

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

**Update to its Procedures Guidance following the CMA's
2020 Consultation**

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NOTICE

- 1.1 From 13 March 2020 to 8 June 2020, the Competition and Markets Authority (CMA) consulted (the Consultation) on proposed changes to the procedure for applying the Restrictive Covenants and Exclusivity Arrangements Test (the Test) as set out in Schedule 4 to the [Groceries Market Investigation \(Controlled Land\) Order 2010](#) (the Order). The purpose of the proposed changes was to improve the clarity of the CMA's test procedures.
- 1.2 Responses to the Consultation were broadly supportive of a number of proposed changes to the existing Test procedure which have now been implemented. 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.
- 1.3 These changes have been implemented and are included in the CMA's revised guidance: '*Procedure for Dealing with Requests to Carry Out the Test in Schedule 4 to the Groceries Market Investigation (Controlled Land) Order 2010 - Update to its Procedures Guidance following the CMA's 2020 Consultation*' (the Revised Guidance). The Revised Guidance supersedes the CMA's August 2010 procedures guidance. None of the changes in the Revised Guidance affect the validity of the test described in Schedule 4 of the Order.
- 1.4 The changes can be found at the paragraphs noted below:
- (a) paragraphs 6iii, 23 and 24 of the Revised Guidance outline the process 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) paragraph 28 of the Revised Guidance outlines that the CMA will consult for one calendar month on all provisional test decisions; and
 - (c) paragraph 34 of the Revised Guidance explains that test outcomes will be recorded in a register of test decisions.

Remedies Monitoring and Enforcement Team
30 March 2021

**PROCEDURE FOR DEALING WITH REQUESTS TO CARRY OUT
THE TEST IN SCHEDULE 4 TO THE GROCERIES MARKET
INVESTIGATION (CONTROLLED LAND) ORDER 2010
UPDATE TO ITS PROCEDURES GUIDANCE FOLLOWING THE
CMA'S 2020 CONSULTATION**

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 (collectively referred to in this document as 'burdens') as defined in the [Groceries Market Investigation \(Controlled Land\) Order 2010](#) (the Order). 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 for 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 post code and full address of the burdened site;
 - (iii) the latitude and longitude points¹ of the main entrance to 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. The main entrance to the burdened site is the most significant pedestrian or road entrance to the site itself, with greatest, typical or expected use. Where there is no building on the burdened site, the applicant should provide the main entrance to the burdened site from the public road network;
 - (iv) an electronic map of the burdened site with the main entrance of the burdened site clearly indicated;
 - (v) a copy of the whole of the Restrictive Covenant or Exclusivity Arrangement showing the burden;
 - (vi) the dates the Restrictive Covenant or Exclusivity Arrangement runs from and to;
 - (vii) the name of the Large Grocery Retailer² in whose favour the burden exists; and
 - (viii) 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. 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.
8. 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.
9. 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 or 10

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

² 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>

of the Order do not apply, the applicant will be advised that the arrangement should either 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 exceptions in Articles 9 and 10 of the Order do not apply, the Test will be carried out.

Running the Test

10. 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 entrance point of the burdened site (see Article 1 (i) to (iii) of Schedule 4 of the Order). To determine this, the CMA will construct a 10-minute drive time isochrone referred to in the Order and in these procedures as a 'Relevant Isochrone'.
11. If there are no Associated Grocery Stores located within a 10-minute drive-time from the main entrance point of the burdened site which benefits from the Restrictive Covenant or Exclusivity Arrangement, then the Test is passed. In the event that the Test is passed, the Large Grocery Retailer would not be required to remove the restriction.
12. If one or more Associated Grocery Stores are identified within a 10-minute drive time from the main entrance 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 Annex 3, 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. For each Relevant Isochrone centred on a Larger Grocery Store, if the total number of fascias, including the fascia of the Large Grocery Store benefitting from the burden, is four or more, then the Test is passed.
14. For each Relevant Isochrone where there are fewer than four Larger Grocery Store fascias, the CMA will need to determine whether the Large Grocery Retailer in whose favour the burden operates occupies 60 per cent or more of the total Groceries Sales Area occupied by all Larger Grocery Stores in that Relevant Isochrone:
 - (i) if it occupies less than 60 per cent, the Test is passed; and

- (ii) if it occupies 60 per cent or more the Test will be failed and the Large Grocery Retailer would be required to take action to remove the restriction.
- 15. For each Relevant Isochrone centred on a Mid-sized Grocery Store, if the total number of fascias of Large Grocery Stores and Mid-sized Grocery Stores within the Relevant Isochrone is four or more, then the Test is passed.
- 16. For each Relevant Isochrone centred on a Mid-sized Grocery Store where there are three or fewer Larger Grocery Store and Mid-sized Grocery Store fascias, the CMA will need to determine whether the Large Grocery Retailer in whose favour the burden operates occupies 60 per cent or more of the total Groceries Sales Area occupied by all Larger Grocery Stores and Mid-sized Grocery Stores in that Relevant Isochrone.
 - (i) If it occupies less than 60 per cent of the total of the Groceries Sales Area, the Test will be passed;
 - (ii) if it occupies 60 per cent or more, the Test will be failed and the Large Grocery Retailer will be required to take the action to remove the restriction.
- 17. In order to conduct the stages of the test described above, the CMA will construct a 10-minute drive time isochrone using the software described in Annex 2.
- 18. Should the CMA need to change the software used to construct an isochrone, an update will be published on gov.uk. In exceptional circumstances, if the CMA is unable to use the software described in Annex 2 and must use an alternate method, the CMA will communicate this to the applicant.
- 19. To identify (i) whether there are Associated Grocery Stores within a 10 minute drive time from the main entrance 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's³ database of Grocery Stores in the UK.
- 20. 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 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.

