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8 June 2020

Dear Sir/Madam

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

We have considered the Consultation Document dated 13 March 2020 and set out our response below. This letter is being written on behalf of Asda Stores Limited and should be taken as being Asda's full response to the Consultation Document.

We note that the consultation period has been extended to 8 June 2020 and we are grateful for the opportunity to be able to respond within that time.

We will cover the specific questions posed and the other matters raised in the Consultation Document, setting out our general observations about the process using the headings in the Consultation Document and based on our experiences of this process.

**Description of the new software**

We note that the CMA has created its own software to calculate the travel time between two specific points, accounting for traffic flow speed and legal speed limits, to replace the isochrones method used to date.

We are broadly supportive of the proposed point to point approach because it removes some of the discrepancies seen with isochrones. For example, currently the CMA considers stores up to 100m outside the isochrones so in that respect this new method provides greater certainty, which is welcomed.

However, we are concerned that the new software is not being made publicly available which will make it difficult for businesses to run like for like tests and which could lead to uncertainty. This is also an issue with the current process and we have experienced problems checking the CMA's application of this test. A test that can be replicated makes it easier for businesses to engage and work with the CMA and would support the CMA's stated intention of greater transparency and certainty in this process. The ability to accurately replicate the CMA's test may also preserve the CMA's resources; if retailers can accurately predict the CMA's outcomes, they may be more confident in their application of the test and have less need to consult the CMA. In light of that we invite the CMA to share its software with businesses or, as an alternative, share the methodology and assumptions used by the new software to enable third parties to recreate the CMA's application of the test.

Finally on this point, Schedule 4 of the CLO refers to the CMA constructing isochrones and we question whether the CMA is permitted by law to dispense with this prescribed method. It is not clear from the Consultation Document whether an amendment to the CLO has been or will be considered if the proposals are implemented. To avoid legal uncertainty, we would prefer that any necessary amendments to the CLO are made to ensure the CMA's procedures guidance and decisions taken pursuant to the Schedule 4 test are on a sound legal footing.

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

It is noted that the CMA's new software uses the HERE dataset and that the CMA will continue to use the Geolytix database to assess the range of retailers locally. In view of the new software tool not being made publically available the Consultation Document invites business to use the HERE and Geolytix datasets to run equivalent tests.

While some of the data being used for the new software may be available from HERE and Geolytix, the software is not so we won't know how the software will analyse the data and what assumptions will be used. Publically available software would avoid this uncertainty.

### **Outputs for test applicants**

We note from the proposal that test applicants and those benefitting from restrictions will receive from the CMA a table detailing the drive times from specific points to grocery stores listed on Geolytix. This, combined with the data from the HERE and Geolytix sources, it is claimed in the Consultation Document, will provide a high degree of transparency regarding the CMA's methodology.

We dispute that this proposed approach will achieve that aim. We note that the CMA does not intend to share either the net sales area of sites used to define those sites as being Mid-sized or Larger Grocery Stores or the grocery sales area data. That information is not contained in the HERE or Geolytix databases, or at least in a form that aligns with the CMA's definition, and without it businesses are unable to replicate the CMA's test. We believe that net sales area and grocery sales area information should be shared along with the CMA's preliminary decision to enable businesses to properly perform the test.

### **Traffic Conditions**

The Consultation Document proposes to use the HERE drive times used by the CMA's internal software. These times are based on average times calculated from historical data of real time traffic conditions across the day accounting for legal speed limits. They are designed to represent an achievable travel time. The new proposals do not reflect drive times at different times or specify travel on a particular day, which is currently the case (11am and 4pm on Saturdays).

The Consultation Document does not specify what is meant by "*average traffic conditions across the day*" and whether this includes night hours when stores may not be open or, if they are open, are likely to be much quieter. It is not clear over what period such an average has been calculated and at what times of day. A simple average may not reflect the true conditions when customers typically shop. This could mean the test result includes stores that are too far away to be within the 10 minute drive time during busier times and, therefore, distort the results to include stores that are not within a reasonable 10 minute drive during typical shopping hours.

