BUILDING A BETTER BRITAIN

How a Labour government could enlist competition regulators to tackle the housing crisis

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Background – an activist regulator and a government in waiting

At various conferences over the summer, both Sir Keir Starmer and Lisa Nandy, the Shadow Levelling Up Secretary, have pledged to "back the builders, not the blockers", in the event they enter government at the next general election. It is no coincidence that the slogan Labour put at the heart of its most recent local elections campaign was "Build a Better Britain".

They doubtless recognise an opportunity to win confidence among voters on the issue of housing shortages, as Rishi Sunak and Michael Gove, the Levelling Up Secretary, struggle to unite their own party behind a coherent housing policy.

At the same time, the Competition and Markets Authority (CMA), having spent the last six months conducting the first stage of a thorough market study into housebuilding, has confirmed it will now spend the next phase focusing in on the practices of land management by larger housebuilders, and the extent to which smaller and medium-sized are able to compete, particularly at local levels.

The regulator has also begun consulting on whether to refer the sector for a full market investigation, and has indicated that, based on its findings to date, it expects the legal reference test for such an investigation to be met. While this is not a guarantee, it shows the CMA has concerns with key elements of the sector and is exploring all its options for addressing them, including an investigation, with the precise focus and scope still to be determined.

If Labour's intention is to rely on state-led solutions, it stands to reason that, in government, the Party could enlist the CMA to go even further in its investigatory work, and then set regulatory expectations and pro-consumer requirements that might pressure the housebuilding industry to deliver on more new homes.

The CMA's decision

The CMA launched its market study into housebuilding in February, following concerns that builders were not delivering the homes people need at sufficient scale or speed. The CMA's consumer protection work will seek to shed light on the experience of renters and explore whether more could be done to help landlords and intermediaries to understand their obligations.

The study into housebuilding was focused on 4 areas: housing quality; land management; local authority oversight; and innovation.

The CMA has long indicated that it has a particular focus on the issue of so-called "land banking", a practice of land management that involves acquiring plots intended for development but holding them largely unused for the long term. The regulator's concern that this was a potentially anti-competitive practice was evident even from the announcement of its study.

The major firms continue to deny that they are somehow 'hoarding' land for their own benefit, but that in many cases practices like this are essential to their business strategies in order to ensure there is a steady stream of new developments passing through the planning system.

In Persimmon's submission to the CMA, the firm contended that larger housebuilders are comparatively better equipped to manage these pressures of changing regulatory frameworks and the uncertainty they create. While this may well be true, arguments like this might have led the CMA to determine that the largest of the firms are particularly robust market participants, and thus could stand to face more specific and demanding regulatory scrutiny.

At this stage of the market study, the regulator has identified the following five key areas of concern, and will focus its analysis on each of them in the next phase of the market study:

- **Land banks:** as indicated in its previous thinking, the CMA has found that the largest builders in the UK hold significant tracts of land, and that these "land banks" have grown in recent years, leading to concerns that this may limit competition or slow build-out rates in some areas.

- **Estate management charges:** the CMA has found that a significant number of new housing estates built over the last 5 years have not been taken on by their local authority, meaning homeowners are required to pay a private management company to maintain amenities such as roads, parks, and street lighting. This has led to concerns about high or uncapped charges for owners and the quality of work carried out in maintaining these amenities.

- **Planning rules:** the regulator clearly recognised the concerns raised by stakeholders that complex planning rules and uncertainty were hindering the delivery of new homes, particularly for smaller housebuilders that have fewer resources to help manage the planning process.

- **Competition between builders:** the study has found that, the housebuilding market does not actually appear to be particularly concentrated at the national level, with a number of large housebuilders competing alongside smaller, regional firms. As a result, the CMA is now considering the number of competitors in particular areas and local markets, and the extent to which small and medium-sized firms are able to compete.

- **Barriers for new businesses wanting to build homes:** concerns were also identified regarding the barriers facing small and medium-sized builders as they seek to deliver new homes.

As a result of its analysis to date, the CMA is now consulting on whether to refer the sector for a full market investigation, bringing to bear its full powers of regulatory scrutiny, to determine whether anti-competitive practices or structures in the industry are causing blockages to new developments.

