

Completed acquisition by JD Sports Fashion plc of Footasylum plc

Decision on relevant merger situation and substantial lessening of competition

ME/6827/19

Please note that [X] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.

SUMMARY

1. On 12 April 2019, JD Sports Fashion plc (**JD Sports**) acquired Footasylum plc (**Footasylum**) (the **Merger**). JD Sports (which is 57% owned by Pentland Group Plc (**Pentland**)) and Footasylum are together referred to as the **Parties**.
2. The Competition and Markets Authority (**CMA**) believes that it is or may be the case that each of Pentland, JD Sports and Footasylum is an enterprise; that these enterprises have ceased to be distinct as a result of the Merger; and that the turnover test is met. The four-month period for a decision, as extended, has not yet expired. The CMA therefore believes that it is or may be the case that a relevant merger situation has been created.
3. The Parties overlap in the retail supply of sports-inspired casualwear, both in-store and online in the UK. JD Sports is a well-established leading retailer of sports fashion footwear and clothing in the UK with over 400 stores and owns several sports fashion brands on the UK high street including JD, Size?, Scotts, Tessuti and Footpatrol. Footasylum is also a national retailer of sports-inspired casual fashion products, operating 70 stores across the UK.
4. The CMA assessed the impact of the Merger on the retail supply of sports-inspired casual apparel and footwear (each as a separate product frame of reference) on a national basis.

5. The CMA found that online sales exert some constraint on the in-store sales of these products, although there may be some limits to the competitive interaction between these two distribution channels. Whilst customers increasingly browse and buy in both channels, there is evidence that shopping in-store remains a particularly important part of a customer's buying experience, and that retailers compete to attract customers specifically to their physical stores through strategies such as promotional in-store experiences. The CMA has therefore considered competition between in-store retailers and competition between online retailers separately, but taken into account the constraint from online retailers on in-store retail (and *vice versa*) in its competitive assessment.
6. The CMA believes that competition between retailers in these frames of reference has a local element, with consumer demand being locally driven (ie consumers choose among retailers in the local area where they live or work).¹ The CMA therefore believes that the geographic frame of reference is local and – whilst not concluding on the exact size of the local market – used a 20 minute-drive time catchment area to approximate the appropriate geographic frame of reference in this case.
7. However, important elements of the Parties' competitive offering are set centrally and applied uniformly across all stores on a national basis. In particular, product range and the ability to access exclusive and/or high-end premium products are important competitive parameters in these frames of reference, with sports fashion players carefully selecting the range of brands that they offer, as obtaining access to such products drives footfall and helps to build loyalty and credibility with the consumer. For both Parties, decisions on product range, in addition to other important parameters such as price, quality and service, are set through central decision-making processes that the CMA believes impacts the effectiveness of the Parties as competitors in every local area where they operate. The CMA also recognises that the incentives of the merged entity will be determined by the aggregate level of competition it faces in the local areas in which it operates. In the competitive assessment, the CMA has therefore assessed the effects of the Merger (and any reduction in competition) on the Parties' conduct at a national level and, thereby, in every local area where either Party operates a store.
8. This national analysis is informed by a range of qualitative and quantitative evidence, including the local analysis (ie the scale of the Parties' geographic overlap as well as the average distance between their stores), but also other evidence that more accurately reflects the overall aggregate constraints on

¹ [Retail Mergers Commentary](#), para. 1.6.

the Parties, such as internal documents, third-party views, evidence on the Parties' service propositions and third-party reports and commentary.

9. The CMA believes that the Merger gives rise to a realistic prospect of a substantial lessening of competition (**SLC**) as a result of horizontal unilateral effects the retail supply of each of sports-inspired casual apparel and sports-inspired casual footwear on a national basis, each within separate frames of reference for in-store and online retail. (The CMA has carried out separate analyses for each of these four theories of harm.)
10. Based on the available evidence, the CMA believes that the Parties are two of a small number of national players active in the retail supply of sports-inspired casual products in-store and online and that they compete closely with each other. This is supported by:
 - (a) the similarity of their product offering and target customer. The Parties have a broadly similar customer proposition, and both target the same key demographics (ie 16-24 year-old customers, albeit with a particular focus on men in the case of Footasylum);
 - (b) the geographic overlaps between their estates, as all Footasylum stores overlap with (ie fall within the same catchment area as) at least one JD Sports store and more than half of JD Sports stores overlap with at least one Footasylum store;
 - (c) the Parties' internal documents, which indicate that, while each Party monitors a range of competitors, the Parties monitor each other particularly closely; and
 - (d) views from third parties, which suggest that the Parties compete closely against each other.
11. Further, the CMA has found that alternative retailers do not pose a sufficient competitive constraint on the merged entity in any of the frames of reference considered. The CMA considers that there are some multi-channel retailers such as Foot Locker, Sports Direct, Nike, Adidas, Office (only for footwear), Schuh (only for footwear), TopShop/Topman (only for apparel) and some online/pure players such as ASOS, Shop Direct or Zalando that pose a degree of competitive constraint on the Parties. However, given that the business strategy, product range and customer segment targeted by each of these retailers varies to those of the Parties to a significant extent, the CMA believes that the competitive constraint posed by each of these retailers is weaker in most cases than that exercised by the Parties on each other.

12. The CMA therefore believes that the Merger gives rise to a realistic prospect of a substantial lessening of competition (**SLC**) within a market or markets in the UK as a result of horizontal unilateral effects in relation to the retail supply of sports-inspired casual apparel and footwear, separately for in-store and online.
13. The CMA is therefore considering whether to accept undertakings under section 73 of the Enterprise Act 2002 (**the Act**). JD Sports has until 26 September 2019 to offer an undertaking to the CMA that might be accepted by the CMA. If no such undertaking is offered, then the CMA will refer the Merger pursuant to sections 22(1) and 34ZA(2) of the Act.

ASSESSMENT

Parties

14. JD Sports is an international retailer of sports casual fashionwear. JD Sports offers sports, fashion and outdoor fasciae. JD Sports' sports and fashion divisions in the UK comprise the following fasciae: (i) JD (371 stores across the UK and online); (ii) Size? (25 stores across the UK and online); (iii) Footpatrol (1 store in the UK and online); (iv) Tessuti (67 stores in the UK, including Scotts, Choice, Xile and Infinities, and online); (v) Hip Store (2 stores across the UK and online); and (vi) Activinstinct (online only and operating on an arms' length basis).² The turnover of JD Sports in the financial year ended 2 February 2019 was [£] in the UK.
15. JD Sports is listed on the London Stock Exchange and is 57% owned by Pentland. Pentland is a privately-owned management holding company active in the sports, fashion and outdoor markets. Pentland and JD Sports operate at arm's length under a relationship agreement dated 30 October 2014. This agreement requires that Pentland does not take any action which precludes or inhibits any member of JD Sports from carrying on its business independently of any member of the Pentland group.
16. Pentland supplies branded casual fashion apparel and footwear products. However, the vast majority of the Pentland brands' sales are at a wholesale level.³
17. Footasylum is a UK-based retailer of sports casual fashionwear, which was founded in 2005 and admitted to the Alternative Investment Market (**AIM**) in 2017. Footasylum owns and operates 70 stores in the UK, including one store

² JD Sports fasciae also include some more high-tier brands such as Armani Exchange, Choice and Hugo Boss.

³ The majority (more than [£]% except for [£], [£]% and [£], [£]%) of sales from Pentland's brands are made at the wholesale level.

under the Drome Men fascia and one under the Seven fascia. Footasylum also supplies sports fashionwear of its own brand products on a wholesale basis, although these activities represent a small part of Footasylum's business.⁴ The turnover of Footasylum for the financial year ended in 2018 was approximately £194.8 million in the UK.⁵

Transaction

18. The Merger was effected by way of a public offer made by JD Sports for the issued ordinary share capital of Footasylum on 18 March 2019. The offer was announced on the same day. On 12 April 2019, the offer was declared wholly unconditional as to acceptances. The remaining shares were acquired on 5 June by way of compulsory acquisition. Footasylum's shares were delisted from trading on AIM on 16 May 2019.
19. The Merger was not reviewed by any other competition authorities other than the CMA.

Rationale for the Transaction

20. JD Sports submitted that the Merger presents an opportunity to:⁶
 - (a) acquire Footasylum's range of in-house/own label brands, which will be added to diversify JD Sports' existing brand portfolio;
 - (b) learn from Footasylum's wholesale business, which JD Sports anticipates will create an exciting opportunity by pairing Footasylum's creative flair with JD Sports' brand strength and extensive international reach; and
 - (c) acquire a portfolio with a somewhat different focus and customer demographic (with JD Sports viewing Footasylum's brand as being more fashion-led than its own).
21. The CMA notes that JD Sports has been highly acquisitive in the fashion markets, and that its acquisition of Footasylum marks the latest in a series of expansive acquisitions. In the last two years, JD Sports has acquired:⁷
 - (a) Finish Line Inc.;⁸

⁴ Footasylum's wholesale operation was launched in 2017 and had a revenue of £2.6million in FY18 (this is 2% of Footasylum's total turnover).

⁵ Final Merger Notice submitted on 23 July 2019 (**FMN**), para. 3.3 (a)

⁶ FMN, para. 3.2.

⁷ FMN, para. 4(a).

⁸ FMN, para 3.1(a).

- (b) Weavers Door Limited;
- (c) Rascal Clothing Limited (50% stakeholder);
- (d) Urban Celebrity Limited;
- (e) Giulio Group;
- (f) Mallet Footwear Limited (25% stakeholder);
- (g) Base Childrenswear Limited;
- (h) Choice Group;
- (i) Pretty Green Limited;
- (j) Dantra Limited;
- (k) The Couture Club Limited; and
- (l) Il Sarto Milano Limited.

22. Footasylum submitted that from its perspective, the Merger provides strategic certainty against the backdrop of the significant financial and trading challenges it has encountered.⁹

Procedure

23. The CMA's mergers intelligence function identified this transaction as warranting an investigation.¹⁰

24. The Merger was considered at a Case Review Meeting.¹¹

Jurisdiction

25. Each of Pentland, JD Sports and Footasylum constitutes an enterprise.

26. As a result of the Merger, the enterprises of Pentland (which includes JD Sports) and Footasylum have ceased to be distinct.

⁹ FMN, para. 3.3 and Parties' response to the IL, para. 2.9.

¹⁰ See [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2), January 2014, paras. 6.9-6.19 and 6.59-60.

¹¹ See [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2), January 2014, from para. 7.34.

27. The UK turnover of Footasylum exceeds £70 million, so the turnover test in section 23(1)(b) of the Act is satisfied.
28. The Merger completed on 12 April 2019,¹² and was first made public on 18 March 2019.¹³ The four-month deadline for a decision under section 24 of the Act is 8 October 2019, following extensions under section 25(1) and 25(2) of the Act.
29. The CMA therefore believes that it is or may be the case that a relevant merger situation has been created.
30. The initial period for consideration of the Merger under section 34ZA(3) of the Act started on 25 July 2019 and the statutory 40 working day deadline for a decision is therefore 19 September 2019.

Counterfactual

31. The CMA assesses a merger's impact relative to the situation that would prevail absent the merger (ie the counterfactual). For completed mergers the CMA generally adopts the pre-merger conditions of competition as the counterfactual against which to assess the impact of the merger. However, the CMA will assess the merger against an alternative counterfactual where, based on the evidence available to it, it believes that, in the absence of the merger, the prospect of these conditions continuing is not realistic, or there is a realistic prospect of a counterfactual that is more competitive than these conditions.¹⁴ The description of the counterfactual is affected by the extent to which events or circumstances and their consequences are foreseeable, enabling the CMA to predict with some confidence. Even if not sufficiently certain to include in the counterfactual, the CMA may still consider the effects of the Merger in the context of an event or circumstance occurring. Future changes in market conditions, such as regulation or market liberalisation, are often addressed as part of the Authorities' competitive assessment.¹⁵

Parties' submissions

32. The Parties have submitted that the competitive dynamics of the industry have changed (and will continue to change in the short-term) significantly and

¹² In accordance with section 27 of the Act.

¹³ FMN, para. 2.4.

¹⁴ [Merger Assessment Guidelines](#) (OFT1254/CC2), September 2010, from para. 4.3.5. The [Merger Assessment Guidelines](#) have been adopted by the CMA (see [Mergers: Guidance on the CMA's jurisdiction and procedure](#) (CMA2), January 2014, Annex D).

¹⁵ [Merger Assessment Guidelines](#) (OFT1254/CC2), September 2010, para. 4.3.2.

in a manner critical to the assessment of the competitive impact of the Merger, in particular because:

- (a) Direct to Customer (**DTC**) sales by major branded suppliers such as Nike and adidas will increase substantially over the next 12-18 months, reducing available products to retailers outside the DTC channel;
 - (b) consumers are increasingly buying clothing and footwear online, and well-resourced online retailers, including ASOS, Boohoo.com, Amazon and Zalando pose a substantial and growing competitive threat to the Parties as they expand rapidly, attract more customers through their digital offerings and build strong partnerships with branded suppliers; and
 - (c) high street retailers have expanded ranges of athletic clothing and invest in their store elevation strategy.¹⁶
33. The Parties have submitted that Footasylum would have been a weakened and less effective competitor going forward for two main reasons: (i) its reliance on Nike and adidas; and (ii) its financial position.¹⁷ The Parties have not submitted that, absent the Merger, Footasylum would inevitably exit the market or that the conditions for a failing firm counterfactual are met.¹⁸
34. With respect to the first point, the Parties submitted that the sale of products produced by Nike and adidas represents a [X] part of Footasylum's business (with Nike and adidas together representing over [X]% of Footasylum's gross sales of footwear and over [X]% of its gross profit value over the three year period 2016 to 2018).¹⁹ Nike and adidas therefore have, according to the Parties, [X].²⁰ According to the Parties, these factors combined comprise sufficient evidence that it is foreseeable that, absent the Merger, [X].²¹
35. With respect to Footasylum's financial position, the Parties submitted that Footasylum had:
- (a) [X];
 - (b) issued three profit warnings for the last financial year resulting in significant share price drops; and

¹⁶FMN, para. 11.2.

¹⁷ FMN, paras. 11.1 to 11.5.

¹⁸ FMN, para. 11.3.

¹⁹ FMN, para. 11.16 and Parties' response to the IL submitted on 3 September 2019 (**Parties' response to the IL**), para. 3.10.

²⁰ Parties' response to the IL, para. 3.11 to 3.13.

²¹ FMN, para. 11.18.

(c) [REDACTED].²²

36. The Parties further submitted that [REDACTED].²³

CMA assessment

37. With respect to the evidence submitted in relation to the changing dynamics of the markets in which the Parties are present, the CMA believes that the available evidence does not, when considered in the round, suggest that it would be appropriate to depart from the pre-Merger conditions of competition:

- (a) According to the available evidence, whilst branded suppliers have increased the proportion of their sales made through DTC channels in the period between 2013 and 2018 (up to nearly 30% of Nike and adidas' overall sales),²⁴ such sales remain only a limited part of the market (reflected in the data underlying the shares of supply discussed below). While the DTC channel is growing, this is taken into account within the CMA's competitive assessment. There is no evidence to suggest that the nature of the constraint exercised by the DTC channel is likely to change to such an extent as to support an alternative counterfactual.
- (b) The CMA acknowledges that online sales are comprising an increasingly significant proportion of sales in the relevant markets, in part due to the increasing emergence of online/pure players.²⁵ However, as considered further in the Background section below, online sales still account for a small proportion of sales in the UK. Whilst online sales have been growing, there has also been growth in the in-store market. There is also evidence suggesting that many consumers still want to try these products on in-store prior to purchasing them, and that retailers are increasingly investing in their in-store experience to attract footfall to their stores.²⁶
- (c) In addition, whilst the CMA acknowledges that there has been expansion by non-specialised²⁷ high street retailers into athletic clothing (see further, the Background section following in paragraphs 56 below), these retailers have not, however, had a significant competitive impact on the relevant markets due to, *inter alia*, their limited access to brands in markets in which product

²² Parties' response to the IL, para. 3.4.

²³ Parties' response to the IL, para. 3.5.

²⁴ Annex 347 to the FMN, Berenberg Sports Retail, page 16.

²⁵ See para. 48 below.

²⁶ See paras. 49 and 50.

²⁷ Non-specialised refers in this context to retailers not specialised in sports or athleisure-related apparel or footwear, but who are active in selling, more broadly, casual fashion and footwear. Examples include Next, Zara or H&M.

range (in particular, exclusive and/or attractive products by brands such as Nike) are key for retailers' ability to compete (as further discussed in the competitive assessment sections below).²⁸

38. The CMA therefore has considered the dynamics of market trends – in particular, the significance of DTC and online channels – within the competitive assessment below.
39. With respect to the importance of adidas and Nike to Footasylum's revenues, according to the available evidence, not only Footasylum but both Parties owe a large share of their revenues to Nike and adidas products. Whilst [X]% of Footasylum's footwear revenues were obtained from Nike and adidas products in 2018, the percentage is even higher, [X]%, for JD Sports' revenues.²⁹ Although JD Sports is more reliant on Nike and adidas than Footasylum, the Parties have not submitted that JD Sports' effectiveness as a competitor would also be materially reduced as a result of its large share of sales due to Nike and adidas products. The CMA also notes that, as outlined above at paragraph 37(a) and in the discussion of the competitive constraint posed by Nike and adidas in the alternative retailers' section below, DTC sales remain a limited proportion of overall sales in the market. Both brands have stated that [X]. In any event, the CMA acknowledges that the DTC channel is growing and has taken this into account within the CMA's competitive assessment below. However, the CMA believes that there is no evidence to suggest that the nature of the constraint exercised by the DTC channel is likely to change to such an extent as to support an alternative counterfactual.
40. With respect to the Parties' submissions on Footasylum's financial position, the CMA acknowledges that Footasylum faced some financial challenges in 2018 [X].³⁰ However, the CMA believes that the evidence does not support the Parties' contention that, absent the Merger, Footasylum's financial situation would have reduced its ability to compete effectively. This is because the evidence shows that:

- (a) Although Footasylum's EBITDA margins have reduced in the current financial year, the historic financial performance shows substantial growth in

²⁸ As discussed in paras. 210, 295, 348 and 388, these high-street retailers do not impose a strong competitive constraint on the Parties.

²⁹ For apparel, the percentages are lower ([X]% for Footasylum and [X]% for JD Sports), but still show that JD Sports' percentage is higher than that of Footasylum. CMA analysis of Annex 1 of Footasylum's response to Request for Information dated 24 June 2019 and CMA analysis of JD Sports' response to Q.6 of RF11.

³⁰ Footasylum's response to request for information dated 24 June 2019, para. 10.33. The term 'upsizing' is used in these markets to describe the process of upgrading a store by increasing its size and/or hiring more employees working on it.

Footasylum's revenues (including for the last financial year, with revenues up by circa £29 million),³¹ as well as its EBITDA (except for the last financial year).³²

(b) Third-party analyst projections show that Footasylum was on course to grow revenue and EBITDA in the next two financial years.³³ In addition, [REDACTED].³⁴

(c) [REDACTED].³⁵

(d) The CMA acknowledges that Nike and adidas are key suppliers of Footasylum. The CMA has not, however, seen any evidence to suggest [REDACTED].

41. The CMA notes that Footasylum issued three profit warnings to the market in the last financial year and the share price has dropped significantly. However, the decrease in the share price could be caused by a number of factors that do not necessarily mean that Footasylum would have a reduced ability to compete effectively in future (including, for example, Footasylum not being able to meet its investors' expectations for the current year financial target, given that previously it has shown growing adjusted EBITDA margin that increased by 5.5 times (from £2.2 million in 2015 to £12.5 million in 2018) over the last four years).³⁶

42. Finally, given that Footasylum has ultimately sought to exit the market through its sale to JD Sports, the CMA notes (notwithstanding that the Parties have not submitted that, absent the Merger, Footasylum would inevitably exit the market or that the conditions for a failing firm counterfactual are met) that its exit through this route has brought about the strengthening of by far the largest market player at present. The CMA therefore notes that (because of the competition concerns described in detail below) any other purchaser would likely produce a better outcome for competition than the merger under consideration. The CMA also notes that Footasylum did not conduct a full sales process and therefore that there may well have been other plausible purchasers for the firm.

43. Accordingly, the CMA considers that the available evidence does not support the Parties' position that, absent the Merger, Footasylum's competitive strength would be materially reduced as a result of its reliance on Nike and adidas products or its financial situation. The CMA therefore believes the

³¹ Parties' response to the IL, para. 3.4 (i).

³² Annex 1 of Footasylum's section 109 consolidated response, Footasylum Annual Report FY18, pages 30-31.

³³ Annex 314 of Footasylum's consolidated section 109 response, [REDACTED], page 1; Annex 7 to Footasylum's response to Request for Information dated 10 July 2019, [REDACTED].

³⁴ Annex 8 to the FMN, [REDACTED].

³⁵ Footasylum's response to Q.12 of Request for Information dated 10 July 2019.

³⁶ [Footasylum Annual Report 2018](#), page 29

prevailing conditions of competition to be the relevant counterfactual and has considered the evidence submitted in relation to Footasylum's financial circumstances in the competitive assessment below, where relevant.

Background

44. By way of background to the analysis that follows, this section provides an overview of the retail sports-inspired casualwear markets in which the Parties are active, focusing on the products and services relevant to the CMA's investigation.

The UK sportswear market: figures and main players

45. The value of the UK clothing and footwear retail sector is forecast to reach £61.8 billion by 2021, at a compound annual growth rate (CAGR) of 2.8% during 2016-2021.³⁷ A report by GlobalData identifies several challenges facing the UK retail sector. For example, the report notes that, coupled with higher inflation (2.5% in 2017) and negative real wage growth, 'the uncertainty surrounding Brexit and its impact on the economy is hitting consumer confidence and the willingness to spend. The sector is also having to cope with consumers preferring to spend on leisure, entertainment and travel rather than products.'³⁸ The report therefore makes clear that the financial challenges facing UK retailers of clothing and footwear are likely to be a result of the combination of these factors and are not necessarily attributable to extensive competition between retailers operating in these markets.
46. The UK market for sportswear was estimated by GlobalData to be worth approximately £5.5 billion in 2018, and is forecast to grow at a rate of 20.9% in the next 5 years, outperforming the clothing and footwear retail markets.³⁹ The growth of the sportswear market has reportedly been driven by the 'athleisure' trend, which is the result of 'a fundamental and permanent shift of consumer lifestyle preferences towards healthy living and greater participation in sports and fitness.'⁴⁰ According to a report by Berenberg, 'Sports-inspired' apparel and footwear, which are products 'not designed to enhance sporting performance, but are instead geared towards fashion trends,' is estimated to

³⁷ Annex 338 of Footasylum's section 109 consolidated response. Global Data, Clothing & Footwear Retailing in the UK, Market Shares, Summary and Forecasts to 2021, page 4.

³⁸ Annex 338 of Footasylum's section 109 consolidated response. Global Data, Clothing & Footwear Retailing in the UK, Market Shares, Summary and Forecasts to 2021, page 4 and 6.

³⁹ Annex 355 to the FMN, The UK Sportswear Market 2018-2023 [GlobalData], page 13

⁴⁰ Annex 347 of FMN, Berenberg Sports Retail, page 4.

account for 52% of the sportswear market, with performance (38%) and outdoor (11%) comprising the remainder.⁴¹

47. JD Sports is considered by Berenberg as ‘best in class, offering significant international growth potential’ as JD Sports’ ‘sales densities are more than double those of its peers.’⁴² The same report states that, owing to its ‘rapid rise’, Footasylum is noted as ‘a star performer in the sector, with strong market share growth in both sports footwear and clothing.’⁴³ JD Sports has been widely recognised within the public domain as a leader in the field with very strong financial performance. For example, a news article reporting on JD Sports’ half year financial results, published on 10 September 2019, states that ‘JD has cashed in on the shift towards casual dressing across the generations and in the workplace that has made trainers and leggings everyday attire.’⁴⁴ A further news article states that ‘JD has successfully targeted younger consumers who are driving the trend for so-called athleisure as sports clothing becomes more acceptable in all walks of life.’⁴⁵

Distribution channels: online growth and importance of in-store experience

48. Different routes to customers (such as online versus in-store) are referred to as ‘channels’ within the industry. Consumer demand in the sportswear market centres on omnichannel retail experiences which allow customers to seamlessly shop online, via smartphone apps and in-store.⁴⁶ This is attributed to the core customer demographic of sportswear being more weighted towards younger consumers than the overall clothing and footwear sectors, and younger consumers being more comfortable with shopping online. Online is often sportswear customers’ first port of call in purchasing sportswear, leading to the online channel becoming a key driver of growth in the sportswear market, making it the fastest-growing channel.⁴⁷ This is due to a combination of the growth of online/pure players, such as ASOS, but also in-

⁴¹ Annex 347 of FMN, Berenberg Sports Retail, page 9.

⁴² Annex 347 of FMN, Berenberg Sports Retail, page 4.

⁴³ Annex 355 to the FMN, The UK Sportswear Market 2018-2023 [GlobalData], page 26. This report also states that Footasylum announced a profit warning in early 2019 and ‘given that trading conditions are expected to remain challenging over the next year, owing to weak consumer sentiment, Footasylum is likely to continue to struggle and there are concerns about its ability to continue trading throughout 2019.’

⁴⁴ <https://www.theguardian.com/business/2019/sep/10/athleisure-boom-fuels-bumper-sales-at-jd-sports> (last access on 18 September 2019)

⁴⁵ <https://uk.reuters.com/article/us-jd-sports-results/jd-sports-outperforms-struggling-uk-retail-sector-idUKKCN1VV0IZ> (last access on 18 September 2019)

⁴⁶ Annex 347 of FMN, Berenberg Sports Retail, page 16.

⁴⁷ Annex 355 to the FMN, The UK Sportswear Market 2018-2023 [GlobalData], page 12 and 18.

store retailers growing their share online, as the convenience of online shopping grows.⁴⁸

49. However, online sales of sportswear (worth around £1.749 billion in 2018) still account for the minority (31.6%) of sales in the UK, with in-store shopping remaining of key importance to the way consumers acquire sportswear products.⁴⁹ According to Berenberg, whilst online sales have been growing, ‘there has also been sufficient growth in the market, driven by the athleisure trend, for store-based like-for-like growth – at least for some well-positioned retailers, such as JD.’⁵⁰ Therefore, the impact which online has had, and continues to have, is deemed less disruptive to in-store growth than observed across broader apparel and footwear.⁵¹ Research carried out by Mintel also indicates that, with trainers being the most popular sportswear item, many consumers still want to try them in-store, prior to committing, as it is important to get the fit of footwear right.⁵²
50. In addition, retailers are increasingly investing in in-store environments and events to offer a superior experience, to better engage consumers in response to demand for experiential retail experiences.⁵³ A GlobalData report suggests that ‘store staff need to be clued up on the latest trends and products, and understand shopper needs’ and that sportswear retailers are ‘introducing events instore such as classes or one-off sessions with trainers to encourage return visits.’⁵⁴ A news article reporting on JD Sports’ half-year financial results of 2019 includes comments made by JD Sports’ CEO, Peter Cowgill, regarding how JD Sports’ in-store experience appeals specifically to its target demographic, reporting him as saying that ‘millennials and generation Z shoppers were attracted to its stores by the company’s use of new technology alongside “vibrant retail theatre”’.⁵⁵ A further news article from September 2019 provides comments from ‘one clothing label that works closely with JD’: “[JD] does all the right events, from [collaboration with tourism company] Ibiza Rocks to boxing [matches]... It is on trend, especially in gaming [it hosts e-sports events], and it has all the right influencers on

⁴⁸ Annex 338 of Footasylum’s section 109 consolidated response. Global Data, Clothing & Footwear Retailing in the UK, Market Shares, Summary and Forecasts to 2021, page 29. A number of UK sportswear retailers offer an online service. The range of products offered is generally the same as products sold in-store (if not wider), as is the price of individual products.

⁴⁹ Annex 355 to the FMN, The UK Sportswear Market 2018-2023 [GlobalData], page 22-23.

⁵⁰ Annex 347 of FMN, Berenberg Sports Retail, page, 29.

⁵¹ Annex 347 of FMN, Berenberg Sports Retail, page, 29.

⁵² Annex 314 to the FMN, Mintel Sports & Outdoor Fashion - UK - December 2018, page 82.

⁵³ Annex 355 to the FMN, The UK Sportswear Market 2018-2023 [GlobalData].pdf, page 10.

⁵⁴ Annex 355 to the FMN, The UK Sportswear Market 2018-2023 [GlobalData].pdf, page 10.

⁵⁵ <https://www.theguardian.com/business/2019/sep/10/athleisure-boom-fuels-bumper-sales-at-jd-sports> (last access on 18 September 2019)

board, both male and female.”⁵⁶ The same article provides comments from an analyst at GlobalData: “JD Sports typically hires young employees who are relatable to its typical shopper, while also creating an in-store environment that appeals to its young urban audience, with appropriate music, as well as great visual merchandising.”⁵⁷

51. JD Sports’ internal documents [REDACTED].⁵⁸ Footasylum documents also note that [REDACTED].⁵⁹

Growth of DTC sales

52. Another recent development in these markets relates to major brands, such as Nike or adidas, expanding their retail businesses and offering their products DTC, both online and in-store. Third party reports indicate that younger sportswear consumers are more likely than their older counterparts to buy directly from brands, more so for clothing than for footwear.⁶⁰ Brands are investing in their online operations and own brand stores, as well as leveraging social media to drive sales via the channel by engaging directly with customers.⁶¹ As a result, brands have increased the proportion of their sales made through DTC channels in the period between 2013 and 2018. Such sales, however, continue to account for only a relatively limited part of the market.⁶² In this regard, Berenberg states that brands’ key wholesale partners (ie retailers), ‘still play a critical role in representing sportswear labels and merchandising products to different consumers in a multi-brand, multi-channel environment.’⁶³ The same report states that brands are ‘expected to shift and increase their best product allocations to key ‘differentiated’ strategic retailers (eg JD Sports), forcing a move away from lower-quality wholesale partners.’ Berenberg adds that JD Sports ‘will continue to grow strongly as weaker peers are forced out of the market’ and that JD Sports ‘is one of just two global strategic partners for adidas and Nike, whereas Sports Direct’s strained relationship with the brands will [...] leave it exposed.’⁶⁴

⁵⁶ <https://www.drapersonline.com/news/why-jd-sports-is-outpacing-its-rivals/7037588.article> (last access on 19 September 2019).

