Housebuilding market study

Private management of public amenities on housing estates working paper

3 November 2023

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APPENDICES

Summary

1. Historically, it was standard practice for amenities on new housing estates intended for communal use – such as roads, sewers and drainage and public open spaces – to be adopted by the relevant authority and maintained at public expense.

2. However, evidence gathered in our market study to date has shown that, over the last five years or so, amenities on new housing estates that are available for wider public use (ie not for the exclusive use of households on the estate), are increasingly not being adopted by the relevant authority. This appears to be driven by the discretionary nature of adoption, housebuilders' incentives not to pursue adoption and by local authority concerns about the future ongoing costs of maintaining amenities, in the context of pressures on local authority resources and finances. Levels and trends of adoption differ by amenity, with non-adoption of public open spaces identified as a particularly significant and growing issue. The position also differs by nation and locality. This variation in the extent of adoption arises because local authorities have wide discretion on whether or not to adopt amenities, and housebuilders are not obliged to seek adoption.

3. Where such amenities are not adopted, a sub-set of people within the wider local community (ie households on the relevant estates) are generally required to pay a private management company for their ongoing maintenance. The issue of private management of amenities is directly linked to the delivery of new homes, and is one of the five key areas we are examining in the market study.

Issues we have been examining

4. Private management of amenities on housing estates was the issue that we received most concerns about in response to our statement of scope, published in February 2023, with around 250 individual respondents raising concerns with us. It has been debated in UK and Welsh Parliaments and also considered by UK and Welsh governments, with the UK government committing in 2019 to giving freeholders on housing estates in England equivalent rights to leaseholders to challenge charges, change management company or seek redress.

Transparency, estate management charges and quality of service

5. Issues raised with us, and with others, include homeowners not knowing that their home was subject to estate management arrangements and charges at an early enough stage in the house buying process, or not knowing/understanding the full implications of those arrangements; poor quality service, or services that homeowners have paid for not being delivered at all; high and uncapped charges, with a lack of clarity around how the charge has been arrived at, how it breaks

down and concerns about high management fees as a proportion of the overall charge. People told us about:

- Estate management arrangements and charges being glossed over (eg as ‘a small annual charge for grass cutting’).
- Significantly-above-inflation fee increases, with no explanation given for the increases, with fees tripling in one case when a new management company took over.
- Fees for management overheads, rather than actual maintenance work carried out, comprising a significant proportion of the overall charge, in one case accounting for over 50% of the total charges for the estate.
- High charges for one-off events or ‘permission fees’ (eg for external alterations) with one managing agent reportedly asking for over £1800 to sign a document.

Impact on resale of home

6. Homeowners have also raised concerns around the impact of estate management arrangements on their ability to sell their home, on the value of their home, and on their ability to get a mortgage. Uncapped charges may deter future homebuyers, or finance companies may refuse to lend because of uncapped charges. Guidance to conveyancers advises them to inform clients of estate ‘rentcharge’ terms (see paragraph 7) which may be considered onerous, and we are aware of at least one major lender which requires that borrowers advise it of any charges over £500, so that its valuer can assess whether the valuation of the home is affected. In some cases, homeowners may also find they are liable to pay additional charges to an estate management company as part of the process of selling their home. We heard of:

- Delays in estate management companies providing ‘management packs’ required for the sale, which can cost hundreds of pounds, delaying the sales process, increasing conveyancing costs and risking the sale of the house.
- Sales falling through because of the existence of an estate management charge of over £500.

Sanctions for non-payment of charges

7. A rentcharge is an annual sum, created in a conveyance or transfer, paid by a freehold homeowner to a third party who normally has no other interest in the property. Rentcharges are often a form of security to ensure homeowners pay management charges. While our review of transfer deeds provided by the 11 largest housebuilders indicates that the use of estate rentcharges as a way to

secure payment of management charges is not universal across the sector, we have seen evidence that it is not uncommon. Of particular concern is that, where such arrangements are in place, management companies may be able to enforce remedies under Section 121 of the Law of Property Act 1925 for outstanding payment, which can lead to the management company taking possession of the home, without any requirement to serve notice, and with no right for the homeowner to apply to the courts for relief.

8. Such sanctions, or the threat of such sanctions, can result in significant and disproportionate financial and emotional detriment, and we have seen evidence of Section 121 notices being served for outstanding payments of as little as just over £400. In response to our information requests, one estate management company provided data showing that it has issued, on average, over 800 written warnings a year between 2020 and 2022 that it might enforce the remedies available under Section 121 of the Law of Property Act 1925 to secure outstanding payments. A further five estate management companies provided data showing they had issued such warning letters over the same period. However, none had followed up with enforcement action using the remedies available under Section 121 of the Law of Property Act 1925. We have also seen:

   - A letter from an estate management company's solicitor to a mortgage company advising that if its mortgagor did not make payment it was instructed to issue proceedings with a view to repossessing the property on behalf of the management company.

   - Another solicitor's letter stating that should its client grant a lease or re-enter the property it will have a detrimental impact on the value of the home.

9. Where estate rentcharges apply, there is clearly a significant imbalance of power between the management company and the homeowner.

Barriers to switching estate management company

10. This imbalance of power is also illustrated through some of the high barriers homeowners may face in switching estate management companies, if they are dissatisfied with the level of service provided, or charges imposed. This may be a particular issue where the management company is contractually imposed on the homeowner and named in the deeds (an 'embedded management company'). In such circumstances, it may not be legally possible to switch, and even where it may, in theory, be possible to switch management company (if the transfer terms allow for it), in practice there could be significant barriers to doing so. Such barriers include achieving collective agreement of households, and the costs incurred in switching, including legal transfer fees.

Ability to challenge charges and seek redress

11. In England and Wales, freeholders are limited in their ability to seek redress and do not enjoy the same rights as leaseholders to challenge the reasonableness of estate charges or to appoint a new management company, thus entrenching their weak position. Freeholders can also be deterred from bringing a challenge, with one individual stating that taking their management company to the small claims court would be futile, as the management company is not prevented from adding its costs to their bill for the following year.

Emerging concerns on the impact of private estate management arrangements on consumers' interests

12. In light of the evidence that we have reviewed, it is our emerging view that consumers subject to private estate management arrangements are experiencing poor outcomes, and in some cases potentially serious detriment, and are in many cases powerless to address this. As the private estate management model risks becoming the default for new estates, if the model is left unchecked, such problems are likely to exacerbate over time.

13. We consider that, at the root of the problems we see, are the falling levels of adoption of amenities on housing estates by local authorities, which appears to be driven by the discretionary nature of adoption, housebuilders' incentives not to pursue adoption and by local authority concerns about the future ongoing costs of maintaining amenities, in the context of pressures on local authority resources and finances. While this appears to be a particular and growing issue for public open spaces, and possibly also for roads, the lack of adoption of amenities in general is driving the growth of a private model which – without satisfactory protections for consumers – is leading to poor outcomes for consumers.

14. Even with additional protections in place for households on housing estates, there is still likely to be a significant imbalance of power and misalignment of incentives between the companies managing those amenities available for wider public use, and the sub-set of households that are required to fund their maintenance.

Possible measures to address emerging concerns

15. Our emerging view is that the current estate management system as it stands:

    (a) Causes an imbalance of power and misalignment of incentives between private companies managing amenities which are open for wider public use and those households who are required to pay for the maintenance of those amenities on an ongoing basis; and

(b) Means that households are unable to effectively oversee estate management companies and if necessary, remove/switch estate management companies or readily challenge poor service or unreasonable charges.

16. We consider that these emerging concerns could potentially be addressed by one or both of:

(a) **providing greater protection to households living under current private management arrangements**; and

(b) **reducing the prevalence of such arrangements**.

17. We consider that it may be possible to mitigate (partially or fully) the detriment experienced by households living under the current arrangements through a series of additional protections (16(a), and see paragraphs 4.16 to 4.31) that could be achieved in the short to medium term (ie within the next 2 to 3 three years) and that an appropriate solution in this regard would align with the following principles:

(a) **Transparency**: All arrangements and charges imposed on consumers should be transparent;

(b) **Cost-reflective**: Households must only be charged for estate management services as and when they receive estate management services, and charges should reflect the costs incurred by the estate management company in managing the public amenities;

(c) **Accountability**: Services provided by the estate management company should meet an agreed service level;

(d) **Proportionality**: Sanctions imposed on households by the estate management company for non-payment of charges should be reasonable and proportionate to the infraction;

(e) **Switching**: Households must be able to switch providers if they are dissatisfied with the level of service provided or the charges imposed by the estate management company;

(f) **Redress**: Households must have the right to readily challenge charges or sanctions, and not face significant barriers in doing so, and the right to redress where necessary;

(g) **Liability**: The system must not place disproportionate legal obligations or liabilities on households; and

(h) **Onward sale**: The system must not cause households undue problems with the onwards sale of the property.

18. Through this working paper we are seeking views on whether these measures would partially or fully address the detriment we have observed and on whether further steps are also required to reduce the overall prevalence of private management arrangements. We are considering this given the risk that any system of consumer protection on its own may not completely remove the potential for detriment since the imbalance of power and misaligned incentives would remain, and while it may act as a deterrent, enforcement itself may be insufficiently comprehensive to overturn private estate management companies' incentives to take advantage of this power imbalance.

19. We consider that reducing the prevalence of private management arrangements would require legislative and policy changes that are likely to cost government resources to implement, take longer to achieve than providing greater protection to households living under current private management arrangements (paragraph 16(a) above), and have a number of practical implications for local authorities and others. Any such legislative changes would require a combination of:

    (a) Common adoptable standards for public amenities on housing estates; and

    (b) Mandatory adoption of those amenities.

20. Although we consider that reducing the prevalence of private management arrangements would be the most direct route to address the root cause of our emerging concerns, we note that it could have a significant impact on local authority finances and resources at a time when local authority funding is already stretched. In addition, even with legislative change to reduce the prevalence of private management arrangements and fees, some additional protections may still be required, both as an interim solution for households living under pre-existing private management arrangements, and for new amenities which are not eligible for adoption under any new regime, or where new amenities are unable to be adopted or where households choose for them not to be adopted. We therefore see the two approaches as potentially complementary, rather than necessarily alternatives. Both approaches may be required if the benefits of enhanced consumer protection measures did not comprehensively address the detriment experienced by customers of estate management companies, unless accompanied by measures to reduce the prevalence of private management including mandatory adoption.

21. We describe these possible measures in detail within this working paper, setting out how they could address our emerging concerns and inviting views on areas for further consideration.

22. We must publish our final report on the market study, setting out our findings, and what action, if any, we propose to take by 27 February 2024.[1]

23. One possible outcome of our market study is a more in-depth investigation by the CMA by way of a market investigation.[2] We indicated in our update report that we would reach a final view on whether or not to make a reference to address features in relation to private management of public amenities on housing estates by the end of the market study.

24. At this stage, our provisional view is that a market investigation may not be the most effective way to address our emerging concerns about estate management arrangements and charges and improve competition, and thus outcomes, for consumers.

25. Market investigations are detailed examinations into whether there is an adverse effect on competition in the market referred, and if so, what remedial action may be appropriate. They must be completed within 18 months of the date of the reference (extendable by 6 months in certain circumstances). The CMA has certain powers that would be available to it at the end of a market investigation to remedy issues it has identified. These include the ability to introduce behavioural remedies, which are ongoing measures that can be imposed by the CMA through making an Order and are designed to regulate or constrain the behaviour of suppliers in a market. Following a market investigation, the CMA could, for example, require estate management companies to take actions that would provide greater protection to households living under private management arrangements. The CMA could not, on the other hand, require other public bodies to take particular actions, for example by requiring local authorities to take action that would reduce the prevalence of private estate management arrangements or directing local authorities to monitor and enforce additional protections for households.

26. However, based on the evidence we have seen so far, our provisional view is that government action may be a more appropriate and comprehensive response to the detriment we have identified. This is for the following reasons:

    (a) Firstly, the use of private management of public amenities on housing estates is considerably influenced by the interaction between housebuilders, local authorities, estate management companies, households and the legislative framework underpinning adoption and property law. In this context, only government action would enable additional consumer protection measures to be introduced as part of an overall coordinated action plan. One example is

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[1] Section 131B(4) of the Enterprise Act 2002; see Market study notice (publishing.service.gov.uk). 27 February 2024 is 12 months from the publication of the market study notice.
[2] A market investigation by the CMA is an in-depth investigation led by a group drawn from the CMA's panel of members.

that amending Section 121 of the Law of Property Act 1925 (see paragraph 4.23) to prevent disproportionate sanctions of home repossession being applied or threatened in the event of non-payment of estate management charges, would only be possible through government legislative action.

(b) Secondly, the CMA itself may not be best placed to enforce and monitor a discrete solution as the additional measures we have outlined would be most effective if underpinned by a broader regulatory framework, including appropriate tools for other bodies to monitor and enforce against breaches of those measures. Such a framework could be included within the legislation required to establish the additional measures to protect households living under private management arrangements, whereas the CMA would not have the ability to alter the powers or duties of other government bodies. While the CMA could, in principle, take on monitoring and enforcement responsibilities for any measures we were introduce, it is not clear at this stage that this would be the best solution, given the other roles already played by local authorities and others in housing markets. A legislative route would enable policy makers to give careful consideration to which body or bodies (at national and/or local level) should act as the enforcement body, and what specific powers and duties they should have.

(c) Thirdly, action may be needed to reduce the prevalence of private estate management arrangements, which could only be implemented through action by government, rather than by the CMA. While we might be able to mitigate some of the current harm by applying our powers, we could not use these powers to address the root cause of the problems we have identified, ie the falling levels of adoption of amenities by local authorities. It may not be proportionate to initiate a market investigation reference, potentially leading to the application of our order-making powers for the adoption of certain measures to better protect the customers of private estate management companies when government action may be needed to address the increasing prevalence of private management, and underlying market power of estate management companies, in any case.

(d) Fourthly, it is not clear that action by the CMA following a market investigation would be quicker than the government acting itself. A market Investigation would take up to 18 months from the date of reference, after which any orders we make would need to be implemented, which could take up to a further 6 months. It is therefore not clear that this would be a faster route to securing consumer protections than government legislation and other action to improve consumer protection for affected households.

27. For these reasons, and consistent with the view set out in in the update report, based on the evidence we have seen so far, our provisional view is that government action may be a more appropriate and comprehensive response to

the detriment we have identified, rather than initiating a market investigation with the prospect of using the CMA's own powers at its conclusion.

28. We welcome views from interested parties **by 24 November 2023** in order to:

(a) Understand the likely effectiveness of the measures set out in this working paper in tackling the issues we have identified (whether in isolation or in conjunction), the potential costs of those measures and any potential unintended consequences.

(b) Understand whether there are other measures that could be taken to address the issues in a more effective and proportionate manner.

(c) Understand the implications for whether or not the CMA should initiate a market investigation reference, or alternatively conclude this market study with clear recommendations to the UK, Scottish and Welsh governments.

29. Given the differences in legal frameworks and processes across the nations which we highlight in this working paper, we are also keen to understand the extent to which the application of any measures should differ across England, Scotland and Wales.

30. We will carefully consider any feedback received in response to this working paper, and take it into account as we develop our final report, which we are required to publish by 27 February 2024.

1. Introduction

Context

1.1 We launched our market study into housebuilding on 28 February 2023 focussing on the supply of new homes to consumers in England, Scotland and Wales. We published a statement of scope at the same time.[3] On 25 August 2023 we published an update report on the market study and a consultation on a market investigation reference ('update report').[4]

1.2 The update report set out the five main areas that we are considering in the market study, which were selected based on responses to our February 2023 consultation on the scope of the study. Those areas are:

(a) The private management of public amenities on housing estates

(b) Land banks

(c) Planning

(d) Barriers to entry and expansion; and

(e) Competition in the market.

1.3 We are continuing to review evidence we have received, and to gather further evidence, to inform our final report and outcomes from the market study.

1.4 We will publish the final report, and any measures we consider may be needed to address any problems we identify, by 27 February 2024. We will also publish our decision on whether or not to make a market investigation reference (see paragraph 1.14 to 1.15) by this date.

Purpose of the working paper

1.5 This working paper is focussed on the private management of public amenities on housing estates.

1.6 Based on evidence reviewed to date, our objectives in publishing the working paper are to:

(a) Set out and test with interested parties our more detailed analysis of the evidence we have reviewed to date, and our emerging thinking on the impact

[3] Statement of scope (publishing.service.gov.uk)
[4] Housebuilding market study update report and consultation on a market investigation reference (25 August 2023)

of the issues we are considering on the interests of consumers and competition.

(b) Set out our emerging thinking on possible measures for addressing the issues we have identified, in particular to:

(i) Understand the likely effectiveness of the measures we set out in tackling the issues we have identified (whether in isolation or in conjunction), the potential costs of those measures and any potential unintended consequences.

(ii) Understand whether there are other measures that could be taken to address the issues in a more effective and proportionate manner.

(iii) Understand the implications for whether or not the CMA should initiate a market investigation reference, or alternatively conclude this market study with clear recommendations to the UK, Scottish and Welsh governments.

1.7 Given the differences in legal frameworks and processes across the nations which we highlight in this working paper, we are also keen to understand the extent to which the application of any measures should differ across, England, Scotland and Wales.

Background

1.8 Although not directly determinative of high-level market outcomes in the housebuilding sector, such as the number of homes built and the price and quality of new homes, the private management of public amenities on housing estates is inextricably linked to the housebuilding process and has a direct impact on the interests of consumers, ie the purchasers of homes on new housing estates and households on those estates.

1.9 The need for the private management of public amenities on housing estates – such as roads, sewers and drainage, lighting and public open spaces – arises where such amenities are not ‘adopted’ by the relevant authority. In such circumstances, a private estate management company may be appointed to take on the maintenance of such amenities.

1.10 Unlike in, say, private gated estates, the amenities in question are generally available for use by the public at large; however, their maintenance is funded by a subset of the public, ie households on the relevant estate who pay an estate management charge, in addition to paying council tax.