Labour is more focused on planning than competition

The Labour Party on the other hand has not focused on the competition between housebuilders. Rather than viewing them as the potential cause of the problem, it argues that these firms hold the solution to the housing crisis, if they were only afforded the opportunity. A central pillar of Labour's mission for sustained economic growth is the need to reform the planning system to allow the delivery of more homes.

While the Party consistently reinforces this approach as a priority, as well as putting social housing at its heart, the planning regime is far from the only lever a Labour government could pull.

Indeed, complexities in the planning process are far from the only issue depressing housing stock output. Persistent inflation and higher interest rates are the prime culprits pushing market leaders like Barratt to downgrade their construction targets this year.

Labour politicians have clarified that they will take a more pragmatic approach when it comes to the planning regime, recognising that previous major overhauls have not worked. However, in recognising the nuance in this policy space, by promising that the Party's approach will be "bold but deliverable", they could risk creating further policy uncertainty for the very firms they will need to incentivise.

Industry argues the CMA's concerns are misguided

The CMA's principal undertaking in their market study is to understand if the UK's low rate of housebuilding is a result of an insufficiently competitive market. However, the overwhelming response from industry thus far has been that regulatory uncertainty and rising costs are the real blockers to development.

The Levelling Up and Regeneration Bill, now making its way through the House of Lords, has been criticised as centralising and undemocratic by conservation campaigners, due to the stipulation that new 'National Development Management Policies' could override local plans if they are in conflict.

Major property developer Taylor Wimpey argued in its response to the CMA that this kind of risk, or more specifically the uncertainty surrounding it, has led local planning authorities to cancel plans outright.

Even just by announcing a consultation on the National Planning Policy Framework in December 2022, local planning has ground to a halt. Analysis from Lichfields found that the proposed changes relating to plan-making and housing land supply have the potential to suppress annual housing delivery, with a drop in supply of around 77,000 compared to most recent statistics.

Around 145,000 new homes have also been held up by so-called "nutrient neutrality" requirements, and many proposed developments often require complete resubmissions late into the permission process.

Additionally, housebuilders voiced their concerns to the CMA that cuts in revenue funding are creating a lack of resource within local authorities, which many cited as the reason for significant delays in the planning process.

Uncertainty has also been the order of the day from Michael Gove's Levelling Up Department, due to political rifts within his own party. In December last year, Gove elicited consternation from across the housing industry when he conceded to a rebellion of Tory backbenchers, and promised to provide councils with exemptions from local housebuilding targets.

These changes have yet to be implemented and have since been delayed until the Autumn, but the Home Builders Federation estimates that this uncertainty has already prompted 58 local authorities to delay their housebuilding plans, including in Gove's own constituency in Surrey Heath.

The CMA is now continuing its analysis and is seeking further engagement with stakeholders, particularly regarding their views on the concerns identified regarding "land banking" and private management of public amenities.

In the autumn it will publish further working papers providing more detailed analysis of the areas of concern and outlining the regulator's emerging thinking on effective solutions. Notably, these may not only include a market investigation reference (though the CMA has suggested it would likely meet the legal test to launch one). It could instead recommend changes to law and government policy, changes which would no doubt be considered in depth by the Party vying for election next year.

Labour's next steps

In taking on the housing crisis, Labour is aiming to address the underlying politics of generational, regional, and class division which the UK's dual housing and cost of living crises have exacerbated.

If regulators like the CMA put further pressure on housebuilders to increase housing stock, through both a market investigation and a parallel study into the private rented sector, a Labour government might see this as a clear opportunity to demonstrate their willingness to use state intervention for pro-consumer causes.

By encouraging this kind of regulatory intervention, the Shadow Cabinet could also see an opportunity to address criticisms from the left of their own party, which has condemned the focus on homeownership in its housing policy in recent months.

With polls still suggesting Labour is on course to take power at the next election, Starmer and Nandy are keen to demonstrate that they are willing to engage statutory and regulatory powers in ways that can be implemented quickly and have the biggest impact on housing numbers.

The party has previously committed to make social housing the second-largest housing tenure, which would require making up a deficit on the private rented sector of around 300,000 homes. This challenging target could reducing the standard of new homes, which is why Labour may be buoyed by the CMA's investigation of overall housing quality.

Labour is doubtless aware that address the housing crisis will require more than regulatory intervention alone, and Labour's proposal for new and powerful "development corporations" shows a recognition of the need to utilise public-private partnership for this purpose.

