in Japan in 2003, 28,666 thousand owned houses, accounting for 61.2%. In 1998, 26,468 thousand owned houses, accounting for 60.3%. Therefore, the number of house-owning principal households rose by 2.2 million, or 8.3%, during the five years from 1998 to 2003, and the percentage increased 0.9 points. The percentage increased from 60.4% in 1978 to 62.4% in 1983, then declined to 59.8% in 1993, slightly increased in 1998, and increased to 61.2% in 2003. (See Graph)

#### *1.2 Year of last move of main earners into owned houses*

Looking at the year of last move of main earners into owned houses, those who moved into owned houses in or before 1950 totaled 3,430 thousand households which accounted for 12.0% of all house-owning principal households, those between 1951 and 1960 totaled 1,860 thousand (6.5%), those between 1961 and 1970 totaled 3,100 thousand (10.8%), those between 1971 and 1980 totaled 4,990 thousand (17.4%), those between 1981 and 1990 totaled 5,140 thousand (17.9%), those between 1991 and 2000 totaled 6,450 thousand (22.5%), and those between 2001 and September 2003 totaled 1,990, thousand (6.9%). (See Table 1.)

#### *1.3 House prices and annual income*

The increase in house prices was particularly pronounced in greater metropolitan areas due to the sharp increase in land prices during the bubble economy. Average house price was eight times higher than annual income in the greater Tokyo metropolitan area in 1990. Thereafter, house prices tended to fall, and the ratio of house price to annual income declined to 4.7 in 1998. In recent years, while house prices have continued to fall, the floor space has been expanding and the annual income of households headed by wage earners tends to decline. Therefore, the ratio of house price to annual income has remained at the level of around 5.0. (See Table 2.)

### 2. **Matches between sellers and buyers**

#### *2.1 Building Lots and Buildings Transaction Business Law*

In Japan, The Building Lots and Buildings Transaction Business Law was established in 1952 with the purposes of achieving the protection of interests of buyers etc. of building lots and buildings and the smooth distribution of them, by (i) ensuring the conduct of proper business and fair transactions, (ii) promoting the sound development of building lots and buildings transaction business through a license system applied to persons who are engaged in the business and control over the activities for the business.

Transactions that are controlled under the Law include (i) sale and purchase, (ii) exchange, (iii) agency for sale and purchase, exchange and lease, and (iv) intermediary for sale and purchase, exchange and lease of building lots and buildings.

Any person who intends to operate real estate transaction business shall obtain a license from the Minister of Land, Infrastructure and Transport when the person establishes the offices in two or more prefectures or from the prefectural governor having jurisdiction over the area where the office(s) is/are located when the person establishes the office(s) in one prefecture only.

The characteristics of legal control include the assignment of licensed real estate agents who satisfy certain requirements such as the passing of examinations, the deposit of business guarantee money, the duty of explanation about important matters concerning the property to the other parties of transactions before entering into agreements, the duty to preserve the earnest money, restrictions on fees, and control over advertisements.

## 2.2 *Matching through intermediary companies*

- Services conducted by intermediary companies

Intermediary companies conduct many services. For example, in the case of intermediation for sale, the services include the investigation of properties, the assessment of prices, the signing of agency agreements and the execution of written agreements, the search of other parties regarding sale and purchase, negotiations with other parties, explanation about important matters of properties, the conclusion of sales agreements and the execution of written sales agreements, and settlement and delivery. In addition, intermediary companies sometimes hold consultations about topics such as taxes, laws and renovations as necessary.

- Legal responsibilities of intermediary companies

When a company engaged in the building lots and buildings transaction business enters into an agreement with a requestor for intermediation for the sale and purchase or exchange of building lots or buildings (intermediation agreement), the company has to prepare a document stating certain details of the agreement and execute the document to the requestor from the standpoint of the dispute settlement between the intermediary company and the requestor and the clarification of agreements about intermediation. In general, it is considered that intermediary companies (regardless of sale or purchase) owe the duty of an outsourced party to the requestor.

- Use of the Internet and exclusive intermediation agreement

Under the Building Lots and Buildings Transaction Business Law, a company engaged in the building lots and buildings transaction business that has entered into an exclusive intermediation agreement<sup>1</sup> with a requestor is obliged to register real estate information related to the intermediation agreement with the designated information network (REINS: Real Estate Information Network System) for the purposes of the appropriate and prompt conclusion of the sales and purchase agreements and the smooth distribution of real estate. Registration companies can exchange property information among them by using an online system.

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1 An exclusive intermediation agreement denotes an intermediation agreement under which a requestor is prohibited from requesting multiple companies engaged in the building lots and buildings transaction business for the intermediation or agency of sale and purchase or exchange. Under the Building Lots and Buildings Transaction Business Law, the term of an exclusive intermediation agreement should not exceed three months. Also, a company engaged in the building lots and buildings transaction business that has entered into an exclusive intermediation agreement must submit a report on the conditions of the transactions related to the exclusive intermediation agreement to a requestor at least once every two weeks.

The website managed by the Ministry of Land, Infrastructure and Transport (MLIT) and REINS' website for consumers have started to provide information on agreed real estate transactions beginning this year in order for consumers to understand market prices for real estate. Also, websites carrying advertisements include an integrated website that was created through the cooperation of multiple real estate industry associations and many other websites operated by private businesses, and they are used by consumers.

In addition, real estate auctions via the Internet have been actively conducted in recent years.

- Fees for intermediary companies

The fees that a company engaged in the building lots and buildings transaction business can receive relating to the agency or intermediation of the sale and purchase, exchange or lease of building lots and buildings is decided based on a notification by the MLIT. They cannot receive fees that exceed the amount indicated in the notification.

The control over the maximum limit for fees has been established because building lots and buildings transaction business is closely related to people's lives and it is necessary to protect consumers who seek building lots and buildings by providing them an assurance that intermediation and other services will be conducted at an appropriate price.

For example, the fees that a company engaged in the building lots and buildings transaction business may receive from a requestor when mediating the sale and purchase of a building lot or building is limited to the following amount: 5.25% of the portion of a selling price (excluding consumption tax) that is 2 million yen or less, plus 4.2% of the portion that exceeds 2 million yen but is 4 million yen or less, plus 3.15% of the portion that exceeds 4 million yen.

A company engaged in the building lots and buildings transaction business may receive fees only if the objective agreement is achieved by the intermediation or agency of the company.

### **2.3 *Control by business associations and the government, and regulations on the listing of real estate information***

Regulations on the listing of real estate information, as mentioned above, include registration with REINS at the time of entering into an exclusive intermediation agreement.

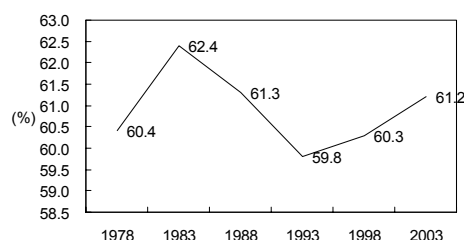
The development and modernization of the real estate market pursue the active and wide circulation of property information in an information exchange organization, REINS, which is open to companies. The objectives also include the acquisition of satisfying properties, saving time for matching, the formation of appropriate market prices through the centralized control of property information by REINS and the selection and comparison of many properties on the market. Exclusive intermediation agreements may cause requestors to miss other favorable opportunities for transactions. However, this problem may be solved by ensuring the disclosure of property information by developing the REINS information exchange system.

## **3. Housing loans**

Non-banks (mortgage banks) play an important role in housing loans in Japan. For example, in the promotion of securitization of real estate loans (purchase type) conducted by the Government Housing Loan Corporation, 18 mortgage banks among 318 total institutions, are participating as of January 2006. The percentage of those mortgage banks' applications to all applications for purchase that were submitted

to the Government Housing Loan Corporation was 34% for FY 2005 and 44% for FY 2006 (up to December).

In Japan, house construction companies, etc. concurrently play the role of brokers that are stated in question (9) of the OECD Secretariat's inquiry. A broker is not established as a professional one, and there are no related statistics.

**Graph: Trend of the Percentage of Owned Houses – Whole Country (1978-2003)**

Data source: "2003 Housing and Land Survey" of the Statistics Bureau, Ministry of Internal Affairs and Communications

**Table 1: Number of Principal Households According to the Time at Which They Entered into the Current Owned Houses - Whole Country (2003)**

	Total number	In or before 1950	1951-1960	1961-1970	1971-1980	1981-1990	1991-2000	2001-2003.9
Owner-occupied household (x1000)	28,666	3,434	1,864	3,097	4,989	5,140	6,448	1,992
Percentage of the total (%)	100.0	12.0	6.5	10.8	17.4	17.9	22.5	6.9

(Note 1) Includes the year of the last move of main earners "Not reported".

(Note 2) Includes the tenure of dwelling "Not reported".

Data source: "2003 Housing and Land Survey" of the Statistics Bureau, Ministry of Internal Affairs and Communications

**Table 2: House Prices and Ratio of House Price to Annual Income**

Condominium		(Unit: 10,000 yen, times, m <sup>2</sup> )																		
Calendar year		1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Tokyo Metropolitan Area	Annual income	660	682	730	767	828	875	854	854	856	842	853	896	859	815	813	823	783	796	790
	Price	3,579	4,753	5,411	6,123	5,900	5,066	4,488	4,409	4,148	4,238	4,374	4,168	4,138	4,034	4,026	4,003	4,069	4,104	4,107
	Ratio	5.4	7.0	7.4	8.0	7.1	5.8	5.3	5.2	4.8	5.0	5.1	4.7	4.8	4.9	5.0	4.9	5.2	5.2	5.2
	Floor space	65.1	68.0	67.9	65.6	64.8	63.3	63.8	64.6	66.7	69.5	70.3	71.0	71.8	74.7	77.0	78.0	74.7	74.6	75.4
Chubu Area	Annual income	610	639	696	697	713	708	737	757	780	787	822	839	832	829	788	756	727	745	694
	Price	2,006	2,400	2,798	3,665	3,630	3,663	3,099	2,991	2,945	2,972	3,009	2,930	2,902	2,942	2,940	2,901	3,175	2,997	3,063
	Ratio	3.3	3.8	4.0	5.3	5.1	5.2	4.2	4.0	3.8	3.8	3.7	3.5	3.5	3.5	3.7	3.8	4.4	4.0	4.4
	Floor space	71.9	72.4	75.2	71.8	72.0	79.2	73.2	74.4	76.5	78.8	79.8	81.9	82.2	84.2	84.9	86.0	87.1	83.6	85.3
Kinki Area	Annual income	666	639	649	719	759	756	761	771	782	822	758	785	775	758	737	745	707	698	710
	Price	2,425	2,885	3,990	5,279	5,552	4,402	3,879	3,662	3,447	3,581	3,687	3,562	3,419	3,245	3,188	3,237	3,165	3,177	3,164
	Ratio	3.6	4.5	6.1	7.3	7.3	5.8	5.1	4.7	4.4	4.4	4.9	4.5	4.4	4.3	4.3	4.3	4.5	4.6	4.5
	Floor space	67.9	67.7	71.0	71.2	74.0	76.8	73.1	69.8	69.5	71.6	73.2	72.5	72.1	73.6	76.5	78.2	75.9	75.6	74.3
Whole Country	Annual income	607	621	652	694	730	766	771	767	780	781	779	808	787	769	749	748	721	730	719
	Price	2,784	3,141	3,833	4,403	4,488	3,938	3,737	3,622	3,546	3,623	3,756	3,582	3,648	3,540	3,539	3,525	3,539	3,548	3,492
	Ratio	4.6	5.1	5.9	6.3	6.1	5.1	4.8	4.7	4.5	4.6	4.8	4.4	4.6	4.6	4.7	4.7	4.9	4.9	4.9
	Floor space	66.6	65.4	66.2	63.4	67.3	68.4	68.3	68.6	69.7	73.5	73.5	72.2	74.0	76.3	78.3	79.2	76.6	76.6	77.3

Built-for-sale House		(Unit: 10,000 yen, times, m <sup>2</sup> )																		
Calendar year		1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Tokyo Metropolitan Area	Annual income	660	682	730	767	828	875	854	854	856	842	853	896	859	815	813	807	783	796	790
	Price	3,668	5,085	5,371	6,528	6,778	6,269	5,873	5,752	5,737	5,785	5,864	5,698	5,552	5,234	4,821	4,733	4,590	4,535	4,533
	Rate	5.6	7.5	7.4	8.5	8.2	7.2	6.9	6.7	6.7	6.9	6.9	6.4	6.5	6.4	5.9	5.9	5.9	5.7	5.7
	Floor space	109.5	118.2	121.6	126.5	128.3	124.1	116.1	114.8	115.3	119.6	118.7	114.0	113.3	111.5	107.8	107.2	106.4	105.4	106.2

(Note 1) The data on condominium and built-for-sale houses was prepared based on the average prices of condominiums and built-for-sale houses that were sold for the first time according to the "Trend of the Condominium Market in Whole Country" published by Real Estate Economic Institute Co., Ltd.

\*Greater Tokyo Metropolitan Area: Tokyo, Kanagawa, Chiba, Saitama Prefecture

\*Chubu Area: Aichi, Mie Prefecture

\*Kinki area: Osaka, Kyoto, Hyogo, Shiga, Nara, Wakayama Prefecture

(Note 2) Annual income is based on the average annual income of households headed by wage earners in greater metropolitan areas such as the Keihinyo, Chukyo, and Keihanshin metropolitan areas (the average annual income of households headed by wage earners in greater Keihin metropolitan area for 1998 and before) according to the "Family Savings Survey" by the Ministry of Internal Affairs and Communications. Annual income for 2001 and thereafter is based on the annual income of households headed by wage earners in greater metropolitan areas such as Kanto, Chukyo and Keihanshin (the greater Kanto metropolitan area denotes the Keihinyo metropolitan area in and before 2003) according to the "Family Income and Expenditure Survey (Savings and Liabilities)" by the Ministry of Internal Affairs and Communications.

\*The average data for January to March 2002 was used for 2001. Annual average data was used for 2002 and thereafter.

(Note 3) The number of houses supplied for 2005 is 84,243 in the Tokyo Metropolitan Area, 7,969 in the Chubu Area, 33,064 in Kinki Area, and 167,560 in the whole country.



## **KOREA**

### **1. Introduction**

Korea's real estate market has improved in terms of competition environment thanks to the government's continued efforts to improve regulations.

First, the government has greatly expanded the real estate agent supply since 1999 by changing the scoring system of the real estate agent examination from curve-scale-based grading to straight-scale-based grading. As a result, the number of people who pass the exam each year has soared to around 15,000 from 1,000 to 3,000. Such a change largely reduced the entry barriers to the real estate intermediary service market. Second, there used to be a lot of restrictions to price competition due to the upper and lower limits to agent fees set by the guidelines of local governments. However, upon the request of the KFTC, the lower limit to the agent fee was eliminated since 2006. This measure expanded the autonomy of the concerned parties in the real estate intermediary market regarding the level of agent fees.

The following report discusses entry rules to the real estate transaction market, price regulations in the market and competition law enforcement cases including cartels and blocking access to real estate listings.

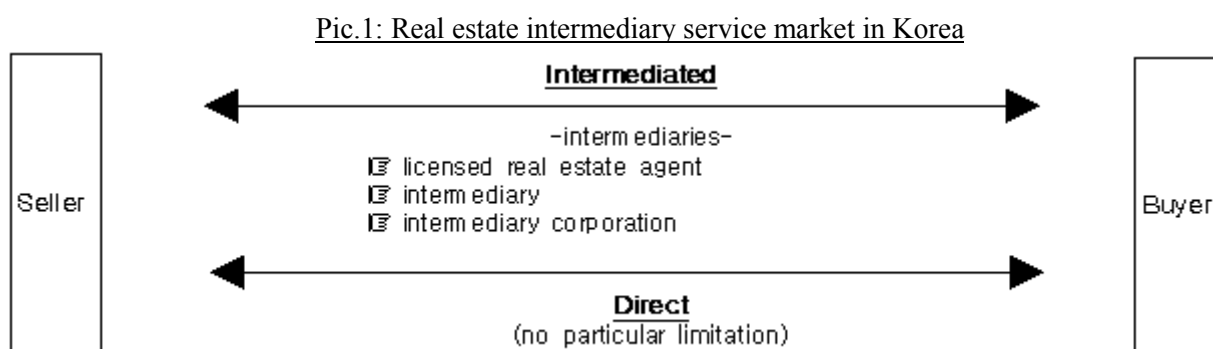
### **2. Current Status of Entry Rules**

Korea's real estate transaction market operates in two ways; intermediated transaction and direct transaction. There exist no government statistics on the proportion of the two transaction methods. But according to a sample survey conducted in 2003 by Korea Association of Realtors, intermediated transaction accounted for 72 percent of the total transactions while direct transaction accounted for 28 percent. One expert at the association predicts the proportion of direct transaction to be higher now due to an increase in the number of direct transactions on the Internet.

There is an entry limit to intermediated transactions imposed by the qualification system, while direct transactions are subject to no particular limitations.

#### **2.1 Intermediated Transactions**

Korea has a qualification system that only allows those who fulfill certain qualifications to provide intermediary services. There are three types of intermediaries approved by the government; licensed real estate agent, intermediary and intermediary corporation. (see Pic. 1)



First, a licensed real estate agent is a person who passed the real estate agent examination<sup>1</sup> conducted by the Ministry of Construction and Transportation and completed required training course, and there is no particular rule on the place of practice. The licensed real estate agent system was introduced in 1985, and since 1993, agents are obliged to submit their license when they open an office. Therefore, those who wish to start real estate intermediation business must obtain the real estate agent license.

Second, intermediaries refer to those who acquired permission to practice before the real estate agent system was introduced, and their place of practice is limited to the city or provinces of registration. But they are allowed to intermediate properties outside the jurisdiction in case they use a real estate transaction information network meeting certain conditions upon subscription.

Third, intermediary corporations refer to companies established solely for the purpose of intermediary business. Intermediary corporations should have the minimum capital of more than 50 million won. The representative of the corporation must be a licensed real estate agent, and majority of executives of staff must be licensed real estate agents as well. Previously, only intermediary corporations could be the agent of tender submission to auctions or public sales, so intermediary corporations were often formed to handle the tender submission. However, since 2006, licensed real estate agents have been allowed to handle tender submissions, too. As a consequence, the number of intermediary corporations has fallen. (see Table 1) According to expert interviews, real estate intermediary corporation now accounts for little of the real estate transaction market in terms of non-residential sales revenue or the number of transactions.

**Table 1: The number of registered real estate agents (2001 ~ 2005)**

unit : persons

	2001	2002	2003	2004	2005
Licensed real estate agent	31,458	41,663	51,354	57,362	62,432
Intermediary	17,566	16,673	15,490	14,331	13,203
Intermediary corporation	656	584	540	554	529
Total	49,680	58,920	67,384	72,247	76,164

\* Source : Ministry of Construction and Transportation website ([www.moct.go.kr](http://www.moct.go.kr))

<sup>1</sup> Subjects in the examination include the general provisions of the civil code, the law of contract, an introduction to real estate studies and the law and practice of intermediation, etc.

The real estate intermediary market saw the number of licensed agents soar since 1999 after the real estate agent examination system was revised. Before 1999, the examination was held every other year and was based on relative assessment, keeping the number of people passing each examination at around 1,000 to 3,000. But since 1999, with the change in the examination system which adopted absolute assessment<sup>2</sup>, an average of about 15,000 people are obtaining the license a year. The revision of the examination system is considered to have lowered entry barriers in the real estate intermediary service market to a large extent.<sup>3</sup>(see Table 2)

**Table 2: Change in the number of people passing real estate agent exam (1993 ~ 2005)**

unit : persons

	'93	'95	'97	'99	'00	'01	'02	'03	'04+'05	'05
Number of people passing real estate agent exam	2,090	1,102	3,469	14,781	14,855	15,461	19,169	29,636	1,258+30,680	16,493
Note	Biennial, relative assessment			Once a year, absolute assessment						

\* Fewer people passed the exam in 2004 due to relatively difficult examination, so in May 2005 additional 30,680 people were selected

An increase in the number of people who passed the exam caused the number of real estate agents to rise as well. As of the end of 2005, a total of 76,164 agents were registered to local governments. (see Table 1)

There are two ways to intermediate real estates; sole intermediation in which the agent solely intermediates transactions between clients and joint intermediation in which the agent jointly intermediates transactions together with other agents. In the case of sole intermediation, the agent receives fee from both the seller and the buyer, but in the case of joint intermediation, each agent receives fee from its direct client, whether that be the seller or the buyer. In Korea, joint intermediation using real estate transaction information network<sup>4</sup> has become universal with the development of the broadband Internet network.

## 2.2 *Direct Transaction*

In Korea, the real estate seller and the buyer are permitted to conduct direct transactions freely without involving an intermediary. According to a sample survey conducted in 2003 by Korea Association of Realtors, intermediated transaction accounted for 72 percent of the total transactions while direct transaction took up 28 percent.

<sup>2</sup> Each subject is scored out of 100. The passing score is above 40 in every subject with the total average score above 60.

<sup>3</sup> Korea Association of Realtors, which is a business group of real estate agents, is demanding that the government control the supply of agents, citing that as of December 2005, only 25.8 percent of the total licensed agents are actually in business.

<sup>4</sup> This is an online system where agents can exchange information on real estate transaction.

Korea has a number of Internet-based services that match a seller and a buyer directly. Most of the professional portal sites that provide real estate information run direct transaction sites for the general public. Korea's top portal site Naver<sup>5</sup> also runs a real estate direct transaction site for the general public.

### 3. Current Price Regulations: Agent Fee System

The rate and the level of real estate agent fee in Korea have upper limits according to related laws including the Act on Licensed Real Estate Agent Business and Real Estate Transaction Reporting.

From 1983 to 2005, real estate agent fee had its upper and lower limit set by the guidelines of local governments. This system was introduced to curb excessive fee charging by agents with a potential to become regional monopolies. However, there was a great concern that the system, under which local governments decided the lower limit of agent fees, could limit price competition. In 2004, the KFTC requested the Ministry of Construction and Transportation for correction on the grounds that the system limited competition among agents willing to charge cheaper fees and that it could undermined consumer welfare. In the end, as a result of inter-ministry discussions, it was decided to remove the lower limit of agent fees while keeping the upper limit. Consequently, the related provisions for implementation were revised in December 2005 to stipulate that only the upper fee limit shall be decided by local governments. The revision is evaluated as having raised the level of autonomy in price competition in the real estate intermediary service market.

At present, the Act on Licensed Real Estate Agent Business and Real Estate Transaction Reporting and its provisions for implementation prescribe that agents receive fees from both the seller and the buyer separately. The upper fee limit that the agent can charge is 0.9 percent of the total home price in case of sale and purchase or exchange, and 0.8 percent in case of rent and etc. More specific agent fee rates and limits are stipulated by the guidelines of the local governments.

The Table below illustrates real estate agent fees in Seoul. The fee rate is 0.6 percent (with fee limit of 250,000 won) for transactions of less than 50 million won, 0.5 percent (with fee limit of 800,000 won) for those between 50 million won and 200 million won and 0.4 percent for those of between 200 million won and 600 million won. Lower fee rates are applied to larger transactions. (see Table 3)

**Table 3: Real Estate Agent Fee in Seoul**

Type	Transaction cost (won)	Fee rate (%)	Fee limit (thousand won)	Note
Sales & Purchase, Exchange	- less than 50 million	0.6	250	agent fee = total home price × fee rate
	- 50 million ~ 200 million	0.5	800	
	- 200 million ~ 600 million	0.4	-	
	- more than 600 million	The agent sets the upper limit within the legal agent fee rate of 0.9 percent, and within the same upper limit, the client and the agent negotiate the fee.		
Rent,	- less than 50 million won	0.5	200	agent fee = total

<sup>5</sup> Naver ([www.naver.com](http://www.naver.com)) is Korea's biggest portal site in terms of the number of users. Its real estate direct transaction site is run by charging a fee of 33,000 won per a property registered for transaction. Most of the online sites of that sort operate in a similar manner.

etc.	- 50 million ~ 100 million	0.4	300	home price × fee rate
	- 100 million ~ 300 million	0.3	-	
	- more than 300 million	The agent sets the upper limit within the legal agent fee rate of 0.8 percent, and within the same upper limit, the client and the agent negotiate the fee.		

The actual real estate agent fee is autonomously decided through negotiation between the agent and the client within the official upper limit set by each local government. There are no government statistics on the actual fees that are being charged. According to an expert at Korea Association of Realtors, the fees are decided at levels close to the upper limit set by the guidelines for about 80 percent of all real estate transactions of less than 600 million won. It is hard to generalize the fee level in case of high-end housing of more than 600 million won because the fee is decided upon the agreement of the buyer and the seller.

Meanwhile, the Seoul city government will launch a system in February 2007, under which the real estate agent must clearly state the upper fee limit for sales and purchase or exchange of high-end housing whose value is more than 600 million won and for lease and rent of housing whose value exceeds 300 million won. If the agent charges fees higher than the upper limit, he or she will be imposed punishment such as business suspension. The Seoul city government expects the system to promote agent fee competition as citizens can compare and choose agents who offer the most attractive fee rate.

#### **4. Application of the Monopoly Regulation and Fair Trade Act (MRFTA) to Cartels**

Korea's real estate intermediary market often witnesses cases of cartels among the real estate agents of a particular area.

Such cartels generally take the form of agents of a particular area organizing a social meeting, whose rules include collusive pricing agreement. To make sure its members abide by the agreement, sanctions are imposed in case of violation.

Exposed cartel cases include agreements on agent fees no lower than the legal rate, no business on regular and special holidays, no advertising of a discount rate on brochures or websites, no display of listings on the front window, no billboard that goes beyond the office area, no flier inserted in daily newspapers, no distribution of business cards by visiting houses, no touting of intermediation at no or less fees.

Such collusive behavior not only limits competition among the agents of a particular area, but also directly undermines consumer welfare in the real estate market. For example, price fixing on agent fees reduces incentives for competition among agents willing to lower fees, which directly affect consumer welfare. Therefore, the KFTC continuously monitors against any price cartels among real estate agents and imposes corrective measures once identified.

#### **5. Application of the MRFTA to Practices such as Blocking Access to Real Estate Listing Services**

In Korea, there are often cases of business associations comprising of real estate agents force their members to block non-members' access to real estate listing services.

One example was in 2001, when the chairmen of 13 social meetings of real estate agents in Bundang<sup>6</sup>, a new town south of Seoul, colluded to make their members deny non-members the access to real estate listings. More specifically, they wrote and notified ethics rules that ban members' transaction with non-members. Those who violated the rules lost their membership. They also made a list of non-members to notify their members and force them to block non-members' access to real estate listings. In fact, one member was imposed a fine of one million won, for introducing a store for sale to a non-member agent. The KFTC saw this kind of practice as unduly limiting member agents' transaction counterpart and the list of properties for intermediation, and ordered suspension of the practice in question and elimination of the related rules on the concerned business association.

In addition, there are often cases where real estate agents of a certain area force the provider of the information network service to deny access to non-member agents. The KFTC decides such a request from agent groups as illegal. But the case went against the KFTC at the High Court on the grounds that the concerned real estate information network was not an essential facility because there already existed other providers in the same area and that the agents who were denied access to the network continued their normal business as they subscribed to other information networks. The KFTC appealed against the decision and the case is pending in the Supreme Court.

## **6. Other information on Korea's Real Estate Market**

### **6.1 *The average length of time between transactions for residential homes***

The average length of time between transactions for residential homes is 12 years for households that own their housing and three to four years for households that rent their housing.

By region, the period is shorter in areas that have more urban characteristics. It is 5.4 years in Seoul, 6.0 years in Gyeonggi province and 6.8 years in Incheon, but the average period is 9.9 years in other provincial regions (7.4 years in large cities, 9.7 years in small and medium-sized cities, 15.7 years in counties).<sup>7</sup>

### **6.2 *The percentage of households that own their primary residences***

The percentage of households that own their primary residences is on a gradual rise from 49.9 percent in 1990 to 52.5 percent in 1995, 54.4 percent in 2000 and 55.6 percent in 2005.<sup>8</sup>

### **6.3 *The Frequency of granting agents an exclusive right to sell***

There is no government statistics on this matter. But according to the experts interviewed, agents are given an exclusive right to sell **rarely or sometimes**, because most sellers want to sell their property as soon as possible.

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<sup>6</sup> Bundang is a new town located south of Seoul, which was built in the early 1990s to increase housing supply in the Seoul metropolitan area. At the time of the case, there were approximately 600 real estate agents in Bundang, 20 of which were non-members. In other words, member agents occupied 97 percent of the market in terms of number.

<sup>7</sup> Source: The Ministry of Finance and Economy website ([www.mofe.go.kr](http://www.mofe.go.kr))

<sup>8</sup> Source: The Ministry of Construction and Transportation website ([www.moct.go.kr](http://www.moct.go.kr))

#### **6.4      *Transfer taxes***

The housing acquisition tax rate is 1.5 percent and the registration tax rate is 1.0 percent. The rates apply uniformly, regardless of the type of acquirer or seller (e.g., individual for primary residence, individual for secondary residence) or regions.



## NETHERLANDS

### 1. Introduction

The Dutch housing market has received a lot of attention in the last few years. Firstly, because of the large price increases (especially in the final years of the millennium). Houses are more than two times as expensive now as they were ten years ago. Secondly, because of the reforms undertaken by the government to foster competition in the real estate agent market (2000) as well as the notary (1999) market.

### 2. Characteristics of the Dutch Housing market

The percentage of households that own the home they are living in is about 54 %, partly because of the strong position of the social (price regulated) rent sector in housing. This percentage is rising steadily the last decennium, as about 80 % of the new-built housing estate goes to households living in it. The number of homes sold per year is about 190.000 (2003) to 210.000 (2006). Fluctuations in the economy seem to influence the number of sales. The average household moves every ten years.

Housing prices have changed dramatically over the last ten years. On an index with 1995 as base-year (100) the value of the average sold home is now at a level of 285. In absolute terms, the average selling price for a home is now € 241.000.<sup>1</sup> On top of this buyers pay about 10 % of the selling price for taxes and professional fees.

### 3. Policy

In general, the government has deregulated the matching market (real estate agent/broker) and the market for transfer of control (notary), while increasing control over the financial market (mortgages), mainly with respect to the consumer's position and product transparency. The main political and social subjects of discussion (and/or problem-areas) for the housing market are:

- **Lack of new-built real estate/lack of housing**
  - Because of smaller households there is a need for extra houses. Discussion concerns how to build those houses, how to finance them and the relative role of market and government in planning. Housing seems partly available in some places but unavailable and/or too expensive were needed (the Randstad).
- **Outsiders have troubles entering the market, starters can't afford a house**
  - Because of high prices in the lower-priced categories of houses, especially young people can't find houses they can afford.

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<sup>1</sup> The average price of a home could also be calculated by averaging the tax values of all homes. This average amounts to € 202.000. However, this also includes rental houses and is based on tax value, not market value.

- **Rental subsidies**

- The government maintains a large system with subsidies for rental homes.
- A gap has evolved between market prices for houses (rent or buy) and the prices in the regulated rental sector.

#### **4. The matching market**

##### **4.1 The matching process**

Matching is mostly done by a real estate agent, the broker. Only about 1 to 3 % of the houses is sold without involvement of the broker, which suggests that a broker has a distinct role in the process. It is important to recognise the difference in the importance of the broker for the seller of a house compared to the buyer. The broker is particularly important for the seller of the house, mainly because of access to marketing tools like funda.nl. Funda.nl is the dominant advertising website for houses and a (NVM-)broker is needed to put your house on sale here (see the internet-section later). In general the seller uses one broker, who carries out all services needed in a package-form and typically receives an exclusive right to sell. The services consist of:

- Marketing: redecorating the house, making pictures, advertising (also on the internet), organising and carrying out open house days.
- Price negotiation: valuation of the house and possibly the building report.

Due to internet the importance of a broker is diminishing for the potential buyer of a house. In general the buyer more and more searches for himself, saving himself the broker fee. When using a broker this is mainly to get local information and/or when in hurry. Services delivered are:

- Home seeking: the actual search for a home.
- Price negotiation: taxation, valuation and building report.

A new trend is the separation of different services in smaller packages. Brokers now offer do-it-yourself services, where the seller for example supplies pictures and information about the house and organizes the open house day. This seems to be a result of intensified competition and increased use of the internet.

Brokers are well-organised: most are member of either NVM, LMV, ERA or VBO. Of these organisations the NVM (the Dutch Union of Real estate Brokers) is by far the biggest and also functions as a quality mark. About 75 % to 80 % of the houses is sold via the NVM. This is a consequence of its position as branch organisation before the protection of the title “Real estate agent” was abolished in 2000. Membership is open for every broker, as long as that broker meets the quality requirements stated (see the paragraph about access to the profession of broker).

##### **4.2 The role of internet**

The importance of the internet in the matching process has grown in recent years. Advertisement on the internet is standard procedure when selling a house. An interesting aspect of the development of the internet is the role of the NVM. They have adjusted very quickly and upgraded their internal database into an external search engine. Funda.nl (their website) is the most important website in The Netherlands in

advertising a home or finding one. It advertises all NVM houses (about 75 to 80 % of houses sold). The site contains around 100.000 houses, and hosts around 3.2 million unique visitors per year. The dominant internet position of Funda.nl strengthens NVM's dominant overall position.

On the other hand internet has triggered competition. A number of websites has developed, of which the biggest are woonkrant.nl, zoekallemhuisen.nl and dimo.nl. These websites are characterised as search engines. They group all information about houses on the internet. Part of this information is the housing supply on funda.nl. The NVM has started some legal procedures to prevent the use of their contents on other websites, but so far have lost their cases.

A new broker (makelaarsland.nl) has started, on the base of the possibilities of the internet. As a member of NVM, it has access to funda.nl. This access is their main selling point. They offer a small(er) package of services for a standard low(er) price. In fact, they can be characterised as a low cost-low service provider. Within the NVM some groups of brokers have complained, as they argue that a broker cannot deliver a good enough service without local knowledge and visiting the house. However, the supervisory council of the NVM has judged these complaints to be unfounded and has not banished Makelaarsland.nl.

#### **4.3      *Access to the profession of real estate agent/broker***

Since the 1<sup>st</sup> of January 2000 the protection of the title "Real estate agent" is abolished. Legally anyone can start a business and call himself a broker. The role of the NVM as the dominant union and dominant quality mark could theoretically mean that entry into the market is hampered. Membership of the NVM is very important (also for access to funda.nl), but limited to brokers that meet the requirements according to the union. On the other hand there have been no cases with complaints about access to the NVM, so practically this argument seems to be not so relevant. The requirements for membership basically contain:

- The broker is competent.
- The broker does not deal in real estate himself.
- The broker serves only one of the parties per deal.
- The broker is fair to other NVM-brokers.
- The broker is overall fair, honest, trustworthy and behaves as potential customers would expect a NVM-broker to behave.

The NVM offers its members access to funda.nl, ict-applications and support, education and lobbying services.

One of the services delivered, the building report for the buyer of the home, is often done by building experts. Access to that part of the broker market is free. Also, the taxation of the home, needed for the mortgage, is often done by the real estate agent.

#### **4.4      *Pricing in the broker market***

Most brokers use the selling price of the house as the base for their payment. This percentage is negotiable and generally goes down as the price of the individual house rises, but not proportionally. Advice prices by the branch-organisations are forbidden by the government, because they limit competition (NMa message, February the 7<sup>th</sup>, 2003). Broker fees are between 0.5 and 2 % of the selling

price and have gone down since deregulation and the start of internet. In case of non-sale the broker from the seller generally receives nothing (or only part of the real costs for advertisement and folders). In the last ten years the overall percentage fee has gone down, but the absolute fees have risen because of the link with the rising selling prices. Due to differences in services delivered and increased competition the difference in prices seems to have increased.

The price is paid by the party using the broker. An interesting feature of the pricing mechanism is the inelasticity of buyers to these transfer costs. Partly because of the tax deductibility, partly because of the low costs compared to the total price of the house, percentage pricing is accepted as long as the percentage is small. This seems strange, as the broker performs no extra service, just because the house is bigger and more expensive. Of course, there is an economic relevance to percentage pricing, as it triggers the broker into getting the highest price possible. However, this incentive could also be given by paying part of the extra money earned compared to for example the taxation value.

An important new trend is that brokers have started offering package pricing. Makelaarsland.nl has decoupled its prices from the selling price of the house. It offers a standard package of services for a standard price. This standard package contains some marketing tools (signs and digital brochure), price advice and negotiation, and most important placing of the house on Funda.nl. The price for this package is € 795 independent of the selling price and independent of actually selling the house (the risk is with the potential seller).

#### **4.5 Conclusion**

The government has deregulated this market. No sector specific regulation is in place. Any flaws in the working of this market are a result of inherent market failures. Groups within the NVM (the biggest brokers organisation) have tried to limit competition but have failed. The NVM has lost legal procedures against outsiders using its information for own purposes (zoekallehuizen.nl), but also ruled that members are allowed to give access to the website for lower prices (makelaarsland.nl). Overall, the market seems to work relatively well, competition increases and prices go down. Although buyers face some problems in finding affordable housing, these problems are the result of external factors.

### **5. Transfer of control**

#### **5.1 The notary**

The transfer of control of a home is done by a notary. Parties are obliged, according to law, to use a notary for the transfer of control-act and the registration and writing of the mortgage-act (in Dutch: domeinmonopolie). All notaries are member of the KNB (Royal Notary Union). The KNB has some legal obligations. It has to create regulation, enhance the knowledge and skills of the notary and quality of work, and protect the name of the notary (the image). This means it has legal opportunities and obligations to control the individual notary. The KNB is controlled by its members, which could theoretically lead to restrictions of competition.

#### **5.2 The 1999 Law on notary**

Before 1999 the market for notaries was completely regulated. A countrywide maximum of notaries was permitted to do business, so entry was basically determined by the exit of an existing notary. A domain monopoly was in place; by law, certain tasks could only be performed by a notary. These tasks involved real estate law (transfer of control and mortgage) family law (making wills, marriage acts, etc.) and business law (transfers of shares, foundation of companies, etc.). Notaries were by law restricted to a geographical area and prices were centrally determined. Furthermore every notary was bound by the “ministerieplicht”: every notary has to perform all services mentioned in the domain monopoly. There

were complaints that this system led to cross-subsidization, where high prices for real estate services compensated for low prices for family law services. It also hampered specialisation.

From the 1<sup>st</sup> of January 1999 the notary market has been deregulated. The Netherlands now forms an example of the “deregulated latin notary system”: the domain monopoly and the “ministerieplicht” have been maintained, but entry into the market and prices are legally free. Prices of real estate tasks have gone down (about 8 % since 2003) and competition has intensified. Also, prices of the different tasks of the notary have developed differently (with a growth in prices of 12 % for family law tasks), suggesting that the practice of cross-subsidization is weakening. Entrance hasn’t grown as much as hoped (from 1300 to 1500 notaries), mainly because of entry barriers (see next paragraph). Furthermore notaries still restrict their business to a geographical region, which results in different prices in different regions.

### **5.3 *Barriers to entry***

First, the importance of a well-known name in this particular branch forms a natural barrier to entry. Notaries deem the risks of starting a new business too large. Many potential entrepreneurs decide to work in an existing firm and when ready for it, buy part of an existing firm, instead of starting from scratch.

Second, law determines that entrepreneurs have to be authorized by a government commission, based on their business plan. The KNB has a (minority) position in this commission, which influences the decision to accept an entrant (and increased competition). This decision is based on the estimation whether or not the new company will reasonably make a profit in its third year.

Third, and most important, the Dutch system still maintains the “ministerieplicht”. This of course increases the pressure on a starting company, as it has to perform the complete range of tasks from the beginning. This requires a lot of knowledge, skills and capital. In addition, it also hampers specialisation and the efficiency gains connected.

### **5.4 *Pricing and taxes***

Prices in notary are free. As mentioned, prices for real estate tasks have gone down 8 % since deregulation. Notaries tend to compete with package-prices, although some raise their price when the value of the house rises. This seems to be a consequence of the price inelasticity of demand. When the selling price goes up, people tend to accept a rise in transfer costs, even when there is no extra service delivered. Notary costs for drawing and registering the mortgage are directly deductible from taxes. When financed from within the mortgage, interest paid is also deductible. This is a double fiscal advantage and diminishes the incentive to save on notary costs. Notary costs for transfer of control, may also be included in the mortgage. This means the interest paid is also deductible from taxes. This again diminishes the incentive to save on notary costs.

The only tax connected to the sale of a home is the “transfer-tax”. This tax amounts to 6 % of the selling price (about € 14.500 for the average home) and has been stable for years, although rising house prices have substantially increased the absolute income for the government. The transfer tax may be financed with the mortgage and interest paid is deductible. Empirical research reveals a strong link between transaction costs and mobility on the housing market. A reduction in transaction costs by 1%-point would result in a 8% higher rate of mobility. Because of the reduction in mobility, the conveyance tax is estimated to cause a welfare loss of about 0,24 cents per euro tax revenue. Given the low price elasticity of housing supply in the Netherlands, the (negative) effect of conveyance tax on housing prices will be nearly 6%.

For new-built housing estates only VAT accounts, there is no transfer tax.

## **5.5 Conclusion**

The most important economic element in the transfer of control is the notary. The notary market has improved in recent years, due to deregulation. Competition has increased and real estate tasks prices have gone down 8 %.

Still, some elements disturb the market:

- The “ministerieplicht” (the legal duty to perform all tasks of a notary) decreases possibilities for specialization and hampers easy entry.
- The inclusion of notary costs in the tax deductible mortgage diminishes price sensitiveness of the customer and raises prices.
- The “domeinmonopolie” restricts entrance, but is deemed necessary to guarantee quality for the products involved.

Furthermore, the transfer tax of 6 % of the selling price disturbs efficient transfer of control decisions by raising transactions costs and (thus) hampering mobility.

## **6. Loans**

### **6.1 Banks, insurers and financial intermediaries (brokers)**

In the consumer market practically all houses are financed with a mortgage, with the value of the mortgage typically about 15 to 20 % higher than the selling price of the house to include transfer costs and renovating costs. The total mortgage debt has risen from about € 150 to € 340 billion (75 % of GNP) in the last ten years. There is a national (private) fund covering risk for mortgages up to 4.5 times the income of the mortgage taker. This fund lowers risk for mortgage suppliers. The mortgage market is dominated by banks and insurers, with the five biggest players controlling 86 % of the market.

Entry is limited, because of legal obligations. There is a special law on supervising the financial markets (wet op het financieel toezicht). To offer mortgage, mediate in or advise on mortgages a permit is required. The law specifies rules about specific expertise, the operation of the business and integrity (fit and proper test). In general mortgage sellers are required to give adequate and sufficient information, give sound advice and handle complaints in a satisfactory way. The Authority for the Financial Markets (AFM) is the competent authority designated to ensure compliance with these requirements of the financial supervision act.

The last few years there have been two main developments. First, securitization of mortgages grows. Banks have started to resell their mortgages to smaller and/or foreign players (like the Bank of Scotland). Second, internet becomes more important in finding the cheapest mortgage, which intensifies competition.

### **6.2 Mortgage brokers and the complexity of the mortgages**

Credit or mortgage intermediaries have an important position in the Dutch market (for instance “de Hypotheker” and “Hypotheekshop”). This important position of the credit intermediary is explained by the complexity of Dutch mortgages. Mortgages are designed to profit as much as possible from the tax deductibility of interest, which makes them more difficult to understand. The credit intermediaries can be remunerated in two ways: a negotiated fee paid by the client, or a commission paid by the bank (these commissions are typically around 2.5 %). Mortgage commissions are deductible from taxes.

Combinations of mortgages with insurance and/or financial instruments have led to complaints about both a lack in transparency as well as so-called reward-driven advices by intermediaries. An example is the discussion about stock mortgages, where about 40 % of the premium goes directly to the bank and isn't invested. According to the government, suppliers didn't inform their clients sufficiently about this product. The government tries to improve transparency by the financial information leaflet (next paragraph).

To reduce the risk of intermediaries advising products from which they themselves instead of the consumer benefit most (advising products with the highest commission) the Ministry of Finance has introduced legislation after extensive consultation of the industry (suppliers of mortgages and credit intermediaries), the financial supervisor (AFM) and consumer organisations. In short this legislation requires intermediaries to be transparent concerning the commission they receive for mortgages by the year 2009. In addition, the legislation maximizes the up-front commission to 50 % of the total commission received. The other 50 % will have to be paid as yearly commission.

### **6.3 *Financial information leaflet***

By law, suppliers of mortgages have to offer objective and standardized information about their product when selling it. This compulsory source of information is called the financial information leaflet ("financiële bijsluiter"), which is only required if the mortgage is characterised as a complex product (stock-based, saving mortgages, etc.). Non-complex mortgages (simple linear or annuities mortgages) do not require a financial information leaflet. The AFM supervises proper conduct regarding the financial leaflet.

An evaluation in 2004/2005 showed that consumers judged the financial leaflet to be too complicated. Furthermore consumers indicated the information should be available earlier in the process of searching a mortgage. Because of the evaluation, the leaflet has been adjusted in two ways: more graphical elements and less text to improve readability (after extensive testing with consumers) and standardisation of information, to improve comparability of mortgages in the orientation phase. The results of these adjustments are not clear yet.

### **6.4 *Tying of loans to other products***

There is no legal obligation to tie a mortgage to other products. Every possible product could also be bought separate. Still, it is common practice to buy some products in one package with a mortgage. The first common product tied to mortgages is life insurance. As homes are often bought by individuals with partners, or couples with children, a life insurance is used to pay off the mortgage in case the mortgage-holder dies. This way the remaining family can keep the house.

The second common product is a saving account (about 35 %), because of the tax deductibility of interest. Instead of repaying part of their debt every year, people put a certain amount of money on a savings account. Interest paid on the mortgage minus tax deducted is lower than the interest received on the savings account. After 30 years (the maximum period for which interest is deductible) people repay the mortgage with the money from the savings account. Over these 30 years the government demands relatively low taxes over the money saved.

Thirdly, there is a new trend to tie the mortgage to an income insurance. In case of illness, job loss, or other forms of sudden income loss, the mortgage holder is insured and the insurance will pay the monthly instalments or even the whole mortgage. The reason for this trend is the same as the reason for tying to life insurance: after buying the house, risks of not repaying the mortgage are minimized.

## 6.5 Conclusion

The mortgage market seems to be relatively competitive. A number of players is active, without any one of them having a dominant market position. Prices seem to be low compared to international standards and mortgage suppliers clearly compete on price. There are some problems though, mainly because of the complexity of the mortgages. Due to the deductibility of interest paid on the mortgage, a number of products have been introduced aimed at keeping interest payments as high as possible over the lifetime of the mortgage. This makes the product less transparent and the consumer dependent on specialists, which explains the important role of mortgage intermediaries and contains a risk of higher mark-ups. Last year research indicated that there is a risk that intermediaries misuse their role. Some intermediaries advised the “wrong” mortgage to customers, because the commission they received from the bank was higher than for the “right” one.

