



A response

to the invitation to comment on the J Sainsbury PLC / Asda Group Ltd merger
Phase 2 Investigation

OVERVIEW

The British Brands Group welcomes the opportunity to present its views at the outset of the CMA's Phase 2 investigation into the proposed Asda Sainsbury merger.

[REDACTED]. The following are highlighted:

- A market moving towards duopoly, with reduced competition between retailers.
- The merged entity with a share of over 30% of the grocery sales, and an even greater share of the procurement market for branded goods. [REDACTED].
- An increased prospect of range rationalisation, and the favouring of private label products, thereby increasing the threat of delisting, reducing access to distribution and restricting consumer choice.
- The loss of competing business models in terms of approaches to funding investment from suppliers [REDACTED].
- No prospect of volume growth, and very limited scope for efficiencies for manufacturers, to offset reductions in trade prices.
- A reduction in margins for investment aggravated by a marked increase in business risk arising from threats of delisting and uncertainty over whether new product development will get listed.
- Attempts by manufacturers to recover lost margins by price rises being sought elsewhere, such as smaller retailers with less buyer power.
- Greater scope for private label copying, weakening the incentive to innovate.
- Greater ability to pressurise manufacturers to supply on an exclusive basis, reducing their access to distribution (and consumer access to their products).
- An accelerated focus for branded suppliers away from the UK to other markets in Europe, USA and China where margin and returns are significantly greater than in the UK.

1. INTRODUCTION

The British Brands Group, a trade organisation that provides the voice for the suppliers of branded products with a mission to build the optimum climate for brands in the UK to deliver value and choice to consumers, responded to the CMA's preliminary invitation to comment on the merger between J Sainsbury and Asda Group. Our input included our list of members and commented on the merger's implications in relation to market concentration, buyer power and competitive distortions between branded and private label products. We focus in this submission on specific concerns raised by our members following that preliminary input.

2. This submission covers:

- The market context Paragraphs [5](#) to [14](#)
- The merger parties Paragraphs [15](#) to [25](#)
- Branded suppliers' perspective Paragraphs [26](#) to [32](#)
- The merger impact on margins Paragraphs [33](#) to [45](#)
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 - Consumer pricing Paragraphs [40](#) to [45](#)
- The merger impact on choice and quality Paragraphs [46](#) to [58](#)
 - Exclusive products Paragraphs [53](#) to [56](#)
 - Quality Paragraphs [0](#) to [58](#)
- The merger impact on innovation Paragraphs [59](#) to [68](#)
- The merger impact on competition from private label Paragraphs [0](#) to [76](#)

3. Member input to Phase 2 was sought via [[link](#)].

4. A profile of the companies responding is [[link](#)].

5. THE MARKET CONTEXT

The proposed merger represents a significant change in the grocery market, creating a retailer with a grocery retail share of over 30%, overtaking Tesco's 27.4% share and placing more than two thirds of the retail market (68.5%) in the hands of three rather than four retailers (source: Kantar, August 2018).

6. For branded suppliers, we believe the merger parties' share of the procurement market to be markedly higher, as their routes to market are narrower than for grocery products overall. Brands tend not to be listed in Aldi, Lidl and Marks & Spencer, which together we understand have around 16% share of the UK grocery market. From the perspective of suppliers of branded products, the distinction between the retail market and the procurement market is particularly important. Branded suppliers would consider the procurement market to be smaller than the grocery retail market, as Aldi, Lidl, and Marks & Spencer at least do not stock branded products on a consistent or significant basis. The discounters in particular, carry a range that is around only 10% or less of the number or products that would typically be carried in a full range supermarket. The merged entities' share of the procurement market is, we believe, a crucial consideration for the Phase 2 investigation as it directly affects the impact of the merger on suppliers and consumers.

7. Shopper behaviour is evolving, with everyday value and convenience being top priorities for consumers who are increasingly promiscuous in their choice of outlet. Over 50% of shoppers now buy across five or more channels, though supermarkets and hypermarkets

continue to represent the single most important channel, being used by 98% of shoppers (source: IGD). The channels (such as supermarkets, convenience, variety discount, food discount, specialist/ethnic, online and frozen discount) are not perfectly substitutable because of differences in assortment, location, store size and price propositions.

