

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

Provisional decision

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The Competition and Markets Authority has excluded from this published version of the market study report information which it considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [X]. [Some numbers have been replaced by a range. These are shown in square brackets.] [Non-sensitive wording is also indicated in square brackets.]

Members of the Competition and Markets Authority who are conducting this review:

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Summary

1. The Competition Commission (CC) published its final report on the Market Investigation into the supply of groceries in the UK on 30 April 2008.¹ 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 the first of these concerns, the CC implemented the Groceries (Supply Chain Practices) Market Investigation Order 2009 (the Order). The Order listed, at Schedule 2, the initial ten groceries retailers to whom the Order applied. Subsequently, in November 2018, two further retailers were designated, including Ocado Group plc.²
2. 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 such that it no longer meets the £1bn turnover threshold for designation under the Order and nor does it have sole control over the Ocado entity which does meet the threshold. The retail activities are now carried out by Ocado Retail Ltd and on 16 October 2019, the CMA designated Ocado Retail Ltd under the Order.
3. Following that designation, the CMA launched this review to determine whether Ocado Group plc should cease to be a designated retailer under the Order. This review does not address any other matter relating to the Order.

¹ See [CMA webpage on the CC Market Investigation](#)

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

4. The [launch decision](#) invited comments from stakeholders on the substance of the review. Following consideration of responses to the launch decision, this document sets out our provisional decision. We have provisionally decided that the structural change undergone by Ocado in August 2019, and the subsequent designation of Ocado Retail Ltd constitutes a change of circumstance. We have provisionally decided that Ocado Group plc should be de-designated. We are now consulting on these provisional decisions and a draft Notice of De-designation which would give effect to this change.

Background

Legal framework

5. The CC published its final report on the market investigation into the supply of groceries in the UK on 30 April 2008.
6. The Order forms part of the CC's remedies for addressing the exercise of buyer power by specifically designated grocery retailers.
7. Paragraph 18 of the [Explanatory Note](#) to the Order explains that requests for de-designation will be considered by the CMA under its statutory duty to keep its enforcement orders under review, that is through the formal remedy review process under s162 of the Enterprise Act 2002 (the Act).³
8. Section 162 of the Act requires the CMA to consider, from time to time, whether, by reason of any change in circumstance, an enforcement order is no longer appropriate and needs to be varied or revoked.
9. Pursuant to section 162 of the Act, the CMA is considering whether Ocado Group plc's designation under the Order remains appropriate in the light of its structural change and the subsequent designation of Ocado Retail Ltd. No other parts of the Order or other Designated Retailers are within the scope of this provisional decision.

The Order

10. The CC published its final report on the Market Investigation into the supply of groceries in the UK on 30 April 2008.⁴ 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 the first

³ As described in the guidance document CMA11.

⁴ See [CMA webpage on the CC Market Investigation](#)

of these concerns, the CC made the Order which addressed buyer power among grocery retailers.

11. Schedule 2 of the Order lists the Designated Retailers to whom the Order applied at the time it was created. From 4 August 2009, the following 10 retailers were designated:
 - Asda Stores Limited, a subsidiary of Wal-Mart Stores Inc
 - Co-operative Group Limited
 - Marks & Spencer plc
 - Wm Morrison Supermarkets plc
 - J Sainsbury plc
 - Tesco plc
 - Waitrose Limited, a subsidiary of John Lewis plc
 - Aldi Stores Limited
 - Iceland Foods Limited, a subsidiary of the Big Food Group
 - Lidl UK GmbH
12. Article 4(1)(b) of the Order also provides for additional retailers to be designated where they have a turnover exceeding £1 billion with respect to the retail supply of Groceries in the United Kingdom. Article 4(1)(c) of the Order provides for additional persons to be designated where they carry on the whole, or a substantial part, of a retailer falling within Article 4(1)(b). In practice, this includes legal persons who control such retailers.
13. In November 2018, the CMA, having taken over the functions previously ascribed to the OFT, designated Ocado Group plc under the Order.