### Literature/sources:

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## TURKEY

In the Turkish legal system, there is no specific legislation which regulates real estate agencies. According to Turkish Commercial Code, the institutions that are established to take part in real-estate activities are considered as “trading houses” and the ones who are in charge of managing these enterprises are called “merchants”. In 1997, real-estate agencies are also included among “tradesmen” and “craftsmen” by a legal legislation. Following the enactment of this decision, “Real-estate Professional Chambers” having a public corporate status have started being established in various provinces of the country since 1999.

Therefore, under the Turkish legislation real-estate agencies can be found in two forms. Accordingly, they are either merchant real-estate agencies or tradesmen real-estate agencies.

“Merchant real-estate agencies” are members of Chamber of Commerce, thus subject to relevant legislation<sup>1</sup> regulating Chambers of Commerce in Turkey and there is no such legislation that allows them to determine fixed or minimum price tariffs, while “tradesmen real-estate agencies” can become members of Professional Chambers and subject to rules governed for them. According to article 135 of the Turkish Constitution, public professional chambers and their higher organisations are:

*“...public corporate bodies established by law, with the objectives of meeting the common needs of the members of a given profession, to facilitate their professional activities, to ensure the development of the profession in keeping with common interests, to safeguard professional discipline and ethics in order to ensure integrity and trust in relations among its members and with the public; their organs shall be elected by secret ballot by their members in accordance with the procedure set forth in the law, and under judicial supervision.”*

Article 62 of the “Act no 5362 on the Vocational Organizations of Craftsmen and Tradesmen” dated 07.06.2005 grants to the Chambers with which tradesmen and craftsmen are affiliated the right to publish price tariffs for goods and services produced by these tradesmen and craftsmen. With this provision, the right to determine price tariffs of tradesmen and craftsmen is explicitly granted to the Chambers and the Unions with which the Chambers are affiliated. The same article also foresees that those prices show the maximum limits to be placed. In fact, this subject concerning “maximum prices” is added to the Act as result of the Turkish Competition Authority’s (TCA) opinion that was sent during the preparation stage on the draft law on the Vocational Organizations of Craftsmen and Tradesmen in 2004. On 09.08.2004, the Ministry of Industry and Trade stated that the works were completed, for redrafting and adapting to today's conditions the Tradesmen and Craftsmen Act No. 507 which had entered into force in 1964 and which was realized not to respond to today's conditions (*“The Act No. 507”*), and it requested that the opinion of our Authority about the “Act on the Vocational Organizations of Craftsmen and Tradesmen” be notified. In the Act No.507, there was no such reference to whether those prices are maximum,

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<sup>1</sup> The Act no 5174 on the Union of Chambers and Commodity Exchanges of Turkey dated 18.05.2004. Union of Chambers and Commodity Exchanges of Turkey (TOBB) is the highest legal entity in Turkey representing the private sector. Currently, TOBB has 364 members in the form of local chambers of commerce, industry, commerce and industry, maritime commerce and commodity exchanges.

minimum or fixed. Nevertheless, the reference as to the prices being “maximum” was regulated via a secondary legislation.

Although there is an open reference to maximum prices via secondary legislation in the past, sometimes this might end up perceived by tradesmen and craftsmen as fixed prices to which compliance is compulsory in different sectors such as in the bread market. Therefore, this addition in the form of open reference to maximum prices in the Act is accepted to serve this misconception in a positive way. Thus, it is considered as a successful example of competition advocacy activities of the TCA. However, until now no such practice from the competition law perspective is experienced in the real-estate transactions that are subject to any form of inquiry.

Another legislation that deserves mentioning in this area is the “Compulsory Standard Communiqué for Real-estate Agencies” issued by the Ministry of Industry and Trade in 2003, and came into force in 2004. This communiqué regulates in general, rules on “tradesmen real-estate agency” services, management of the business house, the specificities of the environment where real-estate services are provided, and the peculiarities of the employees. In brief, this secondary legislation tries to maintain a minimum standard that are expected to be followed by all those parties that take part in such activities. However, these rules should not lead to misunderstandings; as those rules are general rules that aim to maintain a minimum standard in the eyes of the consumers and for the benefit of the profession and are not deemed to be excessive.

One important provision of this communiqué from the competition law and policy enforcement is about “price tariffs”. Accordingly, services provided by real-estate agencies are based on the maximum price tariffs determined by their affiliated Professional Chambers. Besides, the same provision puts forward that the percentage of the commission rates together with the condition that the display of various estates will be free of charge and this issue of “no fees will be charged” issue will be hang up at a place that can be seen by everyone in the trading house.

In this regard, it would also be timely to mention the draft law on “Real-estate Counseling”. Within its competition advocacy role, the TCA sent its opinion to the said draft law especially with respect to Article 16(1) of the draft law. This article reads as follows: *“the prices for the services provided by real-estate agencies are determined according to Act no 5174 on the Union of Chambers and Commodity Exchanges of Turkey and Act no 5362 on the Vocational Organizations of Craftsmen and Tradesmen”*. As discussed above, Act no 5174 and Act no 5362 give the right to determine the maximum prices. Nevertheless, the TCA in its opinion stated that such wording might lead to misunderstandings as in practice such provisions might turn into fixed prices. That’s why the exclusion of such wording from the draft law was suggested.

Within this context, it can be said that rules concerning real-estate transactions do not prevent the operation of low-cost agents or sales-by-owner. There are no professional or governmental rules which restrict the ability of the agents to offer low-cost services. In addition to that, there are no rules or regulations that make it difficult for individuals to sell their own homes. Furthermore, entry rules do not limit the number of real-estate agencies that could perform the necessary transactions. They make a choice in between being a merchant or a tradesman to operate as a real-estate agency.

To summarize, the rules governing the real-estate transactions are general in nature and aim at maintaining an acceptable standard in the eyes of the consumers. From the competition law and policy perspective, this market has not experienced a serious competition restriction so far. It is also worth mentioning that, within its competition advocacy role; the TCA follows the sector closely and works together with the relevant actors in close contact, which are in charge of the regulations in this sector.

## UNITED STATES

### 1. Introduction

In 2005, over 7.4 million new and existing single-family residential homes were sold in the United States.<sup>1</sup> The vast majority of home buyers and sellers use a real estate broker to complete their transaction, and consumers spent over \$65 billion on brokerage fees in 2005.<sup>2</sup> As Internet use has grown, so has the ability of consumers to gather information that previously was available only from traditional real estate brokers. For example, several web sites offer information on homes for sale, neighborhood characteristics, recent sales data, and automated home valuation tools. The Internet also has given rise to brokerage models that are different from traditional full-service brokers (“FSBs”), who provide consumers assistance in all aspects of the real estate transaction. Real estate professionals are increasingly incorporating the Internet into their business models in a variety of ways that allow consumers to search for houses on their own, such as offering potential buyers the option to view selected multiple listing service (“MLS”) information online.<sup>3</sup> The Internet has allowed limited-service brokers (“LSBs”) to market their services and their listings to a wider audience and several websites provide home sellers with information to help them take on more of the transaction without broker assistance. Further, some websites gather “lead” information on customers who seek real estate services and then selling those leads to real estate professionals. Still other business models use the Internet directly to match home buyers and sellers.

As new business models have proliferated, so have anticompetitive attempts to squelch them. In response to these threats to competition, the Agencies have undertaken a variety of actions. First, we have engaged in competition advocacy to persuade states not to adopt laws that would restrict competition between non-traditional and traditional brokers. Further, the Agencies filed antitrust suits against several MLSs and the National Association of Realtors (“NAR”) addressing rules that allegedly discriminate against non-traditional brokers. In addition, to further educate ourselves and the public about the substantial changes occurring in the real estate brokerage marketplace, the Agencies held a workshop to address competition policy in the real estate brokerage industry, and will issue a report this year.<sup>4</sup>

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<sup>1</sup> The National Association of Realtors reports that 6.179 million existing single family homes were sold in 2005. See Nat’l Ass’n of Realtors, Existing Single-Family Home Sales, at [http://www.realtor.org/Research.nsf/files/singlefamilyreport.pdf/\\$FILE/singlefamilyreport.pdf](http://www.realtor.org/Research.nsf/files/singlefamilyreport.pdf/$FILE/singlefamilyreport.pdf). The U.S. Census Bureau reports that 1.28 million new single-family homes were sold in 2005. See U.S. Census Bureau, Houses Sold by Region, at <http://www.census.gov/const/soldann.pdf>. NAR also reports that 896,000 existing condominiums and coop units were sold in 2005, but the Census Bureau has no data on sales of new condominiums and coop units, so these sales have not been included in the above calculation. See Nat’l Ass’n of Realtors, Existing Single-Family Home Sales, at [http://www.realtor.org/Research.nsf/files/condoreport.pdf/\\$FILE/condoreport.pdf](http://www.realtor.org/Research.nsf/files/condoreport.pdf/$FILE/condoreport.pdf).

<sup>2</sup> See GAO Testimony Before the Subcommittee on Housing and Community Opportunity at 1 (Jul. 25, 2006).

<sup>3</sup> The MLS is a local or regional joint venture of real estate brokers, typically operated by a local group of brokers affiliated with NAR, who pool and disseminate information on properties available for sale in their particular geographic areas. See pages 6-7, *infra* for more detail.

<sup>4</sup> See Competition Policy in the Real Estate Industry, at <http://www.ftc.gov/bc/realestate/workshop/index.htm>. Throughout this submission we draw on testimony

This paper provides overviews of the U.S. real estate market, the typical U.S. residential real estate transaction, and the emergence of new business models. We discuss recent state and private actions that threaten competition in the real estate brokerage industry and the Agencies' responses to these actions. We also briefly touch upon state restrictions on the ability of non-attorneys to perform certain tasks related to the closing of real estate transactions.

## **2. The U.S. Residential Real Estate Market and Typical Real Estate Transaction**

### **2.1 *Home-Buyers and Sellers***

The Census Bureau estimates that in 2006, 69 percent of U.S. housing units are occupied by their owners, but this rate varies by region as well as by age and income of the householder.<sup>5</sup> Home ownership rates are higher in the Midwest and South than in the Northeast and West.<sup>6</sup> Over 80 percent of householders over 55 own the home in which they live, whereas only 43 percent of those under 35 own their residence.<sup>7</sup> Further, not surprisingly, homeownership rates are markedly higher for those with income greater than or equal to U.S. median family income than for those who earn less than the U.S. median (84.4% versus 53%).<sup>8</sup>

According to a NAR survey, recent home sellers were in their previous home a median tenure of six years, with 54 percent of those surveyed having lived in their previous home between 3 and 10 years. Job related reasons and a desire for a larger home are the most likely reasons for most homeowners to sell their current home, although for those over 65, moving closer to friends and family and wanting a smaller home are the most popular reasons cited for leaving their existing home.<sup>9</sup>

### **2.2 *Overview of the Real Estate Transaction***

At its most basic, real estate brokerage is about matching a home seller with a home buyer.<sup>10</sup> Home sellers want to negotiate the highest possible price in the quickest possible time and home buyers want to find the best possible house at the lowest possible price.<sup>11</sup> Most buyers and sellers work with real estate professionals – who have access to private marketplace information and experience in handling real estate transactions – to economize on the costs of finding a match and for assistance in other areas related to the transaction.

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and comments received from the workshop. Testimony is cited as “[Speaker], Tr. [page number]” from the official transcript of the Workshop. Comments are cited as: “[Commenter], [comment number]”. The transcript is available at <http://www.ftc.gov/opp/workshops/comprealstate/051209transcript.pdf>. Comments are available at <http://www.ftc.gov/os/comments/realestatecompetition/index.htm>.

<sup>5</sup> See United States Dep’t of Commerce, Commerce News, Census Bureau Reports on Residential Vacancies and Homeownership at 4 (Oct. 27, 2006), at <http://www.census.gov/hhes/www/housing/hvs/qtr306/q306prss.pdf>.

<sup>6</sup> *Id.* at 6.

<sup>7</sup> *Id.* at 7.

<sup>8</sup> *Id.* at 9.

<sup>9</sup> NAR 2005 survey at 56.

<sup>10</sup> See 1983 FTC Report at 9.

<sup>11</sup> Kunz, tr. at 103:12-14.

### 2.2.1 Description of Real Estate Brokers and Agents

Although the terms may vary by state, there are two principal categories of real estate brokerage professionals: “agents” and “brokers.” Generally speaking, agents work directly with consumers and brokers supervise agents. Typically, agents solicit listings, work with homeowners to sell their homes, and show buyers homes that are likely to match their preferences. Instead of working with customers directly, brokers often provide agents with branding, advertising, and other services that help the agents complete transactions. In terms of branding, the broker may invest in and create a brand or affiliate with a national or regional franchisor that provides a brand with certain reputational value and an advertising campaign.<sup>12</sup> As for services, brokers may provide agents with computers, website hosting, office space, training, and marketing. States establish licensing requirements for both agents and brokers, and state commissions, frequently composed of real estate brokers, enforce compliance with state laws and regulations.

Brokers and agents (hereinafter, brokers) usually are more informed about the local real estate market and the process of a real estate transaction than most home buyers and sellers.<sup>13</sup> This informational advantage derives from two sources. First, only brokers and other MLS members have full, direct access to the entire MLS database, which provides information both on the houses currently for sale in a particular geographic area, as well as past sales data, which typically are used in determining a property’s listing price or a buyer’s offer price. Second, most brokers have been involved in many more real estate transactions than their clients; this experience builds expertise in gauging market conditions and knowledge of the details involved in completing a real estate transaction.<sup>14</sup>

Although there is no legal impediment to consumers buying and selling homes on their own, the large majority of consumers choose to work with a real estate broker. For example, a recent NAR survey finds that 85 percent of consumers employ a real estate broker to help them sell their home, and the vast majority of these sellers appear to contract for assistance on all aspects of the transaction.<sup>15</sup> Another NAR survey found that nine out of ten buyers use a real estate professional during their home search.<sup>16</sup> The U.S. Government Accountability Office estimates that consumers paid approximately \$65.7 billion in brokerage fees in 2005.<sup>17</sup>

### 2.2.2 The Seller’s Agreement with the Listing Broker

If the seller chooses to hire a real estate professional rather than selling the house on his or her own, the seller contracts with a “listing broker.” Although some home sellers may contact a number of possible

<sup>12</sup> Century 21, ReMax, and Coldwell Banker are examples of national franchise brands.

<sup>13</sup> See R.C. Rutherford *et al.*, *Conflicts Between Principals and Agents: Evidence From Residential Brokerage*, 76 J. FINANCIAL ECON. 627 (2005); Steven D. Levitt & Chad Syverson, *Market Distortions When Agents are Better Informed: The Value of Information in Real Estate*, NBER Working Paper 11053 (Jan. 2005), at <http://www.nber.org/papers/w11053>.

<sup>14</sup> See Steve Sawyer *et al.*, *Redefining Access: Uses and Roles of Information and Communication Technologies in the US Residential Real Estate Industry from 1995 to 2005*, 20 J. INFORMATION TECH. 213, 213 (2005).

<sup>15</sup> NAR, *The 2006 National Association of Realtors Profile of Home Buyers and Sellers* (November 2006) (NAR 2006 Survey”) at 68.

<sup>16</sup> NAR, *Home Buyer & Seller Survey Shows Rising Use of Internet, Reliance on Agents* (Jan. 17, 2006).

<sup>17</sup> See Statement of David G. Wood, Director, Financial Markets and Community Investments, Government Accountability Office, before the House Subcommittee on Housing and Community Opportunity 1 (Jul. 25, 2006), at <http://financialservices.house.gov/media/pdf/072506dgdw.pdf>.

listing brokers, NAR's most recent industry survey notes that the majority of sellers contact only one listing broker.<sup>18</sup> Once the seller has selected a listing broker, he or she enters into a contractual relationship called a "listing agreement" by which the broker agrees to market and sell the home in exchange for a set fee, typically in the form of a commission based on the sales price of the house. This contract specifies the commission the homeowner will pay the listing broker if the home is sold within a specified length of time, how the home is to be listed in the MLS, the type and amount of advertising and other marketing effort the listing broker will undertake, and, as discussed below, the share of the commission to be offered to a "cooperating broker," who works with the buyer.<sup>19</sup> The listing broker typically markets the property, both within his brokerage firm and to other brokers in the community, by uploading the listing data into the MLS database so that the information can be disseminated to cooperating brokers, who in turn can inform potential buyers of the listing.

There are two principal types of listing agreements. In the most common of the two, an "exclusive right to sell" contract, the listing broker receives a payment if the property is sold during the listing period, regardless of who finds a buyer for the home.<sup>20</sup> An "exclusive agency" listing is a listing agreement under which the listing broker acts as an exclusive agent of the property owner or principal in the sale of a property, but reserves to the property owner or principal a right to sell the property without further assistance of the listing broker, in which case the listing broker is paid a reduced or no commission when the property is sold.

### 2.2.3 *The Buyer's Relationship with the Cooperating Broker*

The broker who works with the buyer is often referred to as the "cooperating broker," the "selling broker," or the "buyer's broker." Cooperating brokers typically attempt to find housing from the available stock that match buyers' preferences, show prospective buyers homes for sale, provide them information about comparable home sales that have occurred in the area, assist prospective buyers in becoming pre-qualified for a certain level of financing,<sup>21</sup> advise them on making offers, and assist in closing the transaction. Buyers typically do not pay their brokers directly.<sup>22</sup> Rather, listing brokers compensate cooperating brokers according to the terms stated in the MLS listing, which usually specifies a split of the listing commission. This split is often referred to as the "commission split" or the "co-broke." For example, a listing broker who charges a seller a six-percent commission may offer to compensate a cooperating broker three-percent, half of his commission. As one panelist reported, it is common for a listing broker to offer 50 percent of his or her commission to a broker who provides a buyer who closes on the property, although this split may vary according to market conditions. In slow markets, a listing broker

<sup>18</sup> See NAR 2006 Survey at 74 (noting that the majority of sellers surveyed contacted only one agent).

<sup>19</sup> See Whatley, tr. at 39; Periello, tr. at 198-99.

<sup>20</sup> See Whatley, tr. at 35.

<sup>21</sup> Sellers often want potential buyers to be pre-qualified for the level of financing required to purchase their home. Often, at the recommendation of their brokers, prospective buyers receive a letter of pre-qualification from a lender or mortgage broker, which is presented at the time of offer. Sellers' brokers may verify the pre-qualification letter.

<sup>22</sup> Although buyers do not pay a direct fee to their brokers, some portion of brokerage fees likely is built into the prices of homes for sale. See Hahn, Robert W.; Litan, Robert E., Gurman, Jesse, "Paying Less for Real Estate Brokerage: What Will Make It Happen?" American Enterprise Institute-Brookings Joint Center for Regulatory Studies, Working Paper 05-11 (June 2005) ("AEI-Brookings Paper") at 5, n. 14.

may offer a 60:40 split to attract scarce buyers, and the percentage may be reversed in a hot market.<sup>23</sup> Commission split disparities may also arise based on local norms for historical reasons.

The legal relationship between the buyer and the cooperating broker varies from state to state and has changed over time. Until the 1990s, it was common for the cooperating broker to be a subagent of the listing broker, working on the seller's behalf, but during the 1990s, most states revised their laws to allow buyer representation and NAR revised its policies, eliminating seller-subagency as a condition of participation in the MLS.<sup>24</sup> Today, after a decade of agency law reform across the country, it is more common for the cooperating broker to owe exclusive fiduciary duties to the buyer.<sup>25</sup>

#### 2.2.4 *The Buyer's Offer, Contingencies, and Closing in a Typical Transaction*

Once a buyer makes an offer on a property, the listing broker may help the seller evaluate offers and formulate counteroffers and may negotiate directly with the buyer or buyer's broker. If the seller accepts the offer, the home is "under contract," and several things must occur during a stated time period before the transaction closes, such as home inspections, appraisals, securing buyer financing, and assuring the title to the property is clear. The listing and cooperating brokers typically work together to assure that all contingencies are removed, and also work to coordinate the other players necessary to the closing, such as the mortgage lender, the insurance agent, the home inspector, the termite inspector, the surveyor, the appraiser, the closing attorney (in some states), the title company, and the escrow agent.<sup>26</sup>

Once all contingencies have been removed, the parties proceed to closing, where they exchange purchase money and title to the property. In the U.S., the HUD-1 form, required by the Real Estate Settlement Protection Act ("RESPA"),<sup>27</sup> is a centerpiece of the closing and requires a detailed listing of the flow of funds from buyer to seller, including selling and buying expenses associated with the transaction

<sup>23</sup> See Perriello, tr. at 199 ("[W]hen I was in a market that was very, very slow, it was not uncommon to actually have a disproportionate share going to the buyer . . . . So, at that point, if it was say a 6 percent commission, I might take 2 percent and offer 4 percent.").

<sup>24</sup> See Whatley, tr. at 40; Ann Morales Olazabal, *Redefining Realtor Relations and Responsibilities: The Failure of State Regulatory Responses*, 40 Harv. J. Legis. 65, 74-75 (2003). Morales notes that the subagency regime was not a creature of state law, but rather was a result of most MLSs permitting listing brokers to split commissions only with cooperating agents who agreed to be a subagent of the seller. *Id.* at 70. Some have argued that subagency was created by members of NAR in order to restrict access to the MLS. As Miceli, Pankcak, & Sirmans explain:

the designation of subagency in an MLS transaction allowed the NAR to argue that sellers and listing brokers would only want to extend subagency to ethical cooperating brokers. Brokers not bound by the NARs Code of Ethics therefore could not be trusted with the responsibility of subagency. Bundling the requirement of subagency with the MLS therefore gave the NAR a justification for limiting access to the MLS to NAR members . . . .

*Restructuring Agency Relationships in the Real Estate Brokerage Industry: An Economic Analysis*, 20 J. REAL ESTATE RESEARCH 30, 34-35 (2000).

<sup>25</sup> Whatley, tr. at 38-40. In all states, brokers are required to disclose to buyers the type of relationship that exists so buyers know whom the cooperating broker represents, although the timing of this disclosure varies by state. See Olazabal, *supra* note 24, at 91-100; see also Early, tr. at 169 (discussing the timing of disclosure of agency relationship in many states as having been changed from "first meaningful contact" to "as soon as practical but no later than the writing of an offer," and how this can give rise to procuring cause issues).

<sup>26</sup> Whatley, tr. at 26.

<sup>27</sup> 27 U.S.C. §§ 2601 *et seq.*

and the amount of commission paid to each broker. Although brokers typically do not play an active role at this stage, they often accompany their clients to the closing, where they are paid their commission.<sup>28</sup>

### 2.3 The Multiple Listing Service

The MLS is a local or regional joint venture of real estate brokers, typically operated by a local group of brokers affiliated with NAR, who pool and disseminate information on properties available for sale in their particular geographic areas.<sup>29</sup> The MLS combines its members' property listings information into a database, usually in electronic form. Most MLSs require that a broker enter a home into the MLS database within a short period of time (e.g., 24 to 72 hours) after entering into a listing agreement. Although the specific data fields on each listing are determined by the individual MLS, they typically include detailed descriptions of the properties for sale, the asking price, the commission split that will be paid to a cooperating broker,<sup>30</sup> and the name of the listing broker. The MLS allows broker-members to search and filter properties based on detailed criteria, including in-depth property and neighborhood information, offers made on the property, prior sales history, and days on the market.<sup>31</sup> In addition to the database of currently available properties, MLSs maintain an historic database of properties sold through the MLS. According to NAR's 2006 survey of home buyers and sellers, 88 percent of sellers reported that their home was listed in the MLS.<sup>32</sup>

The MLS allows brokers to serve home buyers and sellers more efficiently by reducing the costs of matching buyers and sellers. Buyers can go to a single broker for information regarding the vast majority of houses for sale within a given area, instead of visiting multiple brokerages to obtain such information, which maximizes buyers' chances of finding a house that most closely matches their desired characteristics.<sup>33</sup> Further, brokers can use this database to provide their clients information on sales of comparable homes so that the clients can more accurately determine the amount to bid on a property. Sellers benefit from exposure of their listings to a wide audience of potential buyers, increasing the probability of selling their properties quickly and at an optimal price (for those sellers).<sup>34</sup> Further, sellers,

<sup>28</sup> See 2005 NAR Survey at 58 (71% of sellers report that their agent attended the closing).

<sup>29</sup> According to NAR, there are approximately 900 MLSs in the United States. See *Vredevoogd-Combs Testimony*, at 19. See also GAO-05-947 at 6 & 12-13; NAR, *MLS Handbook*, § 1 (2006).

<sup>30</sup> The MLS facilitates the offering of unilateral offers of compensation to cooperating brokers, according to NAR. NAR, *MLS Handbook*, § 1 (2006); NAR's President-Elect stated:

An MLS is a cooperative venture between real estate brokers in which brokers share information on their listings with other competing brokers along with an offer to compensate them in the event they sell the listing. The MLS provides sellers with the advantage of listing with one brokerage firm but having exposure to all buyers working with other brokers in the community. It benefits buyers because they only need to work with one broker but have access to the properties listed by all of the other brokers who participate in the MLS. It is a *business to business* cooperative created by real estate professionals to enable them to share information relating to properties they created by real estate professionals to enable them to share information relating to properties they list for sale, and to research and present property-related information to their clients seeking to buy real estate properties.

*Vredevoogd-Combs Testimony* at 18-19 (emphasis in original).

<sup>31</sup> See *Reifert v. South Central Wisconsin MLS Corp.*, 450 F.3d 312 (7th Cir. 2006) (finding that the features and information available through the MLS at issue are not available through any other service).

<sup>32</sup> See NAR 2006 Survey at 77.

<sup>33</sup> 1983 FTC STAFF REPORT at 31.

through their brokers, can use the MLS information on comparable properties to decide whether to sell their properties and, if so, at what price.<sup>35</sup>

In addition to reducing the costs of matching buyers and sellers, the MLS reduces transaction costs among brokers. By requiring listings to state upfront the commission being offered to a cooperating broker, the MLS can reduce the costs associated with listing brokers negotiating separately with each potential cooperating broker.<sup>36</sup> Further, the MLS also operates an arbitration mechanism to resolve compensation disputes between listing and cooperating brokers.<sup>37</sup>

### 3. The Internet and Nontraditional Business Models

By reducing the cost of transmitting and searching information, the Internet has enabled consumers more easily to gather information related to all facets of home buying and selling. For example, before the introduction of the Internet, consumers had to learn about homes for sale through real estate brokers or various offline marketing vehicles, such as yard signs, newspaper advertisements, or real estate magazines. Consumers now have access to listing information from a variety of online sources as well. Many brokers market listings online through their own websites and give their MLS permission to place their listings on Realtor.com.<sup>38</sup> Consumers can view these listings before contacting or forming a relationship with a particular broker. Further, some brokers operate virtual office websites (“VOWs”) through which they deliver brokerage services to their clients. Consumers also can view homes for sale on third-party advertising sites such as Craigslist.com and on a variety of websites that promote homes that are for-sale-by-owner.<sup>39</sup>

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<sup>34</sup> NAR, Public Comment 208 at 5 (white paper). *See also* Whatley, tr. at 60-61 (that although the Internet provides useful information to buyers and sellers of real estate, by the time properties are advertised on the Internet, they may be gone already; thus, the MLS is crucial).

<sup>35</sup> *See* J. Crockett, *Competition and Efficiency in Transaction: The Case of Residential Real Estate Brokerage*, 10 J. AM. REAL ESTATE & URBAN ECON ASS’N 23, 211 (1982).

<sup>36</sup> *See* Whatley, tr. at 40-41.

<sup>37</sup> For example, if a cooperating broker secures a buyer for a transaction and he can establish that he was the “procuring cause” of the sale through arbitration, then the listing broker is liable for the cooperative compensation. “Procuring cause” refers to the actions of the primary broker who brings a buyer to the listings and causes the transaction to be completed. To enforce his right to payment, the cooperating broker may bring a complaint to the MLS’s arbitration system. *See* NAR, *Code of Ethics and Standards of Practice of the National Association of Realtors*, Standard of Practice 17-4 (rev. Jan. 1, 2006). Therefore, even when buyers, sellers, or listing brokers try to evade compensating cooperating brokers, cooperating brokers cannot be deprived of their share of the commission if they are the procuring cause of the transaction.

<sup>38</sup> In accordance with NAR rules, the MLSs create a datafeed called IDX (“Internet Data Exchange”) that participating brokers may use for their individual advertising websites. In addition, most MLSs contribute the IDX datafeed to national websites like Realtor.com, which are publicly accessible. Brokers can opt not to participate in IDX. If a broker opts out, none of his or her listings are included on the IDX feed, and he or she cannot operate a website based on an IDX feed. Therefore, IDX datafeeds often contain listings on fewer than all of the properties listed for sale in the MLS’s area. IDX data can also be less complete than the full MLS listings database because each MLS determines which datafields to include in the datafeed. For example, it is not uncommon for MLSs to withhold the property address. Further, there often is a delay between an update of MLS data and when those changes are reflected in the IDX, so that IDX-based websites likely will be missing some properties that recently have been listed for sale and include some that are no longer for sale.

<sup>39</sup> *E.g.*, FSBO.com; ForSaleByOwner.com; and homesbyowner.com.

In addition to giving consumers access to information about homes for sale, the Internet helps consumers to educate themselves about other areas of home buying and selling. For example, consumers can use the Internet to research brokers, mortgage and lending options, and recent home sales and home valuations.<sup>40</sup> Consumers also can find information about schools, crime, and other variables relevant to home purchase decisions through a host of online sources, including websites hosted by municipalities.

Industry-produced data appear to support the view that consumers increasingly are turning to the Internet to begin their search for a home. In 2006, 80 percent of home buyers used the Internet during their home search (up from 71 percent in 2004 and 77 percent in 2005).<sup>41</sup> In addition, in 2005 and 2006, 24 percent of recent home buyers first found the home that they purchased on the Internet – up from only 2 percent in 1997.<sup>42</sup> Conversely, the number of buyers reporting real estate agents as the first source of such information has decreased from 50 percent in 1997 to 36 percent in 2005 and 2006.<sup>43</sup> Among the most popular websites used by home buyers in their search were Realtor.com (52 percent of respondents), MLS websites (53 percent), and real estate company sites (40 percent).<sup>44</sup> Brokers surveyed by NAR cite the Internet more frequently than any other method, including yard signs, as a way to market homes.<sup>45</sup>

### 3.1 *Types of New Business Models*

By placing more information in the hands of consumers, the Internet has facilitated the growth of new business models that allow consumers opportunities to substitute their efforts for those of the broker, in many cases in return for lower fees. Below we discuss the following new business models: full-service discount brokers; limited-service brokers; VOW brokers; websites that provide advertising and other services to consumers selling their home without the assistance of a broker; and referral networks.<sup>46</sup>

- Full-Service Discount Brokers

Discount brokers offer buyers and sellers full-service real estate brokerage services at a price lower than the prevailing commission fees.<sup>47</sup> For example, a discount broker may offer all of the services provided by a traditional broker for a 3 percent or 4 percent commission in an area where 6 to 7 percent is the prevailing rate. Some discount brokers offer rebates to buyers. For example, 1% Realty offers buyers a rebate of approximately one percent of the purchase price in states that have not prohibited rebates.<sup>48</sup> Many discount brokers offer lower fees by using the Internet to deliver services to their customers (i.e., using email to communicate) and by working with customers who are easier to serve because they have performed substantial online research themselves.

- Limited-Service Brokers

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<sup>40</sup> See, e.g., <http://www.zillow.com>.

<sup>41</sup> See NAR 2005 Survey at 29; NAR 2006 Survey at 34.

<sup>42</sup> *Id.* at 38; NAR 2005 Survey at 29; NAR 2006 Survey at 38.

<sup>43</sup> NAR 2006 Survey at 38; NAR 2005 Survey at 29.

<sup>44</sup> NAR 2006 Survey at 44.

<sup>45</sup> NAR 2005 Survey at 65 (Internet cited by 84% of respondents, while yard sign cited by 79%).

<sup>46</sup> There is some overlap between the categories because certain business models fit into more than one category. For example, a VOW operator may or may not also be a discount broker.

<sup>47</sup> See GAO Report at 19.

<sup>48</sup> See <http://www.onepercentusa.com/buy.htm>. (last visited Sept. 6, 2006). State anti-rebate laws and regulations and their effect on price competition and consumer choice are discussed in Part 5.A.

LSBs – sometimes also referred to as “flat-fee” brokers or “fee-for-service brokers” – offer home sellers the option to purchase less than the full bundle of services traditional brokers provide. These brokers typically charge a flat fee – around \$500 – to list a home in the local MLS and to provide the client additional selling aids, such as yard signs, online advertisements, and a lock-box to allow buyers’ agents to show the home when the seller is not present. LSBs’ packages also typically include advertising the seller’s listing on websites, such as Realtor.com<sup>49</sup> and other MLS members’ websites. LSBs retain the flat fee whether or not the house ultimately sells. The MLS listing must include the offer of compensation to a cooperating broker.<sup>50</sup> A seller who finds a buyer without the help of a cooperating broker, however, would not pay this compensation.

In addition to the MLS listing package, for an additional fee, many LSBs offer additional brokerage services, such as assistance in negotiation and closing a transaction. Further, many also offer full-service brokerage at a reduced commission.<sup>51</sup> Thus, consumers who purchase the MLS-only package, but later feel they need more assistance with their transaction, typically can obtain it from their broker for an additional fee. Most LSBs allow their clients to cancel their listing agreement at any time, leaving consumers free to pursue other brokerage or non-brokerage options if they become dissatisfied with the broker’s service.

Although many brokers who specialize in the LSB option are not affiliated with major national brokerage chains, some brokers who are affiliated with such chains offer limited-service or flat fee brokerage services.<sup>52</sup> Industry participants told GAO that the Internet has allowed such brokerages, which have existed as a business model since at least the 1970s, to grow in numbers and size in recent years, in part because they can market their services to a larger population of buyers and sellers.<sup>53</sup>

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<sup>49</sup> According to its website, Realtor.com is “the official site of the National Association of REALTORS.”

<sup>50</sup> See, e.g., American Home Market.com (3 percent commission for a broker that finds a buyer), at <http://www.mlslistingnetwork.com/Nav.aspx/Page=http://MLSListingNetwork.com/PageManager/Default.aspx?PageID=241757>; ForSaleByOwner.com (allowing consumers to offer buyers’ agents any commission rate, but noting that “owners should consider that offering less than the traditional 3% could affect these Buyers Agent Realtors [sic] ‘degree’ of interest in showing your property to their customers”), at <http://www.forsalebyowner.com/perl-bin/showPage.cgi?szNextPage=placead.html&szAction=NEW&szURL=MLS;FSBOAdvertisingService.com> (2-3 percent commission for broker that finds a buyer), at <http://www.fsboadvertisingservice.com/flat-fee-mls-MLSTX3.asp>; ifoundahome.net (allowing home sellers to offer “a 3% commission or more” to buyers’ brokers), at <http://www.ifoundahome.net/Listingwork/SBasicListing.htm>; Texas Discount Realty (3 percent commission for a broker that finds a buyer), at <http://www.texasdiscountrealty.com/flatfee.htm>.

<sup>51</sup> In this manner, many LSBs also are full-service discount brokers.

<sup>52</sup> See Kunz, tr. at 101 (noting that several types of business models operate under the Century 21 franchise).

<sup>53</sup> See GAO Report at 19-20.

- VOW Brokers

VOWs are password-protected websites through which brokers offer their registered clients brokerage services online.<sup>1</sup> The unique feature of VOW operators is that these brokers offer their clients the ability to search online the same MLS information that other brokers provide to their clients through other delivery methods, such as hand delivery, mail, fax, or email.<sup>2</sup> In this way, they are different than publicly accessible broker websites like Realtor.com, which provide only limited MLS data.<sup>3</sup>

Access to the VOW and its listings search features is limited to prospective buyers or sellers who have entered into an agreement with the VOW operator that includes a terms-of-use agreement and a password.<sup>4</sup> The VOW permits clients to search the database at their leisure until they are ready to contact their broker for assistance in viewing homes or making an offer to purchase. While many buyers see this as a benefit that allows them greater control over their home-buying process, brokers also benefit. Brokers may reduce the time they spend servicing each customer face-to-face because customers conduct a portion of the time-consuming listings searches on their own.<sup>5</sup> Although VOWs differ from other brokerages in their innovative uses of the Internet, in other respects they operate exactly like other brokers. VOW brokerages typically maintain physical offices in the markets in which they operate, staff those offices with licensed brokers who participate in their local MLSs, and represent both buyers and sellers.<sup>6</sup>

- Websites that Provide FSBO Sellers with Advertising and Other Services

Some consumers choose to sell their houses without any assistance from a real estate broker. These “for-sale-by-owners” or “FSBOs” market their homes themselves by placing ads in local media, posting signs, and conducting their own open houses. A FSBO property is not listed in the local MLS because a listing broker is not involved; however, FSBOs often offer payment to a broker representing a buyer.

Several companies offer advertising and other services to help FSBO sellers. For example, there are several websites devoted to advertising FSBO property that for a fee, allow sellers to post descriptions of their properties along with color photos and virtual tours.<sup>7</sup> These websites also often will provide potential home buyers with general information on neighborhoods, such as demographics, crime rates, and school quality. Further, many provide links to ancillary service providers, such as title insurance companies,

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<sup>1</sup> See Testimony Summary of Russell Capper, President and Chief Executive Officer, eRealty, Inc. before Federal Trade Commission Office of Policy and Planning Public Workshop on E-Commerce, October 10, 2002 at 2.

<sup>2</sup> *Id.*

<sup>3</sup> These websites are governed by NAR’s Internet Data Exchange (“IDX”) rules, which apply to the online use of MLS data to advertise services. Because IDX datafeeds are used to advertise broker services, they contain less information than a consumer would obtain from a broker who has access to the MLS.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1.

<sup>6</sup> *Id.*

<sup>7</sup> Examples of FSBO Web sties are: ForSaleByOwner.com; FSBO.com; Craigslist.com; and homesbyowner.com. See Thorburn, tr. at 97-98 (noting the variety of tools available to FSBOs). See also GAO REPORT at 20.

escrow services, and home inspectors, and also provide sample forms related to real estate transactions, such as sample purchase or lease agreements.<sup>8</sup>

- Broker Referral Networks

Some national Internet websites aggregate some portion of the MLS data from across the country and allow potential home buyers to search the databases. After the potential buyer has searched the information online and is ready to visit houses in a particular area, the website refers him or her to a local broker. This broker pays a referral fee, typically a portion of his or her commission, to the referral website that aggregated the available MLS data. The referral website may then rebate a portion of its referral fee to the consumer, if state law or regulations do not prohibit rebates.

### 3.2 *Consumer Use of New Business Models*

According to NAR's 2006 Profile of Home Buyers and Sellers, 83 percent of home sellers who retained a broker used one who provided traditional full-services; 9 percent hired a broker to provide a limited set of services, and 8 percent hired a broker who placed the listing on the MLS and performed few, if any, additional services.<sup>9</sup> Some reports suggest that alternative brokerage models that offer different combinations of prices and services may put downward pressure on commission rates charged for full-service brokerage.

## 4. **State and Private Restraints on Competition in Real Estate Brokerage**

As alternative brokerage models have grown in prominence groups of real estate professionals, acting through MLSs, industry trade associations, and state regulatory and legislative bodies have engaged in conduct that is likely to make it more difficult for these alternative business models to compete.

### 4.1 *State Restrictions on Competition*

States sometimes seek to restrain competition to pursue conflicting policy goals. However, state regulation also can be used to transfer wealth from consumers to a favored industry.<sup>10</sup> State-imposed restrictions on competition are particularly attractive because unlike illegal cartels that must exist in the shadows, such restraints can exist in the open and compliance is enforced by the state.<sup>11</sup> Anti-rebate laws and minimum-service requirements threaten competition in the real estate brokerage industry.

#### 4.1.1 *Anti-Rebate Laws*

Rebates (*i.e.*, cash payments) and inducements (*e.g.*, gift certificates, coupons, vouchers, and discounted or free services relating to buying and selling property) are incentives that cooperating brokers offers to home buyers to encourage them to use that broker's services. Rebates typically are cash

<sup>8</sup> See *ForSaleByOwner.com Corp. v. Zinnermann*, 347 F. Supp. 2d 868, 870-71 (E.D. Cal. 2004) (providing general description of ForSaleByOwner.com business model).

<sup>9</sup> NAR 2006 Survey at 77.

<sup>10</sup> See James C. Cooper et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091, 1099-1102 (2005) (discussing the economic theory of regulation and explaining how regulation is likely to benefit industry more than consumers).

<sup>11</sup> See Deborah Platt Majoras, Chairman, Federal Trade Commission, *A Dose of Our Own Medicine: Applying a Cost/Benefit Analysis to the FTC's Advocacy Program* (Feb. 8, 2005), at <http://www.ftc.gov/speeches/majoras/050208currebtttopics.pdf>.

payments from the broker to his or her client after closing. Rebates and inducements (collectively referred to as “rebates”) are important under the traditional structure of real estate transactions because the seller and seller’s broker, not the buyer’s broker, determine the amount of the commission via the listing agreement. Without the ability to rebate, the buyer’s broker has no direct control over the amount of the commission. If the buyer’s broker were simply to reduce his commission, the savings would go to the seller’s broker, not to the home buyer. Rebates, in contrast, go directly to the buyer; for example, a buyer’s broker can offer a prospective home buyer \$1,000 (payable from the broker’s commission), if the buyer agrees to hire that broker. Some brokers rebate up to half of their commission to their buyers. Because cooperating brokers typically receive 50 percent of the overall commission, returning half of their commission to their client represents a 25 percent discount on the overall commission payment. This direct-to-consumer benefit means that rebates become powerful tools for price competition between brokers.<sup>12</sup>

Rebates are permitted in most states, and brokers in these states may freely advertise their willingness to offer rebates that save consumers hundreds and often thousands of dollars per transaction. Rebates currently are prohibited, however, in the following ten states: Alabama;<sup>13</sup> Alaska;<sup>14</sup> Kansas;<sup>15</sup> Louisiana;<sup>16</sup> Mississippi;<sup>17</sup> Missouri;<sup>18</sup> New Jersey;<sup>19</sup> North Dakota;<sup>20</sup> Oklahoma;<sup>21</sup> and Oregon.<sup>22</sup> In addition, Iowa<sup>23</sup> prohibits rebates when the customer uses the Services of two or more brokers during a real estate transaction. In states allowing rebates, some brokers operate business models where they rebate up to one-third or one-half of their commission to their buyers.

Rebate bans prevent price discounting to the detriment of consumers. For example, in states allowing rebates, some brokers operate business models where they rebate up to one-third or one-half of their commission to their buyers. Because cooperating brokers typically receive 50 percent of the overall commission, returning half of their commission to their client represents a 25 percent discount on the overall commission payment; rebating one-third represents approximately a sixteen percent discount. For example, if a cooperating broker were to earn half of a 5.1 percent commission and he were to offer a 50 or 33.3 percent rebate, a consumer would save \$3,392 or \$2,262 in commission payments, respectively, on

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<sup>12</sup> All such rebates and inducements will be referred to generally as “rebates,” and state laws and regulations prohibiting rebates will be referred to generally as “rebate prohibitions” or “rebate bans.”

<sup>13</sup> ALA. CODE § 34-27-36 (1975).

<sup>14</sup> ALASKA STAT. § 08.88.401 (Michie 2005).

<sup>15</sup> KAN. STAT. ANN. § 58-3062 (2006).

<sup>16</sup> LA. REV. STAT. ANN. § 37:1455 (West 2006).

<sup>17</sup> MISS. CODE ANN. § 73-35-21 (2006).

<sup>18</sup> MO. REV. STAT. § 339.150 (2006).

<sup>19</sup> N.J. STAT. ANN. § 45:15-3.1 (West 2006).

<sup>20</sup> N.D. CENT. CODE § 43-23-11.1 (2006).

<sup>21</sup> OKLA. STAT. ANN. tit 59, § 858-312 (West 2006).

<sup>22</sup> OR. REV. STAT. § 696.290 (2005).

<sup>23</sup> IOWA CODE § 543B.60A (2005).

the sale of a \$271,267 home.<sup>24</sup> Consumers in states with rebate bans could enjoy a similar level of savings if such bans were eliminated.

At the same time, the Agencies are aware of no evidence that rebate bans prevent any harm to home buyers or sellers that would justify such a restriction to competition. Further, no panelist at the Workshop proffered any justification for these restrictions. A panelist representing several major national brokerage franchises noted that his company has been working with state real estate commissions to repeal prohibitions on rebates, which he characterized as “not necessary” and “antiquated.”<sup>25</sup> Similarly, another panelist representing a major national brokerage franchise stated that “brokers and agents should be allowed the ability to freely negotiate transaction servicing pricing with their clients in any way they see appropriate.”<sup>26</sup>

In March 2005, the DOJ filed a civil antitrust lawsuit against the Kentucky Real Estate Commission (“KREC”), alleging that KREC’s regulations prohibiting Kentucky real estate brokers from offering rebates that restricted competition and caused consumers to pay higher prices for real estate brokerage services.<sup>27</sup> The lawsuit was settled on July 13, 2005. Under the terms of the settlement, which has been approved by the court, KREC agreed to cease enforcement of its rebate prohibitions.<sup>28</sup> Since the Department and KREC entered into the court-approved consent decree ending KREC’s rebate ban, consumers in Kentucky have benefited from new reduced price business models. For example, one realty company offers a 1% cash back rebate program for home buyers; another offers rebates worth up to \$2,250 in the form of HomeDepot or American Express gift cards; and another offers to pay moving costs of up to \$1,500 to consumers who buy particular properties. Two other companies together operate a program that rebates up to \$3,000 for the sale or purchase of a home; that is, a combined maximum rebate of \$6,000 when the customer buys one property and sells another through the program when he or she moves. The discount typically is paid into the customer’s 529 college savings account.

In addition to the Kentucky lawsuit, DOJ also investigated rebate bans by the South Dakota Real Estate Commission, the West Virginia Real Estate Commission, and the Tennessee Real Estate Commission. In response to these investigations, the South Dakota and West Virginia real estate commissions rescinded their regulations prohibiting rebates, thereby enabling consumers in those states to receive the full benefits of competition.<sup>29</sup> The Tennessee Real Estate Commission voted to suspend its rules and is in the process of rescinding them entirely.<sup>30</sup>

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<sup>24</sup> Based on weighted average sales price of new and existing homes in 2005 (\$271,267), the buyer’s broker’s share of a \$13,563 commission would be \$6,784. A buyer who is rebated half of this would receive \$3,392.

<sup>25</sup> Perriello, tr. at 151.

<sup>26</sup> Lewis, tr. at 180.

<sup>27</sup> See Complaint, *United States v. Kentucky Real Estate Comm’n*, Civil Act. No. 3:05CV188-H (filed Mar. 31, 2005), at <http://www.usdoj.gov/atr/cases/f208300/208393.htm> (“KREC Complaint”).