1.11 The private estate management model has emerged in recent years and is increasingly a feature of new housing estates. Whereas, in the past, the default

position was that local authorities would generally adopt such amenities, information we have collected and analysed shows that over the last five years 80% of the freehold properties built by the 11 largest housebuilders – representing around two-fifths of all new builds across England, Scotland and Wales – are likely to be subject to such charges. This is also likely to underestimate the position, as information provided by estate management companies indicates that a proportion of their contracts are with other housebuilders. Information we have received also suggests that this is likely to increase. In particular, we have heard that there is an accelerating trend of non-adoption of public spaces and that this will accelerate further in light of Biodiversity Net Gain requirements imposed by the Environment Act 2021.[5]

1.12 The increase in non-adoption appears to have been driven by a combination of factors, which we explore later in this paper. It is a complex area not least given the different legal frameworks across England, Scotland and Wales, the fact that specific legislation applies to different amenities, and that local authority practices and processes differ from area to area. Adoption is also inherently linked to the planning system.[6]

1.13 Consumers may first become aware of the amenities available on housing estates when they are looking to buy a new build property, with brochures highlighting, for example, open spaces and play areas, as well as the types of property on offer. However, it is not until they go through the reservation and sales process that they may be made aware of the estate management arrangements and charges payable for the management of those amenities, along with a multitude of other information connected with the sale and conveyancing process.

Issues under consideration and consultation on a market investigation reference

1.14 During the course of the market study we have received evidence to suggest that key features of the private management model may be having an adverse impact on the interests of consumers.

1.15 In our update report we stated that our current view was that features of the market underpinning private management of public amenities on housing estates could constitute a basis for a market investigation reference.[7] Our consultation on

[5] This will make it mandatory for developers to ensure that a development results in a minimum 10% gain in biodiversity from 2024 onwards, and from April 2024 for small sites: Biodiversity Net Gain moves step closer with timetable set out - GOV.UK (www.gov.uk).
[6] We will be publishing a further working paper on planning later in November 2023.
[7] We noted that, based on the information gathered to date, including responses to our statement of scope, we believed that the reference test is likely to be met in relation to issues relating to the private management of public amenities on freehold housing estates. The CMA may decide to make a market investigation

a proposal to refer closed on 18 September 2023, and we are assessing the responses received. The CMA will decide whether to make a reference by 27 February 2024 which is our statutory deadline for publishing our final report on the market study. In reaching that decision, we will take into account submissions received in response to this working paper, alongside other evidence. In addition, we will carefully consider the extent to which recommendations to government may be capable of addressing the features we have identified, namely:

(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.

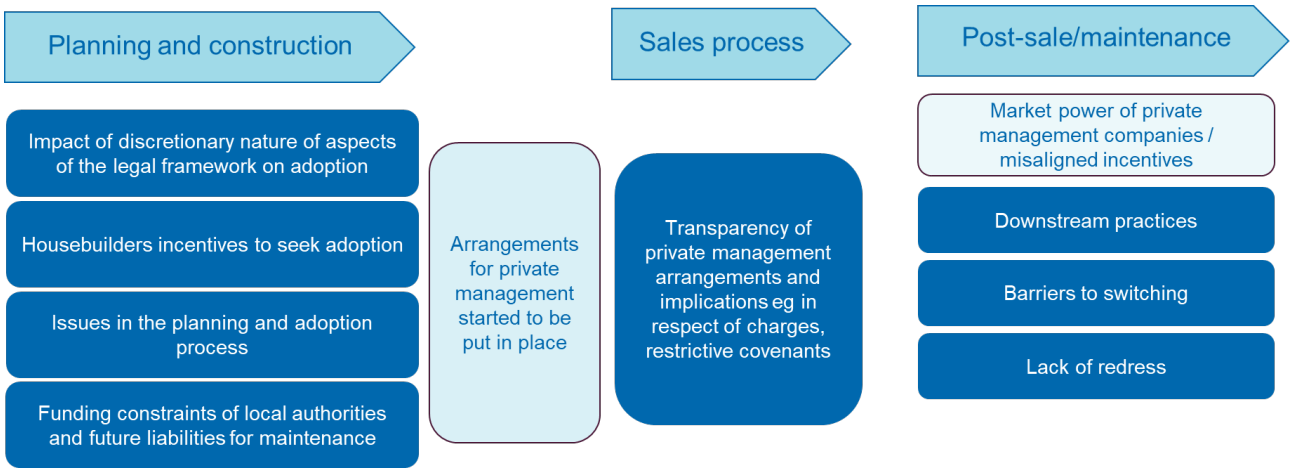
(c) High barriers for consumers to switch estate management companies.

(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, and potential exposure to disproportionate sanctions under the Law of Property Act 1925.

1.16 Fundamentally, we are considering whether the decrease in the adoption of amenities by public authorities, certain features of the private management models that have emerged, and certain practices engaged in by private management companies are resulting in sub-optimal outcomes for consumers. These matters come into play at different stages in the process, from the planning and construction stage, through the marketing and sales process, to the post and onwards sale period as illustrated in Figure 1.1.

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 ('the reference test').

Figure 1.1 Issues under consideration at different stages of the process



Structure of this working paper

1.17 In the remainder of this working paper we set out:

(a) **Section 2**: The legal frameworks governing the adoption of amenities in England, Scotland and Wales.

(b) **Section 3**: The operation of the adoption system in practice and the private management of public amenities, focussing on:

(i) The adoption process

(ii) Private management models as an alternative to adoption

(iii) Assessment of the evidence received on private management models and what this means for consumers.

(c) **Section 4**: Possible measures to address our emerging concerns.

(d) **Section 5**: Consultation questions and next steps.

Responding to the working paper

1.18 We welcome responses to this working paper, and in particular the questions set out in Section 5 by **24 November 2023**.

1.19 Section 5 provides further details on how to respond to the consultation.

2. The legal framework

2.1 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 public open spaces, although we understand that these are normally adopted via planning agreements, as set out below.

2.2 Relevant legislation for adoption is principally to be found in the following sources:

(a) **Highways**: The Highways Act 1980 / the Roads (Scotland) Act 1984

(b) **Sewers and drains**: Water Industry Act 1991 / Sewerage (Scotland) Act 1968

(c) **SuDS**: introduced by Flood and Water Management Act 2010 – appears to be managed through section 106 of the Town and Country Planning Act 1990/ section 75 of the Town and Country Planning Act (Scotland) 1997

(d) **Open spaces, including playgrounds**: 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.

We consider these, in turn, below.

Highways

England and Wales

2.3 Not all streets or roads on housing estates are suitable for, nor do all households or developers wish or require, their roads to receive adoption into the highway to be maintained at public expense. Until roads are adopted, the developer and/or an appointed management company remains the 'street works manager.'[8]

2.4 There is no comprehensive recording of unadopted roads in England and Wales – a 2019 report on unadopted roads in Wales reported that there were some 25,000 kilometres of unadopted roads in Wales alone and in terms of unadopted roads that serve 5 properties or more (which it notes would typically be the case for an unadopted housing estate road), then the length is 2,600 kilometres for the whole of Wales.[9]

[8] As set out in DfT Advice Note (August 2022): Highways Adoption (publishing.service.gov.uk), page 8, in relation to England only.
[9] Unadopted roads in Wales (gov.wales), page 7.

2.5 There are different approaches that can be taken to adoption under the Highways Act 1980:

(a) **'Section 38 agreements'** are voluntarily entered into between a developer and the local authority. They are a common way of creating new highways that are maintainable at the public expense. The developer must construct streets to an agreed standard. Once this has been completed (and the developer has maintained them for a set period of normally 12 months), they are automatically dedicated as public highway.

(b) **Section 37** allows the developer to construct the road and complete the development without the need for a formal road agreement. Provided the road is considered to be of sufficient utility to the public, the highway authority will accept the formal request (notice) of proposed dedication by the developer and following a 12-months maintenance period the road will become maintainable at the public expense.[10]

(c) **Section 228** of the Highways Act 1980 provides for the adoption of a private street after the execution of works.[11]

Scotland

2.6 Provision of roads for new developments is controlled and consented by the local roads authority through the Roads Construction Consent (RCC) process, which is governed by Section 21 of the Roads (Scotland) Act 1984. For the purpose of adoption, all streets are deemed to be roads under the Roads (Scotland) Act 1984. Expenses will be payable by the developer to the roads authority to cover its reasonable costs in inspecting the construction of the works and associated testing.

2.7 The Roads (Scotland) Act 1984 sets out the obligations of the developer to construct the roads and maintain them for a set period of normally 12 months. Following the satisfactory discharge of these obligations, the new roads can be

[10] In terms of process, the owner of the land over which the road runs, usually the developer, serves a notice on the local authority declaring its intention to dedicate the road as a highway. The local authority will assess the application, if it considers that the road would not have such wider public benefit it may apply to the Magistrates Court for an Order not to adopt (under Section 37(2) of the Highways Act). In cases where the Magistrates Court agrees, the road remains a private street.

[11] The Private Street Works Code (PSWC) enables the local authority to make up private streets (under Sections 205 to 218 of the Highways Act 1980) so they become highways maintained at public expense. The PSWC is used in rare circumstances predominantly due to the costs and time incurred to those that benefit from the adoption of the streets concerned. Section 228 of the Highways Act 1980 details how, in specific circumstances, new roads may be adopted when any works undertaken by the local authority have been executed in a private street. This can be used in cases where the owner of the land is not traceable, the land is not registered, or where the developer has the right of way but does not own the land. As set out in Department for Transport, Advice Note Highways Adoption, The Adoption of Roads into the Public Highway (1980 Highways Act), August 2022, at page 9.

offered to the roads authority for adoption. If the road is adopted, it will in the future be maintainable by the roads authority.[12]

Sewers and drains

England & Wales

2.8 The law covering the adoption of sewers is set out in the Water Industry Act 1991 (WIA 1991). Section 102 deals with the adoption of existing private sewers and associated apparatus. Although this can be used to deal with sewers constructed for new development, it is not the most satisfactory means for doing so. Section 104 of the WIA 1991 focuses on the adoption of new sewers only. When a new development is planned, the developer has the opportunity to construct the sewers using approved materials and to a standard which makes them suitable for adoption when construction is complete. An adoption agreement can be entered into under Section 104 of the WIA 1991 prior to the sewers being built. This is, arguably, the most desirable arrangement and if all new developments were covered by such adoption agreements, there would be few, if any, new private sewers on housing estates. However, there are many kilometres of existing private sewers that were built without an adoption agreement in place. Section 102 of the WIA 1991 provides for the adoption of such sewers to be considered.[13]

2.9 Section 104 of the WIA 1991 permits the adoption of a sewer or lateral drain by a sewerage undertaker. Adoption of a drainage system through a Section 104 agreement applies to private areas (such as roofs and driveways) and highway drainage (if both drain into the same sewer system). Once constructed it becomes maintainable at the sewerage undertaker's expense. Sewers adopted under Section 104 WIA 1991 are also subject to guidance.

2.10 An agreement under Section 102 WIA 1991 permits a new connection to an existing adopted public sewer. An application is made via either the local authority or sewerage undertaker which, when approved, allows connection of a proposed sewer system into an existing system.

[12] https://www.gov.scot/publications/designing-streets-policy-statement-scotland/pages/9/

[13] Under Section 105 of the WIA 1991 there is a right to appeal to Ofwat by the applicant if adoption of the sewer is refused (Section 105(1)(b) WIA 1991), or by anyone objecting to the proposal (Section 105(1)(a) WIA 1991).

Scotland

2.11 Scottish Water[14] has a duty under Section 1 of the Sewerage (Scotland) Act 1968 to provide such sewers and public SuDS as may be necessary for its area of domestic sewage, surface water and trade effluent, and to provide necessary treatment of their contents, at reasonable cost.

2.12 Unlike in England where there is a concept of adoption of sewers by a water or sewerage company, under Section 16 of the Sewerage (Scotland) Act 1968 sewers constructed by Scottish Water (or its predecessors or which are lawfully connected to these systems) automatically vest in Scottish Water unless agreed otherwise. In relation to new infrastructure, Scottish Water generally enters into an agreement with a developer that the infrastructure will vest with Scottish Water when it is completed to the technical standards set out in Sewers for Scotland.[15]

SuDS

2.13 SuDS are designed to reduce the impact of rainfall and therefore flooding on new developments by using features such as soakaways, grassed areas, permeable surfaces and wetlands. This reduces the overall amount of water that ends up in the sewers and storm overflow discharge.[16] Generally speaking, SuDS mimic natural systems and differ from traditional drainage in that they aim to manage rain close to where it falls.[17]

England and Wales

2.14 In Wales, the adoption of SuDS is governed by the Flood and Water Management Act 2010 (Schedule 3), which requires that new developments include SuDS features that comply with Welsh national standards, and are approved by the relevant Welsh approval body.

2.15 Broadly, in England SuDS can either be adopted by a local authority, a water company, or a private company. Certain provisions in the Highways Act 1980 and the Water Industry Act 1991 permit that a drainage system be adopted by a sewerage undertaker (who will then be responsible for future maintenance of the system).

2.16 Under Section 38 of the Highways Act 1980 an agreement that a highway is adopted and therefore maintained at public expense will typically include provision

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[14] Scottish Water is a statutory corporation that provides water and sewerage services across Scotland. It is accountable to the public through the Scottish Government.
[15] A guide to surface water drainage, at p 7. See also Sewers for Scotland v4.0, Sewers for Adoption 7th Edition (scottishwater.co.uk)
[16] As described in DEFRA's: The review for implementation of Schedule 3 to The Flood and Water Management Act 2010 (publishing.service.gov.uk)
[17] See Sustainable Drainage, SuDS and Planning - What do you need to know?

for a drainage system which drains the adopted highway only. The final adoption authority is the local authority. Similarly, adoption of SuDS can be achieved through an agreement under Section 106 of the Town and Country Planning Act 1990.

2.17 The system in England is being brought into line with that in Wales as discussed at paragraphs 3.53 to 3.57.

Scotland

2.18 The Scottish Environment Protection Agency (SEPA) is the statutory agency responsible for protecting the water environment. It requires that effective, appropriate SuDS feature in new developments.[18] Under the Sewerage (Scotland) Act 1968 all SuDS consented would be prospectively adopted by Scottish Water upon completion. There are no private water companies in Scotland, and all water supply and drainage are publicly owned and maintained by Scottish Water.

2.19 Section 7 of the Sewerage (Scotland) Act 1968 also allows for agreements between the highway authority and the local authority for the provision, management and maintenance of their sewers. Entry into such an agreement must not be unreasonably refused.

2.20 Under the Water Environment (Controlled Activities) (Scotland) Regulations 2011 (the Regulations), it is a general requirement for new developments with surface water drainage systems discharging to the water environment, that such discharge will pass through SuDS. The Regulations apply, for example, to activities that are liable to cause pollution or abstraction of water, as well as the direct or indirect discharge, or any activities likely to cause a direct or indirect discharge, into groundwater of any hazardous substance or other pollutant (Section 3). Such activities require authorisation under the Regulations and must be carried out in accordance with that authorisation (Section 4). Section 5 of the Regulations imposes a general duty of efficient use of water.

2.21 Sewers for Scotland[19] contains Scottish Water's construction standards for detention ponds, detention basins, end of pipe swales and end of pipe filter trenches. If a SuDS for a developer is constructed to these standards, Scottish Water has a duty to adopt.

2.22 The Water Assessment and Drainage Assessment Guide (WADAG),[20] published by the Scottish SuDS Working Party in January 2016, is intended as a guide for developers, planners and others involved in water and drainage infrastructure

[18] See also SuDS adoption in Scotland (susdrain.org)
[19] Sewers for Adoption 7th Edition (scottishwater.co.uk)
[20] Water drainage assessment guide (sepa.org.uk)

through the necessary stages to obtain relevant permissions and comply with standards and policies.

Public open spaces

England and Wales – general provisions

2.23 Whilst the provision of parks and open spaces is not a statutory function, the Local Government Act 1999 provides local authorities with the powers to promote the economic, social and environmental wellbeing of their communities.

2.24 The National Planning Policy Framework (NPPF), applicable in England, states: 'Planning policies should be based on robust and up-to-date assessments of the need for open space, sport and recreation facilities (including quantitative or qualitative deficits or surpluses) and opportunities for new provision.'[21] Specific guidance on open spaces simply states: 'It is for local planning authorities to assess the need for open space and opportunities for new provision in their areas.'[22]

2.25 Public open space areas, different types of play areas, wildlife and biodiversity areas, woodland, watercourses, ditches and ecological features as well as other matters including combined bin collection points not on the adopted highway, public art and town centres or retail public realm can be adopted under Section 106 of the Town and Country Planning Act 1990. Such planning obligations will apply to the current owner and any subsequent owner, and are legally binding and enforceable.[23]

In the next section

2.26 Having set out the relevant legislation in respect of each type of amenity in each nation, we now go on to examine how the adoption system operates in practice, the alternative arrangements that are put in place when amenities are not adopted by the relevant authority, and the issues that arise from those arrangements.

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[21] NPPF, para 98.
[22] Open space, sports and recreation facilities, public rights of way and local green space - GOV.UK (www.gov.uk)
[23] Section 106(5) of the Town and Country Planning Act (1991) provides that a restriction or requirement imposed under a planning obligation is enforceable by injunction.

3. The operation of the adoption system in practice and the private management of public amenities

3.1 In this section we set out our understanding of how the adoption system works in practice and the arrangements that are put in place when amenities are not adopted by the relevant authority. We then set our emerging assessment of the issues that we have been examining in relation to private estate management arrangements, and how they impact on consumers.

3.2 The assessment that follows is based on evidence reviewed to date in the market study, including: responses to information requests sent to the 11 largest housebuilders ('large housebuilders'[24]) and to 15 estate management companies,[25] meetings with market participants, government and local government representatives and other stakeholders, responses to our statement of scope and to our initial update report, information received from members of the public, and general research we have carried out.

The adoption process

3.3 As highlighted in Section 2, legislation governing the adoption process varies by amenity and by nation. In this section we consider how the adoption process works in practice.

Adoptable amenities

3.4 There are a wide range of amenities which can be adopted by the relevant authority, which can be broadly classified into the following groups: transport infrastructure (including roads and footpaths), drainage and sewers, including SuDS, public open spaces, ecological areas (eg wildlife and biodiversity areas), and other amenities such as combined bin collection points.

