PROCEDURE FOR DEALING WITH REQUESTS TO CARRY OUT THE TEST IN SCHEDULE 4 TO THE GROCERIES MARKET INVESTIGATION (CONTROLLED LAND) ORDER 2010 (‘THE ORDER’)

Introduction

1. These procedures describe how the Competition and Markets Authority (CMA) deals with requests for advice on removal of restrictions in Restrictive Covenants and Exclusivity Arrangements as defined in the Order (collectively referred to in this document as ‘burdens’). The procedures may be subject to change with further experience of using them. Please note that the objective is to advise requesters of their rights rather than to have the CMA lead in procuring the removal of restrictions, although we might seek to get involved where difficulties arise.

2. Important: If you are considering requesting information after the CMA has issued a provisional or final decision on a Test application, parties should please note the contents of paragraphs 39 to 45 on what the CMA generally can or cannot disclose under the Enterprise Act 2002 and the Freedom of Information Act 2000.

Contents of application to run the Test

3. An application (as per Article 4(4) or Article 7(3) of the Order) to run the Test (as described in Schedule 4 to the Order) should contain the following information:

   (i) the identity and full address of the owner of the burdened site

   (ii) the post code and full address of the burdened site

   (iii) the Ordnance Survey grid references of the existing locations of the public road entry and exit points of the burdened site. Each public road entry and exit point should be identified by a 12 digit Landranger grid reference (that is the two 100km letters followed by two five digit eastings and northings). 12 digit Landranger grid references can be found for any point in the UK at www.gridreferencefinder.com. For example, the grid reference for the entrance to Victoria House where the CMA is based is TQ 30418 81729. Please see paragraph 12 below for further information
on the definition of entry and exit points. Annex 1 contains advice on what
to do if there are no roads into the site.

(iv) an electronic PDF map of the burdened site showing clearly the actual
and/or proposed public entries and exits at the points where they join on
to the public road network

(v) a copy of the whole of the Restrictive Covenant or Exclusivity
Arrangement showing the burden

(vi) the dates the Restrictive Covenant or Exclusivity Arrangement runs from
and to

(vii) the name of the Large Grocery Retailer in whose favour the burden exists

(viii) whether the requester has asked the Large Grocery Retailer (see
Annex 2 for some definitions) to remove the burden and what the
response was

(ix) details of, or reference to, any other applications to the former Office of
Fair Trading or CMA to run the Test in relation to the burdened site

Running the Test

Acknowledgement

4. The CMA will acknowledge each application, record all details and inform the
applicant that, in order to progress its request to run the Test, the Large Grocery
Retailer benefiting from the burden may have to be contacted at an early stage.
The CMA will seek any missing information and will not progress the case until
this is received from the applicant.

Checking that the burden is imposed by a Designated Retailer

5. The CMA will reject the request to run the Test unless one of the Large Grocery
Retailers designated under Article 3 of the Order has the benefit of the Restrictive
Covenant or Exclusivity Arrangement. At present, seven Large Grocery Retailers
are designated, namely Asda Stores Limited, Co-operative Group Limited, Marks
and Spencer plc, Wm Morrison Supermarkets plc, J Sainsbury plc, Tesco plc, and
Waitrose Limited (and any associated businesses of any of these companies as
described in Schedule 1 to the Order).
Checking that the burden is of the type that can be the subject of the Test

6. The CMA will determine whether the burden is a Restrictive Covenant or an Exclusivity Arrangement as defined in the Order. If it is neither, it will reject the application.

7. With Restrictive Covenants, the CMA will check when they were entered into. If they were entered into on or after 10 August 2010 and they restrict grocery retailing or have equivalent effect (see Article 5 of the Order), then the CMA will not apply the Test. Such restrictive covenants should not have been entered into and the restrictions in them must be deleted immediately, unless Articles 6, 9 or 10 of the Order apply to the restrictions therein, in which case the restrictions can stand. The applicant will be advised by the CMA of their rights in such circumstances.

Checking whether the burden is listed in the Schedules to the Order

8. If the Restrictive Covenant was entered into before 10 August 2010, or the burden is an Exclusivity Arrangement, the steps below will be taken.

9. The CMA will check whether the site/ premise is listed in any of Schedules 2a, 2b, 3a or 3b to the Order. If it is, the CMA will not apply the Test and will advise the applicant as appropriate.