8. Online grocery shopping is the fastest growing channel and is used by some 42% of shoppers, with a current share of the grocery market of over 7% (source: IGD). It is dominated by the top 3 supermarkets which together accounted for 70% of online sales in 2014, with Ocado, the largest pure online retailer, accounting for 13.4% of online sales (source: Mintel) and 1.2% of all grocery sales (source: Kantar, August 2018). The share of online sales of J Sainsbury and Asda was 17.5% and 13.4% respectively in 2014 (Source: Mintel).
9. Recent years have seen many branded suppliers subjected to declining sales, falling prices and tightening margins. In our preliminary input, we referred to the 2016 [OC&C Index](#) of the food and soft drinks market which reported deflation of more than 3% year-on-year, provoking cost-cutting, rationalisation and factory closures. Margins were close to the low of 5% not seen since the 1980s, and large branded suppliers had cut capex investment by 8.8% compared to the previous year. Meanwhile, supplier returns on capital employed had fallen to their lowest level in 30 years, at 12.4%.
10. This merger is therefore being assessed against a climate of significant change which is increasing uncertainty and risk and raising costs for suppliers as they strive to adapt. Areas of change include the way people shop, distribution (such as e-commerce and mergers involving retailers and wholesalers), technology, regulatory intervention and geopolitics. At the product level, examples of change include product formulation changes to reduce obesity, re-packaging to reduce use of plastics, deteriorating exchange rates for ingredients sourced abroad and significant supply chain uncertainty caused by the UK leaving the EU.
11. In overview, suppliers are under significant pressure with cost-engineering having been a constant feature for many years as they seek to compete and offer value to shoppers. Any negative impact of the merger on suppliers' margins arising from reductions in trade prices not accompanied by equivalent efficiency savings for suppliers, will by necessity result in fundamental changes to many branded suppliers' business models, going further than reductions in marketing and promotional spend (and thereby reducing competitiveness and value to shoppers) to reduced investments (whether in quality, range or innovation) and/or jobs, factory closures and other economies, affecting consumers directly and indirectly.
12. Branded products provide important benefits to consumers:
 - The brand operates at an individual product level;
 - The values and propositions of individual branded products are explained and advertised across a range of media, building and refining consumer understanding;
 - Through the delivery of a consistent promise over time, they inspire reassurance and trust amongst shoppers. Such consistency also builds consumer understanding;
 - Branded products, through the use of distinctive packaging, are instantly recognised and understood, facilitating fast decision-making without the need to read labels. This is crucial in store and online environments where many products are stocked and fast navigation may be required;

- Through a deep understanding of the needs of individual consumers, branded products strive to meet the needs of different consumers and the differing needs of the same consumer. This provides a market of diversity and choice;
 - In competing for consumer preference, brands must innovate, bringing to market new products, new variants, new formulations, new packaging and new processes in order to deliver value to shoppers. In our preliminary input, we provided a report that showed that, over the three years 2012-2014, 80% of the innovation in the top five UK grocery retailers across 75 product categories was brought to market by branded suppliers (source: AIM, [Access to Brands](#)).
13. Branded products also provide strong forces that enhance product and retail competition:
- By focusing on different consumers and differing needs, branded products increase choice at each price point and thereby increase product competition at all price points;
 - By focusing on consistent quality and resonance with individual consumers, branded products increase product competition on the basis of quality and intangible values, not just price;
 - By leading on innovation in many categories, branded products increase product competition on the basis of innovation, acting as a catalyst for innovation overall;
 - By being widely distributed and easily comparable across retail channels, branded products strengthen competition between retailers as shoppers can quickly and accurately compare prices on a like-for-like product basis. Retailers' 'Brand Match' promotional strategies have recognised this, though it is noted that Asda is dropping its Price Guarantee scheme, launched in 2010, this month, making it harder for consumers to benefit where branded products are cheaper in other retailers.
14. In summary, branded products provide strong benefits to both consumers and competition which, taken collectively, cannot be matched by other products such as private label or (retailer) 'owned brand' products. Any decline in brand competition therefore has a much more significant effect on consumer welfare and the competitive environment overall than the simple replacement of one product type over another in a shopper's basket.
15. **THE MERGER PARTIES**
- Both J Sainsbury and Asda represent important routes to the consumer for branded product suppliers. As previously stated, their shares of the UK grocery market (15.5% and 15.2% respectively (source: Kantar, August 2018)) understate their share of the procurement market.
16. Where members supply both retailers, the branded products stocked by each are understood to be broadly (but not always) the same though variants may differ. [X].
17. While there are differences in shopper profiles between the two retailers, they do compete for shoppers, with 67% of J Sainsbury shoppers also shopping at Asda (source: IGD).
18. Both retailers report responding to discounters by reducing costs, simplifying their businesses and reducing products stocked, thereby consumer choice. J Sainsbury reduced items stocked by 1.7% and Asda by 9.8% between 2016 and 2017 (source: IRI).

