

## The Groceries Market Investigation (Controlled Land) Order 2010

### Response to consultation

#### Introduction

1. The Competition Commission (CC) received six responses to its second formal consultation on the draft Order, published on 16 November 2009. We have taken these submissions into account and have now issued a final Order. In this paper we summarize the changes we have made to the Order and explanatory note as a result of submissions accepted and give our reasons for rejecting other submissions.
2. Very minor changes are not discussed. Consequential amendments to the explanatory note have been made following the changes made to the draft Order.

#### Changes made

##### *The Order*

##### *Article 1*

3. In order to provide certainty of commencement Article 1 has been amended to provide for the Order to come into force on a specific date.

##### *Article 2*

4. We have amended the definition of both 'Access Road' and 'Service Yard' to acknowledge that developers will not always 'own' land on which they develop retail opportunities.
5. We have amended the definition of 'Pension Company' to avoid the need for the Order to be amended as the names of pension companies change.

##### *Article 3*

6. We have provided further detail in the explanatory note regarding the applicability of the Order to a transfer by a retailer of 'substantially all' of its grocery business (Article 3(2)). In response to submissions we have included further clarification of the criteria in Article 3(4)(a). Similarly, we have provided further clarification regarding the criteria in Article 3(4)(b).

##### *Article 4*

7. We have amended Article 4(4) (and the corresponding provisions in Article 7(3)) to require the Office of Fair Trading (OFT) to Notify both the retailer concerned and the owner of the burdened land 'in writing' in relation to determinations under Schedule 4. We have also made some drafting amendments to clarify the OFT process. To ensure consistency, similar amendments have been made to Article 7(3).
8. Article 4(5)(b) includes a long-stop date of six months for parties to meet their obligations in Article 4 if a restrictive covenant fails the test set out in Schedule 4.

Following a submission, we have also included a minimum period of three months for a party to comply with these obligations.

9. Article 4(6) sets out alternative obligations on retailers in the event that they cannot fulfil the obligations set out in Article 4(1), one of which is to ensure that successors in title execute a declaration that they will not enforce the restrictive covenant. One respondent noted that a retailer could not ensure that such a declaration would be passed down to successful sellers. We recognize the possible difficulties with enforcing such a requirement on successors in title. However, we believe that such a condition should be included as part of the sale agreement for the initial sale of land by the Large Grocery Retailer. We have amended Article 4(6)(c) by replacing the word 'ensure' with 'require'.
10. The former Article 4(7) has been deleted because the modification to the definition of Large Grocery Retailer made this clause redundant.
11. One respondent suggested that the former Article 4(8) (now 4(7)) should make clear that the obligation to use 'best endeavours' should not include any payment, whether monetary or otherwise. We have made this amendment.

#### *Article 5*

12. We have amended Article 5 so that the permitted restrictive covenants in Article 6 apply to both restrictive covenants and agreements which have equivalent effect to restrictive covenants. We have expressly disappplied Article 5 to restrictions which fall within Article 6.

#### *Article 9*

13. One retailer submitted that there might be circumstances where a retailer owned land but did not have control over its use, in particular where a retailer owned the freehold for a car park adjacent to its grocery store, but the leasehold for the car park was owned by the local council. In such situations, an Operational Land Restriction may be necessary for the grocery retailer to ensure that the leasehold land continues to be operated as a grocery store. We have therefore amended the article to provide for this instance.
14. We received strong submissions from two retailers regarding the planning obligation provision in the former Article 9(1)(b). It was submitted that planning conditions were often overridden by new planning permissions, or subsequently amended, and that the retailer would not always be entitled to notice or consultation, particularly where the planning condition was for the benefit of land other than that used by the grocery retailer. Finally, even if there was an opportunity to make representations, it was submitted that this was no guarantee that the planning obligation would remain in place, even if it was necessary for the effective operation of a grocery store. After careful consideration of these submissions, we have decided to remove this provision from the final Order.

#### *Article 10*

15. One respondent noted that there was some confusion in Article 10 between the definition of 'Pension Company' and their designation as Large Grocery Retailers under the Order as set out in Article 3(1). Changes have been made to the definition of Pension Company. In addition there are some non-material drafting changes to improve clarity and comprehensibility.

## *Article 11*

16. One respondent noted that, as then drafted, notification would not be required if the acquired store had ceased trading before being acquired by another retailer. To prevent avoidance, we have therefore amended the requirement to include the acquisition of any land that had been trading as a large grocery store at any time during the period of 12 months prior to the acquisition.
17. Article 11(2)(d) was deleted in response to comments on the difficulty in obtaining the information 'immediately'. We agree that, for the information required by Article 11(2)(a)–(c), it should be sufficient for the OFT to assess whether further information is required from the retailer.
18. We have amended the Order to clarify that notification to the OFT of other grocery stores operated by the Large Grocery Retailer should also include stores operated by companies under common control or ownership. A similar change has been made to the test in Schedule 4.

