Housebuilding market study

Update report and consultation on a market investigation reference

25 August 2023

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The Competition and Markets Authority has excluded from this published version of the market study report information which it considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✂]. [Some numbers have been replaced by a range. These are shown in square brackets.] [Non-sensitive wording is also indicted in square brackets]

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Executive Summary

1. The CMA launched its housebuilding market study on 28 February 2023, at which point it also issued a Statement of Scope for consultation. Since then, we have been gathering information and discussing issues with a range of stakeholders, including with a range of government bodies across England, Scotland and Wales tasked with forming and delivering policy in this area.

Background to this initial update and consultation

2. This document provides an initial update on our work and emerging analysis to date. As our stakeholder engagement, evidence gathering and analysis is ongoing, this update is inevitably preliminary in nature: we summarise the stakeholder input we have received so far, provide an indication of our preliminary and emerging analysis and address the question of whether the CMA should consult on a market investigation reference, as we are required to do by law.

3. Market studies are carried out under the Enterprise Act 2002 (the Act). Under the Act, the market study can be a self-standing piece of work, or alternatively it can lead to a further market investigation reference, which unlike the market study has powers to impose remedies on firms if these are appropriate for addressing any competition issues identified.

4. Under sections 131A and 131B of the Act the CMA is required, within the first six months of a market study (in this case, by 27 August 2023), to make a decision either (i) not to make a market investigation reference or (ii) to consult upon a proposal to make such a reference.

5. The recent judgment of the Competition Appeal Tribunal (CAT) in *Apple v CMA*[1] made clear that, where the CMA decides at six months not to make a market investigation reference, it cannot, in light of subsequent evidence or developments that may come to light in the second half of the market study, revisit that decision[2]. Instead, the CAT judgment explained that where the CMA considers at the six-month stage that it has identified some concerns that may justify a market investigation reference, the correct approach is to open a consultation and include, in the context of that consultation, information about the circumstances that may lead the CMA to decide not to make a reference.

6. This is therefore the approach we have decided to follow in this case, and we are opening a consultation on a proposal to make a market investigation reference

[1] [2023] CAT 21 (‘*Apple*’). This judgment is currently under appeal.
[2] Unless such evidence or developments establish a mistake of fact, misrepresentation and/or change of circumstance (§55(1) *Apple*).

under section 131 of the Act in relation to the supply of new homes to consumers ('housebuilding') in England, Scotland, and Wales.[3]

7. However, the CMA does not have to make a final decision on whether to make a market investigation reference until the conclusion of the market study, by which time we will have gathered and analysed further evidence and considered the results of the consultation. This work may lead us to conclude that a market investigation reference is not appropriate, or we may decide to make a reference, either consistent with the proposal or with an amended scope. Our decision now to consult on a proposal to make a market investigation reference should not therefore be taken as indicative of the final outcome of the market study. Our decision at this point is to consult and by so doing, to obtain stakeholders' views on that option. In particular, at the end of the market study the CMA may conclude that, even if the reference test is met, there may be alternative and more effective routes to address any concerns that the CMA has identified. For example, we may find that recommendations to government for legislative reform would be more effective if we were to find that our concerns about how the market is operating are mainly the result of deficiencies in the legal framework. Conversely, if we were to find at the end at the market study that our concerns are primarily driven by the way firms are competing, a market investigation reference may be the most effective way to deal with those concerns.

Progress to Date

8. We have received responses to our Statement of Scope from almost 40 different organisations, as well as over 250 individual responses, largely from owners of new build properties.[4] Alongside that, we have sent requests for information to the 11 largest housebuilders, 40 land agents and promoters, a sample of small and medium size housebuilders and 14 estate management companies, as well as carrying out interviews with local authorities, to assemble an evidence base in order to build a picture of the market and assess how well it is working.

9. We are continuing to analyse the evidence that we have received so far and will seek further evidence over the next few months from a range of market participants and other relevant stakeholders. In this update we summarise the initial issues and

[3] As set out in the CMA's Housebuilding Market Study Notice, the term 'housebuilding' encompasses all aspects of the construction and sale of new houses, flats, and any other accommodation, including securing land for future development (whether greenfield or brownfield), obtaining planning permission, putting in place agreements with the appropriate authorities, and the imposition of post-purchase charges or restrictions on freeholders where this occurs. It excludes conversions or changes of use of existing buildings. It also excludes the repair, renovation, and remodelling of existing housing stock. In relation to the imposition of post-purchase charges or restrictions on freeholders, it excludes charges or restrictions in respect of private gated residential estates, but otherwise includes the process of providing ongoing services or approvals in respect of such post-purchase charges or restrictions.
[4] None of the respondents called for a market investigation reference to be made by the CMA.

potential concerns that we have identified on the basis of our work to date, including those issues that pertain to a potential market investigation reference.

Stakeholder feedback and preliminary analysis

10. We begin with a brief discussion of the outcomes that the housebuilding market is currently delivering, before going on to consider particular features of the market that may be influencing these outcomes. Based on the responses to our consultation on the Statement of Scope, we have grouped the issues into five themes:

    (a) Land banks;

    (b) The private management of public amenities;

    (c) Planning;

    (d) Competition in the market; and

    (e) Barriers to entry and expansion.

Outcomes

11. As set out in our Statement of Scope we are considering whether there are issues in how the housebuilding market functions that are leading to poor outcomes for consumers. We set out that we would analyse outcomes of the competitive process for consumers including:

    (a) supply (the volume of new homes built, including the volume of affordable housing within that),

    (b) choice of new build homes,

    (c) quality of new build homes, which could relate to a wide range of parameters including but not limited to construction defects/levels of snagging, aesthetic value, or sustainability, and

    (d) innovation, for example in relation to sustainable design and construction, and other aspects of the move towards net zero housing.

12. We are also seeking to understand the role that diversity of market players, and the presence of small and medium-sized housebuilders, plays in driving innovation and quality.

13. The supply of new-build housing in England is currently short of the government's 300,000 annual target, and in a number of Local Planning Authority (LPA) areas, particularly in London, the East and the South East, housing delivery is currently below their local Housing Delivery Test (HDT) target.

14. In the second half of the study, we will seek to understand whether the functioning of the market is having a negative impact on the overall number of new houses supplied to the market, including the number of these that are affordable, as well as the level of choice that consumers can make among new houses. As set out in the Statement of Scope, we do not propose to test the validity of supply targets, or whether enough homes are being built to meet demand. However, we will give a view on what factors are impacting on the consistent under-supply against targets, and the relative importance of each.

15. On the topic of quality, several large housebuilders told us that they face strong competition to supply and design high-quality homes that people want to buy. Other respondents to our statement of scope said that smaller housebuilders were more likely to produce well-designed homes. We have commissioned an independent research agency to conduct qualitative research with the owner-occupiers of new-build homes to understand quality in more depth.

16. On innovation: we have found that most large housebuilders have made investments in off- or near-site pre-manufacturing, which is a key way to enable faster construction. The range and scale of investments across the modern method of construction categories could indicate a level of competition between the businesses in building homes efficiently and sustainably. We will explore this further in the second half of our study.

Land banks

17. Our analysis suggests that, measured by the number of plots, the land banks of the largest housebuilders have expanded over the past decade, although the evidence is more mixed when considered in terms of future years of supply. The majority of the 11 largest housebuilders own strategic land (that is, land that cannot be developed immediately, but could be developed in the future) across different regions of England and across Scotland and Wales.

18. The majority of housebuilders responding to our Statement of Scope told us that land banks are an essential component of housebuilders' business strategies, as they help to ensure there is a steady stream of projects successfully passing through the planning system.

19. Some academic researchers considered that greater concentration of market share of large housebuilders would lead to an overall slowing of build out rates and higher house prices than in 'competitive' markets. This was because, according to these academics, large housebuilders were likely to have greater market power, derived from focusing on larger sites, as well as more sites under construction, giving them more flexibility, and thus were able to build out more slowly to achieve higher sales prices compared with smaller developers. Conversely, one academic argued that

that there was little evidence to suggest large housebuilders had been significantly increasing the size of their land holdings in the last fifteen years.

20. We are continuing to investigate the drivers of the size of land banks, as well as the impacts for different market participants. In particular, we are examining whether land ownership at the local market level is concentrated among a small number of market players, both in terms of ownership of developable land, as well as in terms of the holding of permissions to build – and what implications this has for competition to supply new homes in those local markets. Further, we have heard from some stakeholders that land banks held by large housebuilders may disadvantage small and medium-sized builders by limiting the availability of land suitable for development. We are also exploring whether Small and Medium-sized Enterprise (SME) housebuilders' inability to engage in holding land banks also reduces their ability to compete effectively in the market. If these competition concerns are borne out by further analysis in the second part of the market study, this could constitute the basis for a market investigation reference as discussed below. However, it may be the case that any such concerns are better addressed through legislative reforms.

21. We will be publishing a working paper in the autumn setting out our further analysis and provisional views on any measures to tackle any areas of concern.

The private management of public amenities

22. The need for the private management of public amenities on housing estates arises where agreement cannot be reached between the housebuilder and relevant public authority, so as to enable the authority to adopt such amenities (for example roads, lighting and public open spaces) and become responsible for their upkeep. Under such circumstances, the housebuilder generally appoints an estate management company to take on the maintenance of the public amenities.

23. We have received evidence from over 250 members of the public relating to what they see as unfair charges that estate management firms impose on them, as well as other harms, such as the poor quality of service they receive, potential impact of these charges, and negative impacts on the onward sale of their houses. Concerns around a lack of transparency regarding charges, lack of protection for freehold residents and failure by local authorities to adopt amenities were key themes coming through the responses. Two estate management companies that wrote to us acknowledged that there were issues in the way the market operates.

24. Information we have collected and analysed shows that over 80% of the freehold properties the 11 largest housebuilders, representing around two-fifths of all new builds across England, Scotland and Wales, have been building in recent years are likely to be the object of such charges. Local authorities in England, Scotland and Wales that we have spoken to have confirmed that such arrangements are now the

norm and that they do not typically seek to adopt open public spaces, such as parks and playgrounds. We understand that new environmental regulations coming into force in England in Autumn 2023 requiring the creation and maintenance for 30 years of biodiverse open spaces on new estates will further embed the role of estate management companies in future housing estates, thus potentially worsening the situation if it remains unchecked.

25. Our analysis suggests that the root cause of the issues lies in the combination of:

    (a) Weaknesses in the legal framework,

    (b) Increasingly complex and slow adoption processes,

    (c) The funding constraints of local authorities; and

    (d) The financial/commercial incentives of housebuilders.

26. Over the next few months, we will be carrying out qualitative consumer research with a sample of new-build owner-occupiers in order to explore further the issues identified by the members of the public who responded to our Statement of Scope.

27. Our current view is that the features of the market underpinning private management of public amenities could constitute a basis for a market investigation reference. However, it may be the case that any such concerns are better addressed through recommendations to government and we will consider this further in the second half of our study.

28. We will be publishing a working paper in the autumn setting out our further analysis and provisional views on any measures to tackle any areas of concern

Planning

29. Responses to our Statement of Scope, and the stakeholder engagement we have conducted in the first half of the study, suggest that in several important ways, the planning systems in England, Scotland and Wales are impeding the effective functioning of the housebuilding market.

30. There is a broad consensus about the biggest issues, namely: the complexity of the planning system and the resources it therefore requires to navigate; the regularity with which the rules change, including the introduction of sustainability requirements; and the preference among some local planning authorities for larger development projects.

31. These concerns are expected to have a greater negative impact on SME housebuilders, which are less able to absorb increasing fixed costs of managing the planning process.

32. We have analysed the evolution of planning timelines over recent years and have found that significantly fewer approvals are provided within statutory timetables now than in 2009.

33. On the broader issue of whether current planning policy incentivises LPAs to deliver their housebuilding targets, LPAs have to balance multiple objectives through planning policy, of which the number of houses to be delivered is only one. These issues are potentially compounded by limited resources of LPAs which have to deal with at times contentious planning decisions, providing further obstacles to delivering against targets, particularly in areas facing greater constraints on land suitable for development. We will continue to consider these issues in the second half of our market study, and we will be publishing a working paper in the autumn setting out our further analysis and provisional views on any measures to tackle any areas of concern.

Competition in the market

34. We are examining both competition to secure land for development and competition to supply new-build housing downstream, as well as the interplay between them.

35. On competition in the land market, we have heard from some respondents to our Statement of Scope that large housebuilders have a strong market position in the land market, and that this gives them power both in housing delivery and maintaining higher prices than in a competitive market. By contrast, the large housebuilders argued that there was intense competition for the purchase of land.

36. Our analysis suggests that there is sufficient land available for development. However, we are continuing to explore how transparent the sales process for land is. The large housebuilders have resources to seek out and acquire sites that have not been openly offered for sale, and we are exploring how much of an advantage this gives them over their smaller peers in navigating the land market.

37. Our analysis also suggests that intermediaries – land agents and promoters – do not appear to privilege large housebuilders over SME housebuilders, with just under half of plot sales to housebuilders via major agents going to housebuilders other than the 11 largest.

38. On competition to supply homes to market, the large housebuilders told us that the market was not concentrated and that there was significant competition, as they competed with the existing housing stock. In contrast, we also heard the view that the market was increasingly concentrated, and several SME housebuilders suggested that the current operation of the housebuilding market favoured large housebuilders.

39. Our analysis of the housebuilding market so far suggests that national shares of supply do not appear to be concerning in themselves, although we are continuing to examine concentration within smaller geographic areas and the implications of this structure for market dynamism, as well as shares of supply at the local level.

40. The amount of housing delivered by SME housebuilders, and particularly small builders, has been falling since the 1980s, with the decline accelerating in the wake of the 2008 financial crisis. Our current view is that this decline in SME building activity is driven by a confluence of factors, including difficulties in acquiring land and navigating the planning system.

41. At the local level, we are undertaking analysis to understand the impact of market concentration on outcomes, including price, quality and build-out rates, and will be exploring this in depth in the second half of the study.

Barriers to entry and expansion

42. Our engagement with SME housebuilders to date suggests that the planning system and access to land are their key barriers to being able to compete effectively in the market.

43. On planning: issues raised include inconsistency in decision making, the length of time the planning process takes, the complexity and levels of information required, and concerns that the planning system favours large sites. It is likely that the need to hold several prospective sites at one time in order to manage the planning process, alongside the time, cost and complexity in navigating the planning system more generally, has a disproportionate impact on SME housebuilders.

44. On the land market: as noted above, we have provisionally found that land availability across England, Scotland and Wales is good, but we are still determining whether the sites are suitable for SME purchasers: some SME housebuilders have highlighted that the availability of land (particularly land with planning permission), and to a lesser extent the affordability of land, is an issue. Further, we are assessing whether there may be transparency issues when it comes to land being made available to purchase.

45. We will continue to examine these issues in the second half of our study.

Market investigation reference

46. In accordance with section 131 of the Act, the CMA may decide to make a market investigation reference when the findings of a market study give rise to reasonable grounds for suspecting that a feature or combination of features of a market or markets in the UK for goods or services prevents, restricts or distorts competition.

47. However, even if the statutory reference test is met, the CMA nonetheless has discretion on whether to make a reference. The CMA may decide that a reference is not the most appropriate course of action.

48. In particular, a market investigation reference would not be the most appropriate course of action if the competition problems identified are better addressed through other means than the remedies powers available to the CMA in a market investigation, including if the concerns are best addressed through legislative reform if we were to find that they are mainly the result of deficiencies in the legal framework, or other recommendations to government.[5]

49. Based on the information gathered to date, we believe that the legal reference test is likely to be met in relation to the home builders' practices of holding large land banks and in relation to private management of public amenities on freehold housing estates ("freehold estate management"). We summarise below the basis for these concerns.

Land banks

50. The amount of land held by larger housebuilders has been increasing for at least a decade. We consider that some level of land holding is unavoidable for housebuilders to manage the necessary timescales for identifying and procuring land, obtaining planning permission and building out developments.

51. However, we are particularly concerned that competition may be being distorted if land is held for longer and in larger quantities than is necessary. We are considering whether concerns arise in the following ways:

(a) Restrictions on the availability of developable land as a result of volume housebuilders holding large landbanks, and whether this may act as a barrier to entry, particularly for small and medium sized housebuilders.

(b) Concentration in certain local markets through the control of a significant proportion of developable land by a small number of housebuilders, which if evidenced, may lead to poor outcomes for purchasers of new homes and for the housing market at large, including lower quality or less diverse new homes, and slower build-out rates.

(c) The extent to which land banks compound the negative impacts of any lack of transparency as to the ownership (and control via options) of land. A lack of transparency may hinder small and medium sized housebuilders from identifying and securing suitable land for development and make it more

[5] OFT511 - Market investigation references (publishing.service.gov.uk), Section 2.

difficult for them to appraise the nature of competition in a given local area. This effect is likely to be more pronounced the more land banking occurs.