19. Based on 2012-2014 data, each retailer differs in their approach to innovation, with Asda listing 32% more new products over the period, both private label and branded, than J Sainsbury (source: AIM, [Access to Brands](#) page 37).
20. J Sainsbury and Asda have fundamentally different models for working with suppliers:
 - J Sainsbury seeks the majority of supplier investment in "front margin", whereby the on-invoice trade price includes non-conditional pricing discounts. It tends not to enter into formal joint business plans (JBP) and tends not to accept off-invoice funding for trade marketing activities that are conditional on performance. While J Sainsbury will agree investment for promotional activities, it operates a different promotional model to Asda in that it does not offer multi-buy promotions and places a strict limit on the frequency and number of promotions run during the year;
 - Asda on the other hand, alongside on-invoice discounts, is understood to negotiate investment for trade marketing and promotional activities being conditional on performance and negotiated and documented off-invoice via a JBP.

The practical impact of these different funding structures is significant, with implications for price pass-through to consumers:

- i. The amount of funding received by each retailer in terms of pricing discounts, and funding for trade marketing and promotional activities, will differ markedly, presenting major financial challenges were the merged entity to seek to harmonise buying terms without considering all aspects of supplier funding;
- ii. The conditional nature of suppliers' investments in trade and marketing activities on performance with Asda gives suppliers much greater influence to ensure that they and consumers benefit directly from the trade investments they make (manufacturer funding to Asda is conditional on growth, which in turn incentivises Asda to lower prices to consumers to generate volume growth and hence receive additional funds from suppliers); and
- iii. In contrast, as a result of its funding model being largely based on non-conditional on-invoice pricing discounts (as opposed to conditional off-invoice funding for trade marketing activities), J Sainsbury is less incentivised to use supplier investments to improve the value and choice offered to its consumers.

It is unclear at this point to what extent, in seeking to harmonise buying terms post-merger, the merged entity will or will not adopt the J Sainsbury funding model.

21. [redacted].

We urge the CMA to conduct a detailed analysis of consumer (retail) pricing across a wide range of products by asking Asda and J Sainsbury to provide the average retail price on, say, the top 25 branded SKUs (homogenous products) sold in each major in-store category. If the pricing is significantly higher in one of the fascia, the CMA could then seek to understand the net acquisition costs of these SKUs to understand if the higher retail prices translate into higher profit margins.

Were it concluded that one of the fascia (for example, J Sainsbury) does indeed achieve higher margins, then the competition analysis needs to assess the merger's impact in this area and its effects on consumer pricing, including the potential for J Sainsbury, as the acquiring retailer, to extend its approach, in part or in full, to the merged entity.

22. In terms of product strategies, Asda has the highest branded share in the grocery market at 53.2%, with J Sainsbury's share being 47.9% (source: Europanel, 2018). It is understood that J Sainsbury's goal is to increase its private label share in food to 60% (source: [Annual Report and Financial Statements 2018](#), page 74).
23. In 2014, J Sainsbury implemented its 'Value Simplicity' approach, which as a headline strategy made great sense, but which in reality is understood to have reduced choice and increased prices to consumers. The strategy involved J Sainsbury driving as many brands as possible towards an 'every day low price', rather than running promotions. [3<].
24. This year, J Sainsbury announced a new product strategy, the Price Quality Framework, in which it segments products into the following spectrum:
- "Commodity brands", meaning branded products that are found across retailers (i.e. the majority of branded products). These would be subject to 40% range rationalisation (i.e. a significant reduction in the breadth and depth of products within a given range) and not be supported by promotions;
 - "Equity brands" which tend to be smaller branded products such as Aveeno skin and hair care products;
 - "Exclusive brands", only found in J Sainsbury as opposed to other supermarkets, such as Godiva chocolates;
 - "Owned brands", such as Hyde & Wilde, created by J Sainsbury but not carrying its branding;
 - "Own brand".