<sup>28</sup> See Amended Final Judgment and (proposed) Order, *United States v. Kentucky Real Estate Comm’n*, Civil Act. No. 3:05CV188-H, at <http://www.usdoj.gov/atr/cases/f210100/210142.htm>.

<sup>29</sup> DOJ, *South Dakota Real Estate Commission Permits Real Estate Brokers To Offer Rebates And Inducements* (Aug. 17, 2005), available at [http://www.usdoj.gov/atr/public/press\\_releases/2005/210637.htm](http://www.usdoj.gov/atr/public/press_releases/2005/210637.htm); DOJ, *West Virginia Real Estate Commission Permits Real Estate Brokers To Offer Rebates And Other Discounts* (May 4, 2006), available at [http://www.usdoj.gov/atr/public/press\\_releases/2006/215961.htm](http://www.usdoj.gov/atr/public/press_releases/2006/215961.htm).

<sup>30</sup> Tennessee Association of Realtors, 12-28-06 Special Notice at <http://www.tarnet.com/digests/122806.html> (noting that the Tennessee Real Estate Commission proposed to remove its ban on cash rebates; The TAR

#### 4.1.2 Minimum-Service Requirements

Relatively recently, several states have enacted so-called minimum-service requirements. As the name suggests, these laws enumerate specific tasks that a real estate broker must provide his or her client. These laws typically require a broker to set up appointments for showings, provide assistance and advice on offers, counteroffers, and negotiations, although some also require a broker to provide assistance in closing the transaction as well. Currently, Alabama,<sup>31</sup> Illinois,<sup>32</sup> Indiana,<sup>33</sup> Iowa,<sup>34</sup> Missouri,<sup>35</sup> Texas,<sup>36</sup> and Utah<sup>37</sup> have minimum-service requirements.<sup>38</sup> Further, Idaho,<sup>39</sup> Kentucky,<sup>40</sup> Michigan,<sup>41</sup> Mississippi,<sup>42</sup> and New Mexico<sup>43</sup> recently have considered minimum-service provisions.

These laws restrain consumer choice and are likely to harm competition in the real estate brokerage market. As discussed in Part 2, in an MLS-only package, an LSB typically will not include assistance with offers and counteroffers or negotiations. Thus, minimum-service laws force LSBs either to cease providing the MLS-only package or increase the services provided with it, which will increase costs and force LSBs either to accept lower profits or raise prices on packages that require additional services to meet state requirements. As the FTC and DOJ have explained in advocacy letters to several states, to the extent that minimum-service laws cause brokers to increase the price they charge for limited-service packages to cover costs for providing additional service that the state requires, minimum-service provisions harm consumers in two ways.<sup>44</sup> First, these laws frustrate consumer choice by reducing the options available to

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Digest: The Weekly membership newsletter (12-12-06) <http://www.tarnet.com/digest/121206.html> (noting that the proposed rule change was initiated because of DOJ inquiry).

<sup>31</sup> ALA. CODE § 34-27-84(c).

<sup>32</sup> 225 IL. COMP. STATS. § 454-15-15(a).

<sup>33</sup> IN. CODE § 25-34.1-10-9.5 – 10-10.

<sup>34</sup> IOWA CODE § 543B.56A.

<sup>35</sup> MO. REV. STATUTES § 339.780(7)(1)-(3). An exclusive brokerage agreement is defined as “a written brokerage agreement which provides that the broker has the sole right, through the broker or through one or more affiliated licensees, to act as the exclusive limited agent, representative, or transaction broker of the client or customer that meets the requirements of section 339.780.” *Id.* § 710(16).

<sup>36</sup> TEX OCC. CODE § 1101.557.

<sup>37</sup> UTAH CODE § 61-2-27(2)(a).

<sup>38</sup> Several states including Delaware, Ohio, Oklahoma, Tennessee, and Wisconsin have less restrictive laws that allow the client to choose if they want the listing broker to perform similar services. *See* DEL. CODE tit.24 § 2973, OHIO CODE § 4735.621, OKLA. STAT. tit. 59 § 858-353, TENN. CODE tit. 62 chap. 13, WI. CODE § 452.133.

<sup>39</sup> Provision 429-02, at <http://www.irec.idaho.gov/publcs/429-02.pdf>.

<sup>40</sup> Kentucky S.B. 43, at <http://www.lrc.ky.gov/record/06RS/SB43.htm>.

<sup>41</sup> Michigan H.B. 4849, at <http://www.legislature.mi.gov/documents/2005-2006/billengrossed/House/pdf/2005-HEBH-4849.pdf>

<sup>42</sup> Mississippi S.B. 2782, at <http://billstatus.ls.state.ms.us/documents/2006/html/SB/2700-2799/SB2782IN.htm>.

<sup>43</sup> *See* Glenn Roberts, Jr., *New Mexico Rescinds Controversial Real Estate Rules*, INMAN NEWS (July 17, 2006), at <http://www.inman.com/InmanNews.aspx?ID=54526>.

<sup>44</sup> *See* Letter from FTC and Justice Department to Michigan State Sen. Alan Sanborn (Oct. 18, 2005), at <http://www.ftc.gov/os/2005/10/051020commmihousebill4849.pdf>; Letter from the FTC and the Justice

consumers in the marketplace; consumers who would otherwise choose a limited-service option that does not meet state minimum service requirements are harmed because they can no longer choose their preferred option.<sup>45</sup>

Forcing consumers who would otherwise prefer a limited service option such as an MLS-only package that does not contain minimum services to choose a less preferred option can significantly increase the amount these consumers will pay for brokerage services. Consider the example of a consumer who is likely to sell his or her home for \$271,267<sup>46</sup> and, absent a minimum-service law, would have paid \$8,638 (\$500 listing fee plus a 3 percent commission for a cooperating broker) for a flat-fee listing. If, due to the minimum-service law, this home seller purchases full-service brokerage at a 5.1 percent commission rate, she will pay \$13,563 for brokerage services – \$4,924 more than she would pay for a flat-fee listing. Similarly, with minimum-service laws in place, the consumer may opt for an augmented MLS-only package that satisfies state requirements or a “flat-fee plus” package. This likely will require an additional expenditure of at least between \$100 and \$500.<sup>47</sup>

Minimum service laws also are likely to reduce the competitive constraint LSBs impose on FSBs. In states without minimum service laws, a consumer typically can choose an MLS-only package as the lowest price/lowest service level option. LSBs in minimum-service states now must include the enumerated additional tasks in their base-level packages, which often results in a higher price due to the increased costs and time commitments associated with each transaction.<sup>48</sup> A FSB who wants the business of a consumer

Department to Governor Matt Blunt (May 23, 2005), at <http://www.ftc.gov/opa/2005/05/mrealestate.htm>; Letter from the FTC and the Justice Department to Alabama Senate (May 12, 2005), at <http://www.ftc.gov/os/2005/05/050512tralabamarealtors.pdf>; Letter from the FTC and the Justice Department to Loretta R. DeHay, Gen. Counsel, Texas Real Estate Comm’n. (Apr. 20, 2005), at [http://www.usdoj.gov/atr/public/press\\_releases/2005/208653a.htm](http://www.usdoj.gov/atr/public/press_releases/2005/208653a.htm).

<sup>45</sup> In the face of minimum service requirements that increase the price of an LSB’s base package, consumers may decide to purchase more or less brokerage services than they otherwise would. For example, a consumer may decide to perform the entire transaction on his or her own, sacrificing the brokerage services that he or she otherwise would purchase. Alternatively, a consumer may hire a traditional broker who will assist him or her with every aspect of the transaction or purchase a brokerage package that provides more service than an MLS-only listing, but less than a traditional package. Regardless of which alternative is chosen, home sellers are now worse off because they cannot choose their preferred combination of price and service.

<sup>46</sup> 2005 weighed average home price for new home and existing home sales.

<sup>47</sup> See *supra* note 16.

<sup>48</sup> According to their Web sites, some LSBs located in Alabama, Texas, and Utah, for example, charge a normal flat fee for an MLS-only package, but also include an additional ½ percent commission due at closing. See, e.g., Crawford Realty, at [http://www.crawfordrealtyofalabama.com/one\\_time\\_fee.htm](http://www.crawfordrealtyofalabama.com/one_time_fee.htm); Discount Realty, at <http://www.discountrealty.biz/12.html>; Houston My Castle, at <http://www.mycastlefsbo.com>. Press accounts also indicate that LSBs have raised their prices or exited the market altogether in response to minimum-service laws. See Glenn Roberts Jr., *Flat-fee brokers adapt to new real estate law Texas' new minimum-service law enacted Sept. 1*, INMAN NEWS (Oct. 12, 2005), available at <http://www.inman.com/inmannews.aspx?ID=48325>; see also <http://www.texasdiscountrealty.com/laws.htm> (Web site of Texas Discount Realty explaining that “because of the added responsibilities forced on to you, the seller and us the broker, by [the Texas minimum service law], we are forced, as most brokers to adjust our prices”); Tracy Donhardt, *New Law Provides Realtors and Edge*, INDIANAPOLIS BUSINESS JOURNAL (July 10, 2006), available at <http://indybiznow.com/Default.aspx?TabId=391&issueyear=2006&issuemonth=07&issueday=10&page=1&article=Ar00101> (noting that Indiana’s minimum service law has caused at least one limited-service broker to exit the market).

who might otherwise consider limited-service brokerage will need to offer lower commissions and/or increased quality to induce the consumer to choose to purchase the additional services offered by an FSB. Data suggest that consumers who consider limited-service business models ultimately negotiate lower fees with full-service brokers.<sup>49</sup> If LSBs are forced to raise their prices in response to minimum-service laws, consumers who choose FSBs are also likely to pay higher prices for real estate brokerage due to a reduction in the competitive constraint provided by LSBs. Uncertainty over the legality of the MLS-only package also reduces the ability of LSBs to compete against FSBs. LSBs have reported that once minimum service laws are passed, many of their clients will withdraw and use a full-service model due to fears over the legality of the LSB's business model.

Finally, although decisions to buy or sell a home are likely to be driven to a large extent by exogenous factors (e.g., change in work or family situations), the supply and demand for homes are not likely to be perfectly price inelastic. The 2005 NAR Homebuyers and Sellers report finds that forty percent of home sellers decided to sell their homes due to factors that are likely to be within their control: 22 percent of consumers listed wanting a larger house as the primary reason for selling, nine percent listed wanting to move closer to a family member, and nine percent listed the neighborhood having become less desirable.<sup>50</sup> Thus, an increase in transaction costs associated with selling real estate is likely to reduce the number of consumer real estate transactions that occur.

Advocates for minimum-service laws have argued that they are necessary to prevent consumers from being deceived into believing that an LSB will provide more services than they actually do.<sup>51</sup> Similarly, some have expressed concerns that consumers have certain expectations about the services a real estate brokers will provide that are disappointed by limited-service contracts.<sup>52</sup> Others have taken a more paternalistic stance, arguing that minimum-service laws are needed because consumers are unable to handle a real estate transaction without a brokers' assistance.<sup>53</sup> Some commentators also have contended that consumers who hire limited-service brokers are subject to so-called hold-up, because once a consumer has entered into an exclusive agreement with an LSB, she effectively is locked into that broker to purchase all additional brokerage services that she subsequently may need.<sup>54</sup>

Another line of argument is that these laws are needed to protect cooperating brokers who represent buyers in a transaction where the seller has entered into a limited-service contract. Such sellers foist external costs upon cooperating brokers by jeopardizing the transaction due to their inexperience. In this scenario, a cooperating broker may have to explain aspects of the transaction to the seller or perform some of the tasks related to removing contingencies and closing the transaction typically performed by the listing agent. Further, some brokers state that minimum service laws are necessary because they fear liability for undisclosed dual agency. In situations where the cooperating broker is an agent of the buyer, but provides

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<sup>49</sup> See Part 3, *supra*.

<sup>50</sup> 2005 NAR at 56. 34% of sellers listed change in family situation or job-related move as the reason for selling their home. *Id.*

<sup>51</sup> Thorburn, tr. at 96.

<sup>52</sup> See, e.g., GAO REPORT at 16.

<sup>53</sup> Peter G. Baker, *Hiring a Broker: Should You Expect Less?* Available at [http://realtymtimes.com/rtpages/20060411\\_hirebroker.htm](http://realtymtimes.com/rtpages/20060411_hirebroker.htm) (April 11, 2006).

<sup>54</sup> Darryl W. Anderson, *Minimum Service Requirements in Real Estate Brokerage: A Response to Maureen K. Ohlhausen*, ANTITRUST SOURCE, Jan. 2006, at 3-4 ( "the exclusive services agreement makes the LSB a monopoly brokerage provider to the particular customer, and she is subject to monopoly pricing if she seeks to purchase additional brokerage services after she had already had entered into the limited service agreement and signed the exclusive agency agreement.").

assistance to a seller, he risks becoming an undisclosed dual agent, which can give rise to legal liability for both the broker and the buyer.<sup>55</sup> At the same time, however, refusing to help an unrepresented seller may jeopardize a transaction that the buyer wants to close.

Despite these concerns, there is a dearth of empirical evidence to suggest that minimum service laws address any problem. There is no indication that consumers who employ LSBs misunderstand the nature of the contractual relationship into which they enter.<sup>56</sup> Nor is there evidence of an increased prevalence of complaints with state agencies against LSBs. One Workshop participant reported that in 2004 there were over 3,500 complaints filed with the Texas Real Estate Commission against brokers and agents, but there has never been a complaint filed against an LSB.<sup>57</sup> This observation is consistent with what FTC and DOJ staff have learned in discussions with Texas and other states. Indeed, a recent NAR survey found the vast majority of LSB clients to be satisfied with the service they received.<sup>58</sup> Not surprisingly, testimony provided at the Workshop suggests that the impetus for these laws comes not from aggrieved consumers, but from state Realtor associations.<sup>59</sup>

The Agencies also are unaware of any increased incidence of undisclosed dual agency problems associated with limited-service brokerage and there is no indication that the marketplace is not adequate to address concerns that cooperating brokers may face special risks when dealing with sellers subject to a limited-service contract. Buyers use cooperating brokers because they have access to the MLS and experience in closing real estate transactions. Moreover, a cooperating broker's commission is protected by the MLS rules and regulations and cooperating brokers know exactly how much they will be paid if they procure a buyer for a home.

Because cooperating brokers can make a choice as to whether or not the compensation offered through a co-broke, or from their buyer, is worth the effort that it will take to close a transaction, there is no need for a minimum-service law to "protect" them from doing additional work. Cooperating brokers are free to take unilateral action to avoid listings that are likely to present special risks, and buyers may

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<sup>55</sup> See Katherine A. Pancak et al., *Real Estate Agency Reform: Meeting the Needs of Buyers, Sellers, and Brokers*, 25 REAL ESTATE L.J. 345, 350 (1997) (noting that agency relationships can be created by actions).

<sup>56</sup> The rhetoric sometimes compares entering into a real estate transaction to surgery. "[Government agencies] argue that with disclosures and waivers consumers should be able to refuse any brokerage service or obligation. . . . We do not, for example, allow consumers to save money by hiring doctors who cut costs by not sterilizing surgical instruments or washing their hands." Peter G. Baker, *Hiring a Broker: Should You Expect Less?* Available at [http://realtytimes.com/rtpages/20060411\\_hirebroker.htm](http://realtytimes.com/rtpages/20060411_hirebroker.htm) (April 11, 2006).

<sup>57</sup> Farmer, tr. at 73.

<sup>58</sup> See 2006 NAR Survey at \_\_.

<sup>59</sup> See Farmer, tr. at 71-72 ("In Texas, the law was filed or the amendment was tacked onto the housekeeping law by a state representative who also happens to be a real estate broker out of El Paso and also happens to be a ranking member in the Texas Association of Realtors. . . . [I]n Utah, a minimum service law recently passed, and it was pushed through by a state senator out of Utah who also happens to be the President this year of the National Association of Realtors"). In response to an FTC questionnaire, respondents from Colorado, North Dakota, Vermont, and Washington noted that complaints against limited-service brokers were minimal or non-existent. Consistent with brokers, not consumers, being behind minimum-service laws, the Consumer Federation of America, a long-standing consumers' rights watchdog organization, issued a report that was critical of minimum-service laws, contending that they "discourage competition" by "making it difficult for internet-based or other limited service firms to function." CONSUMER FEDERATION OF AMERICA, *HOW THE REAL ESTATE CARTEL HARMS CONSUMERS AND HOW CONSUMERS CAN PROTECT THEMSELVES* (June 2006), available at [http://www.consumerfed.org/pdfs/Real\\_Estate\\_Cartel\\_Study061906.pdf](http://www.consumerfed.org/pdfs/Real_Estate_Cartel_Study061906.pdf).

need to compensate brokers directly for any additional risk attendant to closing a transaction involving a limited-service listing.<sup>60</sup>

Although proponents have not demonstrated that limited-service brokerage has given rise to any consumer harm, concerns can be dealt with in far less-restrictive manners than a complete ban of this business model. For example, the Agencies have advocated to states that there is a concern that some consumers who enter into limited-service brokerage arrangements truly do not understand that they are contracting to receive fewer services than a traditional agent typically would provide, requiring disclosure appears to be a far less restrictive solution than a complete ban on limited-service brokerage. Further, such disclosure will inform the seller that they cannot expect any assistance from the cooperating broker. In fact, NAR has agreed that disclosure creates “appropriate expectations” for all parties in the transaction to avoid undisclosed dual agency.<sup>61</sup> Further, licensing laws or regulations could be amended to clarify that negotiations with a party who has chosen not to use his broker for such negotiations do not imply an agency relationship. Ohio,<sup>62</sup> Virginia,<sup>63</sup> and Wisconsin<sup>64</sup> recently have adopted this approach. Finally, although there is no reason to believe that consumers currently cannot ascertain LSBs’ prices in advance – they are clearly stated on most LSB Web sites and there appears to be no impediment to consumers asking – concerns over lock-in could be addressed through laws requiring LSBs clearly to disclose all of their prices for subsequent services up-front.

#### 4.2 *Use of MLS Rules to Disadvantage Competitors*

As discussed in Part 2, the MLS provides important efficiencies through aggregating listings in a central location. Because MLS rules represent agreements among competing brokers, they may not be more restrictive than reasonably necessary to bring about these efficiencies. Due to these significant efficiencies and procompetitive features courts have held that MLSs have market power.<sup>65</sup> Further,

<sup>60</sup> Avoiding limited-service listings without disclosure to buyers may raise issues concerning the fulfillment of fiduciary duties. See Part 5.C. *infra* (discussing the issues related to steering).

<sup>61</sup> Blanche Evans, *Where Real Estate Associations Stand On MLS-Entry-Only Listings*. Available at [http://realtymtimes.com/rtapages/20050224\\_mlsentryonly.htm](http://realtymtimes.com/rtapages/20050224_mlsentryonly.htm), (February 24, 2005).

<sup>62</sup> OHIO CODE § 4735.75(B) (“A licensee who negotiates directly with a seller, purchaser, lessor, or tenant pursuant to a written authorization as described in division (A) of this section does not violate division (A)(19) of section 4735.18 of the Revised Code and negotiations conducted by a licensee pursuant to the authorization shall not create or imply an agency relationship between that licensee and the client of that exclusive broker.”)

<sup>63</sup> See VA. CODE § 54.1-2132(C) (effective Jul. 7, 2007) (“A licensee engaged by a seller in a real estate transaction may, unless prohibited by law or the brokerage relationship, provide assistance to a buyer or potential buyer by performing ministerial acts. Performing such ministerial acts that are not inconsistent with subsection A shall not be construed to violate the licensee's brokerage relationship with the seller unless expressly prohibited by the terms of the brokerage relationship, nor shall performing such ministerial acts be construed to form a brokerage relationship with such buyer or potential buyer.”).

<sup>64</sup> WI. CODE § 452.133(6).

<sup>65</sup> *Realty Multi-List*, 629 F.2d at 1373-74 (citing A. Austin, *Real Estate Boards & Multiple Listing Sys. as Restraints of Trade*, 70 Columbia L. Rev. 1325, 1346 (1970)); accord *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1580 (11<sup>th</sup> Cir. 1991) (“Market power turns on the number of brokers who use the service, the total dollar amount of annual listings, and a comparison of the rate of sales using the multilisting service to the market as a whole.”); see also, e.g., *Reifert*, slip op. at 7-8 (“In short, it is impossible to perform the tasks of a real estate agent or appraiser in the relevant geographic area without using [the defendant MLS]. Thus, it possesses sufficient market power to restrain competition.”); *Austin Bd. of Realtors*, 2000 WL 34239114, at \*4 n.4 (“It is undisputed that ABOR has significant market power in the relevant product market for residential real estate brokerage services in the Austin metropolitan area

although courts do not treat MLS-related restrictions under a *per se* rule, they typically are judged under a truncated form of the rule of reason.<sup>66</sup> The Agencies recently have challenged MLS rules that discriminate against alternative brokerage models as violations of the antitrust laws.

#### 4.2.1 *Discrimination Against Brokers Entering Into EA Listing Contracts*

As discussed in Part 3, NAR data show that 80 percent of home buyers search the Internet for homes, and that 24 percent of home buyers first found the home they ultimately purchased online.<sup>67</sup> Thus, online exposure appears to be a crucial input into marketing a home, and, to the extent that successful marketing is positively related to sales price and negatively related to time on the market, it is reasonable to assume that homes without such exposure are likely to take longer to sell or sell at lower prices. Recently, several MLSs have adopted rules that limit the exposure of exclusive agency listings, which often are used by alternative brokers.

Earlier this year, the FTC charged the Austin Board of Realtors (“ABOR”), Information and Real Estate Services, LLC (“IRES”), Northern New England Real Estate Network, Inc. (“NNEREN”), Williamsburg Area Association of Realtors, Inc. (“WAAR”), Realtors Association of Northeast Wisconsin, Inc. (“RANW”), and Monmouth County Association of Realtors, Inc. (“MCAR”), with violating Section 5 of the FTC Act by adopting MLS rules that limit the publication and marketing on the internet of certain sellers’ properties, but not others, based solely on the terms of their respective listing contracts.<sup>68</sup> The FTC obtained consent agreements with ABOR, IRES, NNEREN, WAAR, RANW, and MCAR.

The complaints accompanying the consent agreements alleged that ABOR, IRES, NNEREN, WAAR, RANW and MCAR each individually controlled key inputs necessary for a listing broker to provide effective real estate brokerage services, and that each respondent’s exclusive agency listing policy was a joint action by a group of competitors to refuse to deal except on specified terms.<sup>69</sup> The rules or policies challenged in the complaints state that information about properties will not be made available on popular real estate web sites unless the listing contracts are Exclusive Right to Sell Listings. When implemented by each of the respondents, this “Web Site Policy” prevented properties with non-traditional listing

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and exclusive access to the MLS Data which is essential to effective competition in this market.”); 1983 FTC STAFF REPORT at 37 (“At the MLS level, there is, in fact, no effective competition at the present time, and almost all brokers are, therefore, members of one system in each local community.”). *See also* Areeda, *Antitrust Law*, paragraphs 2220-2223.

<sup>66</sup> *Id.* at 1369 (“[W]hen broker participation in the [MLS] is high, the service itself is economically successful and competition from other listing services is lacking, rules which invite the unjustified exclusion of any broker should be found unreasonable.”). Subsequent decisions largely have followed this approach. *See, e.g., Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1579-80 (11th Cir. 1991); *Austin Board of Realtors v. E-Realty, Inc.*, No. Civ. A-00-CA-154 JN, 2000 WL 34239114, at \*4 (W.D. Tex. Mar. 30, 2000). A discussion of the various private litigation involving alleged MLS-related restraints is beyond the scope of this Report.

<sup>67</sup> 2006 NAR REPORT at 34-38.

<sup>68</sup> *In the Matter of Austin Bd. of Realtors*, Docket No. C-4167 (Final Approval, Aug. 29, 2006); *In the Matter of Information and Real Estate Services, LLC*; FTC File No.: 061 0087; *In the Matter of Northern New England Real Estate Network, Inc.*; FTC File No.: 051-0065; *In the Matter of Williamsburg Area Association of Realtors, Inc.*; FTC File No.: 061-0268; *In the Matter of Realtors Association of Northeast Wisconsin, Inc.*; FTC File No.: 061-0267; *In the Matter of Monmouth County Association of Realtors*; FTC File No.: 051-0217.

<sup>69</sup> *See* Analysis to Aid Public Comment at 4.

contracts from being displayed on a broad range of public real estate web sites, including Realtor.com.<sup>70</sup> Each policy had the effect of discouraging brokers from using exclusive agency listings, which are often used by Listing Brokers to offer low-cost real estate services to consumers. In the ABOR case, the data showed that three months after ABOR implemented its exclusive agency listing policy, the percentage of all listings that were exclusive agency listings fell from 18 percent to 2.5 percent.<sup>71</sup> The complaints also alleged that the exclusive agency listing policy did not give rise to any plausible or cognizable efficiencies, and was not “reasonably ancillary to the legitimate and beneficial objectives of the MLS.”<sup>72</sup>

Additionally, in October 2006, the FTC charged Realcomp II Ltd. (“Realcomp”) and MiRealSource, Inc. (“MiRealSource”) with illegally restraining competition by limiting consumers’ ability to obtain low-cost real estate brokerage services. The complaint against MiRealSource alleges that MiRealSource adopted a set of rules to keep Exclusive Agency Listings from being listed on its MLS, as well as other rules that restricted competition in real estate brokerage services. This case currently has been withdrawn from administrative litigation to consider a proposed consent order.<sup>73</sup>

The complaint against Realcomp alleges that Realcomp engaged in anticompetitive conduct by prohibiting information on Exclusive Agency Listings and other forms of nontraditional listings from being transmitted from the MLS it maintains to public real estate web sites. Both complaints allege that the conduct was collusive and exclusionary, because in agreeing to keep non-traditional listings off the MLS or from public Web sites, the brokers enacting the rules were, in effect, agreeing among themselves to limit the manner in which they compete with one another, and withholding valuable benefits of the MLS from real estate brokers who did not go along. In litigating the complaints, the FTC staff will seek to prohibit these groups of competitors from engaging in such conduct to the detriment of consumers.

#### 4.2.2 Discrimination Against VOWs

In September 2005, DOJ’s Antitrust Division sued NAR, the largest trade association in the United States, alleging that its nationwide rules violated Section 1 of the Sherman Act. DOJ alleged that the rules, embodied in a so-called VOW Policy, limited competition from real estate brokers using innovative business models and the Internet to offer better services to their clients. NAR’s rules allow brokers to direct that their clients’ listings not be displayed on any VOW or on a particular VOW. The complaint charges that the rules offer no procompetitive benefit. DOJ’s lawsuit is pending in the United District court in Chicago, Illinois.

<sup>70</sup> The conduct challenged recently is similar to conduct that the FTC has challenged in the past. In the 1980s and 1990s, several local MLS boards banned exclusive agency listings from the MLS entirely. The Commission investigated and issued complaints against these exclusionary practices, obtaining several consent orders. See *In the Matter of United Real Estate Brokers of Rockland, Ltd.*, Docket No. C-3461, 116 F.T.C. 972 (1993); *In the Matter of American Industrial Real Estate Association*, Docket No. C-3449, 116 F.T.C. 704 (1993); *In the Matter of Puget Sound Multiple Listing Association*, Docket No. C-3300 (F.T.C., Aug. 2, 1990); *In the Matter of Bellingham-Whatcom County Multiple Listing Bureau*, Docket No. C-3299 (F.T.C., Aug. 2, 1990); *In the Matter of Metro MLS, Inc.*, Docket No. C-3286, 115 F.T.C. 305 (1990); *In the Matter of Multiple Listing Service of the Greater Michigan City Area, Inc.*, Docket No. C-3163, 106 F.T.C. 95 (1985); *In the Matter of Orange County Board of Realtors, Inc.*, Docket No. C-3162, 106 F.T.C. 88 (1985).

<sup>71</sup> See, e.g., *Complaint, In the Matter of Austin Board of Realtors*, File No. 0510219, at ¶ 17 (July 13, 2006), at <http://www.ftc.gov/os/caselist/0510219/0510219AustinBoardofRealtorsComplaint.pdf>.

<sup>72</sup> *Id.* at ¶27.

<sup>73</sup> See *In re MiRealSource, Inc.*, Order Withdrawing Matter from Adjudication for the Purpose of Considering a Proposed Consent Order (Nov. 27, 2006), at <http://www.ftc.gov/os/adipro/d9321/061128MiRealSourceorderwithdrawing.pdf>.

In most markets, real estate brokers share information about properties for sale, known as listings, through the local MLS, which, as discussed above, is a joint venture among competing brokers. Participation in the local MLS makes it possible for a broker to provide clients with listings for virtually all properties for sale in the community, which is critical to compete in the local market, according to the complaint.

Traditionally, brokers provided listings for properties to their customers in a variety of ways, such as by hand at their offices, or by mail, fax, or e-mail. Some brokers began to offer brokerage services to their customers over the Internet, using the so-called VOWs, which allowed the broker's customers to search the MLS database on their own, using their home computers to obtain the same information that would be available in a broker's brick-and-mortar office. As alleged in the complaint, because the Internet can be used to deliver brokerage services more efficiently - resulting in better service and lower costs to consumers - brokers who utilize the Internet represent a competitive challenge to traditional brokers. According to the complaint, NAR rules were developed in response to the development of VOWs.

In its complaint, the DOJ alleged that NAR's policy restrains competition by requiring NAR-affiliated MLSs to adopt rules that will allow brokers to withhold their clients' listings from other brokers' websites by means of an "opt out."<sup>74</sup> In essence, NAR's policy enables traditional brokers to block their competitors' clients from having full on-line access to all of the MLS's listings. When exercised, the opt-out provision prevents web-based brokers from providing all MLS listings that respond to a client's search, effectively inhibiting the new technology.

NAR's policy significantly alters the rules that govern MLSs by permitting traditional brokers to discriminate against other brokers based on their business model, denying them the full benefits of MLS participation. The DOJ's lawsuit seeks to ensure that traditional brokers, through NAR's policy, cannot deprive consumers of the benefits that would flow from these new ways of competing. According to the complaint, brokers who participated in the NAR work group that formulated the VOW policy recognized that the opt-out right would be "abused beyond belief." As quoted in the complaint, the chairman of the working group admitted that the opt out right was likely to be exercised by brokers despite the fact that "it may not be in the sellers' best interest to opt out." NAR's policy denies brokers using new technologies and business models the same benefits of MLS membership available to their competitor brokers, suppresses innovation, discourages competition on price and quality, and prevents new, efficient competitors from entering into the marketplace - all to the detriment of consumers.

In December 2005, NAR filed a motion to dismiss the lawsuit. NAR argued that its VOW policies do not violate the Sherman Act because they merely empower individual brokers to opt out and therefore "restrain" nothing. The Court denied NAR's motion, holding that collective action that "purports to regulate how [competitors] will compete in the marketplace" can indeed, if proven, constitute a restraint of trade.<sup>75</sup> Discovery is continuing, although no trial date has been set.

<sup>74</sup> On the morning the lawsuit was filed, NAR announced a revised policy that contained a blanket opt-out under which the listings of brokers who withheld their listings from a VOW could appear on no brokers' website, except for NAR's website, Realtor.com. The DOJ subsequently filed an amended complaint to take the revisions into account. See Amended Complaint, *U.S. v. Nat'l Ass'n of Realtors*, (October 4, 2005) at <http://www.usdoj.gov/atr/cases/f211700/211751.htm>.

<sup>75</sup> See *U.S. v. Nat'l Ass'n of Realtors*, Memorandum Opinion and Order Denying Defendant's Motion to Dismiss the Complaint of the United States, No. 05 C 5140 (N.D. Ill. Nov. 27, 2006) at <http://www.usdoj.gov/atr/cases/f219800/219889.htm>.

## 5. Restrictions on Use of Non-Attorneys to Close Transactions

As we noted in our 2005 submission, the United States, each of the fifty-states regulates the legal profession.<sup>76</sup> Pursuant to unauthorized practice of law (“UPL”) statutes, states determine the tasks that only an attorney legally can perform. In the majority of states, non-lawyers compete with lawyers to provide real estate closing services, such as performing title searches and completing mortgages and deeds. Some states, however, have restricted anyone other than licensed attorneys from performing many of the tasks associated with closing a residential real estate transaction.

Through competition advocacy, the Agencies have encouraged state legislatures, bar associations, and courts to eliminate or narrow restrictions on competition between attorneys and non-attorneys in performing tasks related to the real estate closing.<sup>77</sup> Separately, the Justice Department has obtained injunctions prohibiting bar associations from unreasonably restraining competition by non-attorneys in violation of the antitrust laws.<sup>78</sup> The Agencies have argued that these UPL restrictions are likely to

<sup>76</sup> See United States Submission, Global Competition Forum, Roundtable on Bringing Competition into the Regulated Sectors, DAF/COMP/GF/WD(2005)35 (Feb. 10, 2005) (“*US UPL Submission*”), at <http://www.ftc.gov/bc/international/docs/compcomm/2005Roundtable%20on%20Bringing%20Competition.pdf>.

<sup>77</sup> See letter from the Justice Department and the FTC to New York Assemblywoman Helen Weinstein (Jun. 21, 2006); letter from the Justice Department and the FTC to Executive Director of the Kansas Bar Ass’n (Feb. 4, 2005); letter from the Justice Department and the FTC to Task Force to Define the Practice of Law in Massachusetts, Massachusetts Bar Ass’n (Dec. 16, 2004); letter from the Justice Department and the FTC to Unauthorized Practice of Law Committee, Indiana State Bar Ass’n (Oct. 1, 2003); letter from the Justice Department and the FTC to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003); letters from the Justice Department to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, *et al.* (Jun. 30, 2003 and Mar. 28, 2003); letter from the Justice Department and the FTC to Task Force on the Model Definition of the Practice of Law, American Bar Ass’n (Dec. 20, 2002); letter from the Justice Department and the FTC to Speaker of the Rhode Island House of Representatives, *et al.* (Mar. 29, 2002); letter from the Justice Department and the FTC to President of the North Carolina State Bar (July 11, 2002); letter from the Justice Department and the FTC to Ethics Committee of the North Carolina State Bar (Dec. 14, 2001); letter from the Justice Department to Board of Governors of the Kentucky Bar Ass’n (Jun. 10, 1999 and Sept. 10, 1997); letter from the Justice Department and the FTC to Supreme Court of Virginia (Jan. 3, 1997); letter from the Justice Department and the FTC to Virginia State Bar (Sept. 20, 1996). Brief *Amicus Curiae* of the United States of America and the FTC in *Lorrie McMahon v. Advanced Title Servs. Co. of W. Va.*, No. 31706 (filed May 25, 2004), available at <http://www.usdoj.gov/atr/cases/f203700/203790.htm><http://www.ftc.gov/be/V040017.pdf>; Brief *Amicus Curiae* of the United States of America and the FTC in *On Review of ULP Advisory Opinion 2003-2* (filed July 28, 2003), available at <http://www.ftc.gov/os/2003/07/georgiabrief.pdf><http://www.usdoj.gov/atr/cases/f201100/201197.htm>; Brief *Amicus Curiae* of the United States of America in Support of Movants Kentucky Land Title Ass’n *et al.* in *Ky. Land Title Ass’n v. Ky. Bar Ass’n*, No. 2000-SC-000207-KB (Ky., filed Feb. 29, 2000), available at <http://www.usdoj.gov/atr/cases/f4400/4491.htm>. Advocacy letters are available at <http://www.usdoj.gov/atr/public/comments/comments.htm> and <http://www.ftc.gov/be/advofileother.htm>.

<sup>78</sup> In *United States v. Allen County Bar Ass’n*, the Justice Department sued and obtained a judgment against a bar association that had restrained title insurance companies from competing in the business of certifying title. The bar association had adopted a resolution requiring lawyers’ examinations of title abstracts and had induced banks and others to require the lawyers’ examinations of their real estate transactions. Civ. No. F-79-0042 (N.D. Ind. 1980). In *United States v. N.Y. County Lawyers Ass’n*, the Justice Department obtained a court order prohibiting a county bar association from restricting the trust and estate services that corporate fiduciaries could provide in competition with lawyers. No. 80 Civ. 6129 (S.D.N.Y. 1981). See also *United States v. County Bar Ass’n*, No. 80-112-S (M.D. Ala. 1980). In addition, the Justice Department has obtained injunctions against other anticompetitive restrictions in professional associations’

reduce consumer welfare.<sup>79</sup> First, they reduce consumer choice and increase the price of closing services for consumers who otherwise would hire a non-attorney. Second, to the extent that non-attorneys provide competitive constraint on attorney pricing, these restrictions also are likely to raise the price that consumers who prefer to hire an attorney pay for closing services. At the same time, the Agencies are not aware of any evidence of widespread consumer harm due to non-attorneys performing tasks related to the real estate closing. Thus, the harm from restricting competition in the provision of closing services is not offset with any benefits that consumers value.

## 6. Consumer Knowledge

The availability of consumer information may alter the competitive environment. For example, there is evidence that some consumers of brokerage services are not necessarily aware that commission rates are negotiable.<sup>80</sup> Although it appears that consumer awareness of this negotiability is increasing,<sup>81</sup> perhaps due to the increasing numbers of discount brokers that have entered the industry over the past few years, some consumers fail to negotiate commission rates. Further, some consumers are not fully informed as to what, if any, duties they are owed by their broker. This can occur because the broker fails to disclose such information to the client, as legally required.<sup>82</sup> Without full and timely disclosure a customer may reveal sensitive information, such as the buyer's maximum offer or the seller's minimum price, to a broker who is actually representing the party on the other side of the transaction.<sup>83</sup>

Some consumers may be unaware of the possibility that their brokers may be steering them away from property listings that offer lower commissions to the broker but that otherwise match the criteria identified by the consumers.<sup>84</sup> All else equal, brokers have a greater incentive to show prospective buyers

ethical codes and against other anticompetitive activities by associations of lawyers. *See, e.g., United States v. Am. Bar Ass'n*, 934 Supp. 435; *Prof'l Eng'rs*, 435 U.S. 679; *United States v. Am. Inst. of Architects*, 1990-2 Trade Cas. (CCH) ¶ 69,256 (D.D.C. 1990); *United States v. Soc'y of Authors' Reps.*, 1982-83 Trade Cas. (CCH) ¶ 65,210 (S.D.N.Y. 1982).

<sup>79</sup> For a more detailed exposition of our framework of analysis, *see US UPL Submission* at 4-5.

<sup>80</sup> *See, e.g.,* Paul Anglin & Richard Arnott, *Are Brokers' Commission Rates on Home Sales Too High? A Conceptual Analysis*, 27 REAL ESTATE ECONOMICS 719, 721 (1999) ("Another factor in sustaining a collusive commission rate is that many sellers do not realize that the commission rate is negotiable."); 1983 FTC STAFF REPORT at 66, 68-69 (reporting that as many as three-fifths of recent sellers and three-fifths of recent buyers may have been unaware of the negotiability of commission rates).

<sup>81</sup> *See, e.g.,* Lord, Public Comment 254 at 1 ("The competition is fierce the majority of time that an agent has a listing appointment . . . they are confronted with the question how much can you reduce your commission? It is a standard question now."); Paulsen, Public Comment 364 at 1 ("If the public felt there was a set fee I would not be asked what my rate is to sell a house. And trust me, everyone asks.").

<sup>82</sup> States typically require agents to disclose to their clients the duties that they owe to their clients under state law. *See, e.g.,* VA. CODE § 54.1-2131(E).

<sup>83</sup> In an effort to educate consumers about the real estate brokerage marketplace, the FTC recently issued a guide for consumers who are selling their homes. *See Selling Your Home? Tips for Selecting a Real Estate Professional*, at <http://www.ftc.gov/bc/edu/pubs/consumer/homes/zrea01.pdf>.

<sup>84</sup> *See* Barry, Public Comment No. 19 at 57 (reporting that, because the public sources of property listings never show the commission offered by the listing brokers, buyers are unaware that their agents have screened out listings with lower commission offerings); CFA REPORT at 5 ("home buyers will not have access to this information about the splits, so they cannot check to see whether their broker is steering them away from houses carrying lower splits"); White, *supra* note 160, at 5 ("in a milieu where there is a great deal of uncertainty as to which house will best fit the demands of a buyer and which buyers are true prospects for a seller, it may be difficult for the client to determine that her agent is steering in a disadvantageous way"); 1983 FTC STAFF REPORT at 75 ("Because many buyers think they are seeing all

property listings that offer the prevailing commission rate rather than listings that offer a lower rate. Homebuyers' increasing use of the Internet, however, may limit brokers' ability to steer buyers away from discounters' listings without their knowledge. As noted earlier, 80 percent of consumers use the Internet to search for homes and 24 percent of homebuyers' survey reported first finding the house they ultimately purchased online.<sup>85</sup> To the extent that consumers have a greater knowledge of the stock of housing for sale than they used to, brokers will be less able to exclude a particular listing from a homebuyers' search without their knowledge. If a homebuyer finds a discounter's listing on their own that appears to be a good match, a broker either will have to show the homebuyer the discounter's listing or explain to his client why he will not.

## 7. Conclusion

The Internet has led to a dramatic change in the real estate brokerage industry in the U.S. Although traditional, full-service brokerage currently is used by the majority of U.S. consumers, business models have proliferated that allow home buyers and sellers to take on more of the real estate transaction themselves. A variety of factors, including actions taken by state and private actors, are likely to hinder the ability of these non-traditional brokers to compete. In appropriate cases, the FTC and DOJ have engaged in competition advocacy and enforcement of the antitrust laws to preserve competition for consumers in this important industry.

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the properties a broker or salesperson knows to be on the market, the practice of steering coupled to the general practice of denying consumers direct access to information from a MLS may mislead buyers.”).

<sup>85</sup>

*See note 67, supra.*

## EUROPEAN COMMISSION

### 1. Background<sup>1</sup>

The Commission has taken the initiative to examine whether the current regulation of professional services, often set by national governments and professional associations, is the most efficient and least restrictive of competition, or whether better regulation, more adapted to the modern world could help spur economic growth, and deliver better services and value for consumers, in line with the objectives set by the Lisbon Strategy. The Commission's work to date has focused on six professions: lawyers, notaries, accountants, architects, engineers and pharmacists.

Extensive research has been undertaken into the regulation of these professions, including an independent study carried out by the Institute for Advanced Studies in Vienna (IHS). This study found that these professions are characterised by high levels of restrictive regulation and in a large number of Member States regulations exist which affect pricing (e.g. fee scales), advertising (e.g. ban comparative or price advertising), limit inter-professional co-operation and restrict business structure.

The Commission has adopted 2 reports on the subject: the first report of 9 February 2004 'Report on Competition in Professional Services' was followed on 5 September 2005 by the report 'Professional Services - Scope for more reform'. Both reports set out the Commission's opinion on the scope to reform or modernise specific professional rules. Regulatory authorities in the Member States and professional bodies are invited to voluntarily review existing rules taking into consideration whether they are necessary for the public interest, whether they are proportionate and justified, and necessary for the good practice of the profession. In addition to making the case for more pro-competitive legislation, the Commission also continues with casework using EC competition rules to promote reform.

Work in this sector is closely co-ordinated with national competition authorities and many are pursuing a general programme of action to bring about reform, including the use of EC competition rules. The European Parliament resolution of 12 October 2006 supports the Commission in its efforts to rid the sector of overly restrictive regulation which inhibits competition and which, it argues, would be beneficial to the EU economy and consumers.

As a next step the Commission has decided to do a further in-depth study into one market. The conveyancing services market (services associated with buying and selling property) has been chosen given its: direct relevance to EU consumers; the fact that it involves a range of professions (notaries, lawyers, real estate agents, technical professions), and is an area where there has been significant positive regulatory change in some Member States (e.g. the Netherlands, UK). The remainder of this paper reports on this study.

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<sup>1</sup> All relevant documents can be found on the Commission's Liberal Professions website: [http://ec.europa.eu/comm/competition/sectors/professional\\_services/overview\\_en.html](http://ec.europa.eu/comm/competition/sectors/professional_services/overview_en.html)

## **2. The study into the regulation and efficiency of the conveyancing services market**

The Centre for European Law and Policy (ZERP) at Bremen University, supported by economists from University of Regensburg and the IHS, was commissioned by the European Commission to undertake the study. The study is the first of its kind in the EU and will make a comparative analysis of the market across the EU. The final report of this study will be ready by end of March 2007 and will be made available online by the European Commission.

The study will be in two parts:

Part One will compare the situation in 20 different Member States<sup>2</sup>, representing a variety of different legal traditions. An overview of the conveyancing process for each country will be prepared in the form of a country fiche showing the key steps and the types of professionals involved and their regulation. This information will then be represented using two sets of indicators which will measure:

- First set: levels of professional services regulation and other relevant regulation affecting the way professionals operate in this market (e.g. market entry, market conduct, mandatory intervention of a professional and consumer protection).
- Second set: market efficiency in terms of price, choice, quality and speed. These outcomes will be assessed on the basis of a survey which is being conducted via an electronic questionnaire and market research company.

The two sets will be compared to identify relationships and draw out conclusions. An analysis will also be made of the justifications for the different types of regulation in this area.

Part Two will consist of 4 in-depth case studies. These will seek to draw out best practice and try to assess the impact of reforms made on jobs and growth. The countries selected are:

- UK and Netherlands selected as significant reforms have taken place in the conveyancing services market (e.g. UK market was deregulated and a new profession of Licensed Conveyancers created/in the NL notaries were deregulated in 1999 with the removal of fixed tariffs and *numerus clausus*).
- Sweden selected as an example of the Nordic licensed agent system under which estate agents provide legal services related to property conveyance and is a system with very low levels of regulation.
- Germany selected as the base case. It is a traditional Latin notary system with high levels of regulation.

## **3. Summary of preliminary findings**

Preliminary findings from the study focussing on the interplay between regulation and the price of legal services are provided in the attached paper at Annex 1 (legal services was chosen as a discreet area because these are much more highly regulated than other services and provide an interesting comparison). The effect of regulation on other market indicators such as quality, speed and choice are still to be analysed

<sup>2</sup>

The countries surveyed include Austria, Belgium, the Czech Republic, Denmark, England and Wales, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Poland, Portugal, Scotland, Slovenia, Spain and Sweden

and will be included in the final report, along with the case studies. For ease of analysis, four broad categories of regulatory systems existing in the EU in area of conveyancing have been identified:

- The lawyer system of the British Isles, Hungary, the Czech Republic and Denmark, which is characterised by quality control of professionals through licensing and professional exams only, negotiable fees and a low level of regulation on market structure and conduct.
- The Nordic licensed agent system under which estate agents provide legal services too. This model is also characterised by quality control of professionals through professional exams and licensing only, negotiable fees and a low level of regulation on market structure and conduct.
- The traditional, highly regulated Latin notary system, characterised by mandatory involvement of notaries, *numerus clausus*, fixed fees and strict regulation on market structure and conduct.
- The deregulated Dutch notary system, which reflects a more modern vision of the notary as a private entrepreneur fulfilling public tasks. Under this model no *numerus clausus* exist, fees are negotiable and market structure and conduct regulation is generally less strict.