10. If the burden is an Exclusivity Arrangement, the CMA will check whether it is an existing one falling within Article 7 of the Order, or a new one falling within Article 8 of the Order. If it is a new one, and the exceptions in Articles 9 and 10 of the Order do not apply, the applicant should be advised that the arrangement should be ended or the duration of the exclusivity should be reduced to five years or less. In these circumstances the Test will not be carried out. If the burden is an existing Exclusivity Arrangement, and the exceptions in Articles 9 and 10 of the Order do not apply, the Test will be carried out.
Checking the accuracy of map references provided by the Test applicant

11. The CMA will check using www.gridreferencefinder.com the map references provided by the applicant. If they appear wrong or inaccurate the applicant will be asked to consider revising them. No further action will be taken until the applicant responds to this request.

Drawing isochrones around the burdened site

12. When the CMA is satisfied that all is in order with the application and that it is appropriate to carry out the Test as described in the Order, the CMA will draw a 10 minute drive time isochrone around the burdened site and generate a list of Grocery Stores (as defined in the Order) operating within the isochrone, highlighting any that are within 100 metres of the boundary of the isochrone using:

- grid references of all the proposed and actual public points of entry and exit to the burdened site, such points being defined as all points where access to the site meets the public road system from where a car can be driven and where unobstructed access may be lawfully gained by members of the public (including footpaths and roads);

- the full address and postcode of the burdened site.

13. Annex 3 (attached) describes the software and information used to construct isochrones.

14. Each isochrone will originate from the proposed and actual public points of entry and exit to the site as described in paragraph 12 above (so if, say, there are three such points, three isochrones will need to be drawn and combined to produce one isochrone around the burdened site – see illustration below – and note that the distances between the entry/exit points have been highly exaggerated to show clearly how the combined isochrone is constructed).
Identifying grocery stores within the isochrone around the burdened site

15. If, by using the Geolytix Data list of Grocery Stores within the isochrone and examining the relevant Large Grocery Retailer’s publicly available data on store locations, the CMA finds that there are no grocery stores at all operated by the Large Grocery Retailer benefiting from the restriction within the isochrone, then the CMA will conclude that the Test is passed (that is the Large Grocery Retailer will be permitted to keep the restriction).

Deciding which stores to draw Relevant Isochrones from

16. If stores owned by the Large Grocery Retailer benefiting from the burden are found within the isochrone around the burdened site, the CMA will seek information on the Net Sales Area and Grocery Sales Area (both as defined in the Order) of each store from that retailer. If there are no stores run by that retailer with a Net Sales Area of 280 square metres or more then the Test will be passed.

17. Where there is doubt about the location of a store, or it appears to be close to, or straddles, an isochrone boundary, the CMA will obtain, using www.gridreferencefinder.com, the 12 digit Landranger map references for all
the public exits and entrances to the store to check whether it is inside or outside the isochrone. If any one of the entrance/exit points are inside the isochrone then the store will be regarded as being inside the isochrone, even if other entrance/exit points to the store are outside it.

18. Note that the maximum extent of the isochrone will be taken to be the middle of the line defining it: i.e.

![Drawing Relevant Isochrones](image)

**Drawing Relevant Isochrones**

19. The CMA will draw 10-minute drive time isochrones around each store owned by the Large Grocery Retailer identified by the process set out in paragraph 14 above and which has a Net Sales Area of 280 square metres or more. Each isochrone so drawn is referred to in the Order and in these procedures as a 'Relevant Isochrone'. The CMA will also generate lists of all grocery stores operating within each Relevant Isochrone, highlighting any that are within 100 metres of the boundary of each Relevant Isochrone.

20. Note that the isochrone drawn round the burdened site is not a Relevant Isochrone, unless it shares the same public exits and entrances with one of the stores of the Large Grocery Retailer benefiting from the burden on the applicant.

21. The CMA will use the list of grocery stores as well as all Large Grocery Retailers' publicly available data on store locations, and may make enquiries of the Large Grocery Retailers, to determine the locations of Mid-sized and Larger Grocery stores within each Relevant Isochrone. The provisions of paragraphs 19 and 20 above will be taken into account in doing this.

**Seeking data from competing Large Grocery Retailers**

22. The CMA will provide to each of the Large Grocery Retailer competitors of the Large Grocery Retailer in all Relevant Isochrones a list of the stores (with addresses) in all Relevant Isochrones and will ask to be provided with the Net Sales Area and Grocery Sales Area of each store within five working days.
Relevant Isochrones where there are four or more competing Fascias

23. Any Relevant Isochrones will be disregarded where they are centred on:

   (i) a Larger Grocery Store where there appear to be a further three or more competing Larger Grocery Store Fascias, and/or

   (ii) a Mid-sized Grocery Store where there appear to be a further three or more competing Mid-sized and Larger Grocery Store Fascias.

24. If all the Relevant Isochrones centred on Larger and Mid-sized Grocery Stores meet the criteria in paragraph 24 above then the Test will be passed.

