

EXPLANATORY NOTE TO ACCOMPANY THE GROCERIES MARKET INVESTIGATION (CONTROLLED LAND) ORDER 2009

(This note is not part of the Order)

Introduction

1. The Competition Commission (CC) published its final report on the market investigation into the supply of groceries in the UK (Investigation) on 30 April 2008 (the Report).¹ The Report set out a number of remedies to address the adverse effects on competition that it found. The CC has made The Groceries Market Investigation (Controlled Land) Order 2009 (Order) to give effect to a number of these remedies.
2. The remedies are designed to limit the ability of large grocery retailers to prevent land being used by their competitors for grocery retailing in the future.

Possible consequences of not complying with the Order

3. [Section 167](#) of the Enterprise Act 2002 (the Act) places a duty on any person to whom this Order applies to comply with it. Subject to the defences in the section, any person who suffers loss or damage due to a breach of this duty may bring an action.
4. [Section 167](#) of the Act also provides that the Office of Fair Trading (OFT) and the CC can seek to enforce this Order by civil proceedings for an injunction or for any other appropriate relief or remedy.

Review of this Order

5. The OFT has a general duty to monitor the operation of the Order under [section 162](#) of the Act. This includes the duty to consider, from time to time, whether the Order should be varied or revoked in the light of a change of circumstances.

Status of this explanatory note

6. Nothing in this explanatory note is legally binding. In the event of a conflict between this explanatory note and any provision of the Order, the Order shall prevail.

Structure of the Order

7. The Order is divided into seven parts.
 - (a) Part 1 contains general provisions, including the commencement date for the Order, to whom the Order applies and definition and interpretation provisions.
 - (b) Part 2 explains which retailers are considered to be 'Large Grocery Retailers' for the purposes of the Order and how other undertakings could be designated as 'Large Grocery Retailers' in the future.

¹www.competition-commission.org.uk/rep_pub/reports/2008/fulltext/538.pdf.

- (c) Part 3 sets out an obligation which applies to certain grocery retailers to release specified Restrictive Covenants. It also prohibits Large Grocery Retailers from entering into Restrictive Covenants in the future.
 - (d) Part 4 sets out a prohibition which applies to certain grocery retailers from enforcing specified Exclusivity Arrangements. It also prohibits Large Grocery Retailers from enforcing new Exclusivity Arrangements after a certain period.
 - (e) Part 5 contains some exceptions to the obligations and prohibitions in Parts 3 and 4.
 - (f) Part 6 contains a notification requirement in relation to the acquisition of Grocery Stores by Large Grocery Retailers.
 - (g) Part 7 sets out duties on Large Grocery Retailers to provide information to the OFT and the CC's powers of direction.
8. The Order has five schedules:
- (a) Schedule 1 lists the Large Grocery Retailers which are subject to the Order.
 - (b) Schedule 2a contains a description of those Restrictive Covenants which were identified in the Report which prevent, restrict or distort competition. Schedule 2b contains a description of those Restrictive Covenants which were notified to the CC during the Investigation and which were not found at the time the CC investigated them to prevent, restrict or distort competition.
 - (c) Schedule 3a contains a description of those Exclusivity Arrangements which were identified in the Report which prevent, restrict or distort competition. Schedule 3b contains a description of those Exclusivity Arrangements which were notified to the CC during the Investigation and which were not found at the time the CC investigated them to prevent, restrict or distort competition.
 - (d) Schedule 4 contains the test to be applied by the OFT to certain Restrictive Covenants and Exclusivity Arrangements.
 - (e) Schedule 5 lists the pension company details for each grocery retailer covered by the Order.
9. The rest of this explanatory note deals with each of the articles in the Order.
10. The Order comes into force on [*insert date*]. It is not intended that there should be any further transitional period in relation to any of the provisions contained within the Order.

PART 1 (Citation, commencement and interpretation)

- 11. Article 1 has two functions. It gives the Order its name and it sets the dates on which the obligations in the Order come into force.
- 12. Article 2 contains a number of definitions applicable throughout the Order.
- 13. *Groceries*: this definition closely follows that in the terms of reference for the Investigation.