This strategy has significant implications for the majority of branded products, which are in addition to the difficulties already caused by the 'Value Simplicity' strategy.

25. Asda is understood to have a different product approach, with a more straightforward private label and own brand offer classed as 'consistently cheaper' to combat discounters and branded products classed under volume or value to drive innovation. It is of course unknown what product strategy the merged entity (or each of its two fascia) will follow, yet this is key to understanding the impact of the merger on suppliers and consumers.

26. BRANDED SUPPLIERS' PERSPECTIVE ON THE MERGER

Important aspects of this merger, many of which are crucial to branded suppliers and the analysis of consumer effects, remain unclear and uncertain. What is known is that over 30% of the UK grocery market, and a larger percentage share of the procurement market for branded products, will come under single ownership; that a key rationale for the merger is to drive efficiency savings that will ultimately reduce the price of common products to consumers by 10%; and that the structure of the UK grocery retail market will change fundamentally in a significant shift towards duopoly, with two retailers controlling nearly 60% of the retail market (and potentially some 70% of the procurement market).

27. While it is known that there is an intention, at least in the short term, to operate Asda and J Sainsbury as distinct fascia, it is not clear what the medium- and long-term strategies of each will be, including potential unification under one fascia. Will the Asda fascia be positioned as a direct competitor to discounters, with greater emphasis on private label and owned brand products at the expense of national brands? Will J Sainsbury's Price Quality Framework be rolled out across both fascia, speeding up the reduction of range and choice and reducing promotional activity for "commodity" brands? Will J Sainsbury's

front-margin approach to supplier negotiations be adopted more broadly across the merged entity, reducing branded suppliers' control over their promotional investments to ensure they benefit both them and consumers? These are just some of the crucial questions that have fundamental implications for suppliers, competition and consumers but for which answers are not known.

28. Suppliers anticipate harmonisation of prices between the two businesses, with the focus single-mindedly on the unit price of products with no regard to the differing promotional and funding models operated by the two businesses (although in the medium- long-term, it is not clear such differences would be maintained). The financial implications on suppliers are anticipated to be significant with wider adverse knock-on effects on consumers (as squeezed margins put downwards pressure on quality and innovation).
29. There is also a clear understanding that buyer power would increase were the merger to proceed, on the basis that one retailer with some 40% of the grocery procurement market has more buyer power than two separate retailers each with some 20% of that market. Furthermore, a near duopoly increases the buyer power of Tesco, as it will become a crucial listing for those new products that may not fit with the merged entity's product strategy. Were it to be known that the merged entity had delisted a product, Tesco would be aware that it would be a more crucial route to market for that supplier.
30. Members do not anticipate that GSCOP and the Adjudicator will mitigate the increase in buyer power or constrain the undue harmonisation of prices. GSCOP and the Adjudicator have been effective in preventing retrospective changes to supply agreements and reducing breaches but in the context of the impact of this merger on suppliers they are expected to have a limited role and impact.
31. [REDACTED]. The following are highlighted:
 - A marked increase in buyer power resulting in reduced trade prices, revenue and margins, with negative implications for innovation, quality and jobs;
 - An increased prospect of range rationalisation, thereby reducing choice to consumers;
 - No prospect of volume growth to offset reductions in trade prices;
 - Very limited prospect of efficiencies. Headcount reductions through combining sales teams and potential logistics savings were the number of distribution centres to reduce are identified as the most likely areas of potential efficiencies;
 - A marked increase in business risk arising from threats of delisting and uncertainty over the listing of new products, affecting the ability to invest and compete;
 - A market moving towards duopoly, with reduced competition between retailers;
 - A reduction in access to shoppers and revenue if stores have to be divested to remedy any competition concerns;
 - An accelerated focus away from the UK to other markets in Europe, USA and China where margin and returns are significantly greater than in the UK.