### Assessing entrances and exits

Instead of assessing all entrances to and exits from sites, the Consultation Document proposes to focus on a single entrance to each site as the basis of its test.

We are broadly in favour of this approach which simplifies the process and removes doubt about whether an entire scheme would fail the test if one of a number of entrances failed but the others passed. However, clarity and guidance would be welcomed to assist with the following:

- (a) Whether businesses are expected to identify and justify the most significant single entrance to a burdened site / most frequently used entrance to a benefitted store or whether the CMA will do that;
- (b) If the CMA will define the most significant single entrance to a burdened site / most frequently used entrance to a benefitted store, how will it do so, particularly if its definition is different from that provided by the business?;
- (c) What criteria should businesses use to identify the most significant single entrance to a burdened site / most frequently used entrance to a benefitted store, particularly in cases where new, proposed access points are not yet being used?;
- (d) Paragraph 3.14 of the Consultation Document defines the single access point as the “*most significant pedestrian or road entrance to the site*” for burdened sites and “*the most frequently used entrance or exit to the specific store itself*” for benefitted sites and it is not clear why these definitions are different for the burdened site and the benefitted site;
- (e) There is inconsistency in the definition of the most significant single entrance of a burdened site: paragraph 3.14 of the Consultation document defines it as the “*most significant pedestrian or road entrance to the site*” whilst paragraph 11 of the Proposed Procedures Guidance defines it as the “*main public road entry point of the burdened site*”.

### Consulting on provisional test results

We note the proposal to consult on all provisional decisions for one month and have no comment on that.

### Register of test results

The proposal to introduce a register of test results is noted. While it is appreciated that the names of the test applicants will not be published, the same assurance is not given in respect of the party that benefits from the restriction. In addition, the benefits of such a register have not been set out, over and above transparency. The Existing Procedures Guidance notes that there is no public register because the decisions are confidential and the Consultation Document has not stated what has changed to prompt this significantly different approach.

More clarity is required about for how long historic decisions would be maintained on such a register and the amount of details that will be included about the application and the decision. A public register will only reveal the circumstances of the decision at a given time and would not reflect

changes in the size of the relevant store(s) over time. For example, a decision may be rendered incorrect if a store's net sales area reduces in the future.

Given that the party that benefits from the restriction could be named in (or, at least, easily identified from) the test register, we would prefer confidentiality to remain in order to avoid the adverse risk to reputation associated with the publication of test results.

**Other points to note**

In addition to the above we would also like to comment, as follows:

1. The CMA has recently recognised the rise of retailers such as Aldi and Lidl . Firstly, the CMA took these retailers into account when assessing the Sainsbury's/Asda proposed merger, concluding that Aldi and Lidl are now "*an important presence in the market*". Additionally, the CMA subjects these retailers to the same obligations as the seven Large Grocery Retailers to treat suppliers fairly under GSCOP. It is not clear therefore why retailers such as Aldi and Lidl should continue to be excluded from the CLO given they are "*a clear competitive focus*" for the Large Grocery Retailers.
2. Related to this, the CLO Schedule 4 test excludes Mid-sized Grocery Stores when calculating the number of retailers around Large Grocery Stores and their respective market share based on grocery sales area. As part of its assessment of the Sainsbury's/Asda proposed merger the CMA recognised that Mid-sized Grocery Stores (including those operated by Aldi and Lidl) are one of the "*strongest constraints*" on Large Grocery Stores and Mid-sized Grocery Stores operated by Large Grocery Retailers, albeit a lesser constraint than Large Grocery Stores. As such, we believe that account needs to be taken of the impact of Mid-sized Grocery Stores (including those operated by Aldi and Lidl), even if by using a lower weighting.

Overall we welcome steps that will reduce discrepancies between multiple test results by providing more clarity about the methodology and that will provide more openness and transparency in the testing process. We are sure that businesses will appreciate more certainty with this process and we look forward to working with you to help achieve that.

We look forward to hearing from you with the outcome of this consultation. If you need any further clarification or would like to discuss the points made in this response then please contact the writer.

Helen Selby  
**General Counsel**  
**ASDA Stores Limited**