

# **Decision to launch a review of Ocado Group plc's designation under the Groceries (Supply Chain Practices) Market Investigation Order 2009**

16 October 2019

## **Introduction**

1. The Competition and Markets Authority (CMA) has decided to conduct a review of Ocado Group plc's designation under the [Groceries \(Supply Chain Practices\) Market Investigation Order 2009](#) (the Order). This review is specifically in relation to a request from Ocado Group plc to be de-designated from the Order following a structural change in which Ocado Retail Ltd, which is now designated, has taken on responsibility for Ocado's grocery retail activities and Ocado Group plc no longer carries out these activities in the UK.

## **Background**

2. The Order, which was made on 4 August 2009 and came into force on 4 February 2010, followed a report<sup>1</sup> by the Competition Commission (CC) which was published on 30 April 2008. The Order requires the UK's large grocery retailers to follow the [Groceries Supply Code of Practice](#) (GSCOP). The Order and the GSCOP are designed to reduce consumer detriment by controlling practices that transfer excessive risks and unexpected costs to suppliers and have an impact on suppliers' quality, innovation and willingness to invest.
3. On 1 November 2018 Ocado Group plc was designated under the Order.<sup>2</sup> Pursuant to a corporate restructuring, in particular the creation of a joint venture with M&S Holdings Ltd Ocado Group plc no longer carries out the retail supply of Groceries in the UK. The retail activities are now carried out independently of Ocado Group plc by Ocado Retail Ltd.
4. The CMA has found that from 5 August 2019 Ocado Retail Ltd now carries on the whole of the relevant business formerly carried on by Ocado Group plc and therefore, by virtue of Articles 4(1)(b) and 4(1)(c) of the Order, from 16

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<sup>1</sup> Competition Commission report: [The supply of groceries in the UK](#), 30 April 2008

<sup>2</sup> See [Notice of Designation for Ocado Group plc](#), 1 November 2018

October 2019, Ocado Retail Ltd is a designated under the Order and is required to comply with the Order and the GSCOP.<sup>3</sup>

5. Having designated Ocado Retail Ltd, the purpose of this review is to determine whether Ocado Group plc should cease to be a designated retailer under the Order. This review will not address any other matter relating to the Order.

## **The CC investigation and findings**

6. 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, in addition to the Order which addressed buyer power among grocery retailers, the CC also made 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.

## **Schedule 2 of the Order**

7. Schedule 2 of the Order lists the Designated Retailers to whom the Order applies at the time it was created. From 4 August 2009, the following 10 retailers were designated:
  - (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

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<sup>3</sup> See Notice of Designation for Ocado Retail Ltd, 16 October 2019.

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

(j) Lidl UK GmbH

8. Article 4 of the Order also provides for additional retailers to be designated. 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.’<sup>4, 5, 6</sup>*

9. Guidance on designation is provided by 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.’<sup>7</sup>*

### **Designation of Ocado Group plc**

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 further to assessing whether that retailer should be designated under the Order. Following a review, the CMA designated Ocado Group plc (as well as B&M European Value Retail S.A.) on 1 November 2018.

## **Legal framework**

10. The CMA has a statutory duty under section 162 of the Enterprise Act 2002 (the Act) to keep its enforcement orders under review. From time to time, the CMA must consider whether, by reason of any change in circumstance an order is no longer appropriate and needs to be varied or revoked.

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<sup>4</sup> Part 2, Article 4(1)(b) of the Order.

<sup>5</sup> 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’.

<sup>6</sup> The CMA has taken on the relevant functions of the OFT as described in this Order.

<sup>7</sup> [Explanatory Note to the Order](#), Part 2 paragraph 18.

11. Paragraph 18 of the [Explanatory Note](#) published alongside the Order states that ‘Any request for removal from the list of designated retailers... would be considered by the [CMA] under its duty to monitor undertakings [and orders] in section 162 of the Act’. The CMA is reviewing the Order to determine whether it is appropriate to de-designate Ocado Group plc in the light of its recent corporate re-structure.