We expand below on the impact the merger would have on (i) branded supplier margins (33 to 45); (ii) the choice and quality of products for consumers (46 to 58); (iii) the innovation of new products (59 to 68); and (iv) competition between branded products and private label products (0 to 76).

32. [REDACTED]

33. THE MERGER IMPACT ON MARGINS

It is recognised that the merger represents a margin squeeze on all suppliers. It is not credible that the merged entity will only focus on larger suppliers [redacted]. It must be assumed in the competition analysis that all suppliers will be potentially affected.

34. [redacted]

35. [redacted]

36. [redacted]

37. [redacted]

38. [redacted]

39. **Trade price increases**

[redacted]

40. **Effects on consumer pricing**

[redacted]

41. [redacted]

42. J Sainsbury's "Price Quality Framework" may also result in consumers paying higher prices for "Commodity brands" and this is an area the CMA may wish to investigate. By not promoting such products and refusing to offer multibuys (despite requiring suppliers to include the price of such promotions in the cost of goods), then there is the prospect that consumers are actually paying more overall and are worse off. [redacted].

43. It cannot be taken for granted that the level of competition in the UK grocery market is such that benefits negotiated from suppliers must by necessity be passed through to consumers. [redacted]. Furthermore, it is understood that retailers primarily benchmark their consumer pricing against other retailers, in other words pricing to the market, and this has a more significant impact on consumer prices than lower trade prices from suppliers.

44. [redacted]. We understand that consumers have an imperfect understanding of actual product prices, not surprisingly in light of the number of products they purchase and the frequency with which prices vary. The CMA may wish to verify the potential for the merged entity to raise prices for individual products effectively unnoticed by the consumer. Were some product prices to rise by a small amount, the impact on an individual shopper may be small but the detriment for consumers overall shopping at the merged entity is likely to be significant given its wide coverage of the UK.

45. As a final comment on margins, we ask the CMA to be alert to false comparisons sometimes drawn in public dialogue between the margins of retailers and the margins of branded suppliers (with the latter often being higher). This is a false comparison and does not compare like with like as the retail and branded product business models differ fundamentally. Retailers have ready access to significant sums of cheap cash, receiving money from shoppers for products many days or months before the retailer pays the producer. In contrast, branded suppliers incur significant upfront costs in innovation,

production, marketing and distribution before a product is sold, significantly increasing its risk. If a comparison between retailers' and branded suppliers' financial performance is to be meaningful, Returns on Capital Employed would be a more appropriate measure.

46. THE MERGER IMPACT ON CHOICE AND QUALITY

Choice

Based on data we have seen on the health and beauty category, reduction in stock keeping units (SKUs), including range simplification, is already underway in both J Sainsbury and Asda, and we understand this trend is being seen across other categories. It is unknown what the merged entity's product strategy will be in the short, medium or long term. However, what is certain is that, with over a 30% share of the grocery market, the merged entity will be a powerful gatekeeper between suppliers and shoppers and a decisive editor and dictator of consumer choice.

47. The extent to which the merged entity will favour private label and owned brands over national brands is also unknown, though the Price Quality Framework initiative demonstrates the power and ability of J Sainsbury with its current market share to dictate its stocking policy. The success of Aldi, Lidl and Marks & Spencer demonstrates that stocking branded products is not a requirement for success and that the concept of 'must-stock brands' is outmoded and inaccurate. However, J Sainsbury and Asda currently both have a different model, which is more focused on brands. Branded and private label products tend not to be interchangeable (though competing head-to-head), having different tangible and intangible values for shoppers at a product level and different effects in relation to price rivalry between retailers and to innovation. A shift away from brands by the merged entity would therefore disadvantage shoppers who value brands, affect the nature of competition between suppliers and between retailers and have adverse implications for brand owners' costs with knock-on effects on consumers. More generally, it highlights the risk of reducing from 4 to 3 the number of large grocery retailers – the impact of a loss of an independent business model may harm both manufacturers and consumers.