The analysis of the legal costs associated with buying a house in the 20 Member States selected finds the following:

- Legal fees in unregulated markets tend to be more flat (whether for solicitors fees or in the Dutch example for the deregulated notarial fees), whereas statutes regulating fees usually set the fee level in accordance to the transaction value, starting with lower fees and going up with the transaction value.
- On average the Nordic systems seem to be the cheapest (in particular Finland and Sweden where no legal professional is often involved apart from the Finnish notary whose services are limited to the authentication of signatures and therefore cheap).
- Comparing the British Isles adversarial systems with flat or nearly flat fees and notarial systems with value-dependant fees, the former are cheaper for transactions values of 250.000.- and 500.000.- Euro; the higher the value becomes the more expensive the notary system (in particular the French, the Belgian and the Italian). This may show the existence of monopoly rents. However, notarial systems (excluding the hybrid Greek system and excluding the deregulated Dutch system) are on average slightly cheaper for a transaction value of 100.000 Euro. This might show a small degree of cross-subsidisation between high and low value conveyancing - an issue which still requires further research.
- The deregulated Dutch system – being a notarial system, but with less professional regulations (in particular without limits on the number of notaries and without statutorily fixed fees) ranges close to the Nordic countries. It is worth noting that this system performs significantly better than the traditional notary system, even for low value transactions.
- When looking at the development of fee levels adjusted by net earning factors an interesting picture emerges: the Nordic and Dutch deregulated model perform very well across the board, followed by the lawyers system. The traditional notary system is the worst performer with substantially higher fees for all types of transactions examined.

In summary the key finding is a clear statistical correlation between higher levels of regulation and higher prices.

#### **4. Next Steps**

The preliminary results already show the advantages offered to consumers by the deregulated or modernised systems of professional regulation and that the traditional highly regulated Latin notary system is generally far more expensive. We are confident that the final study will provide convincing evidence to underpin the case for change in this area, particularly in the case of notaries who currently enjoy a very wide range of exclusive rights and are protected from competition. When completed, the Commission will review the study's findings carefully in close co-operation with national competition authority colleagues and consider what the follow-up to it should be - including possible enforcement action under the EC competition rules to promote more competition.

#### **5. Conclusion**

The Commission would be happy to answer any questions on the study and hear views on the preliminary findings.

## Annex 1

## Preliminary Findings from the ongoing Study on “Conveyancing Services Regulation in Europe”

Commissioned by the European Commission and undertaken by  
 Centre of European Law and Politics, University of Bremen (ZERP): Christoph Schmid (Project Leader)  
 International Real Estate Business School, University of Regensburg: Gabriel. S. Lee and Steffen Sebastian  
 Institute for Advanced Studies (IHS): Marcel Fink and Iain Paterson

### I. Introduction

The present paper presents some provisional key findings already available of the ongoing study analysing the effects of professional services regulation on the functioning and efficiency of the conveyancing market and the links between the two. This paper gives an overview of different regulatory systems (II). These existing regulations are then used to reconstruct in a quasi-quantitative way by means of indices on regulation that are divided into various sub-indices (III). On this basis regulation indices are compared to transaction costs (IV). The analysis on other market indicators such as quality and speed of services is yet to be presented. These data will also be reconstructed econometrically in a market outcome index, which is again composed of various sub-indices (V).

### II. Regulatory Models

#### 1. *Conveyancing disaggregated*

Before addressing different regulatory models, a description of the conveyancing process is of order. With minor variations, this usually involves the following steps in all countries surveyed: After (1) buyer and seller have been found, often with the help of estate agents, (2) an evaluation of the land and the building by technical experts takes place in many countries. Specifically, this may involve an energy check (rendered mandatory by the EU Directive on the energy performance of buildings, 2002/91/EC) and an evaluation on behalf of the buyer and/or the seller, which is frequently required by lending banks. Then, (3) preliminary legal checks are carried out which include the control of the land register (including registered debts), of other debts for which the buyer may be liable and of the building permit for an existing structure. After this, (4) the sales contract is drafted on the basis of legal advice given by the draftsperson (or the parties are counselled by their legal representatives); the draft having become final, it is signed by both parties, with signatures being certified in a special procedure (which may also happen as part of a notarial instrument). The ensuing (5) contract execution includes the application for and the control of administrative permits, carrying out the payment (alternatively through an escrow account or notice and following control of payment), and fulfilling taxation obligations (encompassing notice of the contract to the tax authorities, calculation of the applicable tax, payment and its control or tax retention from the sales price).

## 2 *Types of Professionals*

Professionals involved in the various steps of conveyancing in Europe include estate agents,<sup>1</sup> technical experts (mostly architects, surveyors, engineers) and legal professionals, who constitute the focus of our study.

### a) **Real Estate Agents**

Real estate agent services tend to be little regulated in most European countries. They will be covered as well in the study; however, this presentation focuses on legal services.

### b) **Technical Services**

Technical services are common in conveyancing only in some states. So they will be covered in the study only for these states. Also, concerning conveyancing services, there is little professional regulation.

### c) **Legal Services**

Representing different regulatory traditions and models, the following legal professionals may be found in Europe today:

- **Civil law notaries:** going back to Latin tradition, they are the most important group Europewide, which is dominant in all Western continental European states from Portugal to Germany and in most Eastern European countries including Poland, Slovakia, Slovenia and the Baltic countries (which are not represented in the present study); however, also in Finland, a different form of notaries exists, who are however limited to the authentication of signatures.<sup>2</sup>
- **Lawyers (solicitors):** They are dominant on the British Isles (England and Wales, Scotland and Ireland) as well as in the Czech Republic and Hungary, but may also be found in Austria. In England and Wales, **licensed conveyancers** (legal professionals exclusively competent in conveyancing) have been admitted since the 1980's as competitors to solicitors; however, they exist only in small number. (They handle less than 5% of all land sales in England). A fundamental difference between the notary and the lawyer system is that in the latter in a majority of cases (always on the British Isles, sometimes also in the Czech Republic and Hungary) each party is represented by its own lawyer which might be safer.
- In the Nordic countries, conveyancing is mostly done by (licensed) **estate agents**, who normally have a university degree. They combine agent services (i.e. bringing together buyer and seller) with legal services. However, they are not lawyers. A similar combination may only be found in France, where notaries (just as other lawyers) may also act as estate agents.

In some countries, additional professionals are involved in providing legal services for conveyancing: thus, in Greece, on top of the notary, both parties are also represented by lawyers; in Portugal, on top of the notary, the buyer is typically represented by a lawyer; in Denmark, where the seller is represented by an estate agent, the buyer is usually represented by a lawyer; in Finland, where estate agents are also

<sup>1</sup> Everywhere, estate agents bring buyers and sellers together, but in large group of countries including Austria, France, the Netherlands, Portugal, Slovakia, Slovenia and Spain, they also draft preliminary contracts. In Scandinavia, (licensed) estate agents provide full legal services.

<sup>2</sup> Notaries are normally single profession notaries except in some regions of Germany where lawyers may be admitted as notaries after several years of practice.

dominant, (the specific Finnish form of) notaries have to authenticate the signatures; in Spain, finally, the execution of notarial deeds (registration and taxation in particular) is usually done by gestores administrativos who are typically affiliated to the lending bank.

### 3. Mandatory of Voluntary Involvement and Scope of Services

For assessing the efficiency of conveyancing services, the question whether the involvement of a certain professional is legally mandatory or not is of key importance. In most continental countries, intervention of a civil law notary is mandatory by statute for every land sale. However, notaries' intervention is widely different *ratione materiae*. Some countries require notarial intervention for the validity of the sales contract (e.g. Germany, Poland) or for the transfer of property (e.g. the Netherlands or Spain). In other countries, notarial intervention is required only for the registration in the land register which makes the title opposable to third parties (e.g. Belgium, France, Italy, Luxembourg, and Portugal). In these countries, the preliminary contract may be drafted by someone else - the parties themselves, an estate agent or a lawyer. Other countries require only a certification of signature for the registration in the land register (Slovakia, Slovenia; similar also in Austria and the Czech Republic where the certification can also be made by the court, in the Czech Republic also by an advocate). Here the drafting of the contract is mostly done by lawyers. Hungary constitutes an exceptional case. Here, the intervention of a legal professional is mandatory, but the parties may retain either a civil law notary or a lawyer (which happens in more than 95% of all cases). When comparing especially notarial fees, the different scope of services should be borne in mind.

In a smaller group of countries composed of Austria and England, the involvement of a professional is not mandatory, and the parties may draft the contract themselves or with the help of anyone. However, certain professionals enjoy exclusive rights, i.e. only they may offer conveyancing services professionally (that is for money). This is true for notaries or lawyers in Austria, and solicitors or licensed conveyancers in England. Finally, only in two countries, Denmark and Sweden, neither mandatory involvement nor exclusive rights exist, though in practise estate agents are involved in the vast majority of cases even there.

Types of professionals and mandatory or voluntary involvement are summarised in the following table.

Country	Real Estate Agent	Technical Services	Legal Services (lawyer or civil law notary)	Licensed Conveyancer
<b>Austria</b>		n.a.	90% (lawyer or notary)	n.a.
<b>Belgium</b>	50-75%		notary mandatory	n.a.
<b>Czech Rep.</b>	90%	90% (appraisers)	70% advocates, 30% notaries	n.a.
<b>Denmark</b>	90%,	90%	80% lawyer for buyer	
<b>England</b>	70%	surveyor	97 % 2 lawyers	3 %
<b>Finland</b>	75-90%	usual	only certification of signature mandatory	n.a.
<b>France</b>	25-50%	90%-100%	notary mandatory	n.a.
<b>Germany</b>	50%	n.a.	notary mandatory	n.a.
<b>Greece</b>		n.a.	notary mandatory	n.a.
<b>Hungary</b>	15% -70%	1%-2%	mandatory (lawyer or notary)	n.a.
<b>Ireland</b>		surveyor	99% 2 lawyers	
<b>Italy</b>	75%	n.a.	notary mandatory	n.a.
<b>Netherlands</b>			notary mandatory	n.a.
<b>Poland</b>	40% (25%-50%)	n.a.	notary mandatory	n.a.
<b>Portugal</b>			notary mandatory	n.a.

<b>Scotland</b>		surveyor	99% 2lawyers	
<b>Slovakia</b>		n.a.	only certification of signature mandatory	n.a.
<b>Slovenia</b>	5-50%	n.a.	only certification of signature mandatory	n.a.
<b>Spain</b>	25-50%	n.a.	notary mandatory + <i>gestor administrativo</i>	n.a.
<b>Sweden</b>	85%	physical survey	usually real estate agent	n.a.

#### 4. Professional Regulation

The three main types of legal professionals - notaries, lawyers, and licensed agents – are regulated very differently as regards market entry, market structure and market conduct.

##### *Civil Law Notaries*

Continental (Latin) notaries are assigned a dual role as holders of a public office and liberal professionals. All regulatory restrictions applying to notarial services are based on their public office characterisation. To start with, acting for both parties, notaries are subject to strict duties of neutrality and impartiality. Moreover, *numerus clausus* applies, i.e. there is a limited number of professionals which is generally determined by the Ministry of Justice together with Notaries Professional Associations according to objective needs criteria. The main exception lies with the Netherlands, where *numerus clausus* has been abolished in the 1998 reform; since then, market entry presupposes a detailed business plan. Another peculiar feature of Latin notaries is fixed fees. Whereas statutorily fixed fees were the universal rule in all civil law notarial systems up until 1990, today, there is a trend versus deregulation. Thus, in Austria and in Netherlands fixed fees have been abolished. Italy abolished fixed fees for all liberal professions in 2006 by a legislative decree, which has yet to be confirmed by a parliamentary statute in order to become permanent. In addition, the legal situation is rendered opaque by a contradicting posterior decree which prohibits unfair price competition amongst notaries. Other countries such as Germany have recently liberalised attorney fees (for out of court services only), but kept statutorily fixed fees for notaries.

Similarly, market structure is regulated for all civil law notaries. In all states, except the Netherlands, the notary is appointed for a specific location. This means that he is restricted to providing services in a given area (which, working in his area, does not bar him from authenticating deeds for land situated outside that area). In addition, deeds done by national notaries are required in some states for registration in the land register (e.g. Germany, Italy, and Spain). Also, limitations on interprofessional cooperation and business structure are frequent in all states. Thus, notaries are generally prohibited from entering into formal cooperation, or from establishing common businesses, with tax specialists, lawyers and estate agents. Beyond that, notaries are generally prohibited from exercising other professions at the same time. Notaries must not act as agents (with the exceptions of France and Belgium), nor as lawyers either.<sup>3</sup>

Lastly, in all surveyed states, notarial conduct is regulated by statute. This extends to a regulation of the profession and professional associations. The latter are often delegated certain self-regulatory powers are often delegated, enact professional standards including deontological codes and are generally competent to supervise professional conduct of their members. Also there is regulation for the notarial procedure to be observed e.g. with the authentication or notarisation of documents. Finally, further regulations are common to restrict advertising which do not seem to be implemented strictly in some countries.

<sup>3</sup> This combination may elsewhere only be found in some Swiss cantons.

## ***Lawyers***

Generally, lawyers active in conveyancing are less strictly regulated than notaries. This applies likewise to market structure and conduct regulation. Market entry is in no country conditional on *numerus clausus*, but only on subjective requirements, the most important ones being university degree and bar exam. Fees are generally negotiable. In England a trends exists towards flattish fees based on a broad look at all individual circumstances. Fixed lawyer fees are even excluded in countries such as Hungary, where lawyers and civil law notaries compete in conveyancing services and notarial fees are fixed by statute.

Similarly, regulation on interprofessional co-operation, business structure and advertising for lawyers has generally been liberalised in recent years.

In terms of qualifications, lawyers active in conveyancing must of course fulfil all general qualifications of the profession. Most countries have no additional requirements for lawyers to counsel in the area of conveyancing. However, in England, entry into the conveyancing market requires holding (personally or via a law firm) a practising certificate issued by the Law Society. This supposes an annual application which may be subject to disciplinary recommendations, the payment of a fee and the proof of insurance. In Denmark, whilst there are no additional requirements for lawyers active in conveyancing, lawyers need an additionally license to act as estate agents. Finally, in “notary countries”, lawyers are always prohibited from performing those conveyancing services exclusively assigned to notaries.

## ***English Licensed Conveyancers***

English licensed conveyancers are subject to a similar regulatory regime as solicitors, although they are not lawyers. Licenses are granted by the Council of Licensed Conveyancers (CLC). Requirements to obtain a full licence, allowing offering services to the public, are the following: completion of CLC examinations; practical training, minimum age of 21 years; being a 'fit and proper person'; an annual licence fee; a stipulated contribution to the CLC compensation fund; premium to the professional indemnity insurance premium; evidence of continuing education (minimum 12 of courses certified by CLC). Fees are not regulated but in practise roughly similar to solicitors' fees.

## ***Nordic (licensed) Real Estate Agents***

Scandinavian licensed estate agents are also regulated very little. Entry to the profession is conditional on registration with a board of agents (Sweden) or similar institutions. Requirements for registration include passing an exam as well as proof of professional insurance. In Denmark, admission to the exam requires special education and two years practice; in Sweden, a two years study, one year of which is devoted to law, and 10 weeks practise. Whilst Danish and Finnish agents are under no duty of neutrality (observing “good brokerage practise” being sufficient), such a duty was stipulated for Swedish agents in 1984, albeit it is flawed by the controversial exception to help the seller to get the best price. Fees are not regulated; in Denmark, former fee recommendations have been abolished on the request of the competition authority. In practice, fees exist as flat or percentage based commissions.

# **III. Regulatory Indices**

## ***1. Methodology***

For further econometric analysis it is necessary to reinterpret qualitative information on regulation in form of quasi-quantitative measures. For this purpose, four regulation indices for each state and each profession providing legal services in the conveyancing process are calculated. Each index has a range of “0” (no regulation) to “6” (highest grade of regulation).

First, a distinction is made between market entry regulations (calculated as a “Market Entry Regulation Index”; MERI) and market conduct regulations (calculated as a “Market Conduct Regulation Index”, MCRI).

Market entry regulations (covered in MERI) are in the first instance quotas or economic needs tests, licensing rules (exclusive and shared exclusive tasks) and professional education requirements. In calculating the MERI “Quotas and economic needs tests” is given a weight of 50%, as such regulations have obviously the most direct impacts for market structure and market outcomes. Licensing rules and professional education requirements are given equal weights of 25% each.

Rules on fees/prices, restrictions on advertising, on location and diversification, on form of business and on inter-professional co-operation are market conduct regulations (covered in MCRI). Regulations on prices and fees has been given the highest weighting (50%), as it is evident that the model of price setting has the most significant and direct effects on relevant market outcomes. “Minimum prices for all services” and “minimum prices for some services” are regarded to be the most restrictive forms of price regulation: Whereas maximum prices and even reference prices also have some impact on competition, the direct effects of minimum prices are the strongest.

Regulations on “location and diversification”, “form of business” and “inter-professional co-operation” all have to do with possibilities to implement different business models, which is supposed to have significant impacts on market structures and outcomes. We give all of these three fields of regulation an equal weight of 11%, summing up to 33%. Regulations on advertising are taken into account with the remaining 17%.

Furthermore, it makes a difference which **services** by respective professionals are mandatory (or not) for individuals or juristic persons in case of land/real estate transfer. For that, we calculate a “Mandatory Intervention Index” (MII) regarding legal services in case of a real estate sale for each country. MII is “0”, if no mandatory intervention applies. If a mandatory intervention is necessary for a certification of signatures only, MII is “2”. If further tasks have to be handled by *one* professional in the conveyancing process on a mandatory basis (so that the land sale can be registered etc.) then MII equals “4”. If more than one professional have to be consulted, MII is given the maximum level (“6”).

Some specific regulations (e.g. compulsory indemnity insurance, mandatory continuing education or the existence of specific instruments for quality control/conduct control) are often supposed to be more directly connected to problems of consumer protection than the ones of “traditional” market entry and market conduct regulation. On this background, we calculate a so-called “Consumer Protection Index” (CPI) for each relevant legal profession in every country.

In calculating the CPI, we give “compulsory indemnity insurance” the highest weight (38%), as the direct advantages for the customer are by far most manifest in this field. Conduct/quality control and continuing education are both important fields of consumer protection and for that both given an equal middle-weight of 25%. The obligation to provide services (which only applies for notaries and where direct effects for consumer interests are less self-evident) is counted with a weight of 12%.

## 2. *Summary of first results*

### 2.1 *Countries with “latin notary” (LN-countries)*

Table 1 shows MERI, MCRI and CPI for notaries in countries with “latin notaries”. Overall market entry regulation (MERI) is rather rigid in all countries, with the only exception of the Netherlands.

Market conduct regulation (MCRI) shows a similar situation: A rather high grade of regulation in most countries with the exception of the Netherlands and here as well Austria, were liberalisations during recent years led to (for standards of notaries) rather liberal regulation.

CPI (consumer protection regulation) is rather high for notaries in the countries covered.

**Table 1: Notaries: MERI, MCRI and CPI.**

	MERI Market Entry	MCRI Market Conduct	MERI + MCRI	CPI Consumer Protection	
Hungary		5,9	6,0	11,9	4,5
Czech Republic		5,6	5,7	11,3	4,5
Portugal		5,0	6,0	11,0	3,0
Greece		5,1	5,7	10,8	2,2
Belgium		5,7	5,0	10,7	4,5
Poland		5,6	4,7	10,3	3,0
France		5,1	5,2	10,3	5,3
Germany		5,7	4,5	10,2	5,3
Italy		5,4	4,7	10,1	6,0
Spain		4,8	5,2	10,0	4,5
Slovenia		4,9	5,0	9,9	5,3
Austria		5,9	3,2	9,0	6,0
Netherlands		1,9	1,2	3,1	6,0
<i>Average</i>		<i>5,1</i>	<i>4,8</i>	<i>9,9</i>	<i>4,6</i>
<i>Average without the Netherlands</i>		<i>5,4</i>	<i>5,1</i>	<i>10,4</i>	<i>4,5</i>

In several of these countries with “latin” notaries lawyers play as well an important role in legal services related to conveyancing. Table 2 gives an overview on regulation indices for lawyers in the respective countries.

Regulation on market entry in LN-countries is, generally speaking, less rigid for lawyers than for notaries. However, especially in Greece and Slovenia rather restrictive conduct regulations apply.

**Table 2: Lawyers in LN-countries: MERI, MCRI and CPI.**

	MERI Market Entry	MCRI Market Conduct	MERI + MCRI	CPI Consumer Protection
Greece	2,4	5,0	7,4	3,0
Slovenia	2,2	3,7	5,9	4,5
Austria	2,1	2,5	4,6	3,8
Spain	1,8	2,5	4,3	n.a.
Czech Republic	2,6	2,2	4,8	2,6
Portugal	2,0	1,5	3,5	3,8
Hungary	2,6	1,4	4,0	2,3
<i>Average</i>	<i>2,2</i>	<i>2,7</i>	<i>4,9</i>	<i>3,3</i>

On the basis of these indices for notaries and lawyers we calculate overall indices for LN-countries (see Table 3).

**Table 3: Overall regulation indices for legal services in conveyancing in LN-countries**

	MERI Market Entry	MCRI Market Conduct	MERI +MCRI	MII Mandatory Intervention	MERI +MCRI +MII	CPI Consumer Protection
Greece	6,0	6,0	12,0	6,0	18,0	2,6
Portugal	5,0	6,0	11,0	4,0	15,0	3,0
Belgium	5,7	5,0	10,7	4,0	14,7	4,5
Poland	5,6	4,7	10,3	4,0	14,3	3,0
France	5,1	5,2	10,3	4,0	14,3	5,3
Germany	5,7	4,5	10,2	4,0	14,2	5,3
Italy	5,4	4,7	10,1	4,0	14,1	6,0
Spain	4,8	5,2	10,0	4,0	14,0	4,5
Slovenia	4,9	5,0	9,9	2,0	11,9	5,3
Austria	5,9	3,2	9,0	2,0	11,0	6,0
Hungary	3,3	2,3	5,6	4,0	9,6	3,5
Czech Republic	3,8	3,6	7,4	0,0	7,4	4,1
Netherlands	1,9	1,2	3,1	4,0	7,1	6,0
<i>Average</i>	4,9	4,3	9,2	3,5	12,7	4,5
<i>Average without the Netherlands</i>	5,1	4,6	9,7	3,5	13,2	4,4

## 2.2 Countries without “latin” notaries

In countries without “latin” notaries legal services in conveyancing are provided by lawyers (solicitors) (England/Wales, Scotland, Denmark), real estate agents (Denmark, Sweden, Finland) or so-called “licensed conveyancers” (England/Wales).

Table 4 shows regulation indices (MERI; MCRI and CPI) for lawyers/solicitors in Denmark, England/Wales and Scotland., Table 5 for real estate agents/licensed conveyancers in Denmark, Sweden, Finland and England/Wales.

**Table 4: Lawyers in non-LN-countries: MERI, MCRI and CPI**

	MERI Market Entry	MCRI Market Conduct	MERI + MCRI	CPI Consumer Protection
Denmark	2,1	1,2	3,3	3,8
Scotland	1,9	1,0	2,9	5,3
England/Wales	2,0	0,8	2,8	4,5
<i>Average</i>	2,0	1,0	3,0	4,5

Regulation on market entry and conduct for lawyers in Denmark, Scotland and England/Wales is considerably more liberal than in most LN-countries listed in Table 3 above. At the same time the CPI is quite high (especially in Scotland).

Contrary to most LN-countries in Denmark and Sweden real estate agents (see Table 5) are authorized to provide legal services in conveyancing. The same holds for licensed conveyancers in England and Wales. Though members of these professions have to be “licensed” in the respective countries to provide legal services, regulation appears to be rather liberal. The latter especially is true for market conduct regulation. In Finland, any person may give legal advice (even on a commercial basis). Yet, only registered real estate agents are allowed to act as intermediaries for the sale of real estate.

**Table 5: Real estate agents and licensed conveyancers in non-LN-countries**

	MERI Market Entry	MCRI Market Conduct	MERI + MCRI	CPI Consumer Protection
Denmark	2,0	0,3	2,3	3,8
England/Wales	1,7	0,0	1,7	2,6
Sweden	1,2	0,0	1,2	4,5
Finland	0,5	0,7	1,1	5,3
<i>Average</i>	<i>1,3</i>	<i>0,2</i>	<i>1,6</i>	<i>4,1</i>

Here again, to get an overall picture of the regulation of legal services regulation indices for lawyers/solicitors have to be combined with the ones for licensed conveyancers/real estate agents (Table 6).

**Table 6: Overall regulation indices for legal services in conveyancing in Non-LN-countries**

	MERI Market Entry	MCRI Market Conduct	MERI + MCRI	MII Mandatory Intervention	MERI +MCRI +MII	CPI Consumer Protection
Scotland	1,9	1,0	2,9	0,0	2,9	5,3
Denmark	2,0	0,8	2,8	0,0	2,8	3,8
England/Wales	2,0	0,7	2,7	0,0	2,7	4,3
Sweden	1,2	0,0	1,2	0,0	1,2	4,5
Finland	0,5	0,7	1,1	0,0	1,1	5,3
<i>Average</i>	<i>1,5</i>	<i>0,6</i>	<i>2,1</i>	<i>0,0</i>	<i>2,1</i>	<i>5,8</i>

### 2.3 Comparing “different worlds” of regulation of legal services in conveyancing

Table 7 below presents the regulation indices for all the countries covered so far, grouped according to four “different worlds” of regulation of legal services in conveyancing:

1. The traditional system of “latin” notaries (N).
2. The de-regulated “latin”-notary-system of the Netherlands (D).
3. The liberal systems of England/Wales and Scotland (where solicitors provide most of respective services). Hungary and the Czech Republic are as well part of this group, as clients can decide to consult a lawyer instead of a notary in these countries.
4. The north-European/Scandinavian model, where most relevant services are provided by real estate agents (S).

**Table 7: Overall regulation indices for legal services in conveyancing: four “worlds of regulation”**

Group		MERI Market Entry	MCRI Market Conduct	MERI +MCRI	MII Mandatory Intervention	MERI +MCRI MII	CPI Consumer Protection
N	Greece	6,0	6,0	12,0	6,0	18,0	2,6
	Portugal	5,0	6,0	11,0	4,0	15,0	3,0
	Belgium	5,7	5,0	10,7	4,0	14,7	4,5
	Poland	5,6	4,7	10,3	4,0	14,3	3,0
	France	5,1	5,2	10,3	4,0	14,3	5,3
	Germany	5,7	4,5	10,2	4,0	14,2	5,3
	Italy	5,4	4,7	10,1	4,0	14,1	6,0
	Spain	4,8	5,2	10,0	4,0	14,0	4,5
	Slovenia	4,9	5,0	9,9	2,0	11,9	5,3
	Austria	5,9	3,2	9,0	2,0	11,0	6,0
	<i>Average</i>	<i>5,4</i>	<i>4,9</i>	<i>10,3</i>	<i>3,8</i>	<i>14,1</i>	<i>4,5</i>
D	Netherlands	1,9	1,2	3,1	4,0	7,1	6,0
	<i>Average</i>	<i>1,9</i>	<i>1,2</i>	<i>3,1</i>	<i>4,0</i>	<i>7,1</i>	<i>6,0</i>
L	Hungary	3,3	2,3	5,6	4,0	9,6	3,5
	Czech Republic	3,8	3,6	7,4	0,0	7,4	4,1
	Scotland	1,9	1,0	2,9	0,0	2,9	5,3
	England/Wales	2,0	0,7	2,7	0,0	2,7	4,3
	<i>Average</i>	<i>2,7</i>	<i>1,9</i>	<i>4,6</i>	<i>1,0</i>	<i>5,6</i>	<i>4,3</i>
S	Denmark	2,0	0,8	2,8	0,0	2,8	3,8
	Sweden	1,2	0,0	1,2	0,0	1,2	4,5
	Finland	0,5	0,7	1,1	0,0	1,1	5,3
	<i>Average</i>	<i>1,2</i>	<i>0,5</i>	<i>1,7</i>	<i>0,0</i>	<i>1,7</i>	<i>4,5</i>

Overall, regulation in the sense of MERI, MCRI and MII is rather restrictive in traditional “latin”-notary-systems. Austria is to some degree an exception (especially in respect of conduct regulation).

Examples for rather liberal regulatory systems are the northern European countries, where real estate agents play a major role, as well as the countries of the “L-group”, where lawyers are the most important service providers of legal services in conveyancing.

The Netherlands are *the* example for a de-regulated “latin”-notary system.

Interestingly, consumer protection regulation (as measured in the CPI) on average is not higher in the traditional “latin”-notary-system than it is in the other three models.

#### IV. Market Outcomes: Transaction Costs

Regarding market outcomes, so far only price is examined (other market indicators such as quality, speed as well as jobs and growth will be provided for the final version), including an analysis of the statistical relationship between regulation indices and transaction costs (i.e. legal fees).

##### 1. Preliminary Findings on Transaction Costs

Costs are calculated for transaction values, both with and without mortgage, of 100.000.-, 250.000.-, 500.000.- Euros and average national house price.<sup>4</sup> It is comparatively easy to get the fees which are fixed

<sup>4</sup> For expositional purpose, we only present the case for transaction values both 100% mortgage, of 100.000.-, 250.000.-, 500.000.- Euros and average national house prices. We also analyse the cases for

by statute (such as taxes, register or notarial fees), but it is very difficult to estimate other fees (such as the agents' or the attorney fees). Here the consultants had to do with a best estimate for the average fee.

#### a) Overall transaction costs and professional fees

Figure 1 shows the (non-adjusted) total transaction costs for the EU member states for the property value of 250.000€. The average EU transaction cost is around 9,8% of the property value. Costs in the range between 3% and 7% are associated with the Czech Republic, Denmark, England, Ireland, Scotland, Slovenia and Sweden; for Finland, Germany, Italy and the Netherlands, the corresponding range is between 7% and 10%; costs between 10% and 15% have been reported for Austria, France, Hungary and Poland; costs of more than 15% are for Belgium, Greece and Spain. The total transaction costs are composed of taxes (about 43%), registration fees (about 5%) and professional fees (about 52%). Thus, taxes amount to 4.8%, registration fees to 0,4% and professional fees to about 4,6% of the transaction value.

**Figure 1**

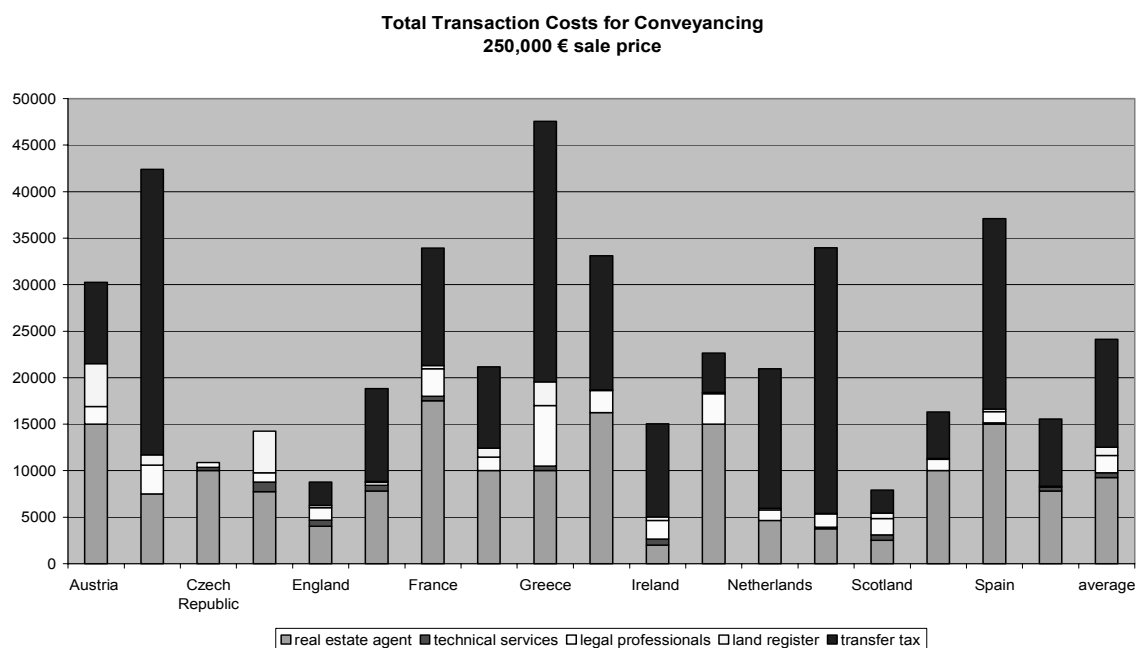
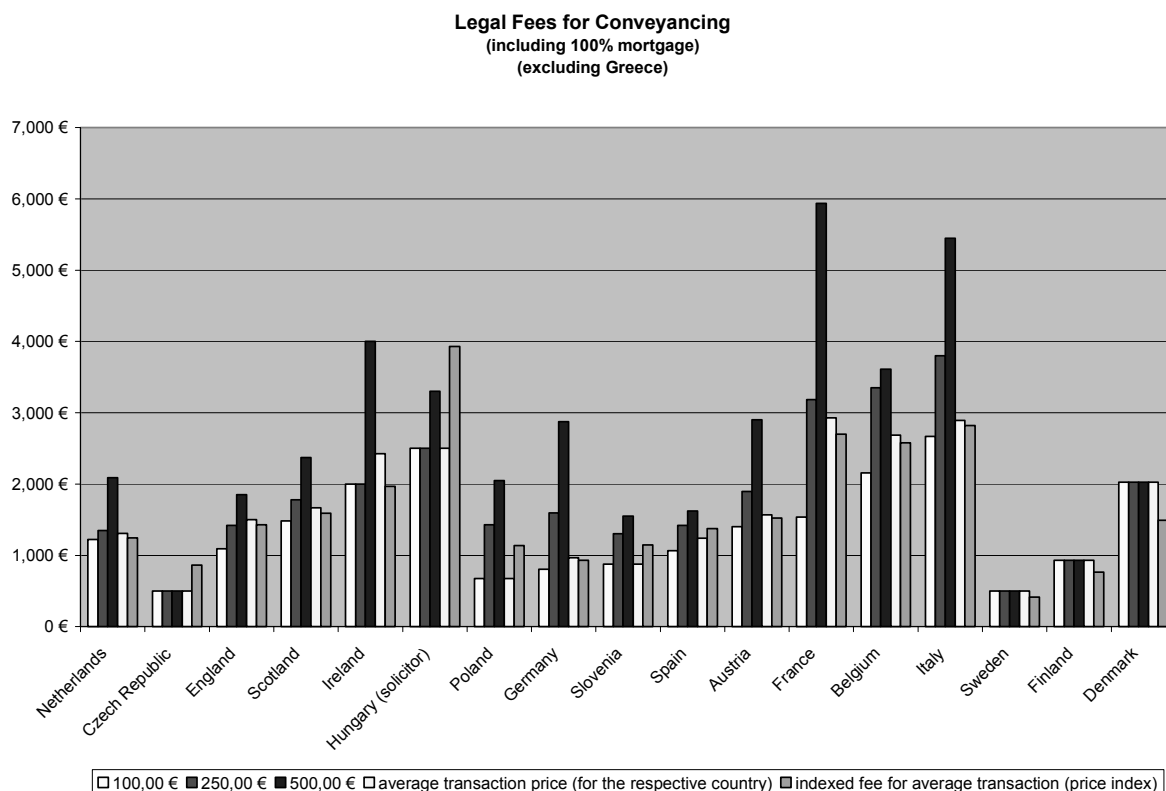


Figure 2 further looks specifically at the legal fees by transaction values. The average (un-adjusted) legal fees as a % of the transaction value for the EU member states under review are 1.4%, 0.62%, 0.79%, and 1.12% for the property values of 100k, 250k, 500k, and average house prices respectively.

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fully paid (i.e. no mortgage) and 70% mortgage scenarios: these results will be included for the final version.

**Figure 2**

### b) Comparison of legal fees

The remainder of this paper analyses legal fees only, i.e. without considering real estate agent fees.

#### (1) Sample transaction of 250.000€ with mortgage: Absolute Fees (i.e. un-adjusted)

For a transaction value of 250.000€ with a mortgage for the same amount, the Swedish system is by far the cheapest as there is no legal professional involved - the percentage of legal costs of the value of the transfer thus being 0,2 only; similar values have been reported for the Czech Republic; Finland follows with a little less than 0,4% (because here the cost of the certification of signature by the “authenticating notary” needs to be added to the legal part of the agent’s cost). Values of 0,5% - 0,6% are reported by England, the Netherlands, Poland, Slovenia and Spain. However, the British Isles and Denmark might offer best quality of advice for money, as the reported fees cover the intervention of two professionals, i.e. one for each party, which seems to be safer than the involvement of one single professional. For the range of values between 0,6% and 0,8%, we find Germany, Scotland, Austria and Ireland.. High legal costs of more than 1% of the transaction value are reported by Denmark (1,1% - involvement of an estate agent of the seller and a lawyer for the buyer), Belgium (around 1,3%), Hungary (solicitor – also around 1,3%), Italy (around 1,5%) and Greece (around 2,7%).<sup>1</sup>

<sup>1</sup>

It should be noted however that in these countries mortgages (here assumed for 100% percent of the price) are particularly expensive. Under the premise that mortgages are created for only 70% of the house price, absolute figures for Italy, France, and Belgium would be about 10-15% lower.

Extending the comparison to the different regulatory systems, the Nordic countries and the Dutch deregulated notary system end up first (with 0,56% or 0,54% of the transaction value), followed by the lawyer system with 0,77% (or 0,69% for the British Isles only, i.e. without Hungary). Traditional notary systems (without the hybrid system of Greece) are most expensive (0,89%). Among them, the surveyed Eastern European states are markedly less expensive in absolute numbers (0,55%) than Western European States (1,01%). However, it should not be ignored that the fees within the various systems vary widely, so that there are some notarial systems which are cheaper than e.g. Ireland (the most expensive country on the British Isles) and Scotland.

## **(2a) Development of fees (unadjusted): transactions 100000.-, 250000.- and 500000.-€**

In a further step, legal fees (unadjusted) are compared for different standard house values: 100.000, 250.000€ and 500.000€. Figures 3 and 4 show the legal fees development for selected countries and different legal systems. Whereas in the notary countries including the Netherlands, legal fees are incremental conditional on the value of the transaction, the Scandinavian countries as well as England have flat respectively nearly flat fees. The latter solution which is market-driven sounds more just because transactions of real estate with different value will usually involve the same amount of work (and somewhat higher fees might only be explained by a higher share of the insurance premium due to the higher financial risk of the professional).

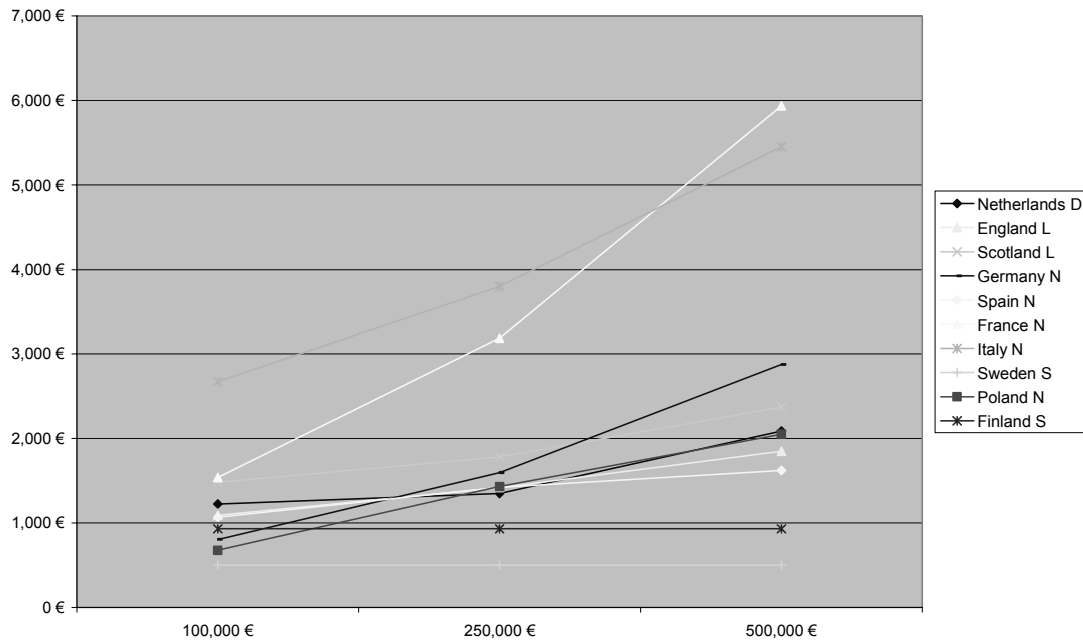
Incremental fees are often argued to entail cross-subsidisation between higher and lower fees. If fees are viewed in absolute numbers, this assessment seems to be correct to a limited extent. Thus, the picture of the fees for the 250.000€ transaction just referred changes when a transfer value of 100.000€ is analysed. Then, incremental (fixed) notarial fees in Germany, Poland, Slovenia and Spain are somewhat less expensive than flat or nearly flat fees in Denmark, Finland and England (only Sweden being still cheaper than the mentioned group of notary countries). To this extent, cross-subsidisation might take place.

This notwithstanding, it should not be ignored that the maximum difference between the cheaper notarial fees and the flat fees is about 400€ (for a transaction value of 100.000€ - we have not yet looked at lower transaction values where the difference might be larger), whereas the difference between notarial fees and flat fees in the case of transactions with a value of 500.000€ goes up to several thousands of Euros. This difference could be interpreted as a monopoly rent conferred by the regulation of fixed fees (without considering at this stage possible further cross-subsidisation among different legal services)<sup>2</sup>. As a preliminary finding, it may thus be stated that whereas cross-subsidisation between higher and lower fees is limited, monopoly rents in the case of high value transactions under fixed notarial fees are high.

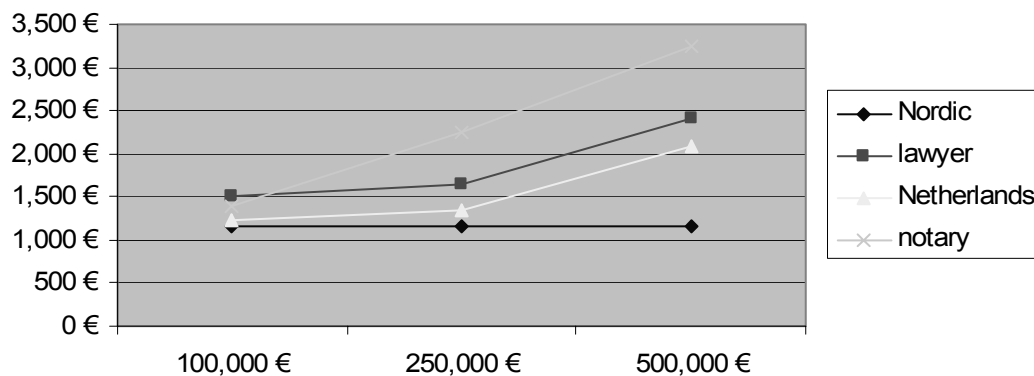
Figure 4 confirms the above trend: The average of notary countries has slightly cheaper fees for 100.000€ transactions than lawyer countries. However, already at a value of about 120.000.€ notary countries fees overtake all other systems' fees. Significantly, both the Dutch deregulated notary model and the Scandinavian system score better than the notary countries for all transaction values under review, even for the low value transaction.

<sup>2</sup>

This will be done in the Dutch case study.

**Figure 3****Development of Legal Fees for Selected Countries (Unadjusted)**

Extending also this comparison to the different regulatory systems, we find the following figures:

**Figure 4****Comparison of legal fees (Unadjusted)  
by regulatory system**

**(2b) Development of fees (Adjusted by net earning factor): transactions 100000.-, 250000.- and 500000.-€**

When absolute legal fees are adjusted by the net income index, we obtain somewhat different results from our analysis in (2a). To adjust the absolute legal fees in order to account for differences in income factor across the countries, we have performed the following transformation. We take the average net income for the EU (23 550 €) as a benchmark. We then multiply the percentage of legal fees to total transaction cost by the ratio of net earnings for respective country to the benchmark of 23 550. For example, the net incomes for Poland and England are 5200€ and 33 668€ respectively. Moreover, the percentage legal fees

for 100k property value for Poland and England are 0.94% and 2.94% respectively. Thus, the net income adjusted percentage of legal fees to 100k house value for Poland is  $(0.94 * (23550/5200)) = 4.25\%$ , whereas for England it is  $(2.94 * (23550/33668)) = 2.06\%$ . Consequently, England is paying less in real percentage terms than Poland.

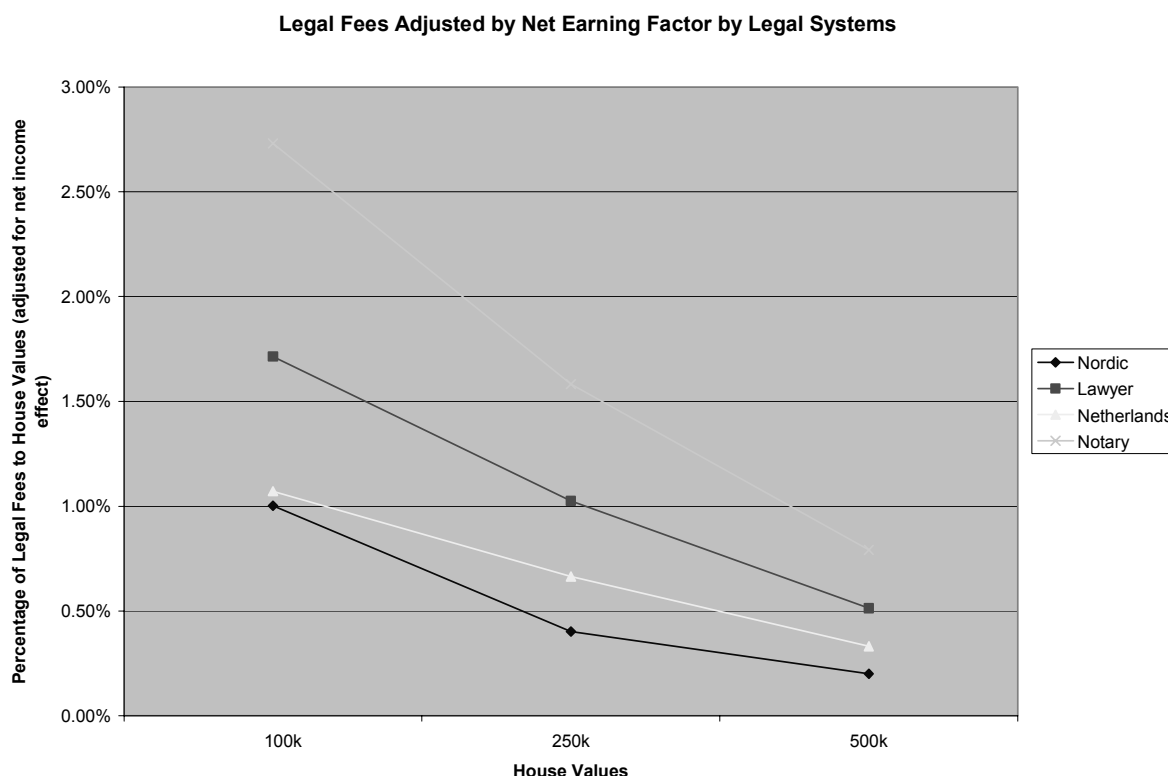
The net income factor adjustment to the percentage of legal fees to house value is equivalent to either adjusting the house value or the legal fees accordingly. One cannot both adjust house value and legal fees across countries as the net effect would be unchanged. For a thought experiment, let's assume the following: a typical English person earns 4 times more than a typical Polish person (i.e. an English person has 4 times more purchasing power than a Polish worker) but both pay 1000 € legal fees for 100K€ house. Consequently, a house that is worth 100k in Poland would be equivalent to 25k for an English person. Thus, the real percentage legal fees to the house value for English person is 1% whereas for Polish person, it is 4% (i.e.  $(1000/25000) * 100$ ). One could also adjust the absolute legal fees by the factor 4: English pays 1000€ whereas Polish pays 4000€ in real terms. Thus, the real percentage is 1% and 4% for English and Polish respectively. The main message is that Polish person is 4 times poorer than English, and hence pays 4 times more in real terms than English.