(d) We are also exploring whether large land banks are a symptom of other aspects of the house building market not working well. In particular, we are exploring whether aspects of the planning process mean that the holding of large tracts of land is important for the efficient management of risk and cost, and whether this may further raise barriers to entry by placing builders who do not have the resources to invest in such land holdings at a material disadvantage.

52. While we believe that the reference test is likely to be met in relation to land banks, it is also clear that the planning system plays an important role in shaping behaviour in the market, and that reforms to the planning system may be the most appropriate way of addressing any problems in the market that we identify. If we conclude this is the case, then we would decide not to make a market investigation reference, but instead make recommendations to government to reform the planning system.

Private management of public amenities

53. Based on evidence we have gathered from the 11 largest housebuilders, interviews with local authorities and analysis of publicly available information, there is reason to believe that the financial incentives of housebuilders and local authorities, combined with weaknesses in the legal framework governing the adoption of public amenities by relevant authorities are causing the increase in the reliance on private management companies for the upkeep of public amenities (roads, open spaces, sustainable drainage systems) in newly built estates. These public amenities are not for the exclusive use of residents and tend to be managed by private companies appointed by the housebuilders early on in the housing development process. Residents in new developments are consequently paying charges for these services in addition to their council tax. This anomalous situation has become increasingly prevalent in recent years.

54. These concerns also affect how the market operates. We are particularly concerned that competition may be being distorted because the legislative framework governing the process of adoption and other financial aspects creates strong incentives for both housebuilders and local authorities to minimise the level of adoption of roads and/or other public amenities. If adoption does not occur, private arrangements are made for the management of newly built freehold estates. This gives rise to the following features:

(a) Lack of transparency for consumers in relation to material aspects of the way in which a newly built estate will be managed, including the actual costs that will be involved, the obligations of house buyers and consequences of the involvement of an estate management company.

(b) Significant market power conferred to estate management companies by housebuilders through the process they use, and have used, for the appointment of estate management companies.

(c) High barriers for consumers to switch estate management companies alongside inadequate rights for freeholders facing unsatisfactory freehold management arrangements, for example: no legal right to manage, require the removal of a management company or challenge the reasonableness of fees (unlike leaseholders who are able to apply to a tribunal for such matters); no ombudsman; potential exposure to disproportionate sanctions under the Law of Property Act 1925 and lack of redress should such sanctions be wrongfully imposed.

55. As with land banks, the legal and policy framework plays a central role shaping behaviour in the market, and if we reach the view that the concerns that we identify are best addressed through changes in the legal and policy framework, rather than through a market investigation, we would decide not to make a reference.

56. We believe that the reference test is likely to be met in relation to the home builders' practices of holding large land banks and private management of public amenities on freehold housing estates. We are therefore opening a consultation on a proposal to make a market investigation reference under section 131 of the Act in relation to housebuilding in England, Scotland, and Wales.

57. We will take a final decision on whether to make a market investigation reference at the conclusion of the market study.

Next steps

58. Over the second half of the market study we will continue to gather and analyse further evidence, and engage with stakeholders, in relation to the five themes outlined above. In response to this initial update and consultation, we are particularly seeking views on the concerns identified in relation to land banks and private management of public amenities, including whether these would merit a market investigation reference or would be best addressed through other means, for example recommending changes in law or policy by government.

59. We will publish working papers in the autumn setting out more detailed thinking and analysis on key areas of concern, including our emerging thinking on the most effective solutions to tackle those concerns.

1. Introduction

1.1 We launched a market study focused on the housebuilding sector on 28 February 2023.

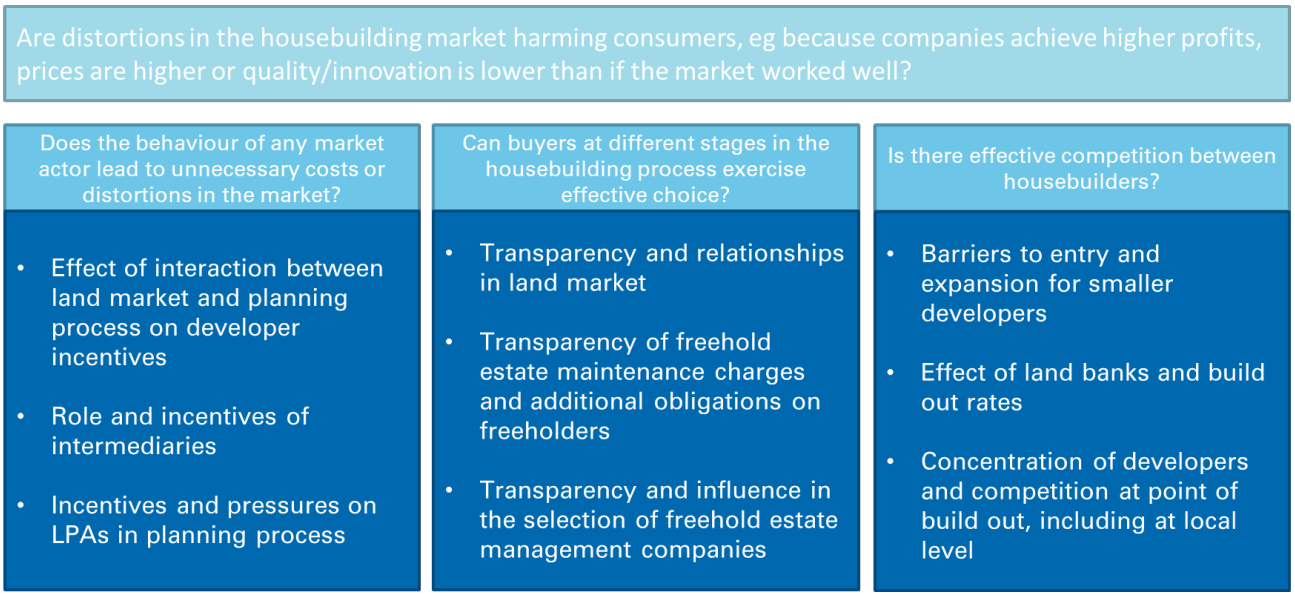
1.2 The market study seeks to explore whether there are distortions in the housebuilding market harming consumers, for example: because prices are higher, profits are higher, or quality/innovation is lower than if the market worked well. As illustrated by Figure 1.1 below, this involves seeking evidence relating to three core questions:

(a) Does the behaviour of any market actor lead to unnecessary costs or distortions in the market?

(b) Can buyers at different stages in the housebuilding process exercise effective choice?

(c) Is there effective competition between housebuilders?

Figure 1.1: Key questions and areas to explore in the Housebuilding Market Study



Note: In this document, the term 'freehold estate' is used to refer to a development which includes any housing of a freehold tenure. As such, mixed tenure estates that include freehold homes would also be classed as freehold estates for the purposes of our analysis.

1.3 In this market study, the term 'housebuilding' encompasses all aspects of the construction and sale of new houses, flats, and any other accommodation, including securing land for future development (whether greenfield or brownfield), obtaining planning permission, putting in place agreements with the appropriate authorities, and the imposition of post-purchase charges or restrictions on freeholders where this occurs. It excludes conversions or changes of use of existing buildings. It also excludes the repair, renovation, and remodelling of existing housing stock. In

relation to the imposition of post-purchase charges or restrictions on freeholders, it excludes charges or restrictions in respect of private gated residential estates, but otherwise includes the process of providing ongoing services or approvals in respect of such post-purchase charges or restrictions.

1.4 We have been gathering and analysing evidence to enable us to:

(a) understand how the market is structured, the relationships between key participants, and other aspects of the way the industry operates, at each key stage of the housebuilding process;

(b) establish whether there may be market distortions in the supply of new homes; and

(c) explore and seek to measure, where possible, whether and to what extent any of the competition issues that we may identify, as described above, may lead to consumer harm, by looking at prices, profitability, quality, and innovation in the sector.

1.5 In this document, we provide an update on the progress we have made to date in evidence gathering and analysis, provide an overview of the key themes from the responses we received to our Statement of Scope and our decision to consult on a proposal to make a market investigation reference.

Progress

1.6 Since launching the market study, the CMA has been gathering information and discussing issues with a range of stakeholders. We have focussed our initial evidence gathering on the building blocks of how the sector works, and obtaining evidence to inform the decision we are required to make by 27 August, i.e. whether or not to consult on a proposal to make a market investigation reference.

(a) We have engaged with a range of stakeholders including the large housebuilders, Small and Medium-sized enterprise (SME) housebuilders, local authorities, land agents and promoters, estate management companies, consumer groups and representative bodies.

(b) As part of our engagement, we have spoken to stakeholders across different parts of England, Wales and Scotland to get an understanding of the challenges facing different regions.

1.7 Specifically, we have:

(a) sent requests for information (RFIs) to the 11 largest housebuilders,[6] to over 40 land agents and promoters, to over 41 SME housebuilders and to 15 estate management companies.

(b) met with numerous stakeholders including local authorities, estate management companies, housebuilders, and various representative bodies (including trade associations, consumer groups and associations representing planning and housing officers and local authorities).

(c) procured planning data from a specialist supplier.

(d) procured an independent research agency to carry out qualitative research with a sample of 100 owner-occupiers of new-build homes, with a focus on understanding their expectations and experiences of the quality of their new home (50 interviews), or their experiences of estate management charges where these apply (50 interviews).

1.8 We also received responses to our Statement of Scope from almost 40 different organisations, as well as over 250 individual responses largely from owners of new build properties. Non-confidential versions of these responses have been published on our case page as well as a summary of the individual responses.

1.9 We are reviewing and analysing the information we have obtained across the range of issues that we identified in our Statement of Scope and where appropriate, additional issues that were brought to our attention by stakeholders in our initial engagement. In this document, we focus on setting out the themes that have emerged from responses to our Statement of Scope and evidence that we have received so far that is pertinent to the question of whether or not we should consult on a proposal to make a market investigation reference.

1.10 We are continuing to analyse the information we have received and will seek further evidence over the next few months from a range of market participants and other relevant stakeholders, in particular in relation to:

(a) The planning system and policies: we will continue our engagement with key parties, seek to further understand differences between England, Scotland and Wales and will continue our analysis of the impact of the planning system and planning policies on competition.

(b) Quality and sustainability: we will continue our analysis considering the metrics that are used by housebuilders to measure quality and the

[6] The largest housebuilders were selected based on turnover and completions over the previous two financial years. Given that the volumes built by different housebuilders vary year to year, there may be other large housebuilders of similar size not included in this sample. However, the housebuilders we have selected represent a significant proportion of houses built in England, Scotland and Wales and include those building in each Nation and so consider this to be an informative sample for understanding the sector.

information that is made available to people looking for a home. We will seek to engage with stakeholders on issues relating to innovation and sustainable design and construction. We will also analyse the results of our consumer research.

(c) Devolved Nations: Housing is a devolved matter and as such our market study reflects the different policy approaches being taken in each nation. As such, we will continue to engage with stakeholders in England, Scotland and Wales to ensure that our analysis reflects the key differences between nations.

(d) Potential remedies: as our work progresses, we will seek to identify the most effective solutions to any competition problems that we may identify throughout this market study. It may be the case that these competition problems are better addressed through other means than the remedies powers available to the CMA in a market investigation, including if the concerns are best addressed through legislative reform or other recommendations to government. If we conclude this is the case, then we would decide not to make a market investigation reference, but instead make recommendations to government.

Structure of the report

1.11 This report summarises the initial issues and concerns raised by stakeholders and individuals and our emerging thinking. As we are still in the process of gathering evidence and undertaking analysis, this update explains what we have heard so far, sets out the analysis we have been carrying out and gives our initial views on the issues we have been considering, before outlining the further work that we are planning.

1.12 In the following sections, we first discuss the outcomes that the housebuilding market delivers currently. We then consider the following areas:

(a) Landbanks;

(b) The private management of public amenities;

(c) Planning;

(d) Competition in the market; and

(e) Barriers to entry and expansion.

1.13 We then set out our decision on whether or not to consult on a proposal to make a market investigation reference.

2. Stakeholder feedback and emerging thinking

Outcomes

Introduction

2.1 Evaluating outcomes of the competitive process in their different forms in a market – including prices and profitability, levels of innovation, product range and quality – helps the CMA determine whether there are competition problems and, if so, the extent to which customers may be harmed by them.[7]

2.2 Prices and profits are among the more observable and measurable outcomes, and an analysis of these may be useful in understanding the extent and nature of competition and can be helpful in measuring customer detriment. However, the other, less quantifiable factors, such as quality, innovation and range and design of product are no less important to customers.[8]

2.3 We said in our Statement of Scope that we would consider whether there were issues in how the housebuilding market functions that might adversely impact quality and innovation in new housebuilding. We set out that we would analyse outcomes of the competitive process for consumers including:

(a) supply (the volume of new homes built, including the volume of affordable housing within that),

(b) choice of new build homes,

(c) quality of new build homes, which could relate to a wide range of parameters including but not limited to construction defects/levels of snagging, aesthetic value, or sustainability, and

(d) innovation, for example in relation to sustainable design and construction, and other aspects of the move towards net zero housing.

2.4 As part of this analysis, we said we would seek to understand the role of choice and in particular of SME housebuilders in driving quality and innovation (including in the development of more sustainable homes).

2.5 We also said that we would consider pricing and profitability within this market. However, we recognised that pricing is driven by many other factors beyond housebuilding levels, in particular the extent to which property is seen as an attractive financial rather than functional asset. This means that we will not seek to assess what the 'right' price for a new-build home might be. Instead, we are

[7] CC3 (Revised), paragraph 103.
[8] CC3 (Revised), paragraph 104.

considering the way in which prices are set by housebuilders, including whether and how this may be affected by:

(a) the price paid for land and other inputs;

(b) projections made when the development is first conceived; and

(c) local market conditions at the time of construction.

Stakeholder feedback

2.6 Several large housebuilders stated that they lack the ability to exert any control on the price of new homes as new supply competes with second-hand homes in the area. Others disagreed and said the market power large housebuilders have enabled them to drip feed new housing onto the market, effectively giving them some control over pricing.

2.7 Several larger builders said that they faced strong competition to supply and design high-quality homes that consumers want to buy. One housebuilder also argued that, due to obligations to report quality metrics, they are often held to a higher standard than SME housebuilders. Other respondents called for greater diversity in the housing supply, referring to:

(a) **Small housebuilders:** Several respondents said that smaller developers were more likely to produce well-designed homes and neighbourhoods than their larger counterparts. One said that new housing developed by smaller housebuilders was more likely to be accepted by local communities due to the perceived better quality of the homes.

(b) **Consumer choice:** We received a number of submissions regarding consumers' lack of choice when purchasing new build housing. Some of these responses expressed the need for self and custom build to diversify the providers and types of housing across the country. There were additional claims that larger builders produce identikit housing that consumers don't want to purchase but do not have a choice. Diversification was reported as one of the many necessary conditions to enable an increased supply of new housing and in turn, a functioning market.

(c) **Innovation:** The majority of housebuilders outlined that they expected regulations on the building of new homes to continue to increase in line with transitions to Net Zero. Some detailed the steps they are taking in considering embodied carbon across the whole lifecycle of their business and the steps they plan to take to reduce this. A range of respondents mentioned modern methods of construction and the benefits this could provide to challenges faced in housebuilding such as skills shortages, quality and

sustainability. Alongside this, they outlined the barriers to growth in this sector.

Emerging thinking and next steps

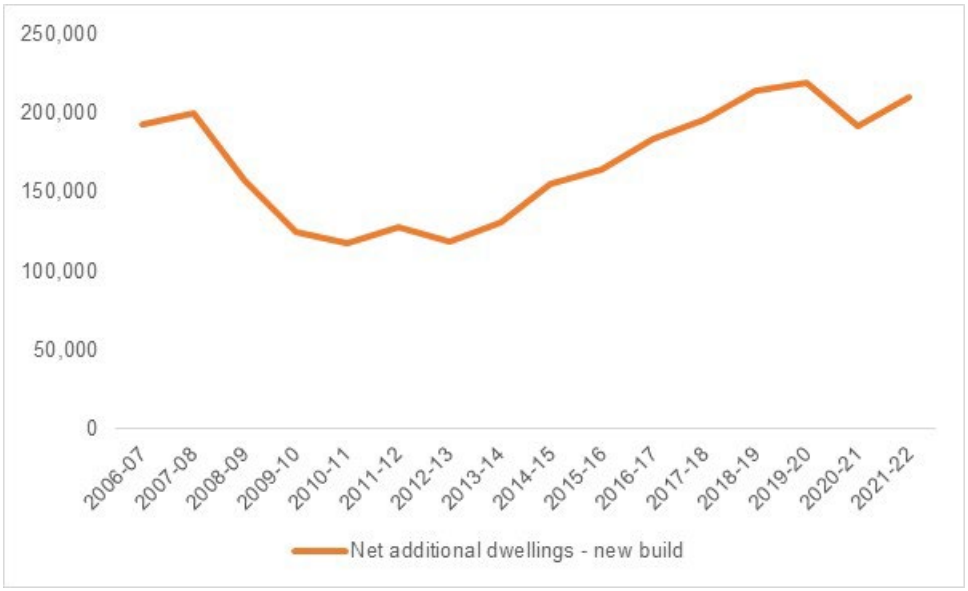
Supply

2.8 The amount of housing that is supplied to the market depends on a range of factors, including decisions made by housebuilders, government policy (such as housebuilding targets or government house building programmes); broader macroeconomic conditions; the planning system and how well it functions; how effectively the markets for the supply of land and housing are working; and natural constraints such as the quantum of developable land in places where people want to live.