48. Brands rely on widespread distribution to achieve the economies of scale necessary to offset significant up-front investments and this makes them vulnerable to delists. The merger increases the risks for branded suppliers significantly. Being delisted from a retailer with a more than 30+% share of the procurement market is very different from being delisted from a retailer with 15+%. Were such a delist to reduce the confidence of other retailers, notably Tesco, in the product, or a Tesco delist to reduce the confidence of the merged entity, the effect may well be terminal for the viability of the product. This dynamic significantly increases the uncertainty and risks for suppliers, potentially dampening investment in range, quality and innovation. We urge the CMA to assess the merger and the near-duopoly it creates on the viability of branded products and the consequent impact on consumer choice were delists to occur both in the merged entity and as a result of the near-duopoly that the merger would create.

49. [redacted]

50. [redacted]

51. We have emphasised that Aldi and Lidl are not generally alternative routes to market for many branded suppliers. [redacted]

52. The extent to which retailers consider choice a primary strategic driver is open to question. The current focus on range reduction of a number of grocery retailers suggests that choice is not an imperative (this focus can be most recently evidenced by Tesco's launch of 'Jack's', with 2,600 products versus 35,000 typically carried by a Tesco supermarket). Furthermore, members point to J Sainsbury's 'Price Quality Framework' and its approach to 'Commodity brands' as illustrative that offering choice is not the top strategic driver. Indeed the primary focus of both J Sainsbury and Asda in negotiations with branded suppliers is on achieving the lowest price. This however is not top for shoppers when choosing a retailer, as research in 2016 by Nielsen shows:



53. **Exclusive products**
 A further current trend that impacts on choice is the growth of exclusive products. These are products produced by national branded suppliers but distributed exclusively through a specific retailer. As retailers seek to differentiate themselves, the role of exclusive products has increased, as evidenced by J Sainsbury's Price Quality Framework initiative. [X]
54. While the approach of the merged entity to exclusive products is unknown, including whether the approach will vary between the two fascia, [X].
55. [X]. By producing an exclusive product for one retailer, the choice available for other retailers and therefore to shoppers in those retailers is inevitably reduced. Moreover, the manufacturer must limit its distribution (in order to comply with exclusivity) thereby increasing its costs of production (as the scope to benefit from scale economies is reduced).
56. Furthermore, the growth of exclusive products is likely to soften retail competition as shoppers will not be able to compare identical product offerings across retailers.

57. **Quality**

Consistent quality is a key component of a brand's proposition and would not be an area in which branded suppliers would wish to seek to economise in order to address margin decline. For large companies, quality is set at a supranational level and may only be indirectly affected by the merger. For certain products, such as those in the healthcare category, ingredients are regulated, with no potential to economise.

58. [X]

59. **THE MERGER IMPACT ON INNOVATION**

A reduction in innovation is, we believe, as important a source of concern in competition analysis as other factors, on a par with price and choice.

60. In our preliminary input to the CMA, we highlighted that the climate for innovation in UK grocery is increasingly challenging. Between 2012 and 2014, 8% of branded new products could not get listed by any of the 5 top retailers, accounting for over 70% of the retail market. 19% of the new products secured listings in only one retailer. Three of the top five retailers reduced their listing of new branded products in the three-year period. Meanwhile maximum weighted distribution at the top five retailers of new branded products is 44% (2015), a number much below the retail market share of 70% of the top five retailers (source: AIM, [Access to Brands](#) page 27), further indicating the struggle to get new products listed.

61. A [2017 study](#) by IRI found that revenue from innovation declined by £99.6million compared to the previous year and that suppliers were finding it harder to obtain the required distribution to make new product launches a success. Range rationalisation was seen as contributory factor, with SKUs stocked by supermarkets declining by 5.7% in the year February 2016 to February 2017 with an average of 930 fewer products being available to shoppers in their local supermarket. 8.4% fewer new branded items were launched. The study concludes that branded suppliers are finding it more difficult to secure the distribution needed to make a success of new product development (NPD) and cover the expense of innovating, a climate that is expected to decline further following the merger.