3.5 Most of the above categories of amenity are adoptable by the local authority (in their capacity as highways authority and local planning authority). However, some are adoptable by other authorities such as the relevant water authority, as set out in Section 2.

[24] The 11 largest housebuilders in Great Britain, by 2020/21 and 2021/22 revenue: Barratt, Bellway, Berkeley, Bloor Homes, Cala, Crest Nicholson, Miller Homes, Persimmon, Redrow, Taylor Wimpey and Vistry – see *Glossary*.
[25] Broadoak, Firstport, Gateway, Greenbelt, HML, Kingston, Meadfleet, Preim, Premier, Remus, Rendall and Rittner, RMG, Scanlans, Specialist, Trinity – see *Glossary*.

Advantages and disadvantages of adoption

3.6 In terms of the benefits of seeking adoption, large housebuilders indicated a range of benefits flowing to households, including the reduction of service charges/costs relative to private sector alternatives, removing liability/legal obligations from households and housebuilders, certainty for households in terms of the standard of work carried out and who carries out the work, with established maintenance teams managing other assets carrying out the required work.

3.7 General themes highlighted by housebuilders on the disadvantages of adoption for housebuilders included bond and adoption costs, including commuted sums[26] and inspection fees, local planning authority processes and requirements for amenities to be adopted, including 'onerous' design standards, and the length of time it can take to go through the adoption process and inconsistencies in local authority approaches.

3.8 Local authorities are concerned about the future ongoing cost of maintaining the amenities they adopt. We were told that such concerns have emerged in the context of reduced local authority budgets and resourcing pressures, with local authorities struggling to maintain, for example, even existing roads.

3.9 A number of individual respondents to our statement of scope called for full adoption of their estates by local authorities, arguing that this would ensure that the estate infrastructure is developed and maintained to a good standard.[27] In Wales, the Senedd Petitions Committee is currently considering a petition calling on the Welsh Government to commit to the adoption of the maintenance of new housing estates by local authorities.[28]

3.10 We now consider the adoption process for roads, public open and spaces and drainage and SuDS, drawing out differences across the nations, to the extent known.

Roads

Guidance issued to local authorities

3.11 In terms of what roads are 'adoptable', we understand that as a general rule of thumb highways authorities tend to only adopt streets that serve more than a particular number of individual dwellings – five often being set as the lower limit.

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[26] Local authorities (in their capacity as highways authority and local planning authority) can request payment of commuted sums as a condition of adoption as compensation for taking on future maintenance responsibility for roads.
[27] Housebuilding market study – Summary of consumer responses (publishing.service.gov.uk), page 3.
[28] P-06-1307 The Welsh Government should commit to the adoption of the maintenance of new housing estates by local authorities (senedd.wales)

This discretionary approach is highlighted in the 'Manual for Streets' guidance produced jointly by the Department for Levelling Up, Housing and Communities and the Department for Transport (applicable in England and Wales).[29] In Scotland, two to three dwellings is often set as the lower limit.[30]

3.12 The guidance states that the highway authority has considerable discretion in exercising its power to adopt through a Section 38 agreement (see paragraph 2.5(a)), whereas Section 37 (see paragraph 2.5(b)) effectively sets the statutory requirements for a new street to become maintainable at public expense. For Section 278 agreements, the guidance notes that before entering into such an agreement a highway authority will need to be satisfied that the agreement is of benefit to the general public.[31]

3.13 The guidance also notes that the highway authority has considerable discretion in setting technical and other requirements for a new highway, and that highways authorities would be expected to adopt street layouts complying with their Design Guide, and normally be expected to adopt, amongst other amenities, residential streets, combined footways and cycle tracks.[32]

3.14 The Scottish Government issued a policy statement in 2010 which roads authorities and planning authorities are directed to follow. It includes supporting guidance to help local authorities implement the guidance.[33]

3.15 The policy statement sets out what is adoptable, noting that the roads authority has considerable discretion in exercising its powers whether to grant an RCC under Section 21 of the Act (see paragraph 2.6) and that a roads authority can be required to adopt a road constructed in accordance with an RCC. The statement also notes that road authorities are now encouraged to take a flexible approach to road adoption in order to allow greater scope for designs that respond to their guidance and create a sense of place. As with the guidance applicable in England and Wales, the guidance notes that roads authorities would normally be expected to adopt residential streets, combined footways and cycle tracks.

Approach to adoption

3.16 There is no obligation to seek adoption, but data from the large housebuilders indicates that while there are large variations in their approach to roads adoption,

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[29] Manual for the Streets (publishing.service.gov.uk), page 134, *'What is adoptable'*.
[30] Annex: Technical questions and answers - Designing Streets: A Policy Statement for Scotland - gov.scot (www.gov.scot)
[31] Manual for the Streets (publishing.service.gov.uk), page 134 and 135.
[32] Manual for the Streets (publishing.service.gov.uk), page 135.
[33] Annex: Technical questions and answers - Designing Streets: A Policy Statement for Scotland - gov.scot (www.gov.scot)

on average, the majority of roads on housing estates have been adopted, have been agreed to be adopted or are in the process of being adopted.

3.17 The Home Builders Federation (HBF) noted that in its experience, developers' preferred option is almost always the adoption of roads by local authorities, and this is consistent with what the large housebuilders submitted (although there are exceptions) and with the findings from a 2020 Welsh Government consultation on estate charges on housing developments.[34] One local authority in England that we spoke to indicated that the vast majority of housebuilders want highways to be adopted, and that typically, they get adopted.

3.18 A local authority in Wales suggested that it tends to adopt roads that carry public transport, but not necessarily all the internal roads (which would be delivered under a management company arrangement but to an "adoptable" standard), although it noted it was moving back towards formal adoption of all public highways in new developments.

3.19 While some housebuilders have told us that the discretionary nature of the legal framework was a key issue in terms of achieving adoption, as set out in our update report,[35] one large housebuilder submitted that given the statutory processes governing the adoption of roads, provided the road is built to the required standard, a road put forward for adoption will ultimately be adopted by local authorities. Another large housebuilder also noted that highways authorities have the obligation to adopt roads that are built to the relevant standards, which facilitates the process of adoption.[36] It noted that in its experience, roads are in the vast majority of cases adopted by local authorities after a number of years. A local authority we spoke to noted that once a developer has entered into a Section 38 or 278 agreement, and paid the relevant fees, 'that's almost like the signing of the contract between the developer and the local authority that those roads are going to be built up to an adopted standard.'

3.20 Despite the above submissions, and some differences of view, there appear to be several barriers to the adoption of roads in practice, and some 'red lines' for developers (such as high commuted sums, as discussed below). Adoption seems to become less desirable to developers where the process takes too long or becomes too costly, and we discuss this further below.

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[34] Estate charges on housing developments – summary of responses (gov.wales), page 49.
[35] See Housebuilding update report (publishing.service.gov.uk) para 2.57.
[36] In its response to the update report it submitted: '[it] notes the CMA's comment that it has received mixed feedback as to whether or not local authorities are required to adopt roads on new housing estates. However, the legislation is clear. The highways authority is required to adopt, provided that the road is built to the appropriate standard [under Section 37] (albeit that in practice, adoption is often achieved through voluntary s.38 agreements with the local authority).'

Barriers to roads adoption: local authority processes, resourcing and funding

3.21 Despite a majority of roads being adopted, we have heard that non-adoption of roads is an issue, and that there is an increased reluctance from local authorities to adopt roads. The HBF told us that it has long considered the non-adoption of roads to be a significant cause for concern, particularly for SME housebuilders. One large housebuilder submitted that road adoption is similar in many ways to the issue of adoption of public amenities in that 'local authorities simply do not want to take roads through the adoption process or are so under-resourced in this area that a developer is left for many years with the burden of maintaining estate roads.'

3.22 We heard that there are often significant delays in the process of adoption of roads, a concern that is supported by data compiled by the HBF based on freedom of information requests to highways authorities in England, Scotland and Wales over several years. The HBF data analysis on costs and timescales associated with the adoption of new public highways indicates substantial disparity across local authorities. For 2021, for example, the data shows that the average total time taken from technical submission to formal adoption of a Section 28 agreement ranged from three months to over five years.

3.23 We also heard that the different approaches taken by highways authorities to adoption of roads and use of their existing statutory powers creates uncertainty in terms of the framework for adoption. One large housebuilder noted that 'under the present system, adoption requirements and costs differ depending on the local authority (who often are unable to adopt all elements of the site) and can be costly in terms of legal and consultancy fees'.

3.24 As we noted in our update report, the budgetary constraints that local authorities have been experiencing over the past 10 years are well documented and recognised as a significant factor in local authorities' reluctance to adopt public amenities. We have heard that local authorities are concerned around the ongoing liabilities they will incur, with one local authority noting that ongoing liabilities for maintenance 'is a big problem for the public purse.'

Barriers to roads adoption: housebuilders incentives

3.25 We noted in the update report that we have seen evidence that suggests housebuilders may have some financial incentives not to get roads adopted on estates they build.[37] As noted above, bond and adoption costs, including inspection fees and commuted sums, have been identified by housebuilders as one of the main disadvantages of seeking adoption.

[37] Housebuilding update report (publishing.service.gov.uk) paragraph 2.63.

3.26 However, in response to the update report, one large housebuilder stated that housebuilders have a strong incentive to avoid the ongoing obligations involved in maintaining roads, noting that adoption eliminates complications and reputational risks that are linked to the private management of infrastructure and common facilities. In contrast, another large housebuilder stated that it is accepted that 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, are causing the increase in the reliance on private management companies for the upkeep of public amenities.

3.27 We consider the responses received in relation to bonds and commuted sums below.

Bonds and commuted sums

3.28 As part of the adoption process, local authorities have the power to require a bond as a guarantee. This is a form of financial surety which ensure that a local authority has the funds available to complete works if developers fail to do so. Department for Transport guidance notes that a Section 38 agreement is very unlikely to be completed by a local authority until all fees have been paid and a bond is in place to cover the full cost of constructing the new roads on a development.[38] The guidance also notes that, amongst other matters:

- The bond value should reflect the costs to the local authority of constructing and completing the road(s) in accordance with the details that have received a technical approval should the developer default on the agreement.
- The value of the bond may differ from the costs incurred by the developer in constructing and completing the road(s).
- Some local authorities use a risk-based approach in calculating bond values while others may use linear rates. In any event, the local authority's methodology and criteria should be published and maintained.
- The local authority should provide clear information on the level and timing of fees that will be required which are likely to include, but not exclusively, costs associated with design checking, preparation of the legal agreement, and site inspection. It should be stressed that the level of costs imposed should be reasonable and proportionate.

3.29 Concerns have been raised about bonds, including by the HBF who told us:

Authorities require housebuilders to provide a bond or cash surety, for 100% of the estimated costs of highway works. HBF's SME members tend

[38] Highways Adoption (publishing.service.gov.uk), page 16 and 17, *Payments to local authorities.*

to be most affected by this, with many finding it prohibitively expensive. HBF notes that there are alternative measures in other sectors eg sewerage undertakers require bonds equal to 10% of the completed works.

3.30 It has, however, been reported that authorities need to be able to cover the cost of the works at a rate they would be able to secure if they had to undertake the work themselves, with a suggestion that housebuilders' costs for road construction were perhaps 70% of those of highways authorities.[39]

3.31 We have heard concerns around delays and inconsistencies relating to bonds, and that they can be difficult to enforce.[40] It has also been submitted that housebuilders' exposure to bonds is increasing, and that local authorities are increasingly refusing to adopt or are delaying adoption requiring housebuilders to retain bonds for longer than anticipated, thereby increasing costs (through interest payments).

3.32 Data provided by the HBF, from its freedom of information requests to highways authorities in England, Wales and Scotland, show that highways authorities have a wide range of costs associated with different types of road infrastructure.[41]

3.33 Local authorities (in their capacity as highways authority and local planning authority) can request the payment of commuted sums as a condition of adoption as compensation for taking on future maintenance responsibility for roads.[42] However, concerns have been expressed about the level of commuted sum required by local authorities, and the manner in which the commuted sum is calculated.

3.34 The HBF told us:

Commuted sums demanded by authorities have increased significantly over the years and are now often exceeding the cost of building the road. This has also resulted in a commensurate increase in inspection fees which are calculated as a percentage of the commuted sums (although there is no consistent approach in how these are calculated, leading to variance across local authorities).

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[39] Cambridge Centre for Housing and Planning Research, Dr Genna Burgess and Michael Jones (May 2015), Road and sewer bonds in England and Wales – Report to the NHBC.
[40] See HBF response to the statement of scope, March 2023: Home_Builders_Federation.pdf (publishing.service.gov.uk)
[41] The data provided in the responses is not all on a like-for-like basis, but where it appears to be so, it can attract very different costs for bonds. For example, Soakaways range from £2,000 to £6,000, and costs for individual trees range from around £200 to over £2,000.
[42] 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.

3.35 One large housebuilder submitted that the principal obstacle to achieving the adoption of roads is the need to agree an appropriate commuted sum. It told us that:

The commuted sums required by local authorities often lack robust evidence as to how they have been calculated and any challenge to commuted sum payments invites considerable delays. There is a tendency for the highways authority to significantly over-estimate the cost of highway works (sometimes more than 50%) and these estimated costs are the basis for the highway authority inspection fees which are often excessive.

3.36 Another large housebuilder noted that commuted sums differ by local authority and can affect the viability of a development and another submitted that 'not seeking adoption avoids the payment of commuted sums, but that would not be a material factor were local authorities to take a consistent, reasonable and proportionate approach'. One large housebuilder stated that:

Even where a local authority is willing to adopt in principle, in practice, local authorities often make adoption unviable as an option for the housebuilder (applying the principle of 'cost in perpetuity' when considering the size of commuted sum for adoption). This is because there is no legislation or regulation that requires local authorities to act reasonably and with transparency when determining the size of the commuted sum…this allows the local authority to set the commuted sum at an exorbitantly high level, without providing any breakdown or justification of the costs, and leaving the developer no option but to have the asset maintained privately.

3.37 Nine of the eleven large housebuilders provided data to us on the levels of commuted sums paid. Given the time involved in agreeing and paying commuted sums, we asked the housebuilders to provide the average (mean) commuted sum paid per freehold property, across all Section 38 (or equivalent) agreements signed, whether or not they were completed in that calendar year.

3.38 We are not able to say what infrastructure is covered by these commuted sums, and what infrastructure was instead moved to an estate management company, or the number of households or estates relevant to each figure. However, we note that adoption appears to be sought for the majority of roads. Over the years 2018, 2020 and 2022:

- The lowest commuted sum paid was £2 per household – while this is notably low, there were several housebuilders and years in which payments were below £100 per household.

- The highest level paid was just over £1000 per household for one housebuilder in one year – all other datapoints were below £1,000.
- The average rate across the housebuilders who supplied data to us was £232 in 2018, £222 in 2020 and £335 in 2022.

3.39 We observe that these one-off payments are low compared to the levels of payments made to estate management companies, to which householders are committed in perpetuity.

3.40 One large housebuilder suggested that the process of adopting roads would benefit from the implementation of guidelines by central government which set out clear criteria as to how commuted sums payable by housebuilders should be calculated, stating that they already exist in some areas.[43] Equally, another suggested that the CMA should consider making a recommendation to government to ensure that commuted sums are transparent, appropriate and reasonable.

Question 1

a) How effective is the process for the adoption of roads on new housing estates in England?
b) What are the barriers to the adoption of roads on new housing estates in England?

Differences in Scotland and Wales

3.41 The issue of unadopted roads has been recognised through the work of the Unadopted Roads Taskforce in Wales.[44] This has led to a collaborative partnership between the Welsh Government, local authorities and representatives of housing developers in Wales and the development of, amongst other initiatives, a Good Practice Guide aimed at reducing the chances of new housing estate roads not being adopted, and a set of Common Standards on highway design and construction for use by local authorities and housing developers.[45] We welcome feedback from stakeholders with experience of the introduction of the Good Practice Guide and Common Standards in Wales on how successful these initiatives have been in increasing the adoption of roads on housing estates.

Question 2

[43] It cites in England s.106 and/or local Supplementary Planning documents stipulate the calculation criteria for certain elements; and, that some Highway Authorities have adopted the (discretionary) principles contained within ADEPT Commuted Sums for Maintaining Infrastructure Assets Guide 2009.
[44] Unadopted Roads Taskforce | GOV.WALES
[45] County Surveyors' Society Wales (css.wales)

a) How effective is the process for the adoption of roads on new housing estates in Wales?
b) What are the key barriers to adoption of roads on new housing estates in Wales?
c) What impact has the Good Practice Guide and Common Standards on highway design had on roads adoption on housing estates in Wales?
d) In particular, have they reduced any barriers to adoption and achieved greater consistency in approach across local authorities?

3.42 In Scotland, we have heard that the adoption process for roads works better than in England, but that commencement of works is dependent on the speed of processing of RCC (see paragraph 2.6) by the roads department. It has also been suggested that Scottish local authority road departments have all published standard forms (CC5 and CC6) to be used for maintenance and adoption requests for roads, therefore a more standardised approach is taken.

3.43 We welcome further views on the effectiveness of the roads adoption process in Scotland, from both house builders and local authorities.

Question 3

a) How effective is the process for the adoption of roads on new housing estates in in Scotland?
b) What are the key barriers to adoption of roads on new housing estates in Scotland?
c) How does the process for adoption of roads in Scotland compare to the process for adoption in England and/or Wales?

Public open spaces

3.44 As discussed in Section 2, we understand that the provision of public open spaces tends to be agreed as part of Section 106 agreements between developers and Local Planning Authorities (LPAs), with no specific legislation governing their adoption. Adoption is, therefore, discretionary in respect of both the housebuilder and the local authority.

3.45 In our update report we highlighted that as contributions towards affordable housing and the community infrastructure levy (CIL) have increased, funding obtained from housebuilders for open spaces has tended to decline.[46]

[46] Housebuilding update report (publishing.service.gov.uk), para 2.64 and Table 2.1.