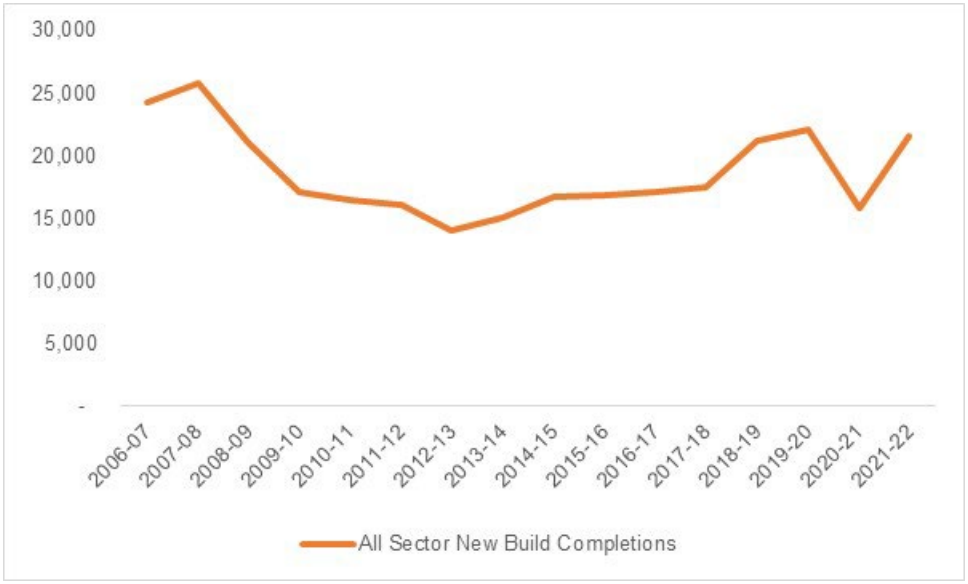
2.9 As Figure 2.1 shows, since the 2007-8 financial crisis the volume of new homes built in England has increased steadily, although it remains below the Government's 300,000 annual target. In more recent years the growth in new homes built has stalled, although the Covid-19 pandemic will have impacted on the post-2020 period. In Scotland and Wales, the volume of new homes built also fell significantly following the financial crisis, but the subsequent recovery in new homes built was much more limited than in England, with annual volumes of new homes built remaining below their pre-crisis levels.

Figure 2.1: New homes built in England, Scotland and Wales 2006-7 – 2021-22

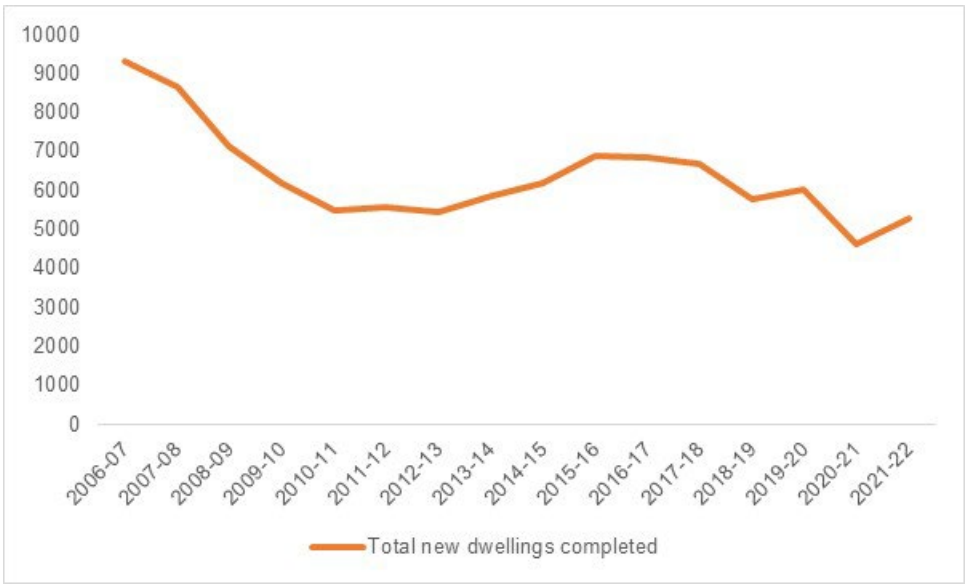
England



Scotland



Wales



Sources: https://www.gov.uk/government/statistical-data-sets/live-tables-on-net-supply-of-housing; Housing statistics quarterly update: new housebuilding and affordable housing supply - gov.scot (www.gov.scot)
New dwellings completed by period and tenure (gov.wales).

2.10 At the local level in England, Local Planning Authority (LPA) Housing Delivery Test (HDT) targets are based on assessment of local housing need, the starting point for which are local plan targets or the Standard Method depending on if the LPA has an up-to-date local plan.[9] Our analysis of HDT data shows that the majority of LPAs in England exceed their HDT targets. Significant underperformance of housing delivery against targets is limited to a relatively small number of LPAs, often without an up-to-date local plan or five-year housing land supply and these are relatively highly concentrated in certain areas of the country. For example, the

[9] See: Housing Delivery Test measurement rule book - GOV.UK (www.gov.uk).

2021 HDT test data shows that 51 out of 306 LPAs assessed[10] had built less than 75% of the new homes they were targeting[11] and of these 37 were located in the South East, East of England, or London regions. We discuss the role of local plans in more detail in paragraphs 2.94 to 2.95.

2.11 Scotland and Wales also have different approaches to the assessments of local housing need with no equivalent to the Standard Method but instead making local assessments of need, undertaken using fairly extensive guidance and tools provided by the respective governments.[12] In the second half of the study we will seek to understand whether the functioning of the market is having a negative impact on the overall number and new houses supplied to the market, including the number of these that are affordable, as well as the level of choice that consumers can make among new houses. As set out in the Statement of Scope, we do not propose to test the validity of supply targets, or whether the UK is building enough homes to meet demand. However, we will give a view on what factors are impacting on the consistent under-supply against targets, and the relative importance of each.

Quality

2.12 The quality of a new-build home relates to a wide range of parameters across different stages of the housebuilding process. The consumer facing metrics on the quality of new builds are the Consumer Satisfaction Survey (CSS) results and the HBF Star Rating Scheme. The CSS is undertaken by warranty provider NHBC who sends out surveys to new-build homeowners, measuring satisfaction with the developer and with high-level aspects of the property at both 8 weeks and 9 months post legal completion. The HBF Star Rating Scheme uses a data from the 8-week survey, and more recently other warranty providers' 8-week survey results to produce the Star Rating for participating members.

2.13 These metrics were borne out of recommendations from the 2004 Barker report and the Office for Fair Trading's market study in 2008 where low customer satisfaction levels were a key concern.[13] Since then, the CSS, for which the results are published annually, suggests that customer satisfaction, and their experience of the aftersales process has improved. Notwithstanding indications that customer satisfaction has improved, numerous pieces of research and responses to

[10] We removed a small number of LPAs included in the HDT data where the hosing targets for them was negative of implausibly low.
[11] CMA analysis of HDT data for 2021 (source: Housing Delivery Test: 2021 measurement - GOV.UK (www.gov.uk)).
[12] Local housing market assessment (LHMA): guidance for local authorities | GOV.WALES; Housing Need and Demand Assessment (HNDA): practitioner's guide 2020 - gov.scot (www.gov.scot).
[13] Review of Housing Supply – Kate Barker 2004; Homebuilding in the UK, A market study, OFT1020 2008

consultations from 2016 onwards indicate that the quality of the construction of new builds is a prevalent concern.

2.14 So far, in examining this area, we have gathered data from the Consumer Code for Homebuilders (CCHB) on complaints and from the NHBC on their Consumer Satisfaction Survey. We have also reviewed existing literature on consumer complaints and met with the New Homes Quality Board (NHQB) to discuss the New Homes Quality Code and the New Homes Ombudsman Service, which NHQB oversees. NHQB was set up to oversee reforms in the quality of new homes and the customer provided by developers.[14]

2.15 We note that HBF's statement of scope response included Ipsos MORI's recommendations on how to better align the Star Rating Scheme with the new NHQB code. The proposed changes are to the phrasing of the questions, including the 9-month survey results as part of the Star Rating System, and making more information available to the public. We have gathered data from the CSS and plan to consider whether these metrics and the proposed changes will be helpful for consumers.

2.16 To further understand quality, in the second half of the study we will examine the information consumers have access to on new build quality, their expectations and access to redress. To support this and work on estate management charges, we have commissioned an independent research agency to explore whether new-build owner-occupiers are satisfied with the quality of the properties they have purchased and the estates they live on, and whether there are particular aspects which are more or less problematic.

2.17 The consumer research will include consumers who have purchased new-build properties from developers of different sizes. We will also continue our engagement with housebuilders and other stakeholders on whether there are differences in people's experiences of purchasing from different sized developers.

Innovation

2.18 To understand innovation, we have gathered information from a range of housebuilders and reviewed existing research and literature by industry stakeholders such as the Home Builders Federation (HBF) and Parliament.

2.19 We have found that most large housebuilders have made investments in off or near site pre-manufacturing which is a key way to enable faster construction. Many have acquired timber frame factories, started their own or invested capital in modular home factories. The range and scale of investments across the modern method of construction categories could indicate a level of competition between

[14] See Homepage (nhqb.org.uk).

the businesses in building homes efficiently and sustainably.[15] The investments imply that competitors are sufficiently incentivised to improve their products, services and strategies to maintain competitive advantage.[16]

2.20 We will continue to test this hypothesis in the second half of our study, alongside other measures of competition and undertakings in sustainable design on the path to Net Zero.

Profitability

2.21 Finally, on profitability, we have gathered financial information from the 11 largest housebuilders in Great Britain and begun our analysis.

2.22 We plan to assess the profitability of these housebuilders to understand whether their levels of profitability achieved are consistent with the levels we might expect in a competitive market. If excess profits (i.e. profits above the levels that we would expect in a competitive market) have been sustained over a sufficiently long period of time, this could indicate that competition may not be working effectively. We shall interpret the results from our profitability assessment in the wider context of our market study, including our understanding of the broader competitive dynamics.

Land banks

2.23 As set out in our Statement of Scope, we are considering whether established housebuilders' control of large land banks enables them to strengthen their position in local housing markets.

2.24 The majority of large housebuilders have an inventory of land, which cannot be developed now, but which could be developed in the future. We use the term 'land banks' to refer to the amount of land which housebuilders own or control (for instance via options to purchase the land). Land may be categorised as short-term or consented land (which has been given some form of planning approval) or long-term or strategic land (which has not yet received any form of planning approval).

2.25 There are good reasons why a housebuilder may wish to maintain significant land banks. As we note elsewhere in this document, the need to gain planning permission on a piece of land before building commences creates uncertainty around when, if ever, it will be possible to begin building on a particular site. Other factors, such as local market conditions and the availability of skilled labour and other resources may mean that building on a site may need to be delayed. Having

[15] Modern Methods of Construction: introducing the MMC definition framework - MMC cross industry working group 2019
[16] Methodologies to Measure Market Competition – OECD 2021

a supply of land that can become ready to build on at different points may therefore help builders manage these uncertainties to maintain a steady stream of properties coming to the market.

2.26 We also appreciate that any owner of potentially developable land (including housebuilders) needs to decide between developing (or selling) the land now or waiting and developing (or selling) it later. Where the value of land is expected to increase in future, all else equal there is a greater incentive to hold onto it rather than develop it as soon as possible. However, there may also be concerns that the way housebuilders are holding land in land banks may be having negative impacts on the functioning of the market.

(a) First, if a housebuilder holds a significant proportion of land suitable for development, this could limit the land available to other housebuilders, particularly SMEs. Where those other housebuilders would be in a position to develop that land more quickly, this could limit or slow down supply.

(b) Second, if a housebuilder holds a lot of land in a local area, either through one or more large sites or several smaller sites, this could give them the ability to "drip" houses onto the market in that area more slowly than necessary, thereby allowing them to limit supply in the area and avoid undermining prices by "flooding" the market.

2.27 Several studies have considered these issues in the past. One important study was the Letwin Review, published in 2018.[17] It found that major housebuilders' business models depend on generating profits from the sale of housing, not from increases in the value of land.

2.28 Over the second half of the market study we will continue to gather and analyse further evidence to allow us to reach a final view on the concerns set out in paragraph 2.26. In the meantime, we can present our initial analysis and set out our plans for further work.

2.29 Our initial analysis presented below is based largely on public data and initial feedback. We have gathered and are in the process of analysing data from the 11 large housebuilders on their holdings of land, which we will consider alongside further data from Glenigan on land which has or is in the process of gaining planning permission and recently completed construction. This will be used to inform our views going forward as to the significance and effect of land banks for how the market operates.

[17] The Letwin Review, was announced by government at Budget 2017. The review was commissioned to look at and analyse the significant gap between housing completions and the amount of land allocated or permissioned and make recommendations for closing the gap. The final report was published on 29 October 2018.

Stakeholder feedback

2.30 Most large housebuilders said that the rationale for these holdings was to maintain a continuous pipeline of land for development. Such a strategy was considered essential given the delays and uncertainties in the planning process and the lack of consented land opportunities.

2.31 Several large housebuilders referenced the Letwin Review in their responses. They supported the review's findings that land banking by major housebuilders does not negatively impact the rate of delivery of new homes, and instead could be expected to accelerate the build out rate of developments.

2.32 Some housing academics considered that greater concentration of market share of large housebuilders is associated with an overall slowing of build out rates and higher house prices relative to 'competitive' markets. This was because, they believed, large housebuilders were likely to have greater market power, derived from focusing on larger sites, as well as more sites under construction, giving them more flexibility, and thus were able to build out more slowly to achieve higher sales prices compared with smaller developers.

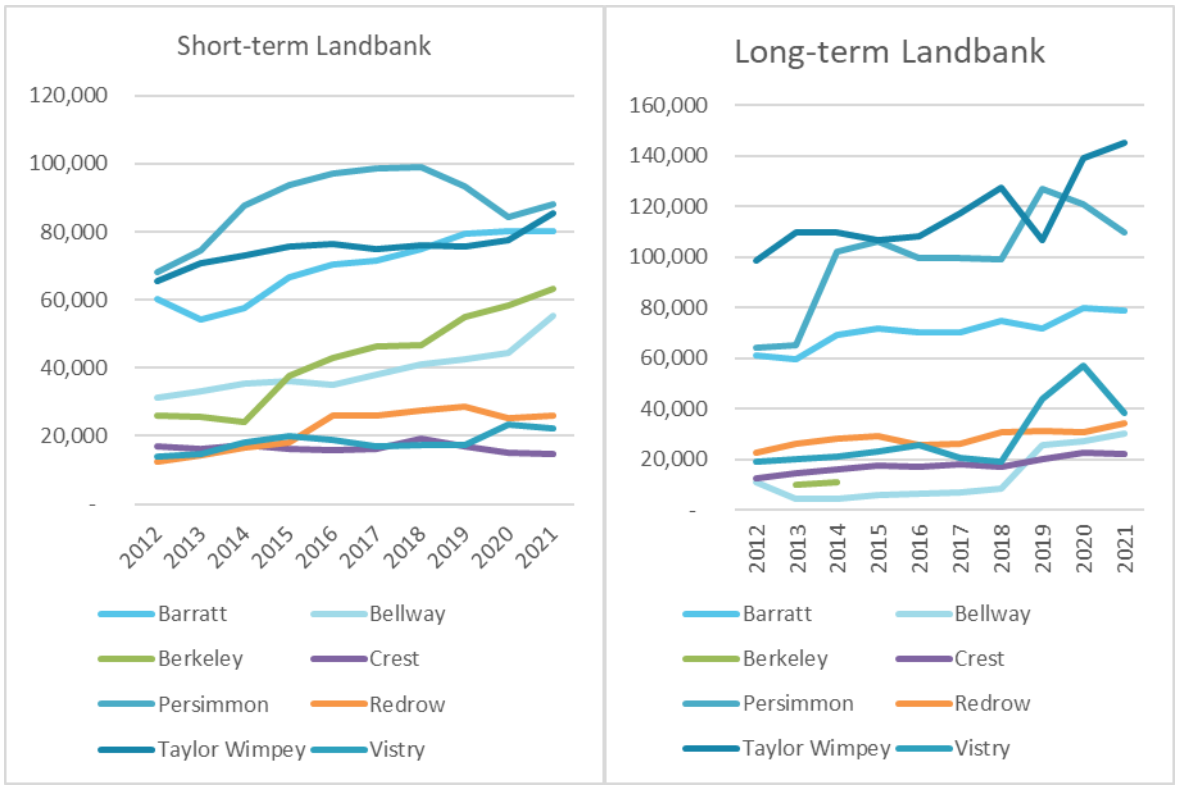
2.33 One academic, however, argued that that there was little evidence to suggest that large housebuilders had been significantly increasing the size of their land holdings since the previous Office of Fair Trading market study in 2008, and therefore a limited impact from land banking in the UK.