Figures 5 and 6 show the legal fees that are adjusted by the net income factor. Figure 5 shows that Poland in real term pays much more than all other countries for different house values (one exception is that Italy pays slightly little more at 100k house value). Figure 6 shows the clear message that when the legal fees in real terms are categorized by the legal systems, the notary system clearly charges much more than others.

**Figure 5**



Figure 6



### c) Fees percentage correlated with the regulatory index

In the following section, we present correlations between the regulation indices and the real percentages of legal fees to the transaction value. Figure 7 shows PTV (percent of transaction value adjusted by the net income factor) against the regulation indices (on market entry (MERI), market conduct (MCRI) and mandatory intervention (MII)). Figure 7 clearly shows the positive relationship between the percentage fees and regulation indices: the higher the regulation indices, the higher the percentage fees. The correlation ( $R^2$  = goodness of fit) between the two variables is 0.10. When Hungary is excluded, the goodness of fit improves to 38% from 10%.

The result of this analysis is straightforward: whilst there are some countries with high regulatory indices and rather low cost percentage values (ES, PL, DE), there are also other highly regulated countries with high or very high costs<sup>3</sup> (FR, IT, BE) and, most importantly, no countries with low regulatory index values and high costs. In sum, Figure 7 therefore shows a clear positive correlation between the level of regulation and the percentage of transaction value taken by legal fees (i.e. high levels of regulation go hand in hand with high fee levels whereas low levels of regulation are associated with low fee levels).

<sup>3</sup>

It should be noted that Greece has been left out here as it represents a hybrid system: two lawyers acting on top of the notary.

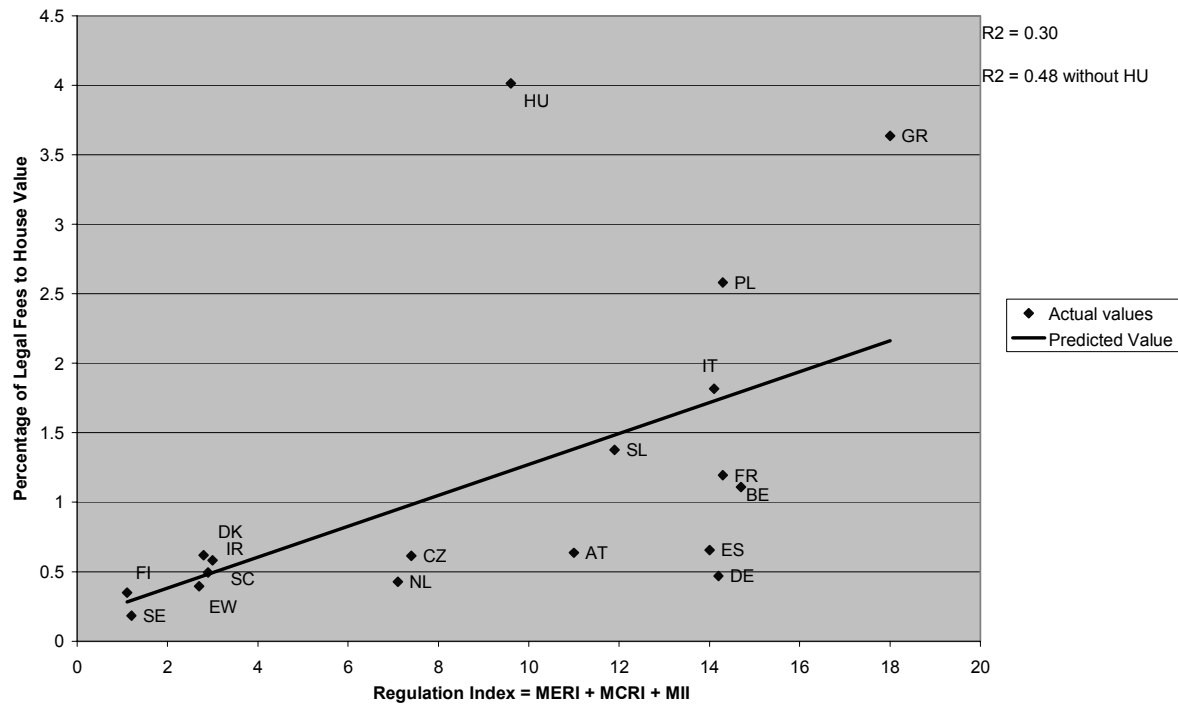
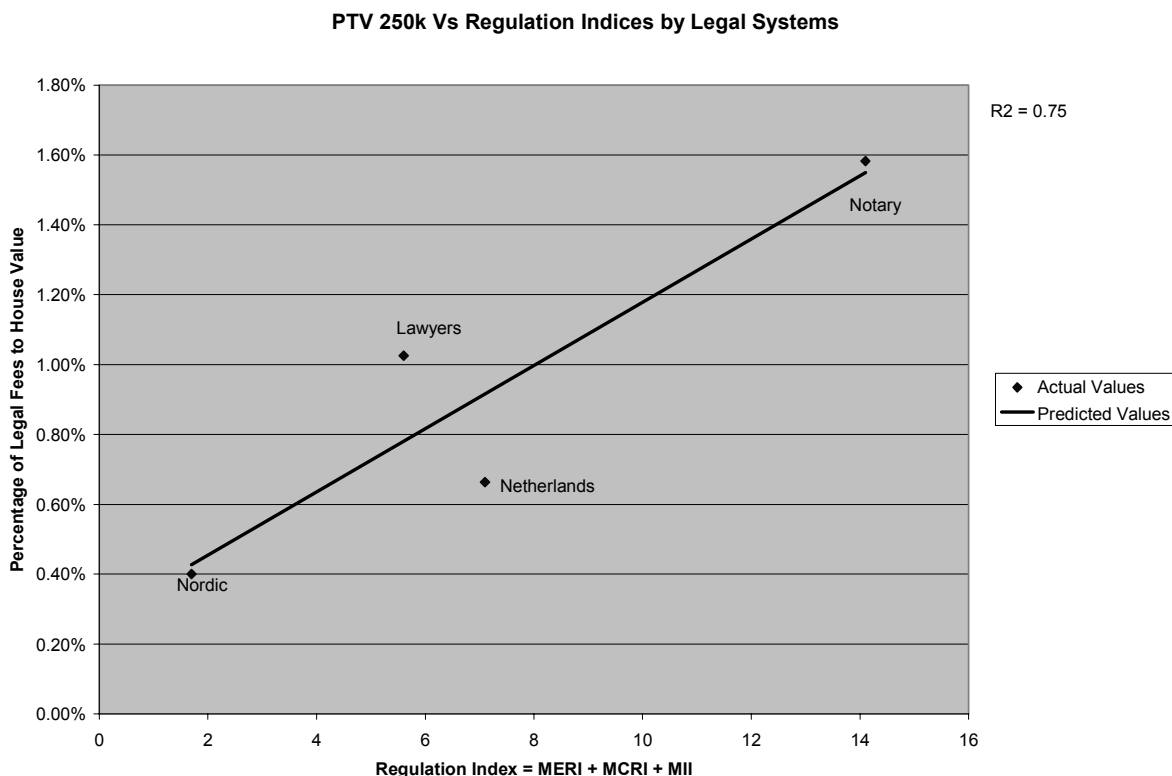
**Figure 7****PTV 250K Vs Regulation Indices**

Figure 8 shows the correlations between the regulation indices and legal systems. The relationship between the two variables is even closer: the correlation value is 0.84 for the house values of 250k.

Figure 8



#### d) Overall result

On average, the Nordic systems are the most efficient (in particular Finland and Sweden). However, it is difficult to get exact figures here, because legal service is part of the overall fee of the Nordic real estate agents.

Comparing the British isles adversarial systems with flat or nearly flat fees and notarial systems with value-dependant fees, the former are cheaper for transactions values of 250.000.- and 500.000.- Euro; the higher the value becomes, the more notary systems (in particular the French, the Belgian and the Italian), become more expensive; this may show the existence of monopoly rents. However, notarial systems (excluding the hybrid Greek system and excluding the deregulated Dutch system) are on average slightly cheaper for a transaction value of 100.000.- Euro (all including a mortgage on the same amount). This might show a small degree of cross-subsidisation between high and low value conveyancing.

The deregulated Dutch system – being a notarial system, but with less professional regulations, in particular without limits on the number of notaries and without statutorily fixed fees -, ranges close to the Nordic countries according to our preliminary figures. It therefore delivers an impressive proof that deregulated notary systems may work very efficiently.

By and large, these tendencies are also confirmed by an additional comparison of the fees charged for average house prices in various countries. However, traditional notary countries such as Spain, Poland and

Germany rank equal or nearly equal in absolute terms to the Netherlands but not in real terms. Finally, overall findings show a statistical positive correlation between higher regulation and higher fees.

**e) Other Market Outcome Indices**

For the purpose of this study, 5 groups of outcomes indices have been identified – Price Index; Choice Index; Quality Index; (ease of) Functioning Index; and Speed Index. The current paper is limited to the analysis of the price index. The final study, which will be ready by end of March 2007, will also examine in detail the other market outcome indices.



## CHINESE TAIPEI

### 1. Frequency of transactions

The average length of time between transactions for residential homes in Chinese Taipei is about 11.1 years, according to a survey conducted by the Council for Economic Planning and Development in the third quarter of 2006<sup>1</sup>. It shows in the same report that the average unit price for housing is about 49,610 NT dollars (1,503 US dollars) per square meter.

In another survey conducted by the Construction and Planning Agency, Ministry of Interior, the ratio of self-owned residential home in the nation was about 83.9% at the end of 2005<sup>2</sup>. The survey also shows that the average total cost for buying a residential home is about 5.06 million NT dollars (153,333 US dollars).

It should be noted that there is a big difference in the average price across the nation because of the development gap between cities and rural areas. In addition, the average price of housing has been rising consistently since the middle of 2005.

### 2. Matching with no intermediaries

There are no legal restrictions for homeowners to sell their own houses by themselves. However, there are no statistics for the ratios of houses sold by owners or by agents.

### 3. Mechanism of matching with intermediaries

The development of real estate intermediary business in Chinese Taipei went through the following three stages: individual brokers, brokers' shops/stores, and real estate agent chain stores/ franchises. Currently, it is very common to use brokers and agents for real estate transactions.

Real estate agents involved in a transaction may include: Land Administration Agents, Real Estate Appraisers, Real Estate Agents, Real Estate Selling Broking, and Real Estate Renting, Managing, and Information Services. The roles and services rendered by these agents are as follows:

- Land Administration Agent: to process land registration, surveying, taxes and fees, to draft and verify the transaction agreements/contracts, and to apply items related to the Land Act and other regulations.
- Real Estate Appraiser: to appraise lands, construction improvements, agricultural improvements, and the rights of those properties.

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<sup>1</sup> "Survey on Demand for Residential Housing in Taiwan for the Third Quarter, 2006" Council for Economic Planning and Development, December 5, 2006.

<sup>2</sup> "Survey on Housing Conditions in the Taiwan-Fukien Areas," Construction and Planning Department Agency, Ministry of Interior, 2006.

- Real Estate Agent: to intermediate or act for the selling, buying, exchanging, or renting of real estates.
- Real Estate Selling Broking: to market or sell real estates entrusted by owners or builders.
- Real Estate Renting, Managing, and Information Services: to provide information and services for the leasing and management of real estates.

According to the “Real Estate Broking Management Act,” a broking agent or broking agency should have the following obligations:

- For broking agents, they should pass the qualifying examination and obtain a real estate agent certificate before practicing.
- For broking agencies, they should apply for permission and register with local government before commencing operations.
- To investigate the entrusted real estate.
- To provide instruction regarding the real estate and a full explain to the client.
- To sign the important documents, including: an entrusted contract for renting, the selling of real estate, an offer document for rental or purchase, a receipt of earnest, a draft of the advertisement for the real estate, and a contract of the sale and purchase, or the lease of the real estate.
- To receive only the repayment in accordance with the standard repayment out of the real price or rental specified by the central administration office. A broking agency or a broker shall not receive any price difference or other repayment.
- To joint the local real estate business association.
- To pay a guaranty bond of operation according to the regulation of the central administration office. The purpose of this bond is to compensate the client for loss resulting from the broker’s performance of business or the salesperson’s intentional act or misconduct.
- To maintain the confidentiality of the client: a broker should keep classified the secrets of others he or she knows on account of performing business.
- To bear liability or joint liability to pay compensation for the client’s loss resulting from the broking agency’s failing to realize the contract or the broker’s performance of business or the salesperson’s intentional act or misconduct.
- To accept the administration office’s examination
- To comply with the “Regulations on the Ethic of Real Estate Broking Business” set by the real estate business associations.

In addition, the real estate agents should comply with all regulations regarding the transactions in the Civil Law, the Fair Trade Act, and the Consumer Protection Act.

Several large broking agents have established their own websites to use as a platform for displaying the selling objects and marketing their products and services. Some have even developed a “multi listing service” (MLS) to share resources and selling objects so as to attract more buyers and increase the chances of transaction take place. The Fair Trade Commission in December 2002 issued a “Regulation of the MLS on Real Estate Broking Agent” to explain the types of conduct that may violate the Fair Trade Act. The Regulation was revised in February 2005.

The Fair Trade Commission also issued the “Regulations on the Real Estate Broking Business” in May 2000 to explain the types of conduct that may violate the Fair Trade Act. The types of conduct included in the Regulation are: price-fixing, false, untrue or misleading representations, and other deceptive or obviously unfair conduct that is sufficient to affect trading order. The Regulation was also revised in February 2005.

#### **4. Matching intermediary fees**

According to Article 19 of the “Real Estate Broking Management Act,” the broking agency should receive the standard repayment out of the real fixing price or rental specified by the central administration office. In accordance with this article, the Ministry of Interior (MOI) announced the following standard in 2000: for the buying and selling of real estate, the total repayment from seller or buyer or both sides cannot exceed 6% of the transaction price. For the leasing of real estate, the repayment cannot exceed 1.5 months of the rent. Note that this standard is a maximum level (price ceiling), and not a fixed price. Broking agents and brokers can compete with each other under this maximum level and cannot act together to fix the repayment, which is in violation of the Fair Trade Act.

According to a survey conducted by the Fair Trade Commission to the real estate broking agents in 2005, 91% of the agents received the repayment in accordance with the contract to buyers and sellers. For buyers, 75% of agents charged 2% of the transaction price and 24% of agents charged 1% of the transaction price. As for sellers, 90% of agents charged 4% of the transaction price and 8% of agents charged 3%. About 7% of the agents received repayments from both sides, and 90% of these transactions amount to 6% of the transaction price in total.

#### **5. Role of professional association rules, governmental rules and listing rules**

The “Real Estate Broking Management Act” requires that all real estate brokers and agents join registered local business associations. The roles of these business association are:

- To save and operate the “guaranty bond”: According to Article 8 of the Act: “The aforementioned guaranty bond shall be deposited in the special guaranty bond account opened in the financial institution named by the national business union together with the National Business Associations of Broking or Sale. A management committee shall be organized to be in charge of the account. The income generated by the bond shall be spent on the sound development of the real estate broking system.”
- To establish ethical regulations: The National Business Associations of Broking or Sale should establish the “Regulations on the Ethics of Real Estate Broking Business” and notify the competent authority.
- To report its members activities: Local business associations should report the situations regarding their members’ entry into business associations, suspension of rights, and

withdrawal from business associations to local administration offices that shall transfer these reports to the records of the central administration office.

As mentioned above, there is no restriction on any individual selling his/her own house in Chinese Taipei. However, for an individual to sell his/her house, it may cost more to list the object and search for the right candidates to buy it. In addition, unlike broking agents, individual sellers usually lack a business reputation and a guaranty bond to carry out the contract, and thus, it is relatively difficult to attract the right buyers.

## **6. Transfer of Control**

### **6.1 *Transfer regulations***

According to Article 36 of the “Land Registration Regulation,” a land registration application can be filed by an agent, but Article 49 of the “Land Administration Agent Act” and other local government regulations require that only those who pass the examination and obtain a certificate to be a land administration agent can engage in the land registration business. Therefore, except for free or occasional acting, the agent should be a qualified land administration agent.

### **6.2 *Transfer taxes***

Before the transfer of the property, the seller and buyer have to pay certain taxes and fees. For the seller, the land value increment tax, the deed tax, and the stamp tax are the primary taxes. For buyers, there is a registration fee and a notarization fee. The land value increment tax is one of an important tax for local governments.

### **6.3. *Professional rules***

According to the “Real Estate Broking Management Act,” a broking agent should obtain the permission and operating license from a competent authority before operation, and a broker should pass the qualification examination and obtain a certificate before practicing. The “Land Administration Agent Act” also requires that only those who pass the examination and obtain a certificate as a land administration agent can engage in such related business. However, these regulations do not have any limitations on the number of practitioners.

Regarding the regulations on the pricing rules, as mentioned above, the “Real Estate Broking Management Act” stipulates that the payment to the broking agency is set by the central competent authority. However, the announced price (6% of the transaction price or 1.5 months’ rent for leasing) is a maximum price, and buyers or sellers can negotiate with brokers and broking agencies. In addition, brokers and broking agencies can compete with each other under this price regulation. Therefore, the price regulation will not fix the price in the market.

## **7. Housing Loans**

### **7.1. *Role of non-banks in housing lending***

The primary housing loan providers in Chinese Taipei are financial institutions, namely, banks and insurance companies. There are no statistics as to what percentages involve a broker since financial institutions compete vigorously and individual buyers can search for their own loan providers.

Land administration agents play an important role in real estate transactions, from the signing of the contract to the transfer of the real estate. Therefore, many land administration agents will offer their clients

extra services by assisting them with applying for housing or land loans and will offer them low-rate products. In recent years, housing builders and real estate agents have started to form strategic alliances with financial institutions to provide their customers with low-rate loan services.

A major issue regarding housing loans in recent years has been the transfer of loans from higher-rate to lower-rate banks due to the declining interest rates in the financial market. The Fair Trade Commission issued the “Guidelines on the Charging of Penalty Fees for the Prepayment of Housing Loans by Financial Enterprises” in September 2002. The Guidelines were also amended in February 2005.

## **7.2      *Tying of housing loans to other products***

The Fair Trade Commission received several complaints about tying housing loans to other products, such as fire insurance on the real estate and the life insurance of the borrowers. However, these cases were resolved either because they fell under the jurisdictions of other agencies (e.g. Ministry of Finance) or due to lack of evidence.



## LITHUANIA

### 1. The residential housing market - an overview

An especially rapid surge of the real estate (further RE) prices in Lithuania broke out in 2003 reflecting the overall favourable situation in the market: the national economy was growing at a pace of up to 10 percent per year, the unemployment levels dropped facilitating a general improvement in the population's expectations. In 2003, the expansive monetary policy pursued by the European Central Bank allowed the basic interest rate to drop to a 2 percent level. This enabled the commercial Lithuanian banks to increase their loan portfolios that were growing by as much as 52.3 percent per year. Furthermore, there was a popular belief that the introduction of the Euro will fuel the real estate prices, and many sought to acquire the new housing considering the timing to be most favourable. The ever more movement of the residential housing market was further heated by the tax relieves to housing loan holders, equally by psychological anticipation of price jumps as well as the herd instinct.

Despite an obviously insufficient supply of the RE the latter was growing quite slowly. This was caused by several reasons. First, the territorial planning (zoning) procedures in Lithuania are rather complicated and time-consuming. There are still some residual red tape barriers: the land restitution procedures have not been completed, in some individual regions the general territorial plans have not been drawn up and etc. Furthermore the construction companies are suffering from a insufficient capacity and an increasing labour force shortage.

It was imbalance between the supply and the demand that caused a soaring price increases. Even discounting influence of buyers expectations (anticipations of price increases), the overall conditions in the market were rather conducive to the price growth. During the last three years the prices were growing by 30-50 percent per year. A similar situation was observable in the markets of other Baltic States: the earlier launched crediting boom in Latvia and Estonia is not yet slowing down, rather it is still gaining momentum. The price dynamics in certain individual sectors of the real estate market is astonishing: over the year 2005 the prices in some old sections of Riga jumped by as much as 80 percent.

It has become a commonplace situation where about 90 percent of housings are purchased within less than two weeks from the announcement of the sale even before the foundation of the buildings is laid down or the necessary construction permits are obtained.

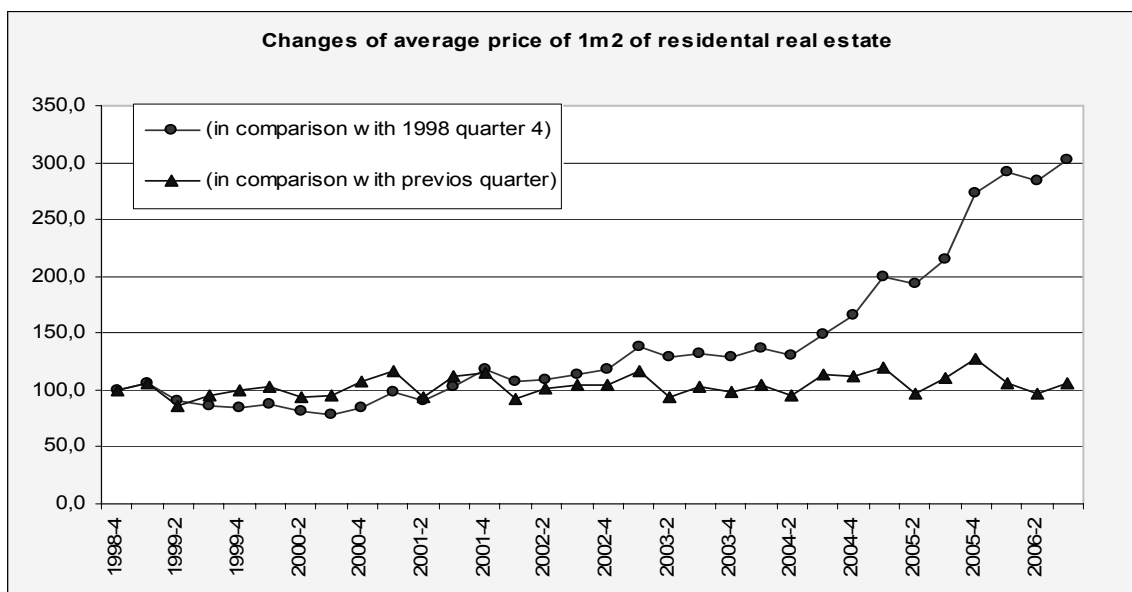
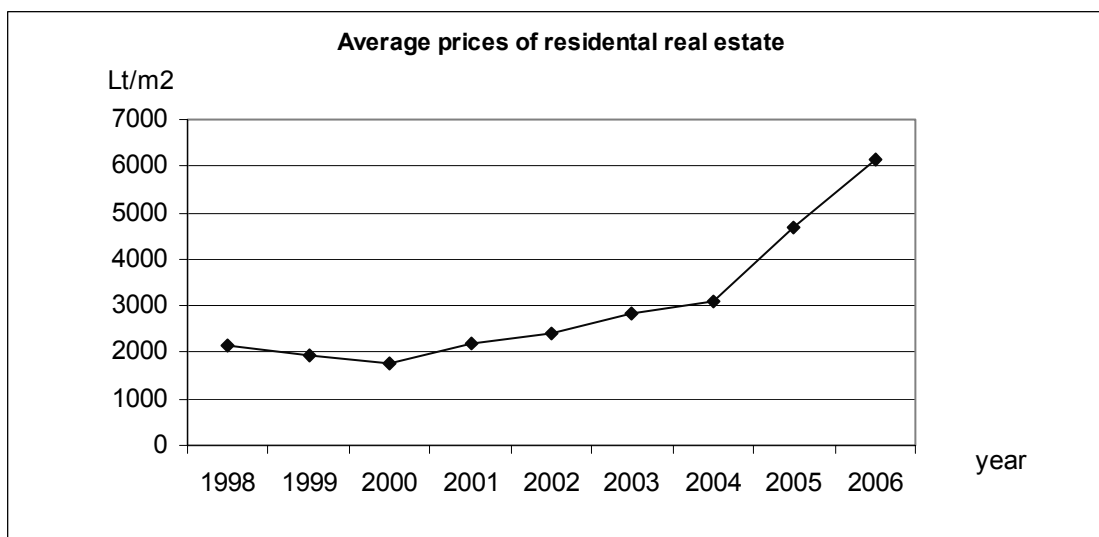
Fig. 1. Registered sold apartments in Lithuania: changes in average price (LTL/1 m<sup>2</sup>)<sup>1</sup>.

Fig. 2. Changes in the indicative prices of residential housing.



The rapid growth of the real estate market was favourable for the emergence and operations of the so-called speculators (or profiteers) who purchase housing in the hope to profit from the rapidly growing housing prices. The significant volumes of such profiteering resulted in even further distortion of the market. The findings of the market surveys conducted by some RE agencies suggest that speculators could account for as much as 15-30 percent of all buyers.

This overall dynamic market determined the peculiarities of competition in the RE intermediation market.

<sup>1</sup> Data source: Department of Statistics of Lithuania.

## 2. Activity of intermediaries operating in the real estate market

The RE (residential housing) market can be relatively distinguished into the primary and the secondary markets. The primary market covers the new construction housing. The absolute majority of these housing assets are marketed through the real estate intermediaries (agencies). The newly constructed housing sale is mostly limited to the three major cities of Lithuania. 90% of market transactions involve housing of old construction and only 10% - of newly constructed housing. In the view of the rapid growth of the primary market and virtually no regulation of the activities of the RE intermediaries, it is not an easy task to establish the percentage of the sellers in the secondary market referring to the services of the real estate agencies rather than relying on their own. This will be to a high degree determined by the market situation itself. During the high season where the search for a buyer was actually limited to a placement of advertisement, the importance of the intermediaries significantly decreased. With the markets maturing an increasing number of customers discover the advantages of intermediation even though so far intermediaries mainly work with the primary market.

Under the existing regulation in Lithuania neither RE agencies, agents nor brokers need to obtain any license to engage in the intermediation activities. The area is regulated only by general legislation such as the Law on Companies<sup>2</sup> or tax legislation<sup>3</sup>. The situation has both its advantages and shortcomings. On the one hand the entry into the market for such agencies is sufficiently easy. According to the recent statistics there are about 400 real estate and property development agencies in Lithuania. Given that the largest number of transactions concentrates in the major Lithuanian cities, the number is quite significant. It would be reasonably expect an intense competition, high quality of the services and relatively low charges. But it is exactly the absence of any licensing or any legal regulatory basis that was conducive to the emergence and operation in the market of numerous small real estate agents and brokers who provide services of inferior quality. Furthermore, the market is flooded with the so called „black brokers“ or “outside brokers” – quite a common phenomenon in an active and not yet matured RE market. These are persons illegally engaging in the intermediation services who avoid paying any taxes to the State from their illegitimate proceeds. Such minor intermediaries, often do not provide services professionally, fail to provide accurate data or documents, rather they considerably create the confusion in the market. Not infrequently such agents engage in small profit making by selling a real estate items for a price much higher than has been agreed with the seller and, having found an interested buyer purchases the item from the seller at a lower price and resells it to an interested buyer.

The activities of the illegal and non professional intermediaries not restricted by any liability or obligations significantly impair the image of all professional real estate companies legally operating in the market. Upon a negative experience of doing business with the such agencies or agents customers tend to avoid having business even with the legal and professional agents which eventually prevents the market from maturing, conducting any more detailed market analysis or the provision to the market of any higher certainty or information. Since in Lithuania the real estate agents do not need to obtain any licences, any market stabilisation may be expected only when customers refer to and rely exclusively upon the honestly working and professional real estate intermediaries.

The services of the Lithuanian real estate agents are much more often relied upon by those who seek to sell any housing rather than by potential buyers. An RE agency and a customer conclude a contract normally specifying the service that the customer seeks to be provided, other terms, such as the charges for the services to be offered. A generally accepted seller's fee (the customer's success fee) amounts to 3-3.5

<sup>2</sup> The Law on Companies (13 July 2000, No. VIII-1835, Official Gazette, No. 64-1914)

<sup>3</sup> The Law on Corporate Income Tax (20 December 2001, No. IX-675, Official Gazette, 2001, No. 110-3992), the Law on Value Added Tax (5 March 2002, No. IX-751, Official Gazette, 2002, No. 35-1271) etc.

percent of the sale price. The fee is charged to the seller. The amount of the fee depends on a number of factors, i.e. the location of the housing, its size, the desirable term of the sale, and the customer's willingness to negotiate the price. In the course of the last several years the fee was steadily growing: from 1-1.5 percent during the „hot season“ of 2003-2004, to 3-3.5 percent in 2006. This growth in the fee clearly demonstrates the growing number of customers who prefer to pay a fee in return of being assured that they sell for a fair price. The real estate agencies not only search for the customers, they assess the housing at market prices.

The buyer will be normally charged a notary's (registration) fee. The Law on the Notariate<sup>4</sup> stipulates that notaries charge a fee for the any notaries' actions, drafting of transaction documents, consultations and technical services. The amount of the fee is established by the Ministry of Justice of the Republic of Lithuania upon an agreement with the Ministry of Finance. The Order of the Minister of Justice<sup>5</sup> approved the provisional amounts of fees to be charged for the notary services. The fee for the confirmation of the transfer of an immovable asset was established at 0.5 percent of the value of the item in any case not less than LTL 100. Confirmation of a loan or credit agreement – 0.3 percent of the amount of the loan but in any case not less than LTL 50. The notary services market is virtually free of any competition. The Orders of the Minister of Justice establish not only the fixed rates for the notary fees, but also the fixed number of notaries in the Republic and their working hours. Besides, the Law on the Notariate provides for a prohibition of the advertising of notary services. Certain services are virtually tied up to specific notaries with the client left with no possibility to apply to another notary (e.g., in cases of property inheritance, the customer is obligated to apply to the notary in whose territory the property to be inherited is located). Furthermore, the Code of Honour (Ethics) of Notaries<sup>6</sup> recognises such actions of notaries as „attracting the customers by one-off or regular lower fees than those offered by other notaries“ as actions of unfair competition. In accordance with the Law on the Notariate for any infringement of the Notaries' Code of Ethics the notary may be subjected to a disciplinary proceedings, a sanction (warning, reprimand, removal from the position). Thus, this chain of circumstances and regulations directly related to the housing acquisition transactions presents a number of hard anticompetitive restrictions.

In Lithuania normally larger real estate agencies would offer a number of auxiliary services: real estate management and strategy services, geodesic and cadastre measurements, property lease and evaluation. The latter service is especially often offered by RE agencies. This market however is subjected to a much more stringent regulation than that of the intermediation. The activities of the asset valuers are being regulated by the Law on the Principles of the Asset Valuation<sup>7</sup>. The State supervision of the activities of assets valuers and entities engaged in asset valuation is being performed by the Auditing, Accounting and Assets Appraisal Institute of Lithuania. The Law also provides that the documents certifying the right to engage in the asset valuation activities are the qualification certificate of the asset valuator or the qualification certificate of the company; the Law also defines the restrictions imposed upon the rights of the asset valuers to assess any property. Asset valuers shall comply with the educational and professional experience requirements established by the Government of the Republic of Lithuania.<sup>8</sup>

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<sup>4</sup> The Law on Notariate (Official Gazette, 1992, No. 28-810), No. I-2882

<sup>5</sup> Order No.57 of 12 September 1999 of the Minister of Justice "On the approval of the provisional fees for the notarial actions, drafting of transaction documents, consultations and technical services“.

<sup>6</sup> Resolution of the Chamber of Notaries on the amendment of the Code of Honour (Ethics) of the Notaries of the Republic of Lithuania, 25 March 2000.

<sup>7</sup> The Law on the Principles of Asset Valuation (25 May 1999, No.VIII-1202; Official Gazette, 1999, No. 52-1672)

<sup>8</sup> Resolution No.1157 of 28 September 1998 of the Government of the Republic of Lithuania "On the approval of the qualification requirements of asset valuers“.

The Competition Council has received complain of individual asset valuator concerning the actions of commercial banks. Prior to granting a housing loan commercial banks require a report of the valuator of the property to be acquired as to its condition and the price. In certain cases it is the commercial banks that perform the asset valuation, although quite often the customers are offered a list of “acceptable asset valuers”. The list often includes 5-10 asset valuation companies. The applicant claimed that banks unreasonably refuse to include him into the lists even though he has acquired all the necessary qualification certificates. The applicant also claimed that the banks had concluded an agreement with the major asset valuation companies to prevent other asset valuers to enter this particular market segment. The close examination of the situation and the inquiries with the banks produced a finding that there are about 25 such companies of which about 10 are included into the list of the companies recommended by the banks. These asset valuation companies were most well known and with the best reputation. They also were in the market at least of 7-11 years, i.e. from the beginning of the market. Seeking to minimize the risk related to the asset valuation and accordingly the related crediting risk the banks have established sufficiently stringent additional criteria for the recommended asset valuation companies. Furthermore, the banks had provided for the customer’s discretion to acquire the asset valuation services at any asset valuator, in which case the Bank will be forced to perform some additional analysis and investigation. Finally, following a sufficiently critical inquiry many banks turned to much more flexible approach towards the customer's desire to choose an asset valuator.

The less frequently offered by the real estate agents geodesic and cadastre measurement services are equally strictly regulated by the Law on Geodesy and Cartography<sup>9</sup>. The geodetic operations include the formation of geodetic networks, surveying to determine setting and inclinations of buildings and structures, cadastre measurements of immovable property objects and marking of buildings and equipment on sites. The rules applicable to licensing concerning the performance of such operations, and the rules on the accounting of validity of surveyor certificates are approved by the Government<sup>10</sup>. The rules provide for a strict education, experience and other criteria applicable to applicant for the necessary licence.

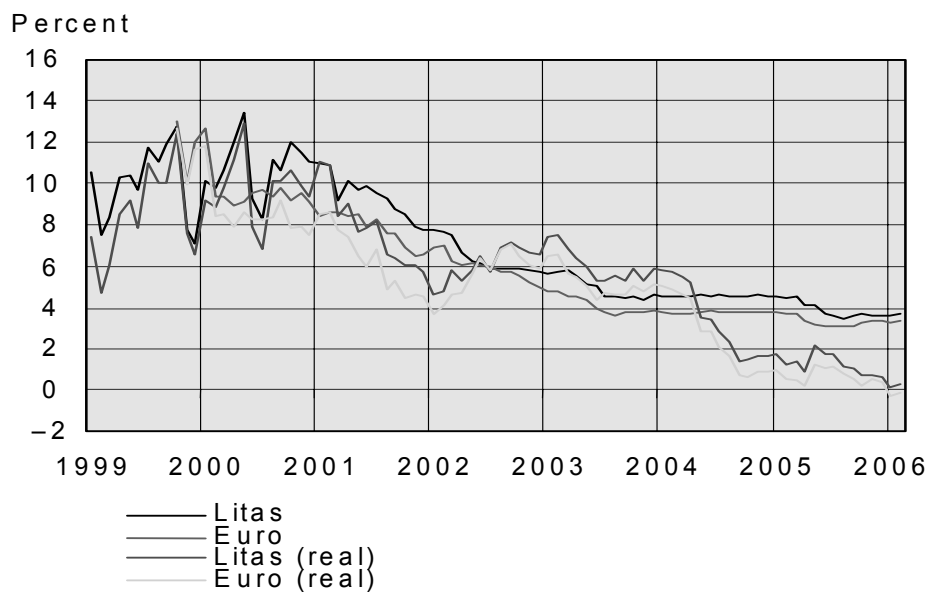
In summary it could be drawn a conclusion that the regulation of the activities of some entities operating in the real estate market (including other agencies providing other services) is not sufficiently balanced. The oversight of the real estate agencies is not clearly defined and creates possibilities for numerous fraudulent activities in the RE market. On the other hand, the activities of notaries is subjected to such stringent regulation that the customer is left without any possibility to look for better or less expensive services.

### **3. Housing loan market**

Another important reason that had to a significant extent heated the prices in the real estate market was the improving terms for obtaining housing loans. The banks had extended the loan repayment term from 25 to 40 years, reduced the required initial instalment and the interest rates, – both in the view of the falling basic interest rates and on the account of the banks' margin. The development of the average housing loan interest rate is shown in Fig.3.

<sup>9</sup> The Law on Geodesy and Cartography (Official Gazette, 2001, No. 62-2226)

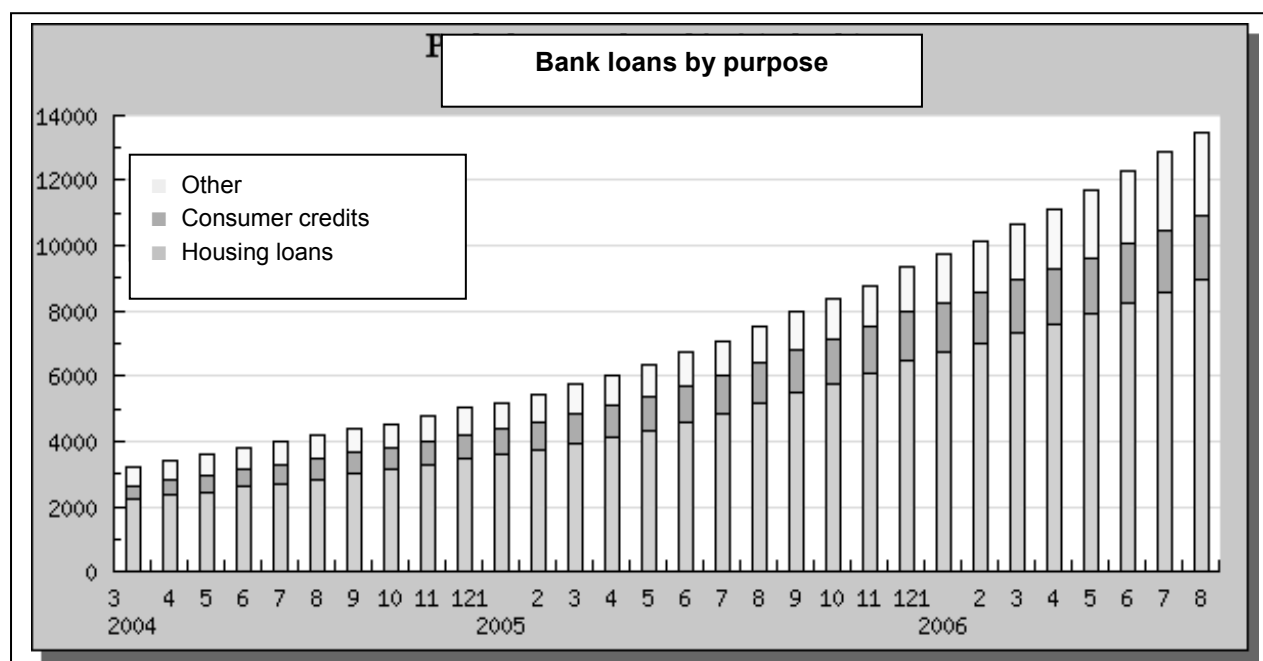
<sup>10</sup> Resolution No. 1805 of 19 November 2002 of the Government of the Republic of Lithuania "On the approval of the regulations on the licesing of geodetic, topography and cartography works“

Fig.3. Housing loan interest rates in 2005-2006.<sup>11</sup>

Taking advantage of the improved terms in the loan market an increasing number of residents feel more willing to apply for the housing loans. The housing loan interest rates have been falling in the view of the growing demand for such funding facilities (although the main part of the interest rate is represented by the variable interest rate). The ever better crediting terms and the decreasing interest rates at the account of the bank's margin allows a conclusion of the growing competition in the loan market.

Loans granted by the banks in the course of the three years (2004-2006) nearly quadrupled (Fig.4).

<sup>11</sup> Data source: The Bank of Lithuania

Fig.4. Banks loan portfolio, 2004-2006<sup>12</sup>

Although the loan portfolio has been increasing at an extremely high rate, the housing crediting potential in Lithuania is still not fully utilised. The housing loan portfolio rate in 2003-2005 increased from 4 to 9 percent of GDP. In the meantime in the closest neighbouring Baltic States this rate accounts for 10 percent of the GDP in Latvia and 20 percent in Estonia. The Euro zone average rate is 38 percent.<sup>13</sup> The report of the Bank of Lithuania on the results of the survey concludes that out of 11 banks surveyed not a single bank indicated of any intention to liberalise any terms for granting the housing credits. 18 percent of the banks surveyed advocated an idea of slightly more stringent crediting terms (they together hold about one fifth of the banking market). This shows that the “softness” of the crediting terms has virtually reached the limit. Taking advantage of the high demand in housing credits and seeking to offer to a client a convenient “single window” service the banks offer or even tie up other services to the loan granting, such as property insurance, account opening, etc. The banks refer to such options for a number of reasons: they seek to assure the insurance of the mortgaged property and customer’s health at a reliable insurer, besides, each extra service is additionally chargeable.

<sup>12</sup> Data source: The Bank of Lithuania

<sup>13</sup> Data source: DNB Nord



## RUSSIAN FEDERATION

The State Office of Public Prosecutor has proposed FAS Russia to carry out a series of inspections aimed at verifying presence of price collusion at the sale of newly built houses among building companies in territory of Moscow, Saint Petersburg and Moscow Region.

Based on the analysis of the markets of newly constructed pieces of real estate of Moscow Region (Moscow and the nearest Moscow suburbs) and Saint Petersburg the following conclusions can be made.

More than 100 organizations are active in the sector of house-building both in Moscow Region and in Saint Petersburg.

In Moscow Region, the greatest shares of the market of commercial building - in terms of the number of houses constructed - are held by: OJSC "Moskapstroj", JSC "Don - Stroy", LLC PSF "KROST", OJSC "Gruppa Kompaniy PIK", JSC «Mosstroymekhanizatsiya 5», OJSC «DSK 1».

At that, the market share of any of the said companies does not exceed 15 %.

In Saint Petersburg the greatest shares of commercial building in terms of houses built are possessed by: JSC "SSMO "LenSpetsSMU", LLC «LEK – Stroitel'naya Kompaniya № 1», JSC «Severniy Gorod», JSC «YuIT Lentek», JSC «Stroitel'noye Obyedineniye M - industriya», OJSC «Building Corporation «Vozrozhdeniye Sankt-Peterburga», OJSC «SK IPS».

All of the said companies hold a market share not exceeding 19 %.

Thus, following the results of the analysis of the market of newly built houses of the Moscow Region and Saint Petersburg, there are no economic entities in the market that occupy a dominant position and the market of commercial house-building in Moscow Region and Saint Petersburg is competitive.

The Regional Office of FAS Russia for Moscow and Moscow Region - according to methodical recommendations of FAS Russia – has selectively conducted 37 inspections of the organizations that operate in the market of house-building and sale of real estate as well as 5 building associations, in particular: Association of Investors of Moscow, the Moscow Building Union, the Russian Union of Builders, the International Union of Builders, Association of Builders of Russia.

In Saint Petersburg, the Regional Office of FAS Russia for Saint-Petersburg and Leningrad Region has implemented 24 control actions, including inspections that have been carried out in non-profit-making associations and unions: the Saint-Petersburg Union of the Building Companies, Association the Building - Industrial Complex of the North-West, Association "SevZapTransSpetsStroy", the Union of the Building Associations and Organizations.

The inspections have not revealed any documents testifying to concerted practices at definition of the price policy on selling the real estate in organizations that are members of this non-profit-making associations and unions.

According to the antimonopoly legislation, concerted practices are interconnected and coordinated actions of economic entities that lead to restriction or elimination of competition in the respective commodity market, including increase, decrease or fixation of the prices.

Therefore, in the course of the inspections of the newly built housing, especial attention was given to the analysis of a price policy of the companies active in the market.

The implemented analysis of the sales of newly built houses in Moscow Region and Saint Petersburg testifies to absence of signs of a price collusion on the market of the real estate in the actions of the aforesaid companies. It appears from the obtained data that the increase in the prices for the specified periods occurred not simultaneously and not with identical price increments.

The analysis of the data on change of the cost price, submitted by the building companies for the period 2005 - first half-year 2006 does not confirm the thesis of significant growth of the cost price of the construction and its influence on the price of sale of newly built houses.

Moreover, in accordance with the official data of Federal Service for State Statistics the average sale price of a square meter - measured country-wide - exceeds average prime cost of the construction more than twice.

In opinion of FAS Russia, the big difference in the data on the cost price, submitted by the building companies, calls for additional analysis on the part of the Federal Tax Service of Russia.

It is also worth to mention that initial cost - when allocating the government contractual work related to construction of social houses in Moscow - makes some 19500 rubles per square meter. Tenders between building companies are held with the decrease of the given cost.

On the whole the inspection has shown that essential excess of the sale price over the building cost, as well as the rise in prices in the market of sale of the newly-built housing are connected, above all, with imbalance of supply and demand.

It is the deficiency of the supply combined with the earlier existed non-transparency in the granting of the land plots and the rights to reconstruction without auctions are major causes of significant growth of prices of the real estate.

Besides the specified reasons, it is necessary to note also deficiency of the ready land plots, long terms of approval of the design documentation, complications related to connection of newly built houses to the municipal infrastructure as well as the imperfection of procedures of formation of land plots by local authorities. The same reasons are also marked by the building companies.

The substantial rise in prices leads to increase in investments into the real estate on the part of means individuals and legal persons as a means to increase their savings (according to expert estimations not less than 30 % profit), which essentially increases the demand and increasingly aggravates situation in the market.

For large cities, such as Moscow and Saint Petersburg, deficiency of free land areas that can be used for house-building is typical. So called "dot building" cannot satisfy the needs of the housing.