3.46 In the update report we also noted that local authorities we have spoken to in England, Scotland and Wales indicated that they do not typically seek to adopt public open spaces, such as parks and playgrounds.

3.47 Ongoing maintenance of public open spaces appears to be a particular challenge for local authorities, given financial resourcing constraints. One local authority told us that, whereas twenty years ago it had a policy for adopting open spaces on developments with maintenance sums with a projection of up to twenty years, its policy of not adopting is driven by the lack of finance for ongoing maintenance. It noted that because of the financial challenges local authorities are facing and because of the costs and uncertainties of taking on public open space, private management is likely to prevail. One local authority in England did indicate to us that it is prepared to adopt open spaces, providing developers pay the 25 year maintenance cost, whereas another in Wales said that the vast majority of its open spaces on new private estates are privately managed because 'we haven't got the resources to manage them in perpetuity through commuted sums.' Heads of Planning Scotland noted that local authorities are not in a position financially to maintain areas of open space for instance, across new build developments.

3.48 Housebuilders also submitted that few open spaces are adopted by local authorities, because local authorities are reluctant to adopt because of the additional costs involved in their maintenance. One large housebuilder suggested that in its experience, local authorities deploy different approaches when considering whether they will adopt new open spaces, with some local authorities who will not respond at all to requests for adoption.

3.49 Another large housebuilder told us that:

The issue of the lack of adoption of open spaces and other public amenities stems from LAs that have become increasingly concerned about the ongoing cost of maintenance in perpetuity of these areas. In particular, LAs are concerned about the impact additional maintenance would have on council tax. There are also concerns that the LA might be blamed over concerns about the quality of the maintenance – ie, LAs do not want to take on responsibility for resident satisfaction. A further constraint on adoption is that LAs may be concerned that if an accident occurs on an adopted amenity, the LA could attract liability for the accident.

3.50 Concerns have been expressed that a sub-set of households effectively fund amenities that are available to the wider public. The same housebuilder noted that:

It is not equitable for the residents of a development to have to pay for the ongoing maintenance of community assets that benefit the entire community (while also paying standard council tax). Open spaces and

other public amenities that are available to all should be funded by the LA. This is also the preference of the customer.

3.51 In its response to the update report, another large housebuilder submitted that:

Legislation is the most appropriate way of resolving these issues and would suggest that the CMA considers recommending to government that local authorities should be obliged to adopt public open spaces at least where they are for the wider community provided that they have been built to the requisite standard, and, importantly, provided that housebuilders contribute to the costs of maintenance through the payment of commuted sums.

3.52 It is clear that open spaces are an increasingly important element of new housing developments, and are likely to become more so (in England) with the coming into force of environmental regulations which will require the creation and maintenance of up to 30 years of biodiverse open spaces on new estates.[47]

Drainage and SuDS

3.53 We have heard some concerns around the process for the adoption of drainage and SuDS infrastructure by relevant authorities, in particular around delays in completing the adoption process, in England, Scotland and Wales. Other issues raised by housebuilders include that adoption design standards can be onerous and that requirements that have been set for SuDS are not compatible with the adopting authority's requirements.

3.54 It was also suggested that households do not have control over quality of maintenance (and we note, unlike for public open spaces, for example, 'quality' is unobservable where the infrastructure is largely underground and of a highly technical nature). Concerns have also been expressed that where there are issues with the infrastructure these can be difficult and expensive to sort out – particularly trying to get facilities brought up to a standard that the water company will accept, if they have not initially been built to acceptable standards.

3.55 In England, SuDS are currently not mandatory in new developments, unlike Scotland and Wales. Non-statutory technical standards were produced by the Department for Environment, Food and Rural affairs (DEFRA) for England and England sought to address SuDS through planning policy (from April 2015) rather

[47] Under the Environment Act 2021, from 2024 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.

than adopt mandatory standards. However, the planning-led approach was considered by many not to be working very well (as this approach made the role of the LPA difficult since there were no specific checking regimes in place to ensure that SuDS had been constructed as agreed, leaving concerns about unsatisfactory standards of design and construction, and of difficulties of ensuring proper maintenance once the developer has left the site).[48]

3.56 Following a review by DEFRA[49] a consistent and mandatory approach to SuDS in England through the implementation of Schedule 3 of the Flood and Water Management Act 2010 is proposed to be enacted in order to ensure SuDS are designed to reduce the impact of rainfall on new developments, reduce the overall amount of water that ends up in the sewers and storm overflow discharges, allow for water reuse, and reduce pressures on water resources. Implementation of the new approach is expected during 2024.[50]

3.57 It has been submitted that if this new approach provides a clear system for adoption in the future, this should improve outcomes.

3.58 In Wales, a review of the implementation of Schedule 3 of the Flood and Water Management Act 2010 has been carried out which sets out recommendations to overcome the issues raised though the review, which primarily relate to delivery process and procedure rather than the outcomes Schedule 3 set to deliver, which were recognised positively by stakeholders.[51] Included in the short-term priority recommendations are the development of a national commuted sums approach, including a schedule of rates and length of maintenance period, and consideration of the desirability and viability of a service charge approach levied by local authorities as a mechanism of funding long-term maintenance of adoptable SuDS assets.

Question 4

a) Please provide views on how effective the adoption process works in practice for (i) sewers and drains and (ii) SuDS. In responding, please state whether your response relates to England, Scotland or Wales, or a combination of nations.

b) Will forthcoming changes in England remove any barriers to adoption?

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[48] The review for implementation of Schedule 3 to The Flood and Water Management Act 2010 (publishing.service.gov.uk), page 6; Report of a review of the arrangements for determining responsibility for surface water and drainage assets (publishing.service.gov.uk).
[49] Sustainable drainage systems review - GOV.UK (www.gov.uk)
[50] New approach to sustainable drainage set to reduce flood risk and clean up rivers - GOV.UK (www.gov.uk)
[51] Sustainable Drainage Systems (SuDS) Schedule 3 Post Implementation Review (gov.wales)

c) In relation to Wales, if implemented, would the recommendations from the review of the implementation of Schedule 3 of the Flood and Water Management Act 2010 remove any barriers to adoption?

Emerging conclusions on adoption

3.59 Based on our review of the evidence to date we consider that there are a number of barriers which, in combination, have led to an increase in the non-adoption of public amenities on housing estates.

3.60 Those barriers are:

(a) The largely discretionary nature of the legal framework for adoption of certain amenities, particularly for public open spaces, with housebuilders under no obligation to seek adoption, and local authorities under no obligation to grant it if it is sought.

(b) The processes involved in seeking and achieving adoption, which can disincentivise housebuilders from seeking adoption, in particular given the timescales and costs involved, inconsistencies in approach and a lack of nationally imposed guidance in certain areas.

(c) Linked to b) above, the funding and resourcing constraints of local authorities.

(d) Commercial incentives of housebuilders to minimise costs, eg through not wishing to negotiate bonds and pay commuted sums.

3.61 As a consequence of non-adoption, private management of those amenities has led to a sub-set of households funding the maintenance of amenities that are available for wider public use.

Private management models as an alternative to adoption

Emergence of the private management model

3.62 The private management of public amenities on housing estates has emerged as a consequence of local authorities not adopting amenities to the same extent as they have done in the past, and we understand that this has become a particular issue over the last 5-10 years.

3.63 Information we have collected and analysed shows that over the last five years, 80% of the freehold properties built by the 11 largest housebuilders – representing around two-fifths of all new builds across England, Scotland and Wales – are likely

to be subject to estate management charges. This is also likely to underestimate the position, as information provided by estate management companies indicates that a proportion of their contracts are with other housebuilders. This is also likely to increase. For example, we have heard that there is an accelerating trend of non-adoption of public spaces and that this will increase further in light of Biodiversity Net Gain requirements (see paragraph 3.52 above).

Types of management model

3.64 The management of the common parts and public amenities on a newbuild estate can take various forms and will differ by developer and depending on what stage of development a particular estate is at. Often the developer will retain responsibility for estate management throughout the construction and development stage of a new estate, but it is increasingly common for management to be passed at the end of the development (or on a phased basis for larger developments) to a management company which will take responsibility for managing the communal areas and facilities across the estate.

3.65 We understand that there are two main models for estate management: resident management companies (RMCs) and embedded management companies (embedded MCs). There is also a third option, which we understand is now rarely used, whereby the housebuilder retains ownership of the estate's public amenities and management in perpetuity. In this scenario, the housebuilder will carry out maintenance itself or more likely through a managing agent, who will be accountable to the developer under the terms of a management contract.

Resident management companies

3.66 An RMC is a not-for-profit company incorporated by a housing developer to own and manage the shared facilities and public amenities on a newbuild housing estate (where these are not adopted by a relevant authority). Given the not-for-profit status of the RMC, and the fact that it is acting in the interests of householders, we might expect an RMC to be a cheaper model than an embedded MC. However, this will depend to a large extent on how the RMC is organised and operationalised, including whether the RMC appoints a managing agent.

3.67 Under the RMC model, homeowners typically become 'members' (ie shareholders) of the RMC when they purchase their home, which gives them rights including attending and voting at company meetings. Once all the plots on a development have been sold, control of the RMC will pass to the residents as members of the RMC, who will then run and operate the RMC. Prior to this transfer, the housebuilder would usually control the RMC and appoint a managing agent to carry out the maintenance of shared facilities until the development has been completed.

3.68 The freehold estate for the common/shared areas is generally transferred to the RMC, typically via the transfer deeds. The RMC covenants directly with the homeowners to undertake the future maintenance of the estate, but it is common for the RMC to appoint a managing agent to deliver the services in return for a fee.

Embedded management companies

3.69 Under an embedded MC, the freehold of the parts of an estate which require maintenance are generally transferred to a management company. The embedded MC is made party to the transfer deed and is thereby appointed to become responsible for managing and maintaining the estate. As such, the embedded MC is contractually imposed on the residents and residents will not have the right to participate in the company by becoming a member/shareholder or taking a role as an officer of the company.

3.70 Once the relevant amenities are completed to the required standard by the developer, they will usually be transferred to the management company.

Prevalence of different models

3.71 Data provided in response to our information requests to 15 estate management companies covering over 7,000 relevant estates[52] across England, Scotland and Wales in total indicates that the predominant model in use on those estates is a management company acting as the managing agent for an RMC (or equivalent). Some of those management companies operate a mix of models, while others specialise in a particular model.

Views on different types of model

3.72 During the course of the market study, we have heard views on the advantages and disadvantages of different types of management model.

3.73 A number of large housebuilders told us they favoured establishing RMCs where that was possible, and noted the issues faced by residents of some housing estates [which the CMA is examining in the market study], particularly where an embedded MC is in place. One argued that where a development uses an RMC, 'the CMA's concerns that apply to embedded management companies would largely disappear.' While we note later in this section that there can be a very significant imbalance of power where a management company is contractually

[52] In our information requests to estate management companies we defined 'relevant estates' as freehold estates in England and Wales, being 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), and developments in Scotland requiring estate management services.

imposed on residents (ie an embedded MC) our concerns, as listed in paragraph 3.97, extend to other management models.

3.74 We have also heard that there are disadvantages to RMCs, in particular around the liabilities and administrative burdens placed on directors. In its response to the statement of scope, an estate management company told us that 'simply forcing home buyers at the point of purchasing a house to commit to becoming owners of the [public open space] is a dangerous and mis-timed way of using a solution such as this.' While it did not provide supporting evidence, it said that this structure tends to lead to frequent re-tendering of managing agents, 'and the focus is purely on short-term costs' rather than considering "best value" principles and non-financial considerations such as ensuring that the [public open space], flood mitigation basins and all the other features are well managed for the long term.' It said that 'the apparent conflict of goals that we see can be addressed, at least in part, by delaying the establishment of the RMC to a more appropriate point when risks are reduced.[53] A similar point was raised in response to the Welsh Government's 2020 consultation on estate charges, with a respondent noting that open spaces on new developments are becoming increasingly complex, often with features that carry liabilities and which require expert handling.[54] Another estate management company respondent to the statement of scope said that an RMC arrangement 'usually ends up relying on a few individuals and if they no longer have the time or energy to put into management efforts or sell their properties, efforts can languish.'[55] It also states that the role may well fall far out of their expertise, a concern that has been more widely expressed.

3.75 Some individuals also raised concerns about RMCs in response to the statement of scope, complaining of difficulties or delays in gaining control of the RMC from developers, or issues with being able to communicate effectively with the RMC.[56]

3.76 We have also heard that there is a role for community-led housing structures such as the community land trust, which we understand are akin to RMCs, in addressing concerns about 'opaque and unaccountable estate management structures' with a respondent to our statement of scope noting that they give homeowners and tenants a significant influence.[57] Community models in Wales have also been highlighted as good practice in the context of the Senedd petition on adoption discussed earlier at paragraph 3.9.[58]

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[53] Greenbelt response to the Statement of Scope.
[54] Estate charges on housing developments – summary of responses (gov.wales),
[55] Estate_Management_Company.pdf (publishing.service.gov.uk)
[56] Housebuilding market study – Summary of consumer responses (publishing.service.gov.uk)
[57] Community_Land_Trust_Network.pdf (publishing.service.gov.uk)
[58] Agenda for Petitions Committee on Monday, 25 September 2023, 14.00 (senedd.wales)

Scotland

3.77 In Scotland, property factors (sometimes called property managers) manage and maintain the commonly owned or used parts of residential land, for example, the common gardens or amenity areas in an estate. This land may be owned jointly by all or some of the homeowners or by someone else, for example, the property factor as a land-owning management company. A property factor can be a private business, a local authority, or a registered social landlord (housing association).

3.78 The Property Factors (Scotland) Act 2011 is made up of three principal constituents: i) a mandatory register of property factors providing services to homeowners in Scotland ii) a code of conduct that specifies the minimum standard of service property factors must provide and iii) the Housing and Property Chamber (First-tier Tribunal for Scotland), to enable homeowners to report their factors. We discuss this further at paragraph 3.186.

Appointment of estate management companies

3.79 We asked estate management companies how they acquire contracts for new estates. The responses received indicate that they seek or are offered opportunities through a combination of proactive and reactive strategies, including:

- Appointment by housebuilders through open tender (with management companies submitting detailed management proposals/budget),[59] or direct approach from a housebuilder based on existing relationships or recommendations; and, solicitor referrals.
- Opportunities identified by the management companies' own business development managers; through local authority planning portals; and through targeted or generic marketing.
- Direct approaches from clients or RMCs wishing to change management company.

3.80 We also asked estate management companies on what basis they competed with each other, and responses noted a variety of parameters of competition, including location, size and type of portfolio under management; reputation and prior experience; quality of customer service; cost, pricing and fee structure; and, technology and innovation which can be attractive to homeowners.

[59] Some large housebuilders also noted that estate management services are tendered, or they work with managing agents they have previously worked with.

Estate management charges

3.81 Estate management charges (sometimes referred to as ‘EMCs’) are recurring charges paid for by homeowners on new build estates to a management company or in Scotland a ‘factor’ or a managing agent.

England and Wales

3.82 Estate management charges are usually created under the terms of the plot transfer. The legal duties relating to the management of private newbuild estates, including the requirement to pay an estate management charge to a developer or management company, are established by covenants entered into under the deed(s) of transfer when a plot is sold.

3.83 The transfer deed is a conveyancing document which serves to transfer legal ownership of the plot / property to the purchaser. In England & Wales, the transfer deed for registered land takes the form of the HM Land Registry Form TP1. The TP1 form will be entered into on completion of the sale and each of the homebuyer (ie the transferee), the housebuilder (ie the transferor) and the management company will be a party to the deed.

3.84 The plot purchaser will enter into a covenant in the transfer deed (TP1) to pay the management charge (often termed a ‘service charge’), as a contribution towards the maintenance of the estate’s communal areas and facilities, and the management company will enter into a covenant to provide the estate management services, such as maintaining the shared amenities.

3.85 The provisions in the transfer deed which create the legal obligation to pay the estate management charge will typically also cover items such as the nature of the costs accounted for through the service charge, the dates payments are due, the time period allowed for making payment and details of how the service charge is calculated. However, the specific mechanics of the estate management charge will vary as between housebuilders.

3.86 The precise level or amount of the estate management charge is not prescribed in the transfer deeds – as it will vary depending on the management company’s expenditure for the year – but there is usually a requirement for the transferee’s proportion of the service charge to be ‘fair’, ‘reasonable’ and / or a proper ‘proportion’ of the overall expenditure by the management company in managing and maintaining the estate. As such, it is common for the management company to enjoy a wide discretion in setting the charge.

3.87 Management companies will typically covenant to perform the following estate management services (amongst others):

- maintain the common parts of the estate and any public amenities in good condition, in accordance with any planning permissions and the principles of good estate management;
- manage and communicate the service charge budget, including setting the level of the charge each year;
- insure the management company against risks for which it may be liable;
- pay all taxes, rates and outgoings relating to the shared amenities;
- set the estate regulations which homeowners must comply with;
- maintain a reserve fund for items of future expenditure;
- grant permissions for alterations and works etc; and
- provide certificates to homeowners confirming certain requirements have been complied with (which can be necessary for any sale, transfer or charge of the property).

3.88 To ensure that the obligation to pay the estate management charge continues for onward purchasers (ie beyond the initial plot purchaser), the initial transfer deed contains a covenant requiring any onward purchaser to enter into a deed of covenant with the management company which contains the same covenants as those entered into by the initial purchaser. This includes the core obligation to pay the estate management charge to the management company. The arrangement is protected with a Land Registry restriction registered on the title to the plot such that any plot transfer cannot be registered at the Land Registry without a certificate from the management company stating that the provisions of the title restriction have been completed.

Rentcharges

3.89 Estate management charges can also take the form of an estate rentcharge. A rentcharge is a sum of money, usually payable annually, created in a conveyance or transfer. The party selling the land reserves an annual rent payable to them and their successor in title, which is charged on the land sold. A rentcharge 'runs with the land' and failure to comply with the terms of the rentcharge may result in enforcement action being taken against the current owner of the land. Effectively, this means that the positive obligations imposed in the rentcharge are binding on the current owner.