62. Distribution is crucial for innovation success not just in terms of delivering the sales volumes to offset high initial fixed costs but also in making consumers aware of the new product or innovation in the first place. Research by Nielsen ([How shoppers look, watch and listen for new products, 2015](#)) suggests that, globally, 48% of shoppers obtained information on a new product by seeing it in store, the third most important source of information behind Word of Mouth (56%) and TV ads (52%). We urge the CMA to explore UK-specific information and to be cautious of claims that retailers stock the innovations that consumers want if in-store presence is so important in alerting consumers to the innovation in the first place. If UK figures broadly align to the global average, then it would indicate the decisive role of retailers as gatekeepers to innovation.

63. The AIM study referenced in paragraphs 12, 19 and 60 highlights differences in approach to innovation by J Sainsbury and Asda. In 2014:

- Asda listed 62% of national brand launches compared to J Sainsbury's 52%;
- in terms of national brand innovations, Asda launched 58% compared to J Sainsbury's 46%; and

- for national brand renovations, Asda listed 63% compared to J Sainsbury's 54%.

The picture is similar for new private label launches, with Asda listing 22% of new launches as opposed to J Sainsbury's 14% in 2014.

64. The study also highlights that national brands represent most of the innovation, accounting for 78.5% of all launches in Asda and 82.7% of all launches in J Sainsbury, based on a three-year average 2012-2014. As discussed below, private labels are often copies of and free ride off branded products. A decrease in innovation for branded products could therefore have a knock-on effect on the number of new private label launches.
65. The merged entity's approach to innovation is unknown, representing one further area of uncertainty for suppliers. What is clear though is that the stocking of new products is not essential to the strategies of grocery retailers, otherwise a greater commonality of approach would be seen. It is also clear that range rationalisation is making the climate for innovation more challenging. It can be anticipated that demand for the most significant innovations will remain strong but such innovation is expensive and risky. The merger increases the risk of innovating if listings cannot be secured. It is also risky if suppliers are unable to negotiate trade prices that would make the innovation viable.
66. [REDACTED]
67. Larger companies tend to innovate at a supranational level and so the merger and consequent margin squeeze can be expected to have a less direct impact on their innovation. However, the consolidation of the UK grocery market is making the UK a less attractive place to invest and large companies may focus their investment in other markets where the return is likely to be greater, in turn impacting innovation in the UK. Members also anticipate an increased risk of private label products copying their innovation and increased pressure to supply new products on an exclusive basis, which increases costs and reduces revenue potential. [REDACTED].
68. While it is difficult to predict the merged entity's approach to innovation, there are concerning indications that the climate for innovation will worsen. The factors we have highlighted include range rationalisation, the increasing prevalence of exclusive products, a greater focus on private label and the increased uncertainty and risk if listings are not secured in a retailer holding 30+% share of the procurement market. We therefore urge the CMA to analyse the implications of the merger for innovation.

69. THE MERGER IMPACT ON COMPETITION FROM PRIVATE LABEL

While typically of different quality and intangible value, private label products compete directly with branded products and enjoy significant competitive advantages through the direct relationship that exists with the retailer that specifies, commissions and lists them, to the extent that they are able to distort product competition. Some of the impacts include:

- A strengthening of the retailer's buying power as they have ready alternatives should it choose to delist a branded product;
- The ability to use the confidential and commercially sensitive new product and other commercial plans of all competing branded suppliers in a category to inform private label strategies. [X];
- The ability to disadvantage a direct product competitor through providing access to the market (via listing decisions), consumer pricing strategies (over which the retailer has total and the branded supplier no control), product facings and position on shelf (that directly affect rates of sale), control over all in-store communication (influencing shopper purchasing decisions at point-of-sale) and packaging their products to prompt shopper confusion with the branded product.