The solution of this situation, in opinion FAS Russia, is comprehensive reconstruction of built up territories, development of programs on relocation of industrial enterprises beyond boundaries of cities, improvement of transport availability of a region. FAS Russia believes that reconstruction of the available

housing, which assumes demolition of defective houses, settling of low-rise buildings combined with construction of high-rise ones is one of the main reserves of the city areas for the housing.

The situation can be amended radically only through sharp increase of the demand in the market, which requires elimination of all the artificial barriers that restrict the house-building and hinder fast increase in the amount of the newly built houses.

Furthermore, with the purpose of improvement of the situation on development of the land plots for their consequent granting of those through public auctions FAS Russia proposes to develop - within the framework of the National Project «Affordable and comfortable housing to the citizens of Russia» - a mechanism of refundable granting of loans to regions from the federal budget in order to develop the land plots for the housing. The refund of the said funds should be ensured through sale of the land plots in the course of auctions. Thus, the region - with the help of the loans received - would develop and sell the land plots at an auction and afterwards would return the loan from the obtained funds. The excess of sale price of a land plot over expenses related to its development should be used by the responsible authority for social house-building or for development of the new land areas for the housing (mechanism of co-financing).

We also consider it expedient to adopt new provisions of law that would oblige natural monopolies to carry out purchases of the goods, works, services for the amount that must exceed the a certain sum of money pursuant to the procedures established by the Federal Law of 21.07.2005 <sup>1</sup> 94-FZ «On Placement of Orders for Delivery of Goods, Executing of Works and Rendering of Services for State and Municipal Needs». At present the expenses of the natural monopolies are a part of the tariff and are carried out independently by them, without compliance with any compulsory procedures.

The proposed measure would allow to lower cost of engineering preparation of the land plots and thus also the tariff for their connection to the infrastructure as well as the level of tariffs for housing and communal services in the Russian Federation.

Moreover, it is expedient to consider the issues of modification of the tax policy in the area of investment in the real estate as a way of capital increase.

Along with carrying out of inspections aimed at establishing of price arrangement at sale of newly built houses, since 2005 FAS Russia has also been carrying out constant inspections on how the granting of the land plots for the house-building is implemented. The number of the infringements related to granting the land plots for the house-building revealed for this period has amounted to some 460. In all cases of the revealed infringements, FAS Russia rules on cancellation of certificates on granting the ground areas.

FAS Russia will continue work on the control over allocation of the land plots for the house-building, the rights to development of the built up territory as well as on the analysis of the market of the house-building in the regions of the Russian Federation.



## SOUTH AFRICA

In this report, the Competition Commission considers real estate transactions in South Africa in four stages, namely (1) the advertising and marketing of property for sale; (2) negotiations between the buyer and seller culminating in an agreement to purchase; (3) financing the purchase of the property (bonds/home loans); and (4) transfer of ownership in property.

### 1. The Advertising and Marketing of Property

Advertising of property is a significant factor in real estate transactions, as it plays an integral part in the marketing and sale of immovable property. In general, property in South Africa is advertised and marketed by the seller or an estate agent on behalf the seller in the print media<sup>1</sup>, online on “property websites”, or by having “show houses”<sup>2</sup>.

The Competition Commission has to date received three complaints relating to the advertising of property in the print media, specifically the advertising of property by estate agents in the property guides of local newspapers.

Two of the complaints received by the Competition Commission related to agreements between an estate agents group and two newspapers in a particular region. The estate agents group has a majority shareholding in these newspapers. The complainant in both these cases was an estate agency that is a competitor to the group.

In both the complaints, the complainant alleged that the newspapers refused to publish its advertisement because it reflected the commission rate of the complainant. The advertisement in question was also worded in such a way as to infer that other estate agents’ charge rates resulted in “excessive profits”. According to the respondent estate agents group, specifying a lower commission is comparative advertising and is contrary to the provisions of the South African Code of Advertising Practice (“Code”). In addition, the group was of the opinion that the wording of the advertisement was “disparaging advertising” and also contrary to the Code. The newspapers therefore refused to publish the advertisements.

The complainant also referred the matter to the Competition Tribunal for interim relief. The matter was settled in the Competition Tribunal on the basis that the complainant would be allowed to advertise its rate until such time as the Competition Commission had concluded its investigation. The Competition Commission thereafter concluded its investigation and resolved not to refer the complaints to the Competition Tribunal as it found no evidence that the complainant was being excluded from the market or that there was an abuse of dominance. Nevertheless, the Competition Commission was concerned that by not allowing agents to advertise their rates, some property guide owners are limiting price competition. The Competition Commission therefore used advocacy and engaged the respondent estate agents group to change its conduct.

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<sup>1</sup> Print media includes magazines, newspapers, property guides and supplements

<sup>2</sup> Boards are placed on roads in areas close to the property, advertising that the property is for sale and directing prospective buyers to the property.

The third complaint relates to a restraint agreement in terms of which an estate agents' group entered into a joint venture with a newspaper for the management and administration of property advertising and also agreed not to advertise in any other newspaper. The complainant in this matter was a competing property newspaper. The complainant alleged that the joint venture and restraint agreement would result in a foreclosure of the market for advertising by estate agents. The Competition Commission resolved not to refer this matter to the Competition Tribunal as there was no evidence of a substantial lessening of competition in the publication of property listings and there was no evidence to suggest that other publishers were foreclosed from the market as a result of the joint venture. Further, only 47 out of 250 estate agents in the area were signatories to the restraint agreement.

## **2. Negotiations between the buyer and seller culminating in an agreement to purchase**

Where the property is being sold by the seller, direct negotiations take place between the seller and buyer. The Competition Commission has not received any complaints in this regard.

However, the seller may also enlist the assistance of an estate agent to sell the property and it is these cases that have raised competition concerns. Where an estate agent is used, the agent acts as the "go-between" between the seller and potential buyers. Estate agents obtain mandates from sellers or buyers to negotiate and/or conclude contracts on behalf of either a buyer or seller of property. The agents are normally paid a commission on conclusion of a sale transaction.

The Competition Commission investigated the conduct of estate agents relating to the following competition issues: the "accreditation system", the granting of a sole mandate and the fixing of commissions charged.

### **2.1 *The accreditation system***

The accreditation system is a process whereby an estate agent is granted an exclusive permit to sell property in a particular development or estate. Normally, an estate agent would apply to a homeowners' association, responsible for the development or estate, to be accredited. The estate agents would then be required to pass an examination to demonstrate that they have the requisite knowledge of the rules and regulations to market and sell property in the estate. The homeowners' associations use the accreditation system to assure potential buyers that the estate agent with whom they are dealing, is familiar with all the necessary rules and regulations of the development or estate.

The Competition Commission has to date considered five complaints in which it is alleged that accreditation is substantially lessening or preventing competition in the relevant markets. The Competition Commission found that the sizes of the respondent homeowners' associations were very small and that there was no foreclosure of the market. The complaints were non-referred as there was no evidence of a substantial prevention or lessening of competition in the market.

There was no case to be made against the homeowners' associations in respect of these complaints. However, the Competition Commission was concerned that the accreditation system could, under different circumstances, have anticompetitive effects. The Competition Commission subsequently entered into discussions with the Estate Agency Affairs Board ("EAAB") in October 2005 to address its concerns about the accreditation system.

The EAAB is the statutory body responsible for the regulation of the conduct of the estate agent. An estate agent must obtain a licence and a fidelity fund<sup>3</sup> certificate from the EAAB in order to practice. The

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<sup>3</sup> Insurance in the event of claims against the agent for negligence

EAAB has a strict Code of Conduct which estate agents must adhere to. The Code of Conduct addresses for example, the general duty of the estate agent to protect the public's interest, issues of mandate such as that a sole mandate must be reduced to writing, and the agents' duty to disclose and not make misrepresentations.

The EAAB does not regulate or decide on the accreditation system or the criteria that is used in the accreditation process. Homeowners' associations in the various areas are responsible for the development and implementation of an accreditation system. The EAAB would only be responsible if there are kickbacks to induce associations to use particular estate agents' services.

However, the EAAB expressed a concern that the criteria for accreditation could affect the entry and viability of emerging agents. The Competition Commission and the EAAB therefore agreed that the Commission would play an advocacy role with various homeowner associations to address the anticompetitive consequences that may flow from the accreditation system.

Consequently, in the last complaint that the Competition Commission considered against a homeowners' association's requirement of accreditation, although there was no evidence of a substantial lessening or preventing of competition in the market and no case to be made against the respondent homeowners' association, the Competition Commission met with the respondent homeowners' association. The Competition Commission raised a concern that the homeowners' accreditation system did not provide for regular review. Subsequent to the meeting, the association amended its rules of conduct to stipulate that the list of accredited estate agents would be reviewed every three years.

## 2.2 *The sole mandate*

A sole mandate is an agreement whereby the seller gives an exclusive right to a particular estate agent to market his/her property on his/her behalf for a certain period.

The Competition Commission received two complaints from estate agents against groups of competing estate agents in particular areas. In the first complaint, the complainant alleged that the affiliated agents under the group fixed the selling price of property by jointly evaluating and determining the price and/or commission to be charged when they secured a sole mandate. In the other complaint, the complainant alleged that the sole mandate excluded other agents from competing in the market. Further, it was alleged that the definition of a sole mandate was not properly explained to the seller.

The Competition Commission found that sole mandate agreements are fairly common practice in the property market and are not anti-competitive *per se*. A property seller can give an estate agent either a sole and exclusive mandate or an open mandate to market and/or sell property. This agreement is contractual in nature and is subject to negotiations between the estate agent and the seller. The property seller determines the final selling price of the property. After investigating the complaints, the Competition Commission found no evidence of price fixing or foreclosure of the market and decided not to refer the matters to the Competition Tribunal.

The Competition Commission was however concerned that the sellers are not fully aware of the meaning of a sole mandate. This issue was also raised in the October 2005 meeting with the EAAB. According to the EAAB's Code of Conduct, estate agents are required to make a full disclosure to the consumer in respect of the sole mandate and what it means. Further, if full disclosure is not made to the seller, the estate agent who is granted a sole mandate is required to indemnify the seller so that the seller is not subjected to a double payment of commission where another agent is used to sell the property. The Competition Commission agreed to refer such matters to the EAAB for appropriate action.

### **2.3      *Fixing commissions***

In South Africa, there is a history of the fixing of commission by estate agents' associations.

The fixing of commissions falls under the mandate of the EAAB insofar as there is failure to disclose to a consumer that it is not mandatory to pay a commission and that the commission rate is negotiable.

From the Competition Commission's perspective, the fixing of commissions is price fixing and is prohibited conduct. Consequently, in 2004 the Competition Commission initiated an investigation against the Institute of Estate Agents of South Africa ("IEASA"). The IEASA is a voluntary professional organisation of estate agents which publishes a tariff book with recommended commissions on sales of houses, semi-detached units, residential sectional title and share block units at 7.5% of the sale price of the properties concerned.

The tariff book set the minimum fees, hourly rates and sales commissions to be charged by estate agents who are IEASA members for (1) property administration services, (2) sales of immovable property, (3) sales of businesses, partnerships and shares in a company, (4) procuring and negotiating a lease, and (5) administration of sectional title developments and share block company buildings. The recommendation rate served as an important tool in aiding estate agents on how much to charge for property sales and also assisted estate agents in determining how much their competitors (other estate agents) would charge for the sale of a property. Estate agents were thus disinclined from setting individual fees. The publication of the tariff book therefore resulted in the indirect fixing of selling prices for estate agents' services in the different regions of South Africa.

The Competition Commission concluded that the prices at which estate agents' services are available in the market for estate agents services was to a large extent determined or influenced by the recommended professional fees and commissions for estate agents published in the tariff book issued by the IEASA. The Competition Commission found that the publication of the tariff book amounted to the indirect fixing of the selling price of estate agents' services by the IEASA. The tariff books were published from 1999 until 2002 when the IEASA became aware that its conduct would be of concern to the Competition Commission and ceased the practice.

Consequently, the IEASA and its members concluded a consent order in October 2004 wherein it admitted to contravening the Competition Act by publishing the tariff book until 2002. In light of the fact that the conduct had ceased in 2003 and the IEASA cooperated fully with the Competition Commission, the Commission recommended a penalty of R522 400, which the IEASA agreed to pay. In addition IEASA agreed to implement a compliance programme designed to ensure that its members are informed about IEASA's obligations under competition law. As the practice of the fixing of commissions has been entrenched in the industry, the Competition Commission is constantly engages with estate agents through advocacy to ensure compliance with the provisions of the Competition Act.

### **3.      *Financing the Purchase of Property***

Once the offer to purchase has been made, the buyer must acquire finance to purchase the property. Often the buyer does not have the cash to purchase a property and must acquire a home loan/bond. Buyers may qualify for a bond of between 25 to 30% of their income. The minimum home loan amounts offered by most banks in South Africa usually varies between R100 000 and R150 000. A first-time buyer may borrow more than 100% of the property value and could include costs such as the deposit, transfer fees and

bond registration costs in the loan.<sup>4</sup> Buyers are able to negotiate with banks and “shop around” for the most favorable interest rates.

Once a bond is acquired and ownership is transferred, the homeowner may still shop around for more favorable rates and switch bonds. Independent mortgage bond brokers and merchant banks have now also entered the market<sup>5</sup> and are encouraging people to cancel their existing bonds with banks and switch to them instead. Costs of switching may include a cancellation penalty charged by the banks as existing bond holder. However, many lenders and brokers offer to pay all or part of the switching costs.

The Competition Commission has considered two matters regarding the conduct of banks involving home loans/bonds.

### **3.1 *The prohibition of a small merger affecting the mortgage origination market***

In April 2004, the Competition Commission prohibited a small merger by four banks involved in the broad financial services market, including the market for the provision of home loan financing. These banks, namely ABSA Bank Limited (“ABSA”), FirstRand Bank Limited (“FirstRand”), Nedbank Limited (“Nedbank”) and Standard Bank of South Africa Limited (“SBSA”) wanted to acquire Comcorp Online (Pty) Ltd (“Comcorp”). Comcorp is involved in the development and provision of software to the home loan origination market.

The banks wanted to establish an industry-wide single channel for the electronic submission of all mortgage bond applications. Furthermore, the banks intended to also acquire BondTrak, which is a software used by mortgage originators (“MOs”) in managing their processes. MOs and banks compete in the market for mortgage applications. MOs are companies that submit the buyers’ applications for home loans to all the major home loan providers in South Africa on behalf of the buyer and also negotiate with the banks for competitive and lower rates.

The Competition Commission found that the joint control of the four banks over Comcorp would create a platform for coordinated conduct and was likely to lessen interbank competition. The transaction would have enabled the banks to, through Comcorp, jointly fix a transaction fee, which would require each originator to pay for the electronic submission of mortgage applications. This would have had the effect of limiting multiple submissions of mortgage applications to competing banks. By submitting multiple mortgage applications, the MOs play one bank off against the other in an effort to obtain the best interest rate for the consumer. A restriction on this process would have severely harmed the consumer in that inter-bank competition would diminish.

In addition, the Competition Commission found that the transaction would lead to a substantial prevention and lessening of competition in the software market. If the banks, through Comcorp, were to dictate the use of only the BondTrak software, all MOs would have been forced to change their software packages, accordingly making their systems redundant.

The Competition Commission therefore found that the merger would substantially prevent and lessen competition in the home loan application, home loan software and the home loan finance markets.

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<sup>4</sup> Source: “Are you a virgin buyer”, Thamar Houliston, 21 January 2007, [www.iafrica.com/property/buying/594779.htm](http://www.iafrica.com/property/buying/594779.htm)

<sup>5</sup> Barriers to entry to the market would include capital adequacy and regulatory requirements. Independent non-bank mortgage lenders have successfully entered into the market by partnering with banks and/or a securitisation operation which obtains lower “warehouse funding rates” through the capital and money markets, and then provides cheaper loans to the mortgage lenders.

Whereas the parties put forward certain efficiencies the Competition Commission found that these could be attained outside the merger and did not outweigh the anticompetitive effects arising from the merger.

### **3.2 *Tying home loans to a bank's insurer***

In 2005, South Africa's Financial and Intermediary Services ombudsman ("FAIS ombud") ruled against Nedbank, a major bank in South Africa, for compelling a homeowner on the conclusion of a home loan agreement, to use the services of the bank's insurer instead of her own. The bank relied on a section in South Africa's Short Term Insurance Act 1998 (section 43(5)(a)) to deny the home owner the right to choose her own insurer for the property bonded to that bank.

The FAIS ombud ruled against Nedbank for engaging in this conduct and was of the opinion that not allowing consumers the choice of their own insurer had the effect of preventing them from obtaining lower premiums and was anti-competitive. He then referred the matter to the Competition Commission for our attention.

After considering the matter, the Competition Commission was the view that section 43(5)(a) was contrary to the spirit of competition and the objectives of the Competition Act. The Competition Commission also held the view that the conduct of the banks in this regard seemed to have the effect of distorting competition in the insurance industry with regards to the insurance product concerned. The insurance companies that are preferred by the banks would have an unfair advantage, which was likely to enhance their dominance and foreclosure of the market.

The Competition Commission conveyed its views to the Minister of Trade and Industry in November 2005, requesting his intervention to amend the relevant provision of the Short-Term Insurance Act and that the Department of Trade and Industry engage the Ministry of Finance in this matter.

Arising from the Commission's intervention and that of the FAIS ombud, the National Credit Act 34 of 2005, which governs all credit agreements including home loans, now includes a section 106 that allows the consumer freedom of choice. Section 43 of the Short Term Insurance Act was also amended to include a new subsection 6. The effect the amendment is that consumers will now be able to choose their insurer when taking a home loan with a bank.

## **4. *Transfer of Ownership***

After securing appropriate financing, the property must be transferred into the name of the buyer.

A buyer of property has to take into account various costs when budgeting to buy a property. These include, transfer duty and conveyancing fees.

Transfer duty is a property tax that the buyer pays to the government before the transfer of the property and is based on the higher of the selling price or value of the property. In the recent past, some analysts in South Africa reported that the high costs of transfer duty deterred consumers from purchasing property. In 2006, South Africa's Minister of Finance, agreed that a decrease in transfer duties will encourage the secondary housing market and contributes to promoting home ownership; and consequently raised the threshold of property which is free of transfer duty to R500000.

Conveyancing fees are paid to an attorney usually appointed by the seller of the property. Only attorneys may be conveyancers. These attorneys must have completed a course, examination and be admitted as conveyancers in order to practice. There is currently a debate in South Africa on whether conveyancing should only be restricted to attorneys. The conveyancer attends to the transfer of the

property from the name of the seller to the buyer in the title deed at the deeds office. The conveyancer handling the registration of a mortgage bond charges a fee for the work that he or she does.

The Competition Commission has considered two matters relating to conveyancing. The first was an investigation against an association of attorneys in Pretoria and the second relates to an exemption application by the four statutory law societies of South Africa.

#### **4.1 *The Pretoria Attorneys' Association***

In 2004, the Competition Commission investigated the conduct of Pretoria Attorneys' Association ("the Association") for publishing "Guidelines for Attorney and Own Client Fees". These guidelines included tariffs of conveyancing services in Pretoria.

The Competition Commission found that the recommended fees had the effect of indirectly fixing prices. The Association and the Competition Commission settled the matter by way of a consent agreement. The Association admitted to contravening the Competition Act by publishing the guidelines and agreed to pay an administrative penalty of R233 000 (or R500 per member). The Association also agreed to withdraw the offending guidelines and undertook not to re-issue them or any like guidelines. The consent agreement was confirmed by the Competition Tribunal.

#### **4.2 *Exemption application by South Africa's law societies***

There are four statutory law societies in South Africa, and each has published guidelines, including conveyancing guidelines. The conveyancing guidelines are recommended conveyancing fees and tariffs that conveyancers may charge. The conveyancing guidelines do not set minimum or maximum fees, but give indication to members as to a fee that would be considered fair and reasonable in each matter.

The Law Society of South Africa applied to the Competition Commission on behalf of the four statutory law societies, for an exemption from application of the provisions of the Competition Act, in that the conveyancing guidelines and recommendation tariffs contravene the provisions of the Competition Act relating to collusion. This exemption application is currently being considered by the Competition Commission which is in discussion with the Department of Justice on this matter.

### **5. Conclusion**

In investigating and considering the various matters before it relating to real estate transactions, the Competition Commission has encountered certain practices, such as accreditation, and the fixing of estate agents' commissions and conveyancers' tariffs, that are widespread. However, it is often difficult to substantiate a case against respondents mainly because the effect of the conduct does not lead to a substantial prevention or lessening of competition, or the party engaged in the conduct does not fall within the strict definition of a dominant firm. Further, the industry is subject to its own regulator, namely the EAAB. In this context the Competition Commission resolved that the best route for it to take in going forward is advocacy. The Competition Commission is working together with the EAAB to ensure that estate agents understand the Competition Act and do not engage in anticompetitive conduct. Since the latter part of last year, two workshops have been held with estate agents to educate them on the Competition Act. Another workshop is scheduled for February 2007. The Competition Commission will maintain an ongoing relationship with the EAAB in order to ensure that its advocacy efforts are successful.



## BIAC

### 1. Introduction

The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit the following comments to the OECD Working Party 2 on Competition and Regulation (the "Working Party") in advance of the roundtable on Enhancing Competition in Real Estate Transactions, scheduled for February 19, 2007.

These comments principally address the first area of concern identified by the Working Party, i.e., the potential for anti-competitive conduct affecting the matching of buyers and sellers in real estate transactions. In particular, these comments focus upon the following issues: (i) agency fees and agent commission rates; (ii) the impact of government/industry rules and regulations; and (iii) rules governing access to listing services.<sup>1</sup> These comments also briefly address the issue of whether aspects of residential real estate transactions should be performed exclusively by lawyers and other professionals (e.g. notaries).

BIAC's views on these issues can be summarized as follows:

- There is broad recognition that residential real estate markets are generally competitive, characterized by low concentration levels and easy entry. On limited occasion, the real estate brokerage industries in some jurisdictions have been the subject of alleged anti-competitive conduct involving, for example, the collective action of realtor associations. BIAC believes that (i) these isolated incidents should not be used to paint the industry as unusually subject to competition concerns and (ii) common principles of competition analysis and advocacy – properly focused on these problems – can serve to protect competition in the real estate industry.
- In other instances, state imposed regulations or restrictions have impacted the nature of competition with respect to residential real estate transactions. There is no consensus on the net economic impact on consumers of the patchwork of government/industry rules and regulations affecting the provision of real estate agency services. The removal of barriers in some cases can be viewed as enhancing consumer welfare while the removal of others arguably may inhibit consumer welfare by removing appropriate mechanisms designed to ensure the integrity of the residential real estate transaction process.
- In some instances, there is a lack of sufficient empirical evidence from which to draw conclusions. BIAC believes that competition authorities must undertake appropriate empirical investigations before embarking on any particular enforcement approach and applauds those authorities that have or are currently undertaking such analyses.

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<sup>1</sup> The term agent will be used throughout this submission to refer to all real estate professionals. In the United States and Canada, there are two levels of real estate professionals, brokers and agents (or salespersons). Agents are typically employed by brokers, who manage and own their own real estate brokerages. In England, there is no distinction between broker and agent.

- In assessing the impact of the various rules and regulations, BIAC also believes that competition authorities must be sensitive to the competing considerations at stake in deciding what is best for consumers of residential real estate agency services.
- Given the competing considerations at issue, BIAC encourages competition authorities to consider first less intrusive enforcement actions to the extent that they conclude that markets may not be fully competitive in certain instances, before exercising more formal powers. For example, several competition authorities have observed that public information campaigns may be an effective way to educate consumers about the various options available to them to save money in residential real estate transactions.
- BIAC recognizes that while it may be appropriate to reserve certain aspects of residential real estate transactions to lawyers and notaries, expanding the role of non-legal professionals in some instances could be in the interests of consumers. Again, this is a balancing exercise in which due regard must be paid to all competing considerations.

## 2. Overview – Structure of Residential Real Estate Transactions<sup>2</sup>

Homeowners typically sell their homes in one of three ways: privately; through a real estate agent under an exclusive listing (or sole agency) contract; or through a real estate agent under a multiple listing contract.<sup>3</sup>

Private sales, also known as for-sale-by-owner (or "FSBOs"), appear to be less common than agent sales. For example, only 5%-10% of homeowners in England and Wales sell their own homes. Similar statistics exist for Australia,<sup>4</sup> the United States<sup>5</sup> and Ireland<sup>6</sup>. However, given the increased availability of

<sup>2</sup> The discussion in this section is based on our understanding of the experiences in the United States, Canada, England, Ireland and Australia. Each of these jurisdictions has a sophisticated consumer base and rates of home ownership are high, ranging from approximately 65% to 75%. In addition, most of the competition authorities in these jurisdictions have examined issues relating to the competitiveness of residential real estate transactions. For example, in October 25, 2005, the Federal Trade Commission ("FTC") and Department of Justice ("DOJ") in the United States jointly hosted a workshop on competition in the real estate industry. See <http://www.ftc.gov/bc/realestate/workshop/index.htm>. Representatives of both agencies also testified in July 2006 before the Subcommittee on Housing and Community Opportunity of the House Financial Services Committee on Competition in the Real Estate Brokerage Industry. See Maureen Ohlhausen, *Prepared Statement of the Federal Trade Commission before the Subcommittee on Housing and Community Opportunity U.S. House of Representatives on Competition in the Real Estate Brokerage Industry* (July 25, 2006), ("Ohlhausen"), <http://www.ftc.gov/bc/realestate/outreach/testimony.htm>. See also *Statement of J. Bruce McDonald, Deputy Assistant Attorney General, Antitrust Division, Department of Justice Before the Subcommittee on Housing and Community Opportunity Committee on Finance Service, United States House of Representatives concerning Competition in Real Estate Brokerage Services*, July 25, 2006 ("McDonald"), <http://www.usdoj.gov/atr/public/testimony/217299.htm>. The Office of Fair Trading ("OFT") in the United Kingdom conducted a market study and released a comprehensive report on the *Estate agency market in England and Wales* in March 2004 (the "OFT Report"), <http://www.ofl.gov.uk/Business/Market+studies/estate+agents.htm>. The Canadian Competition Bureau ("Bureau") is currently undertaking a comparative study into a number of self-regulating professional organizations, including real estate agents. The U.S., Canadian and Australian authorities also have a history of enforcement in this area.

<sup>3</sup> Other methods for selling a home include sale by auction. Sale by auction occurs in Australia, and to a certain degree in Ireland, but it is generally not a common occurrence in any of the other jurisdictions considered.

<sup>4</sup> In Australia, agents are involved in around 95% of all existing home sales: OFT Report – Annex C, p. 36.

internet sites for FSBO listings it may be that private sales are increasing as a percentage of overall residential real estate transactions.

An exclusive listing (or sole agency) contract ties the vendor to one agent for a set period of time.<sup>7</sup> Exclusive listings are the most common method for selling residential real estate in Australia, England and Ireland.<sup>8</sup> Generally, the listing agent (or selling agent) will be entitled to the full amount of any commission for sales made during this period even if another agent makes the sale.<sup>9</sup> However, an exclusive agent may voluntarily agree to compensate another agent who brings the buyer.<sup>10</sup> On the whole, however, buying agents appear to be rare in these jurisdictions.<sup>11</sup>

A multiple listing contract imposes a contractual obligation on the listing agent to cooperate with other agents. A percentage of the listing agent's commission is offered to buyers' agents in exchange for cooperation that leads to the sale of the property. A multiple listing contract typically also gives the seller access to a multiple listing system, which is an information-sharing and cooperative marketing network accessible to real estate agents to assist their customers in buying and selling homes. Such systems are often owned and operated by local real estate boards and associations. Multiple listing services have emerged recently in the United Kingdom but none exist in Australia or Ireland.<sup>12</sup>

Websites have emerged in recent years as an advertising vehicle to help agents market properties listed on multiple listing systems. Typically, in order for a property to be listed on an advertising website operated by a real estate board or association, the property must be listed on the multiple listing system operated by that board or association, or an affiliated board or association. The use of such systems is widespread in Canada and the United States. There are no such systems operated by boards or associations in England, Ireland or Australia.<sup>13</sup>

The degree to which the profession is self-regulated varies considerably across jurisdictions. There are high levels of membership in voluntary self-regulating professional associations in the United States

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<sup>5</sup> National Association of Realtors, *Profile of Homebuyers and Sellers*, 29 (2005).

<sup>6</sup> OFT Report – Annex C, p. 59.

<sup>7</sup> In Australia, the period of an agency contract is usually 90 days: OFT Report – Annex C, p. 39. The term of the contract varies in England. 45% of respondents surveyed by the OFT reported a contract length of less than 3 months: OFT Report, p. 23.

<sup>8</sup> For example, in England and Wales, only 3% of respondents surveyed by the OFT reported using a multiple agency contract: OFT Report, p. 23.

<sup>9</sup> Depending on the terms of an exclusive listing contract, the vendor may or may not have the right to sell the property himself or herself without paying commission to the agent.

<sup>10</sup> Some states in Australia ban commission sharing between agents while others permit it: OFT Report – Annex C, p. 39.

<sup>11</sup> In Ireland, for example, buying agents are used only in very top end markets: OFT Report – Annex C, p.59.

<sup>12</sup> See OFT Report – Annex C, pp. 41 and 60.

<sup>13</sup> However, a similar advertising vehicle has emerged in England in recent years. "Property portals" are internet websites that display property listings on behalf of a number of real estate agents who subscribe to the portal for a fee. A number of portals are owned by groups of estate agents but access is provided to other estate agents. The majority of the portals do not permit private individuals to advertise their property on the portal if they do not use an estate agent. Some of the most significant property portals include Fish4homes.co.uk; homesonview.co.uk; and propertyfinder.co.uk. See, OFT Report, p. 32.

and Canada but it is believed that professional membership is relatively low in England.<sup>14</sup> For example, the National Association of Realtors ("NAR") is the largest real estate association in the United States, representing 1.3 million members who belong to one or more of the 1,600 local real estate associations/boards and 54 state and territory associations affiliated with NAR.<sup>15</sup> NAR represents approximately 60 percent of all active licensed real estate brokers and agents in the United States. In Canada, CREA represents more than 88,000 real estate agents who are members of ninety-nine member real estate boards and 11 provincial and territorial associations.<sup>16</sup> In England, the largest association is the National Association of Estate Agents with around 10,000 members.<sup>17</sup> Some estate agents become members of the Royal Institute of Chartered Surveyors. Industry sources suggest that the total number of agents belonging to either association is 20-25%.<sup>18</sup> Membership in the Real Estate Institute of Australia varies between states but is higher than membership in the industry associations in England.<sup>19</sup>

Notwithstanding the above differences, there are a number of important common elements generally seen in residential real estate markets across jurisdictions. First, residential real estate markets tend to be local. According to the U.S. DOJ, "most sellers prefer to work with a broker who is familiar with local market conditions and who maintains an office or affiliated sales associates within a reasonable distance of the seller's property. Likewise, most buyers seek to purchase property in a particular city, community, or neighbourhood, and typically prefer to work with a broker who has knowledge of the area in which they have an interest".<sup>20</sup> Second, the brokerage industry is generally highly fragmented and competitive, with low market concentrations and low barriers to entry, expansion and exit.<sup>21</sup> The OFT, for example, has described local residential real estate markets in the U.K. as dynamic, "with a large number of new agents setting up in business successfully, and established businesses being forced out by competitive pressures".<sup>22</sup>

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<sup>14</sup> OFT Report, p. 21.

<sup>15</sup> <http://www.realtor.org/>

<sup>16</sup> <http://www.crea.ca/>

<sup>17</sup> [www.naea.co.uk](http://www.naea.co.uk)

<sup>18</sup> OFT Report, p. 21.

<sup>19</sup> <http://www.reiaustralia.com.au/>

<sup>20</sup> See Complaint, *United States of America, Department of Justice, Antitrust Division v. National Association of Realtors*, (September 8, 2005), Civil Action No. 05C-5140 <http://www.usdoj.gov/atr/cases/f211000/211009.htm>. Similarly, the OFT Report found that around 90 per cent of sellers choose an agent located within five miles of their property: OFT Report, p.2. Having said that, Internet and other technological developments may be widening the geographic area that a real estate agent may serve, and markets may also be larger in less densely populated areas or for higher valued properties.

<sup>21</sup> Government Accountability Office, *Real Estate Brokerage: Factors that May Affect Price Competition* (August 2005) ("GAO Report"), p. 8. The GAO Report observes that, in the United States, licensing requirements are relatively easy and there are no significant capital requirements. See also, Ohlhausen, p. 8.

<sup>22</sup> OFT Report, p. 2.

### 3. Agency Fees and Agent Commission Rates

A percentage commission is traditionally the most common formula for the remuneration of real estate agents. Flat fee formulas and fee for service programs also exist in a wide range of formats, but have been found to represent a small share of the overall market in some jurisdictions.<sup>23</sup>

Agency fees and agent commission rates are set on the basis of individual negotiations between the seller and his or her agent.<sup>24</sup> Other terms are also negotiated, such as the duration of the agency contract and, in some jurisdictions, advertising costs.

In some countries, such as Australia, it is reportedly common for commission rates to vary depending on the property's price.<sup>25</sup> In the United States, however, the GAO has reported that commission rates are relatively uniform regardless of the price of the property or the effort required to sell the home.<sup>26</sup>

Commission rates in England, Ireland and Australia are generally lower than those in the United States, in part because an agent's remuneration in these jurisdictions is not typically shared with buying agents. In addition, the agency fee in England, Ireland and Australia does not typically cover the advertising costs of marketing a home for sale.<sup>27</sup>

The OFT Report and GAO Report cite various commentators who have expressed concern that percentage commission rates tend to be stable within a given market and have sought to ascribe such stability to various factors which they claim tend to suppress price competition. These include minimum-

<sup>23</sup> GAO Report, p. 5; OFT Report, pp. 36-42; OFT Report – Annex C, p. 12.

<sup>24</sup> Multiple listing systems in Canada and the United States no longer establish standard commission rates or recommend how commissions should be divided among brokers, as historically was the case. This practice ended in the United States after the Supreme Court ruled in 1950 that an agreement to fix minimum prices was illegal under federal antitrust laws. See *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 488-89 (1950). In the 1970s, the U.S. DOJ brought a series of antitrust actions alleging that the adoption of suggested fee schedules also violated U.S. antitrust laws. See GAO Report, p. 13. Similarly, in Canada, an inquiry into the real estate industry initiated by the Competition Bureau led to the issuance of a Prohibition Order in 1988 against CREA, and certain real estate boards, that directly or indirectly applied to all CREA-member real estate boards and associations in Canada. The Prohibition Order prohibited the fixing of commission rates and fees for CREA's Multiple Listing Service® and prohibited the restriction of the advertisement of rates and fees in any publication. In addition, real estate boards were prohibited from restricting board membership and access to the MLS® system and other real estate board services to any licensed sales personnel who met reasonable financial and educational criteria. See Competition Bureau News Release, *Real estate inquiry resolved by Order of Prohibition* (December 20, 1988); see also the *Remarks of Harry Chandler, Deputy Director of Investigation and Research (Criminal Matters) of the Competition Bureau, 1998 Annual Conference and Trade Show, Canadian Real Estate Association* (September 27, 1998), <http://www.competitionbureau.gc.ca/internet/index.cfm?itemid=160&lg=e>.

<sup>25</sup> OFT Report - Annex C, p. 13.

<sup>26</sup> GAO Report, Highlights.

<sup>27</sup> In the United States, commission rates range from 5% to 7% of a property's selling price: GAO Report, p. 3. In England and Wales, commission rates range from 1% to 2%: OFT Report, p. 36. In Ireland, commission rates currently are around 1.5%, down from 1.75% in recent years. In Australia, commission rates range from 1% to 3% depending on the price of the property: OFT Report – Annex C, pp. 40 and 61. See also, the following article from NAR: "*Comparing U.S. Real Estate Commissions to U.K. Estate Agent Commissions is Like Comparing Apples to Oranges*", [http://www.realtor.org/government\\_affairs/competition/international\\_commission\\_comparison\\_misleading.html](http://www.realtor.org/government_affairs/competition/international_commission_comparison_misleading.html).

service laws and restrictions on offering rebates and other incentives to consumers. Multiple listing systems also have been alleged to contribute to commission rate stability (at least in those jurisdictions which have them), because of their facilitation of cooperation and price transparency amongst agents.<sup>28</sup>

There are, however, competing views on these issues.

First, there is insufficient evidence upon which to derive any conclusions about the reasons for the possible stability in commission rates. For example, the U.S. FTC has concluded that "there is little current empirical evidence, however, that systematically measures the degree to which real estate brokers and agents compete on price (via commission rates). As a result, more study is needed to determine the level of 'competitive' commission rates."<sup>29</sup> The FTC did note in the same report, however, that, "There is relatively recent survey data indicating that average commission rates are declining, as well as anecdotal evidence that discount and limited-service brokers are forcing full-service brokers to compete on price."

Second, even assuming a degree of price stability, there are other potential causes of stability that are unrelated to any allegedly anti-competitive conduct by the real estate industry. Indeed, some jurisdictions, such as the U.K., have experienced price stability absent a widely-used multiple listing systems or significant industry self-regulation, suggesting that other causes may be at work, including the potential, in a competitive market, for prices to stabilize around a competitive price.

One possible factor that may contribute to price stabilization is that, as housing prices have climbed in recent years, home sellers may have become relatively less sensitive to commission rate levels, and thus are less inclined to negotiate them down or seek lower-cost alternatives.<sup>30</sup>

Yet another possible factor is that some consumers may not be aware of all their options relating to commission rates. The FTC has observed that "despite a significant amount of information available to consumers on the internet, there are gaps in consumer knowledge – for example they are not necessarily aware that commission rates are negotiable."<sup>31</sup> Similarly, the GAO found that "[c]onsumers may accept a commission rate of about 6 percent as an expected cost of selling a home, in part because that has been the accepted pricing model for so long, and some consumers may not know that rates can be negotiated."<sup>32</sup>

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<sup>28</sup> See OFT Report – Annex C, p. 14; and GAO Report, referring to various commentators and economists who have taken this view.

<sup>29</sup> Ohlhausen, p. 8. The existing empirical literature was also reviewed for the American Antitrust Institute ("AAI") by economist John Weicher, former Commissioner of the Federal Housing Administration, U.S. Department of Housing and Urban Development, now with the Hudson Institute. According to the AAI, Weicher's "conclusion was that we do not have a dependable basis for saying whether commission prices are relatively stable, as critics of the industry believe, or have been declining, as defenders say, or whether, perhaps, prices have been declining only for the most expensive homes. Being able to plug in the missing data would seem to be critical for public policy decisions". See *Letter to Maureen Ohlhausen, Director, Office of Policy Planning, Federal Trade Commission dated May 9, 2006 from Albert A. Foer, President, American Antitrust Institute*, <http://www.antitrustinstitute.org/recent2/517.cfm>.

<sup>30</sup> See GAO Report, p. 14.

<sup>31</sup> FTC Press Release, *FTC Testifies on Competition in the Real Estate Brokerage Industry*, July 25, 2006, <http://www.ftc.gov/bc/realestate/outreach/testimony.htm>.

<sup>32</sup> GAO Report, p. 14.

The OFT Report reached similar conclusions. The OFT found that only around half of sellers obtain quotes from more than one agent. Those sellers who did shop around and negotiate fees paid on average 14 per cent lower commission rates than those who did neither.<sup>33</sup>

For that reason, both the FTC and the OFT have recommended the development of information campaigns and educational materials to help consumers become more knowledgeable about the various ways in which they can save money in residential real estate transactions, including raising consumer awareness about the benefits of negotiating commission rates and shopping among agents.<sup>34</sup> The OFT for example, sees this as a way to "increase competitive pressures on estate agents and result in better value for money in terms of both lower prices and higher service quality".<sup>35</sup>

Yet another possible factor identified by the GAO is that "buyers may also have little concern about commission rates because sellers directly pay the commissions. Sellers may be reluctant to reduce the portion of the commission offered to buyers' brokers because doing so can reduce the likelihood that their home will be shown".<sup>36</sup>

Before any conclusions are drawn or public policy recommendations are made regarding percentage commission fees, BIAC believes that more and better empirical data should be collected to determine whether stability in fees and rates exists and whether any such stability is due to a market failure rather than a reflection of a competitive outcome.

Moreover, to the extent that competitive concerns are identified in residential real estate markets BIAC, in appropriate cases, supports the initial use of less intrusive enforcement actions (such as consumer education programs) as a possible solution before resorting to more intrusive enforcement actions.

#### 4. Government/Industry Rules and Regulations

In some jurisdictions, government legislation and the rules and regulations of voluntary self-regulated professional associations are under scrutiny for allegedly restricting or hindering the introduction of new low-cost agency models.

For example, some jurisdictions in the United States have enacted or are considering legislation that requires real estate agents to provide a minimum level of service when they represent consumers.<sup>37</sup>

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<sup>33</sup> OFT Press Release, *Estate agency markets need change* (March 23, 2004), <http://www.of.gov.uk/News/Press+releases/2004/51-04.htm>.

<sup>34</sup> See OFT Press Release, *Estate agency markets need change* (March 23, 2004), <http://www.of.gov.uk/News/Press+releases/2004/51-04.htm>. The OFT also recommended that agents should provide quotes both in percentage terms and as an absolute amount calculated on the basis of the recommended selling price; See also, Ohlhausen p. 15.

<sup>35</sup> OFT Report, p. 3.

<sup>36</sup> GAO Report, p. 14.

<sup>37</sup> See GAO Report, p. 16. For example, the U.S. DOJ and FTC wrote letters to the responsible State officials in Oklahoma, Alabama, Missouri and Texas in April and May 2005 expressing concerns with proposed minimum service laws on the basis that such laws limit consumer choice and restrict new and innovative business models that are likely to provide a competitive constraint on full-service brokers' pricing. Despite the concerns raised by the DOJ and the FTC, all four states subsequently enacted minimum service

In other instances, regulations have been enacted that prohibit agents from offering discounts and other incentives to attract customers.<sup>38</sup>

As a general rule, BIAC does not encourage government or industry rules and regulations that restrict the development of innovative business models. BIAC also supports the general proposition that government/industry rules and regulations should be impartial and ought not be used to target a specific class of competitor.

At the same time, BIAC recognizes that it is in the public interest to ensure that professionals, including persons involved in the real estate industry, meet certain minimum standards in order to maintain the integrity of the profession and to protect consumers from malpractice. Thus, in certain circumstances, it may be appropriate to, for example, set standards that control entry, restrict the method of service delivery, or restrict firm organization.

That said, where legislators seek to limit competition because of broader public policy concerns, BIAC also supports the proposition that the legislators should impose the least intrusive limits on free competition as are required to achieve the public policy objective. For example, certain jurisdictions have adopted minimum written disclosure requirements to protect consumers as a less restrictive alternative than mandatory minimum service levels.<sup>39</sup>

BIAC recognizes that this is often a difficult balance to strike. BIAC suggests that competition authorities ought to be sensitive to the difficulties confronted by government authorities/industry organizations in this regard. For that reason, BIAC also suggests that, in appropriate cases, competition authorities consider first utilizing advocacy efforts rather than the blunt instrument of enforcement in this area. Advocacy efforts can be an effective way to promote the benefits of competition while giving due recognition to the balancing of interests that must take place.<sup>40</sup>

As an example, Canada's Competition Bureau recently encouraged the Real Estate Council of Alberta (RECA) to eliminate rules prohibiting brokers from offering cash incentives to buyers and to remove restrictions on the payment of referral fees in certain circumstances.<sup>41</sup> RECA subsequently did remove these restrictions.

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standards. See GAO Report, p. 17. BIAC has not fully investigated the concerns or policy considerations that have led some U.S. States to pass such minimum service laws.

<sup>38</sup> In March 2005, the U.S. DOJ filed a lawsuit against the Kentucky Real Estate Commission, which had promulgated regulations prohibiting brokers from giving clients rebates on their commissions. The Kentucky Real Estate Commission settled the case under a consent decree. Since then, real estate commissions in West Virginia and South Dakota have rescinded regulations that prohibit rebates. See McDonald, p. 8. Similarly, the Prohibition Order issued against CREA in 1988 (since expired) prohibited the boards and associations from restricting the offering of incentives to home owners. See note 24.

<sup>39</sup> Rather than imposing minimum service requirements, Tennessee, Virginia, and Wisconsin allow consumers to purchase limited service packages from real estate agents as long as there is proper disclosure and consent. See Ohlhausen, p. 13.

<sup>40</sup> BIAC notes that the International Competition Network regards competition advocacy as "an important function for all antitrust authorities. It complements law enforcement activities, assists in public education and helps to promote economic development." See <http://www.internationalcompetitionnetwork.org/media/archive0611/advocacy.html>.

<sup>41</sup> Competition Bureau News Release, "Competition Bureau supports Real Estate Council of Alberta decision to end restrictions on cash rebates and referral fees" (June 15, 2006), <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2135&lg=e>. The Bureau also recently

## 5. Rules Governing Access to Listing Services

A balanced approach is also required when assessing the implications of rules governing access to multiple listing services. As multiple listing systems are most common in North America, the following comments are based principally on the experience in North America with such systems.

Multiple listing systems are often member based services, paid for by the members of a real estate board or association and administered and operated by the board or association. Real estate boards invest substantial effort and expense to collect and verify the information that appears in the listings on their systems and to post this information in a standardized format. Boards and associations often also operate a website containing certain information relating to their listings. In many cases, board and association members also may post listing information on their own websites or on third party sites.

Real estate boards or associations generally set their own rules for membership, access, and sharing of information. In Canada, for example, MLS<sup>®</sup> is a trademark owned by CREA that is licensed for use by local real estate boards and agents. Therefore, all real property databases in Canada using the MLS<sup>®</sup> or other CREA-owned trade-marks must be operated by member real estate boards who are licensed by CREA on terms specified by the association. Otherwise, operators of real property databases or advertising vehicles in Canada are free to establish their own rules.

Some boards have adopted rules that restrict the types of listing agreements that may be posted on multiple listing systems and websites operated by the board or that restrict access to agent's listings.

In considering whether these restrictions may pose some restriction to competition, a number of competing concerns should be considered. Opponents to these restrictions argue that they operate to limit consumer choice, prevent price competition from low cost alternatives to full service brokers, entrench the market power of agents who provide traditional agency services, and impede the entry and expansion of innovative services.<sup>42</sup>

Proponents of the restrictions, however, argue that multiple listing systems and related facilities (e.g., websites or advertising vehicles operated by real estate boards or associations) are proprietary business assets created and developed by and for real estate agents in transacting their business. Effective competition policy generally favours the enforcement of private property rights and strongly discourages forced access to private property rights. Providing forced access to private property can frequently create significant disincentives to investment and inhibit innovation.

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made submissions to the Alberta government encouraging the government to liberalize regulations governing dental hygienists in that province. The Alberta government subsequently changed the regulations and dental hygienists in Alberta are now free to provide a number of services directly to clients without requiring the supervision of dentists. See Competition Bureau Information Notice, "Competition Bureau supports Alberta decision to allow greater competition in dental hygiene services" (November 1, 2006), <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2225&lg=e>.

