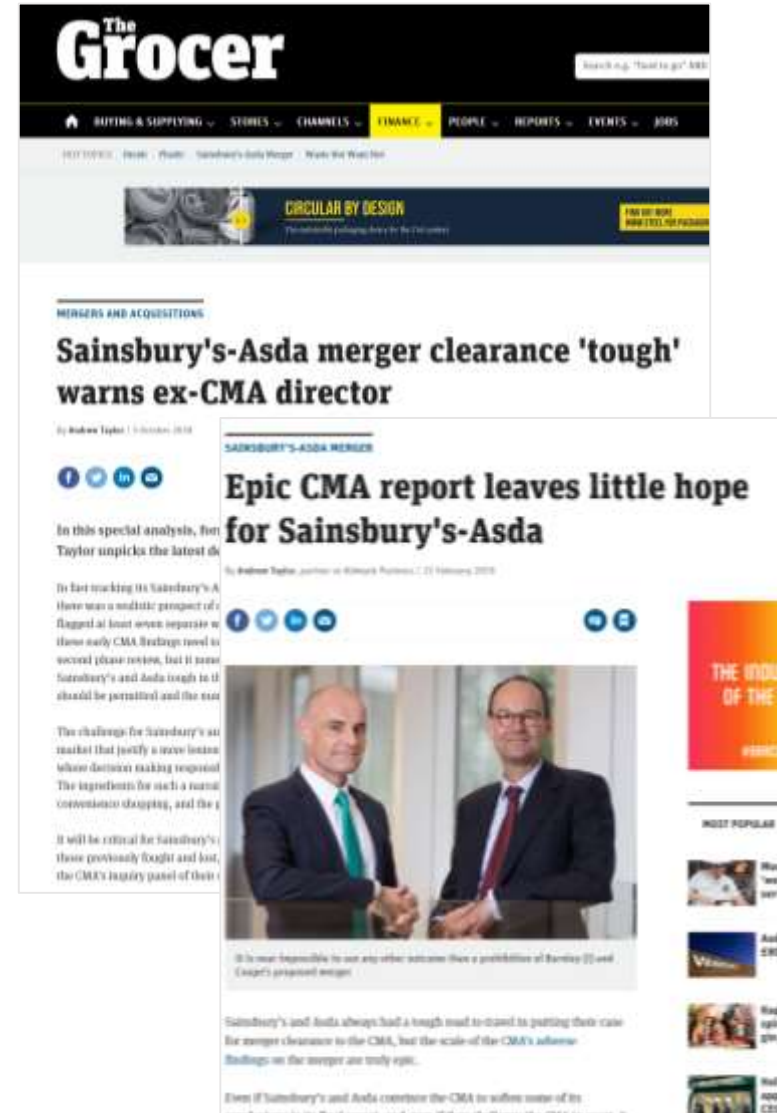




## A (former) regulator's perspective on the Asda/Sainsbury's decision

# What baggage do I bring with me?

- Former Senior Director, Inquiries at the Competition Commission and Inquiry Director for:
  - Groceries market investigation
  - Tesco acquisition of Co-op Slough
  - Cott / Macaw soft drinks
  - Long Clawson / Millway cheese
- Now, at Aldwych Partners advising on merger control
  - started commentating on Sainsbury's/Asda for The Grocer
  - advised Food & Drink Federation on CMA submissions



# Did the CMA make the right decision?

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- Yes ...
  - surprised by strength of adverse finding on competition in local grocery markets
  - on-line element of the adverse finding seemed completely reasonable ...
  - ... as did CMA's approach to Aldi/Lidl ...
  - adverse findings on co-ordinated effects always feel as though it is about stacking the scales
  - no surprise in CMA's lack of any adverse finding on supply chain issues

