



Ministry of Housing,
Communities &
Local Government

Transparency and Competition

Pro forma



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Contents

Responding to this Call for Evidence	1
Questions	2

Responding to this Call for Evidence

1. This call for evidence sets out proposals to increase transparency of contractual arrangements used to exercise control over the buying or selling of land. This will improve the ability of local communities to play an informed role in the development of their neighbourhoods and support the Government's efforts to encourage more companies to enter the house building market.
2. The Government seeks a better understanding of the sort of arrangements that exist, asks for views on how best to improve transparency around them, and what additional data should be made public. Further detail can be found in the *Transparency and Competition* document available at www.gov.uk/government/consultations/transparency-and-competition-a-call-for-evidence-on-data-on-land-control.

Questions

MHCLG call for evidence on data on Land Control

(Transparency and Competition – the “Paper”)

Response of the Land Law Committee of the City of London Law Society (the “Committee”)

Summary of the Committee’s views

The City of London Law Society represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The City of London Law Society responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response to the Consultation has been prepared by the Land Law Committee. The current members of the committee are herewith:-

<https://www.citysolicitors.org.uk/clls/committees/land-law/land-law-committee-members/>

The Committee considers that the proposals extend too widely, impacting on transactions that have nothing to do with the mischief that the Government seeks to address; land banking. For example, it is inappropriate for it to apply to pre-emptions in a shopping centre, which have their own commercial justification that has nothing to do with stymying development opportunities. Equally, it should not apply to rights where the beneficiary of the right will occupy.

Instead, consideration should be given to the proposals applying only to organisations that have rights of the relevant type affecting land in aggregate above a particular threshold. While the call for evidence proposes to collect the data via the transactional/Land Registry process, an alternative could be to place a duty on organisations to report (as a corporate responsibility) where the threshold of affected land was exceeded.

The Committee considers that the proposal, as it stands, will lead to too much information being produced, that is unconnected with the issue of land banking. This, therefore, runs the risk of obscuring the information that is relevant to the issue of land banking and so potentially undermines the policy objective. In other words, it would be preferable to have more specific requirements that are targeted towards the policy objective and, if they were considered insufficient after a period of operation, then they could always be extended later after appropriate consultation.

Question 1: The Public Interest

Do you think there is a public interest in collating and publishing additional data on contractual controls over land?

Please give reasons.

Response

While the Committee notes the Paper’s argument that data collection and improved transparency over contractual control interests in land would be in the public interest as being helpful to the community and local authorities, the Committee considers that the information requested and the situations potentially caught are too widely-framed.

The Committee notes that information held by HM Land Registry is generally available to the public (including the price paid), but the Committee is concerned that the information proposed to be made publicly available will be regarded by property owners and developers as intruding excessively on commercial sensitivities. By the information being available to the community, it could be utilised by third parties for competitive advantage. There is also a concern about the increased administration and consequential extra time and cost that are likely to be caused by the proposed new processes, for example with HM Land Registry, to implement the Government’s policy goals.

The proposals catch situations that are far wider than the Government's primary area of concern of land that could be used for development. This will mean that there will be an obligation to provide information that may have commercial sensitivities, but that the Government does not need to address its stated policy objectives.

The Committee considers that the exemption from disclosure could be widened to include situations where the contractual control relates to land that has no reasonably foreseeable likelihood of development.

Question 2: Rights of pre-emption and options

- (a) Do you think that the definition of rights of pre-emption and land options in the Finance Act 2003, s. 46 is a suitable basis for defining rights of pre-emption and options that will be subject to additional data requirements?

Please give reasons.

Response

Section 46 is a useful basis, on which to build additional data requirements for disclosure of contractual controls over land. However, the drafting of the definition of those rights, which are intended to be within the scope of the disclosure regime, would need to be much more specific and most likely supplemented by a list of exemptions to the regime. This would ensure that only those contractual arrangements, which directly create the "dis-benefits" that the government has identified, are subject to the disclosure requirements.

- (b) Is the exemption for options and rights of pre-emption for the purchase or lease of residential property for use as a domestic residence sufficient to cover:
- options relating to the provision of occupational housing and
 - shared ownership schemes?

Please give reasons.

Response

The Committee considers so.

- (c) Are there any types of rights of pre-emption or options that do not fall under the scope of the definition in the Finance Act 2003, s. 46?

Please give reasons.

Response

The definition in section 46 is comprehensive in scope, perhaps overly so. While the inclusion of pre-emption rights is understandable as it involves a potential control of land, the usefulness of such rights to the rights holder is limited. Their right to exercise the pre-emption depends on the landowner making a prescribed disposal and the landowner usually has the exclusive right to decide whether to make the disposal.