3.90 The Rent Charges Act 1977 prohibits the creation of new rentcharges, however certain types of rentcharge are excepted from the general prohibition.

3.91 This exception applies to an ‘estate rentcharge’, which includes a rentcharge created for the purpose of ‘meeting, or contributing towards, the cost of the performance by the rent owner of covenants for the provision of services, the carrying out of maintenance or repairs, the effecting of insurance or the making of any payment by him for the benefit of the land affected by the rentcharge or for the benefit of that and other land’. This type of rentcharge is known as a ‘service charge’ rentcharge and can be used in large developments to support a system of service charge and estate management obligations.

3.92 The practice of using estate rentcharges as a means of securing the payment of service charges, including the payment of estate management charges by homeowners on newbuild estates, has drawn much criticism due to the severity of the remedies available to the rent owner when payment is not made.

3.93 Section 121 of the Law of Property Act 1925 implies two notable remedies into the rentcharge instrument for recovering monies owed to the rent owner:

- a right to enter into possession of and hold the charged land or any part thereof, and take the income from the charged land (Section 121(3) Law of Property Act 1925). Unlike forfeiture proceedings against a leaseholder following a breach of a lease (under Section 146 Law of Property Act 1925), there is no requirement for the rent owner to serve any notice to the homeowner giving them a reasonable period of time to remedy the breach, nor is there a right for the homeowner to apply to the courts for relief.

- a right to demise the charged land or any part thereof to a trustee by deed for a term of years (a lease) (under Section 121(4) Law of Property Act 1925). This effectively means that if the rentcharge goes unpaid for 40 days, the rent owner may grant a lease of the charged land to a trustee. Again, there is no need for any legal demand to have been made or notice to be given, and the lease can be promptly registered at the land registry. This can allow the trustee to effectively ‘ransom’ the charged land and exclude the homeowner from their home. The trustee can then collect any income received from the charged land or mortgage, sell or underlet the lease to raise the amount owed and any costs incurred.

3.94 Section 125(5) of the Law of Property Act 1925 permits the express exclusion of these statutory remedies.

3.95 We consider the evidence we have received on the prevalence and use of rentcharges, and the remedies for recovering monies in this regard in paragraphs 3.153 to 3.165 below.

Assessment of the evidence in relation to private estate management and what this means for consumers

3.96 In recent years, the private estate management model has attracted focus in the media, in parliament,[60] and in academic research.[61]

3.97 In the course of this market study we have been examining a number of concerns that have been raised directly with us in relation to private estate management arrangements, many of which reflect issues previously considered by others. In this working paper we set out our emerging evidence base, and our assessment of the evidence reviewed to date. We focus on the following issues:

(a) Transparency of estate management arrangements and charges.

(b) Level of estate management charges, and potential for future increases.

(c) Quality of estate management services.

(d) Practices and arrangements that may impact onward sale of a property subject to estate management charges.

(e) Consequences for non-payment / late payment of charges.

(f) Issues with switching estate management companies.

(g) Rights to challenge estate management arrangements and fees, and redress.

3.98 We are continuing to collect evidence in relation to consumers' experiences of private estate management arrangements, including through qualitative consumer research that we have commissioned, and we will take this evidence into account in our final report. We are also continuing to review information and data submitted to us in response to information requests sent to market participants.

Transparency of estate management arrangements and charges

3.99 Many of the c.250 individual respondents to our statement of scope said that there is a lack of transparency regarding estate management arrangements and fees.[62] One respondent told us:

We were told each year there would be a small fee to cut the central grass etc as this was not adopted by the council. We were told it's £120 and

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[60] Freehold Estate Management Fees - Hansard - UK Parliament (July 2023); Plenary 15/06/2021 - Welsh Parliament (senedd.wales).
[61] Bright, S (2022), 'Far from Privatopia: Private Residential Estates in England and Wales', SSRN.
[62] Housebuilding market study – Summary of consumer responses (publishing.service.gov.uk)

would go up by inflation each year. We have since we moved in been charged £200 already …it was very much glossed over… we were never given a breakdown of what we would pay for.

3.100 Such concerns were also raised by some individuals in responses to our update report. They said that during the sales process they were informed that they would be charged a small fee for minor landscaping duties carried out by the management companies, only to find out once they had purchased their property or when they were close to exchanging with the sellers that there was a long list of charges that they were ultimately required to pay. Some respondents added that the transfer documents did not contain some of these future costs. One was told during the process that the council no longer adopted the green spaces on the estate, and that this would cost over £100, which then rose by nearly two thirds the following year to over £200.

3.101 In response to our update report, the Homeowners Rights Network (HorNet)[63] submitted that while most of its members were informed of the existence of a "service charge" [they] were not made aware of the true liability [they] signed up to when [they] bought, noting that 'sales staff from all the big national building firms appear to use the same pitch "a small annual charge for grass cutting/keeping the estate tidy"' whereas, HorNet submits, that a wide range of additional charges were levied.

3.102 In November 2020, the Welsh Government published the outcome of a consultation it carried out in relation to estate charges on housing developments.[64] A total of 566 respondents completed the questions in the "Homeowners and residents" section of the report. Of the 509 responses that indicated when during the purchase process they were first made aware of the charges:

- 110 (22%) stated it was right at the start of the process
- 28 (6%) stated it was when they paid the deposit or reserved the plot
- 90 (18%) stated it was during the conveyancing process
- 125 (25%) stated it was at the signing or exchanging of contracts stage
- 103 (20%) stated it was at completion
- 44 (7%) stated it was after completion or after they had moved in; and

[63] On its website, HorNet states that, by 27 August 2023 it had 10,400 plus supporters in its Facebook Group and 841 estates representing over 181,00 households. It describes itself as 'a group of ordinary homeowners who feel exploited by their respective land management companies on privately owned managed estates with charges.' See: Homeowners Rights Network | HorNet - NO to fleecehold!
[64] Estate charges on housing developments – summary of responses (gov.wales), page 27.

- 9 (2%) stated they were never made aware.

3.103 The report notes that 12% indicated that even when they were made aware they were not properly informed of the full details and potential risks or implications of the estate charges or they were misled into thinking they could not increase or would only be charged until the areas were adopted by the local authorities.

3.104 Approximately a quarter of respondents indicated they were informed at the early stages prior to conveyancing. However, a number of these indicated that they were not fully informed of the true extent of the estate charges.

3.105 In May 2022 HomeViews, in collaboration with the Home Owners Alliance, compiled a list of '10 things homeowners wish they'd known before buying'.[65] This identified 'Service charges – and particularly future rate increases' as something many owners said they wish they had known more about before buying with one reviewer quoted: 'We wish we had known more about the annual estate maintenance charges and what these covered.'

Review of internal documents

3.106 The evidence that we have reviewed from the large housebuilders, which consists predominantly of sales and marketing materials and materials shared with conveyancers, suggests that homeowners *should* have been made aware of the existence of estate management charges before buying their home. However, from the documents provided it appears that minimal information is provided right at the outset of the process.

3.107 Housebuilders appear to be giving homebuyers the information they need to be aware of estate management charges and understand their immediate obligations around the reservation stage. At this stage in the home buying process, the reservation deposit may not be refundable in full or in part, if a customer pulls out of the process outside of any cooling off period. To the extent that information is shared after signing the reservation agreement – we note, for example, that there is a high degree of transparency of estate management charges within housebuilders transfer deeds that we have seen[66] – it may be too late to have the necessary impact as the buyer by this point is arguably psychologically committed to the purchase. Additionally, estate management charges are likely to be perceived as being insignificant in comparison to the purchase price of the property – although this does not mean that as an ongoing annual liability the charges are in fact insignificant at all.

[65] New-Build-Buyer-Guide-FINAL.pdf (hoa.org.uk)
[66] Based on our review of transfer deeds provide by large housebuilders in response to our information requests.

3.108 Based on materials we have reviewed, there appears to be inconsistency between housebuilders as to the quality and extensiveness of information that is provided to home buyers concerning estate management charges. Further, it is unclear at what stage in the sales process many of the materials are provided to purchasers in practice. If homebuyers only receive comprehensive details at, for example, the moment of completion, then this means they have not had sufficient insight or time available to make a proper decision on whether to proceed with the purchase of their home in full knowledge of the charges that apply. In this regard, we would note that whilst the 'information sheets' provided to the buyer's solicitors often do contain considerable information covering estate management and applicable charges, how they affect households etc, it is unclear how much of this information is passed on to the buyer and at what stage. It is also not clear in all cases when the large housebuilders began using the information shared with the CMA.

3.109 In our review to date, we have observed no attempts to communicate to buyers that estate management charges can change *significantly* year on year. We have also seen little on important topics like how to change management company, or what to do when households disagree over the types of work carried out etc. Such information will generally only be 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 (ie as part of the legal formalities which solicitors invariably lead on).

3.110 As noted in our update report, current policies may also not be consistent with past practices. What we do not know from our review of internal documents is whether and how well information about estate management charges is communicated *verbally* to purchasers throughout the sales process. It is also unclear to what extent paperwork (such as reservation checklists) are worked through during sales discussions.

3.111 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 sufficient information to their customers in the course of the sales process, including as regards the practical implications of arrangements. 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 so far seen no evidence to suggest that the majority of large housebuilders take steps to ensure that their sales staff fully inform customers about the cost and practical implications of buying a property on a privately managed estate.

3.112 In response to our update report, one large housebuilder submitted that information on estate management arrangements and charges is provided by members of its team who are specifically trained in the importance of transparency and treating customers fairly. In its response, another large housebuilder noted

that it has always provided details of the service charge (the annual estimated sum) prior to reservation, and notes that it always requires its sales team to provide the whole breakdown of the budget and has developed a training module for sales to improve knowledge.

New Homes Quality Code

3.113 Several housebuilders have indicated that the recently implemented New Homes Quality Code (NHQC),[67] alongside pre-existing codes such as the HBF Code for Home Builders[68] and Consumer Code for Homebuilders,[69] has been implemented to mitigate issues around transparency and other issues that can affect purchasers of new build homes.

3.114 Specifically relevant to transparency of estate management arrangements, participating housebuilders are required under the NHQC to:

- In describing the new home, properly inform and not mislead consumers including in relation to management services and service charges (1.2i and j of the code) and any agreements or restrictions that may affect the consumer if they want to sell the property in future (1.2l of the code).
- Provide an affordability schedule of any costs that are likely to be directly associated with the tenure and management of the new home over the 10 years following the sale, and which the developer can reasonably be expected to be aware of. This must include estimated amounts of any additional costs that the developer knows or expects will arise directly from the sale. This includes 'management fees' (for example to maintain the landscaping, highways that the local authority is not responsible for, and so on), event fees and other charges. This information should bring to the customer's attention any service charges that may increase or be charged in the future as more facilities become available or sinking fund charges that may be introduced for repairs or maintenance. If the developer does not know the actual value of costs or charges, they should give the customer a schedule of costs without including the values. (2.1 of the code).

3.115 The NHQC is a non-statutory code. We understand that around 200 developers, including the vast majority (but not all) of the large housebuilders have voluntarily registered to operate under the NHQB Code, meaning that once activated, around 80% of all new builds in England, Scotland and Wales will be delivered under the

[67] New Homes Quality Code: Downloads (nhqb.org.uk). The NHQC is overseen by the New Homes Quality Board (NHQB), an independent not-for-profit organisation: About us (nhqb.org.uk). The NHQB also oversees the performance of the New Homes Ombudsman Service.
[68] Consumer Code for home builders (hbf.co.uk)
[69] What does the Code cover? - Consumer Code

requirements of the NHQC. By signing up to the code, developers are also signing up to the non-statutory New Homes Ombudsman Service.

3.116 The NHQB has a compliance audit in place where developers have to provide evidence of compliance with the NHQC. NHQB is working towards an onsite developer audit process and seeking Stage 2 approval under the Chartered Trading Standard Institute's Consumer Codes Approval Scheme.[70] Stage 2 requires a code sponsor to demonstrate the full role as code sponsor, including auditing, sanctions and Code reviews. This is a longer-term process requiring tried and tested practical applications. The NHQC anticipates submitting its application for Stage 2 in Q2 2024.[71]

3.117 The New Homes Ombudsman Service[72] is the route to redress for breaches of the NHQC. In the short time that it has been operating it has received 1,400 contacts, of which 3 relate to estate management.

Emerging conclusions on transparency

3.118 While our review of internal documents indicates that many homebuyers may have been made aware of the existence of estate management charges before buying their home, homebuyers may be less informed about the long-term implications of estate management arrangements. Indeed, given that estate management charges are capable of changing each year, and of increasing significantly, we do not see how homebuyers can be given any meaningful transparency about the level of likely future charges. They could, however, be made aware that there are potentially large additional costs that come with buying the house and that these are uncapped and unchallengeable. Moreover, as set out above, there are clearly a number of homebuyers who have been motivated to contact us, and other organisations, who have felt ill- or mis-informed about estate management arrangements.

3.119 In addition, as things stand there are risks that homebuyers are not made aware of estate management charges and arrangements early enough in the process. As they progress through the purchasing process they are likely to become psychologically committed to purchasing the home, so it is essential that information in relation to estate management arrangements, and their implications for the future, are disclosed at the earliest possible opportunity.

3.120 While the NHQC has provisions that address transparency in relation to estate management fees, and many developers are signed up to this, we note that it is a voluntary scheme, that does not provide complete coverage of the sector.

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[70] Consumer Codes Approval Scheme (tradingstandards.uk)
[71] tradingstandards.uk/business-hub/prospective-code-sponsors/
[72] NHOS - The New Homes Ombudsman Service.

3.121 We therefore consider that some homebuyers are poorly informed about estate management arrangements, and the implications of such arrangements, and that existing consumer protection arrangements do not go far enough to adequately address this issue. In particular, those homebuyers who are poorly informed are unable to exercise choice in the house buying process.

3.122 We also observe that the size of the estate management fee relative to the purchase price of the house may mean that even where an estimate of the likely level of fee is given, some homebuyers will not engage with this information, and even if they do, they may not necessarily be in a position to take a different decision about whether to purchase their home, or be in a position to shop around for a home on the basis of the possible size of an estate management charge. Therefore, we consider that greater transparency may not improve outcomes for some consumers, although as noted above, it could serve to raise awareness of potentially large additional costs that come with buying the house and that these are uncapped and unchallengeable.

Level of estate management charges and potential for future increases

3.123 In response to our statement of scope a large number of respondents said that they have had to pay very high maintenance fees to management companies for a range of services, and one off 'event fees' in certain circumstances. A significant number of respondents also alleged that the fees charged are disproportionate for the work carried out.[73]

3.124 Concerns have also been raised in relation to uncapped rises in charges and the potential for future uncapped rises. By way of illustration:

- One respondent to the statement of scope submitted: *Upon completion, ownership of the [green] space was transferred to a management company … who charge circa £200 per year … the fee has almost doubled in 4 years and there are no rules or regulations surrounding how much they are entitled to raise it…there are no courts to complain to, and the management company do not engage in dialogue.*

- In response to our update report, an individual highlighted that their costs had increased by 42% with no explanation for the increase, and another respondent said they had received a bill that was almost double the previous year's charge.

[73] Housebuilding market study – Summary of consumer responses (publishing.service.gov.uk).

- Another said that ‘a few months ago the company that was originally doing the work sold the rights to another firm who immediately tripled the cost to householders.’

3.125 Numerous respondents to both our statement of scope and our update report highlighted that a significant proportion of fees appeared to derive from management overheads rather than direct maintenance costs. One respondent to the update report highlighted that their management fees accounted for a third of costs, without the management company providing any detail on what this covered, and another indicated that management fees made up over 50% of the total cost of the charges for the estate as a whole.

3.126 As noted at paragraphs 3.84 to 3.86 the transfer deeds of the large housebuilders contain obligations on the transferee to pay various types of fee in specified circumstances. This includes event/registration fees, permission fees, administration fees, late payment fees, and more.

3.127 Many individual respondents indicated that they were subject to one-off fees in order to gain permissions for certain activities, such as making alterations to their home, re-mortgaging and selling their home. Additionally, one large housebuilder told us that one of its customers had recently brought to its attention that their managing agent wanted to charge them £1800 to sign a document.

3.128 In the Welsh Government’s 2020 report on estate charges, respondents also raised concerns around charges, highlighting issues with unplanned and uncapped costs, poor value for money service delivery, and a high proportion of the charge being management and administration fees. In a few cases, respondents explained that the annual costs had reduced as a result of changing to a new estate management company.[74]

3.129 Estate management companies provided data to us on the average annual management charge (including VAT) per household. There is wide variation between the different estate management companies in 2022:

- Two have average charges below £100 per year per household;
- Most have charges below £300 a year per household;
- Two have average charges close to £1,000 per year per household.

3.130 This data does not show large changes over time for most companies, however, given these are averages, they will not represent the experiences in all estates.

[74] Estate charges on housing developments – summary of responses (gov.wales), pages 17-19.

3.131 The Welsh Government's 2020 report noted that the average estate management charge was £169 per year, with a range from £50 to a maximum of £500. The majority of respondents indicated this had increased over time.[75]

3.132 In response to our information requests, estate management companies also provided data on how their charges breakdown. Annual management fees – as a subset of the overall management charge – range between 2% and around 50% of the annual management charges across the estate management companies, with the average at 23%.[76]

3.133 One estate management company told us, without providing supporting evidence, that:

> *It is expected that the management fee will increase over time due to the wear and tear as the development ages. As time goes on and things start to breakdown or need replacing more time is needed to manage those projects or changes in legislation take place meaning additional work is required*.

3.134 Estate management companies provided supporting information about their charges. All companies highlighted that costs will vary across different estates, based upon the types and complexity of the services provided, local characteristics, economies of scale etc. Many services are provided by external contractors, with companies highlighting their tendering processes. In other charges, the management companies showed wide variation in approaches – some hold a sinking fund, while others do not; some charge a wide range of administration or inspection fees, while others do not; some have fixed fees structures, while others have much wider variation.

Emerging conclusions on estate management charges

3.135 While estate management charges appear to vary widely on average, which we would expect given the incentives of the estate management companies and lack of competitive pressure they face, we have seen evidence of increases significantly above the rate of inflation – sometimes with no explanation as to how the increase has been calculated, and very high management fees as a proportion of the overall estate management charge, again, with little or no explanation as to why the management fee element is such a high percentage of the overall cost.