# Does Sainsbury's/Asda signal a more interventionist CMA?

- Commentary around decision says 'yes'; govt advisers encouraging this view; Andrew Tyrie's appointment
- Narrative links Sainsbury's/Asda decision to CMA's wider reform agenda
  - CMA is putting consumers at centre; CMA angels vs "competition establishment"
  - Politicisation of CMA (by CMA?) is disappointing, distasteful, counter-productive
- Not sure 'more interventionist' story backed up by actual CMA behaviour
  - CMA more permissive in recent food & drink mergers – more Phase 1 clearances of mergers with high market shares – see <https://aldwychpartners.co.uk/is-the-cma-easing-up-on-food-and-drink-mergers/>
  - Other examples: *finance*, Bottomline buying Experian's BACS business gives it 70-90% market share; *vet care*, highly concentrated local markets are emerging
- Is CMA encouraging the 'more interventionist / consumer at the centre' narrative as a way of protecting the consumer welfare standard?
  - CMA's new interest in distributional issues seems consistent with this

# An outside view of Sainsbury's/Asda relationship with CMA

- Success in merger control often about getting marginal decisions to go your way
  - Good relationships won't get bad mergers cleared, but can help marginal decisions
  - Legal challenges to CMA process may be right, but not a great rel'ship contributor
- Good relationships also about credibility, not just niceness
  - Consistency of arguments (over time and with each other)
  - Making impt points vs making every point
- Issues
  - Size of efficiencies
  - Price harmonisation
  - Post-merger plans (separate brands) vs. Merger rationale (cost reduction)



## Sainsbury's and Asda challenge timeframe for competition probe on merger

By PRESS ASSOCIATION

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Sainsbury's and Asda are challenging the competition watchdog in court for more time to be given to the probe into their £12 billion mega-merger on the grounds of its "unprecedented scale and complexity".

The two supermarkets are to apply for a judicial review of the Competition and Markets Authority (CMA) investigation into their proposed tie-up, as they request more time to consider the evidence.

# How strongly do different brands and stores compete with each other?

- CMA use of weighted share of shop blurred previous bright lines between store sizes and retailer brands/formats
  - Better reflects reality
  - CMA better able to crunch data (more powerful software etc) allowing more nuanced approach
- But markets have changed too ...
  - Obvious point about growth of Aldi and Lidl
  - Also, going by merger decisions, private label a stronger competitor to branded
    - feeds into strength of Aldi/Lidl offer vs Sainsbury's/ Asda/ Tesco et al

## Branded and Private Label in same market



## Branded and Private Label in separate markets



# GUPPI vs Looking at maps

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- CMA's use of GUPPI has generated quite a lot of interest
- Highlights the issue of quantitative measures and extent to which they should influence or determine CMA decisions
  - similar issues arise in hospital mergers (where the CMA uses a quantitative measure of diversion)
- When looking at large numbers of markets, quantitative measures like GUPPI gives confidence about consistency of decision-making across markets
  - contrast this with the filter and 'looking at maps' approach of Groceries Market Investigation
- But, the challenge is that quantitative measures can become a bit of a crutch for decision-makers
  - Decision-makers don't always fully grasp what the measure is, and isn't, measuring

# CMA findings on retailer buyer power and the supply chain

- No adverse findings by CMA on supply chain (eg. innovation, waterbed effect)
  - consistent with previous cases, not surprising given need for adverse effect on consumers
- A key issue for food & drink suppliers (in my view) was whether CMA would accept the Sainsbury's/Asda argument of not having any buyer power
  - It was a little hard for Sainsbury's and Asda to sustain this argument given that:
    - (a) they were also arguing their merger would let them extract lower prices from their suppliers; and
    - (b) the CMA designated Ocado and B&M as subject to the GSCOP saying they could be “expected to have the ability to exert buyer power”
  - But, if CMA accepted Sainsbury's/Asda arguments, the underpinnings of GSCOP and Code Adjudicator may have started to unravel
- CMA, while agreeing with Sainsbury's and Asda that there would be no SLC as a result of supply chain impacts, also did not find that they had no buyer power