14. The Order distinguishes between *Groceries Sales Area*, which is that part of the sales area in a Grocery Store which is used for the sale of groceries, and *Net Sales Area*, which includes all sales area (ie groceries and non-groceries) within a Grocery Store.
15. *Exclusivity Arrangement* means an arrangement whereby a landowner or developer with an interest in a site or sites agrees with a grocery retailer not to allow another grocery retailer to operate a Grocery Store from that site or sites or otherwise agrees to restrict or limit the amount of Groceries retail use on the relevant site. Exclusivity Arrangements commonly arise in connection with the development of a retail park or shopping centre. The offer of exclusivity can be used to attract a grocery retailer to the development as a so-called 'anchor tenant'.
16. *Frozen Food Retailers* means retailers which specialize in the sale of frozen food and which carry a limited range of other groceries, such as Iceland and Farmfoods.
17. *Grocery Store* means a retail store, a significant proportion of which is devoted to the sale of groceries but excludes stores operated by 'Limited Assortment Discounters' and 'Frozen Food Retailers'. The term 'a significant proportion' is used to allow large grocery stores with a net sales area of more than 1,000 sq metres that contain a significant groceries component to be included, but stores with a net sales area of more than 1,000 sq metres with a small food offering (such as Boots, which sells sandwiches and other lunchtime food) to be excluded.
18. A separate *Implementation Date* has been included in the Order in relation to those measures that require the application by the OFT of the test set out in Schedule 4 (see further in paragraphs 28 and 35).
19. *Large Grocery Retailer* is defined by reference to the provisions set out in Article 3.
20. *Restrictive Covenant* is an agreement which restricts the user of land belonging at the date of the agreement to the covenantor for the benefit of the land belonging at the date of the agreement to the covenantee, ie on the sale of land. The definition specifically excludes those agreements which fall within the definition of *Exclusivity Arrangement*.

PART 2 (Large Grocery Retailers)

Article 3 (Designation of Large Grocery Retailers)

21. 'Large Grocery Retailer' is defined as a class of grocery retailers which satisfies the criteria set out below. Such a retailer:
 - (a) has operations throughout a considerable part of Great Britain and Northern Ireland;
 - (b) carries a range of groceries; and
 - (c) has an integrated grocery wholesaling function that purchases directly from grocery suppliers.
22. Existing retailers that will be subject to the Order are listed in Schedule 1. The OFT may add to this list in the future.

PART 3 (Restrictive Covenants)

Article 4 (Release of Restrictive Covenants)

23. During the course of the Investigation, the CC identified a number of Restrictive Covenants which were found to prevent, restrict or distort competition. Those Restrictive Covenants are listed in Schedule 2a. Article 4 requires the grocery retailers which benefit from these Restrictive Covenants to use their best endeavours to release them.
24. Article 4 provides that a grocery retailer must use its best endeavours² to carry out two steps in order to release a Restrictive Covenant. The first is to enter into a deed of release with the owner of the land burdened by the Restrictive Covenant. The second is to procure the removal of the Restrictive Covenant from the relevant charges register or land charges register. Thus subsequent owners of the land will be able to use it for grocery retail use if appropriate.
25. If the grocery retailer is unable to have the land registry remove the Restrictive Covenant from the register (for example, because the owner of the burdened land refuses to cooperate with the grocery retailer which seeks to release the Restrictive Covenant, or the registry is not certain that all beneficiaries agree to a release) the grocery retailer should take action to achieve, as much as possible, the same effect. This includes noting the attempted removal on the relevant register, giving a unilateral undertaking not to enforce the Restrictive Covenant in question, and ensuring that successors in title of the land will not enforce the Restrictive Covenant.
26. During the course of the Investigation, grocery retailers were unable to provide us with comprehensive records of Restrictive Covenants which they had imposed prior to 2000 and we did not receive details of any Restrictive Covenants imposed since 2006. We were therefore unable to examine these Restrictive Covenants in order to ascertain whether they prevent, restrict or distort competition. It is also possible that the benefit of a Restrictive Covenant could be acquired by a grocery retailer upon acquisition of land benefiting from a Restrictive Covenant. Accordingly, the OFT can examine these Restrictive Covenants if it receives a request to do so by an owner of land burdened by such a Restrictive Covenant. We would expect such an owner of land to be prepared to cooperate with the Large Grocery Retailer benefiting from the Restrictive Covenant in question in order to have it released.
27. When examining Restrictive Covenants, the OFT will apply a test which is set out in Schedule 4 of the Order. The purpose of the test is to assist the OFT to ascertain whether a Restrictive Covenant prevents, restricts or distorts competition. If the OFT finds that the test is failed, then the Large Grocery Retailer which benefits from the Restrictive Covenant in question must use its best endeavours to release that Restrictive Covenant by carrying out the two steps described in paragraph 24 above.
28. Upon the making of the Order it will take some time for the OFT to obtain the software and establish the procedures necessary to carry out the duties described in paragraph 27. Therefore, this mechanism for releasing a Restrictive Covenant will not commence until the OFT notifies that the appropriate software and procedures are in place.