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[75] There were 560 responses to the question, with 389 (69%) respondents reporting a change had occurred. There were a further 393 written comments, explaining what the change had been. Of these, the majority indicated an increase in the charge over time. Some were smaller increases that could be attributed to annual cost adjustments or inflationary increase such as RPI while others appeared to be significantly larger. In a number of cases the respondents were unable to get information as to the reason for the increase.
[76] There can be additional one-off fees.

3.136 We have also received evidence of apparently very high event or permission fees, which, on the face of it do not appear to reflect costs incurred (although we have not examined specific examples to confirm whether this is the case).

3.137 We consider that, in the face of unregulated charges, households face uncertainty as to future costs, potential for above inflation and non-cost reflective increases in their charges and potential difficulties in the onwards sale of their property (which we discuss further below).

Quality of estate management services

3.138 Some respondents to our statement of scope argued that they are still being charged for services but see no proof of work actually being done. Where work has been undertaken, many said that it is inadequate or incomplete, with infrastructure in a substandard condition.[77]

3.139 Respondents to our update report raised similar issues, with some respondents noting they had to personally assume maintenance work despite paying fees to the management company to carry this out. We also heard that households have been placed in a position where they have had to pay the management company to put right work that had not been carried out to a satisfactory standard in the first place.

3.140 We have also received complaints of poor customer service, and difficulties in communicating with management companies.

3.141 In our information requests to estate management companies we asked them to set out the volume and nature of complaints that they received. There were very wide differences in the number of complaints per 10,000 homes. The number of complaints received in 2022 varied significantly by company, ranging from one complaint to over 350 per 10,000 homes. We also note that two companies still have a large percentage of complaints in process, even for earlier years.

3.142 In terms of the nature of complaints received, several management companies highlighted 'finance' [ie estate management charges] as the most complained about category, and notably households seeking clearer breakdown of their bills and invoices, with 'maintenance work' the other most complained about category, and 'customer service' also featuring as one of the major topics of complaints.

3.143 While all companies indicated that they have a complaints management process in place, there was a wide range in the average time taken to deal with the complaints, from under 10 days, to over 80, and wide variations in the number of complaints that were successfully upheld.

[77] Housebuilding market study – Summary of consumer responses (publishing.service.gov.uk), page 1.

Emerging conclusions on quality of service

3.144 We acknowledge that there is likely to be wide variability on the standards of service delivered by estate management companies, and that many homeowners who have not contacted us may be satisfied with the service delivered by their management company.

3.145 Nonetheless, quality of service is clearly a concern for a number of households, a subset of whom face challenges in resolving their concerns directly with their management company. Structurally, it appears to be intrinsically very difficult for households to hold anyone to account for the quality of work done - they do not contract directly with sub-contractors who carry out maintenance, and there are no obvious routes to challenge the level of estate management charges based on the quality of work actually done. As we discuss below, switching away from a management company may not be possible, or may be very challenging in practice, and in such circumstances, management companies do not face incentives to improve the quality of their offering, effectively enjoying a position of market power. Households are therefore at risk of companies exploiting this market power to their disadvantage.

Practices and arrangements that may impact onwards sale of a property

3.146 Respondents to our statement of scope, and to our update report, as well as respondents to the Welsh Government's consultation on estate charges have expressed concern at challenges that they have faced in selling their property due to estate management arrangements.

3.147 One of the reasons cited by respondents was that management companies have issued households with management packs, at the cost of several hundred pounds, to progress the sale. According to several respondents, this information was not conveyed to them until the point of sale. There have also been complaints about the length of time it has taken for management companies to provide these packs, which has delayed the sales process and therefore risked the sale of the property.

3.148 Five lawyers responding to the Welsh Government's consultation on estate charges indicated that they had encountered sales falling through because of the existence of an estate charge.[78] Examples of why this had happened included the buyer pulling out of the sale as fees amounted to over £500 a year, and buyers deciding not to make an offer having discovered an estate charge existed with staff not able to confirm that it was capped and that the Section 121 Law of Property Act 1925 provisions did not apply.

[78] Estate charges on housing developments – summary of responses (gov.wales), page 73.

3.149 The Conveyancing Association Protocol for England and Wales offers guidance to conveyancers and addresses the issue of estate charges.[79] Part of the Protocol in relation to estate charges states:

Advise clients of terms which may be considered onerous and would not be accepted by major lenders. Eg, Nationwide require estate renthcharges over £500 per annum to be referred for approval [Clause 7.1]

Ensure that the drafting of rentcharges excludes the remedies to enter or lease the property to recover arrears whether demanded or not [Clause 7.2].

3.150 Having reviewed Nationwide's Property and Construction lending criteria (aimed at professional intermediaries),[80] we note that this states in relation to estate charges that:

Charges must be reasonable at all times. Where charges are greater than £500 per annum, we'll need to be advised what the charges cover so the valuer can assess whether the valuation is affected.

3.151 We note that, while not common, data provided to us by estate management companies shows that charges in the region of £1000 per annum are being applied.

Emerging conclusions on the impact of estate management charges on resale

3.152 The evidence we have reviewed to date indicates that the existence of private estate management arrangements can have a detrimental impact on consumers' ability to sell their home, resulting in abandoned sales and the associated costs incurred,[81] and potentially downgraded valuations.

Consequences for non-payment / late payment

3.153 We have been examining concerns that sanctions available under Section 121 of the Law of Property Act 1925 where a rentcharge is in place, discussed above at paragraphs 3.89 to 3.95, are disproportionate and if threatened or enforced, can have a significant financial and emotional detriment on consumers.

3.154 To illustrate, we have seen notices served on homeowners and their mortgage companies:

(a) One solicitor's letter addressed to a mortgage company stated:

[79] 5th-Edition-CA-Protocol-2023.pdf (conveyancingassociation.org.uk)
[80] Property and construction | Nationwide for Intermediaries (NFI) (nationwide-intermediary.co.uk)
[81] See eg: 'Freehold charges cost us our dream home' - BBC News.

Should your mortgagor fail to comply with the Notice [under s121 of the Law of Property Act 1925] and make payment of the requested sum of [£1000-1500] we are instructed to issue possession proceedings, with a view to repossessing the property on behalf of the management company.

Please note, that to obtain possession under the above detailed section neither a County Court Judgment nor consideration by a Leasehold Valuation Tribunal is required.

If payment is not made to us within 14 days of this notice we will enter into possession without any further notice.

(b) Another stated:

Should our client grant a lease or re-enter the property, then this will have a detrimental impact on the value of your property and may result in our client applying for a possession order and ultimately our client obtaining an eviction in respect of the property.

3.155 One large housebuilder that responded to our update report suggested that the 'disproportionate sanctions under the Law of Property Act 1925, s121, have largely been addressed by the UK Finance Lenders Handbook, so we would not expect any new estate rentcharges created by developers to include those disproportionate sanctions.'

3.156 UK Finance advised us that the UK Finance Lenders' Handbook instructions do not specifically include estate rent charges in the generic instructions (known as 'Part 1'). However, several lenders use the Handbook's lender-specific instructions (known as 'Part 2s') relating to leasehold properties and/or management companies to give specific instructions around estate rent charges. For example, we note that Nationwide's Part 2s instructions in relation to estate rent charges state that:

In the event of non-payment the agreement must either:

i) Specifically prohibit the collector/recipient from being able to create a lease over the property, or

ii) If a lease is created the agreement must clearly state that on payment of all arrears, costs of collecting arrears, all legal costs including court costs and costs of creating and surrendering the lease, then the lease must be surrendered. All costs must be reasonable. The agreement must specifically state no premium can

be charged to surrender the lease. If the agreement doesn't include these details a deed of variation is required.[82]

3.157 We note that other lenders set out specific criteria where rentcharges are payable, including indicating that this may be acceptable where provisions under Section 121 of the Law of Property Act have been excluded under the estate rent charge clause.[83]

3.158 Following our review of transfer deeds provided by the large housebuilders as part of the market study, it would appear that the industry is generally not using estate rentcharges as a way to secure payment of estate management charges (although there may be some exceptions).

3.159 A number of large housebuilders do not use rentcharges as a matter of standard practice. In these cases, there will be a provision in the plot transfer deeds expressly stating that the estate management charge does not constitute a rentcharge. Further, we observed from our review of large housebuilder transfer deeds that the large majority of housebuilders expressly disapply the remedies available under Section 121 of the Law of Property Act 1925. By expressly excluding these statutory remedies, the deeds of transfer remove the ability of the management company to enforce them against homeowners in order to secure payment of a service charge (or to enforce any other covenant the homeowner entered into on plot transfer).[84]

3.160 Of the transfer deeds which did expressly refer to a 'rentcharge' for the purposes of facilitating the estate management charge (which was the case for 3 large housebuilders), all three also disapplied the remedies.

3.161 Our review therefore suggests the industry approach is currently to exclude the possibility of using estate rentcharges, and the remedies available under the Law of Property Act 1925, to impose and enforce obligations relating to payment of an estate management charge by homeowners on newbuild private estates. However, it may be the case in practice that for estate management systems established previously (eg 5 or 10 years ago), this approach was not adopted and so the draconian measures available to rentowners (ie management companies here) remain available.

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[82] Nationwide Building Society - UK Finance Mortgage Lenders' Handbook, clause 5.15.2a. It notes that these requirements also apply where residents of the estate are members/shareholders of the management company and that the requirements will only apply to a statutory rent charge and not where the payment obligation is created by a personal positive covenant/restriction.
[83] As set out in Lenders' Handbook - UK Finance Mortgage Lenders' Handbook, Answers for England and Wales, Question 5.15.2.
[84] We note that 9 out of the 11 large housebuilders disapplied the Section 121 Law of Property Act 1925 remedies in their form TP1s and included provision for management companies not to be able to rely on these remedies to collect outstanding estate management charge payments from residents.

3.162 Evidence received from estate management companies indicates that rentcharges are being used to secure payment.

3.163 Six estate management companies told us that, for the three years to 31 December 2022, they – or parties acting on their behalf, such as solicitors or debt recovery agencies – had issued letters to freeholders in England and Wales warning that they may enforce the remedies available under Section 121 of the Law of Property Act 1925 to secure payment of any outstanding charges. However, none of those companies instigated follow-on enforcement action using the remedies available under Section 121 of the Law of Property Act 1925.[85] [86] We have been told that in some circumstances, such letters may be issued on behalf of a client of the estate management company, rather than directly on behalf of the estate management company. While the numbers of such letters issued are generally low relative to the overall numbers of relevant units under management, we note that the emotional impact on individuals in receipt of such letters could be significant.

3.164 One of those estate management companies provided data showing that it has given written warning, via its solicitors, that it may enforce the remedies available under Section 121 of the Law of Property Act 1925, issuing, on average, 855 written warnings a year between 2020 and 2022. It explained that in a small number of cases (on average 7 cases in each of those years) its external solicitors instigated small claims actions for recovery of the outstanding debts, obtained judgment and then served a notice under Section 121 of the Law of Property Act, noting that it is not their external solicitor's practice to issue an application for possession, despite warning this may occur.

3.165 One of the estate management companies that indicated it had not taken enforcement action under section 121 of the Law of Property Act 1925 stated that: if a debt over a threshold of £100 is outstanding after 7 days from a final reminder being sent, a matter may be referred to solicitors for debt recovery action, and a Section 121 'Right of Re-entry notice' may be issued by the solicitors to both the mortgagee and the mortgagor. It noted that in all cases it is expected that where a mortgage is in place, the mortgagee will step in and settle the debt. Other companies have indicated they also pursue outstanding payments as debt claims.

3.166 We have also seen evidence of Deeds of Variation (DOV) being drawn up or sought to remove threats of people's homes being repossessed, should rentcharges not be paid on time, with costs being incurred by homeowners, and

[85] One company noted that it had issued such letters on less than ten occasions over the period in question.
[86] Another noted that the number of such letters issued is very low compared to the overall number of relevant units under management and it had not taken any follow-on enforcement action. It also noted that any action would always be on behalf of its client and not directly on its own behalf.

we have heard that purchasers' lenders may require this in certain circumstances in order for a purchase to go through.

Emerging conclusions on sanctions for non-payment

3.167 When considering the balance of power between households and the estate management companies an important factor is the legal route for securing the estate charge. In England and Wales, where a rentcharge has been created there are two possible routes for securing payments that are owed (assuming these remedies have not been disapplied).

3.168 Based on the evidence above, we consider that where remedies under Section 121 of the Law of Property Act 1925 can be applied they could be significantly disproportionate to the sums owing and are likely to cause considerable distress to households when they are threatened with enforcement action, and significant emotional and financial harm should threats be followed through. We note that the UK government has stated that, when Parliamentary time allows, it will remove the statutory right for owners of rentcharges to take possession or grant a lease of the property in the event of non-payment by the homeowner.[87]

Issues with switching estate management companies

3.169 In response to our statement of scope, individual respondents indicated that they have very limited ability to switch between estate management companies. In response to our update report, one individual told us:

We have no access to competition ie we are locked into one managing agent chosen by our developer.

3.170 In our information requests to estate management companies we sought to understand whether households have the ability to switch to alternative management companies.

3.171 The responses we received indicated that, where a management company is acting as the appointed agent for an RMC, management agreements will often allow for termination of the existing contract, generally where three months' notice is given. Some management companies indicated residents can switch on the expiry of an existing agreement, or can serve notice where a breach has been established. We also heard from some large housebuilders that where the arrangement takes the form of an RMC, there should not be high barriers to switching.

[87] Written questions and answers - Written questions, answers and statements - UK Parliament (30 May 2023)

3.172 For embedded MC arrangements, TP1 terms may include the ability to transfer to another management company and some parties noted that 50% of homeowners must vote to serve notice, after an initial period. Others noted they would not usually provide notice or allow switching other than where breaches have occurred.

3.173 Our analysis of data provided by estate management companies indicates switching does occur. We are in the process of verifying this data to determine the levels.

3.174 Asked what the main barriers to switching are, estate management companies identified obtaining collective agreement from households to switch, parties reaching agreement on termination, costs (including termination fees and legal transfer fees if the management company owns the land) and a lack of guidance issued to homeowners on how to switch.

Emerging conclusions on switching

3.175 The ability to switch *easily* is significant in that it can improve outcomes for households who are dissatisfied with existing arrangements, and drive competition between management companies to deliver better quality services and lower estate management charges to be more cost reflective. Where there are barriers to switching, this will limit the pressure on companies to deliver benefits to households.

3.176 We have identified barriers to switching in respect of both RMCs and embedded MCs, but it seems that it can be particularly challenging in respect of embedded MCs.

3.177 We note that in the leasehold sector in England and Wales, homeowners have the right to apply to the First-tier tribunal to appoint a new manager to manage the provision of services. This is not the case for freeholders, which we discuss further below.

Rights to challenge and redress

The position in England and Wales

3.178 A key concern about estate management arrangements and charges on freehold estates relates to the ability (or lack thereof) of homeowners to challenge the management company on the amount of the estate management charge and on the nature and quality of the services being provided in return. Currently, freeholders who pay service charges in England and Wales do not have the equivalent statutory rights as leaseholders to challenge unreasonable service

charges and the standard of work carried out, which we discuss further, below.[88] The UK Government has, however, announced an intention to legislate in this area.[89] We understand that any legislation introduced by the UK Government will not automatically apply in Wales.

3.179 In our review of transfer deeds, we looked for provisions concerning the rights of transferees (ie homeowners) to challenge the level of a management charge or the quality of services provided by the management company.

3.180 We found that in some cases, though not all, there is a way for the transferee to challenge the management charge being applied, often with the matter being determined by an independent person such as an expert appointed by the Royal Institute of Chartered Surveyors.

3.181 While this approach to challenging the estate management charge and service level appears to be the norm amongst the large housebuilders, it is unclear how difficult it is in practice to bring about such a challenge and the deeds tell us nothing about the level of expense involved which may be significant deterrent to homeowner minded to challenge the level of their estate management charge. Furthermore, where there is no formal mechanism for challenging the service charge included in the transfer deeds, the only recourse the homeowner will have is to challenge the reasonableness of the sum charged in court. This will be a time-consuming, expensive and complicated legal process which many homeowners will not be prepared to engage in given the sums involved. The outcome is also likely to be highly uncertain, and there is a risk that the homeowner ends up responsible for the other side's costs.

3.182 In addition, in circumstances where a homeowner challenges the estate management charge being applied by a management company, it is common (based on what we have seen) that the homeowner must still pay the management company the sum regardless of whether their challenge is upheld. The management company will hold the sum and, should the transferee's challenge be upheld, the management company will apply the sum as a credit against their next estate management charge payment. This may seem unfair on the face of it as: (i) the homeowner still has to pay the charge even though they are contesting the amount (and the charge may be a significant sum with consequences for their financial wellbeing), and (ii) if their challenge against the estate management charge level succeeds, they still do not receive an immediate cash refund but have to wait for a credit to be applied to the following year's service charge.

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[88] For an assessment of the current position see: Freeholders' estate and service charges (parliament.uk).
[89] The Minister, Rachel Maclean, responded to a PQ on 1 March 2023 saying: *When parliamentary time allows, the Government intends to legislate to ensure that freehold homeowners who pay estate rentcharges have the right to challenge their reasonableness and to go to the tribunal to appoint a manager to manage the provision of services on aligning the position*.

3.183 The rights which are conferred in the deeds and at common law to new build freehold owners can be contrasted with the statutory rights leaseholders have to challenge service charges and management standards.

3.184 Leaseholders in England and Wales have the right to request a written summary of all service charge costs received from the landlord covering the last 12 months from the date of the request. If the landlord fails to comply with this information request without reasonable excuse then they may receive a fine. Leaseholders in England and Wales also have a right to seek a determination from a Tribunal (First-tier Tribunal in England or Leasehold Valuation Tribunal in Wales) as to whether they are liable to pay these costs.