## **Suggested changes not made**

### ***Article 2***

19. One respondent submitted that the definition of 'Exclusivity Agreement' should be further clarified so that it was clear that such agreements were entered as part of a transaction by which a retailer acquired freehold or leasehold land for use as a grocery store. However, we do not believe that such a narrow interpretation should be placed on this definition. Clarifying drafting changes have been made.
20. One respondent submitted that the definition of 'Groceries Sales Area' was misleading, as grocery 'sales' only take place at the check-out area. We considered amending the definition to refer to display, although the definition in the Order is consistent with that in the Report, which was used extensively as a measure of the area dedicated to groceries by a retailer, without confusion. As such, we have not amended this definition.

### ***Article 3***

21. We received two submissions regarding the application of the Order to Large Grocery Retailers. The first submission queried why the Midlands Co-operative Society (Midlands Coop), and connected organizations such as the regional co-operative groups, were not Large Grocery Retailers for the purposes of the Order. It was noted that the Midlands Coop was already required to release one restrictive covenant under Article 4(7) of the Order, and that it met the criteria for designation as a Large Grocery Retailer. The second submission requested that the Order should apply to all regional grocery retailers. It cited the intention of the Order to remove barriers to entry to local markets, and noted that in local markets it was possible for regional grocery retailers to have a strong position in individual local markets. Further, the Report concluded that stores operated by regional grocery retailers could be included in the same local market as that of large national grocery retailers. As such, it was submitted that there was no rational basis for excluding regional grocery retailers from the scope of the Order.
22. We noted comments regarding the express exception of the Restrictive Covenant in Oundle. Modifications made to the definition of a Large Grocery Retailer made this express exception redundant whilst preserving the scope of the application as set out

in paragraphs 11.154 to 11.172 of the Report. The CC decided that only large grocery retailers should be subject to the remedies. Some consideration was given to whether all grocery retailers should be covered by the Order, but ultimately it was decided that this should not be the case. We do not believe that there has been a change in circumstances, or that any other special reasons exist, which suggest that we should depart from the Report in this respect.

#### **Article 4**

23. One respondent requested further clarification on how retailers would satisfy requirements for the use of 'best endeavours' in meeting their obligations in Article 4. We expect that endeavours to release restrictive covenants will include, at a minimum, taking proactive efforts to locate beneficiaries of the restrictive covenant, preparing and filing the necessary documents required to release the restrictive covenant, and undertaking any other administrative steps to secure the release.

#### **Article 9**

24. One respondent submitted that the exception for Operational Land Restrictions should be extended to include areas reserved for access other than vehicles (eg pedestrian access), although no examples of such restrictions were provided. We consider that such an amendment would risk making the exception unnecessarily wide. We have therefore not made any change as a result of this submission.
25. It was also submitted that the criteria in Article 9(1) should be not be cumulative, ie that the exception apply to land that is either adjacent to, or necessary for the effective operation of, the store. However, we believe that the exception would be unnecessarily wide if this criteria was not cumulative, but we have removed the adjacency requirement.

#### **Article 10**

26. One respondent submitted that the prohibitions in the former Articles 10(2) and 10(3) should extend to all land owned by the grocery retailer or its pension fund. However, we do not consider that such a narrowing of the exception is appropriate. We note that the procedure for the release of restrictive covenants will continue to apply to such restrictions where they meet the test set out in Schedule 4.
27. One respondent queried whether the prohibitions in Articles 10(2) and 10(3) would extend to restrictions that have already been entered into, or which are attached to land acquired following the commencement of the Order. Article 10 provides that the prohibition in Articles 5 and 8 would not apply to a Large Grocery Retailer's Pension Company provided that the Large Grocery Retailer does not and has not previously operated a Grocery Store on the land related to the Restrictive Covenant or Exclusivity Arrangement or used the land in connection with the operation of a Grocery Store.
28. One respondent submitted that the principles applying to the pension fund exemption apply equally to insurance subsidiaries, since both pension funds and insurance subsidiaries can be considered institutional investors and there is no difference at a level of principle between insurance subsidiaries and pension funds. While we accepted that the impact of the Order on insurance funds might be similar to that on pension funds, we did not consider that the current regulatory regime for insurance funds would ensure a sufficient degree of independence from the grocery retailer to justify an exemption of the kind provided for pension companies.

## **Schedule 1**

29. Two respondents submitted that the concept of 'control' in paragraph (ix) of Schedule 1 was not reasonable or workable in practice. In particular, a retailer that has voting rights greater than 25 per cent in a company will not necessarily be able to exercise sufficient influence over the company to ensure that it complies with the Order. However, the Order does not provide that retailers must ensure that companies under their 'control' must comply with the Order. Rather, Schedule 1 designates such companies as subject to the Order themselves, so that they will be required to comply in their own right. We have clarified this in various parts of the Order.
  
30. It was also submitted that the 'control' clause was not necessary given the prohibition on procuring restrictions to be entered into on behalf of grocery retailers. However, we do not think that the prohibition on 'procuring' will always capture situations where companies controlled by a retailer enter into restrictions. Therefore, we have not removed the 'control' provision from the Order.