## Potential change of circumstances

12. Following the creation of a joint venture with M&S Holdings Ltd, from 5 August 2019, Ocado Group plc no longer carries out the retail supply of Groceries in the United Kingdom and those activities are now carried out independently of Ocado Group plc by Ocado Retail Ltd. As a result of this re-structure, the CMA considers that there is a reasonable prospect of finding that a change of circumstances has occurred for the following reasons:
- Ocado Group plc no longer meets the turnover threshold of £1bn in retail supply of groceries in the UK, as it and its subsidiaries no longer retail groceries in the UK
  - Ocado Retail Ltd has ceased to be a subsidiary, as defined by s1159 of the Companies Act 2006 of Ocado Group plc. Hence Ocado Group plc no longer has sole control over the operations of Ocado Retail Ltd and cannot procure that Ocado Retail Ltd comply with the terms of the Order.
  - Ocado Retail Ltd has now been designated in its own right for the purposes of the Order.
13. Should a change of circumstances be found, the CMA proposes only to de-designate Ocado Group plc. All other existing designated retailers will be unaffected and remain designated.

## Prioritisation principles

14. In order to make the best use of its resources, the CMA needs to ensure that it makes appropriate decisions about which projects and programmes of work are undertaken across all areas of responsibility. The CMA has assessed the information available in relation to the Order in reaching its decision in the light of its published prioritisation principles. These principles are strategic significance, impact, risk and resources. We consider each of these in turn.
15. **Strategic significance:** The CMA considers this review to represent a strategic priority, as part of its overall obligation to keep remedies under review. In addition, groceries remains a significant market for UK consumers

and the CMA has carried out most recently in September 2019 to ensure the list of Designated Retailers is accurate and hence that the Order is effective in fulfilling its purpose. The CMA considers the updating of the list of designated retailers to be necessary in delivering benefits for consumers and for removing unnecessary constraints on business.

16. **Impact:** Ensuring that regulatory measures effectively address market problems generates benefits for customers. In addition, because Ocado Group plc is no longer able to oversee compliance with the Order on the part of Ocado Retail Ltd, we consider that de-designating Ocado Group plc will have a positive impact on business through removing an unnecessary regulatory obligation.
17. **Risk:** We consider that there is relatively low risk in reviewing the Order for this purpose, and we have highlighted that this review will not be expanded to consider additional items.
18. **Resource:** The CMA considers that conducting the proposed limited-scope review of the Order would involve a modest amount of resource during the next few months. Moreover, the CMA notes that the removal of remedies that are no longer appropriate allows the CMA to focus its resources on monitoring remedies that continue to generate benefit for consumers and the UK economy.

## **Decision to review Ocado Group plc's designation under the Order**

19. The evidence currently available to the CMA indicates a realistic prospect of finding a change of circumstances relevant to Ocado Group plc's designation under the Order. The CMA has assessed the proposed limited-scope review of this Order against its published prioritisation criteria and decided to launch a review, specifically in relation to whether Ocado Group plc should be de-designated.
20. In line with the CMA's Guidance on remedies reviews,<sup>8</sup> the provisional and final decisions in this review will be made by a group of independent [CMA Panel Members](#). Once the group is appointed we will publish on our case page an administrative timetable for the review.

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<sup>8</sup> The process the CMA follows during a review of an existing remedy is described in the [CMA's guidance](#) on its website.

## Stakeholder views

21. We are keen to receive relevant evidence from interested parties to help us carry out this review. This will help us reach a conclusion on whether there has been a relevant change in circumstances, such that Ocado Group plc should be de-designated.
22. Responses should be sent to the following address and should arrive at the CMA by 5pm on 31 October 2019.

Email: [remedies.reviews@cma.gsi.gov.uk](mailto:remedies.reviews@cma.gsi.gov.uk)

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