3.185 As noted in paragraph 3.178 above, unlike leaseholders, freeholders in England and Wales do not have an equivalent statutory right to contest charges or standard of work carried out, despite in some cases paying for the same services as leaseholders on their estate. This issue has been raised by households and other stakeholders throughout the CMA's housebuilding market study and in other government-commissioned reports and areas of work. In the Department for Communities and Local Government's 2017 report on 'Tackling unfair practices in the leasehold market', 91% of respondents to the online survey said that freeholders on private or mixed used estates should have the same rights as leaseholders.

The position in Scotland

3.186 As noted earlier, in Scotland property factors manage and maintain the commonly owned or used parts of residential land, for example, the common gardens or amenity areas in an estate. Homeowners in Scotland are legally protected when they use a property factor.

3.187 The Property Factors (Scotland) Act 2011 is made up of three principal constituents: i) a mandatory register of property factors providing services to homeowners in Scotland ii) a Code of Conduct that specifies the minimum standard of service property factors must provide and iii) the Housing and Property Chamber (First-tier Tribunal for Scotland), to enable homeowners to report their factors.

3.188 It is an offence to operate as a property factor without joining the register of property factors (the Register). There is a legal requirement in Scotland for all registered property factors to comply with the Code of Conduct.[90] The Code of Conduct sets out the minimum standards that must be met, including details that must be included in the written statement of services. The written statement must be simple and transparent, and include information about the services they

[90] Property Factors (Scotland) Act 2011: Code of Conduct for Property Factors - gov.scot (www.gov.scot)

provide, services costs, the complaints procedure and also how to change or end the arrangement with the property factor.

3.189 Homeowners who find that their property factor has breached the Code of Conduct or is not carrying out their duties as expected, can either apply to the First-tier Tribunal for Scotland (Housing and Property Chamber), or follow the process as set out in title deeds. The First-tier Tribunal can make a 'property factor enforcement order' (PFEO) if it finds that the property factor has not met the requirements of the Code. A PFEO may require a property factor to take certain actions, such as making a payment or providing information to the homeowner. Failure to comply with a PFEO may result in the removal of the property factor from the Register.

Ombudsman schemes and codes of practice

3.190 All 15 estate management companies that we sent information requests to indicated that they have a complaints handling process. Some estate management companies are members of redress schemes,[91] such as the Property Ombudsman Scheme (TPO), which is approved by government to provide independent redress in relation to disputes between consumers and property agents.[92] The majority of estate management companies who responded to our information request indicated that consumers have access to an ombudsman as part of the process for escalating a complaint about them if the consumer's complaint is not resolved through the company's complaints process. It is not a requirement for an estate management company to be a member of an approved scheme. However, *if* they employ a managing agent *and* that agent also does property management[93] then that agent must be a member of a redress scheme. The position regarding managing agents in Wales is different, but estate management companies are not required to belong to a redress scheme either.

3.191 Some estate management companies are also members of the Association of Residential Managing Agents (Arma), which is primarily focussed on residential leasehold management.[94]

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[91] See: response to the statement of scope from an estate management company, which contrasts the position of estate managers with managers of blocks of flats noting that there is no ombudsman or other statutory complaints body applying to [estate management companies] and calling for all estate management companies to join an approved independent ombudsman scheme to 'help stamp out bad practice in the sector by increasing accountability.' See also a further response to the statement of scope: Greenbelt_Group.pdf (publishing.service.gov.uk) which notes that consumers can refer to an independent ombudsman scheme run through the RICS Dispute Resolution Service.
[92] The Property Ombudsman scheme: free, fair & impartial redress (tpos.co.uk); TPO also operates in Scotland: TPO Scotland. TPO is approved by the Chartered Trading Standards Institute under the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015.
[93] As defined by Section 84 of the Enterprise and Regulatory Reform Act 2013.
[94] About ARMA - ARMA.

Emerging conclusions on redress

3.192 Freeholders in England and Wales do not benefit from the same protections as leaseholders in England and Wales, nor the protections afforded to homeowners in Scotland under the factors system.

3.193 In order to bring a challenge against an estate management company freeholders are therefore reliant on that company being a member of an ombudsman scheme with the routes for redress that brings, or follow the provisions set out in the transfer deeds, if this allows for challenge. Where there is no formal mechanism for challenging the service charge included in the transfer deeds, the only recourse the homeowner will have is to challenge the reasonableness of the sum charged in court. This will be a time-consuming, expensive and complicated legal process which many homeowners will not be prepared to engage in given the sums involved.

3.194 In addition to the challenges that individuals have raised with us in settling a dispute, one respondent to our update report indicated that taking their management company to the small claims court would be futile, as the management company is not prevented from adding its costs incurred/awarded against it, and any fine imposed, to the resident's bill for the following year.

Emerging conclusions on the balance of interests between consumers and estate management companies

3.195 Our assessment of the evidence to date indicates that there is a lack of balance – significant in some cases – between the position of the consumer and the estate management company in several regards, and this appears to be particularly the case with embedded MCs, ie where a management company is made party to the transfer deeds and thus contractually imposed on the household.

3.196 More widely, households cannot easily challenge charges imposed on them by their estate management company or poor service, and some of them may be subject to, or threatened with, disproportionate sanctions if they fail to pay. While the application of such sanctions (or the threat thereof) may not be widespread, the fact that it is happening at all is a significant concern.

3.197 We consider in the next section possible measures for addressing the issues that we have identified.

4. Possible measures to address our emerging concerns

4.1 As set out in Section 3, we have found a number of emerging concerns regarding the private management of public amenities on housing estates, which relate to the transparency, charges, and quality of services; the impact on the resale of homes; sanctions for non-payment of fees; barriers to switching and redress available to consumers.

4.2 Our emerging view is that the actual and potential consumer harm arising from these issues has arisen as a result of declining adoption by local authorities of public amenities in part driven by financial pressures on local authorities. This, in turn, has led to the establishment of the private management model across thousands of new housing estates where there is currently no adequate legislative or regulatory framework to protect the interests of households.

4.3 In this section, we set out:

(a) the overarching principles we think are necessary to support the effective management of public amenities on housing estates; and

(b) possible measures for addressing our emerging concerns.

4.4 As explained in our update report and Section 1 of this working paper, we have identified some concerns that may justify a market investigation reference. We indicated in our update report that we would reach a final view on whether or not to make a reference to address features of the private management of public amenities on housing estates by the end of the market study, and that is still our intention.

4.5 At this stage, based on the evidence we have seen so far, our provisional view is that a market investigation may not be the most effective way to address our emerging concerns about estate management arrangements and charges and improve competition, and thus outcomes, for consumers.

4.6 Market investigations are detailed examinations into whether there is an adverse effect on competition in the market referred, and if so, what remedial action may be appropriate. They must be completed within 18 months of the date of the reference (extendable by 6 months in certain circumstances). The CMA has certain powers that would be available to it at the end of a market investigation to remedy issues it has identified. These include the ability to introduce behavioural remedies, which are ongoing measures that can be imposed by the CMA through making an Order and are designed to regulate or constrain the behaviour of suppliers in a market. Following a market investigation, the CMA could, for example, require estate management companies to take actions that would provide greater protection to households living under private management

arrangements. The CMA could not, on the other hand, require other public bodies to take particular actions, for example by requiring local authorities to take action that would reduce the prevalence of estate management arrangements or directing local authorities to monitor and enforce additional protections for householders.

4.7 However, based on the evidence we have seen so far, our provisional view is that government action may be a more appropriate and comprehensive response to the detriment we have identified. This is for the following reasons:

(a) Firstly, the use of private management of public amenities on housing estates is considerably influenced by the interaction between housebuilders, local authorities, estate management companies, households and the legislative framework underpinning adoption and property law. In this context, only government action would enable additional consumer protection measures to be introduced as part of an overall coordinated action plan. One example is that amending Section 121 of the Law of Property Act 1925 (see paragraph 4.23) to prevent disproportionate sanctions of home repossession being applied or threatened in the event of non-payment of estate management charges, would only be possible through government legislative action.

(b) Secondly, the CMA itself may not be best placed to enforce and monitor a discrete solution as the additional measures we have outlined would be most effective if underpinned by a broader regulatory framework, including appropriate tools for other bodies to monitor and enforce against breaches of those measures. Such a framework could be included within the legislation required to establish the additional measures to protect households living under private management arrangements, whereas the CMA would not have the ability to alter the powers or duties of other government bodies. While the CMA could, in principle, take on monitoring and enforcement responsibilities for any measures we were introduce, it is not clear at this stage that this would be the best solution, given the other roles already played by local authorities and others in housing markets. Moreover, a legislative route would enable policy makers to give careful consideration to which body or bodies (at national and/or local level) should act as the enforcement body, and what specific powers and duties they should have.

(c) Thirdly, action may be needed to reduce the prevalence of private estate management arrangements, which could only be implemented through action by government, rather than by the CMA. While we might be able to mitigate some of the current harm by applying our powers, we could not use these powers to address the root cause of the problems we have identified, ie the falling levels of adoption of amenities by local authorities, because the CMA cannot require local authorities to take action that would reduce the prevalence of estate management arrangements or direct local authorities to

monitor and enforce additional protections for householders. It may not be proportionate to initiate a market investigation, potentially leading to the application of our order-making powers for the adoption of certain measures to better protect the customers of estate management companies when government action may be needed to address the increasing prevalence of private management, and underlying market power of estate management companies, in any case. The costs to parties of a market investigation – particularly in terms of management time, and the public expenditure costs of an investigation by the CMA – could be disproportionate if the CMA considers that recommendations to government are likely to be the most appropriate outcome at the end of such a process, based on the evidence it has seen.

(d) Fourthly, it is not clear that the advantages of government action would be counteracted by any timing benefits from using the CMA's powers instead. A market investigation would take 18 months from the date of reference, after which any orders we make would need to be implemented, which could take up to a further 6 months. It is not clear that this would take a significantly different amount of time to be implemented than government legislation and other action to improve consumer protection for affected households.

4.8 For these reasons, and consistent with the view set out in in the update report, based on the evidence we have seen so far, our provisional view is that government action may be a more appropriate and comprehensive response to the detriment we have identified, rather than initiating a market investigation with the prospect of using the CMA's own powers at its conclusion.

Overarching principles and possible high-level measures

4.9 As set out in Section 3, the current estate management system:

(a) Causes an imbalance of power and misalignment of incentives between private companies managing amenities which are open for wider public use and those households who are required to pay for those amenities on an ongoing basis; and

(b) Means households are unable to effectively oversee estate management companies and, if necessary, remove/switch estate management companies, or readily challenge poor service or unreasonable charges.

4.10 We consider that these emerging concerns could potentially be addressed by one or both of:

(a) **providing greater protection to households living under current private management arrangements**; and

(b) **reducing the prevalence of such arrangements**.

4.11 We consider that the detriment experienced by households living under the current arrangements (4.10(a)) could be mitigated by a series of additional protections that could be achieved in the short to medium term (ie within the next 2 to 3 years) and that an appropriate solution in this regard would align with the following principles:

(a) **Transparency**: All arrangements and charges imposed on consumers should be transparent;

(b) **Cost-reflective**: Households must only be charged for estate management services as and when they receive estate management services, and charges should reflect the costs incurred by the estate management company in managing the public amenities;

(c) **Accountability**: Services provided by the estate management company should meet an agreed service level;

(d) **Proportionality**: Sanctions imposed on households by the estate management company for non-payment of charges should be reasonable and proportionate to the infraction;

(e) **Switching**: Households must be able to switch providers if they are dissatisfied with the level of service provided or the charges imposed by the estate management company;

(f) **Redress**: Households must have the right to readily challenge charges or sanctions, and not face significant barriers in doing so, and the right to redress where necessary;

(g) **Liability**: The system must not place disproportionate legal obligations or liabilities on households; and

(h) **Onward sale**: The system must not cause households undue problems with the onwards sale of the property.

4.12 We consider that reducing the prevalence of private management arrangements (4.10(b)) would require more fundamental legislative and policy changes that may take longer to achieve, and would result in a wider set of consequential changes (eg for local authorities). Although we consider that reducing the prevalence of private management arrangements would address the root cause of our emerging concerns, we note that it would have number of practical implications for local authorities and others.

4.13 We consider that greater protection for households can be achieved by adding to measures currently in place, and building on proposed government reforms, to

safeguard the interests of households living under current private management arrangements.

4.14 We consider that reducing the prevalence of such arrangements would require a combination of:

(a) Common adoptable standards for the public amenities; and

(b) Mandatory adoption of those amenities.

4.15 We discuss these measures in detail below.

Question 5

a) What measure, or combination of measures would provide the best solution to our emerging concerns? Please give reasons for your views.

b) Does the best approach to tackling our emerging concerns differ according to the amenity (eg roads versus public spaces) or by nation?

c) Are there any options that may be more effective in addressing our emerging concerns than those that we have proposed?

Additional protection for households living under current private management arrangements

Description of measure

4.16 We consider that there are number of ways that households subject to estate management charges could be afforded additional protection.

4.17 We note that the UK Government has committed to:[95]

(a) introduce legislation to ensure that freehold homeowners who pay estate rentcharges have the right to challenge their reasonableness and to bring a case to the First-tier Tribunal (Property Chamber) asking it to appoint a new management company if necessary; and

(b) consider introducing a Right to Manage for residential freeholders after considering the Law Commission's recommendations on changes to the Right to Manage for leaseholders.

4.18 We consider that these measures would provide some additional protection to consumers. However, our proposals below – based on a series of core principles –

[95] As described in: Freeholders' estate and service charges (parliament.uk).

would provide broader and more comprehensive protection to households subject to estate management charges.

Transparency

4.19 All housebuilders could be required to provide information in relation to the management of the new housing estate to customers prior to the purchase of a new home, including:

(a) a full description of the estate management arrangements in place, including the nature of any contract the homeowner will enter into with the relevant party and details of any covenants relating to estate management charges that the homeowner will be required to enter;

(b) the charges payable in the first year of ownership and a statement that charges can increase annually and may not be subject to any cap;

(c) how the estate management process operates in practice (ie who owns the public amenities and who maintains them);

(d) whether, and if so, how the estate management company can be changed; and

(e) households' rights to redress.

4.20 Increased transparency should help to raise potential homebuyers' awareness of the existence of potential future liabilities.

4.21 Following the purchase of a new home, households could also be entitled to receive clear and transparent invoicing, including a full breakdown of costs on an annual basis.

Cost-reflective and accountability

4.22 To address our concerns around non-cost reflective annual increases, it could be required that any increase in the level of the charge beyond the first year must be reasonable with reference to the invoiced costs of providing the service, communicated openly, and be easily challengeable by households. In order to achieve this, the implementation of these principles would need to set out a clear framework to guide management companies in how they should tender for work, monitor the quality of that work and set the level of management charge they are allowed to include.

Proportionality

4.23 Remedies available under Section 121 of the Law of Property Act 1925 could be abolished through legislation where these relate to the non-payment of estate management charges.

Switching

4.24 Households could be empowered to review and change estate management companies, for example, through a routine process of annual renewal or tender.

Redress and Liability

4.25 Households could be entitled to contest charges and to obtain redress and this could be supported by access to an appropriate ombudsman with the necessary powers of investigation. The ombudsman's remit could include checking that providers do not place disproportionate legal obligations or liabilities on households.

Onward sale

4.26 Estate management companies could be required to provide, without charge, any information about the arrangement that a household reasonably requires to progress the sale of their home. Further, if the circumstances warrant it, households could be provided with the right to progress sales without the approval of the management company.

How this measure would address our emerging concerns

4.27 Our emerging view is that households living under private estate management arrangements are facing poor outcomes, and in some cases potentially serious detriment, and are in many cases powerless to address this. We consider that measures aligned with the principles above could improve outcomes in the following ways:

(a) **Transparency:** enhanced transparency measures would enable home buyers to (i) understand the nature of estate management arrangements and charges and thus make more informed decisions at the outset of the house purchasing process and (ii) raise their awareness of the existence of potential future liabilities.

(b) **Cost-reflective:** a requirement to only impose charges that are cost-reflective would help ensure that households are paying reasonable charges for the services that they receive not just in the first year, but in future years.

(c) **Accountability**: greater clarity about expectations would mean that households should be more confident that the services they are paying for will be delivered, and will be delivered to an agreed service level.

(d) **Proportionality**: households should not be subject to potentially significant emotional and financial detriment through the threat of, or imposition of, disproportionate sanctions for non-payment of charges.

(e) **Switching**: if they face unreasonable charges or levels of service, households should be more readily able to switch their estate management company, securing higher standards, and driving competition.

(f) **Redress:** households should not be deterred from seeking redress, and should be readily able to pursue this, which in turn could temper the behaviour of companies.

(g) **Liability:** households should not face unreasonable liabilities eg by virtue of covenants they enter into with companies.

(h) **Onwards sale:** households should not face undue problems in selling their home, as a result of estate management arrangements.

4.28 We consider that a package of measures protecting households living under private estate management arrangements could be implemented which would make a material contribution towards addressing the emerging detriment in alignment with the principles set out above.

Areas for further consideration

4.29 As noted in paragraph 4.6 and 4.7 above, the additional measures to protect households living under private management arrangements that we have set out in this section could in principle be implemented using the powers available to the CMA at the end of a market investigation, or by the UK, Scottish and Welsh governments, as appropriate, introducing the necessary legislation.

4.30 However, as set out in paragraph 4.7, our provisional view based on the evidence we have seen is that legislation may be a better approach to achieving the specific consumer protection aims of this option.

4.31 We are seeking views on whether these measures would partially or fully address the detriment we have observed and on whether further steps may also be required to reduce the overall prevalence of private management arrangements, as discussed in the next section.

Question 6

a) Would enhanced consumer protection measures by themselves provide sufficient protection for households, or would mandatory adoption also be necessary to achieve a comprehensive solution to the detriment experienced by households living under private estate management arrangements?

b) Are there any other measures that are required to provide adequate protection to households living under private estate management arrangements?

c) Do the protections afforded to households in Scotland by virtue of the Property Factors (Scotland) Act 2011 provide adequate protection, in accordance with the principles outlined above.

d) Should such measures be implemented by the UK, Scottish and Welsh governments, as appropriate, or by the CMA following the conclusion of a market investigation? Please explain why, and whether this differs by nation.