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

21. The Test is passed if the burdened site meets the relevant conditions as outlined in the paragraphs noted below:
- (i) Paragraph 11 (Article 1(iii) in Schedule 4 of the Order);
 - (ii) Paragraph 13 (Article 1(vi) (a) in Schedule 4 of the Order);
 - (iii) Paragraph 14 (i) (Article 1(vi) (b)(2) in Schedule 4 of the Order);
 - (iv) Paragraph 15 (Article 1(vii) (a) in Schedule 4 of the Order); and
 - (v) Paragraph 16 (i) (Article 1(vii) (b)(2) in Schedule 4 of the Order).
22. Should the burdened site not meet these relevant conditions, then the Test is failed. If the Test is failed, a Large Grocery Retailer would be required to take action to remove the restriction.

Use of a single main entrance

23. When conducting the test, the CMA will request that each of the retailers benefitting from the restriction provide the latitude and longitude points of the single main entrance to each of the relevant Grocery stores in question. The main entrance should be 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 certain time period.
24. As part of the application to run the test, the applicant may wish to submit the longitude and latitude points 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. In the event of any discrepancies, the CMA will determine the main entrance point as part of the test based on the evidence provided.

Measuring the net sales area and grocery sales area

25. The CMA requires all Large Grocery Retailers (as listed in Schedule 1 of the Order) with stores involved in the analysis of a test to provide the most up to date Net Sales Area and Groceries Sales Area figures in square metres. The figures provided should not be based on temporary nor seasonal reconfigurations. If there is any uncertainty regarding how the Net Sales Area and the Grocery Sales Area should be calculated, the Large Grocery Retailer should contact the CMA in the first instance to gain clarity. In general, please be aware of the following points:

- (a) Where one side is used for Grocery items and the other side for non-Grocery items (e.g. clothing, DIY products, pharmaceuticals, flowers), the groceries sales area provided should be measured from the mid-point of the relevant dividing aisle.
- (b) If the circulation space between aisles is between grocery and non-grocery aisles, this space should be divided between the grocery and non-grocery aisles.

Provisional Decision

- 26. Once the Test has been carried out, the CMA will write to Test applicants and the Large Grocery Retailer benefitting from the burden with its provisional decision. The applicant and the Large Grocery Retailer benefitting from restrictions will be provided with:
 - (a) electronic copies of any relevant maps in PDF form with a list of the locations of all relevant grocery stores in the Relevant Isochrones concerned;
 - (b) a short written explanation of the CMA's provisional decision.
- 27. 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.
- 28. The applicant and the Large Grocery Retailer benefitting from the burden will have one calendar month to write to the CMA with any representations on the provisional decision.
- 29. When submitting representations on provisional test decisions, please note that the CMA cannot consider stores which fall outside the boundary of a calculated isochrone. The CMA will also not accept any other drive-time calculations and will only use the drive-times calculated by the database stated in Annex 2 of this guidance. Representations from parties should focus on whether there is evidence to believe that there have been significant changes from the time the test was conducted which may have had a material impact on the test outcome. An example of a material change would be if there were changes to the road network since the time the test was conducted.

Final Decision

- 30. The CMA will consider any representations 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 reaffirmations or new decisions.

31. The CMA will confirm its provisional decision as final if the CMA receives no response from both the applicant and the Large Grocery Retailer benefitting from the burden within one month of issuing its provisional decision.

Re-running tests

32. The CMA does not expect to re-run tests recently carried out and will do so only in exceptional circumstances.
33. For the CMA to consider re-running a Test, an applicant must be able to demonstrate that there is clear evidence of a relevant change of circumstance in the area that would have a material impact on the outcome of the Test. The CMA will assess this information and determine whether it considers it appropriate to re-run the test in the particular circumstances. Where a Test is re-run, the Test procedure is as described in this guidance.