Relevant Isochrones where there are fewer than four competing Fascias

25. For each Relevant Isochrone centred on a Larger Grocery Store where there are fewer than four Larger Grocery Store Fascias, the CMA will need to determine whether the Large Grocery Retailer in whose favour the burden operates occupies 60 per cent or more of the total Groceries Sales Area occupied by all Larger Grocery Stores in that Relevant Isochrone: if it occupies less than 60 per cent the Test is passed; if it occupies 60 per cent or more the Test will be failed (that is the Large Grocery Retailer will be required to take the action described in paragraph 29 below).

26. For each Relevant Isochrone centred on a Mid-sized Grocery Store where there are three or fewer Larger Grocery Store and Mid-sized Grocery Store Fascias, the CMA will need to determine whether the Large Grocery Retailer in whose favour the burden operates occupies 60 per cent or more of the total Groceries Sales Area occupied by all Larger Grocery Stores and Mid-sized Grocery Stores in that Relevant Isochrone. If it occupies less than 60 per cent of the total of the Groceries Sales Area the Test will be passed; if it occupies 60 per cent or more the Test will be failed (that is the Large Grocery Retailer will be required to take the action described in paragraph 33 or 36 below).

27. The CMA will seek information on the size of Net Sales Areas and Groceries Sales Areas (in square metres) for all Grocery Stores that appear to be relevant for the purpose of calculating market share in each Relevant Isochrone.
Action by the CMA where the Test is passed

28. Where the Test is passed, the CMA will provide a copy of the Relevant Isochrone map(s) to the applicant, giving them 15 working days to comment on our decision if they think there are relevant Larger Grocery Stores or Mid-sized Grocery Stores within the area(s). Where the CMA has had to consult the Large Grocery Retailer which benefits from the burden then they will be informed of our proposed decision. The CMA will redact any commercially sensitive data used in its assessment.

29. The CMA’s decision will be regarded as final if it hears nothing from the applicant within 15 working days.

30. The CMA will consider any comments made on the decision and will either reaffirm its original decision or make a new one, after it has made any necessary further enquiries. The CMA will provide whatever further information it is able to on such reaffirmation or new decision.

Action where the Test is failed

31. Where the CMA concludes that the Test is failed, the Large Grocery Retailer will be given a notice as described in Articles 4(4)c and 7(3)(c) of the Order which will include copies of the Relevant Isochrone map(s), and the data on store sizes the CMA has used. The CMA will redact any commercially sensitive data used in its assessment. The notice will invite the Large Grocery Retailer to provide within one month of the notice reasons why the CMA’s provisional findings that the Test is failed should not become final (or as the case may be, should be varied) (Article 4(4)(d) of the Order refers).

32. The CMA will notify the applicant of its decision and will redact any commercially sensitive data used in its assessment. The notice will invite the applicant to provide within one month of the notice reasons why the CMA’s provisional findings that the Test is failed should not become final (or as the case may be, should be varied) (Article 4(4)(d) of the Order refers). Applicants will be informed of their rights and advised to contact us if the Large Grocery Retailer concerned does not take any required action to release a burden within a reasonable time.

33. If the CMA’s conclusion has not altered, it will advise the Large Grocery Retailer that it should take the action described in Article 4 of the Order in
relation to a Restrictive Covenant or comply with Article 7 of the Order in relation to an Exclusivity Arrangement.

34. In the case of Restrictive Covenants, Article 4(5) of the Order provides that Large Grocery Retailers have between three and six months to use their best endeavours to release burdened parties from them.

35. In the case of Exclusivity Arrangements, Article 7(4)(b) of the Order provides that Large Grocery Retailers must release them the later of five years from the date of the former Competition Commission’s report on the supply of groceries in the UK market investigation (30 April 2008) and five years from the date on which the Grocery Store which benefits from the Exclusivity Arrangement first began trading. As five years have now elapsed since the Competition Commission report was published, it is the five years from commencement of trading date that will apply in future to all Exclusivity Arrangements.

Documents to be provided to the applicant with CMA decisions on the Test

36. The documents to be provided to applicants in relation to a CMA decision on whether the Test is passed or failed will include electronic copies of any relevant maps in PDF form with a list of the locations of all relevant grocery stores in the Relevant Isochrones concerned, together with a short written explanation of the CMA’s decision.

37. The applicant will not be given any data on shares of Grocery Sales Areas in any Relevant Isochrones drawn: there will only be a statement on whether or not the market share threshold has been exceeded, and only then if the market share test has been applied (see below).