<sup>42</sup>

For example, in the United States, NAR recently proposed an "opt out" rule which would allow member agents to withhold their listings from personal websites of other agents. NAR's original opt-out rule allowed agents to specify individual agents who operated virtual office websites as not having access to their listings; however, NAR revised its opt-out rule, such that agents can withhold their listings from all agent websites, but cannot choose to withhold listings only from selected agent websites. (This revised rule specifically exempts from a blanket opt out NAR's website, Realtor.com.) The U.S. DOJ has taken the position that neither version of the rule has any pro-competitive merit, and alleges that both violate the U.S. antitrust laws because they allegedly target on-line real estate agents whose business model is to provide agency services at a discount. In September 2006, the U.S. DOJ filed an antitrust action against NAR. This case is pending in the U.S. district court in Chicago. See note 2 and McDonald, p. 9.

In extraordinary cases, however, exceptions have been made whereby access is granted to “essential facilities” where the facilities cannot practically be duplicated, barriers to entry are extremely high and competition cannot occur without such access.<sup>43</sup> Alternative facilities need not be equally efficient at promoting competition, merely sufficient to allow competition to occur. Litigated cases have reached differing conclusions as to whether MLS listings, under the individual facts of those cases, constitute essential facilities. A key factual consideration in the context of real estate listings, among others, is whether the ability to utilise the internet has reduced the barriers to competition to such an extent that MLS listings are no longer the sole means of effectively promoting properties for sale.

Another area of consideration centers on the potential effects of “free riding.” MLS associations contend that providing a proprietary MLS ensures a certain level of quality and service that could be degraded if the system was opened to free riders who may not share the same interest in maintaining the quality of the information and service offered by the MLS. They argue that agents and buyers rely on factors such as completeness of MLS coverage and the consistent quality of the MLS information without which the system becomes less valuable to brokers, agents and homebuyers. In contrast, non-members seeking access to the MLS contend that the risk of degradation is limited and that all contributors have adequate incentives to ensure the accuracy of their listings. BIAC recognizes that the degradation of quality and reliability of a multiple listing system, as with any other economic “network”, could diminish the externalities that attach to the network and reduce the benefits to all users. Whether this occurs with respect to granting access to the MLS by non-members is a factual question that requires proper analysis by the reviewing authority. Reviewing authorities should also consider other relevant factors, such as whether allowing non-members to post listings to the MLS could unfairly subject members to liability for negligent misrepresentation.

## 6. Use of Non-Legal Professionals

Many jurisdictions reserve to lawyers or related professionals (such as notaries) certain of the functions required to complete real estate transactions.

Questions have been raised as to whether these limitations are justified on consumer protection grounds or, in fact, constitute anti-competitive restraints.

In the United States, for example, the DOJ and FTC have submitted numerous comments in response to various proposals by State legislatures or State bar associations to prevent non-lawyers from competing with lawyers in performing closings of real estate transactions and refinancings.<sup>44</sup> In some cases, the DOJ has obtained injunctions prohibiting bar associations from adopting provisions of this nature.<sup>45</sup> The

<sup>43</sup> U.S. case law, for example, sets forth four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing access to the facility. *MCI Communications v. American Telegram and Telegraph Co.*, 708 F. 2d 1081 (7th Cir.), cert. denied, 464 U.S. 891 (1983) at 1132-3; for the treatment of the essential facilities doctrine in Europe see, *B&I/Sealink*, [1992] CMLR 255; *Sea Containers/Stena Sealink*, OS L 15/8 (1994).

<sup>44</sup> For example see *FTC and Department of Justice Comments to the Honourable Helene E. Weinstein Regarding New York A.B. A05596 to Establish that Certain Services Related to Real Estate Transactions May be Provided Only by Attorneys and FTC Staff and Department of Justice Antitrust Division Comment to the Honourable Paul Kujawski Concerning Proposed Massachusetts H.B. 180 to Authorize Non-Attorneys to Perform Certain Real Estate Settlement Services* (Oct. 2004) (V040025), <http://www.ftc.gov/bc/realestate/outreach/letters.htm>.

<sup>45</sup> See for example see *United States v. Allen County Bar Ass'n*, Civ. No. F-79-0042 (N.D. Ind. 1980), where the DOJ obtained judgment against a bar association that had restrained title insurance companies from

position of the U.S. agencies is that these prohibitions raise the costs of real estate transactions to the detriment of consumers who might not otherwise use lawyers.

The European Commission is currently undertaking a study of this issue as part of its examination of the regulation of conveyancing services in Europe. This examination forms part of the Commission's broader effort to review regulations in the professional services area.<sup>46</sup>

In December 2006, the Commission released a report containing preliminary findings on the effects of restrictions governing the provision of legal services in real estate transactions.<sup>47</sup>

The report identified four regulatory models that are broadly prevalent in Europe, ranging from what the report calls "the traditional, highly regulated Latin notary system" – involving mandatory use of notaries, fixed fees and strict regulation – to the "Scandinavian licensed agent" system – in which licensed estate agents are entitled to perform both agent services (i.e., bringing together buyer and seller) and legal services.<sup>48</sup> The report's preliminary conclusion is that there is a statistical correlation between higher regulation and high prices, with the traditional notary system being the worst performer in this regard and the Scandinavian system being on average the least expensive.

BIAC recognizes that there may be certain services that require the specialized knowledge and skill of professionally-trained lawyers and notaries. However, this may not necessarily be true of all real estate transaction functions. For example, it is possible that non-legal professionals could – without jeopardizing consumers' interests – negotiate the terms and conditions of the sale, prepare the contract, collect title insurance premiums or issue title insurance policies on behalf of a title insurance company.<sup>49</sup>

It also has been suggested that consumer interests could be protected through measures such as establishing regulatory regimes to oversee the activities of non-legal professionals in real estate transactions and/or requiring written notice of the possible risks in using non-legal professionals instead of legal professionals.<sup>50</sup>

BIAC believes that the considerations here are similar to those canvassed in Part D of these comments. The promotion of competition has its place, but due regard also must be paid to legitimate factors that may justify imposing restrictions on non-legal professionals in certain circumstances.

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competing in the business of certifying title by adopting a resolution requiring lawyers' examinations of title abstracts.

<sup>46</sup> See European Commission – DG Competition's work on Professional Services, [http://ec.europa.eu/comm/competition/sectors/professional\\_services/overview\\_en.html](http://ec.europa.eu/comm/competition/sectors/professional_services/overview_en.html).

<sup>47</sup> *Preliminary Findings from the ongoing Study on "Conveyancing Services Regulation in Europe"*, Prepared for "the Economic Case for Professional Service Reform" Conference on December 13, 2006 at the European Commission – DG Competition (December 11, 2006), [http://ec.europa.eu/comm/competition/sectors/professional\\_services/conferences/20061230/index.html](http://ec.europa.eu/comm/competition/sectors/professional_services/conferences/20061230/index.html).

<sup>48</sup> The two other models are (i) the "deregulated Dutch notary system", featuring less regulation, including negotiable fees and (ii) the "lawyer system" used in the British Isles and (to an extent) Austria. In this latter model, professional involvement in the transaction is not mandatory but only certain persons (notaries/lawyers in Austria and lawyers/conveyancers in England) are permitted to offer conveyancing services on a professional basis (i.e., for payment).

<sup>49</sup> See note 44.

<sup>50</sup> *FTC and Department of Justice Comment to the Georgia State Bar Standing Committee on the Unlicensed Practice of Law Concerning the Performance of Certain Real-Estate Closing Activities by Non-Lawyers* (Mar. 2003) (V030007) <http://www.ftc.gov/bc/realestate/outreach/letters.htm>.



## SUMMARY OF DISCUSSION

The Chairman, Alberto Heimler, began by stating that property transactions are very important in the life of individuals. Most individuals perform only a few housing transactions and the transaction, besides constituting the largest financial transaction in which most individuals are directly involved, is complex from a legal, financial and fiscal point of view. In some countries real estate agents are regulation free; anybody can be a real estate agent, can charge what they want and do what they want. In other countries real estate agent services are heavily regulated, access is restricted and fees are regulated. In some countries, property can only be transferred by the notary who is chosen by the buyer and indeed the notary protects the buyer. In others, the closing of a property transaction can be performed both by attorneys and by non attorneys. What seems common to all our countries is that real estate agents everywhere are paid a percentage of the value of the transaction. Since the agent is chosen by the seller, there are good reasons why the fees are set as a percentage of the sale value of the property. A fixed fee would diminish the agencies' incentive to sell the property at the highest possible price and, for example, if the fee was based on the number of visitors brought to visit the property, the agent would no doubt take to the property people who were not interested in the property. So in some sense, the fact that the fee is a percentage of the sale price of the property aligns the incentives of the seller, the buyer and also of course the agent. But the Internet has the potential to change the way transactions work, especially matching between buyers and sellers. The discussion will be organised around three main sections. The first one will address potential restrictions of competition originating in the process of matching buyers and sellers. The second one will address restrictions originating in the final phase of a property transaction, that is, the closing. The third will address restrictions related to the mortgage market or home finance.

### 1. Matching of buyers and sellers

In all countries, real estate agents do not have exclusivity in performing this role of matching buyers and sellers. Indeed, proprietors can sell a house or an apartment on their own. But percentages differ quite a bit. In Italy, for example, almost 50% of homes sold go directly through the proprietor while in the Netherlands, from what I read in their submission, almost none. The decision of whether to use or not a real estate agent does not appear to be directly related to the degree of regulation, in the sense that even in countries where entering into the profession is free and proprietors can negotiate the price, there need not be a high percentage of intermediation by real estate agents. But regulatory restrictions are however widespread in many countries. In Canada, real estate agents are regulated at a local level and restrictions of competition appear to originate at a local level. The Canadian report refers to the fact that real estate agents moving from one province to the other had been required to take exams in order to perform their activity in another province or in the new territory. But what is so different from one province to another in a homogenous country like Canada? Are the laws in one province different to the laws or the regulations in another country? What is the first assessment of the Bureau with respect to these regulatory restrictions becoming barriers to entry into the profession and what can the Bureau do eventually to remove them?

A delegate from Canada replied that real estate agents are regulated at local, provincial and national levels. Canada is not very homogeneous with respect to local and provincial regulations, with practices differing. For example, in Alberta, there were, until recently, restrictions against giving rebates to customers. The Competition Bureau along with the regulatory body of Alberta examined this and the restriction was lifted. There are a number of barriers to entry, such as restrictions on crossing from one province to another. The restrictions can originate both from private bodies and public bodies. A study is

currently underway in Canada that is examining self-regulated professions and how their regulations differ across provinces.

The Chair turned to Japan, noting that real estate agents need to pass an examination and are restricted in terms of fees they are allowed to charge and in terms of advertising. Why are these restrictions in place, why does the bundle of structural measures exist? What is so special about the services of real estate agents that you need to control entry, pricing and ensure that advertising is not free? What would happen if all these barriers were eliminated?

A delegate from Japan noted that while Japan's submission greatly emphasized the regulatory aspect, it is also important to emphasize the restricted nature of those regulations. For example, the examinations required to enter the real estate transactions business are not as high as the level of a bar exam or other professional exams. Regarding fees, and the transaction fees, the restrictions are only for the maximum level which means that each real estate agent is free to introduce a level which is lower than that restriction. For advertising, false and misleading advertising is restricted. In addition, because in the real estate market there are so many stakeholders, even when one real estate agent would like to sell a property, it may not be possible to develop the land or to construct a new building, so a regulation has been introduced to prohibit advertisements before the sale or purchase is quite likely to happen (e.g. the real estate agent has gotten permits for the construction from relevant authorities). The most common practice is the situation where both the seller and the buyer choose their own real estate agent. These regulations seem to be at the minimum necessary level in order to ensure a fair transaction and consumer protection in the real estate market.

The Chair observed that in South Korea, in order to become a real estate agent, individuals must pass an examination. Until 1999 the examination was very difficult and entry into the profession was quite limited, according to the report. However, from 1999, the exam was greatly simplified and, since then, entry every year was of the order of 15000 individuals. Is the exam restricting entry into the market in some way? And what was the reason for the 1999 reform? The KFTC advocated for the elimination of unnecessary regulation, however maximum price regulation, as with Japan, is still in place in Korea.

A delegate from Korea stated that it is true that the exam places an entry restrictions amount but the real restriction has been remarkably lower compared to the past. The current exam is generally considered as an easy exam by applicants. The Korean financial crisis prompted the reform. Though KFTC led a regulatory reform in the area of professional services, the reform of a real estate exam was also part of the project that the Korean government initiated in the area of professional services. The reason that the maximum price regulation remains is for customer protection in this area. In the process of reforming the fee schedules, the Korean government was worried about the potential for price increase if the maximum price regulation was eliminated, so it eliminated the minimum price limitation. From the standpoint of competition, erasing the price limit is an appropriate policy. However, in Korea the real estate policy is a very sensitive issue, especially with regard to the transaction fee.

The Chair observed that in Chinese Taipei, real estate agents have to pass an exam, have to register with the local authority and their association issues ethical codes to be followed by their members. The Fair Trade Commission issued two regulations to avoid unjustified restrictions of competition in services of real estate agents. What was their nature? Secondly, also in Chinese Taipei, the Ministry of the Interior establishes a maximum fee of 6 % that, according to the statistics in the report, is always matched. This is why the Chair also put this question to Korea before. Because, what can be seen is that these maximum prices are probably there to be negotiated away but they can easily become a focus point for tacit collusions. In principle, they may be maximum prices, but in the end everyone focalises on this 6 %. What can the Commission do in this environment?

A delegate from Chinese Taipei said the first regulation is specifically related to the multi-listing service. The second one is a general regulation on the real estate industries. In those two regulations, the first part of the regulation specifically prohibits concerted action, which is price fixing. There are specific rules in these two regulations about the price fixing conduct. For the exam, the regulatory agency for real estate agents is the Ministry of Interior. When they drafted this so called real estate act, they did invite the Fair Trade Commission to provide their opinions on Competition. So, the purpose of this exam is to provide professional knowledge to protect the consumers. Concerning the maximum price mentioned in the report, the Fair Trade Commission conducted a survey in 2005 which demonstrated that 91 % of the agents received a commission either from the sellers or the buyers. That is either side. For buyers, 25% charged 2% and 24% of agents charged only 1% of the transaction fees. And for sellers, 90% of them were charged 4% of transactions commission. Only 7% of agents charged both sides commission. 90% of this 7% charged the 6% maximum. So only these 7% were charged the maximum amount. The maximum price can actually be negotiated by sellers and buyers.

The Chair observed that in Turkey there is a distinction between the merchant and tradesmen real estate agencies. The activity of these two types of professions is the same. However, tradesmen are much more heavily regulated than merchants, and tradesmen are subject to a cap on fees for example. How can these two groups compete with one another if they do the same type of work but are regulated so differently?

A delegate from Turkey noted that there is no specific legislation that regulates real estate agencies. It is up to entrepreneurs to decide whether they would like to perform the real estate services as a merchant or a tradesman. From the competition law and policy perspective, the difference in regulations is not a problematic point, especially for the pricing. If an entrepreneur prefers to perform as a merchant then they are subject to rules under the commercial code, but their obligations, such as tax before the state, differs. There is no article that allows them to determine fixed or minimum price terms. If they want to perform as a merchant then they should establish a trading company and should bear the necessary obligations arising from the commercial code. They can do other business too. As a tradesman, it is much easier to start and end a business. Looking at tradesman real estate agencies, there is an act on vocational organisations of craftsmen and tradesmen. With the amendment of the act, as for the prices, they cannot ask for more than maximum limits, so again from the competition law perspective, there is no problem. It is not possible to say that one regulation is more restrictive than the other. In Turkey, the house sellers can go to the cheapest one and there are no limits for the moment regarding the number of real estate agencies that can be established in Turkey. At the moment there is a draft law on real estate counselling.

The Chair observed that, in the Czech Republic in 2003, the association of real estate agencies which included less than 3% of all the Czech agencies recommended fees to its members. The report states that these recommended fees influenced the price behaviour in general of real estate agencies in the Czech Republic. How has this been possible, given these low percentages?

A delegate from the Czech Republic stated that the decision recommending the prices was taken at a critical moment when the market was being opened, so there were no price limits before. The participants of the agreement, the parties to the proceedings themselves, confirmed that primary intention was to set a price for the whole market. So this was the first consideration. The second one was that these prices recommended by this association were really observed, that all the associations, even the non-members followed this recommended price list. These recommendations were published and readily accessible, so although it was not written in the newspapers, for example, it was followed. The association was not punished for the fact that it influenced prices of the whole market, but only for the price fixing within the association. The sanction of the crime was modest - something like 10000 euros -- although the ultimate effects on the small association were quite substantial.

The Chair observed that in the U.S., 80% of prospective buyers, when deciding they want a new home, look on the Internet. The industry, reading the U.S. report, has rapidly adapted to this new Internet marketing environment. There have been many innovations both on the part of selling and buying agents. In particular, selling agents started offering simplified services at low cost and buying agents started to offer Internet services so as to reduce the time spent visiting houses with prospective buyers. The industry sometimes has dampened competition in anticompetitive ways, for example with actions by the Kentucky Real Estate Commission. Was this a state commission or a private association of real estate agents? If it was public, does the state action doctrine apply? A second set of questions, which arise in particular in the US but also go across the whole report, are what issues arise when an agent represents both the buyer agent and the seller on a given transaction? The Chair noted that in Italy, a seller chooses an agent and a private individual buys the home from that agent. So they play a dual role. Therefore it would be valuable if the U.S. could elaborate on the conflict of interest questions.

A delegate from the United States stated that real estate is an area where each of the agencies in the US Federal Trade Commission and the Justice Department take a very active role. The states action defense may be raised by a defendant accused of an antitrust violation who claims that state law compelled or permitted the allegedly illegal activity. In order to prevail with the state action defense, the defendant must demonstrate that the challenged restraint of trade is the clearly articulated policy of the state and actively supervised by the state. The two prongs of the state action defense are meant to ensure that the state, rather than the private parties, intended to displace competition and supervises the system to minimize consumer harm. The defense is available to private parties and to lesser state agencies such as commissions, boards or local government. The case involving the Kentucky Real Estate Commission, filed and settled in only two months in 2005, involved a body created by the commonwealth of Kentucky to regulate the licensing and education of the real estate brokers and to protect the public interest. It was made up of five commissioners, four of whom had to be active real estate brokers. It was the sole licensing authority for real estate brokers and it was unlawful to be a real estate broker without having a licence in the state of Kentucky. In this case, there was no live question of state action immunity because the statute prohibited any price fixing or setting of rates or establishment of fees by the commission, so it was clear that the state had not intended to displace competition. As a result the case was brought as a per se violation of Section One of the Sherman act and was settled in only a two month period. State action remains however a serious concern in the real estate area where states can take actions which are very harmful to competition and, as a result, both agencies have an active advocacy program in the area of real estate. The three areas that have been covered over the last few years are the question of rebates and inducements given by brokers, the question of minimum service rules and the question of restrictions on the use of non lawyers for real estate conveyancing actions.

A delegate from the United States stated that the rapid change in the industry, due to the Internet, has indeed been accompanied by substantial changes in the way that the industry is operating. Towards the end of 2005, the agencies jointly held a workshop on real estate and competition from which a lot of the information in the U.S. report is drawn. An extensive report will shortly be issued by the U.S. agencies. The commission is set with the seller's agent. If there is a separate agent representing the buyer, usually the buyer's agent knows from the seller's agent what part of that commission is offered to the buyer's agent in advance. So you can have different ranges of what agents are involved in the transaction. The buyer might choose not to have its own agent, in which case the selling, or listing agent would get the entirety of the commission. Alternatively, they might choose to have their own agent, which over time has been subject to different types of regulation by the states. Right now there are fairly significant disclosure rules so that buyers can understand what the fiduciary duties of the buyer's agent are to them. The FTC has sought to inform consumers about their rights. The FTC has a mini-website on real estate and competition and a lot of information dedicated to the consumer, including a four-page guide to the consumer on tips for selecting an agent and for selling homes.

The Chair turned to Canada where the Canadian real estate association, which is the association of all real estate agents in the country, owns and runs the multiple listing service. This is a service that combines property listings by all real estate agents in this association. This listing is available to members only and is available to clients of these members if the real estate agent allows that member to enter into this listing. First, are there competing listings to which discounters could have access? Second, the report mentions disciplinary panels acting in the professions. What type of complaints are admissible under these disciplinary panels and who has a standing? Would agents be allowed to complain and refer a discounter to the disciplinary panel?

A delegate from Canada noted that in Canada, the MLS of the Canadian Real Estate Association is the primary means of distributing information about homes for sale. This system combines many different local systems. Sellers seek to reach a base of buyers which is as large as possible, and this is provided by the MLS, with 88,000 members, whether agents or brokers. Individuals are not allowed to place notices on the MLS. There is no system that provides competition to this MLS, and notably none for discounters at the moment. Part of the MLS feeds an Internet site that is open to the public, but certain information is not released, such as how long a home has been for sale or prices of previous sales and commissions. Disciplinary panels tend to be local, formed of real estate professionals and deal mainly with consumer complaints.

The Chair noted that with newspaper advertisements, anybody can have access to a newspaper, an agent or a single consumer who wants to sell his own house. But with the Internet, the question arises of whether potential sellers are excluded. This leads to an underlying question, whether multiple listing services should be considered essential facilities. If so, access by non owners may be necessary and also maybe access by non intermediaries may be necessary. If the only reasonable way to sell a house is by showing it in an Internet service which is owned by an association of real estate agents, a single individual is not able to do so without the help of an intermediary. For example, given that many such services are owned and operated by local real estate associations, real estate agents from outside are often excluded, as are individuals. Buyers gain from having access to as wide a listing as possible and sellers benefit from this as well. BIAC states that a key factor in deciding whether a multiple listing service constitutes an essential facility is whether the ability to utilise the Internet has reduced the barriers to competition to such an extent that a multiple listing service is no longer the sole means of effectively promoting properties for sale. What is the role of these real estate agents in this alternative real estate Internet services and what can a home owner do to avoid paying 5% or 6% of the price of his home to an intermediary?

A delegate of BIAC suggested that the Internet services would be in the same market as in the traditional services. Consumers are now being given more of a direct hand in the real estate process as a result of the Internet and, most importantly, the Internet is allowing new forms of business models to be developed and to become increasingly available. The process of developing these models is at the beginning, not at the end. New models are offering an alternative. There is some evidence of declining commission rates and increases in market shares resulting from the advent of these various services. It is important to understand that the Internet should not be seen as an alternative to traditional real estate services. So-called traditional brokers are making use of the Internet as well, underscoring the proposition that these services are all really one market. The issue is: how far has the process come along in any given jurisdiction? That is a factual issue that was mentioned in the BIAC paper that needs to be looked at carefully in each situation. The other issue that would have to be addressed by the authorities is to what extent would "traditional brokers" try to impede the process of development in the Internet for the use of alternative brokers and services. That will always depend upon the facts in any jurisdiction. There are varying views on that.

The Chair noted that the U.S. report mentions cases against the National Association of Realtors and various local realtor associations throughout the United States where the defendant tried to block the ability

of innovative or low-cost brokers from more fully incorporating the internet into their business models. Was there an alternative for discounters to place their listing on the web? Were discounters members of the associations that blocked them or were they outsiders? If they were members, was there an implicit contract stating that they should have been given access?

A delegate from the United States said that the FTC has been involved with cases of MLS prohibitions against the dissemination of information from exclusive agency listings (i.e., listings where the seller pays the broker if the broker finds the buyer upon closing, but does not pay any extra upon closing if the seller finds the buyer). There are over 900 MLS's in the United States. Because of the market power that MLSs possess, U.S. antitrust law requires MLSs to accept discount brokers as members. Thus, even a discount broker, as long as it is involved with exclusive agency, would have access to the MLS. Consumers are turning to the internet to search for homes and find a realtor. Brokers find it important to include their homes in the MLS's database so that the listings will appear on the website with information about MLS listings. One of the most well-known ones in the U.S. is Realtor.com. The cases recently brought demonstrate that the information from the MLS, in certain circumstances, is inhibited from being placed on other public websites. This includes a site like realtor.com such that the exclusive agency listings wouldn't be seen by potential buyers, even if the members are members of the local MLS. The FTC has six consent agreements, one case that just came out of litigation, and another in litigation.

A delegate from the United States continued by noting that Multiple Listing Services are joint ventures between competing brokers to pull and share their clients' listings. They are obviously very efficient from the standpoint of both the seller and the buyer. When they first started to be used in the 1920s, typically a broker would assemble a book with photographs and information and clients would consult this book in the office of the broker. Over the years, with the advent of photocopying and then mailing and faxing of this information, these technologies made MLSs more efficient and permitted them to expand their territory. Then eventually in the 1990s some brokers began using password-protected websites, Virtual Office Websites (VOWs). This is a useful service that introduces the possibility of lower costs as well. Any broker can use the Internet. Under a new policy adopted by the National Association of Realtors, the trade association for brokers, individual brokers can deny to other brokers the ability to use their listings on their virtual office websites, while keeping the listings open for the rest of the local MLS. That is a change in policy. Previously, a broker with MLS access always had access to all listings of the MLS. The brokers who are creating these virtual office websites are also members of the National Association of Realtors and have full access to all the information on the MLS. The issue is whether the VOW brokers can use that information on their Internet sites or whether they are blocked from doing so. How necessary is MLS access? According to the Department of Justice complaint, the vast majority of brokers believe that they must participate in the MLS operating in their local market in order to adequately serve their customers and compete with other brokers.

One thing the consumer can do in most states is use a discount broker to pay for a single or specific service, such as being placed on the MLS, without a requirement to purchase any further services from that broker. It can cost around 500 \$ for such a service.

## **2. Closing of property transactions**

The Chair moved on to discuss competition issues in the closing of property transactions, such as those provided by notaries. The function of the different professionals active in real estate transactions is not the same in all countries. Many continental European countries need a Latin notary for the transfer of any registered property. Notaries in these countries have a legal exclusivity and usually the notary is chosen by the buyer and he guarantees that the property is actually the property of the person that actually transfers it and also guarantees that there are no limitations to the rights of the person who transfers the property. For example, that he is not bankrupt or in the process of bankruptcy, that there are no creditors

starting proceedings against him or things of this kind, etc. Legal exclusivity of course does not require that access to the profession is unnecessarily restricted. In practice, the number of notaries is often fixed or limited and fees are regulated. The Dutch have attempted to increase the application of market forces to the notaries.

The Chair asked the European Commission to briefly present its comparative analysis of closing services. There is a very interesting paper that the Commission has submitted where the practices in all European Union countries are described and very well compared, not only with respect to legal requirements but also with respect to cost of services.

A delegate from the European Commission noted that the Commission has recently launched a study looking into how it can improve competition in real estate transactions. However, the study only looks at the transfer of property, so it does not involve the matching discussed earlier and it does not comprise the financing discussed later. At the time of this meeting, it was still an ongoing study. But there were already some interesting conclusions emerging about which the delegate could expand.

First, in terms of methodology, what the study aims to do is look at the market of the transfer of property and assess the level of regulation in different markets. The regulation includes both state regulation and self-regulation by professional bodies. It is also important to look at the issue of quality and legal certainty, for which proxies exist, such as the level of litigation. Another aspect of market efficiency could be considered the speed of the transaction and does it take a lot of time or is it rather rapid? A fourth element is whether the consumer has to go to one specific service provider or is offered a choice of service providers. The study seeks to examine the level of regulation (high or low), and how the market is working: is it efficient, is it expensive, is it good quality, and do consumers have a choice?

How do you measure the level of regulation? There are quantitative restrictions, as for notaries, limiting the number of people who can access a profession, or there are educational requirements. A second element of regulation concerns the market conduct, with the most important being fixed or recommended pricing but also, for example, advertisement bans or restrictions on the possibility to have inter-professional cooperation. The third element of regulation is over whether consumers have a choice to pick their service provider. The different systems identified were the Latin notary system, as in France, Belgium, Spain and Germany. A second system is a deregulated notary system, as in the Netherlands. A third system would be the lawyer system where people usually rely on a lawyer or a solicitor to take care of the legal aspects of the transfer of property. This can be observed in England, Wales and Ireland. In England and Wales, the profession has been opened up to a kind of paralegal which could be the licensed conveyancer, creating competition between the new profession and lawyers. The fourth system is the Nordic system where traditionally the real estate agent would not only deal with the matching and finding a buyer for the property, but also with the legal aspects of the transfer.

After looking at the regulations on the base of a detailed methodology, the study shows that there are indeed very big differences across Europe. Not surprisingly, but still interesting to see, is that a high level of regulation does correspond to high fees. In those countries where deregulation has taken place, price levels are significantly lower, as it is in countries with traditionally flat fees. To provide a quick example of the diversity in fee levels; for a standard transaction, a regular house somewhere in the country, in the Nordic system a customer might pay less than 1000 euros in terms of legal fees. It would be slightly more, say 1300 euros, in the Netherlands. It would go up to 1700 euros in the lawyer countries and it would clearly be above 2000 even up to 2500 euros in a notary system. There are indeed stark differences in price levels. On the basis of the current results, there are no marked differences in the level of quality. It would be premature to conclude that a notary system would, by definition, ensure more legal certainty. The study is still ongoing but nevertheless results suggest there is reason to question the need for high levels of regulation.

The Chair requested that the Netherlands explain the results of its liberalisation. Has there been any change in the number of notaries?

A delegate from the Netherlands stated that access to the profession, has three components: First, one must finish four years of study at University. After that, one must perform an internship of 6 years. Finally, to start a notary business, a business plan has to be submitted to a commission of experts appointed by the Minister of Justice. This commission advises the Minister on whether or not to approve the new business. The KNB has a (minority) position in this commission. The exam at university is governed by the university itself. The government supervises the quality of university education. Regarding the results of the deregulation, it is true, as the European Commission already mentioned, in general, prices of notary tasks have decreased by 2%. Notary tasks are comprised of three parts: family law, business law and real estate. On the part of real estate, the reduction is 8% in prices, which also points to the fact that the different tasks were priced wrongly before deregulation. They have therefore been corrected now, in part, by the market. Regarding entry, in the seven years before deregulation, the number of notaries rose from 1100 to 1300, a rise of 200. Another 200 notaries have been added since deregulation. That does not seem to suggest that there is a very dramatic increase in entry due to the deregulation.

The Chair moved on to Lithuania, where the regulation on notaries is highly restrictive. In Italy for example, notaries have exclusivity in terms of profession but they have a duty to be in a given territory. However, for a given transaction, any notary can compete against another. In Lithuania, there is territorial exclusivity. That is, if a transaction is conducted in a certain area, only the notaries localised in that area are allowed to close the transaction. The fees are fixed by the ministry of justice. Are there any plans by the competition authority to do something?

A delegate from Lithuania replied that there are some plans. The first thing to start with is that the government of Lithuania, in its program for the period 2004-2008, sought the reform of part of the notary system. The government indicated two institutions that are responsible for that reform, the ministries of justice and the competition council. The foreseen government measure states that prices of the notary services should not be fixed but can be maximum levels. For the moment, there are not only fixed prices but also minimal thresholds. The competition council made a close examination of the notary services and proposed to the ministers some additional measures that should be taken into account, so that the reform could be really effective. These include the liberalisation of the number of notaries. That means the reduction of the entry barriers and liberalisation of the advertising rules. For the time being, the competition council takes part in the working group together with members of the finance ministry, ministry of justice and economy. This group is working on the reform of notaries, however the Lithuanian chamber of notaries does not agree with the criticisms, arguing that liberalisation often does not work efficiently. The competition council made a number of remarks about how maximum prices should be calculated. But only the Ministry of Justice, according to the law on notaries, has the power to make changes and to establish new pricing mechanisms.

The Chair turned to South Africa where the competition commission intervened in a number of cases against price recommendations by lawyers' associations. However, with respect to the law societies' price recommendation, the competition commission is considering the granting of an exemption. Why would these law societies be treated differently to the others?

A delegate from South Africa explained that in South Africa, there is no special dispensation for lawyers, neither in the law and nor in the application of the law by the competition commission. As a matter of fact, there is one case that the commission has investigated against a local lawyers' association for fixing prices. That case was settled and confirmed by the competition tribunal and the lawyers were fined just like any other person who contravenes the law would be. There is however a mechanism in terms of which any professional association may apply for an exemption. The exemption can be considered by

the commission and an exemption could be granted if it is reasonably required to maintain professional standards or the ordinary function of the professional. Before the commission grants these exemptions, one of the effects is that it must take into account, in terms of the law, the internationally applied norms. A particular law society in South Africa has applied for an exemption in terms of this requirement. The commission has not yet decided the application.

The Chair observed that in the Russian Federation, the report addresses how municipalities decide where the building of housing will be authorised. Of course these administrative decisions can have very fortunate consequences on the owner of the chosen land plots, because land used for agricultural purposes has a very different value to land that can be used for housing, as in most countries. The report says that FAS, the Russian competition authority, carries out constant inspections on how the process is implemented. The Chair understands the general concerns, but it was not clear from the report what exactly are the antitrust concerns and whether this is indeed the reason why FAS carries out all these inspections.

A delegate from the Russian Federation stated that the real problem in the real estate sector is that prices increased by ten times in the last seven or eight years, especially in the largest cities of Russia, such as Moscow and St Petersburg. From the perspective of FAS, the problem of such a price increase in real estate is a competition problem by its nature, because it arises from an imbalance of supply and demand. There is high growth in personal income, but the supply of modern and comfortable housing is very low. The main problems in this sector are not in the sphere of the construction industry itself but in the state administration and regulation of land property transactions and house building. In general, there are a lot of artificial administrative barriers both in providing land and house construction. Builders need to collect many different papers, approvals, decisions of different authorities before starting the construction of a house. The federal monopoly service made a lot of proposals on how to simplify the process on the basis of market analysis. According to the land code and other legislation of the Russian Federation, the distribution of land plots for housing construction should be based on an open and clear public tender process. This procedure started last year after some amendments to the Russian land code, for all public land plots. The control over the allocation for land plots for house building is one of the responsibilities of the federal antimonopoly service, based both on competition legislation of the Russian Federation and public procurement legislation. The Russian competition authorities are responsible for the control of public procurement. Last year, FAS identified and stopped nearly 500 infringements in this sector in 75 regions of the Russian Federation. The most typical infringement is conclusion of municipal contract without tender procedures. FAS has the power to render the contract null and void on the basis of the court's decision. More than 400 cases followed this procedure.

The Chair opened the floor for questions or comments.

A delegate from Norway commented on the issue of ensuring that consumers have direct access to Internet sites. The competition authority has had one case based on complaints from consumer organizations and consumers with regard to access to the dominating Norwegian Internet site for housing sales in Norway. The special thing about this Internet site is that it is not managed by the brokers themselves, but it is owned by the dominating media and newspaper organisation in Norway. The media group states that 95% of all sales in Norway are conducted through a broker, real estate agent or lawyer in Norway. So they say there's little business to gain from providing consumers with access and potential loss in quality that would result from direct seller access. Therefore, it is not linked, directly owned or controlled by the brokers. The competition authority has not made any decisions with regard to this case.

The Chair turned to the European Commission.

A delegate from the European Commission asked to hear a bit more from the delegates of those countries which have liberalised the service like the Netherlands or the UK or others. Have there been

complaints from consumers? It doesn't seem to be the case from what has been stated in this discussion or in the findings from our study.

A delegate from the Netherlands stated that notaries now have to finish a prolonged internship, while the branch organization for notaries still supervises the branch and watches for quality. The delegate suggested there was no change in the quality of the products.

A delegate from South Africa stated that in South Africa, transferring property is exclusively carried out by attorneys who are qualified to do conveyancing. In countries like the Netherlands, is there a real reason for reserving this function exclusively for notaries? There is currently a debate in South Africa on whether this is a function you should be reserving exclusively for lawyers.

A delegate from the European Commission noted that there are some notary countries, like Austria and the Czech Republic, where there are no reserved rights for notaries for this kind of activity. A consumer can either go to a lawyer or a notary for this kind of service. So far, the study has not given any indication why this task could not be given to any other well qualified professional, as long as the professional has a sufficiently good educational background and there is a real control on quality. But there does not seem to be any particular reason why the profession could not be opened up to other professionals.

### **3. Financing**

The Chair moved on to the last section of the discussion, concerning mortgages and home finance. Many discussions on this occurred when the group discussed banking in the year 2000 and last October. Indeed, competition in mortgages has developed since the 1980's in most European countries, together with the progressive liberalisation of banking which originated in the work of the Basle Committee on banking supervision. Most restrictions in the mortgage market are now of a private nature and some of them led to an important antitrust investigation in the 1980's. The UK mortgages were issued by building societies and interest rates were set centrally by the building society association. This cartel broke down when banks were permitted to issue mortgages as well. In France, the Conseil de la Concurrence in 2003 discovered a cartel in the form of a non-aggression pact by all banks that agreed not to renegotiate other bank mortgages. At that time, interest rates were very high and consumers had negotiated fixed interest rate mortgages with high interest rates. At the time when interest rates decreased, banks agreed not to renegotiate mortgages that were issued by other banks. The cartels were heavily sanctioned by the Conseil. Recently the Direction Générale has investigated the sector again. The Chair asked what concerns prompted the most recent investigation.

A delegate from France replied that the real estate sector was one of eight national foci of the DGCCRF in 2006. In particular, an investigation was performed into the intermediary sector of brokers for mortgages who specialise in refinancing or origination. The DGCCRF checked to ensure that brokers informed clients of all their mandates. There are some who work for single banks, but others who have mandates from multiple banks. They receive payments both from their clients, home buyers, and from banks. Interestingly, the loan rates in France at this time are often below those of the reference rate for French government notes and bonds. To make activities more profitable, banks are seeking to enter the business of selling real estate.

The Chair turned to Hungary for the final intervention. The report from Hungary says that interest rates on mortgages started to be subsidised by 2001 and by 2003, the report says that 95% of all home loans were subsidised in Hungary. The Chair identified his understanding that the reason was that the government wanted to promote home ownership. The Chair asked what the current situation was. This law has been heavily changed. In 2005 the competition authority concluded a sector enquiry that identified a

lack of transparency as the major problem in the Hungarian mortgage market. Extra costs connected to home loans make the comparison of different conditions difficult. The report mentions that there is a mandatory checking account often associated with a mortgage. Is this practice a legal requirement or not? Many problems in this area appear to be consumer protection rather than antitrust issues. What institutional solutions exist for this? The report says there is a lack of transparency that can be solved by the consumer asking different banks for some offer on these very similar products. But perhaps there could be a comparison in other ways, for example by consumers going to multiple banks, asking them for their best offers, and comparing them overall.

A delegate from Hungary responded that the situation of the homeowner has changed significantly since government subsidisation became increasingly limited, both in amount and in accessibility and, by now, there are still subsidised products. But as demand remained quite high for home loan products, most new home loans are granted in foreign currencies. Swiss francs are the most popular instrument for home loans and the majority of the new home loans granted in Hungary are denominated in foreign currency, mostly Swiss francs. The magnitude of the credit outstanding in foreign currency is actually higher than credit outstanding in the Hungarian currency, which is actually a macro-economic risk for financial stability.

Transparency is a major issue in Hungary in the market of home loans. The competition authority found that consumers are not educated enough to choose between the products offered by the banks. The banks tend to introduce a lot of costs which are labelled very differently. So banks invest heavily in making these products not comparable. There are certain cost elements which are considered as sunk costs such as the evaluation of property. In order to get an offer from the bank you have to have an evaluation on the property you want to purchase. And if you get an unfavourable offer from your bank you have to go to another bank and make another evaluation at the same bank. So, in this sense, the evaluation is not transferable from one bank to another because every bank has its own evaluators. If you do this evaluation in one bank you cannot transfer the report to another bank, so you have to do it again and pay extra for this sunk cost. The competition authority would like to solve these transparency issues. There has been a committee set up by the government to formulate some reform proposals in the field of finance/retail banking. Hungary would like to increase consumer education in the field of finance. It is planned that financial education will be introduced in secondary schools. For the banks, the competition authority would like to promote simpler terms which they should use and certain personal information for the clients so as to make the offers from various banks more comparable for the clients. The competition authority would like this information gap to disappear in the long run.

There is a committee set up by the national bank, in which the competition committee also participates, whose objective is among others to increase transparency in home loans. Consumers who want to substitute their loans with loans that have more favourable conditions are having an increasingly difficult time because some banks have increased early down payment ratios - the amount consumers have to pay when they down pay their credit. This is an exit barrier to a loan and can hinder competition.

The Chair noted that in Italy, there was a similar situation with evaluations. Aggressive foreign entry in the mortgage markets drastically changed the situation. A purchaser can have competing offers very easily without any evaluation in Italy with respect to mortgages.

The delegate from Hungary continued by suggesting that the competition and consumer protection issues are really interrelated. It is extremely difficult to separate one from the other because the same issues are connected to switching. In this case, the lack of transparency and this noisy environment for the consumer related to extremely sophisticated financial services makes consumer choice very difficult and this has a very important impact on competition as well. So the Hungarian competition authority has the task in the field of consumer protection too, at least to some extent.

The Chair thanked all participants for the interesting discussion on a topic that seemed rather traditional but turned out to be quite innovative. Originally, when discussing holding this roundtable, the only point that came to the group's attention was the question of price fixing or maybe conscious parallelism, the fact that consumers did not take into account how much they were paying their intermediary, issues that are quite traditional in some sense. The advent of the Internet has changed the matching process substantially. This roundtable suggests that competition problems will then be different. There will no longer be an issue of simple price fixing but there will be a problem of access to some sort of essential facility, if it exists, or problems of limitations of access by single individuals. The discussion on the closing of the property transaction was interesting because in many countries there are new developments. Finally on mortgages, most countries seem to be in a situation where competition is vigorous in mortgage markets, even though in many countries such as France and the UK, there had been some enforcement action in mortgages as well. But lack of transparency can reduce the extent of competition.

## **COMPTE RENDU DE LA DISCUSSION**

Le Président, Alberto Heimler, indique tout d'abord que les opérations immobilières marquent des étapes importantes dans la vie des particuliers. Ils n'en réalisent pour la plupart qu'un faible nombre et, outre qu'il s'agit des plus grosses transactions financières dans lesquelles la majorité d'entre eux intervient directement, ces opérations sont complexes d'un point de vue juridique, financier et fiscal. Dans certains pays, la profession d'agent immobilier n'est nullement réglementée ; chacun peut exercer cette activité, fixer librement ses honoraires et agir comme il l'entend. Ailleurs, les prestations de services des agents immobiliers sont soumises à une réglementation très stricte, l'accès à la profession est limité et les honoraires réglementés. Dans certains pays, le transfert de propriété doit être effectué par un notaire, choisi par l'acheteur, et de fait, le notaire protège l'acheteur. Dans d'autres, les opérations immobilières peuvent être exécutées par des avocats ou par d'autres professions. Ce qui semble commun à tous les pays est que les agents immobiliers perçoivent partout un pourcentage du montant de l'opération. L'agent étant choisi par le vendeur, plusieurs raisons justifient que les honoraires soient fixés en pourcentage de la valeur marchande du bien. S'ils étaient forfaitaires, les agences seraient moins incitées à vendre le bien le plus cher possible et s'ils dépendaient du nombre de visiteurs, par exemple, les agents le feraient certainement visiter à des personnes qui ne sont pas intéressées. D'une certaine manière, la fixation des honoraires en pourcentage du prix de vente du bien aligne donc les incitations du vendeur, de l'acheteur et aussi, bien sûr, de l'agent. Or, l'Internet est virtuellement en mesure de modifier le déroulement des transactions, en particulier la mise en contact de l'acheteur et du vendeur. La discussion s'articulera autour de trois grandes parties. La première traitera des restrictions potentielles à la concurrence résultant du processus de mise en contact de l'acheteur et du vendeur. La deuxième s'intéressera aux restrictions imputables à la phase finale d'une opération immobilière, à savoir l'exécution. La troisième enfin portera sur les restrictions provenant du marché des prêts immobiliers.

### **1. Mise en contact de l'acheteur et du vendeur**

Dans l'ensemble des pays, les agents immobiliers n'ont pas l'exclusivité de cette activité de mise en contact de l'acheteur et du vendeur. En effet, les propriétaires peuvent vendre leur maison ou leur appartement par eux-mêmes. Néanmoins, les pourcentages varient considérablement d'un pays à l'autre. En Italie, par exemple, près de 50 % des logements sont vendus directement par leur propriétaire, tandis qu'aux Pays-Bas, l'examen du rapport néerlandais me permet de dire que ce n'est quasiment jamais le cas. La décision de faire appel ou non à un agent immobilier ne semble pas directement liée à la sévérité de la réglementation, car même dans les pays où l'accès à cette profession est libre et où les propriétaires peuvent négocier les prix, la proportion d'agents immobiliers servant d'intermédiaire n'est pas nécessairement élevée. Les restrictions réglementaires sont néanmoins très répandues dans de nombreux pays. Au Canada, la profession d'agent immobilier est réglementée à l'échelle locale et les entraves à la concurrence prennent manifestement naissance à ce niveau. Selon le rapport canadien, les agents immobiliers ayant quitté une province pour une autre doivent passer des examens afin de pouvoir exercer leur activité dans cette nouvelle province ou dans ce nouveau territoire. Dans un pays aussi homogène que le Canada, en quoi deux provinces sont-elles si différentes ? La législation de l'une diffère-t-elle de la législation ou de la réglementation de l'autre ? Comment le Bureau apprécie-t-il de prime abord le fait que ces restrictions réglementaires puissent constituer des barrières à l'entrée dans la profession et, le cas échéant, quelles mesures peut-il prendre pour les éliminer ?

Un délégué du Canada répond que la profession d'agent immobilier est réglementée à l'échelle locale, provinciale et nationale. Le Canada n'est pas particulièrement homogène du point de vue des réglementations locales et provinciales, car les pratiques diffèrent. Ainsi, en Alberta, l'octroi d'une remise à la clientèle faisait récemment encore l'objet d'une restriction. Le Bureau de la concurrence et l'organisme de réglementation de l'Alberta se sont saisis du problème et cette restriction a été levée. Plusieurs barrières à l'entrée existent, telles que des restrictions au transfert d'une activité d'une province à une autre. Ces restrictions peuvent être le fait d'organismes privés ou publics. Une étude en cours au Canada porte sur les professions autoréglées et sur les différences existant à cet égard entre les provinces.

Le Président s'intéresse ensuite au Japon, notant que dans ce pays les agents immobiliers doivent passer un examen et sont soumis à des restrictions quant à leurs honoraires et à la publicité. Comment expliquer l'existence de ces restrictions et de l'ensemble des mesures structurelles ? Quelle particularité des prestations de services des agents immobiliers justifie ce contrôle de l'accès à la profession et des prix et l'encadrement de la publicité ? Que se passerait-il en cas de suppression de ces barrières ?

