THE ROOFS OVER OUR HEADS

How the Competition and Markets Authority's market study signals further political uncertainty for the housing sector

February 2024

DRD PARTNERSHIP

The CMA's final decision

The Competition and Markets Authority (CMA) launched its market study into the housebuilding sector almost a year ago, and is required to announce its final findings next week (Tuesday 27th February).

The launch of the study came alongside growing disquiet with the UK's planning system, as the effects of a deepening cost of living crisis were, and continue to be, exacerbated by a housing crisis. The shortage of affordable homes, driven by the failure to build sufficient numbers over decades, only serves to deepen generational inequality.

The regulator cited these widespread concerns about housing availability and costs as the impetus for launching its study, referencing specific concerns that "builders are not delivering the homes people need at sufficient scale or speed". This also came alongside the announcement of a separate consumer protection project related to rented accommodation.

The initial scope of the study was proposed to focus on four key areas:

- Housing quality: looking at how builders are delivering the right sorts of homes that communities and buyers need;
- Land management: examining whether the practice of 'banking' land before or after receiving planning permission is anti-competitive;
- Local authority oversight: exploring how councils oversee the delivery of homes and how developers negotiate affordable home requirements; and
- Innovation: considering whether factors may be holding builders back from adopting new building techniques or moving towards more sustainable, net zero homes.

However, the CMA's interim findings showed that it had chosen to focus on particular core issues within these areas. Combined with some tentative qualifying language, this indicated that the regulator may be unlikely to identify competition concerns at the national level.

At the local level however, the CMA is likely to focus on the biggest issue it identified, that of 'land banking'.

In November, the CMA confirmed that its study was reviewing whether local competition is being hurt in what it said were "the small number of areas" where large amounts of land are held by a small number of housebuilders, noting that these could harm the ability of smaller builders to compete.

Detractors often characterise 'land banking' as a conspiracy by the largest housebuilders to control the supply of land, allowing them to slow the rate of developments to benefit their sales prices.

Housebuilders dispute such assertions and insist that maintaining a healthy supply of land is essential to running their business and maintaining production year by year.

The regulator's signalling in November, suggesting that it does not have major competition concerns at the national level, explicitly recognised "that housebuilders need to hold a pipeline of land" as sites pass through the planning system.

However, the CMA may want to look more closely at the data on local markets, and the sheer breadth of the market study's scope leaves significant room for long term scrutiny, especially on the potential impact of complicated planning regulations and delays in construction.

Should the study lead to a formal market investigation reference, involving an in-depth probe into areas of concern, legal powers for the CMA to tackle competition issues directly, or recommendations to government for legislative change, the whole housebuilding sector will feel even greater pressure from government as the UK's housing crisis continues unabated.

Industry representations to the regulator decried the lack of certainty and clarity provided by policy makers on planning. If the market study finds that the planning system perversely necessitates 'land banking' as an all but essential process, the sector can expect even more frequent, but potentially less consistent, interventions from both government and the anticipated 'government in waiting'.

All of this is sure to have a significant impact on how government and the CMA considers major deals within the housebuilding industry, including the recently announced merger of Barratt and Redrow, the biggest acquisition the sector has seen since 2022.

How much has changed in the last six months?

Since the CMA published its interim report, land banks held by the major house builders have grown, though likely not by enough to convince the regulator of any major competition concerns. The CMA also acknowledged that "there are good reasons why a house builder may wish to maintain significant land banks".

Elsewhere, the Government has relaxed rules on nutrient neutrality in its passage of the Levelling Up and Regeneration Act, something the industry long saw as a major blocker for new developments near rivers.

The lack of affordable homes in the UK remains a salient political issue, but so too does the problem of polluted rivers and seas. Combined with the Government's framing of the changes as "using our Brexit freedoms", this charged debate is likely to persist.

The CMA's focus of its second working paper on planning rules came alongside continued criticism of the UK's regime from voices across the political spectrum. In particular, the Labour Party's criticism of the UK's "antiquated" planning system coincided with the regulator's consideration that it could be significantly impeding the operation of the market, particularly for smaller companies.