²For the purposes of Article 4, best endeavours does not include an obligation to make any payment to procure that a party consent to the release of the restrictive covenant.

Article 5 (Prohibition on entering into Restrictive Covenants)

29. Article 5 of the Order prohibits Large Grocery Retailers from entering into any Restrictive Covenant that may restrict grocery retailing or have equivalent effect or enter into any agreement which has equivalent effect. A Restrictive Covenant that may restrict grocery retailing or have equivalent effect is any Restrictive Covenant which prevents land from being used for grocery retail. This may be an explicit restriction or an implicit one. For example, a Restrictive Covenant that specified that land should be used for a certain purpose implicitly restricts grocery retailing, as would a covenant limiting access to properties for certain vehicles, which could prevent required deliveries. An agreement which would have equivalent effect would be a lease which prevents land from being used for grocery retailing. An example might be a lease containing a user clause specifying that a property must be used for a particular purpose (not grocery retailing).
30. Large Grocery Retailers must not procure that others enter into Restrictive Covenants, or agreements having equivalent effect, on their behalf. This is to prevent other parties being encouraged to enter into Restrictive Covenants that that achieve the same effect of restricting grocery retailing and thereby benefit a Large Grocery Retailer without the Large Grocery Retailer being directly involved.³

Article 6 (Permitted Restrictive Covenants)

31. Article 6 contains certain exceptions to the prohibitions set out in Articles 4 and 5. These are (i) restrictions in a lease granted to a tenant or head lessor that specify a leasehold property is to be used solely as a residential dwelling; and (ii) user clauses that reflect any agreement or unilateral undertaking given pursuant to section 106 of the Town and Country Planning Act (or the equivalent legislation in Scotland and Northern Ireland).⁴

PART 4 (Exclusivity Arrangements)

Article 7 (Prohibition on enforcement of Exclusivity Arrangements)

32. During the course of the Investigation, the CC identified a number of Exclusivity Arrangements which were found to prevent, restrict or distort competition. Those Exclusivity Arrangements are listed in Schedule 3a. Article 7 prohibits the grocery retailers which benefit from those Exclusivity Arrangements from enforcing after five years from the later of the date of the Order or the date on which the Grocery Store which benefits from the Exclusivity Arrangement first began trading.
33. During the course of the Investigation, Large Grocery Retailers were unable to provide us with comprehensive records of Exclusivity Arrangements from which they had benefited prior to 2000 and we did not receive details of any Exclusivity Arrangements put in place since 2006. We were therefore unable to examine these Exclusivity Arrangements in order to ascertain whether they prevent, restrict or distort competition. Accordingly, the OFT can examine these Exclusivity Arrangements, if it receives a request to do so by the person who agreed to give a Large Grocery Retailer exclusivity or any company wishing to develop a Grocery Store on the site covered by an Exclusivity Arrangement. The OFT would need to assess competition

³The other parties could decide to do this because of other arrangements between the parties that do not directly involve the particular site.

⁴We note that these agreements run with the land but specifying the agreement in the lease helps to apportion responsibility for ensuring the planning obligations entered into are adhered to.

around the site covered by the Exclusivity Arrangement, and would need to assess the extent of Groceries provision within a 10-minute isochrone around the site in accordance with Schedule 4 of the Order.

34. When examining Exclusivity Arrangements, the OFT will apply a test which is set out in Schedule 4 of the Order. The purpose of the test is to assist the OFT to ascertain whether an Exclusivity Arrangement prevents, restricts or distorts competition. If the OFT finds that the test is failed, then the Large Grocery Retailer which benefits from the Exclusivity Arrangements will be prohibited from enforcing it after the later of five years from the date of the Report or five years from the date on which the Grocery Store benefiting from the Exclusivity Agreement first began trading.
35. As with the similar release mechanism in relation to Restrictive Covenants, upon the making of the Order it will take some time for the OFT to obtain the software and establish the procedures necessary to carry out the duties described in paragraph 33. Therefore, this mechanism will not commence until the OFT notifies that the appropriate software and procedures are in place.

Article 8 (Prohibition on entering into Exclusivity Arrangements)

36. Article 8 prohibits Large Grocery Retailers from entering into or seeking to procure the entry into by others of any Exclusivity Arrangement that may restrict grocery retailing or have equivalent effect with a duration of more than five years from the date on which the Grocery Store which benefits from it first began trading.
37. An example of an Exclusivity Arrangement which could have equivalent effect to one which may restrict grocery retailing is one which specifies that all other units in a development will be let or sold to retailers other than grocery retailers.