⁵⁷ <https://www.drapersonline.com/news/why-jd-sports-is-outpacing-its-rivals/7037588.article> (last access on 19 September 2019).

⁵⁸ See for instance Annex 216 of to the FMN, [REDACTED] (See Annexes 210 to 242 of the FMN).

⁵⁹ Annex 258 of Footasylum’s section 109 consolidated response, [REDACTED].

⁶⁰ Annex 355 to the FMN, The UK Sportswear Market 2018-2023 [GlobalData].pdf, page 26.

⁶¹ Annex 355 to the FMN, The UK Sportswear Market 2018-2023 [GlobalData].pdf, pages 26, 5.

⁶² Annex 347 to the FMN, Berenberg Sports Retail, page 5.

⁶³ Annex 347 of FMN, Berenberg Sports Retail, page 14. [REDACTED] (see paras. 191 below).

⁶⁴ Annex 347 of FMN, Berenberg Sports Retail, page 4.

Importance of range and access to exclusive and/or premium products

53. Access to product range and exclusive and/or high-end/premium (including 'top-of-the-range'/ limited range) products are therefore important competitive parameters in these markets. A report submitted by the Parties notes '[e]xclusive products are important to make the outlets genuine destination stores and footwear in particular has accelerated recent like-for-like growth performance at FA. Adidas Originals is a key example here. [...] Adidas Originals has helped Adidas break recent records and profits surpassed EUR1bn for the first time ever in 2016 and they expect to see no let up until at least 2020. Originals, Climacool, Tubular, Performance, Gazelles and Hamburgs might not mean much to me but for kids this is the latest must have stuff.' The report goes onto saying that 'There are a limited number of chains at which these trainers are available. Sports Direct, which operates in value end discounted goods and similar lower end rivals, might want to have the Adidas, Nike or Reebok's absolute top of the range items but it is inaccessible to them and so the likes of FA stores become a mecca for trendsetters.'⁶⁵
54. Furthermore, according to a GlobalData report, 'product and brand exclusives' are 'vital for multi-brand retailers...to drive differentiation. Obtaining limited edition or unique products and ranges will drive footfall, help to acquire new shoppers, boost destination appeal by standing out from the crowd, and encourage purchases, with shoppers more likely to trade up.'⁶⁶ A news article reporting on JD Sports' half-year financial results of 2019, features Peel Hunt's analysis of how JD Sports' range is distinguished from its competitors, stating: 'People don't come to JD for a browse and a contemplate. They come in knowing that the only place where they are sure to find up-to-date branded footwear or apparel is JD, so there's no point walking the high street.'⁶⁷ A further news article from September 2019 provides comments from 'the chairman of one men's and women's fashion retailer': "'Sports Direct vacated the [premium sportswear] field and has clearly upset all the brands [by discounting]. It's left the full-price part of the market to JD. JD has used its strengths and leadership to dominate that market.'⁶⁸
55. This has also been confirmed by the Parties (see paragraph 125(d)), and by the majority of third parties contacted as part of the CMA's merger investigation, who have submitted that competition occurs mainly on product

⁶⁵ Annex 332 of Footasylum's section 109 consolidated response, SCSW January 2018(mag no reg); The Small Company Share Watch, Jan 2018.

⁶⁶ Annex 355 to the FMN, The UK Sportswear Market 2018-2023 [GlobalData].pdf, page 10.

⁶⁷ <https://www.theguardian.com/business/2019/sep/10/athleisure-boom-fuels-bumper-sales-at-jd-sports> (last access on 18 September 2019).

⁶⁸ <https://www.drapersonline.com/news/why-jd-sports-is-outpacing-its-rivals/7037588.article> (last access on 19 September 2019).

range and that access to exclusive and/or high-end/premium products from the major brands is important to be a successful retailer in the markets affected by the Merger. For example:

- (a) one retailer mentioned that stocking popular product lines is key 'because these retailers have built loyalty with their consumers with the expectation that they will stock those products in their environment.'
- (b) Another retailer submitted that 'it is important to obtain exclusives, as it is how retailers in this market differentiate their offering to consumers. It is always the challenge for retailers to secure exclusives with the vendor partners; it is a continuous discussion which [the retailer] has with suppliers.'
- (c) Another retailer told the CMA that the availability of products is the most important factor to attract customers in the market.

Athleisure ranges by non-specialised high street retailers

56. Finally, a further development in the markets affected by this merger relates to casual fashion retailers launching their own athleisure ranges. The growth of the athleisure trend has led to non-specialised retailers in the wider casual fashion market, such as Joules and BoohooMAN, to launch activewear ranges.⁶⁹ However, there is evidence to suggest that these retailers may face challenges in respect of their ability to access brands. Research carried out by GlobalData shows that '52.1% of sports clothing shoppers and 58.2% of sports footwear shoppers agree that the brand is important to them when purchasing an item, with the figure rising among younger consumers.' GlobalData suggests that this 'indicates that players planning to build private label ranges will have a difficult time in driving appeal especially given the accessibility of branded ranges and ongoing promotional activity by multi-brand retailers.'⁷⁰

Frame of reference

57. Market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects of the merger, as it is recognised that there can be constraints on merging parties from outside the relevant market, segmentation within the

⁶⁹ Annex 355 to the FMN, The UK Sportswear Market 2018-2023 [GlobalData], page 6.

⁷⁰ Annex 355 to the FMN, The UK Sportswear Market 2018-2023 [GlobalData], page 3. The impact of lack of access to brands on the ability of non-specialised retailers in the wider casual fashion market to compete is discussed further in the Alternative retailers sections of the competitive assessment.

relevant market, or other ways in which some constraints are more important than others. The CMA will take these factors into account in its competitive assessment.⁷¹

58. As previously mentioned, the Parties overlap in the retail supply of casual sportswear (including both apparel and footwear) in-store and online.⁷²

Product scope

Apparel versus footwear

59. The Parties have submitted that, in line with the distinction made by the CMA in *JD/Go Outdoors*⁷³ between the retail supply of outdoor clothing, on the one hand, and the retail supply of outdoor footwear on the other, the relevant product frames of reference for the purpose of this Merger comprise: (i) the retail supply of casual fashion apparel and (ii) the retail supply of casual fashion footwear.⁷⁴
60. The CMA has not received any evidence to depart from such a distinction between apparel and footwear and, in line with the Parties' submissions, the CMA has considered separate frames of reference for each of these categories.
61. In determining the appropriate product frame of reference for the competitive assessment, the CMA has considered whether it is possible to further narrow the frame of reference within each of apparel and footwear within the sports-inspired casual segment, and whether it is appropriate to differentiate between distribution channel (ie, between in-store and online sales). As there are no significant substantive differences in the majority of the evidence received for each of these frames of reference, the CMA has not performed this analysis separately for each of apparel and footwear. Therefore, for the purposes of defining the relevant frame of reference, the analysis in the next sections applies to both apparel and footwear, unless indicated otherwise.

⁷¹ [Merger Assessment Guidelines](#), 5.2.2 (the **CMA's Guidelines**).

⁷² The Parties also overlap at the wholesale level: JD Sports through Pentland and Footasylum with their own wholesale activities (see paras. 16 and 17 above). However, given that both entities have a small presence at the wholesale level (which is largely dominated by Nike and adidas) and that no retailer nor supplier was concerned about any possible vertical effect arising from the Merger, this is not addressed further in this Decision.

⁷³ Completed acquisition by JD Sports Fashion Plc of Go Outdoors Topco Limited, ME/6648/16, dated 7 June 2017 (**JD/Go Outdoors**).

⁷⁴ FMN, para. 5.2.

Sports-inspired fashion versus casual fashion

62. The Parties have submitted that the relevant product frames of reference are the retail supply of casual fashion apparel and separately, footwear.⁷⁵ JD Sports stated that there is no clear existing definition of the casual fashion clothing and footwear markets and that [§].⁷⁶ However, the Parties provided a non-exhaustive list of products that fall within these categories, submitting that:
- (a) the retail supply of casual fashion apparel would include T-Shirts and polo shirts, shirts, gilets, tracksuits, denim, sweatshirts, hooded tops, shorts and swim shorts, leggings, skirts and dresses, replica football kits, chinos, formal or printed shirts, etc; and
 - (b) the retail supply of casual fashion footwear would include trainers and classic trainers (including hi-tops), boots, slides, canvas and plimsolls shoes, brown and black casual shoes or brogues, espadrilles and Flip Flops, etc.⁷⁷
63. The Parties further submitted that the following products are excluded from the definition of casual fashion apparel and footwear: formal clothing and formal shoes, accessories, and outdoor clothing and footwear sold in outdoor retail fascia.⁷⁸
64. The Parties submitted that a narrower market segmentation such as athleisure or activewear/sportswear is not appropriate in this case for the following reasons:
- (a) A narrower focus does not capture the wider spectrum of non-athleisure or activewear/sportswear-focused casual fashion products supplied by, in particular, Footasylum;⁷⁹
 - (b) Athleisure forms part of (ie, rather than being separate from) the wider casual fashion apparel and casual fashion footwear markets, and the boundaries between athleisure products on the one hand, and mainstream casual fashion products on another, are not clear;⁸⁰ and
 - (c) The fact that retailers of casual fashion that are not specialised in sportswear (traditional casual fashion retailers such as Next, River Island,

⁷⁵ FMN, para. 5.2.

⁷⁶ JD Sports' response to Q.1 of the CMA's notice under section 109 of the Enterprise Act 2002 dated 14 June 2019.

⁷⁷ FMN, section 12.

⁷⁸ FMN, section 12.

⁷⁹ JD Sports' response to Q.1 of the CMA's notice under section 109 of the Enterprise Act 2002 dated 14 June 2019.

⁸⁰ Parties' response to the IL, para. 5.3.

Topshop and Zara, as well as casual fashion online/pure players such as ASOS, Zalando and Boohoo against whom both Parties consider they compete) have launched athleisure collections, highlighting the position of the athleisure trend within the wider casual fashion markets (and the wide range of competitors in the relevant markets). In relation to footwear, the Parties submitted that the distinction between sports shoes and casual footwear has also become increasingly blurred due to the growth in the athleisure trend.⁸¹

65. The relevant frame of reference will include the most significant competitive alternatives available to customers of the Parties. The CMA's approach to assessing the product frame of reference is to begin with the overlapping products of the merger parties in the narrowest plausible candidate product frame of reference and then to see if this can be widened on the basis, primarily, of demand or supply-side considerations.⁸²
66. The CMA believes that the narrowest plausible candidate product frame of reference is the retail supply of sports-inspired casual apparel and, separately, footwear. Sports-inspired casual fashion products refer to those athletic-inspired products (ie products that could be used to practice sports) primarily used for leisure purposes given their comfort, style and aesthetically appealing designs. This category would exclude: (i) non athletic/sports-inspired casual apparel and footwear (such as jeans, chinos, formal or printed shirts, boots, brown and black casual shoes or brogues, espadrilles, etc); (ii) performance sport clothing/footwear (for example, studded boots or equipment to practice sports); (iii) outdoor clothing and footwear; (iv) formal clothing and footwear (such as formal brown and black leather men's shoes and heeled women's shoes); and (v) accessories.⁸³
67. The CMA has considered whether there is any basis to widen this frame of reference. First, contrary to the Parties' submissions, the fact that the Parties may overlap in additional categories of products is not a basis to disregard sports-inspired casual fashion as a relevant frame of reference. Not all overlapping products sold by two merging parties will necessarily belong in the same frame of reference.
68. Second, evidence presented to the CMA shows that the large majority of the Parties' products fall within the sports-inspired casual fashion frame of

⁸¹ JD Sports' response to Q.1 of the CMA's notice under section 109 of the Enterprise Act 2002 dated 14 June 2019.

⁸² In accordance with [Merger Assessment Guidelines](#) (OFT1254/CC2), September 2010, section 5.2.

⁸³ Regardless of the precise definition or the boundaries of the product frame of reference, the CMA has not used the term 'athleisure' to define these frames of reference given that the term is used in different ways by different players active in these markets.

reference. The Parties argue that their overlapping products (in particular, those of Footasylum) in both apparel and footwear all fall within the broader casual fashion category, that Footasylum's apparel offering is more fashion-led and JD Sports' apparel offering is more sports-led, and that accordingly, athleisure or sports-inspired products should not form a separate frame of reference within this category. The fact that products would also fall within a potential broader frame of reference does not mean that a narrower frame of reference is inappropriate. The CMA notes that Footasylum has stated that 'less than [REDACTED]% of its apparel products and less than [REDACTED]% of its footwear products would not fall within the athleisure trend' (emphasis added).⁸⁴

69. Footasylum submitted further that it categorises customers into 'tribes' and the 'Sports' tribe accounted for [REDACTED]% of its offering. However, the CMA notes that other 'tribes' targeted by Footasylum are also described in internal documents as [REDACTED].⁸⁵
70. Third, the CMA has not received any evidence to suggest that sports-inspired casual fashion and other casual fashion products are substitutes from a consumer perspective. The Parties have provided images of various retailer websites noting that items such as striped t-shirts are available from many retailers that the Parties have identified as competitors including Primark, Topshop and Next. Such evidence is not informative of the extent to which customers consider these retailers to be significant alternatives to the Parties in a differentiated frame of reference. Shoes and apparel can be distinguished based on factors such as prices, creative content and marketing under particular trademarks. It is unlikely, for instance, that a consumer regards a striped t-shirt marketed by a work uniform supplier such as Work Express⁸⁶ as a substitute for a striped t-shirt offered by a luxury brand such as Givenchy.⁸⁷
71. Evidence from the Parties and from third parties supports the conclusion that the Parties are focused on a distinct segment for sports-inspired casual fashion. As discussed in the Background section,⁸⁸ both the Parties and third

⁸⁴ To provide this figure, Footasylum 'assumed that the athleisure trend sits within the broader casual fashion category and captures any sports performance or "sports inspired" (i.e., not designed to enhance sporting performance, but instead geared towards fashion trends) apparel or footwear that can be worn for casual fitness or sporting purposes.' (Footasylum's response to Q.3 of the CMA's notice under section 109 of the Enterprise Act 2002 dated 14 June 2019). JD Sports did not provide this data as they submitted that "'athleisure" is a trend within the wider casual fashion market and JD Sports [REDACTED].

⁸⁵ Exhibit 3 of Footasylum's index of internal documents submitted at the Issues Meeting on 2 September 2019, pages 1 and 4. This internal document defines [REDACTED].

⁸⁶ See: <https://www.workwearexpress.com/t-shirts/?att=572&ge=181>

⁸⁷ See: https://www.givenchy.com/gb/en/givenchy-4g-embroidered-oversized-t-shirt/BM70KU3002-001.html?cgid=T-SHIRTS_M#start=1

⁸⁸ See paras. 53 and 55.

parties have pointed to the importance of range for customers purchasing sports fashion wear. Moreover:

- (a) The Parties' range is different to the range offered by non-specialised general retailers, with the Parties more focused on branded products from major brands such as Nike or adidas⁸⁹ that other high-street retailers do not typically offer. This suggests that the offerings sold by the Parties would not be considered substitutable with the non-branded offerings of non-specialised high street retailers.
- (b) Third party respondents indicated that the Parties focus on sports-inspired products aimed at casual fashion rather than practising sports. Several non-specialised retailers, such as [REDACTED], stated that they did not compete with the Parties or do so only to a limited extent, further suggesting a distinction between suppliers of sports-inspired products and casual fashion more generally.
- (c) Finally, the Parties' internal documents suggest that their competitor monitoring mainly focuses on retailers that either exclusively sell sports-inspired casual wear, or that devote a substantial portion of their offering to sports-inspired casual wear, such as Foot Locker, adidas, Nike, and Sports Direct, as well as Schuh and Office (rather than retailers with a broader focus on the whole spectrum of casual fashion offering such as Zara, River Island and Next, which are monitored by Footasylum less often than the previously mentioned retailers). Although some of Footasylum's internal documents show that they monitor some non-specialised high street fashion retailers (eg TopShop/Topman) as regularly as JD Sports for apparel products, this could be due to Footasylum having a slightly more fashion-focussed offering than JD Sports. This suggests that there is a degree of differentiation between the wider market of casual fashion and the narrower sports inspired casual fashion markets, notwithstanding moves by non-specialised casual fashion retailers to offer athleisure-type products.⁹⁰ A more detailed analysis of the Parties' internal documents is included in the competitive assessment sections below.

72. Finally, the Parties have provided the CMA with various industry reports. The CMA would note that the reports cover various categories of products, not all of which are relevant to the CMA's merger investigation. For example, a Mintel report cited by the Parties in support of their submissions covers a sportswear market that includes technical clothing such as outdoor wear

⁸⁹ Footasylum's 2018 sales due to branded products from Nike and adidas were [REDACTED]% in footwear and [REDACTED]% in apparel, JD Sports' 2018 sales due to branded products from Nike and adidas were [REDACTED] % and [REDACTED]%, respectively.

⁹⁰ See Alternative retailers section below, in particular, paras. 168 to 210(b).

(which the Parties have agreed should be excluded from the relevant frame of reference). As such, it is not always clear that statements made in these reports are relevant to the specific types of products sold by the Parties. These reports do, however, refer to recent growth of the athleisure trend and its effects of prompting more consumers to purchase sportswear for everyday (rather than specifically sports-related) use. The CMA notes that the reports do not identify any consumer trend to substitute sports-inspired items with casual fashion ones. Therefore, the CMA believes that the growth of the athleisure trend supports (rather than contradicts) the position that there is limited demand-side substitutability between sports-inspired products and the broader casual fashion market.⁹¹

73. The CMA therefore believes that there is unlikely to be significant demand-side substitution between sports-inspired casual fashion products and a broader casual fashion category.
74. While the boundaries of the relevant product frame of reference are generally determined by reference to demand-side substitution alone, the CMA may widen the scope of the product frame of reference where there is evidence of supply-side substitution.⁹² However, the evidence received by the CMA does not support a wider definition of the product frame of reference.
75. As explained in more detail in the Background section,⁹³ access to brands and to exclusive products are one of the main factors that enable retailers in the relevant frames of reference to compete effectively. However, many retailers already present in these markets appear to have encountered difficulties in accessing these brands' exclusive and/or high-end/premium products.⁹⁴ As such, the CMA believes that it may be difficult for general non-specialised retailers present in the wider casual fashion markets, amongst others, to obtain access to this range of branded and exclusive and/or high-end/premium products, as they would have neither the ability nor the incentive to shift capacity between the wider casual fashion products and the sports-inspired products that firms such as the Parties currently offer.
76. Moreover, the CMA notes that retail brand repositioning in the sports-inspired casual markets requires significant investment and time. This is evidenced by some third parties' comments.⁹⁵ Therefore, supply-side substitutability will be

⁹¹ JD Sports' response to Q.1 of the CMA's notice under section 109 of the Enterprise Act 2002 dated 14 June 2019.

⁹² [Merger Assessment Guidelines, para. 5.2.17.](#)

⁹³ See paras. 53 and 54 above.

⁹⁴ See further paras. 132 to 135 below.

⁹⁵ [REDACTED]. These retailers highlighted that the perception by suppliers of retailers' positioning is hard to change and elevation strategies are difficult to implement.

very limited as casual fashion retailers will find it difficult to reposition their brands to compete in the narrower sports-inspired casual apparel and footwear markets.

77. On the basis of its assessment above, the CMA therefore believes it appropriate to assess the Merger by reference to separate frames of reference for each of:

- (a) the retail supply of sports-inspired casual apparel; and
- (b) the retail supply of sports-inspired casual footwear.

Distribution channel

78. The CMA has also considered whether the product scope could be segmented by distribution channel, ie between in-store sales and online sales.

79. The Parties have submitted that it is not appropriate to identify distinct product frames of reference for, on the one hand, the retail supply of casual fashion apparel and footwear in-store and, on the other hand, the retail supply through the online channel. This is on the basis that:

- (a) the Parties' customers purchase on a multi-channel basis (ie both in-store and online and via 'apps').⁹⁶ Footasylum submitted its core customer is constantly making use of the online channel for browsing and purchasing, but also makes purchases in-store, showing the constraint that online sales pose on in-store sales;⁹⁷
- (b) third party reports support the importance of online as a key channel in the athleisure market. For example, a Mintel report shows that 57% of consumers buy sports clothing online, which is comparable with the 69% that purchased sports clothing in-store;⁹⁸
- (c) the Parties' prices are, with a few exceptions, uniform across both its in-store and online channels;⁹⁹

⁹⁶ Footasylum submitted a number of third-party reports purporting to demonstrate that its core consumer (defined as being 16-24 years old, with a particular focus on men (see para. 138.) actively shops both online and in-store, and that it uses these channels interchangeably (documents include Annex 438 of Footasylum's section 109 consolidated response, [§]), which shows that [§]. Annex 400 in Footasylum's section 109 consolidated response, [§].

⁹⁷ Footasylum's response to Q.11 of the CMA's notice under section 109 of the Enterprise Act 2002 dated 14 June 2019.

⁹⁸ Parties' response to the IL, para. 5.8.

⁹⁹ FMN, para. 15.70.

- (d) the Parties compete with the full spectrum of retailers – both online/pure players and those with both in-store and online offerings. Footasylum also submitted that it monitors several online/pure players (eg ASOS and Pretty Little Thing) because they compete against both Footasylum’s in-store and the online channel.¹⁰⁰
80. As discussed in the Background section,¹⁰¹ consumer demand in these markets appears to be focused on omnichannel retail experiences which allow customers to browse and shop online and in-store. However, this fact, by itself, is not determinative of both channels forming a single product frame of reference.
81. To assess the extent to which in-store and online should belong to the same product frame of reference, the CMA has considered a wide range of evidence. In particular:
- (a) Whilst customers increasingly browse and buy in both channels, there is evidence that shopping in-store remains a uniquely important part of a customer’s buying experience, with many customers still wishing to try the products in-store prior to purchasing to ensure they get the appropriate fit (notwithstanding that they may have first browsed for / identified such products online).¹⁰² A Footasylum document notes that [REDACTED].¹⁰³
- (b) There is also evidence that retailers compete to attract customers specifically to their physical stores through strategies such as promotional in-store experiences (as increased footfall will increase sales).¹⁰⁴ The Parties’ internal documents, for example, note that investment in in-store events attracts footfall.¹⁰⁵ In this regard, in a recent interview with the BBC, when asked about what protects JD Sports from large online players such as Amazon, JD Sports’ CEO, Peter Cowgill, said that JD Sports offers a ‘consumer experience first of all in-store and I think [JD Sports] select our ranges very carefully and very appropriately, so we have the best and edgiest offers to the consumer’ (emphasis added).¹⁰⁶ Moreover, a news article reporting on JD Sports’ 2019 half-year financial results suggests that

¹⁰⁰ Footasylum’s response to Q.11 of the CMA’s notice under section 109 of the Enterprise Act 2002 dated 14 June 2019.

¹⁰¹ See para. 48 above.

¹⁰² See para. 49 above.

¹⁰³ Annex 351 of Footasylum’s section 109 consolidated response, [REDACTED].

¹⁰⁴ [REDACTED] (Footasylum’s response to Q.23 of Request for Information dated 24 June 2019). JD Sports submitted that [REDACTED], eg Annex 216 to FMN, [REDACTED] (See Annexes 210 to 242 of the FMN).

¹⁰⁵ See para. 50 above for a more detailed analysis of these documents.

¹⁰⁶ “Today” programme – 10 September 2019, BBC Radio 4; interview with Peter Cowgill commencing at 1:24:41.

customers are attracted to JD Sports' 'slick Oxford Street store' in which 'thumping hip-hop tunes create a nightclub vibe and a neon LED ticker flashes around the store trumpeting its customer.'¹⁰⁷

82. The fact that online sales are an increasingly significant proportion of all sales in the market does not necessarily predicate that these should form part of a single frame of reference with in-store sales (sales which, in any event, remain higher).¹⁰⁸ There is also a large variation in the proportion of online sales between different retailers with both an in-store and online presence.¹⁰⁹ The fact that (with the exception of a limited number of online/pure play retailers) most retailers maintain both an in-store and online offering (at considerable cost) suggests that each channel has its own specific advantages that are not also provided by the other distribution channel. In addition:

- (a) Whilst the CMA acknowledges that prices are [redacted] (also corroborated by third party feedback discussed further at paragraph 102 below), [redacted] is not necessarily determinative of the two channels forming a single product frame of reference. Rather, [redacted] may be attributable to other factors (see paragraph 98). Furthermore, competition in these markets takes place primarily on [redacted] (ie, rather than [redacted]),¹¹⁰ which does vary significantly between different retailers' offerings (whether in-store or online).
- (b) The evidence provided in the Parties' internal documents on this question is mixed. Certain of these documents attest to the importance of a presence in both types of distribution channels to a retailers' ability to compete (although again, the CMA notes that this does not in itself mean that both are in the same frame of reference), but others distinguish between the two channels, suggesting that a segmentation between the two may be appropriate. For example:

¹⁰⁷ <https://www.thetimes.co.uk/article/vibrant-jd-sports-outpaces-competition-wwfbl8wtf> (last access on 18 September 2019).

¹⁰⁸ Footasylum obtains [redacted]% of its footwear sales from online, [redacted]% for apparel. JD Sports obtains [redacted]% of its footwear sales from online and [redacted]% for apparel. Source: [redacted]. Also, the CMA notes that, in previous retail cases, the CMA has acknowledged that online sales have become larger over the last few years; however the survey evidence showed that there was little substitution between the in-store and the online channels (*Sainsbury's/Asda*, Final Report, para. 7.57 and 10.18).

¹⁰⁹ For example, Foot Locker obtains [redacted]. For Sports Direct [redacted].

¹¹⁰ This issue is explored further in this Decision at para. 53. There is also specific evidence of the Parties varying in-store range in response [redacted] (discussed further at para. 103 below).

- (i) Some internal documents show that the Parties consistently reference both in-store and online-only competitors, [REDACTED]¹¹¹ or Footasylum's [REDACTED]¹¹² and the [REDACTED].¹¹³ However, other internal documents make a distinction between the online and retail/in-store aspects when monitoring competitors with multi-channel businesses.¹¹⁴ Whilst the internal documents demonstrate that the Parties are monitoring online competitors, it is unclear to what extent this informs business decisions relating to the Parties' stores, which may still be primarily informed by the monitoring of in-store competitors.
- (ii) Other internal documents show that there are some similarities in the customer profile of online and in-store customers. For example, one document states that the [REDACTED].¹¹⁵ Another internal document from JD Sports states that [REDACTED].¹¹⁶ Moreover, any similarity in customers' characteristics other than preference of purchase channel does not evidence substitutability between the two channels.
- (c) Most third parties noted the importance of having an online offering or an online presence to be an effective retailer in these markets.¹¹⁷ The importance of an online presence is not, however, in itself evidence that online and in-store are part of the same frame of reference: an online presence may be important for advertising, promotional or similar purposes. The majority of competitors who responded to the CMA's merger investigation said that they price their products to be the same between the in-store and online channels. On the question of whether in-store and online channels belong to the same market, however, the evidence from competitors was mixed; it was not always apparent that third parties were providing feedback in respect of whether these channels formed part of a single economic market (rather than in relation to the operations of their business more generally). With such caveats in mind, the CMA notes that whilst some third parties stated they did consider both channels to have a significant degree of competitive interaction between them, others suggested that there was a significant degree of differentiation. Third parties noted, for example, the following:

¹¹¹ JD Sports response to Q.3 of the CMA's notice under section 109 of the Enterprise Act 2002 dated 23 May 2019.

¹¹² Footasylum response to Q.3 of the CMA's notice under section 109 of the Enterprise Act 2002 dated 23 May 2019.

¹¹³ See for example Annex 112 of Footasylum's section 109 consolidated response, [REDACTED].

¹¹⁴ Annex 651 of Footasylum's section 109 consolidated response, [REDACTED].

¹¹⁵ Annex 36 to the FMN, [REDACTED].

¹¹⁶ Annex 158 to the FMN, [REDACTED].

¹¹⁷ As noted in para. 82(a) above, the CMA notes that this does not in itself mean that both are in the same product frame of reference.

- (i) One competitor pointed to a loss of sales from in-store to online (but not to ongoing interaction between the two channels);
 - (ii) Another noted ‘We believe the right combination between brick-and mortar and online business will benefit both channels. At this moment online sales do not have a great impact on the size or location of our stores.’
 - (iii) A third competitor explained that ‘Differing promotional activity may sometimes lead to price differences between bricks and mortar stores and online.’
 - (iv) Another third party noted that they have a segmentation strategy aligned to different channels, and one of these channels is digital (online/ pure players), explaining that they ‘have a different product offer in some instances to better serve the focus of the particular partner.’
 - (v) Another third party submitted that competitors’ online offerings do not represent an appreciable constraint on their in-store business.
- (d) Finally, the CMA notes that running a retail business active in the two channels is very costly and requires a substantial investment (eg, the online business would require investment in a website and app, along with associated technological and logistical infrastructure among other costs). Therefore, from a business perspective, there would be limited incentive to operate both channels if they belong to the same frame of reference, as this would, in principle, lead to a cannibalisation of sales.