Despite a commitment to "back the builders not the blockers", Sir Keir Starmer's Party has yet to confirm which it considers larger housebuilding firms to be. Soundings from the CMA suggested that the national market shares of the biggest firms are "not concerning in themselves", but it continues to drill down into market concentration at a more local level.

Looking ahead to other issues facing the sector, the Future Homes Standard is due to come into operation in 2025, but before it does, it is likely that the need for, and cost of, retrofitting for homes built in the meantime will loom larger in the public policy discourse.

All the while, the shortage of new homes will only worsen, as leading house builders scale back production in response to market downturn. Any further deterioration risks increased pressure on government to boost housebuilding, but it remains to be seen whether this will come in the form of incentives and the removal of barriers for the industry, or more intrusive interventions in how they operate.

Signs of renewed sector confidence

Previous representations to the CMA from industry largely argued that its concerns about competition in the sector were misguided.

Housebuilders expressed concerns about the uncertainty created by confused signals from government, for example in the tumultuous politicking around the passage of the Levelling Up and Regeneration Act.

However, while government eventually compromised on some key elements of the legislation to placate its own backbenchers (the so-called 'planning concern group' of Conservatives), it also yielded welcome concessions to developers on 'nutrient neutrality' rules.

The CMA's acknowledgements of the legitimate reasons for 'land banking', and that the market concentration of the largest firms is not concerning, has likely buoyed the confidence of many industry actors.

The most recent and significant indication of this confidence is the merger of Barratt and Redrow, the largest and seventh-largest UK housebuilders, respectively.

Announced earlier this month, the acquisition being proposed so close to the completion of the CMA's market study might have been considered poor timing. But the public representations from Barratt Developments around the £2.5 billion deal suggest any findings about competition concerns at a local level may not be to their detriment.

Both parties have acknowledged that they expect the CMA to look into the merger, but have suggested that the deal would not affect the current state of competition in the market. This is because their combined land holdings (with a pipeline of 92,345 plots and the aim of building 22,000 homes a year in the medium term) would equate to less than 10 percent of the market total.

On a national scale, this could satisfy the regulator. But it has been established that it is more likely to scrutinise local impacts. Barratt and Redrow argue that they have a "complementary" footprint in local geographies, so will be hoping that the CMA might, at most, propose only minor remedies to the deal.

Such piecemeal concessions are not always satisfactory however, and some industry voices have expressed concerns that housebuilding is being used as a 'hot potato' by central government. Earlier this month, the Housing Secretary, Michale Gove told a committee in the House of Lords about the perceived overconcentration of the industry, suggesting that larger housebuilders were too "comfortable" with their working patterns to embrace innovation.

Barratt's chief executive, David Thomas confirmed that the company has a "very high level of confidence" that the deal will be cleared by the CMA. While this confidence may be justified in a number of respects, the broader political machinations in the industry remain a significant risk to this and other transactions.

Reactive government decision-making is increasingly political

Michael Gove's comments come as part of a long struggle by the Government to address the country's housing crisis, and his department's decisions are increasingly announced with a focus on political point scoring.

Earlier this month, the Secretary of State announced a consultation into the relaxation of planning rules in London, which could limit the power of local authorities to block new housing on brownfield sites, as a reaction to the "failure" of the Labour mayor Sadiq Khan to meet his building targets.

While an independent review found the complexity of the mayor's planning rules had been "frustrating" housebuilding, Gove's reactive rule change has been criticised as insufficient.

The architect and broadcaster George Clark cautioned that brownfield development is "notoriously difficult to do" and could lead to even poorer standards for new homes.

At a national level, the passage of the Levelling Up and Regeneration Act, and publication of the new National Planning Policy Framework (NPPF), both in December 2023, were both touted as game changers for accelerating new housing development.

Announcing the new NPPF, Gove claimed that there was now "no excuse not to ensure that homes are delivered swiftly and efficiently" through local plans. However, industry and campaign groups criticised the announcement as lacklustre, and saw only a watering down of more ambitious targets.