CMA analysis and emerging thinking

2.34 We have carried out analysis to look at the size of land banks held by the largest housebuilders and how these have changed over time. The two main metrics used to measure the size of landbanks are the number of plots and the years of supply at their current build-out rate.

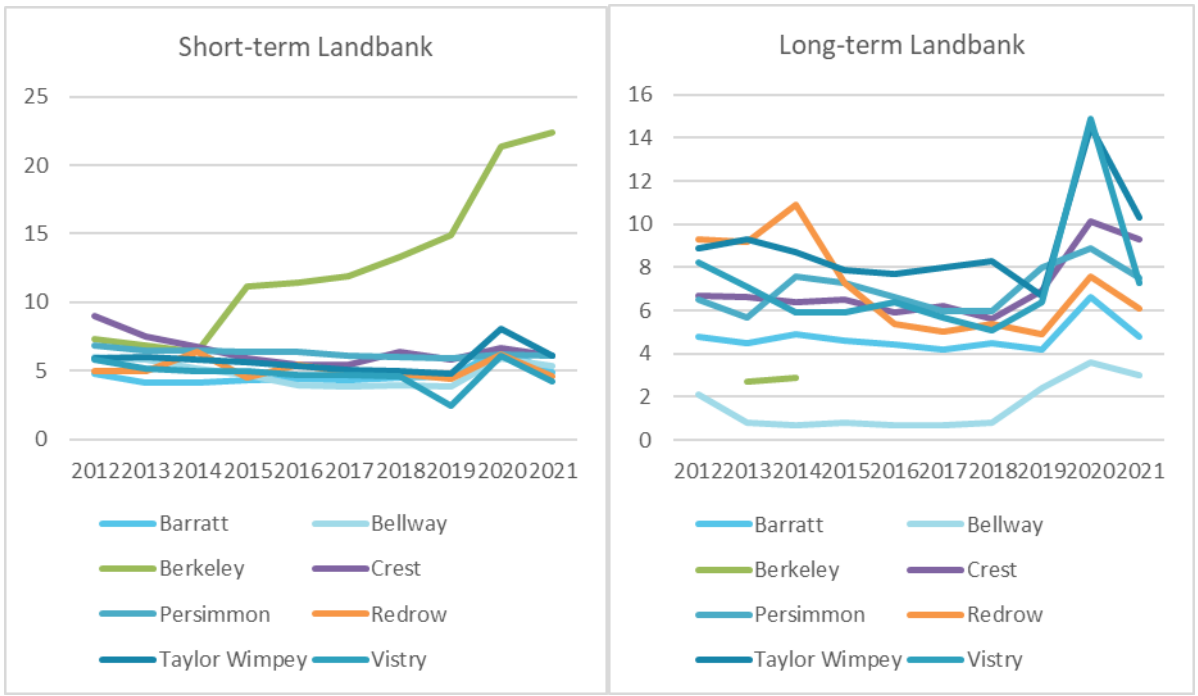
2.35 The largest housebuilders own or control significant swathes of land, accounting for hundreds of thousands of plots and equivalent to many years' worth of future supply (in some cases in excess of 10 years' worth across consented and strategic land), as illustrated in Figure 2.2 and Figure 2.3. While the trends differ between housebuilders, several of the largest housebuilders have increased the number of plots in both their short-term and long-term land banks, although this has not always corresponded with changes in the number of years of future supply.

Figure 2.2: Landbank measured in plots



Source: CMA analysis of Jeffries UK Building, Construction & Housebuilders, Equity Research, October 2022

Figure 2.3: Landbank measured in years



Source: CMA analysis of Jeffries UK Building, Construction & Housebuilders, Equity Research, October 2022

2.36 As noted above, we have received representations that this reflects a need to secure future supply by having land at different stages in the planning process, with the size of land banks reflecting the high costs, time and risks involved in

navigating the planning regime. We have also heard that the large housebuilders value being able to make choices around where and when to develop land, and whether to draw on strategic land (which tends to be higher risk but generate higher returns) or short-term land (which tends to be lower-risk and lower-return), and land banks facilitate this choice. The size and length of land banks is also influenced by factors such as a company's growth plans (whether they intend to increase or decrease the amount of housing they will deliver) and the nature of the sites in the land bank (with some land being more difficult to develop).[18]

2.37 However, it may also be the case that such land banks may increase barriers to entry for small and medium sized housebuilders by limiting the availability of land suitable for development, or by making it more difficult for SME housebuilders to discern who their competitors would be were they to take on a site in a given local area.[19] Our assessment of barriers to entry and expansion, including the role of land within this, is set out in paragraphs 2.122 to 2.127.

2.38 We would be particularly concerned by the potential distortive effects of land banks on competition if we saw evidence that such land holdings led to concentration in the housebuilding market in particular geographic areas.

2.39 We are therefore exploring whether concerns arise in relation to:

(a) Restrictions on the availability of developable land as a result of volume housebuilders holding large landbanks, and whether this may act as a barrier to entry, particularly for small and medium sized housebuilders.

(b) Concentration in certain local markets through the control of a significant proportion of developable land by a small number of housebuilders, which if evidenced, may lead to poor outcomes for purchasers of new homes and for the housing market at large, including lower quality or less diverse new homes, and slower build-out rates.

(c) The extent to which land banks compound the negative impacts of any lack of transparency as to the ownership (and control via options) of land. A lack of transparency may hinder small and medium sized housebuilders from identifying and securing suitable land for development and make it more difficult for them to appraise the nature of competition in a given local area. This effect is likely to be more pronounced the more land banking occurs.

2.40 We are also exploring whether large land banks are a symptom of other aspects of the housebuilding market not working well. In particular, we are exploring whether

[18] For example, we understand Berkeley focuses on brownfield redevelopment where some sites can be particularly complex to deliver.
[19] See in particular the comments made by the Community Land Trust Network: Community_Land_Trust_Network.pdf (publishing.service.gov.uk), p 6.

aspects of the planning process mean that the holding of large tracts of land is important for the efficient management of risk and cost, and whether this may further raise barriers to entry by placing builders who do not have the resources to invest in such land holdings at a material disadvantage.

Next steps

2.41 We are in the process of analysing data from the 11 large housebuilders on their holdings of both short- and long-term land, which we will consider alongside further data from Glenigan on land which has, or is in the process of gaining, planning permission and recently completed construction. We will analyse this data to assess the extent to which there are particular local areas where control of land is concentrated, and the extent to which this could be creating poor outcomes.

2.42 We will also pursue further engagement with SME housebuilders to investigate the impact of land banks on their ability to enter and expand within the housebuilding market.

2.43 If we find that the size or composition of land banks is having a negative effect on market outcomes, we will investigate what is driving housebuilders to engage in land banking in a way that is having this negative impact. In particular, we will consider whether this can be attributed to features of the market, including the nature of the planning system, or whether it is due to business strategies by the housebuilders aimed at exercising market power.

2.44 We will be publishing a working paper in the autumn setting out our further analysis and provisional views on any measures to tackle any areas of concern.

Private management of public amenities on housing estates

2.45 Before construction commences, where the housebuilder wishes a public authority (for example the highway authority) to adopt the roads or other public local amenities on the newly built estates once they are finished, they also need to put in place specific agreements (including in relation to funding) with the authority and build such amenities to the standard required by the authority.

2.46 Where agreements for the adoption of roads and other public amenities have not been put in place in the planning/pre-construction phase of the development, responsibility for the on-going maintenance of the roads and public amenities on the newly built estate is often passed on to the new homeowners as part of the sales process (for example, through covenants contained in the deed of transfer). Under this scenario:

- On-going maintenance of public amenities requires the on-going payment of an estate management charge[20] (**EMC**) in perpetuity.

- This charge is typically payable to an estate management company that is appointed by the housebuilder[21] as part of the overall planning process. This may be a company owned by the residents, but in other cases it is a company that the residents have no control over at all, and which they may be unable to switch from if they are dissatisfied with services or charges.

2.47 The Statement of Scope asked for views on whether such arrangements were problematic, on how transparent EMCs and the covenants implementing them are to buyers at the point of purchase and on how the arrangements with estate management companies work in practice.

Stakeholder feedback

2.48 Of the over 250 submissions from individual consumers that the CMA has received, almost all were from freeholders of properties that were subject to EMCs levied by private estate management companies (**MCs**). They expressed a range of concerns about such arrangements.

2.49 Two MCs also responded to the Statement of Scope. Both recognised that there were issues in the way the market operated and sought to identify solutions to address them.

2.50 We also received a range of views about estate management charges from other organisations, including housebuilders (both volume and SME housebuilders), housing and trade associations, one land promoter, a local council and a residential development consultancy firm.

2.51 The key themes of responses were:

(a) **Cost:** A large number of individual respondents said that they had had to pay very high maintenance fees for services, including the management of roads, water drainage systems, playgrounds, grass and woodland areas around the estate (some of which they were unable to access). Many respondents said that these fees were uncapped and had been rising at an increasing rate each year. A significant number of respondents also alleged that the fees charged were disproportionate for the work carried out, with some arguing

[20] These charges may take the form of a rentcharge, which the Rentcharges Act 1977 in section 1 defines as an annual or other periodic sum charged on or issuing out of land.
[21] In this scenario, the public amenities are transferred to the estate management company and the estate management company becomes the sole provider of estate management services to residents in perpetuity.

that they were still being charged but saw no proof of work actually being done.

(b) **Transparency:** Many individual respondents said that there was a lack of transparency regarding fees, with several respondents adding that when charges were disputed or invoices requested as proof of expense, the response from the MC was unhelpful, delayed or the request simply ignored and there was no further communication. While many individual respondents indicated they had not been aware of these issues prior to purchase, others considered that the information provided had been insufficient and/or misleading, and/or provided too late in the process. Several housebuilders maintained that covenants were transparent regarding the full extent of liabilities, with one volume housebuilder adding that some prospective buyers may be less engaged on the issue of estate charges. Some housebuilders also argued that with the introduction of the New Homes Quality Code,[22] housebuilders were committed to being open and transparent about estate management charges.

(c) **Residents Management Companies (RMCs):** In some cases, an RMC, as opposed to an MC, might be set up to own and manage public amenities on an estate. RMCs are typically jointly owned by the freeholders of properties on an estate and an RMC can opt to appoint their own MC if they wished. Some individual respondents complained of difficulties or delays in gaining control of the RMC from the housebuilders**,** or highlighted challenges regarding being able to communicate effectively with RMCs. Both MCs that responded expressed reservations about RMCs being a full solution to the problem. They argued that RMCs faced significant challenges when running estates, with one of the MCs adding that residents generally lacked the time or expertise to manage their own estates properly.

(d) **Adoption:** According to many individual respondents, new-build estates were not being adopted by local councils as roads, street lighting and other infrastructure were not completed to the required standard for adoption. Furthermore, several individual respondents claimed that local councils had little incentive to adopt new estates as it allowed them to charge full council tax to homeowners while effectively not having to provide a number of maintenance services, as these obligations were transferred to the residents. Responses from organisations also raised this issue. The Home Builders Federation noted that the non-adoption of roads has become a significant cause of concern for developers over the past ten years. One SME housebuilder/land promoter said that there was little incentive for

[22] The NHQB oversees the New Homes Ombudsman Service to ensure developers fulfil the requirements of the New Homes quality Code. See: Who is protected by the Code? (nhqb.org.uk); and, New Homes Quality Code: Downloads (nhqb.org.uk).

housebuilders to pursue adoption with under-resourced and over stretched local authorities and consequently many roads remained unadopted. The same respondent argued that due to local authority budget cuts it was no longer feasible for them to adopt newly created infrastructure at all. One local council in England said that the use of management companies was preferred by housebuilders and caused issues for councils, particularly when residents considered the MCs were not doing their job properly. Regarding the position in Scotland, we were told by the Association of Local Authority Chief Housing Officers that all local authorities will have their roads adopted to ensure that they are maintained, and the roads will be built to the relevant standard to allow for adoption.

(e) **Protections for residents:** Many respondents argued that where the public amenities on an estate had been transferred to the MC, even as a freeholder they were unable to change that MC, had limited legal rights to contest service charges and could therefore be exploited by the MC. Responses from one MC and an SME housebuilder acknowledged issues regarding legislation surrounding freeholder rights, with the MC stating that freeholders in England and Wales lacked statutory protections and must therefore rely on rights in accordance with their deeds of covenant and/or MCs' policies. One individual respondent noted that whilst leaseholders could challenge their service charges by taking the matter to a Tribunal, freeholders were unable to take this course of action.

(f) **Sale of property – impact on resale and additional charges:** A significant number of respondents expressed concerns that uncapped management charges (in addition to other issues highlighted under previous headings) made it much more difficult to sell their homes, as these fees put off potential buyers. Several respondents also said that the sale of their property had fallen through or was at risk of not completing as a result of EMCs. Some individual respondents also said that they had to pay for a management pack (costing hundreds of pounds) before they could sell or re-mortgage their home. Others added that the MC took several months before providing these management packs, delaying the sales process.

(g) **Recommendations:** Many individual respondents requested that the CMA or government take action, suggesting legislation should be introduced to address the issue. Individual respondents made the following recommendations:

    (i) A large number of respondents called for full adoption of their estates by local councils, arguing that this would ensure that the estate infrastructure was developed and maintained to a good standard. If not adopted, respondents said that there should be a reduction in council tax corresponding to the reduced level of council services.

(ii) Many respondents asked for equivalent statutory rights between freeholders and leaseholders to be able to challenge MCs and developers regarding management fees and the work they carry out on housing estates.

(iii) Several said that there should be a limit on charges from MCs.

(iv) Some respondents suggested that a requirement should be introduced compelling housebuilders to provide important information regarding EMCs and estate management earlier in the process of purchase so that prospective buyers can make more informed decisions about whether they wish to proceed.

(v) One MC suggested a range of solutions to what it saw as mismanagement of estates by other MCs, including a ban on estate rentcharges, requirement for all estate managers to join an approved Ombudsman scheme and a full breakdown of costs to be provided on estate management invoices.

(vi) One housebuilder argued that the impact of the New Homes Quality Code should be assessed before a decision is made on whether to take any further action in this area.

CMA analysis and emerging thinking

2.52 In this section, we set out, at a high level, the evidence we have gathered and analysis we have carried out to understand whether, and if so why, there has been an increase in the private management of public amenities on housing estates. We then set out some initial analysis of the competition issues and potential consumer harm that could be resulting from these trends.

Background

2.53 The legal framework for the adoption by public authorities of public amenities in England, Scotland and Wales consists of separate legislation for roads, sewers and drainage, and sustainable drainage systems (SuDS). There is no specific legislation for other adoptable public amenities such as public open spaces (POS).[23]

2.54 The legislation contains provisions to protect the relevant public authorities from unexpected costs arising from a new development:

[23] These are normally adopted via Section 106 of the Town and Country Planning Act 1990 (as amended) in England and Wales and under Section 75 of the Town and Country Planning Act (Scotland) 1997, as amended, in Scotland.

(a) as part of the adoption process, local authorities have the power to require a road or sewer bond[24] as a guarantee; and

(b) although not explicitly set out in legislation, local authorities (in their capacity as highways authority[25] and local planning authority) can request the payment of commuted sums as a condition of adoption, ie financial contributions made by developers as compensation for taking on future maintenance responsibility of roads.

2.55 We discuss the relevant legislation and financial protections available to local authorities in more detail in Appendix B.

Factors leading to public amenities not being adopted

2.56 We understand that until around 2010, the standard practice was for local authorities to adopt roads and public amenities on new housing estates but that this has changed in the past 10 to 15 years. Our analysis suggests that this may have been caused by the combination of four factors:

(a) Inherent weaknesses in the legal framework, and in particularly the largely discretionary nature of public amenity adoption.