83. Based on an assessment of the evidence in the round, the CMA has considered separate frames of reference for the in-store and online supply of each of sports-inspired casual apparel and sports-inspired casual footwear in the UK. However, the CMA recognises that the evidence is somewhat mixed. There is evidence suggesting that the online channel represents a constraint within these frames of reference and, there is also some evidence to suggest that there may be limits to the competitive interaction between the different distribution channels. Accordingly, the CMA has taken into account the constraint from online retailers as an ‘out-of-market’ constraint in the in-store competitive assessment, and vice versa.

Conclusion on product scope

84. For the reasons set out above, the CMA has considered the impact of the Merger in the following product frames of reference:

- the retail supply of sports-inspired casual apparel in-store;

- the retail supply of sports-inspired casual footwear in-store;
- the retail supply of sports-inspired casual apparel online; and
- the retail supply of sports-inspired casual footwear online.

Geographic scope (in-store)

85. The Parties submitted that competition within the relevant geographic frame of reference is national in scope, explaining that [X] and do not materially flex price, quality, range and customer service (**PQRS**) parameters at local level depending on competitive conditions.¹¹⁸
86. The Parties also submitted an analysis of individual local areas based on 20-minute drive-time isochrones drawn around the Parties' stores. The 20-minute drive-time was selected based on an analysis of drive-times of customers to the Parties' stores,¹¹⁹ with 20 minutes representing the 80th percentile.
87. In *JD/Go Outdoors*, the CMA's starting point was that customers shop in local retail stores and that a 30 minute drive-time isochrone was an appropriate geographic frame of reference at the local level.¹²⁰ However, in the competitive assessment in that case, the CMA considered the impact of the Merger at both a national and a local level on the basis that, notwithstanding evidence suggesting that there was relatively limited flexing of the Parties' retail offerings at a local level, there was some evidence to suggest that the Parties: (i) assessed local conditions of competition; (ii) engaged in local marketing activity; and (iii) had previously flexed their local retail offers in response to local competition.¹²¹
88. The Parties' arguments with respect to parameter flexing, and the implications for the CMA's approach to assessing any effects on the Parties' incentives, are assessed in paragraphs 95 to 110 below.
89. In this case, the CMA believes that competition between retailers has a local element, with consumer demand being locally driven.¹²² It is unlikely that for a significant proportion of customers, stores that are located at long distances will represent a good alternative for customers. Furthermore, the identity, number and strength of competitors varies from local area to local area. The

¹¹⁸ FMN, para 5.9 and Section 12.

¹¹⁹ [X]).

¹²⁰ *JD/ Go Outdoors*, para. 69.

¹²¹ *JD/Go Outdoors*, para. 58.

¹²² [Retail Mergers Commentary \(CMA62\)](#), para. 1.6.

CMA saw evidence that new store openings had become less frequent,¹²³ suggesting that retailers could not or would not quickly ‘shift’ their production capacity between different local areas depending on local demand.

90. The CMA therefore believes that the geographic frame of reference is local and, without concluding on the exact size of the local market, used the Parties’ suggested 20 minute-drive time catchment area to approximate the appropriate geographic frame of reference in this case.
91. As set out in paragraphs 106 to 107, notwithstanding that on the demand side the relevant geographic scope of the frame of reference is primarily local, our competitive assessment also takes into account the fact that the Parties are national, large-scale operators, with nationally-recognised brands with integrated and centralised operations. Important elements of the Parties’ competitive offering, including aspects of PQRS, are set centrally and applied uniformly across all stores, nationally. In the competitive assessment below, the CMA has assessed the effects of the Merger (and any reduction in competition) on the Parties’ conduct at a national level, and thereby in every local market where either Party operates a store.

Geographic scope (online)

92. The Parties did not make any submissions regarding the geographic scope of the online frames of reference.
93. The CMA also did not receive any submissions from third parties with respect to the geographic scope of the online frames of reference.
94. On the basis that the effects of online retailing apply equally in all local areas in this case, the CMA believes that the appropriate geographic frame of reference in which to assess the impact of the Merger in the online-only product frames of reference is national.

Parameter flexing

95. The term ‘local flexing’ is used in this Decision to refer to the process of retailers varying some aspects of their offering locally, having had regard to local competitive conditions (ie varying certain parameters of PQRS from store to store in response to local competition). For example, a retailer may set the range available at a store taking into account the number and type of competitors present in the local area where the store is located. If a retailer follows this strategy, there are unlikely to be two stores in a retailer’s estate

¹²³ See para. 409 below.

with identical ranges, as the mix of competitors will be different in each local area in which the retailer has a store. Other examples of local flexing may include changing staffing levels or opening hours, or investing in the presentation of products in a store in order to respond to local competition.¹²⁴

96. The CMA notes that retailers may also vary some parameters of PQRS locally for reasons not directly related to competition, such as customer demographics or the layout or the size of the store. In this section, when discussing local flexing, the CMA has focused on whether the Parties vary some parameters locally in response to competition and/or factors likely to be influenced by competition.
97. The benefit of local flexing to a retailer is that it is able to improve its retail offer where it faces more competition so as to win more customers from its rivals, and degrade (or choose not to improve, where it would otherwise have done so) its offer where it faces less competition. The benefits are greater when local demand and the intensity of local competition differ across the areas where the retailer operates.¹²⁵
98. The costs of local flexing (or of moving to local flexing where the retailer does not do so currently) might include the cost of carrying different ranges in different stores, the fragmenting of sales volumes with suppliers and, for a retailer not currently engaged in local flexing, the additional complexity associated with such a change in policy, which may require different systems or adverse reputational effects for certain stores or for the brand as a whole (if customers expect a consistent offer across all of the retailers' stores).¹²⁶
99. In this section, we examine whether the Parties do (or could) flex their offer locally, and which parameters of their offering are (or could be) flexed in this way across their estates.

Parties' submissions

100. The Parties submitted that this is a case where national competition should be assessed as an aggregation of local competition. The Parties noted that both JD Sports and Footasylum's prices are set nationally, are not flexed at a local level, [REDACTED]. Neither party engages in [REDACTED], and other key parameters of competition (store opening times, and staffing levels) are determined centrally and applied uniformly across the Parties' stores ([REDACTED]). Store formats, opening hours, and branding are also generally uniform across each fascia. There are

¹²⁴ [Sainsbury's/Asda](#), Final Report, para 7.100 to 7.103.

¹²⁵ [CMA62](#), para. 1.11.

¹²⁶ [CMA62](#), para. 1.10.

student discount events [REDACTED], but these are occasional and limited for both Parties.¹²⁷

101. The Parties, however, submitted evidence recognising that there are exceptions to this position. For example:

- (a) product range is sometimes flexed locally following [REDACTED].¹²⁸ [REDACTED] are considered when deciding how to flex range.¹²⁹
- (b) Footasylum stated that [REDACTED] are made locally by [REDACTED] and are determined by [REDACTED].¹³⁰ JD Sports did not explain how decisions were made on [REDACTED]. The CMA notes that stores' turnover will be determined by both local and national competition.
- (c) Footasylum submitted that [REDACTED] are made locally and that [REDACTED].¹³¹ JD Sports explained that [REDACTED].¹³²

Third party responses

102. Overall, third parties indicated that their own prices and other competitive parameters are generally set uniformly. Some third parties noted that certain parameters such as opening hours, staffing levels or product range are set locally.

Parties' internal documents

103. JD Sports' internal documents include some limited evidence of local monitoring. One JD Sports internal document [REDACTED]. In that document, JD Sports [REDACTED].¹³³ JD Sports also [REDACTED] (a more detailed analysis of these documents is included in the competitive assessment section below).¹³⁴

104. Footasylum submitted that the number, identity and characteristics of the stores of competitors in a local area are not factors taken into account by [REDACTED].¹³⁵ However, according to some Footasylum internal documents, [REDACTED]

¹²⁷ FMN, para. 5.8 and section 12.

¹²⁸ [REDACTED] states that where there are range variations at a local level these are driven by [REDACTED]. However, Footasylum stated that its "*range and stock does vary between stores (for example, [REDACTED].*" (RF11 Q18)

¹²⁹ JD Sports' response to Q.18 of Request for Information dated 24 June 2019.

¹³⁰ Footasylum's response to Q.18 of Request for Information dated 24 June 2019.

¹³¹ Footasylum's response to Q.18 of Request for Information dated 24 June 2019.

¹³² JD Sports' response to Q.18 of Request for Information dated 24 June 2019.

¹³³ See for example Annex 38 to the FMN, [REDACTED].

¹³⁴ See for example Annex 24 to the FMN, [REDACTED].

¹³⁵ Footasylum's response to Q.16 of Request for Information dated 24 June 2019.

does vary range locally and in some instances, does so with consideration of what other competitors (such as JD Sports) are offering in the same local area. For example, [REDACTED].¹³⁶

105. There is also evidence from internal documents that Footasylum monitors competitors at a local level. For example:

(a) in one document containing a summary of a store visit to [REDACTED] it is noted that there [REDACTED];¹³⁷

(b) another document related to [REDACTED] notes that “[REDACTED];¹³⁸ and

(c) another document [REDACTED] notes the following [REDACTED].¹³⁹

CMA assessment

106. The CMA believes on the basis of the available evidence that:

(a) the Parties set most of the main dimensions of PQRS (prices, quality of the products and staff training) centrally and homogeneously on a national basis. Range is also set centrally, as access to brands and certain products is agreed at the national level. Store formats, opening hours, and branding are also generally uniform across each fascia;

(b) the Parties vary some parameters locally, although it is often not clear whether this is directly in response to competition, a competitive response to changes in performance or a response to other factors such as customer demographics. For example, as mentioned in paragraph 101(a) above:

(i) product range is sometimes flexed locally following [REDACTED],¹⁴⁰ as well as [REDACTED].¹⁴¹ The CMA notes that sales and demand are, in turn, affected by competition in the local area. Given that store relocations are relatively

¹³⁶ Annex 482 of Footasylum’s section 109 consolidated response, [REDACTED].

¹³⁷ Annex 429 of Footasylum’s section 109 consolidated response, [REDACTED].

¹³⁸ Annex 394 of Footasylum’s section 109 consolidated response, [REDACTED].

¹³⁹ Annex 431 of Footasylum’s section 109 consolidated response, [REDACTED]. There are other internal documents with similar statements such as Annex 401 of Footasylum’s section 109 consolidated response [REDACTED], Annex 438 of Footasylum’s section 109 consolidated response [REDACTED], Annex 428 of Footasylum’s section 109 consolidated response [REDACTED], Annex 468 of Footasylum’s section 109 consolidated response [REDACTED], Annex 432 of Footasylum’s section 109 consolidated response [REDACTED].

¹⁴⁰ JD Sports’ response to Q.16 of Request for Information dated 24 June 2019 states that where there are range variations at a local level these are driven by [REDACTED]. However, Footasylum stated that its “range and stock does vary between stores (for example, [REDACTED].” (RFI1 Q.18).

¹⁴¹ JD Sports’ response to Q.18 of Request for Information dated 24 June 2019.

common, store space may also be affected by local competition in the medium term (see further point (iii) below).

(ii) Footasylum stated that [redacted] are made locally and are determined by [redacted].¹⁴² JD Sports did not explain how decisions were made on [redacted]. The CMA notes that stores' turnover will be determined by both local and national competition.

(iii) Footasylum submitted that [redacted] are made locally and that [redacted].¹⁴³ JD Sports explained that [redacted].¹⁴⁴

107. Based on the evidence above, the CMA believes that:

- (a) important elements of the Parties' competitive offering such as prices, quality or branding are set centrally and applied uniformly and that opening hours vary according to local regulation and not competition;
- (b) service is a competitive parameter that could be flexed both nationally and locally, as staff undergo the same training across the country but staff levels vary locally according to demand, which will be influenced by competition; and
- (c) range is a competitive parameter that could be flexed both locally and nationally in response to competition.

108. The CMA considers that the flexing of nationally-uniform parameters of competition affects the Parties' performance in every local area in which they operate. The CMA recognises that the incentives of the merged entity to improve or worsen the level of these nationally-uniform parameters will be determined by the aggregate level of competition in the local areas in which it operates.

109. The Parties and the majority of third parties adjust the parameters of competition relating to the retail supply of apparel and footwear in-store, such as price, quality, range and service on a national basis. The CMA found that local flexing was limited in importance compared with those aspects of strategy set uniformly as part of each brand's national proposition and saw no evidence that this would change in the foreseeable future. On this basis, the CMA has focused its assessment on the impact of changing local competitive dynamics on the Parties' aggregate incentives at the national level. Because the Parties' stores are located across the UK, the CMA considers that

¹⁴² Footasylum's response to Q.18 of Request for Information dated 24 June 2019.

¹⁴³ Footasylum's response to Q.18 of Request for Information dated 24 June 2019.

¹⁴⁴ JD Sports' response to Q.18 of Request for Information dated 24 June 2019.

evidence on competition at the national level, such as internal strategy documents and third parties' views, are indicative of this aggregate impact. Other evidence that considers the closeness of the Parties' product offering, or the overall extent of their geographic overlap, is also probative of the extent to which the customers of each Party are likely to see the other Party as a close alternative.

110. Reflecting the nature of the Parties' activities in this case, the CMA has, in its competitive assessment, primarily assessed the effect of the Merger (and any reduction in competition) on the Parties' conduct at a national level, and thereby in every local market where either Party operates a store. As the CMA believes, for the reasons set out in detail in this decision, that the Merger would give rise to the realistic prospect of an SLC in each local area where one or more of the Parties' stores is present, this decision does not consider further the specific individual local markets where the Parties overlap.

Competitive assessment

Horizontal unilateral effects

111. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices or to degrade quality on its own and without needing to coordinate with its rivals.¹⁴⁵ Horizontal unilateral effects are more likely when the merging parties are close competitors.
112. The concern under this theory of harm (**ToH**) is that the removal of one party as a competitor could allow the parties to increase prices or lower aspects of quality (including range and service). After the merger, it is less costly for the merging company to raise prices (or lower quality) because it will recoup the profit on recaptured sales from those customers that switch to the products offered by the other merging company.
113. The CMA assessed whether it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC in relation to horizontal unilateral effects in the retail supply of: (i) sports-inspired casual apparel (in-store) (**ToH 1**); (ii) sports-inspired casual footwear (in-store) (**ToH 2**); (iii) sports-inspired casual apparel (online) (**ToH 3**); and (iv) sports-inspired casual footwear (**ToH 4**).
114. In order to assess the likelihood of the Merger resulting in horizontal unilateral effects, the CMA has considered evidence on:

¹⁴⁵ [Merger Assessment Guidelines](#), from para. 5.4.1.

- (a) shares of supply;
- (b) closeness of competition between the Parties; and
- (c) competitive constraints from alternative retailers.

ToH 1: The retail supply of sports-inspired casual apparel (in-store)

Shares of supply

115. The Parties submitted shares of supply (based on data from third party industry reports, publicly available information and their own market intelligence) for their proposed frame of reference (ie the retail supply of casual fashion apparel, including both in-store and online sales).¹⁴⁶ For the reasons outlined in paragraphs 65 to 77, this frame of reference is wider than the frame of reference that the CMA has considered in this case. The CMA therefore believes that the Parties' estimated shares of supply overstate the level of competition the Parties face in the relevant frame of reference.
116. As part of its merger investigation, the CMA received data on revenues directly from most retailers listed by the Parties as their competitors in the FMN.¹⁴⁷ In particular, the CMA asked other retailers and brand suppliers such as Nike (the latter, to capture also DTC sales) to provide their revenues attributable to products that they considered to be in competition with those sold by the Parties. The CMA also sought to verify these estimates by asking for each of the brands' sales revenue from their top ten customers.¹⁴⁸ The estimates were in line with the shares of supply calculated based on the retailers and brands' response. The CMA's estimates of the size of the market and shares of supply, based on data from third parties and the Parties, are set out further at Table 1 below.
117. In markets characterised by highly differentiated products - such as those affected by the Merger - measures of concentration such as shares of supply may not fully capture the closeness of competition between the Parties and the extent to which other retailers pose a competitive constraint on the Parties.¹⁴⁹ In addition, the shares of supply in Table 1 include data for retailers that the CMA does not consider to be competitors of the Parties (for the

¹⁴⁶ FMN, para. 14.1 onwards and Tables 1 and 2.

¹⁴⁷ See para. 166 of this Decision. There were some retailers listed by the Parties as their competitors but for which the CMA has not received a response (in some instances because the contact details provided by the Parties were not complete and did not allow the CMA to reach them), and as such they are not included in Table 1 below. These include: Next, TopShop/Topman, Zara, Urban Outfitters, House of Fraser, TK Maxx, Selfridges, Treds, Pro Direct, Puma, Skechers and Gym King.

¹⁴⁸ The CMA received data from [redacted].

¹⁴⁹ [Merger Assessment Guidelines](#), para. 5.3.2

reasons explained further in the sections below), and therefore overstate the competition the Parties face in the relevant frame of reference. Accordingly, the CMA has given limited weight to the shares of supply set out below.

Table 1: Shares of supply for the retail supply of sports-inspired casual apparel in calendar year 2018 (in-store sales)

Retailer	Sport-inspired casual apparel
JD Sports	[30-40]%
Footasylum	[0-5]%
Combined	[30-40]%
Clarks	[0-5]%
Debenhams	[0-5]%
Decathlon	0-5]%
Deichmann	0-5]%
DW Sports	0-5]%
Foot Locker	0-5]%
Intersport	n/a
John Lewis	0-5]%
Primark	[10-20]%
Sports Direct	[30-40]% ⁱ
<i>adidas</i>	[0-5]%
<i>New Balance</i>	[0-5]%
<i>Nike</i>	[0-5]%
<i>Converse</i>	[0-5]%
<i>Fila</i>	[0-5]%
<i>The North Face</i>	[0-5]%
<i>Vans</i>	[0-5]%
<i>Asics</i>	[0-5]%
<i>Under Armour</i>	[0-5]%
Total	100%

Notes: Intersport provided only total revenues without distinguishing between apparel and footwear. Brands' DTC sales are provided in italics. There is no data for online/pure players as these are in-store shares of supply.

Source: CMA analysis of Parties' and third parties' data

118. The Parties submitted that the CMA's analysis does not accurately capture the market because the narrow product definition leads to inflated shares of supply, the analysis does not properly take account of brands' DTC sales, and many of the Parties' rivals did not provide data.¹⁵⁰ The Parties further submitted that the combined shares of supply are in any case below the level that typically raises *prima facie* competition concerns (c.40%) and that the increment from the Merger is small.¹⁵¹

¹⁵⁰ Parties' response to the IL, para. 6.1.

¹⁵¹ Parties' response to the IL, para. 6.2.

119. With respect to the Parties' argument that the data does not properly take account of brands' DTC sales, the CMA verified that the revenues it had received from suppliers were attributable to products that they considered competed with those sold by the Parties (ie their revenues made through their DTC sales, both online and in-store). The CMA therefore believes (absent evidence to the contrary) that the information provided by these third parties about their own businesses is liable to be more reliable than any other estimates the Parties may have access to.
120. With respect to the Parties' statement that the combined shares of supply are below the level that typically raise *prima facie* competition concerns, the CMA notes that the Parties neglect to recognise that this statement refers, in the CMA's Guidelines, to undifferentiated product markets.¹⁵² In differentiated markets, such as the markets affected by this Merger, while shares of supply may act as a useful starting point, they are only one indicator of a potential competitive constraint, and must be considered alongside the body of evidence on the closeness of competition between the Parties, and the nature of competition in the market as a whole, as set out in the remainder of this section. In this case, and as further considered below within the competitive assessment, the CMA believes that limited weight should be put on the share of supply analysis, primarily because it does not reflect the strength of the constraint posed by certain capabilities held by the Parties (and not by other suppliers) – most notably, access to an attractive range of brands' products.
121. Table 1 above shows that, even if the CMA were to take a very broad view of the relevant competitors in this frame of reference:
- (a) Post-Merger, JD Sports' strong existing position – as the only player other than Sports Direct with a share of [30-40]% – will be further strengthened by the addition of Footasylum. The merged entity would be the largest retailer in the retail supply of sports-inspired casual apparel, with a combined share of supply of [30-40]%.
 - (b) Sports Direct would be the only retailer with a comparable share of supply to the merged entity [30-40]%.ⁱ All other retailers would have a [10-20]% share of supply or less and lag the merged entity to a significant extent.
122. Accordingly, the CMA believes that the Parties' combined shares of supply are, relative to the positioning of other players' shares, high enough to raise *prima facie* competition concerns. Moreover, for the reasons explained below,

¹⁵² 'Previous CMA decisions in mergers in markets where *products are undifferentiated* suggest that combined market shares of less than 40% will not often give the CMA cause for concern over unilateral effects.' CMA62, para. 3.36 (emphasis added); [Merger Assessment Guidelines](#), para. 5.3.5.

the CMA believes that the relatively low increment, of [0-5]%, is not reflective of the significance of Footasylum as a close competitor to JD Sports.

123. In addition to the shares of supply, the CMA has considered a range of other evidence to assess closeness of competition between the Parties and the constraint imposed on the Parties by their rivals.

Closeness of competition

124. The CMA examined the closeness of competition between the Parties on the basis of the following:

- (a) comparisons in the Parties' respective propositions;
- (b) scale of the geographic overlaps between the Parties;
- (c) evidence from internal documents;
- (d) third party views on closeness of competition; and
- (e) Footasylum's financial position.

- *The Parties' propositions*

125. The Parties submitted that they are not particularly close competitors since their offerings are differentiated, in particular for the following reasons:

- (a) Broadly speaking, the Parties consider Footasylum's range is more fashion-led (with a higher percentage of sales of [X]) than JD Sports' offering, which is more sports-led.¹⁵³ Footasylum, in contrast to JD Sports, has a [X],¹⁵⁴ and these [X].¹⁵⁵ This is reflected in the Parties' brand focus, with the Parties submitting that Footasylum offers a greater range of 'fashion-inspired' products including brands such as Calvin Klein Jeans, Alessandro or Pre-London, none of which are available at JD Sports, whereas JD Sports stocks apparel by key sports brands such as New Balance, Canterbury and Asics, none of which are sold by Footasylum.¹⁵⁶ In this regard, the Parties submitted an analysis of brand cross-over sales which shows that only 40% apparel brands sold by Footasylum are also sold by JD Sports. For JD

¹⁵³ FMN, para. 3.1, Parties' response to question 24 of Request for Information dated 24 June 2019 and Parties' response to the IL, para. 8.5.

¹⁵⁴ FMN, para. 15.104.

¹⁵⁵ FMN, paras. 3.1-3.2.

¹⁵⁶ Parties' response to the IL, para. 8.6.

Sports, only [REDACTED]% of the brands stocked at JD Sports are also available at Footasylum.¹⁵⁷

- (b) The Parties further submitted that their brand offerings also differed in the sense that Footasylum stocks a range of smaller niche brands when they are early in their evolution and offer a degree of exclusivity, whereas JD Sports tends to focus on brands which have reached a more mature stage of development where there is greater brand awareness on the part of its customers.¹⁵⁸
- (c) According to the Parties, Footasylum targets different consumer demographics to JD Sports. Footasylum segments its customers into six core audiences or 'tribes' (trend, sport, urban, premium, terrace and everyday), and only [REDACTED]% of its apparel sales are attributable to the 'Sports' tribe, with other tribes being more fashion-led than 'sports-inspired'.¹⁵⁹ The Parties submitted that by contrast, JD Sports' key target demographic is 16-24 years old mainly male customers.¹⁶⁰
- (d) Finally, the Parties submitted that the ability to purchase exclusive products from mainstream brands is of great importance to consumers in the casual fashion apparel and footwear markets,¹⁶¹ and that a key point of differentiation between the Parties is JD Sports' ability to access exclusive products from Nike and adidas known as special make-up products (**SMUs**). The Parties submitted that SMUs are an important part of JD Sports' business and help to differentiate its offering from other retailers.¹⁶² Footasylum submitted that by contrast, as a smaller player than JD Sports, it does not have the power to command exclusivity over products from the likes of these brands.¹⁶³

126. The Parties also provided the results of GlobalData's UK Sportswear report in support of their submission that customers do not see them as particularly close alternatives. The Parties submitted that, according to this report, JD Sports' customers do not tend to visit a Footasylum store, and are more likely to shop at other large chains such as Sports Direct and Primark, or directly at brands' stores, eg Nike and adidas.¹⁶⁴

¹⁵⁷ [REDACTED].

¹⁵⁸ FMN, para 15.103(c).

¹⁵⁹ FMN, para. 15.100(a) and Parties' response to the IL, para. 8.8.

¹⁶⁰ JD Sports' response to Q.28 of Request for Information dated 24 June 2019.

¹⁶¹ FMN, para. 15.102.

¹⁶² FMN, para. 15.102.

¹⁶³ FMN, para. 15.102.

¹⁶⁴ Annex 355 to the FMN, The UK Sportswear Market 2018-2023 [Global Data], page.38.

127. The CMA believes that there are significant overlaps between the Parties' customer propositions and between the Parties' customer targets. As further explained below, both Parties supply a broadly similar range of exclusive and/or high-end/premium products in apparel. The CMA's conclusion is based on the following analysis.

128. According to the available evidence, the Parties offer a similar product range:

- (a) With respect to the Parties' allegedly different brand focus, the CMA notes that of the top 20 brands sold by Footasylum (making up [redacted]% of its FY2019 sales) 15 were also sold by JD Sports. As for those brands that the Parties cited as being only available at one of Footasylum or JD Sports, they represent [redacted].¹⁶⁵ In addition, some of those brands are in fact available at both Parties (eg Calvin Klein Jeans which is available at JD Sports, Tessuti and Scotts (not just Footasylum)).¹⁶⁶
- (b) With respect to the brand crossover data submitted by the Parties, the CMA notes that these percentages do not take into account the relative importance and the actual sales of the brands. A combination of the data on brands' sales (paragraph 128(a)) with the crossover data provided by the Parties (paragraph 125(b)) shows that the crossover is much more significant: [redacted]% for JD Sports and 64% for Footasylum). The results of this analysis are shown in Table 2 below.

Table 2: Analysis of cross-over sales between the Parties (apparel)

	Number of brands sold	Crossover with other Party	Simple brand crossover %	Sales-weighted brand crossover % ¹⁶⁷
Footasylum	[redacted]	[redacted]	[redacted]%	[redacted]%
JD Sports	[redacted]	[redacted]	[redacted]%	[redacted]%

Source: CMA analysis of Parties' response to RFI dated 24 June 2019, Question 8

129. With respect to the Parties' submissions in relation to JD Sports' more advantageous access to SMUs, Table 3 below shows the proportion of sales due to SMUs in 2018 for each of the Parties. According to this data, JD Sports' sales due to SMUs were much higher than for Footasylum: for

¹⁶⁵ Alessandro represents [redacted]% of Footasylum's net sales, followed by Pre-London ([redacted]%), and Calvin Klein ([redacted]%). As per the brands available at JD Sports but not at Footasylum, New Balance represents [redacted]%, followed by Canterbury ([redacted]%) and Asics ([redacted]%).

¹⁶⁶ <https://www.scottsmenswear.com/search/calvin+klein/> (Last access on 11/09/2019). <https://www.jdsports.co.uk/brand/calvin-klein,calvin-klein-jeans,calvin-klein-underwear,calvin-klein-swim/?from=24> (last access 12/09/2019). <https://www.size.co.uk/search/calvin+klein+jeans/> (last access 12/09/2019).

¹⁶⁷ This analysis has some limitation as the number and name of brands may not match perfectly across different sources. However, the CMA is confident that the analysis captures all the most important brands.

example, JD Sports made [REDACTED]% of its sales due to SMUs, whereas for Footasylum this percentage was much lower ([REDACTED]%).

Table 3: Proportion of Parties' sales due to SMUs in apparel (2018)

Exclusive		Non-exclusive	
JD Sports	Footasylum	JD Sports	Footasylum
[REDACTED]%	[REDACTED]%	[REDACTED]%	[REDACTED]%

Source: Response to RFI dated 24 June 2019, Q8 (JD Sports) and RFI dated 24 June 2019 Q8 (Footasylum).
Note: Footasylum's data is for FY 2018/19.

Importance of access to exclusive and/or high-end/premium products

130. As mentioned in paragraphs 53 above, range and SMUs/exclusive products and/or high-end/premium products are important competitive parameters in these markets. JD Sports has a significant market share of these SMUs/exclusive products and/or high-end/premium apparel products: JD Sports sold [REDACTED]% (by value) of Nike's apparel 'positioning products'.¹⁶⁸ Similarly, JD Sports is [REDACTED] retailer of exclusive products for adidas: in 2019 it sold [REDACTED]% (by value) of its apparel SMUs/exclusive products.
131. Footasylum's internal documents highlight that JD Sports has a privileged position to access these products from major brands. For example:
- (a) One document refers to [REDACTED].¹⁶⁹
- (b) In another document containing the question [REDACTED], Footasylum's response is as follows: '[REDACTED]'.¹⁷⁰
132. Several third parties responding to the CMA's market test mentioned that JD Sports has a privileged position to access SMUs/exclusive and/or high-end/premium products due to its scale. For instance, one retailer stated that: 'JD has an incredibly high level of buyer power', that 'Exclusivity is what JD Sports is built on' and that 'JD Sports are market leaders in particular for boys and gents market therefore these brands see this market segment already more than catered for with JD Sports.' Another retailer mentioned that the Merger 'strengthens JD Sports' already significant market position even further and will leave consumers with very little choice of retailers that stock the full range (including the premium ranges) of branded products' and that '[c]ertain key

¹⁶⁸ Data based on UK deliveries from Nike's EEA and Switzerland distribution system. Data provided by Nike in response to the CMA's notice under section 109 of the Enterprise Act, dated 14 August 2019. 'Positioning products' were defined by Nike as products whose certain 'colour ways' Nike commits not to provide to other retailers (with the exception of its own DTC channel).

