

Notice of designation of Ocado Group plc under the Groceries (Supply Chain Practices) Market Investigation Order 2009

1 November 2018

Introduction and background

1. The Competition Commission (CC) investigated the supply of groceries, following a reference from the Office of Fair Trading (OFT) in May 2006. The CC found adverse effects on competition arising in several areas including the potential exercise of buyer power in relation to suppliers of grocery retailers, and concerns regarding the use of restrictive covenants in concentrated local markets. To address these concerns, the CC made two Orders, namely the Groceries Market Investigation (Controlled Land) Order 2010 which limits large grocery retailers' ability to prevent land being used by their competitors for grocery retailing in the future and the Groceries (Supply Chain Practices) Market Investigation Order 2009 which addressed buyer power among grocery retailers.
2. The Competition and Markets Authority (CMA) actively monitors and enforces the remedies within its remit, including the Groceries (Supply Chain Practices) Market Investigation Order 2009 (the Order), and works closely with the Groceries Code Adjudicator (GCA). As part of this role, the CMA has considered the evidence available to it regarding whether there are additional retailers that should be designated and responded to requests in this area.
3. In October 2016, the Government launched a formal Call for Evidence to explore the case for extending the remit of the GCA. In February 2018, it published the response to the Call for Evidence, in which it made several changes that affect the sector, but did not extend the scope of the GCA. As part of the response, the Government agreed with the CMA that the CMA would:

'[F]ormalise its current activities, by reviewing publicly available information on an annual basis. Where there are reasonable grounds for suspecting that any additional retailer may have reached the turnover threshold specified in the Order, the CMA will request further evidence from it. This will allow the CMA

*to assess whether that retailer should be added to the list of designated retailers.*¹

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4. From the date of the Order, the following 10 retailers were designated, as described in Schedule 2 of the Order:

(a) Asda Stores Limited, a subsidiary of Wal-Mart Stores Inc

(b) Co-operative Group Limited

(c) Marks & Spencer plc

(d) Wm Morrison Supermarkets plc

(e) J Sainsbury plc

(f) Tesco plc

(g) Waitrose Limited, a subsidiary of John Lewis plc

(h) Aldi Stores Limited

(i) Iceland Foods Limited, a subsidiary of the Big Food Group

(j) Lidl UK GmbH

5. Part 2, Article 4 of the Order also provided for additional retailers to be designated once the Order was in place.

6. The test for designation of additional retailers is described in the Order as follows:

'Any retailer with a turnover exceeding £1 billion with respect to the retail supply of groceries in the United Kingdom, and which is designated in writing as a Designated Retailer by the OFT.'^{2, 3, 4}

¹ [Groceries Code Adjudicator Review: Part 2: Government response to the Call for Evidence on the case for extending the Groceries Code Adjudicator's remit in the UK groceries supply chain](#), page 11.

² Part 2, Article 4(1)(b) of the Order.

³ Groceries is defined in Article 2 of the Order as, 'Groceries means food (other than that sold for consumption in the store), pet food, drinks (alcoholic and non-alcoholic, other than that sold for consumption in the store), leaning products, toiletries and household goods, but excludes petrol, clothing, DIY products, financial services, pharmaceuticals, newspapers, magazines, greetings cards, CDs, DVDs, videos and audio tapes, toys, plants, flowers, perfumes, cosmetics, electrical appliances, kitchen hardware, gardening equipment, books, tobacco and tobacco products'.

⁴ The CMA has taken on the relevant functions of the OFT as described in this Order.

*'For the purposes of Article 4(1)(b), a Retailer's turnover with respect to the retail supply of Groceries in the United Kingdom, on any particular dates, will be the applicable turnover figure for the financial year preceding that date.'*⁵

7. The CMA has a discretion over whether to designate retailers in the Order, as described in the Explanatory Note to the Order:

*'As currently drafted, the OFT will designate a grocery retailer as a Designated Retailer as soon as it obtains evidence that it meets the £1 billion turnover threshold. The OFT has a discretion as to whether to appoint a business meeting the turnover threshold as a Designated Retailer, based on the nature of the business meeting the turnover threshold, and the purposes of the Order.'*⁶

8. The purposes of the Order include the prevention of the exercise of buyer power over suppliers by large grocery retailers. This is demonstrated by the following extracts from the Competition Commission's final report:

*'We found that the exercise of buyer power by certain grocery retailers with respect to their suppliers of groceries, through the adoption of supply chain practices that transfer excessive risks and unexpected costs to those suppliers, was a feature of the markets for the supply of groceries.'*⁷

*'The size of a purchaser (here a grocery retailer) in terms of both its size relative to the market and relative to the supplier is a key influence on a grocery retailer's buyer power in relation to a supplier.'*⁸

*'In particular, we set out in Section 9 that the ability to pass excessive risks and unexpected costs to suppliers is a function of buyer power, and that buyer power is, in a large part, a function of the size of the retailer. Given this, we decided that a threshold based on UK retail groceries turnover should be set, below which retailers will not be subject to the GSCOP.'*⁹

'We decided that this threshold should be set at £1 billion a year. There is an element of judgement in the setting of this threshold in that it is not possible to calculate precisely the degree of buyer power that any individual retailer will have relative to its suppliers. Nevertheless, in setting this threshold, we took into account the identity of the retailers where particular issues had been brought to our attention during the course of this investigation (see Appendix

⁵ Part 2, Article 4(3) of the Order.

⁶ Part 2, Article 18 of the Explanatory Note to the Order.

⁷ From Executive Summary Paragraph 4.1.

⁸ From paragraph 9.7.

⁹ From paragraph 11.410.

9.9). *There were very few cases which involved a grocery retailer with an annual turnover of less than £1 billion*.¹⁰

Decision on designation

9. We have established that Ocado Group plc has turnover of groceries that is greater than the £1 billion threshold specified in the Order.
10. Having established that Ocado Group plc' turnover exceeds this threshold, the CMA gave consideration of whether or not to designate Ocado Group plc, having regard to the representations made, the nature of its business and the purposes of the Order.
11. The CMA notes that Ocado is primarily a grocery retailer, that sells a wide range of grocery products in the UK. Its products are sourced from a range of suppliers, including a supply agreement with Waitrose, which is itself a designated retailer. The CMA has, in particular, considered the significance of Ocado's relationship with Waitrose. While the supply agreement with Waitrose means that certain of Ocado's suppliers already benefit from the provisions of the Order, this would not protect Ocado's other suppliers from the exercise of buyer power. The CMA therefore considers that these arrangements, together with the scale of grocery retailing activities undertaken by Ocado Group plc, mean that Ocado Group plc may be expected to have the ability to exert buyer power over at least some of its suppliers. In light of this assessment, the CMA considers that it would be appropriate to exercise its discretion to designate Ocado as this would be consistent with the purposes of the Order.
12. Ocado Group plc will be a designated retailer under the Groceries (Supply Chain Practices) Market Investigation Order 2009 with immediate effect.

¹⁰ From paragraph 11.411.