(b) Process issues, partly linked to the piecemeal nature of the legal framework, increasing costs and making adoption an increasingly unattractive option for housebuilders to pursue.

(c) Funding constraints at local authorities.

(d) Commercial incentives of housebuilders.

Shortcomings of the legal framework

2.57 In relation to roads, we have seen some conflicting evidence. Some of the issues that we are considering further include:

(a) The extent to which adoption is an option for both the housebuilder and the highways authority. The housebuilder has no obligation to seek adoption from the local authority, but while some have told us that, similarly, there is much scope for local authorities to refuse adoption, others have argued that provided the road has been built to the adoptable standard set by the local authority and a bond has been secured, the local authority cannot easily

[24] A form of financial surety which ensures that a local authority has the funds available to complete works if developers fail to do so.
[25] The power of local authorities to accept commuted sums under the Highways Act 1980 was confirmed by the Court of Appeal in its decision in *The Queen on the Application of Redrow Homes Ltd v Knowsley Metropolitan Borough Council* [2014] EWCA Civ 1433.]

refuse to adopt the road (at least in part because of the option of using a section 37 process and associated possibility of appeal – see Appendix B, paragraph 2). Some housebuilders have told us that the discretionary nature of the legal framework was a key issue.

2.58 Public open spaces are increasingly being considered as essential elements of new housing developments, on the basis that they help deliver a healthy environment, provide recreational space, manage flood risk and drainage and comply with ecological planning policy requirements amongst other things. However, there is invariably an ongoing financial cost associated with the maintenance of these spaces and facilities and yet no existing legislative regime to govern the adoption of open spaces. Two key challenges in this respect are the lack of certainty and the fact that adoption is entirely discretionary, in respect of both the housebuilder and the local authority. The reliance on section 106 agreements as the legal mechanism through which open spaces are provided means that the on-going cost of maintenance is considered as part of broader negotiations and subject to various trade-offs (see further below).

2.59 In relation to SuDS, the current framework is confusing because there are different requirements across the UK, although we understand that the government has decided to align the approach in England to that taken by Wales and Scotland, effective from 2024. See Appendix B for further details.

Process issues

2.60 The process issues that we have identified and are seeking to understand further include:

(a) The timescales for the adoption of roads under section 38 have increased over time and appear to vary significantly between local authorities and in some cases can be very long, with delays attributed to resourcing issues.[26]

(b) Increasing complexity of the adoption process - with multiple authorities (Highway Authority, Lighting Authority, Local Planning Authority (which are not necessarily part of the same local authority) and water and sewerage company) involved, with issues arising from lack of coordination and delays caused by resourcing issues.

(c) No agreed national building standards for the various public amenities and much variation between local authorities as to what they require.

[26] The HBF's response to the Statement of Scope states that: "*[our] research over five years shows a large – and growing – disparity in timescales and costs associated with the process for approving highways designs and the adoption of roads*."

(d) The lack of predictability as to the appropriate amount for a commuted sum and the lack of guidance on how commuted sums should be calculated for open spaces, resulting in wide variability and consequently more protracted negotiations.

(e) Delays and inconsistencies in the approach relating to bonds.

Financial constraints on local authorities

2.61 The budgetary constraints that local authorities have been experiencing over the past 10 years are well documented and is recognised as a significant factor in local authorities' reluctance to adopt public amenities. We understand that open spaces were historically adopted by the parks departments of local authorities in return for modest commuted sums. However, such departments have been particularly affected by budget cuts, and under such circumstances have been increasingly unwilling and/or unable to adopt new open spaces, given their reduced ability to maintain existing ones.[27]

2.62 In addition, we have heard that commuted sums have become a less effective way of funding on-going maintenance costs, due to the low interest on deposits that local authorities have been able to obtain in recent times.

Housebuilders' incentives

2.63 The evidence we have seen suggests that housebuilders may have some financial incentives not to seek the adoption of roads on the estates they build:

(a) We have heard that because there is no legal requirement to build private roads to adoptable standards, there may be an incentive for housebuilders to construct such roads to lower standards and therefore save on building costs for the development.

(b) Some of the large housebuilders have identified that not seeking adoption has the advantage of avoiding the payment of commuted sums. This also creates greater certainty in planning the likely costs of building an estate, as the level required to be paid as a commuted sum is arrived at fairly late in the building process.

(c) We have heard that there are costs associated with bonds that SME housebuilders may find prohibitively high. We note however that the fees appear to be modest for larger housebuilders.

[27] See: https://publications.parliament.uk/pa/cm201617/cmselect/cmcomloc/45/4507.htm#_idTextAnchor047

2.64 As explained in paragraph 2.53 and Appendix B, the provision of open spaces tends to be agreed as part of section 106 agreements and in negotiations, local authorities would need to consider how to allocate these sums between various priorities. We note that as contributions towards affordable housing and the community infrastructure levy (CIL) have increased, funding obtained from house builders for open spaces has tended to decline, as shown by table 2.1 below:

Table 2.1: Detailed nominal value of agreed developer contributions between 2005/06 and 2018/19 (£ millions)

Contribution Type	*2005/6*	*2007/8*	*2011/12**	*2016/17*	*2018/19*
CIL	-	-	-	771	830
Mayoral CIL	-	-	-	174	200
Affordable Housing	2,000	2,614	2,300	4,047	4,675
Open Space & Environment	215	234	113	115	157
Other**	1,712	2,026	1,287	900	1,117
England total	3,927	4,874	3,700	6,007	6,979

Source: based on Section 106 planning obligations and the Community Infrastructure Levy in England, 2018 to 2019: report of study (publishing.service.gov.uk) – table 3.2.
** 2011-12 values are calculated for combined in-kind and direct payment values, County Council data were not reported separately*
***Includes transport and travel, community works, education, land and other contributions.*

Prevalence of the problem

2.65 Our analysis of the data provided to us by the 11 largest housebuilders suggests that the majority of new properties being built in the past 5 years comprises public amenities that have not been adopted, and this trend appears to be accelerating as shown in Table 2.2.

Table 2.2: Proportion of homes subject to EMCs

	2018	2020	2022
Proportion of total homes subject to EMCs	58%	69%	71%
Proportion of freehold homes subject to EMCs	89%	91%	90%
Number of freehold homes	51,345	51,063	65,779

Source: CMA analysis of data provided by the 11 largest housebuilders

2.66 Some large housebuilders' have indicated that they seek adoption of roads where possible as a default, and we understand that normal practice is for only relatively narrow roads serving a small number of houses (normally around 4 to 5) to be treated as private roads and not to be put forward for adoption. However we have also seen some housing development plans which appear to show that more significant roads are sometimes not put forward for adoption. We continue to

investigate what is the position in practice. The evidence we have received from both housebuilders and local authorities suggests that it is very rare for open spaces to be adopted.

The implications of Biodiversity Net Gain

2.67 We understand that under the Environment Act 2021, from 2024[28] it will be mandatory for all new planning applications made in England to ensure that the development results in a minimum 10% gain in biodiversity (referred to as Biodiversity Net Gain - BNG). This requires the developer to measure the biodiversity of habitats (pre- and post-development) within the planning application boundary following an assessment process set by Defra. We understand that developers' 'net gain plan' will need to demonstrate that the gain can be delivered and will be secured with appropriate management for a minimum of 30 years. At present there is no equivalent legislation in Scotland and Wales.

2.68 We are not aware of any upcoming legislation or guidance seeking to formalise the process of adoption of open spaces created for the purpose of meeting the above requirements and have not seen any guidance relating to the funding of their on-going maintenance for the required 30 years. Our current view is that open spaces created for the purpose of meeting the Environment Act 2021, as described above, might not be adopted by local authorities, thus responsibility for their maintenance seeming likely to be passed on to estate residents with the related potential costs and competition problems that are discussed below.

Analysis of competition issues and harm

2.69 In our initial evidence gathering, we have sought to understand the contractual arrangements governing the provision of estate management services and the consequences of such arrangements for the respective levels of bargaining power of residents and their suppliers; the barriers to switching that residents may face; and the level of information residents are provided with on these when they buy a home from a housebuilder.

Arrangements

2.70 We understand there are two different models: resident management companies (RMC) and embedded management companies (embedded MCs).

(a) The former is a not-for-profit company incorporated to manage the public amenities that are not to be adopted by the relevant authorities. Under this model, typically, the housebuilder would initially control the RMC and appoint

[28] Relevant provisions come into effect in November 2023, but small sites will be subject to a transition period until April 2024: New developments to deliver for people and nature - GOV.UK (www.gov.uk)

a managing agent to carry out the maintenance of such facilities until the development has been completed, at which point, control of the RMC is passed to the residents.

(b) The latter are contractually imposed on the residents, and under which residents do not have the right to participate in by becoming a member/shareholder or taking a role as an officer of the company. Under such circumstances, residents appear to have no ability to switch to a new provider, particularly as we understand the embedded MC typically owns the land and/or is named in the property deeds of the land that it maintains.

2.71 Several of the 11 large housebuilders have told us that their current policy is to appoint RMCs rather than embedded MCs but based on our analysis of data[29] we obtained, it appears that in the past 5 years, some of these housebuilders have appointed an embedded MC in a significant proportion of their new housing estates. In addition, the two MCs that have responded to our statement of scope between themselves manage 1,000 housing estates under this model. We are therefore concerned that this model may be significantly more widespread than the current policies of some housebuilders might suggest. At this stage, we do not know how easy it is for resident management companies to switch between suppliers of estate management services and intend to explore this issue further.

Information provided at the point of sale

2.72 Many of the people who wrote to us told us that they were not made properly aware of the estate management arrangements and/or their consequences during the sales process, with some of the respondents alleging that the information was provided only at the point of exchanging contracts. This is broadly consistent with the findings of a Welsh government call for information carried out in 2020.

2.73 The Welsh Government's call for information on EMCs[30] was answered by 566 people. Recognising that residents motivated by dissatisfaction were likely to have responded in greater numbers than other residents, the report stated, among other things, that 75% of respondents indicated that they were either very unsatisfied (50%) or quite unsatisfied (25%) with the level of information they received before their purchase about the charge, with similar proportions (being very unsatisfied (50%) or quite unsatisfied (24%) about information provision during the purchase.

2.74 We have obtained sales and marketing documents, as well as information on related current policies from the 11 largest housebuilders. The evidence we have reviewed to date suggests that:

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[29] There are limits to the analysis we could carry out as the data provided by a number of suppliers was incomplete.
[30] Estate charges on housing developments – summary of responses (gov.wales)

(a) under current policies and if information is provided by sales staff in accordance with policies, many homebuyers may have been made aware of the existence of EMCs before buying their home. In addition, they may have been made aware of the estimated amount for the first year, and most housebuilders may also have made their customers aware of the identity of the current MC.

(b) however, homebuyers may be less informed about the long-term implications of EMCs – for example that the amount of an EMC can change significantly year-by-year – and about their rights under estate management arrangements, for example how they can change MC or what they can do if they disagree over the types of work carried out etc. Such information is generally only included in provisions in the transfer deed and in the articles of association of RMCs which are frequently provided at the end of the sales process.

2.75 We note that current policies may not be consistent with past practices. In addition, we requested sight of the 11 largest housebuilders' relevant internal guidance and training for their sales staff and found, based on our review, that many did not produce internal guidance to ensure that their sales staff provided the right level of information to their customers in the course of the sales process. Although some provided us with reservation checklists that showed the estate management charge to be paid (but with no further information), and one company provided us with a training presentation explaining how the adoption process works, we have seen so far no evidence to suggest that the majority of large housebuilders take steps to ensure that their sales staff properly inform customers about the cost and practical implications of buying a property on a privately managed estate.

Balance of power between residents and embedded MCs

2.76 When considering the balance of power between residents and the estate management company, an important factor is the legal route adopted for securing the estate service charge from freehold owners of properties on a newbuild estate. In England and Wales, there are two such routes:

(a) an estate rentcharge: a sum of money, usually payable annually, created in a conveyance or transfer under the Rentcharges Act 1977. It has the practical effect of ensuring successors pay the estate charge and are subject to the covenants.

(b) an entry on the Land Registry title which ensures there is a direct contractual relationship (covenant) between the homeowner and the developer/management company.

2.77 Where a rentcharge has been created, there are two possible remedies for recovering monies owed to the rent owner (unless the contract expressly excludes these): i) the right to enter possession and take any income from holding the land for non-payment (section 121(3) Law of Property Act 1925) and ii) if the "rent" is unpaid for 40 days after becoming due there is also a right to demise the charged land to a trustee by deed for a period of time (that is to create a lease) to raise money to pay the arrears and costs (section 121(4) Law or Property Act). Both remedies do not require that the homeowner be put on prior notice of the intended action.

2.78 Although we have not yet established how widespread the use of rentcharges may be, or how frequently Law of Property Act remedies are contractually excluded, it appears to us that they have the potential to provide an excessive level of market power to the estate management company. In this respect, we also note that experience of customers relayed by the Welsh government in its call for information (see paragraph 2.73), where:

(a) 38% of respondents had challenged their charge, and the majority reported being dissatisfied with the nature of the response they received; and

(b) 35% of respondents had had action threatened or taken for non-payment, including additional fees and penalties, legal action, bailiffs, damage to credit rating, reporting to lenders and having charges added to mortgages, and reports or threats that residents' properties could be taken.

2.79 Further, we understand that the covenants associated with the private management of housing estates may include various obligations on homeowners, including the payment of a fee in order to get consent for certain actions, such as alterations of their property or of various charges when the property is sold on.

2.80 At this stage, and based on the analysis so far, we believe that freeholders are not protected by the same right to challenge the reasonableness of charges and the standard of services from their management company as leaseholders are from their managing agent under section 27A of the Landlord and Tenant Act 1985. This means that freeholders may only have very limited rights, as set out in their deeds of transfer.

Current view

2.81 Taking both issues into account, we are therefore concerned that, in England and Wales, the balance of power between estate management companies and residents may be very significantly imbalanced in favour of the suppliers: based on the evidence we have seen so far, home owners appear to have a very limited ability to challenge charges imposed by their estate management company, while

the estate management companies may have disproportionate powers of enforcement, if customers fail to pay.

2.82 We are seeking data from estate management companies to quantify this issue. The system in place in Scotland is slightly different, with more protections afforded to homeowners and we continue to investigate whether such protections may be sufficient to alleviate any concerns we may have. In Scotland, property 'factors' are required to comply with the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors. Homeowners have certain rights of redress against factors, including (if it has not been possible to resolve the issue directly with the factor) to apply to the First-tier Tribunal for Scotland Housing and Property Chamber for a determination of whether the property factor has failed to comply with the 2011 Act.[31]

Next steps

2.83 We have sent requests for information to 15 estate management companies, responses to which we will analyse over the next few months. We will also seek to engage further with housebuilders and local authority representatives on the issues we have identified.

2.84 We have also procured qualitative consumer research, which will be undertaken with a sample of new-build owner-occupiers, focusing on estate management charges. The research will enable us to understand better the experience of consumers when public amenities on their housing estate are not adopted by the relevant public authority.

2.85 We will be publishing a working paper in the autumn setting out our further analysis and provisional views on any measures to tackle any areas of concern.

Planning

2.86 In the Statement of Scope, we recognised that planning laws and policies formed the backdrop to any assessment of how the housebuilding market was functioning. We stated that the market study would seek to focus on the aspects of the housebuilding market where we considered that the CMA could provide most insight and have greatest impact, such as structural and behavioural barriers to the market working well and the implications of these for customers, rather than

[31]In Scotland, homeowners retain a share of the open areas as listed in the deeds. A licensed company known as a factor maintains, upon completion, the open space areas of the development on behalf of the homeowners, in line with the deed of conditions registered for the development. Under a development management scheme, an owners' association can be set up to manage the property. They can appoint a factor to do so on their behalf: Property factors - mygov.scot.

fundamental aspects of the planning regime or government policy. In particular, we proposed to explore:

(a) The concern that the interactions between pricing in the land market and the planning process distorted the incentives of housebuilders in planning condition negotiations and in bringing land forward for development in a timely manner.

(b) The possibility that the pressures to meet supply targets have incentivised Local Planning Authorities[32] (LPAs) to favour large developments and/or large housebuilders over smaller ones, thus distorting competitive dynamics in local markets.

(c) In turn, whether reliance on large sites and/or large housebuilders to deliver their local plans, combined with pressures on resources, has diminished LPAs' bargaining power in negotiations and re-negotiations of planning conditions (including in relation to affordable housing).

(d) More generally, whether there were unnecessary costs and delays in the planning process arising from the incentives and actions of those involved in negotiations (eg the LPAs, the housebuilders, or land promoters) beyond those costs that were inherent to the overall planning systems adopted across England, Scotland and Wales.