Also pre-emption arrangements are often used in a situation unconnected with the development of land. For example, in a shopping centre context, the leases may provide for the tenant, if it wishes to dispose of its lease, to offer it first to the landlord. This is not necessarily because the landlord wishes to develop the

property, but instead because it wants to control the mix of tenants and uses at the property.

Question 3: Estate contracts

Are the tests set out above sufficient to avoid inadvertently capturing transactions not related to the development of land?

If not, please give examples.

Response

The Committee is concerned that the current tests could capture planning permission for a change in the use of land, which does not involve the (physical) development of land. This situation should be excluded. There should also be excluded a conditional contract to grant a lease which may satisfy the current tests but relates for example to an existing commercial property such as an office building or shopping centre where any works relate primarily to the inside of the building. So in that sense there is no development of the land since the building already exists and the works primarily affect the inside of the building.

The proposals should not apply to rights where the beneficiary of the right will occupy themselves, since that would not appear to be relevant to the policy objectives that underpin this call for evidence.

Consideration should perhaps be given to the proposals applying only to organisations that have rights of the relevant type affecting land in aggregate above a particular threshold (say in square feet). This would enable there to be a focus on the organisations that have a material impact on the control of land.

Question 4: Other contractual controls

- (a) Are there any contractual arrangements by which control can be exercised over the purchase or sale of land, which should be included within this regime and which are not rights of pre-emption, options or estate contracts?

Please give examples.

Response

Not in the Committee's view.

- (b) If so, do you consider them (i) an interest in land (interests that are capable of being protected by way of a notice on the land register); or (ii) not an interest in land?

Please give reasons.

Response

Not applicable.

Question 5: Data requirements

- (a) Are there any data fields that (i) should; or (ii) should not be subject to additional data requirements?

Please give reasons.

Response

The Committee considers that there may be commercial sensitivities about the provision of the data referred to in Annex A. To the extent the data already needs to be provided to protect an interest at HM Land Registry, the Committee is satisfied that such data can be subject to the additional data requirements.

While the Committee notes that information in relation to the price and fee will be for official use only and not publicly available, there may be other data in Annex A that has commercial sensitivities and where it would not necessarily be appropriate for such information to be on the land register or in a dataset. Some of that data may well be relevant to the policy underpinning this call for evidence (for example, data on the longstop date), but the issue is whether the disclosure of that data (thereby prejudicing private commercial interests) is justified by the public interest of the policy.

It would be helpful to understand who will be able to access the data in the dataset and, therefore, whether it is a more appropriate repository for sensitive data than the land register. If some assurance can be provided about who can access the dataset, there may be greater readiness to consider the acceptance of more sensitive data appearing there.

There would be great concern about data in the dataset or held at the Land Registry being made generally available and possibly for financial gain for the provider of the data.

- (b) Are there any data fields that (i) should; or (ii) should not be placed on the land register?

Please give reasons.

Response

Please see the answer to question 5(a). What underpins the Committee's concerns about what is being proposed is that the extent of the data required is too intrusive from the perspective of commercial sensitivities, and this may lead to media enquiries and, potentially, loss of privacy and competitive advantage.

The Committee is also generally concerned about the additional time and expense for organisations of dealing with these requirements and having to answer follow-up questions. This position can be mitigated if the documents/transactions affected can be limited to those, which impact on the policy objective behind the proposals. There are also particular objections to including on the register the name of an individual solicitor (as opposed to the name of a law firm).

- (c) Are there any data fields that (i) should; or (ii) should not be included in a contractual control interest dataset?

Please give reasons.

Response

Please see the answer to question 5(a).

- (d) Are there other data fields that should be collected?

Please give reasons.

Response

The Committee considers that those in Annex A to the Paper are comprehensive.

- (e) Do any of the data fields give rise to privacy risks?

Please give reasons.

Response

Yes, the Committee considers that in the area of the development of commercial or residential property, the competition is often intense and there are fears of loss of privacy and competitive edge.

Question 6: Contractual conditions

- (a) Are there any data fields that (i) should; or (ii) should not be subject to additional data requirements?

Please give reasons.

Response

Please see the discussion of these matters given in the earlier responses.

- (b) Are there any data fields that (i) should; or (ii) should not be placed on the land register?

Please give reasons.

Response

Please see the discussion of these matters given in the earlier responses.

- (c) Are there any data fields that (i) should; or (ii) should not be included in a contractual control interest dataset?