¹⁶⁹ Annex 344 of Footasylum's section 109 consolidated response, [REDACTED].

¹⁷⁰ Annex 364 of Footasylum's section 109 consolidated response, [REDACTED]. Also in this document, JD Sports is referenced; "[REDACTED]."

branded products will now only be available either directly from the brands themselves or from JD Sports’.

133. One third party also noted that not only JD Sports but also Footasylum has access to these products. According to this retailer, JD Sports and Footasylum ‘have successfully built a reputation for model exclusivity, and use this as a key marketing story. Price positioning is also very relevant but less so in this particular market sector, where product access to franchises and brands very well known to the consumer is critical.’ This is further supported by JD Sports’ website, which contains a standalone section for products which are exclusively sold at JD Sports.¹⁷¹ The introduction to this section states: ‘stand out from the crowd in our exclusive range of fresh trainers, jackets, hoodies and much more. From leading brands such as Nike, adidas Originals, The North Face and Fred Perry, our exclusive to JD range knows no limits.’¹⁷² Moreover, multiple pages on JD Sports’ website blog also promotes products which are exclusives to JD Sports.¹⁷³ Similarly, Footasylum’s website also features a dedicated section for exclusive apparel products¹⁷⁴ and marketing pages promoting products which are exclusively sold at Footasylum.¹⁷⁵
134. JD Sports’ advantage in this respect is also widely reported in press articles. For example, a September 2019 article comparing JD Sports and Sports Direct states that ‘JD Sports is streets ahead of its rival because it has exploited the “athleisure” phenomenon and forged closer ties with Nike and Adidas to ensure that it has better ranges than Sports Direct.’¹⁷⁶ Another article from September 2019 states: ‘long-standing tie-ups with big brands – in particular Nike and Adidas – have allowed JD to gain sought-after exclusives, justifying the often-premium price tag for the products.’ This same article provides comments by a ‘clothing label that works closely with JD’: “the relationships [JD] has with Nike and Adidas are amazing” and ‘another label that works with JD’ states: “they do a lot of business with the big sports brands that are the powerhouse of the business, and they achieved that by curating exclusives.”¹⁷⁷ A further article from September 2019 states that JD

¹⁷¹ <https://www.jdsports.co.uk/campaign/jd+exclusive/?facet-exclusive=1>

¹⁷² <https://www.jdsports.co.uk/campaign/jd+exclusive/?facet-exclusive=1>

¹⁷³ <https://blog.jdsports.co.uk/nike-air-max-2015-exclusive-jd/>; <https://blog.jdsports.co.uk/stefflon-don-wears-the-jd-exclusive-puma-cali/>; <https://blog.jdsports.co.uk/new-in-new-balance-jd-exclusives/>

¹⁷⁴ <https://www.footasylum.com/mens/mens-featured/exclusive-apparel/>

¹⁷⁵ <https://www.footasylum.com/lowdown-footasylum-exclusive-air-max-1-/>;

<https://www.footasylum.com/exclusive-launch-jordan-1-black-and-gold/>

¹⁷⁶ <https://www.thetimes.co.uk/article/vibrant-jd-sports-outpaces-competition-wwfbl8wtf> (last access on 18 September 2019)

¹⁷⁷ <https://www.drapersonline.com/news/why-jd-sports-is-outpacing-its-rivals/7037588.article> (last access on 19 September)

Sports ‘sells premium ranges from the likes of Nike (NKE.N) and Adidas (ADSGn.DE), often using exclusive products to set itself apart from rivals.’

135. On the basis of the above evidence, the CMA acknowledges that JD Sports has particularly advantageous access to SMUs/exclusive products relative to other retailers operating in these markets. However, the CMA also notes that Footasylum is one of a limited set of retailers with comparable access to these SMUs/retailers. For example, one internal document from Footasylum states: “[redacted].” Moreover, a supplier stated that it discusses SMUs/exclusives only with seven retailers active in the UK, including Footasylum.
136. Moreover, the evidence received from third parties indicated that focusing solely on the differentiation afforded to retailers through access to SMUs – that is, *exclusive* products – would be misplaced. This is for two reasons:
- (a) Firstly, SMUs/exclusive products vary to a significant extent in their attractiveness. For a retailer to successfully increase sales through SMUs/exclusive products, it must obtain exclusivity on the most attractive or desirable products for consumers (ie, the fact that a product is exclusive does not, on its own, guarantee sales). For example, the SMUs/exclusive products to which Sports Direct has access are different in nature to the exclusive ranges that JD Sports or Footasylum have access to. One third party has commented that brands provide Sports Direct with exclusive access to less desirable ranges than that provided to the Parties (such as plain products which are a ‘watered-down’ version of the desirable product offered by the Parties) and that this, accordingly, hinders Sports Direct’s competitiveness against the Parties on the parameter of product range: the fact that it has access to products that are technically exclusive is, therefore, insufficient. [redacted]. Therefore, the CMA believes that Table 3 may not fully capture the scope of the competitive advantage afforded by the most *attractive* exclusive products such as adidas originals apparel offered by JD Sports.¹⁷⁸ For example, JD Sports sold [redacted]% of Nike’s [redacted] positioning products in both apparel and footwear in FY2019.¹⁷⁹
- (b) Secondly, a focus on SMUs/exclusive products would not fully capture the competitive advantage afforded to retailers with access to high-end and/or premium products that – whilst not being strictly exclusive to that retailer – are nevertheless highly attractive to consumers by virtue of, for example, having a celebrity association (eg, JD’s #ROADTOUNDISPUTED campaign with Anthony Joshua) or being of a limited range colour-way (eg, Foot Locker’s website offers Nike Futura Logo Mens t-shirts in 3 different colours,

¹⁷⁸ See for example <https://www.jdsports.co.uk/brand/adidas-originals/?facet-exclusive=exclusive>

¹⁷⁹ CMA analysis of Nike’s data on positioning products.

while JD Sports' offers 5 and Footasylum's 1). Such products may afford retailers a competitive advantage, notwithstanding that the retailers offering them do not have exclusive access. On that basis, the CMA considers that Table 3 may overstate the differentiation between the Parties' product offerings, as Footasylum (as well as JD Sports, and other small number of retailers) has access to a range of high-end and/or premium products that, whilst not being exclusive, nevertheless allows it to offer a particularly attractive product offering with products (such as adidas originals for apparel) that position it closely with JD Sports' offering.¹⁸⁰ The importance of high-end and/or premium products is consistent with the third party market report cited above at paragraphs 53 to 54. It is also consistent with feedback received during the CMA's market testing, with third parties describing the importance of access to popular or new styles, which may not be available to all retailers, but are not exclusive.

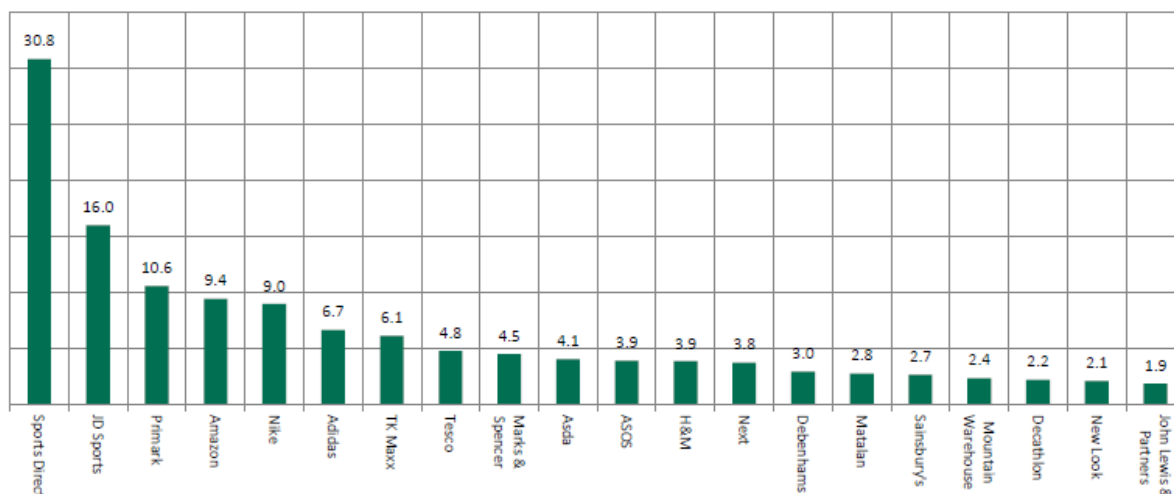
137. With respect to the analysis in the GlobalData report submitted by the Parties, the CMA notes the following:

- (a) The first graph submitted by the Parties (and reproduced below) set out the top 20 most purchased sports clothing retailers according to GlobalData survey, with JD Sports as the second retailer in this list and Footasylum not featuring in the top 20. However, the CMA believes that this graph is not representative of the competitive landscape that the Parties face for two main reasons. First, the list relates to sports apparel in general, and not sports-inspired casual apparel, and as such the results could also include sales of sports performance products. Second, the top 20 retailers also include retailers such as Tesco or Asda. The CMA considers that this is consistent with these data incorporating a wide range of customers on different types of shopping mission. The fact that supermarkets have made sales to customers on grocery shopping missions does not necessarily imply that customers that go on a specific mission to a retailer specialised in, eg, sports-inspired casual apparel, such as the Parties, would consider a supermarket to be a close alternative. The CMA notes in this respect that the Parties have not identified Tesco or Asda as competitors (notwithstanding their presence in the GlobalData survey).

¹⁸⁰ These products were cited as examples of products that are attractive (whilst not being exclusive to Footasylum) by a competitor.

Top 20 most purchased from sports clothing retailers

All figures are percentages



The chart shows purchaser share for the top 20 most shopped sports clothing retailers in 2018, according to GlobalData Retail's 2018 clothing survey of 5,000 consumers.

Source: Globaldata UK Sportswear Market, 2018-2023, February 2019, page 31¹⁸¹

- (b) The second graph describes responses to the question 'In the last 12 months, where have you shopped for sports clothing yourself?' to determine where JD Sports consumers also shop. According to these results, only 1.6% of JD Sports apparel customers said that they have shopped for sports clothing at Footasylum. However, the CMA believes that these results are not representative because: (i) the results are linked to a question related to sportswear which could also relate to sports performance products, and as such not being part of the frame of reference affected by this Merger, as mentioned in paragraph 66 above; (ii) the question asks about the customers' shopping destinations, rather than substitution patterns; and (iii) the results are unlikely to be nationally representative because the sample is made of only 266 responses for apparel and 174 for footwear.¹⁸²

138. Finally, according to the available evidence, the CMA believes that the Parties target the same key demographics, ie 16-24 year-old customers, with a particular focus on men in the case of Footasylum. This is supported by evidence provided by the Parties during the course of this investigation (including internal documents),¹⁸³ as well as by third parties' responses, which not only mentioned that both Parties target the 16-24 year-old market, but

¹⁸¹ Parties' response to the IL, para. 8.13.

¹⁸² Global Data – JD Slides for Issues Meeting_v1.01 (003), submitted by JD Sports in advance of the Issues Meeting.

¹⁸³ For JD Sports, see response to Q.28 of Request for Information dated 24 June 2019. For Footasylum, see responses to Q.24 and Q.28 of Request for Information dated 24 June 2019 and associated internal documents or Annex 1 of Footasylum's section 109 consolidated response, [Footasylum Annual Report FY18](#), page 16. Response to Q.1 of the CMA's notice under section 109 of the Enterprise Act 2002 dated 23 May 2019.

also that they both focus on younger and more fashion-focused customers than the average consumer of other retailers (as discussed further below).

139. Based on the evidence above, the CMA therefore believes that the Parties present a broadly similar customer proposition for consumers and that they both target the same customer segment.

- *Scale of geographic overlap*

140. The Parties submitted that they overlap geographically with each other only to a comparatively modest extent and that JD Sports faces greater competition from other rivals across its store network, with Footasylum being a small rival. The Parties further submitted that only [X] JD Sports fascia have a Footasylum within 20 minutes of a JD Sports fascia ([X]% of JD Sports' 462 stores).¹⁸⁴

141. However, the CMA believes that the extent of overlap between the Parties is substantial. Based on a catchment area of 20-minutes' drive-time, and excluding JD Sports fascia that do not compete directly with Footasylum:¹⁸⁵

(a) [X] ([X]%) of Footasylum's stores overlap with JD Sports stores. On average, each Footasylum store has 5.4 JD Sports stores within its catchment area.

(b) [X] ([X]%) JD Sports stores (out of 416 included in the analysis) overlap with Footasylum stores.¹⁸⁶ On average, each of these JD Sports stores has [X] Footasylum stores within its catchment area.

(c) Within the proposed 20-minute catchment area, every Footasylum store is particularly close to a JD Sports store, ie within the same town centre or shopping centre. All JD Sports stores are no further than 0.7 miles from a Footasylum store and, on average, are 0.1 miles away from a Footasylum store, based on straight line distance. This is in comparison to the distance from Footasylum stores to Foot Locker stores of, on average, 7.5 miles and at most 87.2 miles, and to Sports Direct on average of 0.3 miles and at most 3.2 miles.

142. Based on the evidence above, the CMA believes that the Parties are geographically close to each other, as all Footasylum stores overlap with at

¹⁸⁴ FMN, para. 15.78.

¹⁸⁵ These brands were excluded after the CMA's analysis revealed that their focus was on more high-tier brands: Armani Exchange, Choice, Hugo Boss, Tessuti, Infinities. However, the CMA notes that Footasylum monitors Tessuti and Infinities in some of its internal documents. The CMA has also excluded stores in Northern Ireland as Footasylum has no presence in this region.

¹⁸⁶ Of the overlapping stores [X].

least one JD Sports store and more than half of JD Sports stores overlap with at least one Footasylum store (within a catchment area of 20 minutes' drive-time). As described more in detail below, the scale of this geographic overlap with JD Sports from Footasylum's point of view is higher than that of Foot Locker, Nike and adidas, and comparable to that of Sports Direct.

- *Internal documents*

143. The CMA reviews internal documents to understand the Parties' assessment of competitive conditions within the markets at issue, including their assessments of the positioning and activities of their competitors. Internal documents are a useful source of evidence for the CMA as they reflect how the merging parties assess the market in the ordinary course of business and when making strategic decisions. The CMA seeks to understand how rivalry may be affected by a transaction,¹⁸⁷ and evidence as to how rivalry operated prior to the transaction is informative.
144. The Parties provided a significant volume of internal documents to the CMA. The Parties' internal documents generally do not consider apparel and footwear on a separate basis; the CMA has therefore not carried out separate assessment of the Parties' internal documents for apparel specifically on the basis that the assessment made in paragraphs 152 to 158 below also apply equally to in-store footwear. The internal documents provided by the Parties included the following categories of documents:
- (a) From JD Sports: [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; and [redacted].
 - (b) From Footasylum: [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; and [redacted].
145. Both Parties also provided certain other documents that did not belong to any of the categories set out above, but that they considered relevant for the CMA's merger investigation.
146. As noted above, the CMA assesses internal documents to understand how the Parties assess competitive conditions in the market and how rivalry might be affected by the Merger. This framework informs the CMA's approach to internal documents, which are assessed in the round (and in conjunction with all other available evidence). Specifically:
- (a) In assessing the content of a document, the CMA takes into account the purpose for which it was prepared. The CMA typically places greater weight on documents ultimately prepared to inform decision making by senior

¹⁸⁷ [Merger Assessment Guidelines](#) (OFT1254/CC2), September 2010, paras. 4.1.2 and 4.1.3.

management in some way as these are likely to be most reflective of the Parties' strategic thinking.

- (b) The CMA considers what information means in the context of the substantive content of a particular document. For example, the fact that a given competitor's name appears in a document is less informative than the context in which it appears.
- (c) The CMA also considers what the overall body of internal documents shows. The CMA will consider factors such as the different treatment of competitors in different types of documents, and the extent to which different competitors are monitored across the total set of internal documents.

147. Furthermore, internal documents may not lend themselves to a mechanistic assessment: where there is a heterogeneous set of internal documents and a diversity in the presentation of information even within a particular document, an arithmetic approach to measuring the assessment of competitors in those documents (eg by adding up the number of times a competitor's name is used, or the number of documents in which the competitor is mentioned) is unlikely to be meaningful.
148. The Parties submitted that their internal documents show that they are not uniquely close competitors (emphasis added), and that they monitor a wide range of competitors.¹⁸⁸ The Parties provided a simple counting measure (recording the number of competitor mentions) in documents as support for their contention that the Parties compete with a wide range of competitors.¹⁸⁹
149. However, as noted above, the CMA believes that there are shortcomings to using a simple count of competitor mentions over an in-depth review of the documents, as it fails to take into account the context in which a term is used / a given player analysed, or the reasons why some terms may appear more frequently than others. In particular, this approach wrongly attributes equal weight to all individual mentions. This would ignore the fact, for example, that a mention in the titular or first point on a slide/page may provide an indication of that player's relative importance.¹⁹⁰ Similarly, in one situation, the individual mention of a given player may be accompanied by a detailed profile discussing that player, whereas in another situation, an individual mention may simply be in the context of a list of players in a given geographic region. The fact that these mentions are all given equal weight by the Parties does

¹⁸⁸ Headline over para. 7.12 of FMN.

¹⁸⁹ Parties' response to the IL, page 17.

¹⁹⁰ See for example Annexes of the FMN; [REDACTED]; Annex 249, [REDACTED]; Annex 246, [REDACTED].

not, therefore, reflect the qualitative differences in the context of these mentions.

150. While a competitor count may be a useful measure in some contexts (including where it is possible to take into account the relative importance of mentions),¹⁹¹ the CMA believes that an overall assessment of the documents based on its in-depth review is more informative than using a simple counting measure across the total document population in the circumstances of this particular case. This is the approach the CMA has taken in this case.
151. The CMA believes that, considered in the round, and in the proper context for which they were produced, the internal documents submitted by the Parties suggest that they each view the other Party as a close competitor.

JD Sports documents

152. The following paragraphs focus on the analysis of some of the categories of JD Sports documents mentioned in paragraph 144(a) above.¹⁹² The CMA also includes below an assessment of some other documents that do not belong to any of these categories but that the Parties provided to assist with the CMA's merger investigation.
153. With respect to JD Sports' internal documents, a large number of players are cited. JD Sports describes this process as part of general 'market monitoring' and suggests that [REDACTED].¹⁹³ Accordingly, and also for the reasons mentioned in paragraphs 148 to 150 above, the CMA has not been able to put material weight on the simple fact that a player is cited in the Parties' internal document (even where cited in a significant number of internal documents).
154. The CMA believes that Footasylum receives a particular focus in JD Sports' internal documents. Footasylum is present in nearly all JD Sports' key categories of internal documents listed below. For example, Footasylum is regularly monitored in the following documents:
- (a) [REDACTED].¹⁹⁴ The CMA considers these documents to be particularly relevant as they specifically assess the constraint of other competitors' stores on JD Sports: [REDACTED]. In these documents, JD Sports consistently monitors

¹⁹¹ For example, in *Electro Rent/Microlease*, the CMA was able to take into account when counting competitor mentions that several mentions of a competitor may nevertheless all relate to a single point, and in these cases did not count these references more than once: Completed acquisition by Electro Rent Corporation of Microlease, Inc. and Test Equipment Asset Management Limited (17 May 2018), *Final report*, footnote 306.

¹⁹² The CMA has not considered in this section the categories [REDACTED], and as such they will be discussed in the sections dedicated to the competitive assessment of the online frames of reference.

¹⁹³ For instance, [REDACTED].

¹⁹⁴ FMN, para. 15.92 (b).

Footasylum together with [REDACTED] and [REDACTED]. JD Sports submitted that [REDACTED].¹⁹⁵ [REDACTED],¹⁹⁶ [REDACTED]:

(i) [REDACTED].¹⁹⁷

(ii) [REDACTED].

(b) [REDACTED],¹⁹⁸ [REDACTED], for general information-gathering purposes, [REDACTED].¹⁹⁹ In these documents, JD Sports monitors Footasylum alongside [REDACTED] and [REDACTED]. However, when discussing JD Sports' marketing activities in the UK, certain of these reports have a particularly targeted focus on the impact of Footasylum on JD Sports. [REDACTED].²⁰⁰ There are also certain reports which mention only Footasylum and include a detailed summary of its activities, something that it is not done for other retailers.²⁰¹

(c) In other documents, [REDACTED],²⁰² [REDACTED],²⁰³ [REDACTED],²⁰⁴ [REDACTED],²⁰⁵ various competitors are mentioned but, again, Footasylum appears to often given greater prominence than other competitors. In particular, either significantly more pages are devoted to analysing Footasylum's offering than to any (or almost any) other competitor,²⁰⁶ separate documents are prepared to assess Footasylum where other competitors are assessed only as part of documents providing an overview of all competitors,²⁰⁷ or Footasylum appears as one of only a very small number of competitors that are mentioned.²⁰⁸ [REDACTED].²⁰⁹

(d) [REDACTED].²¹⁰ This data is gathered by JD Sports in the ordinary course of business rather than for the purposes of the Merger. The CMA notes that this analysis

¹⁹⁵ Parties' response to the IL, para. 8.1 (d).

¹⁹⁶ The CMA recognises that this analysis may have certain limitations including: [REDACTED]. Nonetheless, the CMA believes the results below are indicative of JD Sports' own view on the relative impact of competitors on its performance.

¹⁹⁷ [REDACTED].

¹⁹⁸ Annexes 210 to 242 of the FMN.

¹⁹⁹ FMN, para. 15.88 (e) (ii).

²⁰⁰ Annex 226 to the FMN, [REDACTED] and Annex 227 to the FMN, [REDACTED]. See also Annex 231 to FMN, [REDACTED], Annex 232 to FMN, [REDACTED]; Annex 233 to FMN, [REDACTED].

²⁰¹ Annex 217 to the FMN, [REDACTED], Annex 218 to FMN, [REDACTED]; Annex 220 to the FMN, [REDACTED]; Annex 239 to the FMN, [REDACTED]; Annex 240 to the FMN, [REDACTED] and Annex 242 to the FMN, [REDACTED].

²⁰² See for example, Annex 184 to the FMN, [REDACTED]; Annex 160 the FMN, [REDACTED], Annex 160; [REDACTED].

²⁰³ Annexes to the FMN: Annexes 141, 298-299.

²⁰⁴ Annexes 37 to 66 to the FMN.

²⁰⁵ Annexes to the FMN: Annexes 68-70, 76, 78-79, 81, 99-100, 117-118, 146-149, 167-171, 173-176, 179-182.

²⁰⁶ Annex 184 to the FMN, [REDACTED].

²⁰⁷ Annex 141 to the FMN, [REDACTED].

²⁰⁸ Annex 61 to the FMN, [REDACTED].

²⁰⁹ See for example Annex 106 to the FMN, [REDACTED].

²¹⁰ Annex 90 to the FMN, [REDACTED].

tracks only Footasylum and [REDACTED] (as well as JD Sports and Size?). [REDACTED]. For these reasons, the CMA has given limited weight to these results, but noted that JD Sports has (in the ordinary course of business) limited its own analysis to just Footasylum and [REDACTED].

Footasylum documents

155. Footasylum submitted that, given JD Sports' position as one of the largest and most well-established players in the market, it is inevitable that a much smaller retailer like Footasylum will look closely at JD Sports within its competitor monitoring, and that this is not a reflection that Footasylum competes particularly closely with JD Sports.²¹¹ Footasylum also stated that its focus on JD Sports is also due to the historical links between the two businesses.²¹²
156. As noted in paragraph 144(b) above, the CMA has reviewed a large collection of Footasylum internal documents. The documents suggest that Footasylum is monitoring and considering its commercial strategy against, primarily, JD Sports (as compared to other retailers), particularly in strategic documents prepared for the board (which the CMA considers, for the reasons explained above, are particularly likely to be more reflective of the importance placed on certain competitors than other general monitoring documents). Even if Footasylum selected JD Sports as its benchmark, at least in part, for historic reasons, it remains the case that JD Sports (which is several times referred to as Footasylum's closest competitor and monitored far more closely than other competitors as a whole) appears to continue to exert significant competitive influence on Footasylum. For example:
- (a) [REDACTED]²¹³ [REDACTED] to report on [REDACTED] to its Board of Directors.²¹⁴ In the (limited number of) documents which refer to competitors, JD Sports is notably referenced across many of the documents; JD Sports is often the sole competitor mentioned,²¹⁵ or is referred to multiple times in other documents which feature single mentions of other retailers.²¹⁶ [REDACTED].²¹⁷
- (b) [REDACTED]²¹⁸ are reports by Executive Management [REDACTED] to senior management and heads of department (and are, therefore, a particularly useful insight into

²¹¹ FMN, para. 15.6.

²¹² FMN, para. 15.106(b).

²¹³ Annexes 9 to 75 of Footasylum's section 109 consolidated response.

²¹⁴ As stated in Footasylum's section 109 consolidated response.

²¹⁵ See for example Annex 36 of Footasylum's section 109 consolidated response, [REDACTED].

²¹⁶ Annex 41 of Footasylum's section 109 consolidated response, [REDACTED].

²¹⁷ Annex 66 of Footasylum's section 109 consolidated response, [REDACTED].

²¹⁸ Annexes 149 to 248 of Footasylum's section 109 consolidated response.

issues informing Footasylum's strategic thinking).²¹⁹ JD Sports and Foot Locker are the only retailers which are consistently monitored across all the documents, usually with multiple mentions within each document.²²⁰ [REDACTED]²²¹ [REDACTED]. [REDACTED].²²²

- (c) [REDACTED]²²³, [REDACTED] to key decision-makers [REDACTED].²²⁴ [REDACTED].
- (d) [REDACTED]²²⁵ [REDACTED].²²⁶ JD Sports and its fascia are monitored across all documents which mention competitors, with multiple mentions per document. [REDACTED].²²⁷ [REDACTED].²²⁸ Foot Locker is often also monitored in these documents but with fewer mentions than JD Sports.²²⁹ There are a limited number of documents which also mention other retailers but these appear alongside mentions of JD Sports (and its fascia) and are not detailed or standalone comments about these competitors. [REDACTED].²³⁰
- (e) [REDACTED]²³¹, [REDACTED].²³² [REDACTED]. In documents which discuss competitors, JD Sports is the competitor that features across all of these documents and often more than once in each such document.²³³ Foot Locker is the second most monitored competitor, being monitored in most but not all of these documents.²³⁴ [REDACTED].²³⁵
- (f) [REDACTED],²³⁶ [REDACTED].²³⁷ [REDACTED]. Where there are documents with references to competitors, Footasylum monitors JD Sports and its fascia across all of

²¹⁹ As stated in Footasylum's section 109 consolidated response.

²²⁰ Annex 151 of Footasylum's section 109 consolidated response, [REDACTED].

²²¹ Annex 158 of Footasylum's section 109 consolidated response, [REDACTED].

²²² Annex 153 of Footasylum's section 109 consolidated response, [REDACTED].

²²³ Annexes 529 to 653 of Footasylum's section 109 consolidated response.

²²⁴ [REDACTED]. (Parties' response to the IL, para 8.12(a)).

²²⁵ Annexes 654 to 679 of Footasylum's section 109 consolidated response.

²²⁶ FMN, para. 15.107(c).

²²⁷ See, for example, Annex 690 of Footasylum's section 109 consolidated response, [REDACTED] or Annex 408 of Footasylum's section 109 consolidated response, [REDACTED].

²²⁸ Annex 656 from Footasylum's section 109 consolidated response, [REDACTED].

²²⁹ See for example Annexes from Footasylum's section 109 consolidated response; Annex 663, [REDACTED]; Annex 657, [REDACTED].

²³⁰ See for example Annex 666 of Footasylum's section 109 consolidated response, [REDACTED].

²³¹ Annexes 76 to 148 of Footasylum's section 109 consolidated response.

²³² Parties' response to the IL, para 8.12(d). As mentioned in footnote 224 above, [REDACTED].

²³³ See for example Annexes from Footasylum's section 109 consolidated response; Annex 76, [REDACTED]; Annex 136, [REDACTED]; Annex 78, [REDACTED].

²³⁴ See for example Annex 112 of Footasylum's section 109 consolidated response, [REDACTED].

²³⁵ See for example Annex 136 of Footasylum's section 109 consolidated response, [REDACTED].

²³⁶ Annexes 680 to 691 of Footasylum's section 109 consolidated response.

²³⁷ Parties' response to the IL, para 8.12(h).

these documents, with multiple references in the same document.²³⁸

Retailers such as Topshop/Topman and Foot Locker appear in most but not all of these documents and feature fewer mentions than JD Sports.²³⁹

(g) [REDACTED].²⁴⁰

(h) Several Footasylum internal documents refer to JD Sports as being Footasylum's key competitor; for example, [REDACTED].²⁴¹ This position is also set out in Footasylum's annual report for 2018, in which it is noted that '[w]ithin our overall market, Footasylum is in the competitive mainstream for both footwear and apparel, competing most frequently against retailers such as ASOS and JD Sports'.²⁴²

(i) Several documents [REDACTED] include a consideration of the impact of the strategy followed by other competitors such as JD Sports, Size? and Foot Locker.²⁴³ Some of these documents also refer to JD Sports as Footasylum's main competitor,²⁴⁴ [REDACTED].²⁴⁵

(j) Several documents refer to the impact of JD Sports on Footasylum's business with respect to brands. [REDACTED].²⁴⁶

(k) [REDACTED]²⁴⁷ [REDACTED].²⁴⁸ Footasylum monitors JD Sports (and to a lesser degree, JD Sports-owned Size? and Tessuti) across all of these documents, [REDACTED]. Mentions of other retailers, such as Foot Locker and Topman are less frequent and less detailed. [REDACTED].²⁴⁹

²³⁸ See for example Annexes from Footasylum's section 109 consolidated response; Annex 687, [REDACTED]; Annex 689, [REDACTED].