Enterprise Act 2002 information provisions and Freedom of Information Act 2000 issues

38. The CMA confirms that it will have regard to the relevant provisions of Part 9 of the Enterprise Act 2002 (EA2002) in handling the information it obtains in dealing with applications to run the Test and in running the Test. Note that the Freedom of Information Act 2000 (FoIA) cannot be used to require the CMA to disclose information where such disclosure would contravene the relevant provisions of Part 9 of the EA2002. Although every FoIA application is
considered on its merits, two particular examples relevant to these procedures are discussed below for illustration purposes.

**Grocery Retailers’ Groceries Sales Areas and market shares**

39. In particular, it is very unlikely the FoIA could be used to require the CMA to provide information on sizes of any sales areas (e.g. Net Sales Areas or Groceries Sales Areas) used in calculating market shares of retailers. This information is likely to be exempt from disclosure under section 44 of the FoIA which provides that the information is exempt from disclosure where its disclosure by the CMA is prohibited by or under any other enactment.

40. Section 237 of the EA2002 prohibits the disclosure of specified information which relates to the affairs of an individual or any business of an undertaking. Specified information is defined in section 238 of the EA2002 as information which comes to a public authority in connection with the exercise of its functions under a number of statutory provisions.

41. Section 44 of the FoIA is an absolute exemption which does not require a public interest test to be carried out. The CMA is not likely to be able to supply any requesters with market shares or any sales area information under the FoIA as this is information which the CMA considers to be specified information as defined, since it came to the CMA in connection with the exercise of its information gathering function under Part 1 of the EA2002 and its functions in respect of market investigation references under Part 4 of the EA2002.

42. Further information on the links between section 44 of the FoIA and the EA2002 is on the Information Commissioner’s website.

**Information on the mapping and road speed data software**

43. We are able only to supply the information set out in Annex 3 (attached). Under the FoIA we have a duty to confirm the existence of information requested and to supply that information unless there are good reasons for not doing so. We confirm that the CMA holds further information on ESRI UK Limited’s software but we would generally consider this information to be exempt from disclosure under section 43 of the FoIA.

44. Section 43(2) provides that information is exempt if its disclosure under the FoIA would prejudice, or would be likely to prejudice, the commercial interests of any person. It is probable that the disclosure of further technical information
on the software provided by ESRI UK Limited would prejudice, or would be likely to prejudice, the commercial interests of ESRI UK Limited. However, this is a qualified exemption and therefore would be subject to a public interest test at the relevant time.

**Other issues**

45. There is no public register of decisions given their confidential nature.

46. Applicants may apply to have a Test re-run if there is firm documentary evidence that the number of competing fascias in any Relevant Isochrone has fallen below four and/or the market share of the Large Grocery Retailer in whose favour the burden operates occupies rises to 60 per cent or more of the total Groceries Sales Area occupied by all relevant Grocery Stores in any Relevant Isochrone.

**Enquiries about these procedures**

47. These should be directed to:

George Brenton and Sharon Dias
Remedies Monitoring Team
Competition and Markets Authority
Victoria House37 Southampton Row
London
WC1B 4AD

Email: George.Brenton@cma.gsi.gov.uk    Telephone 020 3738 6327
Email: Sharon.Dias@cma.gsi.gov.uk       Telephone 020 3738 6235
Annex 1

How to select a grid reference on www.gridreferencefinder.com for the point of entry to a site where there is no separate road access

If it is a single shop place the cursor on the edge of the pavement by the public road outside the middle of the premises. If the site comprises several properties, select the point on the edge of the pavement in the middle of the line of properties facing the public road – see example below which shows selecting the grid reference point for four shop premises in Glastonbury High Street.
Annex 2

Definitions

Larger Grocery Store = >1,000m

Burdened Site = the site which is the subject of a Restrictive Covenant or an Exclusivity Arrangement as defined in the Order

Mid-sized Grocery Store = 280 to 1,000m

Associated Grocery Store = An LGS or MGS within the 10-minute drive time isochrone around the burdened site and owned/controlled by the large grocery retailer benefitting from the burden

Fascia = the trading name under which a Grocery Retailer operates a Grocery Store

For definitions of other terms see the Order
Annex 3

Software and information used to construct isochrones

Software

A2.1 The mapping software used is ESRI UK Limited's Arc GIS Pro. The Grocery Retailers list is generated using Geolytix Open Retail Points.

Drivetime network

A2.2 The drivetime network is based on TomTom Streetmap Premium. The CMA has chosen to use a custom Speed Profile based on the time period of Saturday 11am to 4pm.

Holes and Islands

A2.6 Holes and Islands are excluded from the drivetime isochrones.

Drivetime network updates

A2.7 The drivetime network is updated on an annual basis.