Please give reasons.

Response

The scope of requirements for granular information should not be intrusive in commercially sensitive situations. It should be limited to relevant planning information and contractual documentation, which imposes controls over the development of land.

It would be helpful if there are clear parameters as to when data fields are exempt from inclusion in datasets.

It is important to achieve a balanced approach to the requirement for information, to ensure a general acceptance of the approach and, therefore, provision of more relevant information to satisfy the policy objectives of the proposals.

Question 7: Legal Entity Identifiers

Should legal entities that are beneficiaries of contractual arrangements be asked to provide a Legal Entity Identifier?

Please give reasons.

Response

The Committee has insufficient experience of Legal Entity Identifier to comment.

Question 8: Data currency

- (a) Should beneficiaries be required to provide updated information on:

- variation
- termination, or

- assignment or novation?

Please give reasons.

Response

Information that has been provided should be updated on the occurrence of a material event. A variation may not be a material event if it has no relevance to the information previously provided.

- (b) Are there other ways in which data currency could be maintained?

Response

The currency of the data is most likely to be maintained where the document that has led to the change in the data is required to be registered or noted at HM Land Registry.

Question 9: Accounting treatment

If your organisation is required to produce annual accounts, when are: (i) rights of pre-emption; (ii) options; and (iii) estate contracts recognised on the balance sheet?

Please give reasons and state the accounting standard used.

Response

The Committee does not comment on this, as it is not within its expertise.

Question 10: Existing contractual control interests

(a) Should the requirement to supply additional data be limited to: (i) new contractual control interests only; or (ii) all extant interests?

Please give reasons.

Response

The Committee considers that it should be limited to new contractual interests only.

(b) How long should beneficiaries of an extant contractual control interests that is varied, assigned or novated be given to provide additional data before losing protection: (i) three months; or six months?

Response

Three months is suggested, subject to transitional relief and extension in extenuating circumstances.

Question 11: Current beneficiaries

What are the best ways of informing current beneficiaries of the need to provide additional data?

Please give reasons.

Response

There could be publicity from HM Land Registry, which would highlight the position to relevant professionals who may inform current beneficiaries, but this is still administratively burdensome. HM Land Registry could also be required to send information to a beneficiary about ongoing obligations to provide additional data, following when the beneficiary first registers.

Question 12: A digital process?

Should the provision of additional data prior to the application process for an agreed notice be exclusively digital (with assisted digital support if required)?

Please give reasons.

Response

Yes, provided that an applicant for an agreed notice should not be prejudiced by their lack of digital capability.

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Question 13: Certification

Should beneficiaries of contractual control interests with a duty to produce annual accounts be required to certify that all relevant interests have been noted?

Please give reasons.

Response

This could add extra burdensome administration to the production of annual accounts. For the reasons mentioned earlier, there may also be commercial sensitivities, in view of the accounts being publicly available, of such a certificate being provided in the accounts.

We mentioned earlier that consideration should be given to the proposals applying only to organisations that have rights of the relevant type affecting land in aggregate above a particular threshold. While the call for evidence proposes to collect the data via the transactional/Land Registry process, an alternative could be to place a duty on organisations to report (as a corporate responsibility) where the threshold of affected land was exceeded.

Question 14: Restrictions

- (a) Should beneficiaries of contractual control interests be required to obtain an agreed notice before they could apply for a restriction?

Please give reasons.

Response

There may be concerns about the data that may be revealed, by entering an agreed notice, as highlighted in the Committee's earlier responses. However, so long as the requirement to provide the data is focused on the policy objective of controls relating to the development of land and avoids especially commercially sensitive information, the requirement for an agreed notice to be entered first is not objectionable. This is especially the case, since these contractual control arrangements are entered into by the registered proprietor of the title to the land.

- (b) Should the protections of restrictions placed on an un-noted contractual control interest be (i) limited; or (ii) removed?

Please give reasons.

Response

Restrictions play an important role in the Land Registry system of preventing the registration of a disposition or other dealing with the registered property without a certificate or consent of the beneficiary of the restriction. The role of restrictions extends to all aspects of land registration and various circumstances and well beyond the policy objectives of this call for evidence. It is important that any changes to the operation of restrictions do not adversely impact on their role generally in the land registration system. Restrictions that are already on a title before any new changes are introduced, should not be impacted.

- (c) If the Government accepts the Law Commission's recommendation on restrictions, should contractual control interest fall into the category of interest that cannot be capable of protection by way of a restriction?

Please give reasons.