The corporate restructuring and the de-designation of Ocado Group plc

14. Pursuant to a corporate restructuring, Ocado Holdings Limited has established a 50/50 joint venture with Marks & Spencer Holdings Limited called Ocado Retail Limited. This is the exclusive vehicle by which the Ocado group of companies now makes retail sales of groceries in the UK. As part of this corporate restructuring, all of Ocado's UK retail groceries business was transferred from Ocado Group plc to Ocado Retail Limited.
15. Ocado Retail Ltd now carries on the whole of the retail groceries business formerly carried on by Ocado Group plc. The CMA therefore, on 16 October 2019, published a [Notice of Designation to Ocado Retail Ltd](#). This states that, by virtue of Articles 4(1)(b) and 4(1)(c) of the Order, Ocado Retail Ltd is a Designated Retailer as defined in Article 2 of the Order and is required to comply with the Order and the Code.

16. Ocado Group plc, which is the subject of this de-designation decision, no longer makes any grocery retail sales in the UK and nor does it carry on the whole, or a substantial part, of Ocado Retail Limited within the meaning of Article 4(1)(c) of the Order. In particular, Ocado Retail Ltd has ceased to be a subsidiary, as defined by s1159 of the Companies Act 2006, of Ocado Group plc such that Ocado Group plc no longer has sole control over the operations of Ocado Retail Ltd

Stakeholder views

17. The CMA published its [launch decision](#) on 16 October 2019 in which it sought views from stakeholders on the substance of the review. We received one response, from a trade association on behalf of its members, which supported Ocado Group plc's designation being revoked on the basis that: (a) Ocado Group plc no longer makes grocery sales; (b) Ocado Retail Limited is the relevant Ocado entity which makes the sales; and (c) Ocado Retail Limited is designated under the Order.

Change in circumstance

18. We have explored whether the creation of a joint venture with M&S Holdings Ltd and the consequent ceasing of the relevant activities by Ocado Group plc constitutes a change in circumstance for the purposes of s162 of the Act.
19. 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 provisionally finds that a change in circumstance 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; and
 - Ocado Retail Ltd is now designated in its own right for the purposes of the Order.

20. Consequently, we provisionally conclude that none of the designation criteria in Article 4(1) of the Order apply to Ocado Group plc and that Ocado Group plc should therefore be de-designated.

Proposed action

21. Having provisionally found a relevant change of circumstance, and provisionally found that Ocado Group plc should be de-designated, we consider it appropriate to issue a Notice of De-designation to Ocado Group plc.

Provisional decision

22. We have provisionally concluded that the creation of a joint venture with M&S Holdings Ltd, the consequent ceasing of the relevant activities by Ocado Group plc and the subsequent designation of Ocado Retail Ltd constitutes a change of circumstance for the purposes of s162 of the Act. Consequently, our provisional decision is that it is appropriate to de-designate Ocado Group plc.
23. In giving effect to this de-designation, we have also considered the desirability of ensuring that suppliers, and as a consequence consumers, are properly protected and also avoiding unnecessary regulatory burden on businesses. We are satisfied that, following the designation of Ocado Retail Ltd, the supplier relationships which were previously held by Ocado Group plc remain protected. We are also mindful that, in light of the information provided, were Ocado Group plc to remain designated it would be subject to a regulatory compliance burden that it cannot fulfil and for which it no longer qualifies.

Notice of intention to de-designate Ocado Group plc

24. We hereby give notice of our intention to de-designate Ocado Group plc.

Consultation on the CMA's provisional decision

25. The CMA is now consulting on this provisional decision, its intention to de-designate Ocado Group plc, as set out above, and on a Notice of De-designation which is published alongside this provisional decision.
26. Responses to this consultation, including supporting evidence where appropriate, should be sent to the following address and should arrive at the CMA by **5pm on Tuesday 24 December 2019**. Following this consultation, the CMA will consider the responses received and assess the evidence and views presented before reaching and then publishing its final decision.

Email: remedies.reviews@cma.gov.uk

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