

# **Procedure for Dealing with Requests to Carry Out the Test in Schedule 4 to the Groceries Market Investigation (Controlled Land) Order 2010**

Consultation Document

13 March 2020

CMA116con

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# 1. About the consultation

## Introduction

- 1.1 The [Procedure for Dealing with Requests to Carry Out the Test in Schedule 4 to the Groceries Market Investigation \(Controlled Land\) Order 2010](#) ('procedures guidance') describes how the Competition and Markets Authority (CMA) deals with requests for advice on removal of restrictions in Restrictive Covenants and Exclusivity Arrangements (collectively referred to in this document as 'burdens') as defined in Schedule 4 of the [Groceries Market Investigation \(Controlled Land\) Order 2010](#) ('The Order').
- 1.2 Since the procedures guidance was first published in August 2010, the CMA has had to make a change to its procedures in practice as a result of changes to the software used by the CMA when conducting the test.
- 1.3 The CMA is now making more substantial changes to the procedure for carrying out these tests and has also created its own software for the analysis of competition in local areas, including determining the drive times between specific points. This approach will give the CMA ownership and control of the process for carrying out these tests.
- 1.4 We are consulting on the revised procedures guidance document which reflects this new approach, as well as a number of other changes to help improve the clarity of the test procedures. None of the changes on which we are consulting affect the validity of the test described in Schedule 4 of the Order.

## Scope of this consultation

- 1.5 The CMA is consulting on its revised procedures guidance and is seeking views from interested parties. The test in Schedule 4 of the Order and this consultation apply throughout the UK.
- 1.6 The specific questions on which we are seeking respondents' views are provided in Section 4.

## Consultation process

- 1.7 We are publishing this consultation on the CMA webpages and drawing it to the attention of a range of stakeholders to invite comments. We would welcome your comments on the appropriateness of the revised procedures guidance.

## *How to respond*

- 1.8 We encourage you to respond to the consultation in writing (by email or alternatively in writing by letter) using the contact details provided in paragraph 1.11 below.
- 1.9 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
- 1.10 In pursuance of our policy of openness and transparency, we will publish a non-confidential version of responses on our webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide a non-confidential version for publication on our webpages which omits that material and which explains why you regard it as sensitive at the same time.

***Duration***

- 1.11 The consultation will run for 30 working days, from Friday 13 March 2020 to Monday 27 April 2020. Responses should be submitted by post or email and should be sent to:

Remedies Monitoring Team

Competition and Markets Authority

The Cabot (B8.03)

25 Cabot Square

London

E14 4QZ

Email: [RemediesMonitoringTeam@cma.gov.uk](mailto:RemediesMonitoringTeam@cma.gov.uk)

## 2. Legal framework

- 2.1 The Competition Commission conducted an investigation into the supply of groceries by retailers in the United Kingdom and published its [Final Report](#) on 30 April 2008. The Report concluded that there were features of the market, either alone or in combination, which prevent, restrict or distort competition within the relevant market, and that an adverse effect on competition existed.
- 2.2 The Groceries Market Investigation (Controlled Land) Order 2010 (CLO) is one of two orders made following the Competition Commission's 2006 to 2008 inquiry into the supply of groceries in the UK. The Order was made in accordance with [section 138](#) and in exercise of the powers conferred by [section 161](#) of the Act. It was made for the purpose of remedying, mitigating or preventing the adverse effect on competition identified in the Final Report.

## 3. Proposed changes to the guidance

- 3.1 The CMA's revised guidance includes the following departures from the previous procedures guidance:

### ***Description of the new software***

- 3.2 The CMA has created an internal software tool to use when calculating the time to travel between specific points. This has been designed to assist in cases where local competition in specific areas is of particular importance, including carrying out the test described in Schedule 4 of the Order.
- 3.3 The software is able to calculate the drive times between two points using the UK road network. The routing takes account of historic data on real traffic (flow speed) and the legal speed limits in the area. The CMA's software calculates actual drive times between pairs of points measuring by latitude and longitude, rather than calculating an isochrone with a boundary.
- 3.4 The CMA's software is capable of providing purely illustrative isochrones, however these are only indicative and not an accurate representation of the boundary of a particular travel time from a single point. Consequently, the CMA will no longer analyse the boundaries of drawn isochrones to determine whether particular retailers are inside or outside a particular area. In addition, the CMA will no longer provide parties with diagrams of isochrones. Instead, the CMA will consider the stated drive time reported by its software for driving time between pairs of points to determine whether particular retailers' stores are within the set driving time of a particular point.

### ***Data inputs to the CMA software***

- 3.5 The CMA's software makes use of the HERE dataset<sup>1</sup> in calculating the drive times between two points, which is the same dataset the CMA has been using in recent software for calculating test results.<sup>2</sup>
- 3.6 The CMA will continue to use information from the Geolytix database of grocery retail sites in the UK<sup>3</sup> to understand the full range of grocery retailers present within a specific local area, and the role of this database remains unchanged in the revised test procedures.
- 3.7 The CMA's software tool is not available for external use. However, third parties are able to use the HERE API at <https://www.here.com/> and the Geolytix database at <https://www.geolytix.co.uk/> to conduct an equivalent test and obtain similar results. These websites are both publicly available.
- 3.8 The CMA will also continue to seek information from test applicants regarding the burdened site, and from individual retailers concerning specific information relating to individual stores, such as the location of an entrance, the size of the sales area, and these sources are the same as used previously.