PART 5 (Exceptions)

Article 9 (Exception for land supporting a Grocery Store)

38. Article 9 contains a narrow exception for certain categories of land that are necessary for the operation of a Grocery Store. It provides that the obligation in Article 4 and the prohibitions in Articles 5, 7 and 8 will not apply to 'Operational Land Restrictions'. 'Operational Land Restrictions' are restrictions which prevent land from being used other than for a car park, service yard or access roads, and which is essential for the effective operation of the relevant Grocery Store. The exclusion applies to land not owned by the retailer, which is adjacent to the relevant Grocery Store, and which is not subject to an existing planning condition or planning obligation regarding its use as a car park, service yard or access road. A restriction will not benefit from the exception if it provides for exclusive use of land to the exclusion of other grocery retailers.

Article 10 (Exception for pension companies)

39. Article 10 contains a limited exception to the prohibitions in Articles 5 and 8 for Large Grocery Retailers' pension companies. Details of the retailers' pension companies are set out in Schedule 5 of the Order.
40. The exception would allow a pension company to enter Restrictive Covenants and Exclusivity Arrangements except to the extent that the restriction relates to land which the retailer uses (or has used) as a Grocery Store. In addition, the exception

will not affect the ability of third parties to apply to have restrictions lifted if they meet the criteria set out in Schedule 4 of the Order.

PART 6 (Acquisition of stores)

Article 11 (Notification of acquisition of Grocery Stores)

41. Article 11 requires Large Grocery Retailers to notify the OFT and provide it with specified information if it acquires a Grocery Store with a Net Sales Area greater than 1,000 sq metres.

PART 7 (Miscellaneous)

Article 12 (Supply of information to the OFT)

42. Article 12 requires Large Grocery Retailers to provide certain information to the OFT under certain circumstances. The information is for the purposes of enabling the OFT to monitor and review the operation of the Order or any provisions of the Order. However, the OFT cannot require parties to provide it with privileged information.

Article 13 (Powers of direction)

43. Article 13 is made under [section 87](#) of the Act as applied by [section 164\(2\)](#) of that Act.
44. Article 13 gives the CC power to give directions to a person for the purpose of ensuring compliance with the Order. The directions can be addressed to an individual or a company or can be addressed to the holder for the time being of an office in a company, for example, the secretary.

Schedule 1

45. Schedule 1 lists those retailers which are Large Grocery Retailers and are therefore affected by the Order. As well as the retailers explicitly named, the Order also extends to any agents of these retailers, any Interconnected Bodies Corporate (as defined in the Act) and any companies over which these companies have control. For the purposes of Schedule 1, 'control' is defined as having a shareholding of over 25 per cent of the voting rights in the other company, or having the power to appoint more than one-quarter of its directors.

Schedule 2a and Schedule 2b

46. Schedule 2a describes those Restrictive Covenants which were identified in the Report as preventing, restricting or distorting competition and in respect of which grocery retailers named in the Schedule must use their best endeavours to have released.
47. Schedule 2b describes those Restrictive Covenants which were notified to the CC during the Investigation and which were not found to prevent, restrict or distort competition.

Schedule 3a and Schedule 3b

48. Schedule 3a describes those Exclusivity Arrangements which were identified in the Report as preventing, restricting or distorting competition and in respect of which grocery retailers named in the Schedule must not enforce five years from the later of the date of the Order or the date on which the Grocery Store which benefits from the Exclusivity Arrangement first began trading.
49. Schedule 3b describes those Exclusivity Arrangements which were notified to the CC during the Investigation and which were not found to prevent, restrict or distort competition.

Schedule 4

50. Schedule 4 describes the test to be applied by the OFT in order to ascertain whether a local market is highly concentrated.
51. The test set out in Schedule 4 is failed if the total number of fascias in a relevant isochrone is three or fewer and the Large Grocery Retailers benefiting from a Restrictive Covenant or Exclusivity Arrangement has a share of greater than 60 per cent of Groceries Sales Area in the relevant isochrone.⁵
52. Only mid-sized and larger Grocery Stores are relevant to the test.

Schedule 5

53. Schedule 5 lists details of the pension companies for each Large Grocery Retailer.

⁵The CC intends to recommend the software to be used by the OFT as the underlying road network to construct the 10-minute drive-time isochrones. A provisional decision was published on the same date as this explanatory note.