2.87 We asked specific questions on whether there had been changes over time in the time and cost of going through the planning process, the likelihood of success in securing planning permission, the propensity for housebuilders to negotiate s106 agreements[33] to reduce affordable housing requirements and whether they were successful in doing so. We also sought views on LPAs' objectives in taking decisions on housebuilding, and differences in the bargaining power between LPAs and developers when negotiating with each other.

2.88 We set out the relevant legislative provisions and policy frameworks for planning in England, Scotland and Wales in Appendix B.

[32] The public authority whose duty it is to carry out specific planning functions for a particular area. All references to local planning authority apply to the district council, London borough council, county council, Broads Authority, National Park Authority and the Greater London Authority, to the extent appropriate to their responsibilities.
[33] In England and Wales, section 106 of the Town and Country Planning Act 1990 sets out that agreements can be negotiated between developers and LPAs to meet concerns that an LPA may have about meeting the cost of providing new infrastructure (referred to as s106 agreements).

Stakeholder feedback

2.89 Many respondents to the Statement of Scope considered that the CMA should look more closely at the planning system and the issues that it causes in the market. The main issues raised by respondents were:

(a) **Complexity and resources:** Some of the large housebuilders argued that continuous changes to the planning system had led to increased costs, delays and uncertainty which also act as a barrier to entry and expansion for large and smaller housebuilders. Several housebuilders told us that the planning process had become increasingly lengthy due to resourcing issues in LPAs.

(b) **Impact of changes to policy and legislation:** Some large housebuilders raised concerns that the Levelling Up and Regeneration Bill (LURB) would increase the complexity of the planning process, and so the length of time to get through it. Another respondent said that the LURB and changes to the National Planning Policy Framework (NPPF) would slow down local plan production and dramatically reduce housing delivery. Another respondent agreed that revisions to the NPPF will constrain land supply and disincentivise investment, particularly from SME housebuilders. This could strengthen the market position of the large housebuilders. One SME housebuilder told us that uncertainty, created by government consultations on planning reform, leads to delays in the planning process.

(c) **Bias towards large sites:** We received a number of responses from SME housebuilders which raised concerns around LPAs and the planning system, arguing that LPAs tended to focus on large sites to meet their housing land supply targets, which favours the large housebuilders. SME housebuilders told us that the cost, delay, and risk associated with securing planning permission was, in part, responsible for the reduction in SME housebuilders, who cannot afford to go through the process. Similarly, some academics suggested that the CMA should examine the extent to which government planning polices favour larger housebuilders over smaller ones. They note that the introduction of the NPPF had apparently led to a drive towards sustainable development and an increase in the proportion of planning permissions for large greenfield sites. They argued that this, in turn, has made it easier to get approval for speculative planning applications that tended to favour larger and better resourced housebuilders who were capable of developing these capital-intensive sites.

(d) **Scottish planning system:** We received some responses specifically on the Scottish planning system. One trade body described the Scottish planning process as inefficient, inconsistent and lacking resource across many LPAs. They noted that the new National Planning Framework 4 has done little to

address the resource burden on local authority planning departments or the cost and delays for housebuilders in the planning system.

(e) **Developer contributions:** One academic said that evidence gathered over several studies showed that negotiating S106 agreements was more difficult for SME housebuilders than for the large housebuilders, as larger housebuilders have greater expertise and capital to conduct negotiations with local planning authorities. Another academic told us that, by threatening to withhold sites, the large housebuilders can exert structural power over LPAs, power that is underpinned by the fact that land, as an asset, does not depreciate over time, and that the structural power has likely been enhanced by the cuts to local authority funding, which has made them more reliant on S106 revenues.

(f) **Viability:** One local authority argued that since viability assessments – which verify that a proposed development remains profitable after factoring in developer contributions – have been introduced, affordable housing provision has more frequently been negotiated down from policy requirements. Separately, some academics argued that the propensity for developers to seek to enter into viability negotiations to provide developer contributions below policy requirements has increased. Conversely, several developers argued that developers have a lack of bargaining power compared to LPAs because developers are under significant time pressure to make an investment decision and commence construction of a project, which may require them to make significant concessions to an LPA, who themselves have the power to determine applications and grant or refuse consents.

CMA analysis and emerging thinking

2.90 In this section we set out our emerging thinking on areas of focus for the remainder of the market study on planning policy and the planning system. In particular we set out emerging thinking on how it might impact outcomes in the housing market such as the volume, type and quality of housing delivered, as well as the ability of LPAs to raise funding for infrastructure in the form of developer contributions.

The planning process

2.91 A common issue that was raised by the large housebuilders was that the planning process is long and complex and is becoming increasingly so. A long and complex planning process can impact the rate at which all housebuilders are able to deliver homes and can disproportionately impact SME housebuilders.

2.92 Our analysis of the planning application data[34] shows that the percentage of the major dwelling planning decisions that were made within the statutory 13-week deadline fell significantly from above 50% in 2009 to below 20% in 2021 as more applications were processed via planning performance agreements to which this deadline does not apply, although the use of these is not necessarily the underlying cause of the increase in time taken (we discuss this below).[35] [36] Our preliminary analysis of Glenigan construction data and evidence from large housebuilders and the devolved nations also suggests that planning applications can on average take significantly longer than 13 weeks to determine. These sources indicate that the average time taken to make an outline planning permission decision was over a year and often took much longer than that, whereas for a detailed or reversed matter application the average time taken was between 35 and 55 weeks. [37]

2.93 The evidence that we have obtained from stakeholders has indicated that there are a number of reasons why the planning process is taking a long time and why the time taken to make planning decision may be increasing, including:

- **Increasing amount of policy impacting the planning system**: particularly, environmental regulation such as the Future Homes Standard[38] or Biodiversity Net Gain[39] and the introduction of NPF4 in Scotland.

- **Resources**: LPAs face increasing pressures on resources both in terms funding of planning departments and also their ability to recruit qualified staff. Not only has local authority expenditure decreased by 43%[40] over the past decade but there is a shortage of qualified planners[41] as well as other relevant support professions. Resourcing was also seen as a significant issue within Wales and Scotland.[42]

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[34] DLUHC District planning application statistics (PS2): Live tables on planning application statistics - GOV.UK (www.gov.uk)

[35] PPAs were introduced as part of the of the NPPF in 2012, with the intention of providing increased certainty and dedicated resources for determining planning applications. Where PPAs are used, a different timeframe (rather than the 13 weeks statutory period) for determining planning applications can be applied and as long as the application is determined in this time frame then the application will be recorded as being made 'within time' planning permeance statistics. Housebuilders' views on the effectiveness of PPAs is mixed. Generally, they are seen to have increased certainty for housebuilders in some cases but the application and effectiveness of these agreement across LPAs is inconsistent.

[36] See: Determining a planning application - GOV.UK (www.gov.uk).

[37] CMA analysis of Glenigan data and evidence provided by Housebuilders.

[38] The Future Homes Standard: changes to Part L and Part F of the Building Regulations for new dwellings - GOV.UK (www.gov.uk).

[39] Biodiversity net gain - GOV.UK (www.gov.uk).

[40] In its report Planning Agencies: Empowering Public Sector Planning, September 2022 the Royal Town Planning Institute analysed the changes in total expenditure for every Local Authority planning team throughout England. Nationally, local authority net expenditure on planning fell by 43%, from £844m in 2009/10 to £480m in 2020/21, when adjusted to 2021 prices.

[41] See, for example, RTPI | Local Authorities struggle as over a quarter of planners depart.

[42] See, for example, the Heads of Planning Scotland and the Royal Town Planners Future Planners Project Report (June 2022) which discusses a shortage of planners in Scotland.

- **Increasing public and political engagement**: LPAs told us that increasing public engagement through social media, whilst in many ways a positive development, can lead to more issues to deal with as part of the planning process.[43] It was also noted that local planning and new development is an increasingly politicised issue.

- **Statutory consultees**: LPAs reported significant issues with getting statutory consultees[44] to respond within the typical 21-day consultation period. Responses from statutory consultees were stated to routinely be late and in many cases be returned well in excess of the 21-day period. This was largely attributed to the resourcing issues within the statutory consultee organisations.

- **Negotiation of developer contributions**: Where a planning application requires a negotiation of a legal agreement to provide developer contributions through planning obligations, this can significantly increase the time required to process a planning application, particularly when the negotiation requires consideration of a site's viability.

The role of local plans and LPA objectives in housing delivery

2.94 Housebuilders have suggested to us that an important determinant of a given LPA's success at delivering housing is whether it has an up to date local plan in place. An up to date (updated or reviewed within the last 5 years) local plan was viewed as important for identifying sufficient development land within an area and providing the level of certainty about whether a planning application was likely to be successful to ensure that applications are brought forward. Analysis of Planning Inspectorate data[45] shows that as of 1 May 2023 less than 40% of LPAs in England had in place and adopted a strategic local plan that was less than 5 years old.

2.95 Further, LPAs have to balance multiple objectives through planning policy, of which the number of houses to be delivered is only one. LPAs told us that addressing climate change matters and environmental protection have become more important recently and that different housing needs (eg affordable, older person, and student housing) mean that LPAs' policies and priorities are not always the same across the three nations. This inevitably influences the build out rate, type of residential development, and extent of development that is

[43] See for example: RTPI | 87% of planners say social media fuels misinformation.
[44] Including the Canal and Rivers Trust, Coal Authority, Environment Agency, Forestry Commission, HSE, Relevant Highways Authority, Flood Authority, National Parks, Natural England, Rail Authorities, Sport England and Water and Sewerage undertakers.
[45] Local Plan: monitoring progress - GOV.UK (www.gov.uk)

encouraged in an area, and there are few effective mechanisms to incentivise the delivery or exceeding of the targets.[46]

Developer contributions

2.96 Developer contributions are intended to capture a share of the uplift in the value of land once it receives planning permission to fund the infrastructure that is required to support new development. Developer contributions are secured though Section 106 agreements and the community infrastructure levy in England and Wales, section 75 agreements in Scotland, with around two-thirds of contributions being in the form of affordable housing provision.[47]

2.97 Contributions in England were £7bn in 2018/19, with their geographic distribution heavily skewed towards the South of England.[48] In Scotland, in 2019/20 it was estimated that approximately £490 million worth of developer contributions were agreed, of which £310m was for affordable housing and £180m towards infrastructure.[49] In comparison with England, developer contributions in Scotland and Wales tend to be lower, in large part due to lower land and house prices which mean there tend to be less of a planning uplift from which contributions can be made. In particular, small rural communities in these nations do not tend to benefit from developer contributions.

2.98 Whilst these are significant sums, it is difficult to know if they represent a fair or reasonable level of contributions. An LPA's ability to raise contributions is not necessarily related to their need for infrastructure funding; LPAs which have more limited ability to raise contributions may still have to fund significant levels of infrastructure provision.

Next steps

2.99 We will continue to review the evidence that we have received from larger, medium and small housebuilders and gather further evidence from them in the next part of the market study. We will continue to engage with LPAs to understand

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[46] Currently, in England, a sanction-based approach used to increase housing supply and delivery (in the form of the presumption in favour of sustainable development for not having an up-to-date five-year housing land supply or delivering a low of amount of housing against a LPAs three-year housing target [via the Housing Delivery Test]). However, the impact of 'the presumption' sanction is proposed to be diluted in the emerging LURB. Additionally, there are few practical or specific incentives to encourage exceeding housing delivery targets in England beyond the existing New Homes Bonus and the economic and social benefits new housing can often bring. Similarly, in Scotland and Wales, there do not appear to be any significant incentives that actively encourage Scottish or Welsh LPAs to exceed their housing delivery or supply targets, or penalties for not meeting them.

[47] Section 106 planning obligations and the Community Infrastructure Levy in England, 2018 to 2019: report of study (publishing.service.gov.uk)

[48] The South East, South West and London regions account for 61% of the total value. Ibid.

[49] The five largest contributing authorities, all in the central belt, accounted for about 43% of agreed contributions towards affordable housing in 2019/20, See: 10. Annex 3: Analysis of Survey Data - Planning - the value, incidence and impact of developer contributions: research - gov.scot (www.gov.scot).

how the planning system functions in local areas. In addition, we are in the process of understanding more about how the proposed changes to the planning system in England outlined in the LURB and NPPF consultations will impact the planning system in England and the issues that we have set out above.

2.100 Our understanding of the planning system in the devolved nations will be a focus of the next part of the market study. We will continue to engage with national and local government in Scotland and Wales as well as other stakeholders.

2.101 We will be publishing a working paper in the autumn setting out our further analysis and provisional views on any measures to tackle any areas of concern.

Competition in the market

Stakeholder feedback

2.102 The Statement of Scope stated that we would consider whether there was effective competition between housebuilders. We invited submissions on:

(a) How competition in the market could be strengthened

(b) How the functioning of the market could be improved

(c) Issues facing housebuilders in identifying and securing land; and

(d) Whether any participants in the market have market power, how they exploit it and whether concentration has changed over time.

2.103 We received a range of views about how competition in the market is working. The broad summary of views from respondents on competition in the market is:

(a) **Competition in the land market**: some respondents noted that the large housebuilders were in a strong market position. They often took option agreements on land in the early development of a local plan, enabling them to control the land when it became available for use. Concerns were raised regarding the market power that large housebuilders have which allows them greater control over build out rates and prices. One respondent argued that the non-responsiveness of land prices to demand is an indication that the land market is not working well.

(b) **Competition to supply new-build homes**: large housebuilders told us that the housebuilding market was not concentrated and that the largest housebuilders only accounted for a small proportion of new supply of homes. They said that there was intense competition to acquire land for development. Some developers told us that there was significant competition to sell to new consumers, as new homes competed with the existing housing

stock. In contrast, some housing academics told us that the housebuilding industry had become increasingly concentrated, in part due to volume housebuilders being able to buy land more cheaply than SME housebuilders and to achieve higher sale prices. One SME housebuilder suggested that the current operation of the housebuilding market favoured the large housebuilders as they had better access to finance and labour and had stronger supply chains resulting in lower build costs. One large housebuilder noted that they did not generally compete with SMEs for land acquisition, as larger housebuilders focused on larger plots; but that they did compete with them in the sale of homes.

CMA analysis and emerging thinking

Land

2.104 We have reviewed the availability of developable land in England using land use statistics provided by Department for Levelling Up, Housing and Communities (DLUHC), which indicates whether land is developed,[50] protected against development by one or more natural designations,[51] or located within Flood Zone 3.[52,53] This indicates that approximately 43.6% of land in England is available for development.[54] However, as shown in Figure 2.4, this varies substantially across different regions, with London having the lowest proportion of developable land (26.6%) and the East of England having the highest proportion of developable land (58.3%). Nevertheless, this indicates that there is land across all regions of England which in principle could be developed for housing. Land use statistics were not readily available for Scotland and Wales, but we note that no housebuilders or other parties have stated there are issues with respect to the availability of potentially developable land in these countries either.