²³⁹ See for example Annex 688 of Footasylum's section 109 consolidated response, [REDACTED].

²⁴⁰ Annex 8 to the FMN, [REDACTED] (emphasis added).

²⁴¹ Annex 986 of Footasylum's section 109 consolidated response, [REDACTED]; Annex 407 of Footasylum's section 109 consolidated response, [REDACTED]; Annex 354 of Footasylum's section 109 consolidated response [REDACTED].

²⁴² [Footasylum Annual Report 2018](#).

²⁴³ Annex 777 407 of Footasylum's section 109 consolidated response, [REDACTED]; Annex 779 407 of Footasylum's section 109 consolidated response [REDACTED], page 1; Annex 879 of Footasylum's section 109 consolidated response, [REDACTED]; Annex 456 of Footasylum's section 109 consolidated response, [REDACTED].

²⁴⁴ Annex 477 of Footasylum's section 109 consolidated response, [REDACTED].

²⁴⁵ Annex 656 of Footasylum's section 109 consolidated response, [REDACTED].

²⁴⁶ Annex 427 of Footasylum's section 109 consolidated response, [REDACTED].

²⁴⁷ Annex 392, [REDACTED]; Annex 399, [REDACTED]; Annex 402, [REDACTED].

²⁴⁸ FMN, para, 15.107(i).

²⁴⁹ Annex 402 of Footasylum's section 109 consolidated response, [REDACTED].

(l) [REDACTED]²⁵⁰ [REDACTED].²⁵¹ [REDACTED].²⁵² The CMA found, however, that certain documents reference, in terms of competitors, only JD Sports²⁵³ or refer to only JD Sports and Foot Locker.²⁵⁴ [REDACTED].²⁵⁵ [REDACTED].²⁵⁶ [REDACTED].²⁵⁷ [REDACTED].

157. As set out above, Footasylum's internal documents track JD Sports more closely than they track other competitors, and JD Sports appears to be Footasylum's main reference point or benchmark. Several documents presented to Footasylum's senior managers also explicitly refer to JD Sports as Footasylum's main competitor.

158. Based on the above evidence, in the round, the CMA believes that the Parties' internal documents show that the Parties monitor each other particularly closely.

- *Third party comments*

159. Overall, the third parties contacted by the CMA during its merger investigation indicated that the Parties compete closely against each other.

160. As part of its merger investigation, the CMA requested third parties to rate retailers according to how closely they competed with each of the Parties.²⁵⁸ Out of ten (with ten being the maximum score), the average score given by third parties to competition between the Parties was 8.3 in both directions (JD Sports vs Footasylum and vice versa) for the retail supply of sports-inspired casual apparel. Relative to other retailers, most third parties scored each of the Parties as the 'top' competitor to the other party.

- *Footasylum's financial position*

161. As noted in the Counterfactual section above, the Parties submitted that Footasylum's poor financial performance has led to [REDACTED].²⁵⁹ The Parties also

²⁵⁰ Annexes 249 to 290 of Footasylum's section 109 consolidated response.

²⁵¹ Parties' response to the IL, para 8.12(e).

²⁵² Parties' response to the IL, para 6.19(e).

²⁵³ See for example Annexes of Footasylum's section 109 consolidated response; Annex 271 [REDACTED]; Annex 257 [REDACTED]; Annex 264 [REDACTED].

²⁵⁴ Annex 259 of Footasylum's section 109 consolidated response, [REDACTED].

²⁵⁵ Annex 257 of Footasylum's section 109 consolidated response, [REDACTED].

²⁵⁶ Annex 269 of Footasylum's section 109 consolidated response, [REDACTED].

²⁵⁷ Annex 269 of Footasylum's section 109 consolidated response, [REDACTED].

²⁵⁸ The CMA questionnaire included one question for both in-store and online, therefore the results should be interpreted accordingly (ie the results are the same to both in-store and online).

²⁵⁹ See from para. 11.6 of the FMN.

submitted that Footasylum has issued three profit warnings for the last financial year and [REDACTED].²⁶⁰

162. However, according to the available evidence, the CMA believes that, contrary to the Parties' submissions, Footasylum's financial performance would not have reduced its ability to compete. As noted in the Counterfactual section, the historical financial performance shows substantial growth in Footasylum's revenues, as well as its EBITDA (except for the last financial year).²⁶¹ In addition, third party analyst projections show that Footasylum will have a growing revenue and EBITDA in the next two financial years. This is also supported by Footasylum's [REDACTED], which show that Footasylum was expecting to [REDACTED].²⁶²
163. The CMA therefore believes that the available evidence in relation to Footasylum's financial circumstances, both current and future, does not support the position that Footasylum would cease to be a significant competitive constraint on JD Sports.

Conclusion on closeness of competition for the retail supply of sports-inspired casual apparel (in-store)

164. The CMA therefore believes that the Parties compete closely with each other in the retail supply of casual apparel in-store due to (i) similarity of product offering and customer targets; (ii) the substantive geographic overlaps between the Parties' stores; (iii) the Parties' internal documents, which closely track and monitor each other; and (iv) third party views indicating that the Parties are close competitors. The CMA also does not believe that Footasylum's financial circumstances have prevented, or are likely to prevent, the Parties from competing closely in the future.

Competitive constraints: alternative retailers

165. Unilateral effects are more likely where consumers have little choice of alternative retailer. The CMA has therefore considered whether there are alternative retailers which would provide a competitive constraint on the combined entity.
166. The Parties submitted that they face a diverse range of competitors in the in-store supply of sports-inspired casual apparel. In particular, the Parties submitted that they will continue to compete with a significant number of

²⁶⁰ FMN, paras. 11.6 to 11.15.

²⁶¹ Annex 1 of Footasylum's section 109 consolidated response, [REDACTED].

²⁶² Annex 991 of Footasylum's section 109 consolidated response, [REDACTED].

credible retailers in each product category, from online/pure play retailers, multi-channel retailers and DTC sales from brands, including:

- (a) online/pure players: ASOS, Boohoo.com, Zalando, Amazon and Kitbag;
- (b) multi-channel competitors including Decathlon, Puma, River Island, Outfit, TK Maxx, John Lewis, Selfridges, Sports Direct (including Flannels and USC), Next, Foot Locker, DW Sports, Topshop/Topman, Zara, Urban Outfitters, Debenhams and House of Fraser; and
- (c) DTC competitors: adidas (and Reebok), Nike and The North Face.²⁶³

167. The CMA has assessed the constraint from these alternative retailers by taking into consideration:

- (a) the particularity of these third parties' propositions;
- (b) views of third parties;
- (c) the Parties' internal documents; and
- (d) third party market reports and commentary.

- *Foot Locker*

168. The Parties have submitted that they regard Foot Locker as one of their competitors in casual fashion apparel. Foot Locker has a similar national scale to Footasylum (currently operating [70-80] stores in the UK). It has an estimated share of supply of [0-5]% in in-store apparel.²⁶⁴ Foot Locker submitted that it targets [X].

169. Foot Locker [X]. Foot Locker considers itself to compete [X] with the Parties in apparel and to target [X].²⁶⁵ Foot Locker submitted that [X].

170. Third parties generally considered Foot Locker to compete closely with the Parties in apparel. Out of ten (ten being the maximum score), the average score given by third parties to Foot Locker as against, individually, both JD

²⁶³ FMN, para. 7.21.

²⁶⁴ See Table 1 above. As explained previously in the section prefacing Table 1, the CMA has placed limited weight on these shares of supply as these are markets characterised by a high degree of differentiation between retailers' offerings. References to retailers' shares of supply in this following section should, therefore, be viewed within that context.

²⁶⁵ When asked to rate how closely it competed with each of the Parties (10 being the maximum score), Foot Locker rated itself with a score of [X] in apparel (ie, as competing [X] with the Parties).

Sports and Footasylum, was 8.7 in apparel, which is higher than that given to each of the Parties.²⁶⁶

171. The Parties' internal documents, which suggest that Foot Locker is closely monitored by both Parties, also support third parties' views that Foot Locker is a relatively close competitor to each of the Parties. For example, [REDACTED].²⁶⁷ Moreover, several internal documents from both Parties monitor Foot Locker's offering and activities. For example, [REDACTED].²⁶⁸ One Footasylum internal document, from its [REDACTED], which refers to [REDACTED], states: [REDACTED].²⁶⁹
172. Third party industry reports suggest Foot Locker – similarly to JD Sports in particular – is considered a key player in these markets for some suppliers, with the Berenberg report of 9 November 2018 noting that 'Brands will also create exclusive products for some key partners (eg JD, Foot Locker) based on wholesalers' guidance on what they believe they can sell in their markets'.²⁷⁰
173. The Parties have submitted that Foot Locker operates 74 stores.²⁷¹ Based on a 20-minute drive-time catchment area, the CMA calculates that [REDACTED]% of Footasylum stores and [REDACTED]% of JD Sports stores overlap with at least one Foot Locker store.
174. Overall, the CMA believes that the available evidence indicates that Foot Locker competes closely with the Parties in the retail supply of sport-inspired casual apparel in-store (in particular, as against JD Sports with respect to [REDACTED]). Moreover, Foot Locker has a significant geographic overlap with the Parties.

- *Sports Direct*

175. The Parties have submitted that Sports Direct is a competitor in casual fashion apparel, describing it as the 'market leader' for sports or outdoor fashion items.²⁷² Sports Direct operates 485 stores and has a relatively large estimated in-store share of supply comparable to that of JD Sports': [30-40]% in apparel.²⁷³

²⁶⁶ Third parties scores are based on those responses that mention Foot Locker as a competitor.

²⁶⁷ Annexes 15-34 to the FMN, [REDACTED]. See also para. 154(a)(i) above.

²⁶⁸ Annex 158 to the FMN, [REDACTED]. Other internal documents including Foot Locker are Annex 79 to the FMN, [REDACTED], Annex 80 to the FMN, [REDACTED], Annex 89 to the FMN, [REDACTED].

²⁶⁹ Annexes 656-659 to s.109 dated 23 May 2019, [REDACTED].

²⁷⁰ Annex 347 of FMN, Berenberg Sports Retail, page 17.

²⁷¹ Foot Locker stated that it operates 70 stores.

²⁷² FMN, para. 15.36.

²⁷³ See Table 1 above, and the caveats made in para. 117 and footnote 264 with respect to this data.

176. The available evidence indicates that Sports Direct's product positioning is differentiated from the Parties. In particular:

- (a) Sports Direct offers a wider range of sports clothing targeting a broad range of customers. In contrast to the Parties' 16-24 year-old focussed offerings (in particular, men for Footasylum). Sports Direct has submitted that it does not focus on any specific customer demographic group.
- (b) Sports Direct positions itself as offering value for low-prices. [REDACTED] JD Sports [REDACTED]. [REDACTED].
- (c) The Parties have submitted that Sports Direct is implementing a 'store elevation strategy' under which stores are designed to serve a more high-end clientele.²⁷⁴ However, the CMA has received evidence showing that, this elevation strategy has encountered some challenges:
 - (i) Sports Direct's own 2019 Annual Report states that 'even though our third party brand partners by their own admission think we have done a superb job of elevating our stores, we still do not receive as quickly as we would like the premium product we feel the stores deserve. This, combined with our competition getting stronger, increases the risk of us being cut off completely by these suppliers. When we are not providing the right product at the right time at the right price the consumer will not visit our stores and thus ancillary purchases will not be made, hence a greater risk against our remaining inventory.'²⁷⁵
 - (ii) Sports Direct's own profit statement related to its preliminary results for 2019 acknowledges the limited success of the elevation strategy: 'We feel our elevation strategy is being delivered in line with the requirements initially highlighted to us by these brands several years ago, however we feel there remains some scepticism on their part with regards to our commitment to the full roll out of our elevation strategy...We want to flag to the market that based on our current position our relationships with key third party brands remain challenging although we are attempting to improve on these as a significant work stream of senior management within the Group.'²⁷⁶
 - (iii) Press reports also throw doubt on the success of Sports Direct's store elevation strategy. A September 2019 article reporting on JD Sports' half-year financial results compares JD Sports' 'slick Oxford Street store'

²⁷⁴ FMN, para. 44.

²⁷⁵ https://www.sportsdirectplc.com/~/_media/Files/S/Sports-Direct/annual-report/annual-report-2019.pdf, page 16 (last access on 18 September 2019) .

²⁷⁶ <https://www.investigate.co.uk/sports-direct-intl---spd-/ms/final-results/201907261719269335G/> (last access on 18 September 2019).

in which ‘thumping hip-hop tunes create a nightclub vibe and a neon LED ticker flashes around the store trumpeting its customer’ to a nearby Sports Direct store: ‘Across the road, Sports Direct’s store still has a whiff of jumble sale about it...Sports Direct’s shops are still discount-driven.’²⁷⁷

177. A number of third parties, including [REDACTED] have noted that Sports Direct does not have access to the same product options as the Parties (JD Sports, in particular). [REDACTED]. These third parties noted that, whilst the Parties have access to SMUs/exclusives and/or high-end/premium products, Sports Direct’s access to such products is restricted and its constraint on the Parties is therefore limited. The average score given by third parties to Sports Direct in their rankings for how closely Sports Direct competed with the Parties was a moderate 6 (out of 10) in apparel, much lower than that of Foot Locker and each of the Parties.²⁷⁸
178. Despite Sports Direct having a larger store footprint than JD Sports, [REDACTED], and references in Footasylum’s internal documents are limited, both in absolute terms, and in comparison to references to the other Party and to certain other competitors such as Foot Locker.²⁷⁹ [REDACTED] confirm that there are limitations to the constraint posed by Sports Direct, notwithstanding its significant share of supply and relatively large geographic footprint. For example:
- (a) [REDACTED].²⁸⁰
 - (b) As noted in paragraph 154(a)(i) above, [REDACTED].²⁸¹
 - (c) A third party report from GlobalData states in relation to Sports Direct that ‘[t]hough its value proposition is well-known, it is overshadowed somewhat by its poor brand image and weaker engagement with shoppers compared to the likes of JD’ and that ‘the specialist is losing relevance due to a lack of fashionability in its offer’.²⁸²
 - (d) A third-party report from Berenberg states that ‘JD is one of just two global strategic partners for adidas and Nike, whereas Sports Direct’s strained

²⁷⁷ <https://www.thetimes.co.uk/article/vibrant-jd-sports-outpaces-competition-wwfbl8wtf> (last access on 18 September 2019).

²⁷⁸ The averages of third parties scores are based on those responses that mention Sports Direct as a competitor.

²⁷⁹ For example, [REDACTED] is not mentioned in any of [REDACTED] (Annexes 188-190 to the FMN), in [REDACTED] (see Table 7 of the FMN) and [REDACTED] (Annexes 680-691 to the FMN). In all these documents, [REDACTED].

²⁸⁰ Annex 86 to the FMN, [REDACTED].

²⁸¹ See, for example Annex 15 to the FMN, [REDACTED].

²⁸² Annex 355 to the FMN, The UK Sportswear Market 2018-2023 [GlobalData], pages 37, 35.

relationship with the brands will, we think, leave it exposed'.²⁸³ Berenberg also states that '[w]e therefore believe that the brands will not start treating Sports Direct as a premium strategic partner in the UK when they already have JD dominantly positioned in this category, in which Foot Locker is also present'.²⁸⁴

- (e) Sports Direct's limited access is also well-documented in the press. A September 2019 news article comparing JD Sports and Sports Direct states that 'JD Sports is streets ahead of its rival because it has exploited the "athleisure" phenomenon and forged closer ties with Nike and Adidas to ensure that it has better ranges than Sports Direct.'²⁸⁵ A further news article from September 2019 provides comments from 'the chairman of one men's and women's fashion retailer': "Sports Direct vacated the [premium sportswear] field and has clearly upset all the brands [by discounting]. It's left the full-price part of the market to JD. JD has used its strengths and leadership to dominate that market."²⁸⁶

179. JD Sports suggested at the Issues Meeting that the relative lack of references to Sports Direct in its documents reflected the fact that Sports Direct is so obviously its main competitor that it did not need to be mentioned in the internal documents. Such an explanation, that JD Sports does not monitor its close competitors, does not hold for many of the documents discussed elsewhere in this Decision: [redacted]²⁸⁷ or [redacted],²⁸⁸ do indeed track the promotions and activities of JD Sports' competitors (but contain limited and brief references to [redacted]). The CMA cannot accept that JD Sports found it necessary to closely monitor the activities of other competitors, such as [redacted] and [redacted], more closely than the activities of the entity it says is [redacted].
180. As explained above in paragraph 53, in the sports-inspired casual apparel frame of reference, the available evidence suggests that the ability to offer high-end and/or premium products, possibly on an exclusive basis, is key to the success of a retailer. Given Sports Direct's limited access to these products,²⁸⁹ the CMA believes there are significant limitations to the constraint posed by Sports Direct to the Parties in this frame of reference.

²⁸³ Annex 347 to the FMN, Berenberg Sports Retail, page 4.

²⁸⁴ Annex 347 to the FMN, Berenberg Sports Retail, page 83.

²⁸⁵ <https://www.thetimes.co.uk/article/vibrant-jd-sports-outpaces-competition-wwfbl8wtf> (last access on 18 September 2019).

²⁸⁶ <https://www.drapersonline.com/news/why-jd-sports-is-outpacing-its-rivals/7037588.article> (last access on 19 September 2019).

²⁸⁷ Annexes 243 to 291 of the FMN.

²⁸⁸ Annexes 210 to 242 of the FMN.

²⁸⁹ See also para. 134 above.

181. The Parties submitted that Sports Direct operates 458 stores.²⁹⁰ Based on a 20-minute drive-time catchment area, the CMA calculates that [X] Footasylum stores and [X]% of JD Sports stores overlap with at least one Sports Direct store.
182. Overall, the CMA believes that, although Sports Direct has a significant geographic overlap with the Parties, it exerts only a limited competitive constraint on the Parties in the retail supply of sports-inspired casual apparel in-store. The CMA believes that Sports Direct poses a substantially weaker constraint than Foot Locker, or the Parties to one another, due to its differentiated product offering, its broader and less-targeted consumer focus, and lack of access to SMUs/exclusive, and/or high-end/ premium products.
- *Nike and adidas*
183. The Parties have submitted that competitive pressure from brands selling through DTC channels is increasing, stating that DTC sales by major branded suppliers are increasing and set to increase further over the next 12-18 months, thereby reducing the availability of products made available to retailers outside the DTC channel.²⁹¹ The Parties also stated that DTC occurs mainly online, but also through 'mono-brands' stores and is therefore increasingly competing directly with the Parties.²⁹² In support of its position, the Parties cited third party reports purporting to place great emphasis on the important role of the DTC channel in these markets, both in relation to in-store and online.²⁹³
184. Nike and adidas are the two largest suppliers of sports-inspired casual apparel in the UK. With respect to their DTC business in-store, Nike has a low geographic store footprint of just [X] stores in the UK,²⁹⁴ and has a relatively low in-store share of supply of [0-5]% in apparel. Adidas also operates a relatively low footprint of 24 stores and has a low in-store share of supply of [0-5]%.²⁹⁵

²⁹⁰ Sports Direct stated that it operates 485 stores.

²⁹¹ Parties' response to the IL, para. 4.4 (c).

²⁹² FMN, para. 6.2(d)(iii)(A).

²⁹³ Parties' response to the IL, para. 4.4 (c).

²⁹⁴ Nike operates other factory or clearance stores. We do not consider that they compete closely with the Parties based on third parties' responses (see para 187 below).

²⁹⁵ See Table 1 above, and the caveats made in para. 117 and footnote 264 with respect to this data. These shares are likely to overestimate Nike and adidas constraint on the Parties because they are based on revenues not only from commercial stores (in direct competition with the Parties), but also from flagship stores and outlet/factory stores.

185. Both Parties are part of a [redacted] set of retailers with access to SMUs/exclusive products and/or high-end/premium products by Nike and adidas.²⁹⁶ In the last three financial years, JD Sports sold [redacted]% (by value) of Nike's apparel SMUs/exclusive products.²⁹⁷ Similarly, JD Sports is [redacted] retailer of exclusive products for adidas: in 2019 it sold [redacted]% (by value) of its apparel exclusive products.²⁹⁸ This is consistent with JD Sports' strong position in the market and its close relationship with both suppliers, and suggests that both Nike and adidas might have a weaker incentive to compete with JD Sports (both currently and post-Merger).
186. [redacted] Nike and adidas told the CMA that [redacted]. In this regard, [redacted]. One supplier [redacted] explained that [redacted]. It further stated that [redacted]. When asked to score how closely they considered themselves to compete with each of the Parties, Nike, [redacted].
187. Third parties contacted during the CMA's merger investigation indicated that Nike and adidas are the only two brands recognised as being potentially significant competitors at retail level, on the basis that they have been the only brands (operating in the UK) mentioned by third parties as competitors to the Parties. The evidence received from third parties as to the extent of constraint posed by each of Nike and adidas was, however, mixed. In particular:
- (i) Third parties acknowledged the expansion of brands selling DTC. However, [redacted], some of them stated that brands' flagship stores are not in direct competition with retailers, and that these stores are used by the major brands as marketing tools to create brand awareness and expand sales (whether through DTC channels or other retailers'). Similarly, one competitor told the CMA that clearance stores are not in direct competition with mainstream retailers because they help 'clean the market' from old products.²⁹⁹
 - (ii) However, third parties nevertheless tended to score Nike and adidas as competing relatively closely with the Parties. The average score given by third parties to Nike and adidas respectively in their rankings for how closely these players compete with the Parties in apparel was for Nike, 8.5 (out of 10) and for adidas, 7.5, the former being slightly higher than that of each of the Parties and the latter being slightly

²⁹⁶ Together with, according to Nike and adidas, [redacted].

²⁹⁷ Data based on UK deliveries from Nike's EEA and Switzerland distribution system. Data provided by Nike in response to the CMA's notice under section 109 of the Enterprise Act 2002, dated 14 August 2019.

²⁹⁸ Revenue data may include articles that may be subsequently sold online or through stores outside of the UK. Data provided by Adidas in response to the CMA's notice under section 109 of the Enterprise Act 2002, dated 14 August 2019.

²⁹⁹ [redacted]. We note that the number of stores presented in para. 184 above excludes clearance stores.

lower.³⁰⁰ The CMA considers these scores partly to be consistent with the fact of the Parties' access (in particular, JD Sports) to exclusive and/or high-end/premium Nike and adidas products.

188. Internal documents from both Parties show that they monitor extensively both Nike and adidas, in some cases with respect to their DTC sales, and in some others as a supplier offering products to other competitor retailers.³⁰¹ For example, an internal document from JD Sports [REDACTED].³⁰²
189. Footasylum also notes the importance of an increase in DTC sales more generally, and of competition from Nike and adidas in its internal documents. For example, [REDACTED].³⁰³ Another document [REDACTED].³⁰⁴ As stated previously in the Background section, third-party industry reports also corroborate to some extent the Parties' submissions regarding the increase of DTC sales in recent years.³⁰⁵
190. Based on the evidence above, the CMA believes that in-store DTC sales are an increasing competitive pressure on the Parties' in-store sales, and online DTC sales, an increasingly significant out-of-market constraint on in-store sales.³⁰⁶ The CMA further notes that these brands are increasingly being ranked as relatively close competitors to the Parties, in further support of the Parties' submissions on the increasing importance of DTC sales in these markets.
191. However, the evidence above also shows that, whilst DTC sales may be of greater significance in recent years than previously, the fact remains that the constraint imposed by the brands' DTC sales is relatively limited due to a combination of factors including: (i) their small number of stores; (ii) the small size of DTC in-store sales relative to the overall markets; and (iii) their inability to offer a multi-branded product range. The CMA also notes that Nike and adidas are predominantly wholesale operators (wholesale operations represents [REDACTED]% of sales for both suppliers) [REDACTED]. The CMA believes that the brands' strong relationship with the Parties as a route to market may also dampen the suppliers' incentives to compete strongly with the merged entity post-Merger.

³⁰⁰ Third parties' scores are based on those responses that mention Nike and adidas as a competitor.

³⁰¹ See for example Annex 160 to the FMN, [REDACTED], Annex 160; [REDACTED].

³⁰² Annex 158 to the FMN, [REDACTED].

³⁰³ Annex 391 of Footasylum's section 109 consolidated response, [REDACTED].

³⁰⁴ Annex 253 of Footasylum's section 109 consolidated response, [REDACTED].

³⁰⁵ See para, 52 above.

³⁰⁶ For the reasons outlined in the product frame of reference section of this Decision, the CMA believes that online sales do not form part of a single frame of reference along with in-store sales.

192. As explained above, Nike and adidas have a small store presence. The Parties submitted that Nike operates 6 stores and adidas (including its Reebok brand) 30 stores.³⁰⁷ Based on a 20-minute drive-time catchment area, the CMA calculates that only [REDACTED]% of Footasylum's stores overlap with a Nike store and [REDACTED]% with an adidas store; [REDACTED]% and [REDACTED]% for JD Sports, respectively.

193. Overall, the CMA believes that Nike and adidas exert a degree of competitive constraint on the Parties in the retail supply of sports-inspired casual apparel in-store. However, they pose a substantially weaker constraint than Foot Locker, or the Parties to one another, for the reasons explained above.

- *TopShop/Topman*

194. The Parties submitted that Topshop/Topman is a competitor in the apparel market, in particular from 2014 when Beyoncé's athleisure Ivy Park range was first launched by Topshop.³⁰⁸ According to the Parties, Topshop/Topman and Outfit have 247 stores in the UK.^{309,310}

195. According to the available evidence Topshop/Topman provides an element of competitive constraint to Footasylum and, to a more limited extent, to JD Sports.

(a) Internal documents show that Footasylum monitors Topshop/Topman regularly. [REDACTED].³¹¹ [REDACTED].³¹² However, although TopShop/Topman is mentioned in a majority of Footasylum's internal documents, it does not tend to be discussed in strategic documents prepared for the board and the senior management. For example, [REDACTED].³¹³

(b) The CMA found little evidence that JD Sports monitors [REDACTED].

196. However, no third parties indicated that Topshop/Topman provides a competitive alternative to the Parties. There is also evidence to suggest that Topshop/Topman have a differentiated focus from that of the Parties. According to Mintel's industry report, Topshop/Topman is popular with young

³⁰⁷ Nike stated that [REDACTED]. Adidas stated that it operates 24 stores.

³⁰⁸ FMN, paras. 15.7 and 15.47 (b).

³⁰⁹ Topshop/Topman did not provide a response to the CMA's questionnaire for the purposes of this merger investigation. As such, TopShop/Topman did not confirm their number of stores in the UK.

³¹⁰ As noted in footnote 147 above, Topshop/Topman did not provide a response to the CMA's questionnaire for the purposes of this merger investigation, including information on its revenues for the purposes of enabling the CMA to calculate shares of supply.

³¹¹ See for example Annex 688 of Footasylum's section 109 consolidated response, [REDACTED].

³¹² Annex 394 of Footasylum's section 109 consolidated response, [REDACTED].

³¹³ See paras. 156(a) and 156(b) above for a more detailed discussion of these documents.

females aged 16-24 and males of an older demographic aged 25-44. The CMA also notes that Arcadia, the owner of Topshop/Topman, recently experienced financial problems that led the company to close some stores in the UK.³¹⁴

197. The Parties have submitted that Topshop/Topman operates 247 stores in the UK. Based on a 20-minute drive-time catchment area, the CMA calculates that [redacted] Footasylum stores overlap with TopShop/Topman and Outfit; [redacted]% of JD Sports stores overlap with TopShop/Topman and Outfit.³¹⁵

198. Overall, based on the evidence above, and despite its significant geographic overlap, the CMA believes that Topshop/Topman competes to some extent with Footasylum but to a very limited extent with JD Sports. However, the CMA believes that TopShop/Topman poses a substantially weaker constraint than Foot Locker, or the Parties to one another, or ASOS, for the reasons explained above.

- *ASOS, Shop Direct and Zalando*

199. ASOS, Shop Direct and Zalando are online/pure players, ie they do not operate any brick-and-mortar stores or sell products exclusively online. For this reason, the CMA considers them to be a stronger constraint in the online frames of reference than in the in-store frames of reference. Nonetheless, as mentioned in paragraph 83 above, the CMA recognises that ASOS, Shop Direct and Zalando may provide an out-of-market constraint on the Parties' in-store sales.

200. Shop Direct is significantly smaller than ASOS in the retail supply of sports-inspired casual apparel with online shares of supply of [5-10]% in comparison to [20-30]% for ASOS. Zalando is an even smaller player with [0-5]% shares of supply in the UK.³¹⁶

201. The nature of brand focus / customer target of each of these online/pure players does not directly correlate to that of the Parties' sports-inspired casual fashion focus on 16-24 year old (particularly male) demographic. In particular:

(a) ASOS has a broad casual fashion offering and stated that [redacted]. ASOS told the CMA that [redacted] it targets [redacted].

³¹⁴ <https://www.bbc.co.uk/news/business-48367379> (Last access on 18 September 2019).