### ***Outputs for test applicants***

- 3.9 The CMA will provide test applicants and those benefitting from restrictions with a table detailing the drive times from specific points to grocery stores listed on Geolytix. This will allow test applicants and those benefitting from restrictions to see which stores are within a 10-minute drive time from a particular point, and which are further away involving a greater drive time. This information, together with knowledge of the use of the HERE dataset and Geolytix data will provide a high degree of transparency regarding the CMA's methodology and ensure its decisions are clear, accurate and justified.
- 3.10 As a result of the similarity of the data inputs to the CMA's revised procedures, the CMA expects a high degree of consistency between recent and future tests. Consequently, the CMA does not intend to repeat any recent tests which it has carried out using its previous procedures purely as a result of these proposed changes, unless it can be demonstrated that there have been relevant changes in the degree of competition in the relevant local areas to a particular test.

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<sup>1</sup> See <https://www.here.com/> for details.

<sup>2</sup> While the CMA's published guidance has stated that the CMA uses a TomTom database for the calculation of drive times, in practice, recent test applicants have been informed that the CMA's previous software provider had changed the underlying database it used to HERE.

<sup>3</sup> See <https://www.geolytix.co.uk/> for details.

## **Reduction in the discrepancy between multiple test results**

- 3.11 There are two areas of the previous guidance which have led to discrepancies in results or differences between results that may have led to some decisions to be contested due to the way these discrepancies are resolved. These issues are explored below.

### ***Traffic conditions***

- 3.12 The CMA's previous guidance referred to the use of traffic conditions on one specific day and at two times of day, namely 11AM and 4PM on Saturday. The use of this led to the CMA creating two sets of isochrones for the differing traffic conditions at those two specific times. In some cases, the differences were significant enough for some stores to be in an isochrone for one time but to fall outside at the other time. While the CMA's previous procedures provided a way to address this, the CMA's new software takes a different approach that avoids these potential discrepancies. This is because the HERE travel times used by the CMA's internal tool are based on average traffic conditions across the day when computing travel times, and consequently it is a representation of a travel time that should be achievable, on average. As a result, our revised procedures have no need to reflect travel at different times or to specify travel on a particular day.

### ***Assessing entrances and exits***

- 3.13 The CMA's previous procedures involved assessing all public entrances and exits of both burdened sites and competing stores, creating multiple test results, and similar to above the possibility for discrepancies over the 10-minute drive time isochrones created for these multiple points. While the aim of these multiple points was to provide completeness in terms of covering all entrances and exits, the result has been potentially conflicting and diverging results. For this reason, we have chosen to focus on the most significant and most frequently used single entrance to a site, or a store.
- 3.14 For the burdened site, this may be the most significant pedestrian or road entrance to the site itself, with greatest current or expected use, while for retailer that benefits from the restriction, this will be the most frequently used entrance or exit to the specific store itself.
- 3.15 For the analysis of competitor locations, the CMA will continue to use Geolytix data on locations, including the latitude and longitude co-ordinates specified by Geolytix, to ensure consistency with its current procedures.

## **Consulting on provisional test results**

- 3.16 The CMA's previous guidance provided for different consultation periods depending on whether the test had been passed or failed at a provisional point. Given there are two parties to all applications and decisions (the test applicant and the organisation that benefits from the restriction), the CMA considers it appropriate that all test outcomes should be consulted upon for the same length of time, irrespective of the outcome, to ensure this is fair for both parties in each case. Consequently, the CMA will now consult on its provisional test decisions for one month.

## **Register of test results**

- 3.17 The CMA has not provided any public details of the tests carried out to date, however, in line with its broader commitment to transparency of its work, the CMA intends to create a new register of test results, both those where the test was passed and those where it was failed, so that details of these restrictions can be made public. The CMA does not intend to publish the names of test applicants as part of this register.

## 4. Consultation questions

4.1 In this consultation, the CMA is keen to seek the views of interested parties on the appropriateness of the revised guidance generally, and particularly on the following matters:

- (a) the simplification of the test procedure including:
  - (i) using the single main entrance of a site or building as described
  - (ii) using a single average time of day for the travel time calculation;
- (b) the proposed changes to the consultation procedures on provisional test decisions; and
- (c) the proposed new register of test decisions and restrictions removed and remaining in place.

### ***Compliance with government consultation principles***

4.2 In consulting, the CMA has taken into account the published [government consultation principles](#), which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders.

### ***Statement about how we use information and personal data that is supplied in consultation responses***

- 4.3 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.
- 4.4 We are processing this personal data for the purposes of our work. This work relates to the revised procedures guidance, for which we are consulting. This processing is necessary for the performance of our functions and is carried out in the public interest, in order to take consultation responses into account.
- 4.5 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long we retain personal data, see our Privacy Notice.
- 4.6 Our use of all information and personal data that we receive is also subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to

do so, we will have regard to the need for excluding from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.

- 4.7 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, we will take fully into consideration representations made by you here in support of confidentiality. We will also be mindful of our responsibilities under the data protection legislation referred to above and under the Enterprise Act 2002.
- 4.8 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

***After the consultation***

- 4.9 After the consultation, we will publish a final version of the guidance and a summary of the responses received that fall within the scope of the consultation. As noted above, we propose to publish non-confidential versions of the responses received. These documents will be available on our webpages and respondents will be notified when they are available.