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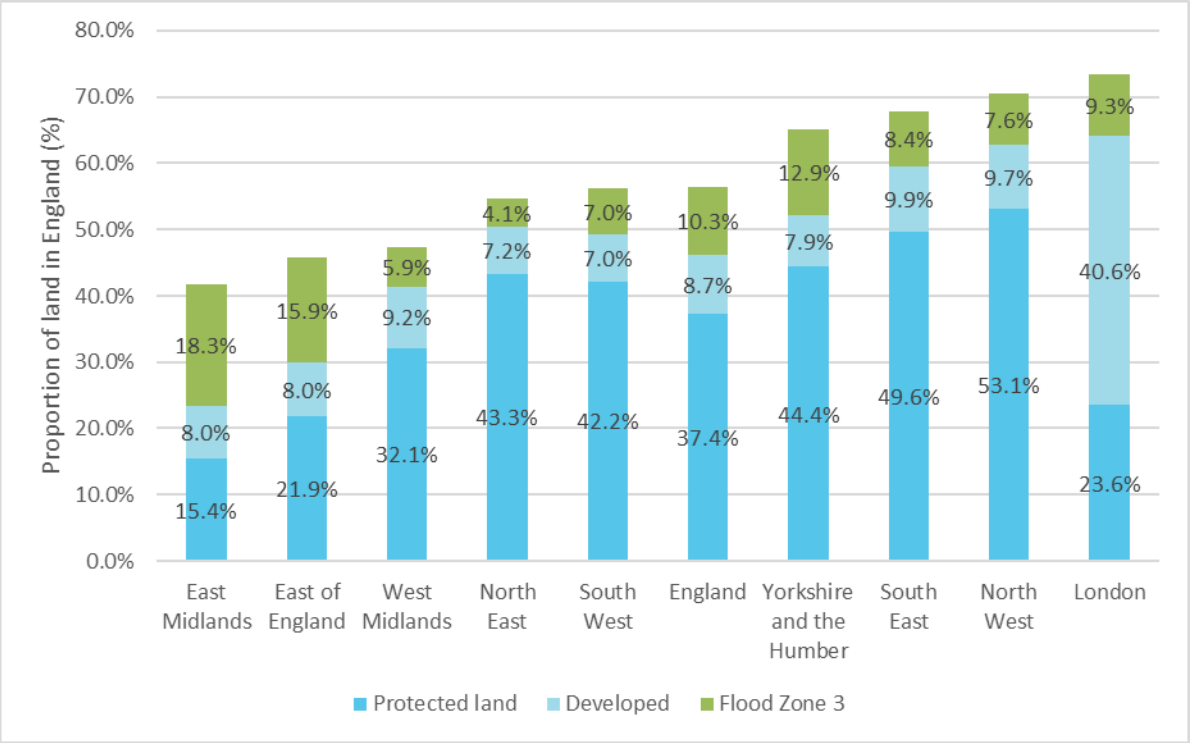
[50] See Land use statistics, Table A1. The definition of developed land includes community services, defence buildings, industry and commerce, minerals and landfills, residential, transport and utilities, and other developed uses.
[51] Such designations include Green Belt, National Parks, Areas of Outstanding Natural Beauty (AONBs) and Sites of Special Scientific Interest (SSSIs)). DLUHC, Local authority green belt statistics for England, 2021 to 2022 ("Land_designations_by_LA" tab).
[52] Flood Zone 3 is an area defined as having a more than 1 in 100 risk of flooding from rivers each year and more than 1 in 200 risk of flooding from the sea each year. It does not consider any flood defences. Less than 0.6% of land within Flood Zone 3 is used for residential development compared to 1.3% outside of Flood Zone 3 areas (see DHCLG, Land Use in England, 2018, statistical release, page 6).
[53] DLUHC, Land use in England, 2022, tab "P402a" and "P403a".
[54] We expect our calculation of the land available for development is a lower bound because the categories "Protected", "Developed" and "Flood Zone 3" are assumed to be non-overlapping. However, it is expected that there will be some overlap. For example, a protected area may be developed and/or be at risk of flooding. This would mean more land is available for development. We also note (1) we have not included areas which are currently in the process of being "built up" which we understand accounts for around 10.5% of land in England, but for which there is no regional breakdown and (2) not all developable land may be suitable for residential purposes.

Figure 2.4: Proportion of land that is protected, developed or at risk of flooding by region



Source: CMA analysis of DLUHC Land use in England data (2022) and Green Belt statistics for England (2021-2022)

2.105 We understand there are two routes that large housebuilders use to find land:[55]

(a) Land may be marketed for sale by the landowner or their appointed land agent (otherwise known as 'on-market' sites). For these on-market sites, the developer's land team may submit bids for sites which are openly listed for sale or be invited to bid for sites by the landowner or their appointed land agent.[56]

(b) Land may not be advertised or actively marketed (otherwise known as 'off-market' sites). Housebuilders typically proactively search for off-market sites, although they may be approached directly by the landowner. For off-market sites, a volume housebuilder's local land teams find land using a combination of local knowledge; information via relationships with landowners, land agents (at local, regional and national level), chartered surveyors, land promoters,[57] and local business networks; public information, for example provided in the local plan, land registry, and publications such as Estates

[55] Based on information from housebuilder responses to compulsory information requests.
[56] Land agents facilitate the sale of land representing either landowners or developers. Additionally, agents act as independent experts for example in dispute resolution as chartered surveyors. Examples of land agents include Savills, Knight Frank, CBRE, and JLL.
[57] Land promoters promote land through the planning system on behalf of the landowner (or in some cases on land they have purchased), then sell the land generally on the open market (in some cases via a land agent). Examples of promoters include Gladman (part of Barratts), Commercial Estates Group (CEG), Barwood Land, Gleeson Land, and Hallam Land.

Gazettes; and electronic platforms, for example, LandInsight[58] and LandStack.[59]

2.106 We have also gathered information from SME housebuilders on how they find land.[60] Almost all the SME housebuilders from whom we have received information find land through intermediaries, with most using land agents, and some also using land promoters. A small number of SME housebuilders said they purchase land directly from landowners and others occasionally purchase land from other developers. Some SME housebuilders highlighted the importance of intermediaries, saying that land agents can help SME housebuilders save resources by assisting with negotiations and providing useful information on planning, construction and legal issues. A few also highlighted the role promoters play in taking forward challenging sites that SME housebuilders would not usually be able to through the planning system.

2.107 The above indicates that land agents and land promoters are an important source of land for housebuilders. We have collected sales data from a number of land agents and promoters between 2020 and 2022 (inclusive).[61]

2.108 Figure 2.5 shows that sales made by land agents from whom we have received information were relatively evenly split between sales to the largest 11 housebuilders,[62] sales to other housebuilders and sales to non-housebuilders.[63]

[58] LandInsight - Find Off-Market Land - Site-Sourcing Tool
[59] Home - Landstack
[60] See from paragraph 2.122 for a description of our evidence gathering from SME housebuilders.
[61] We have collected data from five land agents, who we understand to be the largest land agents operating in Great Britain: Savills, JLL, Knight Frank, LaSalle and CBRE. We have collected data from 28 land promoters, based on membership of the Land Promoters and Developers Federation.
[62] Barratt, Bellway, Berkeley, Bloor Homes, Cala, Crest Nicolson, Miller Homes, Persimmon, Redrow, Taylor Wimpey, and Vistry.
[63] This includes a variety of companies, investors, promoters, public landowners (for example, central and local government) and private individuals.

Figure 2.5: Land sold via agents by type of purchaser

Source: CMA analysis of land agents completed sales data

2.109 Figure 2.6 shows that the majority of sales made by promoters we received information from were made to housebuilders [64] (much of this land is likely to have some form of planning permission at the point it is sold, making housebuilders the most likely purchasers). Between 70% and 80% of land (in terms of plot numbers) sold by these promoters in each year went to the largest housebuilders, with around 15% going to other housebuilders.

[64] This includes land sold to multiple purchasers where at least one of the buyers was a top-11 volume builder. As such, this could overstate to some degree the proportion of land sold to the large housebuilders.

Figure 2.6: Land sold via promoters by purchaser type

Source: CMA analysis of promoters completed sales data

2.110 However, for land to move from being 'developable' to being developed, it must receive planning permission. This often involves the land being identified within the relevant LPA's local plan as being suitable for development, and then a planning application being submitted with more specific proposals for the type of development intended to be undertaken. The operation and challenges presented by the planning system are set out in more detail in the section on planning in paragraphs 2.86 to 2.101. These issues can mean there is a shortage of land which is readily developable, that is, which has implementable planning permission. We set out in the section on landbanks in paragraphs 2.23 to 2.44 our current understanding of certain large housebuilders holdings of land with and without planning permission.

2.111 While our analysis of the land market is preliminary, it suggests that:

(a) The availability of 'developable' land varies across the regions of England, but there is some developable land available in all regions;

(b) Land agents are an important source of land for housebuilders, particularly smaller builders;

(c) Land promoters also supply land to housebuilders across the market, including those other than the 11 largest.

2.112 We are still investigating the role of relationships between intermediaries and housebuilders in how the market works, and how competition works for both on-market and off-market sites. We will also continue to assess how SME housebuilders access land and how land prices are determined and their influence on prices and delivery of houses. This further work will enable us to take a view, by the end of the market study, as to whether the land market in general is working well.

Supply of new build houses

2.113 As well as competing to secure suitable land, housebuilders also compete to sell houses. One factor which is likely to affect the strength of this competition is the level of concentration.[65]

2.114 We have used data from NHBC on the share of warranties granted to houses built by different housebuilders in GB to estimate the shares of different groups of firms in delivering new-build houses. The NHBC data over-estimates shares of supply in the building of new houses, as NHBC is only one of a number of warranty providers; it estimates it covers only 70-80% of new homes provided with warranties.[66] In 2022, the single largest firm in NHBC's data supplied 13 per cent of the market, while the top ten firms collectively supplied 57 per cent of total supply. The 75 largest firms (all of whom produce 100 units a year or more) supplied about 85 per cent of the output. The remaining 15 per cent of supply was accounted for by a tail of 1,000 firms.

2.115 As noted above, this method overestimates market shares, and we have compared the NHBC results with other sources to enhance our understanding of market structure. Based on data from their publicly available accounts, and using the total number of new-build houses from government statistics, in 2022 the largest firm supplied 8% of the market, and the largest ten firms supplied around 40%.[67] We cannot produce estimates for the size of the tail given the number of firms involved, but assume that a greater proportion of supply is provided by a wider set of firms than shown in NHBC's data. The two methods taken together therefore suggest that across GB, concentration in the industry is relatively low.

2.116 However, consumers generally choose houses from within much smaller local areas. We would therefore be concerned if we observed that one or two

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[65] We focus here on concentration in the supply of new-build houses. This provides a more conservative view as to concentration, given that existing housing stock makes up the majority of all house sales. We are still investigating the nature and strength of competition between new-build and existing housing.
[66] NHBC: The UK's Leading Provider of Warranty and Insurance for New-Built Homes
[67] Annual reports of housebuilders, England: Live tables on housing supply: net additional dwellings - GOV.UK (www.gov.uk), Scotland: Housing statistics quarterly update: new housebuilding and affordable housing supply - gov.scot (www.gov.scot), Wales: New dwellings completed by period and tenure (gov.wales). These figures are an approximation as different housebuilders have different financial year ends which do not always align with the dates used for compiling housing statistics.

housebuilders accounted for a large proportion of the housing being delivered in a given locality – either on the basis of how many houses have been built or the amount of land which they control for future building (as discussed in paragraphs 2.23 to 2.44). We will investigate this in the second half of the study, using a combination of data on planning permissions and delivered units from Glenigan[68] and information received from the top 11 housebuilders on land they own and/or control.

2.117 As part of understanding the dynamics of local competition, we are seeking to understand whether weaker competition at the local level results in the slower development, or 'build-out' rate, of a given site.[69] To do this, we have gathered information from the 11 largest housebuilders in the UK and conducted a review of existing evidence and research, including the Letwin Review, Start to Finish by Lichfields, and academic literature such as Greenhalgh et al.'s study of the Leeds City Region and work by Ball et al.[70]

2.118 Based on this evidence, a variety of factors besides the strength of competition locally can impact build-out rates, including the availability of labour and materials, site characteristics (such as site type, size and logistics), and external delays such as weather and delays by third parties.

2.119 In addition, we have seen evidence that demand side constraints can influence build-out rates. Evidence from the large housebuilders suggests that they aim to build houses at a rate at which they can sell them to try and avoid outpacing the local market's absorption rate,[71] whilst also avoiding excess capital becoming tied up in unsold homes. The existing literature supports the view that the strength of a local market can impact build-out rates. We are still assessing the effect of competition on build-out rates and will continue to explore this in the second half of the study.

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[68] Construction sales leads and industry insight | Glenigan

[69] The build-out rate is generally understood to be the percentage of a site that is built out on average in each year during the construction period.

[70] Independent review of build out: final report - GOV.UK (www.gov.uk); start-to-finish_what-factors-affect-the-build-out-rates-of-large-scale-housing-sites.pdf (lichfields.uk); (PDF) Does the Diversity of New Build Housing Type and Tenure Have a Positive Influence on Residential Absorption Rates? An Investigation of Housing Completion Rates in Leeds City Region (researchgate.net), Ball, Cheshire, Hilber and Yu (2023) 'Why Delay? Understanding the construction lag AKA the build out rate', presented at International AREUEA Conference, July 2023.

[71] The absorption rate is the rate at which newly constructed homes can be sold into (or are believed to be sold successfully into) the local market without disturbing the market price.

Next steps

Land

2.120 As noted above, we intend to continue analysing the incidence and competitiveness of sales processes for on- and off-market sites as well as further exploring the role of intermediaries in driving competition. We will also examine the extent to which the assumptions and expectations made at the land purchase stage feed through to the build-out and sales phases of a site, and the impact competition has on these expectations.

Supply of new build houses

2.121 We intend to analyse the factors affecting build-out rates in more detail and focus on the extent to which competition impacts build-out rates, as well as the factors influencing the prices set by housebuilders for new homes. We will examine whether there are areas with high levels of concentration, and whether we observe different outcomes or decision-making processes by housebuilders in these areas compared to areas with lower levels of concentration.

Barriers to entry and expansion

2.122 In the Statement of Scope, we said we would explore whether there were barriers to entry and expansion limiting competitive pressures on volume housebuilders and diversity in the housebuilding sector, and whether they might be higher than one might expect in a well-functioning market. We said that we were particularly interested in the impact of potential barriers for SME housebuilders. We specifically asked for views on the difference between small, medium and large housebuilders in terms of the type of developments and type of land they developed, the key challenges that SME housebuilders faced in securing sites for development, securing planning permission and building out sites, and differences (if any) that existed between the developments built by large, medium and small builders, for example, in terms of quality of housing built, speed of build, and diversity of housing built.

2.123 In discussing growth and expansion in the market, there was a general consensus amongst respondents in the reported types of barriers faced by housebuilders of all sizes.

(a) **Expansion:** The main barriers highlighted were access to viable land, the planning system, increased building regulation and labour and material shortages. Respondents noted that SME housebuilders experienced these barriers more acutely and, unlike larger builders, they faced additional challenges in accessing affordable finance. One respondent asserted that current market conditions, such as increases in material and labour costs and

reductions in the availability of allocated or consented land were making it increasingly difficult for SME housebuilders to continue to operate in the market.

(b) **Entry:** A range of stakeholders also noted that locating and securing viable land has become more challenging, and that this coupled with rising build costs are barriers for new entrants. One respondent argued that new entrants found it difficult to enter the market on account of the capital needed to acquire a site and take it through the planning process.

CMA analysis and emerging thinking

2.124 To understand whether there are barriers to entry and expansion in housebuilding, we have approached a number of SME housebuilders for their views. The housebuilders we have approached use different types of land and construct different types of housing, and our sample included housebuilders present in different parts of Great Britain. However, in order to ensure respondents had sufficient experience in navigating the housebuilding process, we largely approached medium-sized housebuilders (ie those building over 100 units per year). To date we have received information from 16 SME housebuilders in response to our requests for information.

2.125 In addition to gathering information directly from market participants, we have also reviewed and drawn on existing research and analysis of the challenges faced by SME housebuilders by industry stakeholders, such as Federation of Master Builders, Home Builders Federation and National House Building Council.

2.126 Our work so far indicates the main barriers facing SME housebuilders are:[72]

(a) **Issues relating to the planning system**: the majority of SME housebuilders we have heard from and several of the studies reviewed identified the planning system as one of, and in some cases the most important, barrier for SME housebuilders. Specific issues include inconsistency in decision making, the length of time the planning process takes, the complexity and levels of information required, and concerns that the planning system favours large sites. These issues disproportionately affect SME housebuilders as they typically work on fewer sites and have less resources than large developers.

(b) **Issues relating to access to land**: Several SME housebuilders we have spoken to, along with several studies, have highlighted that the availability of land (particularly land with planning permission), and to a lesser extent the

[72] Other barriers raised include access to labour and materials (which appear to have worsened in recent years), the impact of additional regulations (such as nutrient neutrality), and issues with third party agencies and utilities companies.

affordability of land, is an issue. We have also heard that land agents may limit SME housebuilders' access to land by holding closed bidding processes, which we are continuing to assess. We are also assessing whether and to what extent issues relating to access to land are exacerbated by the size of land banks held by large housebuilders.

(c) **Access to finance:** The existing literature and the SME housebuilders we have spoken to suggest that the main challenges SME housebuilders face with finance relate to its availability and cost, as well as its conditionality, for example the need to secure planning consent prior to being able to obtain finance. However, the literature suggests that challenges related to finance may have reduced in recent years, and fewer of the SME housebuilders we have received information from raised this as an issue (although we note this may be related to the fact we mainly have information from larger SME housebuilders who may have better access to finance).

Next steps

2.127 We will continue to explore these issues in more detail through further engagement with SME housebuilders, industry bodies and other stakeholders. We will also examine the contribution SME housebuilders make to the market, in order to assess the extent to which the decline in SME housebuilders, and the barriers they face, impact market outcomes.

3. Market investigation reference

Introduction

3.1 Market investigations are statutory examinations of markets at the end of which, unlike in market studies, the CMA has powers to impose orders on firms if these are needed to address the problems identified. In particular a market investigation assesses whether there is an adverse effect on competition (AEC) in the market(s) for the goods or services being referred. If any AECs are identified, the CMA must decide what remedial action, if any, is appropriate. Following a market investigation, a wide range of legally enforceable remedies are available, aimed at making the market(s) more competitive in the future.[73]

3.2 A market investigation is initiated by a market investigation reference ('reference'). The CMA may decide to make a market investigation reference when the findings of a market study give rise to reasonable grounds for suspecting that a feature or combination of features of a market or markets in the UK prevents, restricts or distorts competition, and a market investigation reference appears to be an appropriate and proportionate response.[74]

3.3 Under sections 131A and 131B of the Enterprise Act 2002 (the Act), the CMA is required within the first six months of a market study to make a decision either (i) not to make a market investigation reference or ii) to consult upon a proposal to make such a reference. In this case, the statutory deadline for the publication of this decision is 27 August 2023.