³¹⁵ The Parties data aggregates Topshop, Topman and Outfit.

³¹⁶ Shop Direct's revenues attributed to the sport-inspired casual fashion apparel and footwear are [redacted] those of ASOS in the same frames of reference. See Table 7 and Table 8 and the caveats made in para. 117 with respect to this data.

- (b) Shop Direct stated that [REDACTED].
- (c) Zalando submitted that its focus is on male and female customers between 20 and 49 years old.
202. Third parties contacted as part of the CMA's merger investigation identified ASOS as a competitor but recognised that its competitive constraint is limited by its lack of in-store presence. Only three third parties mentioned Shop Direct as an effective competitor. No third parties mentioned Zalando as a competitor of the Parties.
203. As explained above, the CMA requested third parties to rate retailers according to how closely they compete with each of the Parties. The results were as follows:
- (a) Out of ten, the score given by ASOS to itself against the Parties was [REDACTED] in apparel. For ASOS, [REDACTED]. The average score given by third parties to ASOS was 5 in apparel.³¹⁷
- (b) The score given by Shop Direct to itself was [REDACTED] against JD Sports and [REDACTED] against Footasylum for apparel. Third parties, [REDACTED] considered Shop Direct to pose only a very limited constraint with respect to the Parties; Shop Direct was mentioned as a competitor by only three third parties. Of these three, for apparel, one third party rated Shop Direct's closeness to both Parties as 7, whilst another rated the closeness to both as 6. The other third party did not rate it for closeness as against the Parties.³¹⁸
- (c) Out of ten, the score given by Zalando to itself against each of the Parties was [REDACTED]. No third party mentioned Zalando as a competitor to the Parties.
204. Internal documents also corroborate this view, suggesting that whilst the Parties view [REDACTED] as a material competitor, they view [REDACTED] as a weak player posing a limited constraint. Both Parties regularly monitor [REDACTED]. For example:
- (a) JD Sports' [REDACTED].³¹⁹
- (b) Footasylum's document [REDACTED].³²⁰ [REDACTED].³²¹

³¹⁷ Third parties scores are based on those responses that mention ASOS as a competitor.

³¹⁸ Third parties scores are based on those responses that mention Shop Direct as a competitor.

³¹⁹ Annex 89 to the FMN, [REDACTED].

³²⁰ Annex 714 of Footasylum's section 109 consolidated response, [REDACTED].

³²¹ See also para. 326(c) below.

(c) By contrast, the Parties' internal documents contain only limited mentions of [REDACTED] ([REDACTED]) without discussing it in detail.³²²

(d) [REDACTED] is monitored only to a limited extent by the Parties. For example, [REDACTED].³²³[REDACTED].

205. Third party industry reports also typically discuss ASOS' and Zalando's growth, but do not discuss Shop Direct:

(a) Mintel notes that 'In February 2018, ASOS introduced its much-anticipated athleisure line.'³²⁴

(b) Global Data states that 'Pureplays such as ASOS, Missguided and Boohoo.com are growing fast as young shoppers engage heavily in online shopping, but also physical retailers are growing their share online as the convenience of online shopping appeals to all ages and genders.'³²⁵

(c) Berenberg states that 'while ASOS and Zalando are growing quickly and gaining credibility in premium sports fashion – thereby competing with JD – we believe they largely focus on a different consumer demographic, namely millennial women. This cohort is underserved by traditional sports retailers, but is the fastest-growing segment in sportswear.'³²⁶ It also states 'with its content and curated assortment, we believe ASOS will present brands well and gain access to premium product – a clear competitor to JD.'³²⁷

206. Overall, based on the evidence above, the CMA believes that both Parties compete with ASOS, Shop Direct and Zalando to some extent (although with ASOS, to a greater degree). With respect to ASOS, the CMA recognises that it exerts a degree of competitive constraint on the Parties on the basis that the Parties monitor this retailer regularly in their internal documents. However, the strength of Shop Direct's and Zalando's competitive constraint is substantially limited given their limited scale in the UK, the feedback received from third parties and their limited appearance in the Parties' internal documents.

- *Other retailers*

207. The Parties listed a long tail of other competitors that they considered to be present in these markets (including Next, River Island, Urban Outfitters, Zara,

³²² For example, Annex 86, [REDACTED].

³²³ Annexes 71 and 89 to the FMN.

³²⁴ Annex 314 to the FMN, Mintel Sports & Outdoor Fashion - UK - December 2018, page 7.

³²⁵ Annex 338 of Footasylum's section 109 consolidated response. Global Data, Clothing & Footwear Retailing in the UK, Market Shares, Summary and Forecasts to 2021, page 29.

³²⁶ Annex 359 to the FMN, Berenberg Sports Retail, page 6.

³²⁷ Annex 359 to the FMN, Berenberg Sports Retail, page 27.

House of Fraser, John Lewis, Selfridges, Debenhams, TK Maxx, Deichmann, Sole Trader, Decathlon, Puma, Boohoo.com, Amazon, Kitbag, Outfit, DW Sports, The North Face, Clarks, Wynsors, Asics, Skechers, New Balance and Vans).

208. The Parties submitted that these retailers are mentioned in their internal documents, and thus support the Parties' contention of there being subject to competition from a large number of retailers, including:

(a) [REDACTED].³²⁸

(b) [REDACTED].³²⁹

(c) [REDACTED].³³⁰ [REDACTED];³³¹

209. The Parties suggested that these documents emphasise both the wide effective competitor set and the strength of the online constraint on in-store offerings.³³²

210. However, the CMA does not believe that these firms impose a strong constraint on the Parties post-Merger (either individually or in aggregate) for the following reasons:

(a) As stated at paragraph 148 above, the CMA does not consider the fact that a competitor is mentioned to be in itself (that is, devoid of the context in which they are mentioned), reflective of that competitor being a competitive constraint. Although some of the Parties' internal documents refer to some of these competitors, these mentions are significantly more limited in scale as compared to the competitors mentioned in the previous sections (with the exception of [REDACTED]), which are referenced more consistently and to a greater depth throughout the Parties' internal documents. For example: one JD Sports document refers to a number of competitors, including [REDACTED], but these refer to there being no product crossover with these competitors, [REDACTED].³³³ See also paragraph 323(b), as to the limited level of monitoring of these competitors in [REDACTED] and paragraph 326(a) as to the different framing of these competitors in Footasylum's [REDACTED].

(b) Third parties generally did not indicate that these other retailers are competitors to the Parties. For example, none of these competitors were

³²⁸ Parties' response to IL, para. 8.11(c), Annexes 71 and 156 to the FMN.

³²⁹ Parties' response to IL, para. 8.11(c).

³³⁰ Parties' response to IL, para. 7.10, Competitor Pack, Annex 188-190 to the FMN.

³³¹ Parties' response to IL, 7.10.

³³² Parties' response to IL, para. 8.11(c),

³³³ Annex 184 to the FMN, [REDACTED].

mentioned more than once as an alternative to the Parties (with the exception of Amazon, which, as further discussed in paragraph 348, was mentioned three times for apparel). Furthermore, two players cited as being competitors by the Parties ([X]) submitted that they do not consider either Party as a competitor.

- *Store locations*

211. The Parties submitted that JD Sports faces greater competition from rivals other than Footasylum across its store network and that Footasylum is a small rival³³⁴ that is not present nationally with only 70 stores (primarily located in the North West of England and the Midlands).³³⁵
212. The CMA considers, based on the evidence outlined above, that the Parties are close competitors to each other. The evidence on which the CMA has based this view comes from a range of sources, including internal documents, third parties' views and cross-over sales data. Many of these sources of evidence describe the extent to which the Parties are close competitors at the national level and already take into account the extent of geographic overlap between them. The CMA considers that any evidence at the national level that suggests that the Parties are close competitors to each other, despite the fact that Footasylum has a small number of stores relative to some other retailers present in these frames of reference, would be consistent with the Parties' retail offerings being especially close substitutes to each other.
213. To inform its national assessment of horizontal unilateral effects, the CMA also considered the extent to which the Parties' physical stores overlap with those operated by the competitors identified in paragraphs 168 to 206 to ascertain whether these other retailers are geographically close to the Parties across their store networks. This evidence was included in the retailers' descriptions in the paragraphs above. The CMA did not use this assessment as a mechanistic filtering exercise to identify potentially problematic local areas. Rather, the CMA used this analysis as additional evidence on the overall competitive constraints faced by the Parties post-Merger at the national level, in a similar fashion to the analysis carried out for the Parties' stores in paragraphs 141 and 142.³³⁶
214. The Parties submitted the results of an analysis of local areas based on several scenarios, with each scenario considering a different possible approach to counting the number of competitor fascia in each area. The

³³⁴ FMN, para. 7.7.

³³⁵ Parties' response to the IL, para. 8.2.

³³⁶ This analysis is based on Footasylum's 68 stores and JD Sports' 416 stores as explained under the Scale of geographic overlaps section.

Parties submitted that when counting only those competitors that belonged to what they considered was a narrow set of effective competitors – namely Foot Locker, Sports Direct, adidas and Nike – and adding one competitor per local area to reflect the constraint from online retailers, there would be only 17 local areas where the Parties faced two effective competitors (sometimes referred to as a ‘4-to-3’ local area³³⁷) or fewer. They submitted that further including a small number of competitors would mean that there would be no 4-to-3 local areas. The Parties submitted that it was not credible for there to be a potential reduction of competition in anything other than a minority of overlapping areas, if any at all. ³³⁸

215. While it is correct that there is a large number of local areas that could be classified as ‘5-to-4’ (or higher, e.g. ‘6-to-5’) using the ‘effective competitor set’ outlined in paragraph 214, the CMA considers that this fascia counting exercise does not necessarily imply that the loss of competition from the Merger in local areas like these would be insufficient to contribute to an incentive for the Parties to deteriorate their retail offering in a uniform way at the national level. As is explained in greater detail below:

- (a) the CMA does not consider all of the retailers identified by the Parties as effective competitors exerting a strong constraint; and
- (b) the CMA does not consider that a basic fascia counting exercise accurately reflects competitive conditions.³³⁹

216. The supply of sports-inspired casual apparel is a differentiated market. In differentiated markets, measures of concentration (such as shares of supply or counting the number of competitors) will ignore important market features, such as the varying strength of constraint from different competitors. Fascia counts are especially susceptible to this weakness when they treat each competitor in a binary way (i.e. either treated as a full and equal competitor, or as exerting no competitive constraint at all).

217. As such, the CMA would note that it is not the case that four remaining competitors will always be considered to provide sufficient constraints on merging parties. In a differentiated market where merging parties are close competitors, it is plausible that the merged entity will have an incentive to raise prices or worsen the competitive offer even in the presence of several

³³⁷ This is because, pre-Merger, there are four effective competitors in total; the Parties and two rivals. Post-merger, three competitors would remain: the merged entity and the two rivals. This is why local areas with two effective competitors to the Parties are referred to as ‘4-to-3’ local areas.

³³⁸ Email of 27 August 2019 (17:22) sent by Bruce Kilpatrick on behalf of the Parties to the CMA case team.

³³⁹ A simple fascia count exercise may under or overstate the extent of competition in an area, as they treat each brand as being equally important and therefore do not reflect the differences between them. See [Sainsbury’s/Asda](#), Final Report, footnotes 119 and 239).

competitors. This is because any incentive to, for example, cut costs by reducing the product range they offer to customers would be driven by the fact that some of the customers lost by one merging party as a result would be expected to be recaptured by the other merging party. In cases where customers see the merging parties as close substitutes, the proportion of customers that would be 'recaptured' by the merged entity may be substantial even in the presence of several competitors.

218. By way of illustration with respect to this particular case, the CMA has identified [X] Footasylum stores and [X] JD Sports stores where the Merger would give rise to a reduction in the number of fascia from 5 to 4 based on the following rule: each of Foot Locker, Nike, adidas and Topshop/Topman are counted as one fascia each (along with the other merging party). However, for the reasons set out above, the CMA considers that in these local areas, some of these competitors would provide only a limited constraint. Nike and adidas as noted above may provide a lesser constraint as single brand retailers. Topshop/Topman as set out above was generally not considered by third parties to be a competitor to the Parties and was considered to exert a particularly limited constraint on JD Sports. As a result, the CMA considers that the remaining constraint provided by these competitors would be unlikely to be sufficient to offset the constraint lost as a result of the Merger and, therefore, these '5-to-4' local areas would be likely to contribute to an overall reduction in the competitive constraints on the Parties' at the national level.
219. The Parties proposed an approach to 'down-weight' weaker competitors by applying a weight of 0.25 instead of a weight of 1. The CMA considers that this approach would not reflect the CMA's view that the Parties are among a small set of relatively close competitors and that a substantial proportion of customers are likely to choose from that subset of close competitors where they are present, while a relatively small proportion of customers are likely to consider other competitors to be a good alternative to the Parties. Applying a fixed weighting of 0.25 to each of these weaker competitors would implicitly assume that the total constraint exerted by these weaker competitors would increase in proportion to their number. The CMA considers that even in the presence of a large number of weaker competitors, a substantial proportion of the Parties' customers would continue to choose from the Parties and their closest competitors. The approach of applying a fixed weight will not take this into account.
220. More generally, it is not clear to the CMA why a weight of 0.25 would be appropriate.

221. In light of these considerations, the CMA has not attached weight to the Parties' submissions on the number of local areas with five or more competitors.

Conclusion on alternative retailers

222. Based on the evidence above, the CMA believes that there are certain retailers that may pose a degree of competitive constraint on the Parties in the retail supply of sports-inspired casual apparel (in-store). These retailers are, for the reasons outlined in this section: Foot Locker, Sports Direct, Nike, adidas, TopShop/Topman (primarily, for Footasylum and JD Sports to a significantly lesser extent), Shop Direct, ASOS and Zalando (the last three retailers as out-of-market constraints).
223. However, the markets affected by this Merger are characterised by highly differentiated retailers and, as such, the CMA believes that the competitive constraint posed by each of these retailers varies to a significant degree.
224. In addition, the CMA believes that it does not have sufficient evidence to consider that other retailers identified by the Parties provide a significant competitive constraint on the Parties.

Conclusion on horizontal unilateral effects in the retail supply of sports-inspired casual apparel (in-store)

225. As set out above at paragraphs 121 to 122, JD Sports' strong existing position will be further strengthened by the addition of Footasylum. The merged entity would be the largest retailer in the supply of sports-inspired casual apparel (in-store) in the UK.
226. Based on the evidence described above, the CMA believes that the Parties compete closely with each other in the retail supply of sports-inspired casual apparel in-store. The CMA therefore believes that the Merger will lead to the removal of one of JD Sports' closest competitors.
227. The CMA does not believe that the remaining fringe of suppliers would be sufficient to effectively constrain the Parties post-Merger. In particular:
- (a) While Foot Locker competes closely with the Parties in the retail supply of sport-inspired casual apparel in-store, the CMA believes that Foot Locker's constraint may be weaker in apparel than in footwear, given [✂];
 - (b) While Sports Direct has a large presence and significant geographic overlap with the Parties, it offers only a weak constraint because of its differentiated

product offering, its broader and less-targeted consumer focus, and its lack of access to SMUs/exclusive and/or high-end/ premium products;

- (c) While the DTC sales of Nike and adidas have grown in recent years, they also offer only a relatively limited constraint, in particular because of the differences in their offering (as they are not able to offer a multi-branded product range), their very limited in-store presence and the small size of DTC in-store sales relative to the overall market. The CMA also considers that Nike and adidas are predominantly wholesale operators, which may dilute their incentive to compete strongly with the Parties post-Merger;
- (d) TopShop/Topman, despite its significant retail presence, is also a relatively limited constraint, in particular because of material differences in its offering;
- (e) The constraint offered by online players – such as ASOS, Zalando, Shop Direct – is liable to be more limited than the constraint imposed by other retailers with an in-store presence (and, in any case, the evidence suggests that only ASOS of these players offers any kind of meaningful constraint at all to the Parties);
- (f) There is little evidence to support the position that any meaningful constraint is offered by the very long list of other retailers that the Parties suggested they compete against.

228. In the round, the CMA believes that Foot Locker is the only close competitor to the Parties in the retail supply of sports-inspired casual apparel (in-store). The CMA does not believe that the fringe of other weaker (most of them significantly weaker) constraints would, in addition to Foot Locker, be sufficient to constrain the Parties post-Merger.

229. Accordingly, the CMA found that the Merger raises significant competition concerns as a result of horizontal unilateral effects in relation to the retail supply of sports-inspired casual apparel in-store at a national level (and, thereby, in every local area where either Party operates a store).

ToH 2: The retail supply of sports-inspired casual footwear (in-store)

Shares of supply

230. The Parties submitted shares of supply based on their proposed frame of reference (ie, the retail supply of casual footwear included both online and in-store). However, for the reasons mentioned in paragraph 115 above, the Parties' estimated shares of supply for the wider casual fashion footwear market is not consistent with the frame of reference that the CMA has

considered in this case³⁴⁰ and, as a result, overstate the competition the Parties face in the relevant frame of reference.

231. To estimate shares of supply for the in-store footwear frame of reference affected by this Merger, the CMA has followed the same approach explained in paragraph 116 above. The CMA's estimates of the size of the market and shares of supply, based on feedback from third parties and the Parties, are set out further at Table 4 below. Accordingly, the CMA has placed limited weight on shares of supply in these markets for the reasons set out above at paragraph 117.

Table 4: Shares of supply for the retail supply of sports-inspired casual footwear in calendar year 2018 (in-store sales)

Retailer	Sport-inspired casual footwear
JD Sports	[30-40]%
Footasylum	[0-5]%
Combined	[30-40]%
Clarks	[0-5]%
Debenhams	[0-5]%
Decathlon	[0-5]%
Deichmann	[0-5]%
DW Sports	[0-5]%
Foot Locker	[5-10]%
Intersport	n/a
John Lewis	[0-5]%
Primark	[0-5]%
Schuh	[10-20]%
Sole Trader	[0-5]%
Sports Direct	[30-40]% ⁱ
Office	n/a
<i>adidas</i>	[0-5]%
<i>New Balance</i>	[0-5]%
<i>Nike</i>	[0-5]%
<i>Converse</i>	[0-5]%
<i>Fila</i>	[0-5]%
<i>The North Face</i>	[0-5]%
<i>Vans</i>	[0-5]%
<i>Asics</i>	[0-5]%
<i>Under Armour</i>	[0-5]%
Total	100%

Notes: Office did not provide revenue data. Intersport provided only total revenues without distinguishing between apparel and footwear. Brands' DTC sales are provided in italics. There is no data for online/pure players as these are in-store shares of supply.

Source: CMA analysis of Parties' and third parties' data

³⁴⁰ FMN, para. 14.1 onwards and Tables 1 and 2.

232. The Parties submitted that the CMA's analysis does not accurately capture the market because the narrow product definition leads to inflated shares of supply, the analysis does not properly take account of brands' DTC sales, and many of the Parties' key rivals such as Office did not provide data.³⁴¹ The Parties further submitted that the combined shares of supply are in any case below the level that typically raises *prima facie* competition concerns (c.40%), that the increment from the Merger is small, and that even in the CMA's narrow market definition, Sports Direct has a share of supply of [30-40]% and Schuh [10-20]%.³⁴²
233. With respect to the Parties' argument that the data does not properly take account of brands' DTC sales, for the reasons mentioned in paragraph 119 above, the CMA believes that (absent evidence to the contrary) the information included in the table above is liable to be more reliable than any other estimates the Parties may have access to.
234. With respect to the Parties' argument that the shares are below the level that typically raises *prima facie* competition concerns, the CMA rejects these arguments for the reasons as explained in paragraph 120 above (namely, that the Parties' position is of limited relevance in the context of differentiated markets in which shares of supply are but one limited indicator of a potential competitive constraint).
235. Table 4 above shows that, even if the CMA were to take a very broad view of the relevant competitors in this frame of reference:
- (a) Post-Merger, JD Sports' strong existing position – as the only player other than Sports Direct with a share of [30-40]% - will be further strengthened by the addition of Footasylum. The merged entity would be the largest retailer in the retail supply of sports-inspired casual footwear, with a combined share of supply of [30-40]%.
 - (b) Sports Direct would be the only retailer with a comparable share of supply to the merged entity with [30-40]%.¹ All other retailers would have a [10-20]% share of supply or less, and lag the merged entity to a significant extent.
236. Accordingly, the CMA believes that the Parties' combined shares of supply are, relative to the positioning of other players' shares high enough to raise *prima facie* competition concerns. Moreover, for the reasons explained below, the CMA believes that the relatively low increment of [0-5]%% is not reflective of the significance of Footasylum as a close competitor to JD Sports.

³⁴¹ Parties' response to the IL, para. 6.1.

³⁴² Parties' response to the IL, para. 6.2.

237. In addition to the shares of supply, the CMA has considered a range of other evidence to assess closeness of competition between the Parties and the constraint imposed on the Parties by their rivals.

Closeness of competition

238. The CMA examined the closeness of competition between the Parties on the basis of the following:

- (a) comparisons in the Parties' respective propositions;
- (b) scale of the geographic overlaps between the Parties;
- (c) evidence from internal documents;
- (d) third party views on closeness of competition; and
- (e) Footasylum's financial position.

- *The Parties' propositions*

239. The Parties submitted that they are not particularly close competitors in relation to the retail supply of sports-inspired casual footwear in-store since their offerings are differentiated for the same reasons as in relation to the apparel frame of reference. The Parties submitted that the Parties differed in brand focus in particular for footwear specifically, submitting that 'while the Parties compete more closely in footwear than in apparel, there are still differences in the parties' offerings with Footasylum selling only 38% of the footwear brands on offer at [JD Sports].'³⁴³

240. The CMA believes that there are significant overlaps between the Parties' customer propositions and between the Parties' customer target for the retail supply of sports-inspired casual footwear (in-store).

241. According to the available evidence, the Parties offer a similar product range:

- (a) Both Parties have a high degree of dependence on Nike and adidas, where in the last three years at least [X%] of JD Sports' revenue and [X%] of Footasylum's revenue was generated by the two brands.³⁴⁴
- (b) With respect to the brand crossover data submitted by the Parties for footwear, the CMA notes again that these percentages do not take into

³⁴³ Parties' response to the IL, para. 8.21 (a). In the case of JD Sports, 52% of the footwear brands sold by Footasylum are also sold by JD Sports (response to RFI dated 24 June 2019, Question 8).

³⁴⁴ CMA analysis of JD Sports' response to Q.6 of Request for Information dated 24 June 2019, Project Fox – 3 year brand split FW-Apparel.

account the relative importance and the actual sales of the brand. A combination of the data on brands' sales with the crossover data provided by the Parties (paragraph 239) shows that the crossover is much more significant [X]% [X]). The results of this analysis are shown in Table 5 below.

Table 5: Analysis of cross-over sales between the Parties

	Number of brands sold	Crossover with other Party	Simple brand crossover %	Sales-weighted brand crossover % ³⁴⁵
Footasylum Footwear	[X]	[X]	[X]%	[X]%
JD Sports Footwear	[X]	[X]	[X]%	[X]%

Source: CMA analysis of Parties' response to RFI dated 24 June 2019, Question 8

242. With respect to the Parties' argument on JD Sports' more advantageous access to SMUs, Table 6 below shows the proportion of sales due to SMUs in 2018 for each of the Parties. According to this data, JD Sports' sales due to SMUs were much higher than for Footasylum: for example, JD Sports made [X]% of its sales due to SMUs, whereas for Footasylum this percentage was much lower ([X]%).

Table 6: Proportion of Parties' sales due to SMUs (2018)

	Exclusive		Non-exclusive	
	JD Sports	Footasylum	JD Sports	Footasylum
Footwear	[X]%	[X]%	[X]%	[X]%

Source: Response to RFI dated 24 June 2019, Q8 (JD Sports) and RFI dated 24 June 2019 Q8 (Footasylum).
Note: Footasylum's data for FY 2018/19.

243. However, the evidence received from third parties indicated that focusing solely on the differentiation afforded to retailers through access to SMUs or exclusive products would be misplaced; specifically because:

- (a) Firstly, Table 6 may not fully capture the scope of the competitive advantage afforded by *attractive* exclusive products such as Nike Air Max 2015, offered by JD Sports. For example, JD Sports sold [X]% of Nike's [X] positioning products in both apparel and footwear in FY2019.³⁴⁶
- (b) Secondly, a focus on SMUs/exclusive products would not fully capture the competitive advantage afforded to retailers with access to high-end and/or premium products that are highly attractive to consumers by virtue of, for example, having a celebrity association or being of a limited range colour-

³⁴⁵ This analysis is not perfect as the number and name of brands may not match perfectly across different sources. However, the CMA is confident that the analysis captures all the most important brands.

³⁴⁶ CMA analysis of Nike's data on positioning products.

way (eg, Foot Locker's website offers 13 different colourways of Nike's Air Max 270, while JD Sports' lists 4 and Footasylum's, 11). Such products may afford retailers a differentiating competitive edge, notwithstanding that the retailers offering them do not have exclusive access. On that basis, the CMA believes that Table 6 may overstate the differentiation between the Parties' product offerings, as Footasylum (as well as JD Sports) has access to a range of high-end and/or premium products that, whilst not being exclusive, nevertheless allows it to offer a particularly attractive product offering with products (such as Nike Air Max 90 and adidas originals) that position it closely with JD Sports' offering.³⁴⁷ The importance of high-end and/or premium products is consistent with the third party market report cited above at paragraph 53. It is also consistent with feedback received during the CMA's market testing, with third parties describing the importance of access to popular or new styles, which may not be available to all retailers, but are not exclusive.

244. With respect to the analysis in the third-party reports submitted by the Parties, as mentioned in paragraph 137 above, the CMA believes that it is not representative and it does not provide clear evidence about the Parties' relative closeness in those areas where the Parties' two chains are present.
245. Finally, as mentioned in paragraph 138 above and according to the available evidence, the Parties target the same key demographics, ie 16-24 years old customers with a particular focus on men in the case of Footasylum.
246. The CMA therefore believes that, overall, the available evidence suggests that the Parties present a broadly similar customer proposition for consumers and that they both target the same customer segment in the retail supply of sports-inspired casual footwear in-store.

- *Scale of geographic overlap*

247. As mentioned in paragraph 140, the Parties submitted that they overlap geographically with each other only to a comparatively modest extent, and that JD Sports faces greater competition from other rivals across its store network, with Footasylum being a small rival. The Parties further submitted that only [X] JD Sports fascia have a Footasylum within 20 minutes of a JD Sports fascia ([X]% of JD Sports' [X] stores).³⁴⁸

³⁴⁷ These products were cited as examples of products that are attractive (whilst not being exclusive to Footasylum) by a competitor.

³⁴⁸ FMN, para. 15.78.

248. However, as noted in paragraph 141 above, the CMA believes that the extent of overlap between the Parties is substantial. Based on a catchment area of 20-minutes' drive-time and excluding JD Sports fascia that do not compete directly with Footasylum,³⁴⁹ [REDACTED] Footasylum stores overlap with JD Sports stores, and [REDACTED] ([REDACTED]%) of JD Sports' stores overlap with Footasylum stores.³⁵⁰ Within the proposed 20-minute catchment area, every Footasylum store is particularly close to a JD Sports store, ie within the same town centre or shopping centre.

249. Based on the evidence above, the CMA believes that the Parties are geographically close to each other, as [REDACTED] Footasylum stores overlap with at least one JD Sports store and [REDACTED] JD Sports stores overlap with at least one Footasylum store (within a catchment area of 20 minutes' drive-time). As described more in detail below, the scale of this geographic overlap with JD Sports from Footasylum's point of view is higher than that of Foot Locker, Nike and adidas, and comparable to that of Sports Direct.

- *Internal documents*

250. As mentioned in paragraphs 143 to 148 above, the Parties provided a significant number of internal documents to the CMA, submitting that these showed that they were not uniquely close competitors.³⁵¹ The Parties' internal documents do not consider apparel and footwear on a separate basis; the CMA has therefore not done a separate assessment of the Parties' internal documents for footwear specifically on the basis that the assessment made in paragraphs 152 to 158 above also apply equally to in-store footwear.

251. The CMA therefore believes that, as for apparel, the internal documents submitted by the Parties suggest that they each view the other Party as a close competitor.³⁵² The CMA notes the following examples of Footasylum documents monitoring JD Sports specifically in relation to footwear (namely, through access to SMUs):

(a) One document states: '[REDACTED]'.³⁵³

³⁴⁹ These brands were excluded after the CMA's analysis revealed that their focus was on more high-tier brands: Armani Exchange, Choice, Hugo Boss, Tessuti, Infinities. However, the CMA notes that Footasylum monitors Tessuti and Infinities in some of its internal documents. The CMA has also excluded stores in Northern Ireland as Footasylum has no presence in this region.

³⁵⁰ Of the overlapping stores [REDACTED].

³⁵¹ Headline over para. 7.12 of FMN; para. 148 above.

³⁵² See paras. 143 to 151 above.

³⁵³ Annex 392 of Footasylum's section 109 consolidated response, [REDACTED].

(b) One document notes [REDACTED].³⁵⁴

(c) According to another document, [REDACTED].³⁵⁵

252. Based on the evidence considered in the assessment of the Parties' internal documents in the in-store apparel section above, the CMA believes that the Parties monitor each other closely.

- *Third party comments*

253. Overall, the third parties contacted by the CMA during its merger investigation indicated that the Parties compete closely against each other in sports-inspired casual fashion footwear. Out of ten (ten being the maximum score), the average score given by third parties to competition between the Parties was 8.8 (Footasylum on JD Sports) and 8.2 (JD Sports on Footasylum) for the retail supply of sports-inspired casual footwear (for both in-store and online).³⁵⁶ Relative to other retailers, most third parties scored each of the Parties as the 'top' competitor to the other party.

