

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

Draft for consultation

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## **PROCEDURE FOR DEALING WITH REQUESTS TO CARRY OUT THE TEST IN SCHEDULE 4 TO THE GROCERIES MARKET INVESTIGATION (CONTROLLED LAND) ORDER 2010**

### **Introduction**

1. These procedures provide an overview of how the Competition and Markets Authority (CMA) deals with requests for advice on removal of restrictions in Restrictive Covenants and Exclusivity Arrangements as defined in the [Groceries Market Investigation \(Controlled Land\) Order 2010](#) ('the Order') (collectively referred to in this document as 'burdens'). It is not a substitute for the Order and it is not part of the Order.
2. The objective of this guidance is to provide transparency to test applicants and those benefitting from restrictions on how the CMA administers the test in Schedule 4 of the Order.
3. Nothing in this procedures guidance is legally binding. In the event of a conflict between this guidance and any provision of the Order, the Order shall prevail.
4. Any words or expressions used in this guidance shall, unless otherwise defined herein and/or the context otherwise requires, have the same meaning as in the Order.
5. The CMA confirms that it will have regard to the relevant provisions of Part 9 of the Enterprise Act 2002 (EA2002) in handling the information it obtains in dealing with applications to run the Test.

### **Application to run the Test**

6. An application (as per Article 4(4) or Article 7(3) of the Order) to run the Test (as described in Schedule 4 to the Order) should contain the following information:
  - (i) name and full address of the owner of the burdened site;

- (ii) the latitude and longitude points<sup>1</sup> of the main public road entry point of the burdened site. The burdened site refers to the site which is the subject of a Restrictive Covenant or an Exclusivity Arrangement as defined in the Order;
  - (iii) an electronic map of the burdened site showing clearly the main public road entry point of the burdened site;
  - (iv) a copy of the whole of the Restrictive Covenant or Exclusivity Arrangement showing the burden;
  - (v) the dates the Restrictive Covenant or Exclusivity Arrangement runs from and to;
  - (vi) the name of the Large Grocery Retailer<sup>2</sup> in whose favour the burden exists; and
  - (vii) details of any previous applications to either the Office of Fair Trading or the CMA to run the Test in relation to the specific burdened site.
7. The CMA will check that it has received all relevant information and that the data provided by the applicant is accurate before proceeding with the Test.
8. The CMA will reject the request to run the Test unless one of the Large Grocery Retailers designated under Article 3 of the Order (and any associated businesses of any of these companies as described in Schedule 1 to the Order) has the benefit of the Restrictive Covenant or Exclusivity Arrangement.
9. If the burden is a Restrictive Covenant which was entered into before 10 August 2010, the CMA will check whether the site/premises is listed in any of Schedules 2a, 2b, 3a or 3b to the Order. If it is, the CMA will not apply the Test and will advise the applicant as appropriate.
10. If the burden is an Exclusivity Arrangement, the CMA will check whether it is an existing one falling within Article 7 of the Order, or a new one falling within Article 8 of the Order. If it is a new one, and the exceptions in Articles 9 and 10 of the Order do not apply, the applicant should be advised that the arrangement should be ended or the duration of the exclusivity should be reduced to five years or less. In these circumstances the Test will not be carried out. If the burden is an existing Exclusivity Arrangement, and the

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<sup>1</sup> The latitude and longitude points can be found on the UK Grid Reference Finder's website (<https://gridreferencefinder.com/>)

<sup>2</sup> An up to date list of designated Large Grocery Retailers can be found on gov.uk <https://www.gov.uk/government/publications/groceries-market-investigation-controlled-land-order-2010>

exceptions in Articles 9 and 10 of the Order do not apply, the Test will be carried out.

