

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

Final decision

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Members of the Competition and Markets Authority who conducted this review:

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Contents

	<i>Page</i>
Summary	1
Background	2
Legal framework	2
The Order	3
The corporate restructuring and the de-designation of Ocado Group plc	4
Stakeholder views	4
Change in circumstance	4
Action to be taken	5
Final decision	5

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 Limited, 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 Limited and on 16 October 2019, the CMA designated Ocado Retail Limited 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 has not addressed any other matter relating to the Order.

The [launch decision](#) invited comments from stakeholders on the subject of the review. Following consideration of responses to the launch decision, a

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

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

[Provisional Decision to de-designate Ocado Group plc and a draft Notice of De-designation](#) was published for consultation on 21 November 2019. The CMA's consultation period expired on 24 December 2019. No responses to the consultation were received and this document sets out our final decision, which is that the following changes of circumstance have taken place:

- 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 Limited 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 Limited and cannot procure that Ocado Retail Limited comply with the terms of the Order; and
 - Ocado Retail Limited is now designated in its own right for the purposes of the Order.
4. Our final decision is that Ocado Group plc should be de-designated. A [Notice of De-designation](#) which gives effect to this change has been published alongside this decision document.

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.

³ As described in the guidance document CMA11.

9. Pursuant to section 162 of the Act, the CMA has considered 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 Limited. No other parts of the Order or other Designated Retailers are within the scope of this 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 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

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

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 Limited 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 Limited](#). This states that, by virtue of Articles 4(1)(b) and 4(1)(c) of the Order, Ocado Retail Limited 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 Limited 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 Limited

Stakeholder views

17. The CMA published its [Provisional Decision](#) and a consultation draft Notice of De-designation on 21 November 2019. The consultation period closed on 24 December 2019. The CMA received no responses.

Change in circumstance

18. We have explored whether the creation of a joint venture with M&S Holdings Limited and the consequent ceasing of the relevant activities by Ocado Group plc constituted 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 Limited. As a result of this re-structure, the CMA has found the following changes in circumstance:
- 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 Limited 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 Limited and cannot procure that Ocado Retail Limited comply with the terms of the Order; and
 - Ocado Retail Limited is now designated in its own right for the purposes of the Order.
20. We 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.

Action to be taken

21. Having found a relevant change of circumstance, and found that Ocado Group plc should be de-designated, we have today issued a Notice of De-designation to Ocado Group plc.

Final decision

22. We have concluded that the following constitutes a change of circumstance for the purposes of s162 of the Act:
- 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 Limited 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 Limited and cannot procure that Ocado Retail Limited comply with the terms of the Order; and
 - Ocado Retail Limited is now designated in its own right for the purposes of the Order.

23. Our final decision is to de-designate Ocado Group plc.
24. 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 Limited, 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.
25. Alongside this decision document, we have published a [Notice of De-designation](#) to Ocado Group plc.