- *Footasylum's financial position*

254. As noted in the Counterfactual section above, the Parties made various submissions regarding Footasylum's financial performance and its impact on its ability to compete.

255. However, as mentioned in paragraph 40 above, the results of the CMA's review of the Parties' evidence and internal documents suggest that, contrary to the Parties' submissions, Footasylum's financial performance would not have reduced its ability to compete. The CMA therefore believes that the available evidence in relation to Footasylum's financial circumstances, both current and future, does not support the position that Footasylum would cease to be a significant competitive constraint on JD Sports.

Conclusion on closeness of competition for the retail supply of sports-inspired casual footwear (in-store)

256. The CMA therefore believes that the Parties compete closely with each other in the retail supply of casual footwear in-store due to (i) similarity of product offering and customer target; (ii) the substantive geographic overlaps between the Parties stores; (iii) the Parties' internal documents, which closely track and

³⁵⁴ Annex 349 of Footasylum's section 109 consolidated response, [REDACTED].

³⁵⁵ Annex 363 of Footasylum's section 109 consolidated response, [REDACTED].

³⁵⁶ As mentioned in footnote 258, the CMA questionnaire included one question for both in-store and online, therefore the results should be interpreted accordingly (ie the results are the same to both in-store and online).

monitor each other; and (iv) third party views indicating that the Parties are close competitors. The CMA also does not believe that Footasylum's financial circumstances have prevented, or are likely to prevent, the Parties from competing closely in the future.

Competitive constraints: alternative retailers

257. Unilateral effects are more likely where consumers have little choice of alternative retailer. The CMA has therefore considered whether there are alternative retailers which would provide a competitive constraint on the combined entity.
258. The Parties submitted that they face a diverse range of competitors in the in-store supply of sports-inspired casual apparel. In particular, the Parties submitted that they will continue to compete with a significant number of credible retailers in each product category, from online/pure play retailers, multi-channel retailers and DTC sales from brands, including:
- (a) online/pure players: ASOS, Boohoo.com, Zalando, Amazon and Kitbag;
 - (b) multi-channel competitors including Decathlon, Puma, River Island, Outfit, TK Maxx, John Lewis, Selfridges, Sports Direct (including Flannels and USC), Next, Foot Locker, DW Sports, Topshop/Topman, Zara, Urban Outfitters, Debenhams and House of Fraser; and
 - (c) DTC competitors: adidas (and Reebok), Nike and The North Face.³⁵⁷
259. The CMA has assessed the constraint from these alternative retailers by taking into consideration:
- (a) the nature of their respective propositions;
 - (b) views of third parties;
 - (c) the Parties' internal documents; and
 - (d) third-party market reports and commentary.
- *Foot Locker*

260. The Parties have submitted that they regard Foot Locker as one of their competitors in casual fashion footwear. Foot Locker has a similar national scale to Footasylum (currently operating 70-80 stores in the UK). It has an

³⁵⁷ FMN, para. 7.21.

estimated share of supply of [5-10]% in in-store footwear.³⁵⁸ Foot Locker submitted that it targets [X].

261. Foot Locker is a retailer of athletically-inspired apparel and footwear, whose products are fashion-focussed and inspired by sport. Foot Locker considers itself to compete [X] with the Parties in footwear and [X].³⁵⁹ Foot Locker submitted that it targets the same demographics as the Parties, namely 16-24 year-olds.
262. Third parties generally considered Foot Locker to compete closely with the Parties in footwear. Out of ten, the average score given by third parties to Foot Locker as against, individually, both JD Sports and Footasylum, was 8.8.³⁶⁰
263. As mentioned in paragraph 171 above, the Parties' internal documents, which suggest that [X] is closely monitored by both Parties, also support third parties' views that [X] is a relatively close competitor to each of the Parties. There are also some examples that relate to footwear (in-store) in particular: a Footasylum document [X].³⁶¹
264. As noted in paragraph 172 above, third party industry reports suggest Foot Locker – similarly to JD Sports in particular – is considered a key player in these markets for some suppliers.
265. Overall, the CMA believes that the available evidence indicates that Foot Locker competes closely with the Parties in the retail supply of sport-inspired casual footwear.

- *Sports Direct*

266. The Parties have submitted that Sports Direct is a competitor in casual footwear, describing it as the 'market leader' for sports or outdoor fashion items.³⁶² As noted above, Sports Direct operates 450-490 stores and has a relatively large estimated in-store share of supply comparable to that of JD Sports': [30-40]% in footwear.³⁶³

³⁵⁸ See Table 1 above. As explained previously in the section prefacing Table 1, the CMA has placed limited weight on these shares of supply as these are markets characterised by a high degree of differentiation between retailers' offerings. References to retailers' shares of supply in this following section should, therefore, be viewed within that context.

³⁵⁹ When asked to rate how closely it competed with each of the Parties (10 being the maximum score), Foot Locker rated itself with a score of [X] in footwear (ie, as competing [X] with the Parties).

³⁶⁰ Third parties scores are based on those responses that mention Foot Locker as a competitor.

³⁶¹ Annex 426 of Footasylum's section 109 consolidated response [X].

³⁶² FMN, para. 15.36.

³⁶³ See Table 4 above, and the caveats made in para. 117 with respect to this data.

267. The available evidence indicates, however, that Sports Direct's proposition is materially differentiated from those of the Parties.

- (a) Sports Direct offers a wider range of sports footwear targeting a broad range of customers; [REDACTED]. This is in contrast to the Parties' offerings, which are targeted towards a specific demographic group of 16-24 year-olds (and, for Footasylum, men in particular);
- (b) Sports Direct positions itself as offering value for low prices. With respect to footwear, [REDACTED].
- (c) The Parties have submitted that Sports Direct is implementing a '*store elevation strategy*' under which stores are designed to serve a more high-end clientele.³⁶⁴ [REDACTED] the CMA has received evidence showing that, [REDACTED]. As discussed at paragraph 176(c) above in the context of in-store apparel, Sports Direct's external image still appears to be primarily that of a discounter.³⁶⁵

268. A number of third parties, including [REDACTED], have noted that Sports Direct does not have access to the same product options as the Parties (JD Sports, in particular). These third parties noted that, whilst the Parties have access to SMUs/exclusives and/or high-end/premium products, Sports Direct's access to such products is restricted and its constraint on the Parties is therefore limited. The average score given by third parties to Sports Direct in their rankings for how closely Sports Direct competed with the Parties was a moderate 6 (out of 10) in footwear.³⁶⁶

269. As mentioned in paragraph 178 above, despite Sports Direct having a larger store footprint than JD Sports, references to Sports Direct in both Parties' internal documents are limited, both in absolute terms, and in comparison to references to the other Party and to certain other competitors such as Foot Locker.³⁶⁷ Also, the Parties' internal documents are generally consistent with the position that there are limitations to the constraint posed by Sports Direct, notwithstanding its significant share of supply and relatively large geographic footprint. For example:

³⁶⁴ FMN, para. 44.

³⁶⁵ <https://www.thetimes.co.uk/article/vibrant-jd-sports-outpaces-competition-wwfb18wtf> (last access on 18 September 2019)

³⁶⁶ The averages of third parties scores are based on those responses that mention Sports Direct as a competitor.

³⁶⁷ For example, [REDACTED] is not mentioned in any of [REDACTED] (Annexes 188-190 to the FMN), in [REDACTED] (see Table 7 of the FMN) and [REDACTED] (Annexes 680-691 to the FMN). [REDACTED].

- (a) JD Sports submitted [REDACTED] which characterises Sports Direct as being differentiated from the Parties because of its lower product tier.³⁶⁸
- (b) As noted in paragraph 178(b) above, JD Sports [REDACTED].³⁶⁹
- (c) A third-party report from GlobalData states in relation to Sports Direct that '[t]hrough its value proposition is well-known, it is overshadowed somewhat by its poor brand image and weaker engagement with shoppers compared to the likes of JD' and that 'the specialist is losing relevance due to a lack of fashionability in its offer'.³⁷⁰
- (d) A third-party report from Berenberg states that 'JD is one of just two global strategic partners for adidas and Nike, whereas Sports Direct's strained relationship with the brands will, we think, leave it exposed'.³⁷¹ Berenberg also states that 'We therefore believe that the brands will not start treating Sports Direct as a premium strategic partner in the UK when they already have JD dominantly positioned in this category, in which Foot Locker is also present'.³⁷²

270. As explained above in paragraphs 53 to 55, in the sport-inspired casual footwear frame of reference, the available evidence suggests that the ability to offer high-end and/or premium products, possibly on an exclusive basis, is key to the success of a retailer. Given Sports Direct's limited access to these products (see also paragraph 134), the CMA believes there are significant limitations to the constraint posed by Sports Direct to the Parties in this frame of reference.

271. Overall, the CMA believes that Sports Direct exerts a degree of competitive constraint on the Parties in the retail supply of sports-inspired casual footwear in-store. However, the CMA believes that Sports Direct poses a substantially weaker constraint than Foot Locker, or the Parties to one another, due to its differentiated product offering, its broader and less-targeted consumer focus, and lack of access to SMUs/exclusive, and/or high-end/ premium products.

- *Nike and adidas*

272. The Parties have submitted that competitive pressure from brands selling through DTC channels is increasing, stating that DTC sales by major branded

³⁶⁸ Annex 86 to the FMN, [REDACTED].

³⁶⁹ See, for example Annex 15 to the FMN, [REDACTED].

³⁷⁰ Annex 355 to the FMN, The UK Sportswear Market 2018-2023 [GlobalData], pages 37, 35.

³⁷¹ Annex 347 to the FMN, Berenberg Sports Retail, page 4.

³⁷² Annex 347 to the FMN, Berenberg Sports Retail, page 83.

suppliers are increasing and are set to increase further over the next 12-18 months, thereby reducing the availability of products made available to retailers outside the DTC channel.³⁷³ The Parties also stated that DTC occurs mainly online, but also through 'mono-brand' stores, so the proposition offered by the brands is increasingly competing directly with the Parties.³⁷⁴

273. Nike and adidas are the two largest suppliers of sports-inspired casual footwear. As mentioned in paragraph 184 above, Nike has a low geographic store footprint of just [X] stores in the UK,³⁷⁵ and has a relatively low in-store share of supply of [0-5]% in footwear. adidas also operates a relatively low footprint of [X] stores and has a low in-store share of supply of [0-5]% in apparel.³⁷⁶
274. Both Parties are part of a [X] set of retailers with access to SMUs/exclusive products and/or high-end/premium products by Nike and adidas.³⁷⁷ In the last three financial years, JD Sports sold [X]% (by value) of Nike's footwear SMUs/exclusive products.³⁷⁸ Similarly, JD Sports is [X] retailer of exclusive products for adidas: in 2019 it sold [X]% (by value) of its SMUs/exclusive footwear products.³⁷⁹ This is consistent with JD Sports' strong position in the market and its close relationship with both suppliers, and suggests that both Nike and adidas might have a weaker incentive to compete with JD Sports (both currently and post-Merger).
275. [X] Nike and adidas told the CMA that [X]. In this regard, [X] Nike sees the Parties as key customers rather than competitors. One supplier [X] explained that [X]. It further stated that [X]. When asked to score how closely they considered themselves to compete with each of the Parties, Nike [X].
276. As noted in paragraph 187 above, third parties contacted during the CMA's merger investigation indicated that Nike and adidas are the only two brands recognised as being potentially significant competitors at retail level, on the basis that they have been the only brands (operating in the UK) mentioned by

³⁷³ FMN, para. 4.2(a).

³⁷⁴ FMN, para. 6.2(d)(iii)(A).

³⁷⁵ Nike operates other factory or clearance stores. We do not consider that they compete closely with the Parties based on third parties' responses (see para 187 below).

³⁷⁶ See Table 4 above, and the caveats made in para. 117 with respect to this data. These shares are likely to overestimate Nike and adidas constraint on the Parties because they are based on revenues not only from commercial stores (in direct competition with the Parties), but also from flagship stores and outlet/factory stores.

³⁷⁷ Together with [X].

³⁷⁸ Data based on UK deliveries from Nike's EEA and Switzerland distribution system. Data provided by Nike in response to the CMA's notice under section 109 of the Enterprise Act 2002, dated 14 August 2019.

³⁷⁹ Revenue data may include articles that may be subsequently sold online or through stores outside of the UK. Data provided by Adidas in response to the CMA's notice under section 109 of the Enterprise Act 2002, dated 14 August 2019.

third parties as competitors to the Parties. The evidence received from third parties as to the extent of constraint posed by each of Nike and adidas was, however, mixed. More specifically:

- (a) As mentioned above, third parties acknowledged the expansion of brands selling DTC. However, [REDACTED], some of them stated that brands' flagship stores are not in direct competition with retailers, and that these stores are used by the major brands as marketing tools to create brand awareness and expand sales (whether through DTC channels or other retailers'). Similarly, one competitor told the CMA that the brands' clearance stores are not in direct competition with mainstream retailers because they help 'clean the market' from old products.³⁸⁰
- (b) However, third parties nevertheless tended to score Nike and adidas as competing relatively closely with the Parties. The average score given by third parties to Nike and adidas respectively in their rankings for how closely these players compete with the Parties in apparel was 8.8 (out of 10) for each of these brands.³⁸¹

- 277. As mentioned in paragraphs 188 and 189 above, internal documents from the Parties show that they monitor the DTC activities of both Nike and adidas.
- 278. As stated previously at paragraph 52, third-party industry reports also corroborate to some extent the Parties' submissions regarding the increase of DTC sales in recent years.
- 279. As noted above, the CMA recognises that there is some evidence to suggest that in-store DTC sales are an increasing competitive pressure on the Parties' in-store sales and that the brands are increasingly being ranked as relatively close competitors to the Parties. However, according to the available evidence, the CMA also believes that whilst DTC sales may be of greater significance in recent years than previously, the fact remains that the constraint imposed by the brands' DTC sales is relatively limited due to their small number of stores, the small size of these sales relative to the overall markets and their inability to offer a multi-branded product range. The CMA also believes that the brands' strong relationship with the Parties as a route to market may also dampen the suppliers' incentives to compete strongly with the merged entity post-Merger.

³⁸⁰ [REDACTED]. The number of stores presented above excludes clearance stores.

³⁸¹ Third parties' scores are based on those responses that mention Nike and adidas as a competitor.

- *Office/Schuh*

280. The Parties submitted that a large number of retailers compete with them in the sports-inspired casual fashion footwear market. Among them, Office and Schuh are the two largest footwear-only retailers. Each of them has more than 100 stores in the UK. Schuh had an estimated in-store share of supply of [10-20]%.³⁸²
281. According to Office, it [REDACTED]. Schuh submitted that it [REDACTED]. [REDACTED] Office and Schuh consider [REDACTED]. Moreover, [REDACTED].
282. Third parties contacted as part of the CMA's merger investigation recognised both Office and Schuh as competitors to the Parties. However, competitors and suppliers' responses indicate that the competitive constraint posed by both Office and Schuh is likely to be lower than the Parties' constraint on each other, and also lower than that of Foot Locker, Nike or adidas. With respect to how closely they considered themselves to compete with the Parties, out of ten, the score given by Office to itself was [REDACTED] against, individually, JD Sports and Footasylum, and by Schuh to itself was [REDACTED], against, individually, each of the Parties. [REDACTED], third parties tended to score Office and Schuh as competing moderately with the Parties. The average score given by third parties to Office and Schuh respectively in their rankings for how closely these players compete with each of the Parties in footwear was, on average, 5.6 for Office and 4.4. for Schuh.³⁸³
283. Internal documents from the Parties show that both retailers are regularly monitored. For example, JD Sports [REDACTED].³⁸⁴ Moreover, Footasylum included [REDACTED].³⁸⁵ However, the CMA notes that the frequency and depth with which [REDACTED] and [REDACTED] are monitored by both Parties are significantly lower than competitors considered above, suggesting the Parties view each of these players as being a relatively much weaker constraint than each other and Foot Locker, and also Nike and adidas. For example, [REDACTED].³⁸⁶ A Footasylum document discussing footwear states: [REDACTED].³⁸⁷

³⁸² See Table 1 above, and the caveats made in para. 117 with respect to this data. As noted above, this information is not available for Office.

³⁸³ Third parties scores are based on those responses that mention Office and Schuh as a competitor.

³⁸⁴ Annex 89 to the FMN, [REDACTED] and Annex 67 to the FMN, [REDACTED].

³⁸⁵ Annex 494 of Footasylum's section 109 consolidated response, [REDACTED]; Annex 897 of Footasylum's section 109 consolidated response, [REDACTED].

³⁸⁶ Annex 189 to the FMN, [REDACTED]

³⁸⁷ Annex 426 of Footasylum's section 109 consolidated response, [REDACTED].

284. Third party reports are also generally consistent with the position that Schuh and Office offer only limited constraints. For example:

(i) Mintel states that Office *'has also experienced a few years of tough trading conditions in 2017, recording a steady decline in revenue over the past four years. Targeting a young consumer, Office has lost consumers who have the ability to shop with brands they connect with. Office is appearing to be a bit stale in comparison to its growing competitors such as JD Sports, Schuh and Footasylum.'*³⁸⁸

(ii) Mintel also states that *'Schuh is focusing on children's footwear and is rolling out a dedicated children's footwear chain, Schuh Kids'*.³⁸⁹

285. The Parties have submitted that Office (and Offspring) operates 100 stores and Schuh 103 stores. Based on a 20-minute drive-time catchment area, the CMA calculated that:

(a) [X] % of Footasylum stores overlap with Office and [X] % with Schuh;

(b) [X] % of JD Sports stores overlap with Office and [X] % with Schuh.

286. On the basis of the evidence above, the CMA believes that both Office and Schuh provide some constraint on the Parties in the footwear market, although this is more limited than the constraint imposed by other retailers such as Foot Locker, Nike or adidas.

- *ASOS, Shop Direct and Zalando*

287. As noted above, ASOS, Shop Direct and Zalando are online/pure players, ie they do not operate any brick-and-mortar stores or sell products exclusively online. For this reason, the CMA considers them to be a stronger constraint in the online markets than in the in-store markets. Nonetheless, the CMA recognises that ASOS, Shop Direct and Zalando may provide an out-of-market constraint on the Parties' in-store sales. Shop Direct is significantly smaller than ASOS in the retail supply of sports-inspired casual footwear with online shares of supply of [5-10] % in comparison to [10-20] % for ASOS. Zalando is even a smaller player, with a [0-5] % share of supply.³⁹⁰

³⁸⁸ Annex 305 to the FMN, Mintel, Footwear Retailing - UK - April 2019, page 32.

³⁸⁹ Annex 305 to the FMN, Mintel, Footwear Retailing - UK - April 2019, page 46.

³⁹⁰ Shop Direct's revenues attributed to the sport-inspired casual fashion footwear are [X] of those of ASOS in the same markets. Zalando's revenues attributed to the sport-inspired casual fashion footwear are [X] % of ASOS' revenue. See Table 8 below and the caveats made in para. 117 with respect to this data.

288. ASOS stated that [redacted], while Shop Direct stated that [redacted]. Zalando submitted that it competes [redacted] with the Parties (the score Zalando gave itself against both Parties for footwear was [redacted]). ASOS told the CMA that [redacted].
289. Third parties contacted as part of the CMA's merger investigation identified ASOS as a competitor but recognised that its competitive constraint is limited by its lack of in-store presence. Only a few third parties mentioned Shop Direct as an effective competitor. No third parties mentioned Zalando as a competitor of the Parties.
- (a) Out of ten, the score given by ASOS to itself as to how closely it considered itself to compete against the Parties was [redacted] in footwear. For ASOS, [redacted]. The average score given by third parties to ASOS was 6.5 in footwear.
- (b) The score given by Shop Direct to itself was [redacted] against JD Sports and [redacted] against Footasylum for footwear. Third parties, [redacted] considered Shop Direct to pose only a very limited constraint with respect to the Parties; Shop Direct was mentioned as a competitor by only one third party which did not rate it for closeness as against the Parties.³⁹¹
- (c) Out of ten, the score given by Zalando to itself as against each of the Parties was [redacted]. No third party mentioned Zalando as a competitor to the Parties.
290. As mentioned in paragraph 204 above, internal documents also corroborate this view, suggesting that whilst the Parties view [redacted] as a significant competitor in online sales, they view [redacted] and [redacted] as weak players posing only a limited constraint (and, even then, only to [redacted]).
291. As noted in paragraph 205 above, third party industry reports also typically discuss ASOS' growth, with some also referring to growth by Zalando, but not typically Shop Direct.
292. Overall, the CMA currently considers that the available evidence indicates that both Parties compete with ASOS, Shop Direct and Zalando to some extent (and with ASOS to a greater degree). With respect to ASOS, the CMA recognises that it exerts a degree of competitive constraint on the Parties, as reflected by the fact that the [redacted]. However, the strength of the constraint posed by Shop Direct and Zalando is likely to be substantially limited given their limited scale in the UK, the feedback received from third parties and their limited presence in the Parties' internal documents.

³⁹¹ Third parties scores are based on those responses that mention ASOS and Shop Direct as a competitor.

- *Other retailers*

293. The Parties listed a long tail of other competitors present to some extent in these markets (including Next, River Island, Urban Outfitters, Zara, House of Fraser, John Lewis, Selfridges, Debenhams, TK Maxx, Deichmann, Sole Trader, Decathlon, Puma, Boohoo.com, Amazon, Kitbag, Outfit, DW Sports, The North Face, Clarks, Wynsors, Asics, Skechers, New Balance and Vans).

294. The Parties submitted that these retailers are mentioned in their internal documents, as well as in third party reports.³⁹²

295. However, for the same reasons set out in paragraph 210 above, the CMA does not believe that these firms impose a strong constraint on the Parties post-Merger (either individually or in aggregate). For example:

- (a) Third parties generally did not indicate that these other retailers are competitors to the Parties. For example, none of these competitors were mentioned more than once as an alternative to the Parties (with the exception of Amazon, which, as further discussed in paragraph 389, was mentioned three times for footwear). Furthermore, two players cited as being competitors by the Parties ([X]) submitted that they do not consider either Party as a competitor.

- *Store locations*

296. The Parties submitted that JD Sports faces greater competition from rivals other than Footasylum across its store network and that Footasylum is a small rival.³⁹³

297. The CMA considers, based on the evidence set out above, that the Parties are close competitors to each other in the supply of sports-inspired casual footwear. As in the case of apparel, the evidence considered includes substantial evidence that takes into account the extent of geographic overlap between the Parties.

298. The CMA considered evidence from local areas to examine the extent of overlap between the Parties across the UK to inform its national assessment of horizontal unilateral effects. The CMA did not use this assessment as a mechanistic filtering exercise to identify individual, potentially problematic local areas.

³⁹² Parties' response to the IL, para. 8.24.

³⁹³ FMN, para. 7.7.

299. The Parties submitted the results of an analysis of local areas based on several scenarios, with each scenario considering a different possible approach to counting the number of competitor fascia in each area. The Parties submitted that when counting only those competitors that belonged to what they considered was a narrow set of effective competitors – namely Foot Locker, Sports Direct, adidas, Nike, Office and Schuh – and adding one competitor per local area to reflect the constraint from online retailers, there would be only three local areas where the Parties faced two effective competitors (ie 4-to-3 areas) or fewer. This number reduced to zero when (i) including Next and Topman/Topshop; (ii) including Primark and TK Maxx or (iii) including a list of 32 competitors, each counted as 25% of a competitor.
300. For the same reasons as set on in paragraphs 215 to 221 with respect to apparel, the CMA has not attached weight to the Parties' fascia counting exercise. As is set out in that section, the CMA does not consider all of the retailers identified by the Parties as effective competitors exerting a strong constraint; and the CMA also does not consider that a basic fascia counting exercise would adequately capture competitive conditions in this market.

Conclusion on alternative retailers

301. Based on the evidence above, the CMA believes that there are certain retailers that may pose a degree of competitive constraint on the Parties in the retail supply of sports-inspired casual footwear in-store. These retailers are, for the reasons outlined in this section: Foot Locker, Sports Direct, Nike, Adidas, Office, Schuh, Shop Direct, ASOS and Zalando (the last three retailers as out-of-market constraints).
302. However, the markets affected by this Merger are characterised by highly differentiated retailers and accordingly, the CMA believes that the competitive constraint posed by each of these retailers varies to a significant degree and has taken this into account in its competitive assessment.
303. In addition, the CMA believes that it does not have sufficient evidence to consider that other retailers identified by the Parties provide a significant competitive constraint on the Parties.

Conclusion on horizontal unilateral effects in the retail supply of sports-inspired casual footwear (in-store)

304. As set out above at paragraphs 235 to 236, JD Sports' strong existing position will be further strengthened by the addition of Footasylum. The merged entity would be the largest retailer in the supply of sports-inspired casual footwear (in-store) in the UK.

305. Based on the evidence described above, the CMA believes that the Parties compete closely with each other in the retail supply of sports-inspired casual footwear in-store. The CMA therefore believes that the Merger will lead to the removal of one of JD Sports' closest competitors.
306. The CMA does not believe that the remaining fringe of suppliers would be sufficient to effectively constrain the Parties post-Merger. In particular:
- (a) Foot Locker competes closely with the Parties in the retail supply of sports-inspired casual footwear in-store, but appears to be the only close constraint to the Parties;
 - (b) While Sports Direct has a large presence and significant geographic overlap with the Parties, it offers only a weak constraint because of its differentiated product offering, its broader and less-targeted consumer focus, and its lack of access to SMUs/exclusive and/or high-end/ premium products;
 - (c) While the DTC sales of Nike and Adidas have grown in recent years, they also only offer a relatively limited constraint, in particular because of the differences in their offering (as they are not able to offer a multi-branded product range), their very limited in-store presence and the small size of DTC in-store sales relative to the overall market. The CMA also considers that Nike and Adidas are predominantly wholesale operators, which may dilute their incentive to compete strongly with the Parties post-Merger;
 - (d) Office and Schuh, despite their significant retail presence, also pose only a limited constraint, in particular because of material differences in their offerings;
 - (e) The constraint offered by online players – such as ASOS, Zalando, Shop Direct – is liable to be more limited than the constraint imposed by other retailers with an in-store presence (and, in any case, the evidence only suggests that ASOS of these players offers any kind of meaningful constraint to the Parties);
 - (f) There is little evidence to support the position that any meaningful constraint is offered by the very long list of other retailers that the Parties suggested they compete against.
307. In the round, the CMA believes that Foot Locker is the only close competitor to the Parties in the retail supply of sports-inspired casual footwear (in-store). The CMA does not believe that the fringe of other weaker (most of them significantly weaker) constraints would, in addition to Foot Locker, be sufficient to constrain the Parties post-Merger.

308. Accordingly, the CMA found that the Merger raises significant competition concerns on a national basis as a result of horizontal unilateral effects, in relation to the nationally-set elements of PQRS, in the retail supply of sports-inspired casual footwear in-store (and, thereby, in every local area where either Party operates a store).

ToH 3: The retail supply of sports-inspired casual apparel (online)

Shares of supply

309. The Parties submitted shares of supply based on their proposed frame of reference (ie, the retail supply of casual apparel included both online and in-store). However, for the reasons set out in paragraph 115 above, the Parties' estimated shares of supply for the wider casual fashion apparel market are not consistent with the frame of reference that the CMA has considered in this case³⁹⁴ and, as a result, overstate the extent of competition the Parties face in the relevant frame of reference.

310. To estimate shares of supply for the online apparel frame of reference affected by this Merger, the CMA has followed the same approach explained in paragraph 116 above. The CMA's estimates of the size of the market and shares of supply, based on feedback from third parties and the Parties, are set out further at Table 7 below. Accordingly, the CMA has placed limited weight on shares of supply in this frame of reference for the reasons set out above at paragraph 117.

Table 7: Shares of supply for the retail supply of sports-inspired casual apparel in calendar year 2018 (online sales)

Retailer	Sport-inspired casual apparel
JD Sports	[10-20]%
Footasylum	[0-5]%
Combined	[20-30]%
Amazon	n/a
ASOS	[20-30]%
Clarks	[0-5]%
Debenhams	[0-5]%
Decathlon	[0-5]%
Deichmann	[0-5]%
DW Sports	[0-5]%
Foot Locker	[0-5]%
Intersport	n/a
John Lewis	[0-5]%

³⁹⁴ FMN, para. 14.1 onwards and Tables 1 and 2.

Retailer	Sport-inspired casual apparel
MandM Direct	[0-5]%
Sports Direct	[30-40]% ⁱ
Zalando	[0-5]%
Shop Direct	[5-10]%
<i>adidas</i>	[0-5]%
<i>New Balance</i>	[0-5]%
<i>Nike</i>	[0-5]%
<i>Converse</i>	[0-5]%
<i>Fila</i>	[0-5]%
<i>The North Face</i>	[0-5]%
<i>Vans</i>	[0-5]%
<i>Asics</i>	[0-5]%
<i>Under Armour</i>	[0-5]%
Total	100%

Note: Amazon provided data only on general merchandising and was therefore excluded from the table above; Office did not provide revenue data. Intersport provided only total revenue without distinguishing between apparel and footwear. Brands' DTC sales in italic. There is no data for Primark as they do not have an online offering.