However, the Party's preference for state-led solutions, even ones that involve partnerships with the private sector, may end up causing unexpected problems.

Major developers have voiced concerns that adding new regional development corporations into the mix may ultimately hinder, rather than help the drive to build, as they could effectively just form another bureaucratic element in the process where failures and delays could occur.

Should a Labour government back the CMA in to go further, and to explore its options for structural remedies to push the sector to build more homes, it may find that such additional regulatory burdens could have the opposite effect.

DRD Partnership's Competition and Regulation team

Jon McLeod, Partner and Head of Competition and Regulation

Jon specialises in regulatory policy challenges and has advised businesses and individuals on political relations, corporate governance, dispute resolution and reputation management. Bringing connections across political parties, the law and industry sectors, as well as particular knowledge of communications challenges arising from competition and anti-trust matters, where he has worked alongside leading legal firms in a wide range of transactions and investigations, Jon leads DRD's competition and anti-trust practice. In 2021, Jon delivered the launch of the Business Banking Resolution Service (BBRS). Previously he was a Partner and Head of Public Affairs at Brunswick. Before that, Jon spent 21 years at Weber Shandwick, latterly as chair of its UK corporate, financial and public affairs practice, and of its Manchester office. Clients counselled include those in sports business, media, heavy industry, raw materials, technology, life sciences, leisure, trade and professional services.

Email: Jon.McLeod@drdpartnership.com

Claire Harris, Senior Advisor

Claire is a seasoned advisor on competition and anti-trust issues. Her experience encompasses senior roles at several international law firms and regulators, such as the precursor to the UK Competition and Markets Authority, and strategic communications and consulting at FTI Consulting. Claire works internationally, across London and Brussels, providing strategic counsel to companies involved in competition cases before national regulators and the European Union. She has worked across a wide range of sectors, with a special focus on tech merger clearance and regulatory interventions.

Email: claire.harris@drdpartnership.com

Edward Bowie, Senior Associate

Ed specialises in the interface between public affairs, regulatory and public law issues. Prior to joining DRD, he spent six years as a public lawyer working on judicial reviews, regulatory investigations and public policy development for both public and private sector clients. In the UK, he worked at a leading City firm and was involved in litigation across a wide range of policy areas including building standards, environmental regulation and digital regulation. Ed previously worked as a political advisor to a senior Cabinet member in his native New Zealand.

Email: edward.bowie@drdpartnership.com

About DRD

Founded in 2012, DRD Partnership has made a rapid impact in applying proven expertise in managing reputational issues for client businesses and organisations across a wide range of domestic and international markets. DRD Partnership is a strategic communications consultancy focused on building value for our clients and protecting their reputations at moments of challenge and change.

Our approach combines the deep experience of our senior partner team with rigorous analysis and interrogation of issues. This is to ensure that our programmes deliver meaningful impact.

DRD's partners have held senior roles in government, financial institutions, the law, international corporations, charities and leading public affairs consultancies. By combining our insight into relevant institutions with our experience of engaging stakeholders and delivering campaigns in multiple markets, we ensure that, when clients have only one chance to get things right, we are consistently able to meet and exceed their expectations.

Overview of DRD's Competition and Regulation services

Our work seeks to enhance and support the services of legal advisers and is guided by our clients' commercial, regulatory and reputational objectives. All our services are tailored to specific needs, but broadly speaking our potential offer can be summarised as follows:

- Apprise clients and their legal advisors of what is important to political decision-makers and influencers who oversee the regulators in the jurisdictions where they may face scrutiny.
- Create an effective communications strategy towards stakeholders, for instance, emphasising the benefits of a transaction to customers or addressing investors' concerns during an investigation.
- Prepare clients for Select Committee hearings or any other high-level political meetings.
- Where appropriate, brief Members of Parliament, who can interrogate the relevant senior political decision-makers that oversee the regulators clients are facing; and brief other bodies that may be consulted during the lifecycle of a regulatory process.
- Ensure journalists are well-briefed, to obtain positive press commentary that is in line with the argumentation put forward by legal advisers, or at the very least pays more than simply lip service to both sides of the argument.

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W: www.drdpartnership.com
A: DRD Partnership
17 Slingsby Place
St Martin's Courtyard
London
WC2E 9AB