Response

To do so would exert extra pressure on beneficiaries of contractual control interests to enter agreed notices on the register and we explained earlier that there may be commercial sensitivities in that regard. If restrictions are not permitted, there is no other method under the land registration system of the beneficiary of the restriction being able effectively to control particular dispositions of the land, which may interfere with the desired commercial arrangement between the registered proprietor and beneficiary.

Question 15: Alternative options

- (a) Should a mandatory system be introduced whereby the beneficiary of a contractual control interest would, where it is possible to do so, be required to note their interest with HMLR?

Please give reasons.

Response

The Committee does not think this is necessary, because the land registry system of notices provides a benefit for the beneficiary since it gives them priority on the title. There is, therefore, an incentive to register a notice to protect their position.

(b) If so, how should the system be enforced?

Please give reasons.

Response

The Committee considers that enforcement would not be easy and it would be preferable first to gauge the level of compliance and, if it is inadequate, then determine the best, if any, methods of enforcement.

Question 16: Current practice

(a) If you are a beneficiary of a right of pre-emption, option or estate contract, please indicate how you protect your interest.

	Notice		Restriction	Other	Do not protect
	Agreed	Unilateral			
Right of pre-emption					
Option					
Estate contract					

(b) What factors influence your choice?
Please give reasons.

Response

The Committee is not such a beneficiary.

Question 17: Data collation and provision

(a) Are there any data fields in Annex A that contracting parties would not have readily to hand? Please list them.

Response

The contracting parties would normally have the data fields readily to hand, but, as indicated, it may be inappropriate to ask them to provide them.

(b) What is your estimate of the time needed to provide the additional data?

Response

The data should in the main be readily to hand, but the issue is more the appropriateness of disclosure.

(c) Does your entity hold a Legal Entity Identifier?

Response

Not applicable.

Question 18: Data currency

What additional work (over and above the time and cost of preparing annual accounts) would your organisation need to undertake to identify contractual control interests that needed to be updated?

Response

Not applicable.

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Question 19: Certification

What additional work (over and above the time and cost of preparing annual accounts) would your organisation need to undertake to certify in your organisation's annual accounts that all relevant contractual control interests had been noted on the land register where the land is registered?

Response

Not applicable.

Question 20: Economic impact

What impact, if any, do you think that these proposals will have on the English land market (residential and commercial)?

Please describe the effects and provide evidence.

Response

The Committee has commented in its preceding replies.

Question 21: Costs

What impact, if any, do you think that these proposals will have on the costs incurred by participants in the English land market (residential and commercial)?

Please describe the effects and provide evidence.

Response

The extra administration is likely to increase the costs incurred in the English land market, but the Committee is not in a position to be precise as to the amounts.

Question 22: Identifying and understanding contractual control interests

(a) Can you estimate the amount of (i) time and (ii) money that you have spent on identifying land affected by a contractual control interest?

Response

Not applicable.

(b) What is the source of your information?

Response

Not applicable.

- (c) Can you estimate the amount of (i) time and (ii) money that you have spent on seeking professional advice on exactly how a contractual control interest affects a piece of land?

Response

Not applicable.

Question 23: Market impact

- (a) If you are a small or medium enterprise (SME) builder or developer, do contractual controls hinder your ability to assess the viability of a local market?
Please give reasons.

Response

Not applicable.

- (b) If you are an SME builder or developer, does a lack of freely accessible and understandable data act as a barrier to you entering the market?
Please give reasons.

Response

Not applicable.

Question 24: Trust in the planning system

- (a) Do you think that a lack of accessible and understandable data on contractual controls makes it more difficult for local communities to understand the likely pattern of development?

Please give reasons.

Response

The Committee considers not in relation to question 24(a). While some members of the community may be frustrated by the lack of data, they may have a commercial incentive to ascertain this data to promote their own commercial interests. While communities do have an interest in understanding the likely pattern of development in their area, this may well not extend to a strong wish to have access to the more detailed data proposed by this call for evidence. This depends to a degree on the adequacy of the local plan and knowledge of how the planning system works.

- (b) If so, to what extent does it undermine trust and confidence in the planning system:
(i) not much; (ii) somewhat; (ii) a great deal?

Please give reasons.

Response

See the answer to question 24(a).

Question 25: Public Sector Equality Duty

What impact, if any, do you think that these proposals will have on people who share protected characteristics? Please describe the effects and provide evidence.

Response

People who share protected characteristics may well benefit or be disadvantaged by these proposals depending on their involvement in relation to the contractual control.

Question 26: Wales

Should a contractual control interest regime be extended to Wales?

Please give reasons.

Response

The Committee does not comment on this.