

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

Interim Update to the CMA's Procedures Guidance
Consultation

27 November 2020

CMA131con

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1. Interim Update from the CMA regarding its procedures guidance consultation

- 1.1 The *Procedure for Dealing with Requests to Carry Out the Test in Schedule 4 to the Groceries Market Investigation (Controlled Land) Order 2010* (procedures guidance) describes how the Competition and Markets Authority (CMA) deals with requests for advice on the removal of restrictions of the use of the land known as Restrictive Covenants or Exclusivity Arrangements (collectively referred to in this document as ‘burdens’) as defined in Schedule 4 of the [Groceries Market Investigation \(Controlled Land\) Order 2010](#) (Order).
- 1.2 From 13 March 2020 to 8 June 2020, the CMA consulted on proposed changes to the procedure for applying the test for the removal of burdens (the Test). The purpose of the proposed changes was to improve the clarity of the CMA’s Test procedures.
- 1.3 Views were sought on the use of the CMA’s internally developed software tool within the Test to calculate the travel times between specific points. This tool was described in paragraphs 3.2 to 3.4 of the CMA’s [consultation document](#).
- 1.4 During ongoing testing of the CMA’s internally developed software tool, the CMA identified an issue with the results that are produced by it. We are investigating this issue further to ensure that it is fully resolved before the tool is used operationally. Consequently, and while this work takes place, we have decided to delay the implementation of this tool.
- 1.5 One consequence of this is that we will also delay the introduction of the revised procedures guidance relating to this tool. We will publish our revised procedures guidance along with an update of our plans regarding the tool **by 31 March 2021**.
- 1.6 In the interim, we intend to introduce a number of other changes to our existing Test procedures that commanded broad support in consultation. These changes are not associated with the software tool. These are as follows:
 - (a) to simplify the procedure for calculating travel times by using the single main entrance of a site or building rather than assessing all public entrances and exits of the burdened sites and competing stores;
 - (b) to consult for one calendar month on all provisional Test decisions; and
 - (c) to introduce the new register of Test decisions which would record the restrictions which have been removed and those remaining in place.

- 1.7 These changes have been implemented in '*Procedure for Dealing with Requests to Carry Out the Test in Schedule 4 to the Groceries Market Investigation (Controlled Land) Order 2010 - Interim Update to its Procedures Guidance following the CMA's 2020 Consultation*' published on Friday 27 November 2020. This revised guidance document now supersedes the CMA's procedures guidance published in August 2010. None of the changes in the revised guidance affect the validity of the test described in Schedule 4 of the Order.

2. Issues raised during the consultation and the CMA's response

- 2.1 The CMA's consultation set out three questions on which respondents' views were sought:
- (a) the simplification of the Test procedure including:
 - (i) using the single main entrance of a site or building,
 - (ii) using a single average time of day for the travel time calculation;
 - (b) the proposed changes to the consultation procedures on provisional Test decisions; and
 - (c) the proposed new register of Test decisions which would record the restrictions which have been removed and those remaining in place.
- 2.2 This section is intended to summarise the key issues raised by the responses and the CMA's views on these key issues. This section is not intended to be a comprehensive record of all views expressed by respondents. This document should be read in conjunction with the procedures guidance consultation document, which contains further background and an explanation of the revised guidance.
- 2.3 The CMA received four written responses to the consultation. The list of respondents is at Appendix A, and non-confidential versions of all submissions are available on the [consultation page](#).
- 2.4 Respondents were broadly supportive of CMA's changes to simplify the Test procedure and requested clarity in certain areas. Summaries of responses are set out below, together with the CMA's views. We have taken into account requests for clarification in the guidance.

Use of the single main entrance of a site or a building in Test procedures

- 2.5 The CMA's previous procedures involved assessing all public entrances and exits of all burdened sites (the 'burdened site' refers to the site which benefits from the restriction in a land agreement) and competing stores, creating multiple test results, and the possibility for discrepancies. In the consultation, we sought views on the simplification of the Test by using a single main entrance of a site or building in its procedures when calculating travel times.

Respondents' views

- 2.6 Three out of the four respondents were supportive of this proposed change and the fourth respondent did not raise any opposing views to this proposed

change. All four respondents asked for further clarity on what is meant by the single main entrance and how the CMA will determine what the main entrance is.

CMA's view

- 2.7 As part of its Test procedures, the CMA will request that the grocery retailer benefitting from the restriction provides co-ordinates for the existing single main entrance to each of the relevant grocery stores in question. The single main entrance is the entry point which has the greatest footfall figures, i.e. the entry point to a store which is used by the highest number of people over a given time period.
- 2.8 When conducting the Test, an applicant may wish to submit the co-ordinates for the main entrance to each of the relevant grocery stores benefitting from the burden. The CMA will consider the points provided by the applicant and the grocery retailer. If there is a discrepancy, the CMA will determine the main entrance point to use as part of the Test based on the evidence provided. We have made this clear in the revised guidance.

Use of a single average time of day for the travel time calculation

- 2.9 The CMA's previous procedures referred to the use of traffic conditions on one specific day and at two times of day, namely 11am and 4pm on Saturday which led to possible discrepancies in results. In the consultation, we sought views on the use of the CMA's internal tool to use travel times which are based on average traffic conditions across the day.

Respondents' views

- 2.10 All respondents expressed concern with the CMA's proposal to use an average travel time calculation in its test procedures. The main concern is that not all stores are open for 24 hours and so the average travel time calculations should be restricted. Some respondents asked for further detail on how the travel times are calculated and one respondent suggested the hours should be restricted to 8am to 8pm.

CMA's view

- 2.11 It was envisaged that via the CMA's internally developed tool, we would use travel times which are based on average traffic conditions across the day in Test procedures. However, as we have delayed the implementation of the CMA's internal tool within its Test procedures, we will not be introducing this proposed change to use an average travel time calculation at this stage. In the interim, we will continue to follow the existing procedure where traffic conditions at two times of day on one specific day are used, namely 11am

and 4pm on Saturday.

Consultation procedures on provisional Test decisions

- 2.12 The CMA sought views on whether it should consult on its provisional Test decisions for one month in all cases. All respondents were either supportive of this change or did not raise any opposing views in their response.

New register of Test decisions

- 2.13 The CMA sought views on the creation of a public register of Test outcomes so that the details of restrictions which have been removed and those remaining in place can be made public.

Respondents' views

- 2.14 Two respondents expressed concern with this proposed change. The third respondent said that they had no concerns with the CMA's approach here and asked for further detail on what information would be included within the public register. The fourth respondent did not raise any opposing views.

CMA's view

- 2.15 The public register would only include the area where the Test was conducted, the grocery retailer and the grocery store(s) that benefit from the restriction and the outcome of the Test. The applicant's details would be anonymised. We believe that it is important to create the register to introduce greater transparency to the Test results and also to ensure that prospective applicants are aware of the areas where the CMA has previously conducted the Test. We do not believe that creating the register would create a deterrent as the applicant's details would not be published in the register.

CMA's internal software

- 2.16 Respondents requested that the CMA should share the methodology and assumptions used by the CMA's internally developed software tool in order to enable retailers and prospective applicants to undertake the analysis conducted as part of its Test procedures.
- 2.17 With our update in March 2021, we will be able to provide further clarity on the software, and the underlying data that will be used within the CMA's Test procedures in future.

Appendix A: List of respondents to the consultation on the draft revised procedures guidance

Tesco

Sainsbury's

Asda

Vivienne Robinson: Competition Law Services