Un délégué du Japon fait observer que si le rapport remis par son pays met sensiblement l'accent sur l'aspect réglementaire, il importe également de souligner le caractère limité de ces réglementations. Les épreuves imposées pour accéder au secteur des opérations immobilières, par exemple, ne sont pas aussi difficiles que celles du barreau ou d'autres examens professionnels. En ce qui concerne les honoraires, et les frais de transaction, les restrictions se limitent à la fixation d'un plafond, chaque agent immobilier étant libre de déterminer ses honoraires en deçà de ce montant. Pour ce qui est de la publicité, les restrictions portent sur la publicité mensongère. De plus, compte tenu du nombre particulièrement élevé des parties prenantes au marché de l'immobilier, même lorsqu'un agent immobilier souhaite vendre un bien, il est parfois impossible de bâtir sur le terrain concerné ou d'y construire un nouvel immeuble, de telle sorte qu'une réglementation a été introduite pour interdire toute publicité avant que la vente ou l'achat ait de grandes chances de se produire (par exemple, lorsque l'agent immobilier a obtenu un permis de construire auprès des autorités compétentes). La pratique la plus courante veut que le vendeur et l'acheteur choisissent leur propre agent immobilier. Ces réglementations correspondent manifestement au minimum requis pour assurer la régularité de l'opération et la protection des consommateurs sur le marché immobilier.

Le Président fait remarquer qu'en Corée du Sud, pour devenir agent immobilier, il faut passer un examen. Selon le rapport, jusqu'en 1999 les épreuves étaient particulièrement difficiles et l'accès à la profession était fortement limité. À partir de 1999, toutefois, l'examen a été considérablement simplifié et depuis, 15 000 personnes accèdent chaque année à la profession. Cet examen a-t-il pour effet de restreindre l'entrée sur le marché d'une manière quelconque ? Qu'est-ce qui a motivé la réforme de 1999 ? La Commission sud-coréenne de la concurrence a préconisé la suppression des règles superflues, mais comme au Japon, le plafonnement des prix est toujours en vigueur.

Un délégué de la Corée précise que l'examen restreint effectivement l'accès à la profession, mais que dans les faits cette restriction est bien moins importante qu'auparavant. L'épreuve actuelle est généralement considérée comme facile par les candidats. La réforme est due à la crise financière coréenne. Bien que la Commission sud-coréenne de la concurrence ait réformé la réglementation applicable aux services professionnels, la réforme de l'examen d'entrée sur le marché immobilier faisait également partie du projet lancé par les pouvoirs publics coréens dans ce secteur des services professionnels. La réglementation concernant le plafonnement des prix persiste afin de protéger les consommateurs dans ce domaine. Lorsqu'elles ont réformé les barèmes d'honoraires, les autorités sud-coréennes craignaient que la disparition de la limite supérieure n'entraîne une hausse des prix, de sorte qu'elles ont supprimé la limite inférieure. Du point de vue de la concurrence, la suppression de ces limites constitue une mesure opportune. En Corée du Sud, toutefois, la politique immobilière est un sujet très sensible, notamment en ce qui concerne les frais de transaction.

Le Président note que dans le Taipei chinois, les agents immobiliers doivent passer un examen et s'inscrire auprès de l'autorité locale et que leur association édicte des codes de déontologie auxquels les adhérents doivent se conformer. La Commission de la concurrence a élaboré deux réglementations pour éviter des restrictions injustifiées de la concurrence en matière de prestations de services immobiliers. De quelle nature sont-elles ? Par ailleurs, toujours dans le Taipei chinois, le ministère de l'Intérieur a limité les commissions à 6 %, pourcentage qui, selon les statistiques contenues dans le rapport, est invariablement atteint. C'est pourquoi le Président a déjà posé cette même question à la Corée. De fait, on observe que ce plafond est probablement destiné à servir de base de négociation, mais qu'il peut également devenir un objectif pour les collusions tacites. En principe, il s'agit peut-être d'un plafond, mais en définitive, chacun cherche à atteindre ces 6 %. Que peut faire la Commission dans ce contexte ?

Un délégué du Taipei chinois déclare que la première réglementation est spécifiquement liée au service inter-agences. La seconde correspond à une réglementation générale des secteurs de l'immobilier. Dans ces deux cas, la première partie de la réglementation proscribit spécifiquement l'action concertée, à savoir les ententes sur les prix. Ces deux réglementations comportent des règles spécifiques sur les pratiques de fixation des prix. Pour l'examen, l'organisme de contrôle des agents immobiliers est le ministère de l'Intérieur. Lors de la rédaction de la loi sur l'immobilier, la Commission a effectivement été invitée à faire part de son opinion sur la concurrence. L'examen est donc destiné à évaluer les compétences des professionnels afin de protéger les consommateurs. Concernant le plafond mentionné dans le rapport, la Commission de la concurrence a réalisé en 2005 une étude dont il ressort que 91 % des agents ont perçu une commission de la part du vendeur ou de l'acheteur, c'est-à-dire de l'une ou l'autre partie. En ce qui concerne les acheteurs, 25 % des agents ont prélevé une commission de 2 % et 24 % une commission de 1 % seulement. Quant aux vendeurs, 90 % d'entre eux ont dû verser une commission de 4 %. Seuls 7 % des agents ont touché une commission des deux parties et sur ces 7 %, 90 % ont appliqué le maximum de 6 %. Par conséquent, seuls ces 7 % ont atteint le plafond, qui dans les faits peut donc être négocié par le vendeur et l'acheteur.

Le Président constate qu'en Turquie on distingue les agences immobilières qui ont le statut de commerçant et celles qui bénéficient de celui d'artisan. Ces deux professions exercent la même activité. Toutefois, les artisans sont soumis à une réglementation bien plus stricte que les commerçants et leurs honoraires, par exemple, sont plafonnés. Comment ces deux groupes se font-ils concurrence s'ils exercent le même métier tout en faisant l'objet d'une réglementation aussi différente ?

Un délégué de la Turquie constate qu'aucune législation spécifique ne régit les agences immobilières. Il revient au créateur d'entreprise de décider s'il souhaite délivrer ses prestations dans ce secteur en tant que commerçant ou artisan. Du point de vue du droit et de la politique de la concurrence, la différence de réglementation ne pose aucun problème, en particulier pour les prix. Lorsqu'un créateur d'entreprise préfère exercer son activité en tant que commerçant, il est soumis aux règles du Code de commerce, mais ses obligations, comme les impôts d'État, diffèrent. Aucun article ne l'autorise à fixer des conditions tarifaires imposées ou minimales. Pour exercer en tant que commerçant, il doit créer une société commerciale et remplir les obligations requises par le Code de commerce. Il peut également exercer d'autres activités. Le statut d'artisan permet de fonder et de liquider une société avec plus de facilité. Les agences immobilières qui en bénéficient sont régies par une loi sur les organisations professionnelles de l'artisanat. Compte tenu des modifications apportées à la loi, concernant les prix, par exemple, les artisans ne peuvent pas exiger des honoraires supérieurs à un certain plafond, de sorte que là encore, du point de vue du droit de la concurrence, il n'y a aucun problème. On ne peut affirmer qu'une réglementation est plus restrictive que l'autre. En Turquie, les vendeurs peuvent opter pour l'agence immobilière la moins chère et pour l'heure, le nombre des agences pouvant être créées dans le pays n'est pas limité. Un projet de loi sur le conseil immobilier est actuellement à l'étude.

Le Président relève qu'en République tchèque, en 2003, l'association des agences immobilières, qui réunissait moins de 3 % des agences du pays, a recommandé des prix à ses adhérents. Le rapport montre que ces prix ont influé sur l'évolution des tarifs généralement pratiqués par les agences immobilières tchèques. Comment a-t-il pu en être ainsi compte tenu de la faiblesse de ce pourcentage ?

Un délégué de la République tchèque précise que la décision recommandant les prix est intervenue à un moment capital, c'est-à-dire lors de l'ouverture du marché, de sorte qu'il n'existait jusque-là aucune limitation des prix. Les participants à cet accord, les parties au litige elles-mêmes, ont confirmé que la finalité première consistait à fixer un prix pour l'ensemble du marché. Voilà pour le premier aspect, le second étant que les prix recommandés par cette association ont effectivement été respectés, que toutes les agences, même si elles n'en étaient pas membres, se sont conformées à cette liste de prix. Ces recommandations ont été publiées et sont largement disponibles, de sorte que même si elles ne figuraient pas dans la presse, par exemple, elles ont été suivies. L'association n'a pas été sanctionnée pour avoir influé sur les prix de l'ensemble du marché, mais seulement pour avoir pratiqué une entente sur les prix. La sanction appliquée à ce délit a été mesurée – de l'ordre de 10 000 euros – bien qu'en définitive elle ait été lourde de conséquences pour cette petite association.

Le Président fait remarquer qu'aux États-Unis 80 % des acheteurs potentiels recourent à Internet lorsqu'ils ont décidé de changer de logement. À en juger par le rapport américain, le secteur s'est rapidement adapté à ce nouveau contexte de commercialisation en ligne. Les agents des vendeurs et des acheteurs ont procédé à de nombreuses innovations. Les agents des vendeurs, notamment, ont commencé à proposer des services simplifiés à bas prix et ceux des acheteurs proposent des services en ligne destinés à réduire le temps consacré aux visites des logements par les acheteurs potentiels. Les intervenants du secteur ont parfois freiné la concurrence de façon anticoncurrentielle, comme dans le cas des actions en justice introduites par la Kentucky Real Estate Commission. S'agissait-il d'une commission d'État ou d'une association privée d'agents immobiliers ? Dans le premier cas, la théorie de l'action de l'État est-elle valable ? Une deuxième série de questions, concernant les États-Unis notamment, mais aussi l'ensemble du rapport, tient aux problèmes qui surgissent lorsqu'un agent représente à la fois l'acheteur et le vendeur pour une opération donnée. Le Président note qu'en Italie le vendeur d'un logement choisit un agent et qu'un particulier l'acquiert par l'intermédiaire de cet agent. Les agents jouent ainsi un double rôle. Il serait donc utile que les États-Unis reviennent sur la question du conflit d'intérêts.

Un délégué des États-Unis indique que l'immobilier est un secteur où la Federal Trade Commission (FTC) et le ministère de la Justice jouent tous deux un rôle très actif. Toute personne accusée d'infraction au droit de la concurrence peut invoquer l'excuse de l'action de l'État en faisant valoir que la loi de l'État impose ou autorise l'action présumée illicite. Pour obtenir gain de cause par ce moyen, le défendeur doit apporter la preuve que l'entrave au commerce qu'il conteste correspond à une politique de l'État clairement formulée et qu'elle est activement supervisée par celui-ci. Les deux volets de cette excuse visent à assurer que l'État, et non les parties privées, avait l'intention d'évincer la concurrence et qu'il supervise le dispositif pour minimiser le tort causé aux consommateurs. Ce moyen de défense peut être invoqué par des parties privées ou des organismes publics de rang inférieur, comme des commissions, des comités ou des administrations locales. L'affaire impliquant la Kentucky Real Estate Commission, déposée et réglée en deux mois seulement en 2005, concernait un organisme créé par l'État du Kentucky pour réglementer l'agrément et la formation des courtiers en immobilier et protéger les intérêts du public. Il était composé de cinq membres, dont quatre devaient exercer cette profession. C'était la seule autorité apte à délivrer un agrément aux courtiers en immobilier et il était illégal de pratiquer cette activité sans être agréé dans l'État du Kentucky. La question de l'immunité découlant de l'action de l'État ne s'est pas posée dans cette affaire, la loi interdisant à la Commission de pratiquer des ententes sur les prix ou de fixer des droits ou des honoraires ; il était donc clair que l'État n'avait pas eu l'intention d'évincer la concurrence. Par conséquent, l'affaire a été traitée comme une infraction *per se* à l'article 1 de la loi Sherman et réglée en deux mois seulement. L'action de l'État demeure néanmoins un sujet de préoccupation dans le secteur de

l'immobilier où les États peuvent prendre des mesures extrêmement nuisibles pour la concurrence et en conséquence, la FTC et le ministère de la Justice mènent un programme actif de sensibilisation sur ce marché. Les trois questions qui ont été couvertes ces dernières années concernent les remises et incitations proposées par les courtiers, les règles de service minimum et les restrictions au recours à d'autres professions que les avocats pour les activités inhérentes à l'établissement des actes de transfert dans l'immobilier.

Un délégué des États-Unis précise que l'évolution rapide du secteur, due à l'Internet, s'est accompagnée de profondes modifications de son mode de fonctionnement. Vers la fin 2005, la FTC et le ministère de la Justice ont organisé conjointement un séminaire sur l'immobilier et la concurrence, dont sont tirées un grand nombre des informations contenues dans le rapport américain. Un rapport détaillé sera publié prochainement par ces deux organismes. La commission est fixée avec l'agent du vendeur. Si un autre agent représente l'acheteur, il est généralement informé par l'agent du vendeur de la fraction de cette commission qu'il pourra percevoir à l'avance. Les agents peuvent donc intervenir dans la transaction à divers degrés. L'acheteur peut choisir de ne pas avoir d'agent propre, auquel cas l'agent du vendeur ou l'agent inscripteur perçoit l'intégralité de la commission. À l'inverse, il peut choisir de désigner un agent, ce qui au fil du temps a été soumis à différents types de réglementations par les États. À l'heure actuelle, des règles de diffusion de l'information relativement importantes sont imposées pour permettre aux acheteurs de comprendre l'obligation fiduciaire de leur agent envers eux. La FTC s'efforce d'informer les consommateurs sur leurs droits. Elle a créé un minisite Web sur l'immobilier et la concurrence et fournit un grand nombre d'informations destinées aux consommateurs, notamment un guide de quatre pages pour les aider à choisir un agent et à vendre leur logement.

Le Président s'adresse au Canada où l'Association canadienne de l'immeuble, qui réunit tous les agents immobiliers du pays, est propriétaire et gestionnaire du Service inter-agences (S.I.A.). Ce service regroupe les fichiers des biens de tous les agents immobiliers de l'association. Chaque fichier est mis à la disposition des seuls membres du S.I.A. ; il peut également être consulté par les clients d'un membre lorsque l'agent immobilier concerné l'a autorisé à s'y inscrire. Premièrement, existe-t-il des fichiers concurrents auxquels des intervenants à faible marge (« discounters ») peuvent avoir accès ? Deuxièmement, le rapport fait état de comités de discipline œuvrant dans la profession. Quels types de plaintes sont recevables dans le cadre de ces comités et qui a autorité ? Les agents ont-ils le droit de déposer une plainte et de renvoyer un intervenant à faible marge devant le comité de discipline ?

Un délégué du Canada observe que dans son pays, le Service inter-agences de l'Association canadienne de l'immeuble est le principal support de diffusion d'informations sur les logements à vendre. Ce dispositif regroupe une grande variété de systèmes locaux. Les vendeurs cherchent à entrer en contact avec le plus grand nombre possible d'acheteurs et ils peuvent le faire grâce au S.I.A., qui compte 88 000 membres parmi les agents et les courtiers. Les particuliers ne sont pas autorisés à passer des annonces par le biais du S.I.A. Aucun dispositif ne peut concurrencer ce service et les intervenants à faible marge, en particulier, sont actuellement dépourvus d'un tel système. Le S.I.A. alimente pour une part un site Internet ouvert au public, mais certaines informations ne sont pas publiées, comme le temps écoulé depuis la mise en vente d'un logement ou le montant des précédentes ventes et commissions. Les comités de discipline sont généralement locaux ; composés de professionnels de l'immobilier, ils traitent principalement les plaintes des consommateurs.

Le Président note qu'avec les annonces de la presse écrite, chacun peut avoir accès à un journal, à un agent ou à un particulier souhaitant vendre son logement. Avec Internet, cependant, on peut se demander si certains vendeurs potentiels ne sont pas exclus du marché et, par répercussion, s'il faut considérer les services inter-agences comme des facilités essentielles. Dans l'affirmative, il conviendrait d'en autoriser l'accès aux personnes qui ne sont pas propriétaires et peut-être aussi à celles qui ne sont pas des intermédiaires. Si le seul moyen raisonnable de vendre un logement consiste à le présenter sur un service

en ligne appartenant à une association d'agents immobiliers, les particuliers ne peuvent y parvenir sans l'aide d'un intermédiaire. Ainsi, un grand nombre de ces services étant détenus et gérés par des associations professionnelles locales, les agents immobiliers extérieurs en sont souvent exclus, à l'instar des particuliers. Les acheteurs bénéficient d'un accès au plus gros fichier qui puisse exister et les vendeurs en tirent eux aussi avantage. Selon le BIAC, pour déterminer si un service inter-agences constitue une facilité essentielle, il convient de se demander en particulier si la possibilité de recourir à Internet a réduit les obstacles à la concurrence à tel point qu'un service inter-agences n'est plus le seul moyen de promouvoir efficacement les biens à vendre. Quel rôle ces agents immobiliers jouent-ils dans ces nouveaux services immobiliers en ligne et comment un propriétaire peut-il éviter de verser 5 % ou 6 % du prix de son logement à un intermédiaire ?

Un délégué du BIAC laisse entendre que les services sur Internet appartiennent au même marché que les services traditionnels. Grâce à Internet, les consommateurs ont désormais davantage de prise sur le processus immobilier et, par-dessus tout, de nouvelles formes de modèles d'entreprise se développent et sont de plus en plus disponibles. Nous n'en sommes qu'aux prémices, et non au terme, du développement de ces modèles, qui offrent de nouvelles possibilités. Du fait de l'avènement de ces divers services, on constate une baisse des commissions et une progression des parts de marché. Il faut savoir qu'Internet ne doit pas être considéré comme un substitut des services immobiliers classiques. Les courtiers dits traditionnels recourent eux aussi à Internet, confortant l'idée que tous ces services constituent un seul et même marché. La question est donc de savoir où en est ce processus dans les différents pays. Cet aspect pratique mentionné dans le document du BIAC doit être examiné avec soin dans chaque situation. L'autre aspect requérant l'attention des autorités porte sur les obstacles mis par les « courtiers traditionnels » au processus de développement d'Internet en vue de recourir à d'autres courtiers et d'utiliser de nouveaux services. Dans tous les cas, cela dépendra de la situation des différents pays à cet égard. Les avis divergent sur ce point.

Le Président constate que le rapport américain cite des actions intentées contre la National Association of Realtors et diverses associations locales d'agents immobiliers à travers le pays, dans lesquelles le défendeur a tenté d'empêcher les courtiers innovants ou à bas prix d'intégrer plus pleinement Internet dans leurs modèles d'entreprise. Les intervenants à faible marge avaient-ils d'autres moyens pour mettre leur fichier en ligne ? Étaient-ils adhérents ou non des associations qui leur ont interdit l'accès à certains services ? Dans le premier cas, était-il précisé, par contrat implicite, qu'ils auraient dû y avoir accès ?

Selon un délégué des États-Unis, la FTC est intervenue dans des affaires dans lesquelles des adhérents de services inter-agences avaient la possibilité d'interdire la diffusion d'informations tirées de fichiers de mandats exclusifs (en vertu desquels, lors de l'exécution, le vendeur paie le courtier si ce dernier a trouvé l'acheteur, mais ne verse aucune somme supplémentaire lors de l'exécution si c'est lui-même qui a trouvé l'acheteur). On recense aux États-Unis plus de 900 services inter-agences. Compte tenu de leur pouvoir de marché, les lois antitrust américaines leur imposent d'accepter les courtiers à faible marge parmi leurs adhérents. Par conséquent, ces courtiers ont eux aussi accès aux services inter-agences à condition de bénéficier d'un mandat exclusif. Les consommateurs recourent à l'Internet pour trouver un logement et un agent immobilier. Les courtiers ont intérêt à introduire leurs logements dans la base de données des services inter-agences pour que leurs fichiers apparaissent sur le site Internet avec les informations sur les fichiers du service inter-agences. L'un des plus connus aux États-Unis est Realtor.com. Les actions intentées récemment montrent que dans certaines circonstances il est interdit de publier les informations provenant du service inter-agences sur d'autres sites Internet ouverts au public, comme realtor.com, de sorte que les fichiers de mandats exclusifs ne peuvent pas être consultés par les acheteurs potentiels, même si les courtiers à faible marge sont membres du service inter-agences local. La FTC recense six conventions d'expédient, une affaire qui vient de faire l'objet d'une décision de justice et une autre qui a été portée devant les tribunaux.

Un délégué des États-Unis précise ensuite que les services inter-agences sont des co-entreprises fondées par des courtiers concurrents pour exploiter et mettre en commun leur fichier clients. À l'évidence, ils sont très efficaces du point de vue du vendeur et de celui de l'acheteur. Lorsqu'ils ont commencé à être utilisés dans les années 20, les courtiers avaient l'habitude de constituer des livres de photographies et d'informations, que les clients consultaient dans leur bureau. Au fil des ans, avec l'avènement des technologies de photocopie, puis de publipostage et de télécopie de ces informations, les services inter-agences ont gagné en efficacité et élargi leur rayon d'action. Enfin, dans les années 90, certains courtiers ont commencé à utiliser des sites Internet protégés par des mots de passe : les bureaux virtuels sur Internet. Ce service est précieux et permet en outre de réduire les coûts. Tous les courtiers peuvent utiliser Internet. En vertu d'une nouvelle politique de la National Association of Realtors, l'association professionnelle des courtiers, chaque courtier peut interdire à d'autres d'utiliser ses fichiers dans leurs bureaux virtuels, tout en laissant ces fichiers à la disposition du reste du service inter-agences local. Il s'agit d'un revirement, car précédemment, les courtiers ayant accès à un service inter-agences pouvaient toujours consulter l'ensemble des fichiers de ce service. Les courtiers qui créent ces bureaux virtuels sont également adhérents de la National Association of Realtors et ont pleinement accès à l'ensemble des informations du service inter-agences. La question est de savoir si les courtiers recourant aux bureaux virtuels peuvent utiliser ces informations sur leur site Internet ou cela leur est interdit. L'accès au service inter-agences est-il nécessaire ? Selon le ministère de la Justice, la grande majorité des courtiers estiment qu'ils doivent participer au service inter-agences en place sur leur marché local pour servir comme il se doit leurs clients et concurrencer les autres courtiers.

Dans la plupart des États, les particuliers peuvent passer par un courtier à faible marge pour payer un service unique ou spécifique, par exemple pour que leur offre apparaisse sur le service inter-agences, sans obligation d'acheter d'autres prestations auprès de lui. Il peut leur en coûter 500 USD pour un tel service.

## **2. Exécution des opérations immobilières**

Le Président ouvre ensuite le débat sur les questions de concurrence liées à l'exécution des opérations immobilières, notamment par les notaires. Les fonctions exercées par les divers professionnels intervenant lors de ces transactions diffèrent selon les pays. Dans de nombreux pays d'Europe continentale, le transfert d'un bien enregistré ne peut se faire qu'en présence d'un notaire latin. La profession jouit d'un droit exclusif et en règle générale, le notaire est choisi par l'acheteur et garantit que le bien est effectivement la propriété de la personne qui la transfère et qu'il n'existe aucune limitation aux droits de cette dernière. Ainsi, il garantit qu'elle n'a pas fait ou n'est pas sur le point de faire faillite et qu'aucun créancier n'a engagé de procédure à son encontre, par exemple. Naturellement, le droit exclusif n'exige pas que l'accès à la profession soit inutilement limité. Dans la pratique, le nombre des notaires est souvent fixé ou limité et les honoraires sont réglementés. Les Néerlandais ont tenté de soumettre davantage cette profession aux lois du marché.

Le Président a demandé à la Commission européenne de présenter brièvement son analyse comparative des services d'exécution. La Commission a soumis un document très intéressant, qui contient une description et une excellente comparaison des pratiques dans toute l'Union européenne, non seulement en matière d'obligations légales, mais aussi de coût des services.

Un délégué de la Commission européenne note qu'elle a engagé récemment une étude sur les moyens d'améliorer la concurrence dans les opérations immobilières. Néanmoins, cette étude s'intéresse uniquement au transfert de propriété, et ne couvre pas la mise en contact analysée précédemment, pas plus que le financement, qui sera examiné ultérieurement. À l'heure où se déroule cette réunion, l'étude est toujours en cours. Néanmoins, on peut déjà en tirer des conclusions intéressantes que les délégués pourront développer.

Premièrement, en ce qui concerne la méthodologie, l'étude entend analyser le marché du transfert de propriété et évaluer l'intensité de la réglementation sur différents marchés, en tenant compte de celle qui est édictée par l'État et de l'autodiscipline exercée par les organismes professionnels. Deuxièmement, elle s'intéresse à la question de la qualité et de la sécurité juridique, à l'aide d'indicateurs comme le nombre de litiges. Troisièmement, elle pourra analyser un autre aspect de l'efficacité du marché, à savoir la rapidité des transactions, en se demandant si elles prennent beaucoup ou peu de temps. Quatrièmement, elle cherchera à savoir si les consommateurs doivent s'adresser à un prestataire de services donné ou s'ils peuvent choisir parmi un large éventail de prestataires. Cette étude tente d'analyser l'intensité de la réglementation (élevée ou faible) et le fonctionnement du marché : est-il efficace, onéreux, de qualité ? Les consommateurs ont-ils le choix ?

Comment mesurer l'intensité de la réglementation ? Sa première composante a trait aux restrictions quantitatives, comme pour les notaires, qui limitent le nombre des personnes pouvant accéder à la profession, ou aux obligations liées à la formation. Le deuxième aspect concerne le comportement du marché, et principalement les prix imposés ou recommandés mais aussi, par exemple, l'interdiction de faire de la publicité ou les restrictions concernant la coopération interprofessionnelle. Le troisième élément de la réglementation est la possibilité ou non pour les consommateurs de choisir leur prestataire de services. Parmi les différents régimes identifiés figure celui du notariat latin, notamment en France, en Belgique, en Espagne et en Allemagne. Le deuxième régime est celui du notariat déréglementé, comme aux Pays-Bas. Le troisième est celui où les aspects juridiques du transfert de propriété sont généralement confiés à un avocat ou à un avoué. C'est le cas en Angleterre, au Pays de Galles et en Irlande. En Angleterre et au Pays de Galles, la profession a été ouverte à une sorte d'« auxiliaire » des avocats, l'exécuteur agréé des actes de transfert (« licensed conveyancer »), ce qui crée une concurrence entre ces nouveaux intervenants et les avocats. Le quatrième régime est celui des pays nordiques dans lequel, traditionnellement, l'agent immobilier assure la mise en contact et la recherche d'un acheteur, tout en prenant en charge les aspects juridiques du transfert.

Après avoir examiné les réglementations selon une méthodologie détaillée, l'étude fait effectivement apparaître des différences extrêmement marquées en Europe. On constate sans surprise, mais avec intérêt, qu'une réglementation sévère ne correspond pas à des honoraires élevés. Dans les pays qui ont déréglementé ce marché, les prix sont sensiblement inférieurs, comme dans ceux où les honoraires sont traditionnellement forfaitaires. Pour illustrer brièvement la diversité des honoraires, prenons l'exemple d'une opération classique concernant une maison ordinaire dans un pays déterminé. Dans le régime nordique, un client peut verser moins de 1 000 euros au titre des frais juridiques. Cette somme serait légèrement supérieure, soit 1 300 euros, aux Pays-Bas. Elle atteindrait 1 700 euros dans les pays où l'exécution est confiée aux avocats et serait nettement supérieure à 2 000 euros, voire égale à 2 500 euros, dans un régime fondé sur le notariat. Les prix varient donc considérablement. Selon les résultats actuels, il n'existe pas de différence marquée concernant la qualité. Il serait prématuré d'en conclure qu'un régime fondé sur le notariat assurerait, par définition, une plus grande sécurité juridique. L'étude se poursuit, mais au vu des premiers résultats, on est en droit de s'interroger sur l'opportunité d'une réglementation stricte.

Le Président demande aux Pays-Bas de décrire les résultats de leur libéralisation. Le nombre des notaires a-t-il évolué ?

Un délégué des Pays-Bas indique que l'accès à la profession comporte trois éléments. Tout d'abord, il convient de suivre un cursus de quatre années à l'université. Ensuite, il faut effectuer un stage de six ans. Enfin, pour ouvrir un office notarial, il est nécessaire de soumettre un plan d'entreprise à une commission d'experts nommée par le ministre de la Justice. Cette commission rend au ministre un avis, favorable ou non, sur l'autorisation de cette installation. La KNB, l'association professionnelle des notaires néerlandais, est représentée (de façon minoritaire) au sein de cette commission. L'examen universitaire est régi par l'université elle-même. Les pouvoirs publics supervisent la qualité de la formation dispensée. Concernant

les résultats de la déréglementation, il est vrai que d'une manière générale, comme la Commission européenne l'a déjà indiqué, les prix des tâches accomplies par les notaires ont déjà reculé de 2 %. Ces tâches concernent trois domaines : le droit de la famille, le droit des affaires et l'immobilier. S'agissant de l'immobilier, les prix ont diminué de 8 %, ce qui montre également qu'avant la déréglementation la tarification des tâches était inappropriée. Les prix ont donc été partiellement corrigés par le marché. En ce qui concerne l'accès à la profession, durant les sept années qui ont précédé la déréglementation le nombre des notaires a été porté de 1 100 à 1 300, soit 200 de plus. Depuis la déréglementation, on recense également 200 notaires supplémentaires. Cela ne semble pas indiquer que la déréglementation a entraîné une hausse considérable du nombre des notaires.

Le Président s'intéresse maintenant à la Lituanie, où la réglementation du notariat est particulièrement restrictive. En Italie, par exemple, les notaires ont une exclusivité sur le plan professionnel, mais ils sont tenus à un certain périmètre géographique. Toutefois, pour une opération donnée, tous les notaires peuvent se faire concurrence. En Lituanie, il existe une exclusivité géographique : si une opération est réalisée dans une certaine zone, seuls les notaires situés dans ce périmètre ont le droit de procéder à son exécution. Les honoraires sont imposés par le ministère de la Justice. L'autorité de la concurrence a-t-elle l'intention d'intervenir ?

Un délégué de la Lituanie répond par l'affirmative. Tout d'abord, dans leur programme pour 2004-08 les pouvoirs publics lituaniens ont entrepris de réformer une partie du régime notarial. Ils ont désigné deux institutions qui sont responsables de cette réforme, le ministère de la Justice et le conseil de la concurrence. Ils prévoient notamment de prendre des mesures interdisant d'imposer des prix pour les services notariaux, mais autorisant leur plafonnement. Pour l'heure, il existe des prix imposés, ainsi que des seuils. Le conseil de la concurrence a examiné de près les services notariaux et proposé aux ministres d'envisager des mesures complémentaires pour assurer pleinement l'efficacité de la réforme. Il s'agit notamment d'augmenter le nombre des notaires, et donc de réduire les barrières à l'entrée et de libéraliser les règles de publicité. Pour le moment, le conseil de la concurrence participe au groupe de travail, au côté de représentants des ministères des Finances, de la Justice et de l'Économie. Ce groupe travaille sur la réforme du notariat, mais la Chambre lituanienne des notaires rejette les critiques émises, faisant valoir que les effets de la libéralisation sont souvent inefficients. Le conseil de la concurrence a formulé des remarques quant au calcul des plafonds. Mais seul le ministère de la Justice, conformément à la loi sur le notariat, a autorité pour effectuer des changements et établir de nouveaux mécanismes de prix.

Le Président s'adresse à l'Afrique du Sud, où la commission de la concurrence est intervenue dans plusieurs affaires contre les recommandations de prix formulées par des associations d'avocats. En ce qui concerne les recommandations de prix émanant des barreaux, la commission de la concurrence envisage néanmoins d'accorder une exemption. Pourquoi les barreaux bénéficieraient-ils d'un régime différent ?

Un délégué de l'Afrique du Sud explique que, dans son pays, les avocats ne bénéficient d'aucune dispense spéciale en raison de la loi ou de son application par la commission de la concurrence. Dans une affaire, la commission a en effet enquêté sur une association locale d'avocats pour entente sur les prix. Cette affaire a été réglée, la décision a été confirmée par le Tribunal de la concurrence et les avocats ont dû payer des amendes comme tout contrevenant à la loi. Un mécanisme permet néanmoins aux associations professionnelles de demander à bénéficier d'une exemption. Celle-ci peut être envisagée par la commission et accordée si elle est raisonnablement sollicitée pour préserver les normes en vigueur dans la profession ou les activités ordinaires du professionnel. Avant d'accorder cette exemption, la commission doit tenir compte, sous l'angle juridique, des normes appliquées à l'échelle internationale. Un barreau sud-africain a demandé à bénéficier d'une exemption en invoquant cette obligation. La commission n'a pas encore statué sur cette requête.

Le Président observe que pour la Fédération de Russie, le rapport s'intéresse à la façon dont les municipalités déterminent les zones où la construction de logements sera autorisée. Naturellement, ces décisions administratives peuvent avoir des conséquences particulièrement heureuses pour le propriétaire des terrains sélectionnés, la valeur des parcelles destinées à l'agriculture étant, comme dans la majorité des pays, sensiblement différente de celle des terrains à bâtir. Selon le rapport, le service fédéral anti-monopole (FAS), l'autorité russe de la concurrence, mène constamment des enquêtes sur la mise en œuvre du processus. Le Président comprend les inquiétudes générales, mais le rapport ne fait pas clairement état des préoccupations liées à la réglementation antitrust et ne précise pas si c'est ce qui motive toutes ces enquêtes du FAS.

Selon un délégué de la Fédération de Russie, le vrai problème du secteur immobilier est que les prix ont décuplé depuis sept ou huit ans, notamment dans les grandes métropoles russes comme Moscou et Saint-Petersbourg. Du point de vue du FAS, cette hausse des prix de l'immobilier pose par nature un problème de concurrence, car elle est due à un déséquilibre de l'offre et de la demande. Le revenu des particuliers progresse fortement, mais l'offre de logements modernes et confortables est très faible. Les principales difficultés de l'immobilier ne tiennent pas au secteur de la construction, mais à l'administration et à la réglementation par l'État des opérations foncières et de la construction de logements. En générale, les barrières administratives artificielles sont nombreuses dans ces deux domaines. Les constructeurs doivent rassembler divers documents, autorisations et décisions de différentes autorités avant de pouvoir entamer la construction d'un logement. À partir d'une analyse du marché, le FAS a formulé de nombreuses propositions pour simplifier le processus. Selon le Code foncier et d'autres textes législatifs de la Fédération de Russie, l'attribution des terrains à bâtir doit être fondée sur un processus d'appels d'offres publics ouvert et clair. Cette procédure a été engagée l'an dernier après plusieurs modifications du Code foncier russe, applicables à l'ensemble des terrains publics. Le contrôle de l'attribution des terrains à bâtir compte parmi les responsabilités du service fédéral anti-monopole, sur la base du droit de la concurrence de la Fédération et de la législation sur les marchés publics. Le contrôle des marchés publics relève des autorités russes de la concurrence. L'an dernier, le FAS a identifié et mis un terme à près de 500 infractions dans ce secteur dans 75 régions de la Fédération. L'infraction la plus courante est la conclusion d'un contrat municipal sans appel d'offres. Le FAS a autorité pour invalider le contrat sur la base de la décision de la Cour. Plus de 400 affaires ont été traitées selon cette procédure.

Le Président invite les participants à faire part de leurs questions ou commentaires.

Un délégué de la Norvège formule des commentaires sur la question de la garantie d'un accès direct aux sites Internet pour les consommateurs. L'autorité de la concurrence a instruit une affaire dans laquelle des associations de consommateurs et des consommateurs ont déposé des plaintes concernant l'accès au site Internet norvégien qui domine le marché national de la vente de logements. La particularité de ce site est qu'il n'est pas géré par les courtiers eux-mêmes, mais qu'il appartient au principal groupe de médias, et notamment de presse écrite, du pays. Selon ce groupe, 95 % des ventes réalisées dans le pays passent par un courtier, un agent immobilier ou un avocat norvégien. Ouvrir l'accès de ce site aux consommateurs n'engendrerait donc, d'après lui, qu'un faible volume d'activité, et conférer un accès direct aux vendeurs pourrait nuire à la qualité. Par conséquent, ce site n'est ni lié à, ni directement détenu ou contrôlé par les courtiers. L'autorité de la concurrence n'a pas statué sur cette affaire.

Le Président se tourne vers la Commission européenne.

Un délégué de la Commission européenne demande aux pays qui ont libéralisé ce service comme les Pays-Bas, le Royaume-Uni ou d'autres, de lui fournir de plus amples informations. Les consommateurs ont-ils déposé des plaintes ? Cela ne semble pas être le cas si l'on en juge par ce qui a été dit au cours de ce débat ou par les conclusions de l'étude de la Commission.

Un délégué des Pays-Bas indique que les notaires doivent désormais effectuer un stage prolongé, tandis que l'association des notaires continue de superviser la profession et de veiller à la qualité. Le délégué laisse entendre que la qualité des produits n'a pas changé.

Un délégué de l'Afrique du Sud précise que dans son pays le transfert de priorité est exclusivement réalisé par les avocats habilités à établir ce type d'actes. Dans des pays comme les Pays-Bas, le fait de réserver exclusivement cette fonction aux notaires se justifie-t-il réellement ? En Afrique du Sud, le débat est lancé pour savoir s'il convient de la réserver exclusivement aux avocats.

Un délégué de la Commission européenne constate que dans certains pays fondés sur le notariat, comme l'Autriche et la République tchèque, les notaires ne jouissent d'aucun droit d'exclusivité pour ce type d'activité ; les consommateurs peuvent ainsi faire appel soit à un avocat, soit à un notaire. Pour l'instant, l'étude n'indique pas pourquoi cette tâche ne pourrait pas être confiée à un autre professionnel compétent, sous réserve qu'il soit suffisamment bien formé et qu'un véritable contrôle de la qualité soit mis en place. Rien ne semble interdire spécifiquement l'ouverture de ce métier à d'autres professionnels.

### **3. Le financement**

Le Président aborde la dernière partie de la discussion, qui concerne les prêts immobiliers. Ils ont donné lieu à de nombreuses discussions lorsque le groupe a examiné le secteur bancaire en 2000 et en octobre dernier. En matière de prêts hypothécaires, la concurrence s'est en effet développée dans la plupart des pays européens à partir des années 80, parallèlement à la libéralisation progressive du secteur bancaire née des travaux du Comité de Bâle sur le contrôle bancaire. Sur le marché des prêts hypothécaires, la majorité des restrictions sont désormais de nature privée et une partie d'entre elles ont donné lieu à une vaste enquête antitrust dans les années 80. Au Royaume-Uni, les prêts hypothécaires étaient consentis par des mutuelles d'épargne-logement et les taux d'intérêt étaient fixés au niveau central par l'association réunissant ces mutuelles. Ce cartel a disparu lorsque les banques ont aussi été autorisées à octroyer des prêts hypothécaires. En France, le Conseil de la concurrence a découvert en 2003 l'existence d'une entente sous la forme d'un pacte de non agression réunissant l'ensemble des banques, qui avaient convenu de ne pas renégocier les prêts immobiliers accordés par d'autres établissements. À l'époque, les taux d'intérêt étaient très élevés et les consommateurs avaient négocié des prêts assortis de taux fixes élevés. Lorsque les taux d'intérêt ont baissé, les banques sont convenues de ne pas renégocier les prêts consentis par d'autres établissements. L'entente a été lourdement sanctionnée par le Conseil. Récemment, la Direction générale de la concurrence, de la consommation et de la répression des fraudes (DGCCRF) a de nouveau mené une enquête sur ce secteur. Le Président souhaite connaître les inquiétudes qui ont motivé cette dernière enquête.

Un délégué de la France répond que le secteur immobilier figurait parmi les huit priorités nationales de la DGCCRF en 2006. En particulier, une enquête a été réalisée sur les intermédiaires que sont les courtiers spécialisés dans le refinancement ou l'octroi de prêts immobiliers. La DGCCRF s'est attachée à vérifier que les courtiers informent leurs clients de tous leurs mandats. Certains travaillent pour une banque en particulier, mais d'autres se voient confier des mandats par plusieurs banques. Ils sont rémunérés par leurs clients, les acheteurs et les banques. Il est intéressant de noter qu'à l'heure actuelle, les taux des emprunts en France sont souvent inférieurs aux taux de référence des obligations de l'État français. Pour accroître la rentabilité de leurs activités, les banques cherchent à prendre pied sur le marché de la vente immobilière.

Le Président se tourne vers la Hongrie pour la dernière intervention. Selon le rapport hongrois, les premières bonifications des taux d'intérêt ont été accordées en 2001 et 2003 pour les prêts hypothécaires et à l'échelle nationale, 95 % de l'ensemble des prêts immobiliers étaient bonifiés. Le Président croit comprendre que cette situation s'explique par la volonté des pouvoirs publics de promouvoir l'accession à

la propriété. Le Président s'enquiert de la situation actuelle. La législation a été amplement modifiée. En 2005, l'autorité de la concurrence a réalisé une enquête sectorielle, dont il ressort que le manque de transparence est le principal problème du marché hypothécaire hongrois. Compte tenu des coûts supplémentaires liés aux prêts immobiliers, il est difficile de comparer des situations différentes. Le rapport indique que l'octroi d'un prêt hypothécaire s'accompagne souvent de l'obligation d'ouvrir un compte-chèques. Cette pratique est-elle imposée ou non par la loi ? Nombre des problèmes observés dans ce domaine semblent tenir à la protection des consommateurs plutôt qu'à des questions antitrust. Quelles sont les solutions disponibles sur le plan institutionnel ? Le rapport fait état d'un manque de transparence, auquel le consommateur peut remédier en demandant à différentes banques de lui faire une offre pour ces produits très similaires. Mais peut-être est-il possible d'effectuer des comparaisons par d'autres moyens, les consommateurs pouvant ainsi demander à plusieurs banques de leur communiquer leurs meilleures offres et procéder à une comparaison globale.

Un délégué de la Hongrie répond que la situation des propriétaires a profondément évolué depuis que les pouvoirs publics ont largement restreint la bonification des prêts, à la fois en volume et en termes d'accessibilité ; à l'heure actuelle, certains produits sont encore bonifiés. Toutefois, la demande des produits de prêt immobilier restant très élevée, la plupart des prêts nouvellement accordés dans ce domaine sont libellés en monnaies étrangères. Le franc suisse est l'instrument le plus couramment utilisé pour les prêts immobiliers et la majorité des prêts nouvellement consentis en Hongrie sont libellés en monnaies étrangères, principalement en francs suisses. L'encours total des prêts libellés en monnaies étrangères est de fait supérieur à celui des prêts libellés dans la monnaie nationale, ce qui représente un véritable risque macro-économique pour la stabilité financière.

La transparence est une question de premier plan sur le marché hongrois des prêts immobiliers. L'autorité de la concurrence a constaté que les consommateurs ne sont pas suffisamment formés pour choisir parmi les produits proposés par les banques, qui ont tendance à introduire un grand nombre de coûts sous diverses appellations. Les banques s'emploient donc activement à empêcher toute comparaison des produits. Certains éléments de base des coûts passent pour des coûts irrécupérables, comme l'évaluation du bien. Pour obtenir une offre de la part d'une banque, on doit disposer d'une évaluation du bien que l'on souhaite acheter. Et si l'on obtient de sa banque une offre défavorable, il faut s'adresser à un autre établissement et y faire procéder à une nouvelle évaluation. Dans ce sens, l'évaluation n'est donc pas transférable d'une banque à une autre, chaque établissement ayant ses propres évaluateurs. Si l'on fait une évaluation dans une banque, il n'est pas possible de transférer le rapport s'y rattachant à une autre banque ; il faut donc recommencer et acquitter une somme supplémentaire pour ce coût irréversible. L'autorité de la concurrence souhaiterait résoudre ces problèmes de transparence. Un comité a été institué par les pouvoirs publics pour formuler certaines propositions de réforme dans les secteurs de la finance et de la banque de détail. La Hongrie aimerait renforcer l'information des consommateurs dans le domaine financier. Il est prévu d'introduire une formation sur ce thème dans l'enseignement secondaire. L'autorité de la concurrence souhaiterait introduire des conditions simplifiées impératives pour les banques et certaines informations personnelles pour les clients, afin qu'ils puissent plus facilement comparer les offres de différents établissements. L'autorité de la concurrence aimerait que ce déficit d'information disparaisse à long terme.

La banque centrale a institué un comité, dont le comité de la concurrence fait également partie et qui a notamment pour objectif d'accroître la transparence en matière de prêts immobiliers. Les consommateurs qui souhaitent remplacer leur emprunt par un autre dont les conditions sont plus avantageuses ont de plus en plus de difficultés, car certaines banques ont augmenté les pénalités de remboursement anticipé – c'est-à-dire la somme que les consommateurs doivent verser lorsqu'ils remboursent leur prêt par anticipation. Il s'agit là d'une barrière à la sortie d'un emprunt et cette pratique peut nuire à la concurrence.

Le Président note que l'Italie connaissait une situation analogue pour les évaluations. L'arrivée d'intervenants étrangers offensifs sur le marché des prêts hypothécaires a radicalement changé la donne. En Italie, un acheteur peut obtenir très facilement des offres de prêt hypothécaire concurrentes sans évaluation.

Le délégué de la Hongrie fait alors observer que les questions de la concurrence et de la protection des consommateurs sont véritablement interdépendantes. Il est extrêmement difficile de les dissocier, car elles sont également liées à la question du changement de fournisseur. Dans ce cas, l'absence de transparence et le battage médiatique autour de services financiers extrêmement sophistiqués font que les consommateurs ont beaucoup de mal à effectuer un choix, et cette situation a aussi des répercussions considérables sur la concurrence. L'autorité de la concurrence hongroise doit intervenir dans le domaine de la protection des consommateurs, du moins dans une certaine mesure.

Le Président remercie tous les participants pour cette intéressante discussion sur un domaine qui semblait plutôt traditionnel, mais qui s'est révélé très innovant. À l'origine, lorsqu'il a été question d'organiser cette table ronde, les seules questions qui avaient retenu l'attention du groupe étaient celles de l'entente sur les prix ou peut-être du parallélisme délibéré des comportements, ou le fait que les consommateurs ne prenaient pas en compte les sommes qu'ils versaient à leur intermédiaire, thèmes très traditionnels en un sens. L'avènement de l'Internet a sensiblement modifié le processus de mise en contact. Cette table ronde fait apparaître que les problèmes de concurrence vont évoluer. Il ne s'agira plus d'une simple question d'entente sur les prix, mais d'un problème d'accès à une sorte de facilité essentielle, si tant est qu'elle existe, ou de problèmes de limitation de l'accès par certaines personnes. Le débat sur l'exécution des opérations immobilières a été intéressant, car dans de nombreux pays la situation a changé. Enfin, s'agissant des prêts hypothécaires, la plupart des pays semblent connaître une vive concurrence sur ces marchés, même si dans nombre de pays comme la France et le Royaume-Uni, certaines mesures ont été prises pour que la réglementation soit également appliquée dans ce domaine. Le manque de transparence peut néanmoins restreindre la concurrence.