## Running the Test

11. The Test consists of identifying whether there are any Larger Grocery Stores or Mid-sized Grocery Stores owned or controlled by the Large Grocery Retailer (or a company under common control or ownership) (together 'Associated Grocery Store') within a 10-minute drive time from the main public road entry point of the burdened site (see Article 1 i to iii of Schedule 4 of the Order). If there are no Associated Grocery Stores located within a 10-minute drive-time from the main public road entry point of the burdened site which benefits from the Restrictive Covenant or Exclusivity Arrangement, then the Test is passed.
12. If one or more Associated Grocery Stores are identified within a 10-minute drive time from the main public road entry point of the burdened site, then the next step of the Test is to identify the number of competing Fascias which operate within a 10-minute drive time of each of the Associated Grocery Stores identified (see Article 1 iv – vii of Schedule 4 of the Order). A Fascia refers to the trading name under which a Grocery Retailer operates a Grocery Store.
13. In order to conduct the stages of the test described in paragraphs 11 and 12 above, the CMA will use an internally developed software tool known as 'Callisto'. This tool calculates drive times between pairs of points, using the HERE API dataset.
14. HERE's routing estimations rely on historical data of real time traffic (flow speed) and legal speed limits. This considers average traffic conditions across the day when computing travel times, and consequently it is a representation of a travel time that should be achievable on average. Should the CMA need to change the data source used, an update will be published to gov.uk.
15. To identify (i) whether there are Associated Grocery Stores within a 10 minute drive time from the main public road entry point of the burdened site and (ii) to identify the number of competing Fascias which operate within a 10-minute drive time of any of the Associated Grocery Stores identified, the CMA will use Geolytix's<sup>3</sup> database of Grocery Stores in the UK.
16. The size of Net Sales Areas and Groceries Sales Areas (in square metres) for Grocery Stores (as referred to in Articles 1 vi, vii and xi of Schedule 4 of the

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<sup>3</sup> Geolytix database of Grocery Stores - <https://geolytix.co.uk/#geodata>

Order) is not publicly available information. For the purposes of calculating the market shares as required, the CMA will seek this information directly from the relevant Grocery stores.

17. The Test is passed if the burdened site meets the relevant conditions as outlined in Schedule 4 of the Order (either Article 1iii, Article 1 vi (a), Article 1 vi (b)(2), Article 1 bii (a) or Article 1vii (b)(2)). Should the burdened site not meet these conditions, then the Test is failed.

### ***Provisional Decision***

18. Once the Test is conducted, the CMA will write to test applicants and the Grocery Retailer benefitting from the burden with its provisional decision. The applicant and the Grocery Retailer benefitting from restrictions will be provided with:
  - (a) a table detailing the drive times from the main burdened site to the Associated Grocery Stores within a 10-minute drive time;
  - (b) if relevant, a table detailing the drive times from each Associated Grocery Store identified and the competing Fascias within a 10-minute drive time; and
  - (c) a short-written explanation of the CMA's provisional decision.
19. The CMA's software tool is not available for external use. However, third parties are able to use the HERE API at <https://www.here.com/> and the Geolytix database at <https://www.geolytix.co.uk/> to conduct an equivalent test and obtain similar results. These websites are both publicly available.
20. The applicant will not be given any data on shares of Grocery Sales Areas; there will only be a statement on whether or not the market share threshold has been exceeded, and only then if the market share test has been applied.
21. The applicant and the Grocery Retailer benefitting from the burden will have one calendar month to write to the CMA with their comments on the provisional decision.

### ***Final Decision***

22. The decision will be regarded as final if the CMA hears nothing from the applicant nor the Grocery Retailer benefitting from the burden within one month of issuing its provisional decision.

23. The CMA will consider any comments made on the decision received within one calendar month of the provisional decision being made. The CMA will make necessary further enquiries and either reaffirm its original decision or make a new one, providing a short-written explanation. The CMA will provide any further information that it is able to on such reaffirmation or new decision.
24. Applicants may not apply to have a Test re-run if the result is borderline. Only in exceptional circumstances would the CMA consider re-running a Test. In such instances, the applicant must be able to demonstrate that there is firm documentary evidence that the number of competing fascias in any Relevant Isochrone has fallen below four and/or the market share of the Grocery Retailer in whose favour the burden operates occupies rises to 60 per cent or more of the total Groceries Sales Area occupied by all relevant Grocery Stores in any Relevant Isochrone.

### ***Public register of decisions***

25. All test outcomes will be included in a publicly available register, in line with the CMA's broader commitment to transparency of its work. The CMA does not intend to publish the names of test applicants as part of this register.

### ***Enquiries about these procedures***

26. Enquiries should be directed to:

Remedies Monitoring Team  
The Cabot (B8.03)  
25 Cabot Square  
London  
E14 4QZ

Email: [RemediesMonitoringTeam@cma.gov.uk](mailto:RemediesMonitoringTeam@cma.gov.uk)