70. Both J Sainsbury and Asda have a record of favouring their private label products, or copying branded products. For example:

- In 2009, J Sainsbury's "[Switch and Save](#)" campaign used in-store communication that would never be permitted for a branded supplier to switch consumers from branded to private label products, while it controlled the consumer pricing of both. [X];
- [X];
- [X];
- In 2017, J Sainsbury introduced two private label wine products, Villetta and Camino del Angel, packaged to look strikingly similar to familiar branded wines (see [The Drinks Business](#));
- In 2013, its Olive Spread and Muscle Relax Bath Soak featured in a Which? [article](#) investigating similar packaging and its shopper effects. A further example is Stain Remover Powder reported by the [Mail Online](#);
- Asda meanwhile faced a high profile legal suit over the packaging of its Puffin biscuits in 1997 and in 2009 launched a margarine product resembling I Can't Believe It's Not Butter, reported in [The Guardian](#). These examples may be old but the climate in the UK remains tolerant of such copying and brand owners remain powerless to act despite consumers being misled and confused (see below).

71. Brand owners are unable to address such distortions:

- Retailers act as a gatekeeper to consumers for branded suppliers whilst also acting as competitors in respect of their private label range. Members remain frustrated with the anomaly that retailers may use a brand owner's confidential information to inform their own competing private label range. Such access to a competitor's confidential information would not be countenanced in other circumstances. In this instance though there is no agreement to share information and no dominance so competition law does not come into play;
- Non-disclosure agreements, were they ever obtainable in a negotiation, are meaningless as the information is used within the retailer itself: first as retailer to determine whether the product will be listed, and then as product competitor in determining private label strategies;

- The use of pricing, facings, shelf position and in-store communication to influence shopper decision-making are wholly under the control of the retailer and the branded supplier has no basis to raise a complaint;
- Similar packaging, while known to confuse shoppers in a number of different ways, is nigh impossible to address in the UK. Both trade mark and passing off actions rely on high levels of evidence of consumer confusion, but retailers prevent evidence being gathered in-store and survey evidence is most often dismissed by the Courts. In the 2008 market investigation, the Competition Commission considered the matter an issue for consumer protection (Groceries Market Investigation, Final Report, [Annex 9.10](#), para 19). However the Consumer Protection Regulations are not enforceable in the UK by brand owners, only by Trading Standards who state they do not have the resources to do so. As a result, the practice goes largely unchallenged, despite the consumer detriment.

Compounding the problem of ineffective remedies, buyer power prevents concerns even being raised with retailers for fear of commercial retaliation which can take many forms and be devastating.

72. Private label is a strong, significant and growing force in grocery product competition, rising from an overall market share of 48.1% in 2016 to 50% in 2018 (source: Europanel). The nature of private label competition is also changing, with the clear potential for private label products (developed with all the competitive advantages listed above) having the scope for distribution beyond the commissioning retailer's fascia (for example, Tesco's merger with Booker, which opens the door for Tesco's private label products to be purchased by and distributed via independent retailers in the same way as national branded products).
73. Private label market share in J Sainsbury is currently 50.6%, a small (0.2%) increase since 2016, while Asda's private label share is 45.6%, up 2% since 2016. The private label strategy of the merged entity is unknown, though it will be able to consolidate their private label expertise and supply base and achieve economies of scale, thereby strengthening further their competitiveness. [§<]. Certainly J Sainsbury has announced its intention to grow its own label share, at least in food, and can be expected to do so in other categories as it strives for greater differentiation. Meanwhile, the Aldi, Lidl and M&S models demonstrate the viability of a predominantly or exclusively private label approach.
74. In terms of analysing the competition implications of this merger, we urge the CMA to assess the implications of consolidating private label resources, expertise and competitive advantage in a retailer with some 40% share of the grocery procurement market. In addition, the impact of creating a near-duopoly with Tesco, which also has a high private label market share (currently 49.8%, up 1.5% since 2016), requires scrutiny.
75. Such scale and consolidation of private label means that an assessment of whether the competitive advantages the merged entity enjoys in terms of access to commercial, confidential information from direct competitors; control over the retail pricing of its own and competing products; control over in-store levers of competition; and scope to mislead consumers through similar packaging without challenge, are warranted in competition terms and in relation to the consumer interest. In such an analysis, the lack of available and effective remedies, even where consumers are being confused, needs to be considered.

76. We note that some of the concerns raised here are present in the DG Competition's recent decision to launch a preliminary anti-trust investigation into Amazon, involving its ability to access information and data from third party sellers on its platform and to use such information for its own competitive advantage, including launching its own versions of products that sell best.

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5th October 2018

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