3.4 The recent judgment of the CAT in Apple v CMA (the CAT Judgment) [75] made clear that where the CMA has chosen the first option (not to make a reference), it cannot, in light of subsequent evidence or developments that may come to light in the second half of the market study, revisit that decision.[76] Instead, the CAT made clear that, where the CMA considers at the six month stage that it has identified some concerns that may justify a market investigation reference, the correct approach is to consult on whether to make a reference and include in the context of that consultation information about the circumstances that may lead the CMA to decide not to make a reference. This is the approach we have decided to follow in this case.

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[73] Section 131 of the Act sets out the power of the CMA to make references, and section 138 sets out the duty of the CMA to take remedial action following a reference.
[74] Section 131 (2) of the Act sets out what is to be construed as a feature for the purposes of Part 4 of the Act.
[75] *Apple v. CMA*, [2023] CAT 21
[76] Unless, exceptionally, such evidence or developments establish a mistake of fact, misrepresentation and/or change of circumstance (§55(1) *Apple*).

3.5 The CMA has therefore decided to consult on a proposal to launch a market investigation. This is based on evidence we have received and analysed at this stage of the process which indicates that there may be features of local land and housebuilding markets that distort competition in the supply of houses and in the downstream supply of estate management services.[77] However, the CMA does not have to make a final decision on whether to make a market investigation reference until the conclusion of the market study, by which time we will have gathered and analysed further evidence, and considered the responses to the consultation. This work may lead us to amend the scope of the market investigation, or to conclude that a market investigation reference is not appropriate. Our decision at this stage to consult on a proposal to refer, therefore, does not prejudge whether, at the end of the market study, the CMA should make a market investigation reference in relation to the concerns identified, or the scope of any such market investigation.

3.6 In the following paragraphs:

(a) We first set out whether we consider we will, at the end of the market study, be likely to have "reasonable grounds for suspecting that any feature or combination of features of a market… prevents, restricts of distorts competition", based on the facts that we have been able to establish since the launch of the market study. This is the test that determines whether a reference is capable of being made (the reference test).

(b) We then consider the factors that we are likely to take into account in deciding whether to exercise our discretion to make a reference, if the reference test is met.

(c) Finally, we set out our proposal at this stage in the market study process.

The reference test

3.7 As set out above, the reference test is a 'reasonable grounds to suspect' test and does not require the CMA to have concluded by the end of the market study, that there are, in fact, features of a market which prevent, restrict or distort competition.[78]

3.8 Based on the information gathered to date, including responses to our Statement of Scope, we believe that the reference test is likely to be met in relation to:

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[77] The CAT has recently, in *Apple v CMA,* [2023] CAT 21 (the CAT Judgment), clarified that it is not likely to be open to the CMA to revisit any decision not to propose a market investigation, absent a significant change of circumstances. We have therefore also taken this clarification into account when weighing up whether to propose to launch a market investigation.

[78] This point was made clear by the Competition Appeal Tribunal in Association of Convenience Stores v OFT, [2005] CAT 36, paragraph 7.

(a) issues relating to the private management of public amenities on freehold housing estates ('freehold estate management')[79] and

(b) housebuilders' practice of holding large 'landbanks'.

3.9 The decision not to propose at this stage to make a market investigation reference based on other matters should not in any way be interpreted as the CMA finding no concerns in relation to such matters, or as a decision not to include any such matters within the scope of any market investigation that we go on to launch.

Housebuilders' 'land banks'

3.10 Based on the information we have gathered to date, we believe that the reference test is likely to be met in relation to issues stemming from the amount of land held by the largest housebuilders.

3.11 Based on representations and information received so far in the market study process set out in paragraphs 2.23 to 2.44, we consider that we will be likely to have reasonable grounds to suspect that there may be a feature or combination of features of a market or markets in the UK which prevents, restricts or distorts competition for the following reasons:

(a) Restrictions on the availability of developable land as a result of volume housebuilders holding large landbanks, and whether this may act as a barrier to entry, particularly for small and medium sized housebuilders.

(b) Concentration in certain local markets through the control of a significant proportion of developable land by a small number of housebuilders, which if evidenced, may lead to poor outcomes for purchasers of new homes and for the housing market at large, including lower quality or less diverse new homes, and slower build-out rates.

(c) The extent to which land banks compound the negative impacts of any lack of transparency as to the ownership (and control via options) of land. A lack of transparency may hinder small and medium sized housebuilders from identifying and securing suitable land for development and make it more difficult for them to appraise the nature of competition in a given local area. This effect is likely to be more pronounced the more land banking occurs.

3.12 We are also exploring whether large land banks are a symptom of other aspects of the house building market not working well. In particular, we are exploring whether aspects of the planning process mean that the holding of large tracts of land is important for the efficient management of risk and cost, and whether this may

[79] In our information requests to housebuilders we initially focused on freehold housing estates but are now also exploring arrangements pertaining to leasehold-only estates.

further raise barriers to entry by placing builders who do not have the resources to invest in such land holdings at a material disadvantage.

3.13 We are, however, also mindful that there are sound operational reasons for housebuilders to secure access to land for future development and will consider these against any evidence that large land banks and concentration in land ownership may impede the functioning of the market before ultimately deciding whether to make a reference. We welcome evidence from stakeholders as to the effect on small and medium sized housebuilders of the existence of such land holdings, how the size of land holdings has been influenced by changes in the planning regime and other drivers of the size of land holdings.

3.14 We also note that some of the issues that are cited as potential drivers of the maintenance of large landbanks by housebuilders come out of the legal and regulatory framework, in particular, the nature of the planning regime. If we conclude that changes are required to address this, it may be that recommendations to government are the more appropriate route, so that the government can consider potential changes in the context of wider policy aims, rather than us making a market investigation reference.

Private management of public amenities on housing estates

3.15 As explained in Section 2, we have received representations from over 250 individuals describing the issues that such arrangements create, and in particular the very limited ability they have to switch between estate management companies or to secure the adoption of the public amenities on their estate by the relevant authority. Two estate management companies also acknowledged that there were issues in the supply of services by estate management companies (see Section 2 paragraph 2.49). We also received evidence that limited transparency on the nature and consequences of freehold estate management obligations as part of the house sales process may be distorting the choices made by house buyers, with many consumers reporting that they were either not aware of, or received misleading or insufficient information on these issues, prior to purchase; or the information was provided too late in the process to be readily taken into account.

3.16 As explained in Section 2 paragraphs 2.57 to 2.64 there is reason to believe that the financial incentives of housebuilders and local authorities, combined with an inadequate legal framework governing the adoption of public amenities by relevant authorities are causing the increase in the reliance on private management companies for the upkeep of public amenities (roads, open spaces, sustainable drainage systems) in newly built estates. These public amenities are not for the exclusive use of residents and tend to be managed by private companies appointed by the housebuilders early on in the housing development process. Further, as explained in Section 2 paragraphs 2.76 to 2.82, under such

circumstances, the arrangements that are put in place for the provision of maintenance services by private companies can leave residents with little bargaining power and have a significant impact on their ability to switch to a new supplier if they receive poor services or prices charged appear unreasonable.

3.17 Therefore, based on the information we have obtained and analysed to date, as set out in Section 2, we consider that we will be likely to have reasonable grounds for suspecting that the following feature or combination of features of a market or markets in the UK prevents, restricts or distorts competition for the following reasons:

(a) Lack of transparency for consumers in relation to material aspects of the way in which a newly built estate will be managed, including the actual costs that will be involved, the obligations of house buyers and consequences of the involvement of an estate management company.

(b) Significant market power conferred to estate management companies by housebuilders through the process they use, and have used, for the appointment of estate management companies.

(c) High barriers for consumers to switch estate management companies.

(d) Inadequate rights for freeholders facing unsatisfactory freehold management arrangements, for example: no legal right to manage, require the removal of a management company or challenge the reasonableness of fees; no ombudsman; potential exposure to disproportionate sanctions under the Law of Property Act 1925 and lack of redress should such sanctions be wrongfully imposed.

3.18 The legislative framework governing the process of adoption and other financial aspects creates strong incentives for both housebuilders and local authorities to minimise the level of adoption of roads and/or other public amenities (see Section 2 paragraphs 2.53 to 2.59). If adoption does not occur, private arrangements are made for the management of newly built freehold estates (thus giving rise to the potential problems identified in c) and d) above).

3.19 We are mindful, however, that some of the features derive from the (lack of) powers and duties of local authorities, and from how the planning regime operates. Reform to these issues may be a more effective route to solving the problems we have seen, and such reform is not likely to be within the CMA's powers - it would most likely require legislation by government.

Discretion to refer

3.20 Where the reference test is met, the CMA can exercise its discretion whether or not to make a market investigation reference. In our guidance on making market

investigation references, we set out four criteria which help to guide our exercise of that discretion:

(a) The scale of the suspected problem is such that a reference would be an appropriate response.

(b) There is a reasonable chance that appropriate remedies would be available.

(c) It would not be more appropriate to address the concerns through undertakings in lieu of a reference (UILs).

(d) It would not be more appropriate to address the competition problems through alternative powers available to the CMA or through the powers of sectoral regulators.[80]

3.21 We are inviting comments on these points as part of our consultation and will reach a final view on the exercise of our discretion to refer by the end of the market study. The following paragraphs therefore provide an initial outline of the key facts that we have considered at this stage in relation to each of the four factors, and which weigh both for and against making a market investigation reference.

Private management of amenities on freehold estates

3.22 Based on the information that we have been able to obtain so far, the issues we have identified in relation to the private management of new housing estates appear widespread – with a high majority of freehold estates potentially affected[81] – and the resulting detriment therefore potentially significant. Evidence from numerous homeowners highlighted their experiences of high and/or sharply increasing charges, poor quality of maintenance and poor customer service, and their concerns about the potential effects on the value or resale of their property.

3.23 As explained in Section 1, we have procured consumer research to further inform our analysis. The findings will be available in the autumn and may be a material consideration in reaching a final decision on whether to make a reference.

3.24 Given the representations we have received so far and the evidence available to us, it seems that recommendations to government or others could be a better route and one that is capable of addressing the competition problems that we have identified in relation to the private management of public amenities on housing estates more fully than the CMA would be able to achieve using its order making

[80] Guidance about the making of references under Part 4 of the Enterprise Act, OFT 511, paragraph 2.1.
[81] Data received from the 11 largest housebuilders indicates that over 80% of their freehold homes on estates completed in each of three sampled years were subject to management charges arising from the private management of public amenities on the estate.

powers. In addition, in correspondence with the CMA, the Secretary of State for the Department for Levelling Up Housing and Communities stated that 'the Government would welcome recommendations for measures we, industry and the regulators could take to make sure the housing market is operating effectively'. We are, however, still in the process of gathering evidence and analysing the market dynamics underlying these issues, and the behaviour of MCs. As such, we cannot rule out the possibility that the remedial powers available to the CMA itself at the end of a market investigation could have a beneficial role to play.

Land Banks

3.25 In relation to land banks, we note that they are of a very significant scale and that, in principle, divestment may be a suitable remedy in concentrated markets. However, at this stage, we are not in a position to reach a final view on this point and will consider it further during the second part of the market study. A key part of this consideration will be understanding whether, and to what extent, the size and composition of landbanks are driven by features of the market outside the control of the housebuilders, such as the nature of the planning system, versus strategic decisions by housebuilders to exercise market power to improve their position in the market. If we find that the former is the more plausible explanation, we are likely to judge that advice to government – which government can then consider as part of its wider policy responsibilities – would be a more appropriate response than making a market investigation reference.

Consultation on a proposal to refer

3.26 Our evidence gathering process is ongoing. However, at this stage in the market study process, we have identified concerns, which form the basis for our proposal to make a market investigation reference, in the following two areas:

(a) weaknesses in the adoption process for roads and public open spaces resulting in responsibility for their maintenance being passed on to private companies that may have significant market power, and

(b) the large amount of developable land controlled by the largest housebuilders, which may be hindering the growth of smaller housebuilders.

3.27 The recent CAT Judgment[82] made clear that where the CMA has chosen not to consult on a proposal to make a market investigation reference under section 131 of the Act, it cannot, in light of subsequent evidence or developments that may come to light in the second half of the market study, revise that earlier decision[83].

[82] [2023] CAT 21 (*'Apple*'). This judgment is currently under appeal.
[83] Unless such evidence or developments establish a mistake of fact, misrepresentation and/or change of circumstance (§55(1) *Apple*)

Instead, the CAT made clear that where the CMA considers at the six month stage that it has identified some concerns that may justify a market investigation reference, the correct approach is to open a consultation and include in the context of that consultation information about the circumstances that may lead the CMA to decide not to make a reference. We are therefore opening a consultation on a proposed market investigation reference under section 131 of the Act in relation to the supply of new homes to consumers ('housebuilding') in England, Scotland, and Wales.[84]

3.28 Under section 131A(2)(b), the CMA is required to consult the relevant persons about the proposal, in such a manner as it considers practicable, before deciding whether to make a reference. As explained in the first section of this report, we are currently engaging actively with interested parties on various aspects of the housebuilding market and intend to continue to do so over the next few weeks and months, alongside this consultation.

3.29 Alongside this wider ongoing engagement, the CMA is now commencing a period of consultation in relation to its proposal to make a market investigation reference. Following the consultation, the CMA will decide whether to make such a reference, carefully weighing up all the evidence that will be available to us at that time.

3.30 The CMA welcomes representations from interested parties on the market investigation reference proposal set out in this document. The CMA wishes to stress the importance of the consultation process in assisting the CMA's decision making and urges interested parties to engage with the consultation. The CMA in particular welcomes views on the extent to which recommendations to government may be capable of addressing the features that we have identified at paragraphs 3.11 and 3.17 and any specific proposals relating to such recommendations. In responding to this consultation, respondents may wish to consider the following questions in particular:

- Do you agree with the CMA's reasons for suspecting that there may be features of the land and housebuilding markets leading to competition issues in the supply of houses and estate management services?

[84] As set out in the CMA's Housebuilding Market Study Notice, the term 'housebuilding' encompasses all aspects of the construction and sale of new houses, flats, and any other accommodation, including securing land for future development (whether greenfield or brownfield), obtaining planning permission, putting in place agreements with the appropriate authorities, and the imposition of post-purchase charges or restrictions on freeholders where this occurs. It excludes conversions or changes of use of existing buildings. It also excludes the repair, renovation, and remodelling of existing housing stock. In relation to the imposition of post-purchase charges or restrictions on freeholders, it excludes charges or restrictions in respect of private gated residential estates, but otherwise includes the process of providing ongoing services or approvals in respect of such post-purchase charges or restrictions.

- Are there any reasons why a market investigation reference may not be the most appropriate outcome of the market study? If so, please elaborate by reference to the criteria set out in paragraph 3.20, and in particular:
  - Suitability of the use of the CMA's order making powers, given the issues that may exist in these markets
  - Alternative possible solutions, drawing out, if appropriate, long-term solutions and measures to mitigate the issues the CMA has identified in the short-term
  - Views on likelihood of alternative solutions being implemented and what factors may increase their likely success.

3.31 Such comments should be provided no later than 5pm on **18 September 2023** to:

- **Email:** housebuilding@cma.gov.uk
- **Post:** Housebuilding Market Study
  Competition and Markets Authority
  The Cabot
  25 Cabot Square
  London
  E14 4QZ

3.32 Please ensure that all personal data, other than your contact details, is redacted or excised from your response and any documents you submit to us.[85]

3.33 The CMA intends to publish responses to this consultation or, where appropriate, a summary. Therefore:

(a) Please supply a brief summary of the interests or organisations you represent, where appropriate.

(b) Please consider whether you are providing any material that you consider to be confidential and explain why this is the case. The factors that the CMA must have regard to in these circumstances are set out in Appendix A. Please provide both a confidential and non-confidential version of your response where applicable.

3.34 If you are an individual (ie you are not representing a business or other organisation), please indicate whether you wish your response to be attributed to you by name or published anonymously.

[85] Personal data is defined in the UK General Data Protection Regulation (Article 4(1)) as 'any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person'.

3.35 An explanation of how the CMA will use information provided to us can be found in Appendix A. This Appendix sets out how the CMA may use information provided to it during the course of this market study, including where it may need to refer to information in order to pursue enforcement action against a business in this sector.