Labour sends supportive signals but refrains from legislative commitments

Waiting in the wings is the Labour Party, still maintaining a sizeable lead in the polls and slowly crafting more detailed policy to boost housebuilding.

The closer to the election the country gets though, the less certain the environment becomes for the housebuilding sector. Labour confirmed it would reverse the changes to the NPPF announced by Gove on its very first day in government.

The party's local housing recovery plan also suggests that housing targets would be made mandatory, with strengthened mechanisms to enforce it. Nationally the Party has promised, if elected, to write to chief planning officers to get councils to look for reasons to approve applications in areas without an up-to-date plan where development has stalled.

More broadly, the Party has pledged to build 1.5 million new homes over the next parliament, with a targeted boost for affordable and social housing. This would suggest that Labour is planning on putting developers at the vanguard of a concerted drive for building new homes. However, Labour's housing plan also includes measures to tax private developers to fund more social housing, with the levy charged when a newly built property is sold.

Labour has been careful not to make any solid commitments on this kind of policy before an election date is confirmed, so while signals remain largely positive that the housebuilding sector would be prioritised as an area of significant growth, concrete details are still lacking.

In the meantime, this could serve to create an even more uncertain landscape for housebuilders to navigate. Industry will therefore need to engage closely and effectively with shadow ministers, and focus on successfully preparing for an incoming interventionist government, that will also be seeking to guide an equally activist regulator.

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 a new bank regulator, the 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. Client sectors included 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 all matters competition and anti-trust. Her experience encompasses senior roles at several international law firms and regulators, such as the precursor to the UK's CMA, and in strategic communications and consulting. Claire works internationally, across London and Brussels, providing strategic counsel to companies involved in competition cases before the European Union. Her specialist expertise provides her with unique opportunities to deliver results to a wide range of clients, particularly in the tech sector.

Email: claire.harris@drdpartnership.com

Tamlin Vickers – Senior Advisor

Tamlin is based in Brussels where he advises on EU regulatory affairs and market entry. He was previously director of Atlas Capital Group, a boutique investment advisory firm providing high-level advice to western banks, corporations and family offices on entering China; as well as assisting Chinese conglomerates on expansion into Europe.

Prior to that, Tamlin worked at Amec plc, a leading engineering consultancy specialising in the oil and gas market, where he advised senior management on the European economic and political landscape, and on business opportunities in the Far East.

Tamlin has also worked in the European Corporate Affairs Division of Tesco plc and as Senior Advisor to a member of the UK Parliament's European Scrutiny Committee.

Email: tamlin.vickers@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, and holds degrees in Law and a Bachelor of Arts in history and politics from the University of Otago, New Zealand. He also gained a Masters in Public Policy and Administration from the London School of Economics.

Email: edward.bowie@drdpartnership.com

Toby Chapman – Associate

Toby supports clients in public affairs and communications campaigns, and government and regulatory engagement. He joined DRD from HM Treasury, where he was a policy advisor delivering strategic advice to UK Government ministers. He recently worked with the Labour Party's external relations team, establishing stakeholder networks and communications platforms for businesses and supporters.

Toby has also provided research and analytical support for House of Commons select committees, regulatory bodies, and political intelligence and advice on communication strategies for companies across a wide array of sectors, including energy companies, charitable foundations, and financial services firms.

Prior to joining the Treasury, Toby worked at the National Audit Office, conducting financial investigations. Toby holds a BA in History from the University of Oxford, and an MSc in Public Policy from University College London.

Email: toby.chapman@drdpartershsip.com

Dulcie Brennan – Senior Analyst

Dulcie is a communications specialist who supports a range of clients, including private clients and large multi-national organisations, with a particular focus on litigation, competition, and regulatory issues.

She graduated with a law degree from the University of Manchester and then completed the LPC at distinction grade with the University of Law.

Email: dulcie.brennan@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.

DRD PARTNERSHIP

T: + 44 (0) 2039 510 346

W: www.drdpartnership.com

A: DRD Partnership,
17 Slingsby Place,
St Martin's Courtyard,
London WC2E 9AB