Public register of decisions

34. Some details of 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

35. Enquiries should be directed to: RemediesMonitoringTeam@cma.gov.uk

Annex 1: Definitions

Large Grocery Store	Means a person designated from time to time as a Large Grocery Retailer in accordance with Article 3 of the Order.
Larger Grocery Store	means a Grocery Store with a Net Sales Area of more than 1,000 sq. metres.
Burdened Site	is the site which is the subject of a Restrictive Covenant or an Exclusivity Arrangement as defined in the Order.
Mid-sized Grocery Store	means a Grocery Store with a Net Sales Area of between 280 sq. metres and 1,000 sq. metres inclusive.
Net Sales Area	means the internal sales area within a Grocery Store comprising all internal areas accessible to the customer and excludes the area in which checkouts, lobbies, concessions, restaurants, customer toilets and walkways behind the checkouts are sited where these are not used for the sale of Groceries.
Groceries Sales Area	means that part of the Net Sales Area within a Grocery Store used for the sale of Groceries.
Associated Grocery Store	means a Larger Grocery Store or a Mid-sized Grocery Store within the 10-minute drive time isochrone around the burdened site and owned/controlled by the Large Grocery Retailer benefiting from the burden.
Fascia	is the trading name under which a Grocery Retailer operates a Grocery Store.

For definitions of other terms, please see the Order.

Annex 2: Software and information used to construct isochrones

Software

A2.1 The mapping software used is ESRI UK Limited's Arc GIS Pro. The high precision setting is used to draw an isochrone. This provides a higher degree of accuracy of the stores within and outside the boundary. The Grocery Retailers list is generated using [Geolytix Open Retail Points](#).

Drivetime network

A2.2 The drivetime network is based on the HERE database. Third parties are able to use the HERE API at <https://www.here.com/>. The CMA has chosen to use a custom Speed Profile based on two time periods of Saturday, 11am and 4pm.

Holes and Islands

A2.6 Holes and Islands are excluded from the isochrones.

Drivetime network updates

A2.7 The drivetime network is updated on an annual basis.

Annex 3 - Schedule 4 of the Groceries Market Investigation (Controlled Land) Order 2010: Test to be applied to Restrictive Covenants and Exclusivity Arrangements

1. The Test referred to in Articles 4(3)(b)(iii) and 7(2)(b)(ii) of the [Groceries Market Investigation \(Controlled Land\) Order 2010](#) is carried out as follows:
 - (i) Construct a 10-minute drive-time isochrone around the site burdened by the Restrictive Covenant or on which grocery retailing is restricted by an Exclusivity Arrangement.
 - (ii) Identify any Larger Grocery Store or Mid-sized Grocery Store owned or controlled by the Large Grocery Retailer (or a company under common control or ownership) which benefits from the Restrictive Covenant or Exclusivity Arrangement and which is located within the 10-minute drive-time isochrone identified in paragraph 1(i) above ('Associated Grocery Store').
 - (iii) If no Associated Grocery Stores are identified in performing the step described in paragraph 1(ii) above, the Test is passed.
 - (iv) If one or more Associated Grocery Stores are identified in performing the step described in paragraph 1(ii) above, construct a 10-minute drive-time isochrone around each of the Associated Grocery Stores (each a 'Relevant Isochrone').
 - (v) For the area within each Relevant Isochrone, carry out the Test described in paragraphs 1(vi) and 1(vii) below.
 - (vi) If the Associated Grocery Store is a Larger Grocery Store, count the number of Fascias under which Larger Grocery Stores are operated within the Relevant Isochrone and
 - (a) if the total number of Fascias (including that of the Associated Grocery Store) under which Larger Grocery Stores are operated within the Relevant Isochrone is four or more, the Test is passed;
 - (b) if the total number of Fascias (including that of the Associated Grocery Store) under which Larger Grocery Stores are operated within the Relevant Isochrone is three or fewer, calculate the share of the Large Grocery Retailer benefiting from the Restrictive Covenant or Exclusivity Arrangement of Larger Grocery Stores Groceries Sales Areas within the Relevant Isochrone. If the share is:

- (1) 60 per cent or greater, the Test is failed;
- (2) less than 60 per cent, the Test is passed.

(vii) If the Associated Grocery Store is a Mid-sized Grocery Store, count the number of Fascias under which Larger Grocery Stores and Mid-sized Grocery Stores are operated within the Relevant Isochrone and

(a) if the total number of Fascias under which Larger Grocery Stores and Midsized Grocery Stores within the Relevant Isochrone is four or more, the Test is passed;

(b) if the total number of Fascias under which Larger Grocery Stores and Midsized Grocery Stores are operated within the Relevant Isochrone is three or fewer, calculate the share of the Large Grocery Retailer benefiting from the Restrictive Covenant or Exclusivity Arrangement of Larger Grocery Stores and Mid-sized Grocery Stores Groceries Sales Areas within the Relevant Isochrone. If the share is:

- (1) 60 per cent or greater, the Test is failed;
- (2) less than 60 per cent, the Test is passed.

(viii) For the purposes of this Test, if any Larger Grocery Stores within the Relevant Isochrone are under common ownership or control they will be considered to be operating under a single Fascia.

(ix) For the purposes of this Test, if any Mid-sized Grocery Stores within the Relevant Isochrone are under common ownership or control they will be considered to be operating under a single Fascia.

(x) For the purposes of this Test, if any Mid-sized Grocery Stores and Larger Grocery Stores within the Relevant Isochrone are under common ownership or control they will be considered to be operating under a single Larger Grocery Store Fascia.

(xi) Any Grocery Store which has a Net Sales Area of less than 280 sq. metres is not relevant for the purposes of this Test.