Reducing the prevalence of private estate management arrangements

4.32 While the additional protections set out above would mitigate the harm currently experienced by existing households, reducing the prevalence of private estate management models could address the root cause of our emerging concerns in respect of future housing estates by ensuring that local authorities become responsible for funding the ongoing maintenance of public amenities. We note that any system of protection for households living under private estate management arrangements on its own is unlikely to completely remove the *potential for* detriment, since the imbalance of power and misaligned incentives discussed at paragraphs 4.9 would remain, and while it may act as a deterrent, enforcement itself may be insufficiently comprehensive to overturn private estate management companies' incentives to take advantage of this power imbalance.

4.33 We consider that reducing the prevalence of private estate management arrangements would require a combination of:

(a) the development of common standards for housebuilders to adhere to; and

(b) mandatory adoption by local authorities of amenities built to those standards.

4.34 Although we consider that reducing the prevalence of private management arrangements will address the root cause of our emerging concerns, we note that the private management model has become established over recent years in the

light of various practical and financial challenges facing local authorities (see Section 3). Halting the recent trend towards the private management model, while addressing sources of potential detriment, could also have a significant impact on local authority finances and resources at a time when local authority funding is already stretched. We consider funding options relating to mandatory adoption at paragraph 4.51 to 4.54.

Determination of common adoptable standards

Description of measure

4.35 Where they are not already in place, we consider that common adoptable standards could be agreed at a national level by each government in the UK, Scotland and Wales, and housebuilders should be required to build public amenities on housing estates to those standards.

4.36 We note that this option may only apply to future housing estates, given the potentially significant additional challenges and costs associated with bringing existing infrastructure up to an agreed common adoptable standard.

Question 7

a) Would the determination of common, adoptable standards support an increase in the adoption of amenities by local authorities?

b) Are there existing standards that could be used to support the determination of common adoptable standards?

c) Who should be responsible for determining and enforcing common adoptable standards?

d) Should this option only apply to future housing estates or include existing housing estates? If the latter, how and over what timescale could existing infrastructure be brought up to the agreed common standard?

How the measure could address our emerging concerns

4.37 As noted in paragraph 3.60 above, one of the barriers to the adoption of public amenities by local authorities is inconsistency in the approaches taken by local authorities and a lack of mandatory national guidance on this matter. We therefore consider that determining and enforcing common adoptable standards for the construction of public amenities could:

(a) enable housebuilders to build public amenities to an agreed adoptable standard, which, in turn, may encourage local authorities to adopt those amenities; and

(b) if adoption is not mandated, create more clarity for housebuilders in terms of the quality of amenities they are expected to build. This could reduce delays and reduce future maintenance costs, which might in turn reduce the fees that households must pay in respect of the management of public amenities, particularly if the fees were required to be cost-reflective (see paragraph 4.22).

4.38 We note that an increase in the quality of amenities and the payment of commuted sums would increase costs for housebuilders and that these costs may be passed onto the purchasers of new homes through an increase in the sale price. It is our current view that any such pass-through would be limited due to the constraint imposed on new housing prices by the prices of existing housing stock, and may instead be passed back to landowners through lower land prices (particularly if the likely costs are well-understood as a result of greater clarity over the adoptable standard which must be met). Further, we consider that it would be more transparent if the costs of adoption, to the extent those costs are passed through to consumers, were reflected in the purchase price rather than through estate management charges, as the costs incurred by housebuilders in building amenities to a common, adoptable standard and paying commuted sums for their ongoing maintenance would be based on agreed requirements, whereas, under the current system, they are implicit, perpetual and uncapped.

Areas for further consideration

4.39 Where public amenities on new housing estates are not built to the determined adoptable standard, they will need to be brought up to that standard. We consider that this could be done in two ways:

(a) The housebuilder would be responsible for completing the work necessary to meet the determined adoptable standard and would bear the cost of this remedial work, although there would also be cost and resource implications for local authorities who would need to monitor and enforce against the adoptable standards. This is consistent with the requirement for housebuilders to remediate fire safety works through the Responsible Actors Scheme;[96]or

(b) The public authority would be responsible for completing the work necessary to meet the determined adoptable standard. To fund the cost of this remedial work, public authorities could draw upon bonds put up by the housebuilder

[96] As introduced through the Building Safety Act (2022).

for the eventuality that they do not complete their work (see paragraph 3.28 above). This system would necessitate the mandatory use of bonds by housebuilders. This would be consistent with the requirements of the Roads (Scotland) Act 1984 and the Security for Private Road Works (Scotland) Regulations 1985, SI 1985/2080 (as amended).[97]

4.40 It may also be desirable to provide public authorities with a range of sanctions that they can employ in the event that a housebuilder fails to build a public amenity to the required adoptable standard and subsequently fails to carry out the remedial work required to bring the public amenity up to the adoptable standard.

Question 8

a) How should local authorities fund the cost of remedial work required to bring a public amenity up to adoptable standard?

b) Which sanctions, if any, should be available to public authorities in case a housebuilder fails to build a public amenity to the adoptable standard?

c) Are there particular examples of standard setting arrangements in Britain that should inform our approach? For example, are there lessons from the requirements of the Roads (Scotland) Act 1984 and the Security for Private Road Works (Scotland) Regulations 1985, SI 1985/2080 (as amended) that should be considered across England and Wales?

Mandatory adoption

Description of measure

4.41 Both the determination of common adoptable standards for the construction of public amenities and enhanced protection for households subject to estate management charges seek to improve the existing system. However, neither measure by itself addresses the underlying cause of the growing problems we see which is driven by the falling levels of adoption of public amenities on housing estates by local authorities. Mandatory adoption of these amenities, unless there were good reason for a local authority not to adopt, would halt the trend of falling adoption levels and prevent households from paying privately for public amenities. We therefore consider currently that mandatory adoption may also be necessary

[97] The arrangements in Scotland require that each public road is built to adoptable standard and adopted. Each housebuilder must put up a bond for each development of sufficient value to cover the expense of completing the roads to adoption standards, and the adopting local authority draws down on this bond to complete the roads to standard if the housebuilder fails to do so.

to achieve a comprehensive solution to our emerging concerns (as considered in Section 3).

4.42 We note that the mandatory adoption of public amenities on housing estates by local authorities would require legislative and policy change by the respective governments in the UK, Scotland and Wales.

4.43 We note that mandatory adoption would only apply to future housing estates, given the likely significant additional challenges and costs associated with implementing the retrospective adoption of public amenities on existing housing estates. It could therefore be complementary to enhanced consumer protection measures for households subject to estate management charges on existing housing estates.

Question 9

a) Is mandatory adoption likely to be an effective and feasible option to address our emerging concerns in relation to new housing estates? Please state whether this applies in general terms, or to specific amenities, and/or in specific nations.

b) Do you agree with our preliminary view that mandatory adoption is likely only to be practicable for new housing estates, given the significant additional challenges and costs of retrospective adoption? Please explain your views.

c) Do you consider there to be any unintended consequences from mandatory adoption? If so, please describe the consequences and state whether this applies in general terms, or to specific amenities, and/or in specific nations.

d) Are there circumstances where it may not be appropriate for a local authority to adopt a public amenity? Please provide an explanation.

4.44 To enable this solution to be effectively implemented, we currently consider that:

(a) housebuilders would need to build all public amenities to an adoptable standard (see our consideration of common adoptable standards in paragraphs 4.35 to 4.40);

(b) housebuilders would be required to offer all public amenities for adoption by the local authority;

(c) local authorities would be required to adopt all public amenities that are built to an adoptable standard;

(d) adoption by the local authority would have to take place upon completion of construction of the public amenity; and

(e) there would need to be a clear route for householders to enforce the above duties, in addition to a power for an inspector to enforce those duties.

How this measure would address our emerging concerns

4.45 Our emerging concerns have arisen in the context of declining local authority adoption of amenities on housing estates leading to increasing private estate management. Even with suitable protections in place for households, we consider currently that there may still be a significant imbalance of power and misalignment of incentives between the companies managing those amenities available for wider public use, and the sub-set of households that are required to fund their maintenance. If this trend continues, and we have not seen evidence to suggest that it will not, the detriment caused by the emergence of the private estate management will continue to grow. Mandatory adoption would reverse this trend and thereby address our emerging concerns in relation to new housing estates at the source.

Areas for further consideration

4.46 We set out below the areas that would require further consideration by government in order for the mandatory adoption of public amenities on new housing estates to be implemented effectively:

(a) Specification of the public amenities to be adopted by the local authority;

(b) Funding of the maintenance of adopted public amenities;

(c) Inspection; and

(d) The steps that will need to be taken during the interim period from when mandatory adoption is accepted by UK, Scottish and Welsh governments as a viable solution to when it is brought into effect.

Specification of public amenities that must be adopted

4.47 We consider that the following amenities could be required to be adopted by the relevant public authority:

(a) Roads that meet the eligibility criteria for public roads;

(b) The connection to the sewer and drain network for homes that are built in appropriate proximity to those networks. There are some existing homes in Britain that are not connected to the sewer and drain network due to their

distance from the network. Only those homes that are built in appropriate proximity to the network would have to be connected to it; and

(c) Public open spaces on housing estates that are accessible to the general public.

4.48 We consider that the following amenities might not be required to be adopted by the relevant public authority:

(a) Roads that do not meet the eligibility criteria for public roads;

(b) Homes that are built too distant from the sewer and drain network to be connected; and

(c) Open spaces that are not accessible to the general public.

4.49 Recognising that there are circumstances where adoption of a road may not be appropriate (eg private roads, roads serving a very small number of dwellings), we consider that the UK, Scottish and Welsh governments would need to set out clear criteria to enable local authorities to identify the circumstances under which they would not be required to adopt a road. Under these circumstances, our proposed additional measures to protect households living under private management arrangements (see paragraphs 4.16 to 4.26) would apply.

4.50 As noted in Section 3, the existing legal framework for the adoption of public open spaces appears to allow local authorities greater discretion than is the case for roads and drainage. It may therefore be appropriate for governments to adopt a phased approach to mandatory adoption, beginning with roads and drainage before considering public open spaces.

Question 10

a) Are our proposed criteria for determining which public amenities should be adopted the right ones? Are there amenities that we have not mentioned but should be included?

Funding of maintenance of adopted public amenities

4.51 We have acknowledged throughout this working paper that mandatory adoption will have financial and resourcing implications for local authorities. It follows that further consideration needs to be given to the funding of the long-term maintenance of public amenities.

4.52 A number of options are available to mitigate the taxpayer impact of this option. For example, local authorities could fund the ongoing maintenance of adopted

public amenities by requiring the payment of commuted sums by housebuilders that cover the expense of maintenance for an initial period. We have explained in paragraph 4.38 above why we do not consider that these additional costs for housebuilders would necessarily be passed through in full to consumers.

4.53 We acknowledge that the payment of commuted sums only covers an initial period of maintenance, after which the expense must come from the local authority's overall budget. Although this allows local authorities to plan for the expense in advance of funding it themselves, they would nevertheless reach a stage where the commuted sums are spent and must be replaced with general budget expenditure. To mitigate the financial impact and secure sufficient funding for an initial period of maintenance, such commuted sums could be:

(a) hypothecated for maintenance expenditure and reflective of the typical cost of the ongoing maintenance of adopted public amenities. To ensure consistency in the calculation of commuted sums, local authorities could be provided with guidance on how to calculate the sums;

(b) set by the local authority and agreed with the housebuilder as part of the planning process; and

(c) published alongside each local plan so that all key stakeholders are aware of the methodology and housebuilders are able to take this into account for further developments.

4.54 Water and wastewater network providers have their prices regulated (by Ofwat in England and Wales and by WICS in Scotland) taking into account required investment and expected revenues. This includes allowances for investment to support network growth and expected revenue from new network connections. Therefore, we consider that in England and Wales, mandatory connection should not, therefore, fall outside of normal business and should not require funding through inclusion in commuted sums. We note that unlike in England where there is a concept of adoption of sewers by a water or sewerage company, under Section 16 of the Sewerage (Scotland) Act 1968, sewers constructed by Scottish Water (or its predecessors or which are lawfully connected to these systems) automatically vest in Scottish Water unless agreed otherwise.

Question 11

a) How should local authorities fund the long-term ongoing maintenance of adopted public amenities? Please provide examples of existing or considered funding mechanisms where relevant (for example we noted in paragraph 3.58 the national commuted sums approach considered in the review in Wales of the implementation of Schedule 3 of the Flood and Water Management Act 2010).

Inspection

4.55 We consider that an inspection regime would be necessary to ensure that public amenities are built to the required adoptable standard and adopted by the local authority in a timely manner (note we consider inspection fees in paragraph 3.25 above). Our current thinking is that such inspections should be carried out by the relevant public authority (eg, the local authority for public open spaces and roads, and the sewer and drain network provider for sewers and drains).

Interim preparation

4.56 We anticipate that it would take a number of years to implement the policy, legislative and practical changes required to effect mandatory adoption including embedding the new arrangements in each local authority's standard practice. We consider that the following preparatory measures could be taken during this interim period:

(a) The existing codes of conduct for housebuilders (the Consumer Code for Home Builders and the New Homes Quality Code) could be updated to include requirements regarding the construction and handover of public amenities for adoption by local authorities. This could set out the common, adoptable standards and the process for adoption.

(b) Guidance could be provided to local authorities to help them understand their responsibilities in respect of the adoption of public amenities and thereby support effective implementation.

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5. Consultation questions and next steps

5.1 The CMA welcomes comments on this working paper, and in particular on the questions below.

5.2 We will carefully consider any feedback received in response to this working paper and take it into account as we develop our final report, which we are required to publish by 27 February 2024.

Roads adoption (Section 3)

Question 1

a) How effective is the process for the adoption of roads on new housing estates in England?
b) What are the barriers to the adoption of roads on new housing estates in England?

Question 2

a) How effective is the process for the adoption of roads on new housing estates in Wales?
b) What are the key barriers to adoption of roads on new housing estates in Wales?
c) What impact has the Good Practice Guide and Common Standards on highway design had on roads adoption on housing estates in Wales?
d) In particular, have they reduced any barriers to adoption and achieved greater consistency in approach across local authorities?

Question 3

a) How effective is the process for the adoption of roads on new housing estates in in Scotland?
b) What are the key barriers to adoption of roads on new housing estates in Scotland?
c) How does the process for adoption of roads in Scotland compare to the process for adoption in England and/or Wales?

Sewers, drainage and SuDS adoption (Section 3)

Question 4

a) Please provide views on how effective the adoption process works in practice for (i) sewers and drains and (ii) SuDS. In responding, please state whether your response relates to England, Scotland or Wales, or a combination of nations.

b) Will forthcoming changes in England remove any barriers to adoption?

c) In relation to Wales, if implemented, would the recommendations from the review of the implementation of Schedule 3 of the Flood and Water Management Act 2010 remove any barriers to adoption?

Possible measures to address our emerging concerns (Section 4)

Question 5

a) What measure, or combination of measures would provide the best solution to our emerging concerns? Please give reasons for your views.

b) Does the best approach to tackling our emerging concerns differ according to the amenity (eg roads versus public spaces) or by nation?

c) Are there any options that may be more effective in addressing our emerging concerns than those that we have proposed?

Question 6

a) Would enhanced consumer protection measures by themselves provide sufficient protection for households, or would mandatory adoption also be necessary to achieve a comprehensive solution to the detriment experienced by households living under private estate management arrangements?

b) Are there any other measures that are required to provide adequate protection to households living under private estate management arrangements?

c) Do the protections afforded to households in Scotland by virtue of the Property Factors (Scotland) Act 2011 provide adequate protection, in accordance with the principles outlined above.

d) Should such measures be implemented by the UK, Scottish and Welsh governments, as appropriate, or by the CMA following the conclusion of a market investigation? Please explain why, and whether this differs by nation.

Question 7

a) Would the determination of common, adoptable standards support an increase in the adoption of amenities by local authorities?

b) Are there existing standards that could be used to support the determination of common adoptable standards?

c) Who should be responsible for determining and enforcing common adoptable standards?

d) Should this option only apply to future housing estates or include existing housing estates? If the latter, how and over what timescale could existing infrastructure be brought up to the agreed common standard?

Question 8

a) How should local authorities fund the cost of remedial work required to bring a public amenity up to adoptable standard?

b) Which sanctions, if any, should be available to public authorities in case a housebuilder fails to build a public amenity to the adoptable standard?

c) Are there particular examples of standard setting arrangements in Britain that should inform our approach? For example, are there lessons from the requirements of the Roads (Scotland) Act 1984 and the Security for Private Road Works (Scotland) Regulations 1985, SI 1985/2080 (as amended) that should be considered across England and Wales?

Question 9

a) Is mandatory adoption likely to be an effective and feasible option to address our emerging concerns in relation to new housing estates? Please state whether this applies in general terms, or to specific amenities, and/or in specific nations.

b) Do you agree with our preliminary view that mandatory adoption is likely only to be practicable for new housing estates, given the significant additional challenges and costs of retrospective adoption? Please explain your views.

c) Do you consider there to be any unintended consequences from mandatory adoption? If so, please describe the consequences and state whether this applies in general terms, or to specific amenities, and/or in specific nations.

d) Are there circumstances where it may not be appropriate for a local authority to adopt a public amenity? Please provide an explanation.

Question 10

a) Are our proposed criteria for determining which public amenities should be adopted the right ones? Are there amenities that we have not mentioned but should be included?

Question 11

a) How should local authorities fund the long-term ongoing maintenance of adopted public amenities? Please provide examples of existing or considered funding mechanisms where relevant (for example we noted in paragraph 3.58 the national commuted sums approach considered in the review in Wales of the implementation of Schedule 3 of the Flood and Water Management Act 2010).

5.3 Responses should be provided no later than 5pm on **24 November 2023** to:

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

5.4 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.[98]

5.5 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.

5.6 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.

5.7 An explanation of how the CMA will use information provided to us can be found in Appendix A, which is published alongside this working paper. This Appendix sets out how the CMA may use information provided to it during the course of this

[98] 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'.

market study, including where it may need to refer to information in order to pursue enforcement action against a business in this sector.