Source: CMA analysis of Parties' and third parties' data

311. The Parties submitted the same arguments outlined above at paragraph 118 with respect to the CMA's analysis: namely, that the CMA's analysis does not accurately capture the market because the narrow product definition leads to inflated shares of supply, many of the Parties' key rivals did not provide data.³⁹⁵ and the combined shares of supply are in any case below the level that typically raises *prima facie* competition concerns (c.40%), that the increment from the Merger is small.³⁹⁶ The Parties also noted that there are a wide range of other competitors with a market share of [0-5]%, that combined, add to a significant competitive constraint.³⁹⁷
312. With respect to the Parties' argument that the data does not properly take account of brands' DTC sales, for the reasons set out in paragraph 119 above, the CMA believes that (absent evidence to the contrary) the information included in the table above is liable to be more reliable than the Parties' estimates.
313. With respect to the Parties' argument that the shares are below the level that typically raises *prima facie* competition concerns, the CMA rejects these arguments for the reasons explained in paragraph 120 above (namely, that the Parties' position is of limited relevance in the context of differentiated

³⁹⁵ Parties' response to the IL, para. 6.1.

³⁹⁶ Parties' response to the IL, para. 6.2.

³⁹⁷ Parties' response to the IL, para. 6.2 (c).

markets in which shares of supply are but one limited indicator of a potential competitive constraint).

314. Table 7 above shows that, even if the CMA were to take a very broad view of the relevant competitors in this frame of reference:
- (a) Post-Merger, the merged entity would be the third largest retailer in the retail supply of sports-inspired casual apparel online, with a combined share of supply of [20-30]%.
 - (b) Sports Direct, with [30-40]%, and ASOS, with [20-30]%, would be the only retailers with shares of supply of similar or higher level than the merged entity. With the exception of Shop Direct with [5-10]%, all other retailers would have a [0-5]% share of supply and lag the merged entity to a significant extent.
 - (c) Although there is a long tail of retailers with shares of supply below [0-5]% that, combined, could add a competitive constraint, for the reasons mentioned in the sections below, the CMA does not believe they impose a significant competitive constraint on the Parties.
315. In addition to the shares of supply, the CMA has considered a range of other evidence to assess closeness of competition between the Parties and the constraint imposed on the Parties by their rivals.

Closeness of competition

316. The CMA examined the closeness of competition between the Parties on the basis of the following:
- (a) comparisons in the Parties' respective propositions;
 - (b) evidence from internal documents;
 - (c) third party views on closeness of competition; and
 - (d) Footasylum's financial position.

- *The Parties' propositions*

317. The Parties submitted that they are not particularly close competitors in relation to the retail supply of sports-inspired casual apparel online since their offerings are differentiated for the same reasons as in relation to the in-store frame of reference.

318. The CMA believes that, according to the available evidence, there are significant overlaps between the Parties' customer propositions and between the Parties' customer target for the retail supply of sports-inspired casual apparel (online) for the same reasons explained in paragraphs 127 to 139 above.

- *Internal documents*

319. As mentioned in paragraphs 143 to 148 above, the Parties provided a significant number of internal documents to the CMA, submitting that these showed that they were not uniquely close competitors.³⁹⁸ The Parties' internal documents do not consider apparel and footwear, and in some cases, in-store and online, on a separate basis; the CMA has therefore not carried out a separate assessment of the Parties' internal documents for apparel and footwear specifically on the basis that the assessment made in paragraphs 321 to 327 below apply equally to both categories. The approach taken by the CMA for the analysis of those internal documents related specifically to the online frames of reference is the same as the approach taken for in-store mentioned in paragraphs 143 to 151.

320. The CMA believes that, considered in the round, and in the proper context for which they were produced, the internal documents submitted by the Parties suggest that they each view the other Party as a close competitor for the same reasons as in relation to the in-store frames of reference,³⁹⁹ as well as for the following reasons specific to the retail supply of sports-inspired casual apparel online.

JD Sports documents

321. The following paragraphs focus on the analysis of some of the categories of documents mentioned in paragraph 144(a) above that have particular focus on online.⁴⁰⁰ The CMA also includes below an assessment of other internal documents that do not belong to any of the categories of documents considered at paragraph 144(a) above but are nevertheless relevant to the online frames of reference.

322. With respect to JD Sports' internal documents, a large number of players are cited. As mentioned in paragraph 153 above, JD Sports describes this process as part of general 'market monitoring' and suggests that [X]. Accordingly, and also for the reasons mentioned in paragraphs 148 and 150

³⁹⁸ Headline over para. 7.12 of FMN; para.148 above.

³⁹⁹ See paras. 143 to 151 of this Decision.

⁴⁰⁰ These categories are: Competitor Packs, Competitor Review reports and Weekly Market Place Review.

above, the CMA has not been able to put material weight on the simple fact that a player is cited in the Parties' internal document (even where cited in a significant number of internal documents).

323. The CMA believes that Footasylum is given a particular focus in JD Sports' internal documents. Footasylum is present in nearly all JD Sports' key categories of internal documents listed below. For example, Footasylum is regularly monitored in the following documents:

- (a) [REDACTED],⁴⁰¹ [REDACTED].⁴⁰² The CMA considers these to be a particularly key category of document, given that they were prepared for the specific purpose of competitor monitoring. In these documents, JD Sports monitors an extensive range of multi-channel and online retailers including [REDACTED]. However, in these documents Footasylum features more prominently compared to any other retailer, [REDACTED].⁴⁰³
- (b) [REDACTED].⁴⁰⁴ The CMA considers these to be a particularly important category of document, as they are prepared for the specific purpose of competitor monitoring. [REDACTED].⁴⁰⁵ JD Sports monitors Footasylum across most of these documents; the monitoring of Footasylum often appears across multiple pages dedicated solely to Footasylum and is also often positioned at the start of the documents (followed most often by [REDACTED]).⁴⁰⁶ These documents also feature dedicated pages for [REDACTED]. Other competitors, namely [REDACTED], consistently appear combined [REDACTED].⁴⁰⁷
- (c) [REDACTED],⁴⁰⁸ [REDACTED].⁴⁰⁹ Footasylum's offering on its website is monitored alongside a small competitor set [REDACTED].⁴¹⁰

⁴⁰¹ Annexes 98 and 188-190 to the FMN. See para. 144(a) above.

⁴⁰² FMN, para. 15.88(e)(i).

⁴⁰³ For example, Footasylum is the only competitor being monitored in these weekly reports in Annex 98 to the FMN, [REDACTED] and Annex 189 to the FMN, [REDACTED].

⁴⁰⁴ Annexes 243 to 291 of the FMN.

⁴⁰⁵ Annexes 243 to 291 of the FMN.

⁴⁰⁶ See for example Annexes of the FMN; Annex 248, [REDACTED]; Annex 249, [REDACTED]; Annex 246, [REDACTED].

⁴⁰⁷ See for example Annexes of the FMN; 248 of the FMN, [REDACTED]; Annex 255, [REDACTED].

⁴⁰⁸ Annex 71 to the FMN, [REDACTED].

⁴⁰⁹ FMN, para. 15.88 (e)(i).

⁴¹⁰ Annex 71 to the FMN, [REDACTED].

- (d) In other documents, Footasylum appears to often be given greater prominence than other competitors, [REDACTED],⁴¹¹ [REDACTED].⁴¹² [REDACTED].⁴¹³ [REDACTED].⁴¹⁴

Footasylum documents

324. Footasylum submitted that, given JD Sports' position as one of the largest and most well-established players in the market, it is inevitable that a much smaller retailer like Footasylum will look closely at JD Sports within its competitor monitoring and this is reflected in Footasylum's internal documents, but that this is not reflective of Footasylum competing particularly closely with JD Sports.⁴¹⁵ Footasylum stated this is also due to the historical links between the two businesses.⁴¹⁶
325. The CMA has reviewed a large collection of Footasylum internal documents, as noted in paragraph 144(b) above. The following paragraphs focus on the analysis of some of the categories of documents mentioned in paragraph 144(b) above that have particular focus on the online channel.⁴¹⁷
326. As set out below, the documents suggest that Footasylum is monitoring and considering its commercial strategy against, primarily, JD Sports (as compared to other retailers): in particular, JD Sports appears to often be given greater prominence than other competitors. For example:
- (a) [REDACTED]⁴¹⁸ [REDACTED] to provide information to key decision-makers within the business on competitors' activities [REDACTED].⁴¹⁹ In these documents, in relation to both in-store and online, Footasylum monitors JD Sports, Foot Locker, Schuh, Office, River Island, Scotts and Topman. [REDACTED].⁴²⁰ [REDACTED].

⁴¹¹ For example, see Annex 91 to the FMN, [REDACTED]. Or Annex 83 to the FMN, [REDACTED].

⁴¹² For example, see Annex 111 to the FMN, [REDACTED]. See also Annex 70 to the FMN, [REDACTED].

⁴¹³ Annex 112 to the FMN, [REDACTED].

⁴¹⁴ Annex 115 to the FMN, [REDACTED].

⁴¹⁵ FMN, para. 15.6.

⁴¹⁶ FMN, para. 15.106(b).

⁴¹⁷ These categories are: [REDACTED].

⁴¹⁸ Annexes 529 to 653 of Footasylum's section 109 consolidated response.

⁴¹⁹ [REDACTED]. (Parties' response to the IL, para 8.12(a)).

⁴²⁰ See for example Annexes from Footasylum's section 109 consolidated response; Annex 608, [REDACTED]; Annex 619, [REDACTED]; Annex 650, [REDACTED].

- (b) [REDACTED]⁴²¹ [REDACTED] offers which online competitors have with affiliate websites such as [REDACTED].⁴²² JD Sports and Size? are monitored across all of these documents, whilst [REDACTED], feature in a smaller number of the documents.⁴²³
- (c) [REDACTED]⁴²⁴ [REDACTED].⁴²⁵ Of the documents which monitor competitors, JD Sports appears across most of the documents as well as certain documents which also mention Size? and Tessuti. Many of these documents also feature competitors including [REDACTED].⁴²⁶ [REDACTED].⁴²⁷
- (d) In other documents, JD Sports appears to often be given greater prominence than other competitors. There are either significantly more pages devoted to analysing JD Sports' offering than are devoted to any (or almost any) other competitor and/or JD Sports appears as one of only a very small number of competitors that are mentioned and/or the presentation is dedicated exclusively to JD Sports. For example:
- (i) [REDACTED].⁴²⁸
 - (ii) [REDACTED].⁴²⁹
 - (iii) [REDACTED].⁴³⁰
 - (iv) [REDACTED].⁴³¹
 - (v) [REDACTED].⁴³²

327. Based on the above evidence, in the round, the CMA believes that the Parties monitor each other closely but do not support the existence of a wide range of similarly significant competitors.

⁴²¹ Annexes 692 to 707 of Footasylum's section 109 consolidated response.

⁴²² FMN, 15.107(k).

⁴²³ See for example Annexes of Footasylum's section 109 consolidated response; Annex 696, [REDACTED]; Annex 698, 20180913 [REDACTED]; Annex 699, [REDACTED]; Annex 703 [REDACTED].

⁴²⁴ Annexes 713 to 731 of Footasylum's section 109 consolidated response.

⁴²⁵ FMN, 15.107(l).

⁴²⁶ See for example Annex 715 of Footasylum's section 109 consolidated response, [REDACTED]; Annex 718, [REDACTED].

⁴²⁷ Annex 714 of Footasylum's section 109 consolidated response, [REDACTED].

⁴²⁸ Annex 549 of Footasylum's section 109 consolidated response, [REDACTED].

⁴²⁹ Annex 253 of Footasylum's section 109 consolidated response, [REDACTED].

⁴³⁰ Annex 779 of Footasylum's section 109 consolidated response, [REDACTED].

⁴³¹ Annex 777 of Footasylum's section 109 consolidated response, [REDACTED].

⁴³² Annex 879 of Footasylum's section 109 consolidated response, [REDACTED].

- *Third party comments*

328. As mentioned in paragraphs 159 and 160 above, overall third parties contacted by the CMA during its merger investigation indicated that the Parties compete closely against each other in apparel. Relative to other retailers, most third parties scored each of the Parties as the ‘top’ competitor to the other party.

- *Footasylum’s financial position*

329. As noted in the Counterfactual section above, the Parties submitted that Footasylum’s poor financial performance [redacted].⁴³³ The Parties also submitted that Footasylum had issued three profit warnings for the last financial year and has had [redacted].⁴³⁴

330. However, as mentioned in paragraph 40 above, the results of the CMA’s review of the Parties’ evidence and internal documents suggest that, contrary to the Parties’ submissions, Footasylum’s financial performance would not have reduced its ability to compete.

331. The CMA therefore believes that the available evidence, in relation to Footasylum’s financial circumstances, both current and future, does not support the position that Footasylum would cease to be a significant competitive constraint on JD Sports.

Conclusion on closeness of competition for the retail supply of sports-inspired casual apparel (online)

332. The CMA therefore believes that the Parties compete closely with each other in the retail supply of casual apparel online due to (i) similarity of product offering and customer target; (ii) the Parties’ internal documents, which closely track and monitor each other; and (iii) third party views indicating that the Parties are close competitors. The CMA also does not believe that Footasylum’s financial circumstances have prevented, or are likely to prevent, the Parties from competing closely in the future.

Competitive constraints: alternative retailers

333. The Parties submitted that they face a diverse range of competitors in the online supply of sports-inspired casual fashion apparel.⁴³⁵

⁴³³ See from paras. 11.6 of the FMN.

⁴³⁴ FMN, paras. 11.6 to 11.15.

⁴³⁵ FMN, para. 7.21.

334. In determining which of these suppliers pose effective competitive constraints on the Parties in the online sports-inspired casual apparel frame of reference, much of the evidence considered by the CMA is similar to that outlined above in relation to the in-store frame of reference. That evidence is not considered in full again but should be considered in conjunction with the additional information and evidence set out below that is specific to the apparel online frame of reference. Where third-party retailers have online and in-store operations (as the majority of retailers considered below do), these operations are considered together (with the in-store operations being considered an out-of-market constraint for the purposes of this section).

- *Foot Locker*

335. Foot Locker's online business size (measured by its online revenue) is relatively smaller than its in-store business. Foot Locker has a very small presence in the online apparel market, where it has [0-5]% share of supply and where its competitive constraint is likely to be weak.⁴³⁶ Nonetheless, an internal document from JD Sports focuses on Foot Locker's [redacted].⁴³⁷

336. For the same reasons set out above with respect to the in-store frame of reference, overall, the CMA believes that the available evidence indicates that Foot Locker competes with the Parties in the retail supply of sport-inspired casual fashion apparel online. However, according to the available evidence, the CMA believes that Foot Locker's competitive constraint in the online frame of reference may be more limited than in in-store, given Foot Locker's limited presence in the retail supply of sports-inspired casual apparel online.

- *ASOS, Shop Direct and Zalando*

337. Although the CMA does not consider that share of supply is indicative of closeness of competition, it may be relevant to understanding the significance of certain competitors in the online market as compared to the in-store market. The CMA estimates ASOS to have [20-30]% share of supply in the retail supply online of sports-inspired casual apparel, Shop Direct has [5-10]% and Zalando [0-5]%.⁴³⁸ Based on the available evidence, the CMA believes that the constraint posed by these competitors is likely to be stronger in the online markets than in the in-store markets due to these online/pure players' focus on customers' online experience and offering.

⁴³⁶ See Table 7 above. However, for the reasons mentioned in para. 117 above, the CMA places limited weight in these shares of supply.

⁴³⁷ Annex 115 to the FMN, [redacted].

⁴³⁸ See Table 7 above. However, for the reasons mentioned in para. 117 above, the CMA places limited weight in these shares of supply.

338. As mentioned in paragraph 202, the Parties' internal documents suggest that the Parties view ASOS as a significant competitor in online sales, while viewing Shop Direct and Zalando as weak players posing only a limited constraint.

339. ASOS told the CMA that [redacted].

340. Overall, the CMA believes that the evidence indicates that ASOS, Shop Direct and Zalando constrain the Parties to some extent. With respect to ASOS, the CMA recognises that it exerts a degree of competitive constraint on the Parties, and that this constraint is greater in the online market than the in-store market, on the basis that the Parties monitor this retailer regularly in their internal documents. The strength of the constraint from Shop Direct and Zalando, although greater than in the in-store market, is substantially limited in the online market given their limited scale in the UK, the feedback received from third parties and its limited appearance in the Parties' internal documents.

- *Sports Direct*

341. The CMA estimates that Sports Direct has the largest share of supply in the online market for sports-inspired casual apparel [30-40]%.⁴³⁹ For the same reasons as set out above with respect to the in-store frame of reference, however, the CMA believes Sports Direct to pose a substantially weaker constraint on the parties than Foot Locker, ASOS or the other Party, due to its differentiated product offering, its broader and less-targeted consumer focus and lack of access to SMUs/exclusive products and/or high-end/premium products.

- *Nike and adidas*

342. Nike has [0-5]% share of supply in the online apparel frame of reference. For adidas, it is [0-5]%.⁴⁴⁰

343. Third-party industry reports submitted by the Parties as well as the CMA's market testing showed that the majority of DTC sales by Nike and adidas are from their online stores. The evidence gathered from the CMA shows that online DTC sales are likely to increase faster than in-store DTC sales in the

⁴³⁹ See Table 7 above. However, for the reasons mentioned in para.117 above, the CMA places limited weight in these shares of supply.

⁴⁴⁰ See Table 7 above. However, for the reasons mentioned in para.117 above, the CMA places limited weight in these shares of supply.

future.⁴⁴¹ Internal documents also suggest that Nike and adidas' online activities are monitored closely by the Parties.⁴⁴² For these reasons, the CMA believes Nike and adidas DTC sales are a stronger constraint online than in-store.

344. However, for the reasons explained in paragraphs 191 to 193 above, the CMA believes that the constraint imposed is relatively limited due to a combination of factors including their different offering, as they are not able to offer a multi-branded product range as the Parties do. The CMA also notes that Nike and adidas are predominantly wholesale operators, and this may also dilute these suppliers' incentives to compete strongly with the merged entity post-Merger.

- *TopShop/Topman*

345. As mentioned above in paragraph 195, internal documents show that TopShop/Topman online activities are monitored by both Parties, although more regularly by Footasylum. The CMA found only limited monitoring of [REDACTED] in JD Sports' internal documents. For example, [REDACTED].⁴⁴³

346. For the same reasons set out above with respect to the in-store frame of reference, overall, the CMA believes that TopShop/Topman provides a limited competitive constraint on the Parties in the online apparel market, and more limited than the constraint imposed by other retailers such as Foot Locker, ASOS, Nike or adidas.

- *Other retailers*

347. For the same reasons outlined at paragraph 210 of the in-store horizontal unilateral effects section above, the CMA does not consider that the long tail of other competitors submitted by the Parties impose a strong constraint on the Parties post-Merger in the retail supply of sports-inspired casual apparel online (either individually or in aggregate). As mentioned above, this is consistent with the evidence the CMA has received, including internal documents and the CMA market testing.

348. The Parties submitted at the Issues Meeting that Amazon imposes a strong competitive constraint on the Parties. However, as explained in paragraph 210(b) based on the available evidence, the CMA believes that Amazon's

⁴⁴¹ [REDACTED]

⁴⁴² For example, [REDACTED] (Annex 253 of Footasylum's consolidated section 109 response) and [REDACTED] (eg Annex 514 of Footasylum's consolidated section 109 response); JD Sports monitors, for example, Nike and adidas' offers on their marketplaces (Annex 71 to the FMN) and adidas through some of its sales channel, including DTC (Annex 83 to the FMN).

⁴⁴³ Annex 260 of Merger Notice.

competitive constraint is substantially limited, given the feedback received from third parties and their very rare appearance in the Parties' internal documents. Amazon was mentioned as a competitor to the Parties by only three third parties. However, on average, they tended to score Amazon as competing moderately with the Parties.⁴⁴⁴ Moreover, in a recent interview with the BBC, when asked about what protects JD Sports from large online players such as Amazon, JD Sports' CEO, Peter Cowgill, said that JD Sports offers a 'consumer experience first of all in-store and I think [JD Sports] select our ranges very carefully and very appropriately, so we have the best and edgiest offers to the consumer' (emphasis added).⁴⁴⁵

Conclusion on alternative retailers

349. Based on the evidence above, the CMA believes that there are certain retailers that may pose a degree of competitive constraint on the Parties in the retail supply of sports-inspired casual apparel online. These retailers are, for the reasons outlined in this section: Foot Locker, ASOS, Shop Direct, Zalando, Sports Direct, Nike, adidas and TopShop/Topman (primarily, for Footasylum and JD Sports to a significantly lesser extent).
350. However, the markets affected by this Merger are characterised by highly differentiated retailers and accordingly, the CMA believes that the competitive constraint posed by each of these retailers varies to a significant degree and has taken this into account in its competitive assessment.
351. In addition, the CMA believes that it does not have sufficient evidence to consider that other retailers identified by the Parties provide a significant competitive constraint on the Parties.

Conclusion on horizontal unilateral effects in the retail supply of sports-inspired casual apparel (online)

352. As set out above at paragraph 314, the merged entity will hold a strong position in the retail supply of sports-inspired casual apparel (online) in the UK.
353. Based on the evidence described above, the CMA believes that the Parties compete closely with each other in the retail supply of sports-inspired casual

⁴⁴⁴ Of these three retailers, for apparel, one third party rated Amazon's closeness to JD Sports and Footasylum as 5 and 1, respectively, a second third party gave scores of 8 and 9, respectively, whilst another rated the closeness to both as 6. (Third parties scores are based on those responses that mention Amazon as a competitor).

⁴⁴⁵ "Today" programme – 10 September 2019, BBC Radio 4; interview with Peter Cowgill commencing at 1:24:41.

apparel online. The CMA believes that the Merger will lead to the removal of one of JD Sports' closest competitors.

354. The CMA does not believe that the remaining fringe of suppliers would be sufficient to effectively constrain the Parties post-Merger. In particular:
- (a) While Foot Locker generally competes closely with the Parties, the CMA believes that Foot Locker's constraint may be weaker in apparel than in footwear, given [redacted], and also weaker online than in-store, given its more limited online presence;
 - (b) The constraint offered by online players – such as ASOS, Zalando, Shop Direct – is liable to be more significant within the online frame of reference, but the available evidence only suggests that only ASOS of these players offers any kind of meaningful constraint to the Parties;
 - (c) While Sports Direct has a large presence and significant geographic overlap with the Parties, it offers only a weak constraint because of its differentiated product offering, [redacted], and its lack of access to SMUs/exclusive and/or high-end/ premium products;
 - (d) While Nike and adidas' DTC sales have grown in recent years, and they seem to be stronger in online than in-store, they ultimately offer only a relatively limited constraint because of the differences in their offering (as they are not able to offer a multi-branded product range). The CMA also considers that Nike and adidas are predominantly wholesale operators, which may dilute their incentive to compete strongly with the Parties post-Merger;
 - (e) TopShop/Topman is also a relatively limited constraint, in particular because of material differences in its offering;
 - (f) There is little evidence to support the position that any meaningful constraint is offered by the very long list of other retailers that the Parties suggested they compete against.
355. In the round, the CMA believes that ASOS, and to a more limited extent, Foot Locker, are the only close competitors to the Parties in the retail supply of sports-inspired casual apparel (online). The CMA does not believe that the fringe of other weaker (most of them significantly weaker) constraints would, in addition to ASOS or Foot Locker, be sufficient to constrain the Parties post-Merger.
356. Accordingly, the CMA found that the Merger raises significant competition concerns within a market or markets in the UK as a result of horizontal

unilateral effects in relation to the retail supply of sports-inspired casual apparel online at the national level.

ToH 4: The retail supply of sports-inspired casual footwear (online)

Shares of supply

357. The Parties submitted shares of supply based on their proposed frame of reference (ie, the retail supply of casual footwear included both online and in-store). However, for the reasons mentioned in paragraph 115 above, the Parties' estimated shares of supply for the wider casual fashion footwear market are not consistent with the frame of reference that the CMA has considered in this case⁴⁴⁶ and, as a result, overstate the competition the Parties face in the relevant frame of reference.
358. To estimate shares of supply for the online footwear frame of reference, the CMA has followed the same approach explained in paragraph 116 above. The CMA's estimates of the size of the market and shares of supply, based on feedback from third parties and the Parties, are set out further at Table 8 below. Accordingly, the CMA has placed limited weight on shares of supply in this frame of reference for the reasons set out above at paragraph 117.

Table 8: Shares of supply for the retail supply of sports-inspired casual footwear in calendar year 2018 (online sales)

Retailer	Sport-inspired casual footwear
JD Sports	[10-20]%
Footasylum	[0-5]%
Combined	[10-20]%
Amazon	n/a
ASOS	[10-20]%
Clarks	[0-5]%
Debenhams	[0-5]%
Decathlon	[0-5]%
Deichmann	[0-5]%
DW Sports	[0-5]%
Foot Locker	[0-5]%
Intersport	n/a
John Lewis	[0-5]%
MandM Direct	[0-5]%
Schuh	[5-10]%
Sole Trader	[0-5]%
Sports Direct	[10-20]% ¹

⁴⁴⁶ FMN, para. 14.1 onwards and Tables 1 and 2.

Retailer	Sport-inspired casual footwear
Zalando	[0-5]%
Shop Direct	[5-10]%
Office	n/a
<i>adidas</i>	[5-10]%
<i>New Balance</i>	[0-5]%
<i>Nike</i>	[10-20]%
<i>Converse</i>	[0-5]%
<i>Fila</i>	[0-5]%
<i>The North Face</i>	[0-5]%
<i>Vans</i>	[0-5]%
<i>Asics</i>	[0-5]%
<i>Under Armour</i>	[0-5]%
Total	100%

Note: Amazon and Office did not provide revenue data. Intersport provided only total revenue without distinguishing between apparel and footwear. Brands' DTC sales in italic. There is no data for Primark as they do not have an online offering.

Source: CMA analysis of Parties' and third parties' data

359. The Parties submitted that the CMA's analysis does not accurately capture the market for the reasons described at paragraph 118 above.⁴⁴⁷ The Parties further submitted that the combined shares of supply are in any case below the level that typically raises *prima facie* competition concerns (c.40%), that their shares would be lower or close to those of Sports Direct and ASOS and that the increment from the Merger is small.⁴⁴⁸ The Parties also noted that there are a wide range of other competitors with a market share of [0-5]% that, whilst small individually, cumulatively amount to a significant competitive constraint.⁴⁴⁹
360. With respect to the Parties' argument that the data does not properly take account of brands' DTC sales, for the reasons mentioned in paragraph 119 above, the CMA believes that (absent evidence to the contrary) the information included in the table above is liable to be more reliable than any other estimates the Parties may have access to.
361. With respect to the Parties' argument that the shares are below the level that typically raises *prima facie* competition concerns, the CMA rejects these arguments for the reasons explained in paragraph 120 above (namely, that the Parties' position is of limited relevance in the context of differentiated markets in which shares of supply are but one limited indicator of a potential competitive constraint).

⁴⁴⁷ Parties' response to the IL, para. 6.1.

⁴⁴⁸ Parties' response to the IL, para. 6.2.

⁴⁴⁹ Parties' response to the IL, para. 6.2 (c).

362. Table 8 above shows that, even if the CMA were to take a very broad view of the relevant competitors in this frame of reference:

- (a) Post-Merger, JD Sports' relatively strong existing position – as the only players other than Sports Direct, ASOS and Nike with a share of [10-20]% - will be further strengthened by the addition of Footasylum. The merged entity would be the largest retailer in the retail supply of sports-inspired casual footwear online, with a combined share of supply of [10-20]%.
- (b) Sports Direct, with [10-20]%, and ASOS, with [10-20]%, would be the only retailers with comparable shares of supply to the merged entity, followed by Nike with [10-20]%. All other retailers would have a [0-5]% or [5-10%] share of supply and lag the merged entity to a significant extent.
- (c) The Parties mentioned that there is a long tail of retailers with shares of supply below [0-5]% and combined they could add a competitive constraint. However, for the reasons mentioned in the sections below, the CMA does not believe they impose a significant competitive constraint on the Parties.

363. In addition to the shares of supply, the CMA has considered a range of other evidence to assess closeness of competition between the Parties and the constraint imposed on the Parties by their rivals.

Closeness of competition

364. The CMA examined the closeness of competition between the Parties on the basis of the following:

- (a) comparisons in the Parties' respective propositions;
- (b) evidence from internal documents;
- (c) third party views on closeness of competition; and
- (d) Footasylum's financial position.

- *The Parties' propositions*

365. The Parties submitted that they are not particularly close competitors in relation to the retail supply of sports-inspired casual footwear online since their offerings are differentiated for the same reasons as in relation to the in-store frames of reference.

366. The CMA believes that, according to the available evidence, there are significant overlaps between the Parties' customer propositions and between

the Parties' customer target for the retail supply of sports-inspired casual footwear (online), for the same reasons explained in paragraphs 127 to 139 above.

- *Internal documents*

367. As mentioned in paragraphs 143 to 148 above, the Parties provided a significant number of internal documents to the CMA, submitting that these showed that they were not uniquely close competitors.⁴⁵⁰ The Parties' internal documents do not consider apparel and footwear on a separate basis, and in some cases, in-store and online; the CMA has therefore not carried out a separate assessment of the Parties' internal documents for footwear specifically on the basis that the assessment made in paragraphs 152 to 158 above also apply equally to online footwear.

368. The CMA believes that the internal documents submitted by the Parties (as described above) generally suggest that they each view the other Party as a close competitor in relation to the in-store and online frames of reference, essentially for the same reasons for each channel.⁴⁵¹ Some of the available evidence that is specific to the online channel also supports the position that the Parties are close competitors. For example:

(a) With respect to Footasylum's internal documents, [REDACTED].⁴⁵² [REDACTED],⁴⁵³ [REDACTED].⁴⁵⁴

369. Based on the above evidence and the evidence considered for the retail of sports-inspired casual apparel online, in the round, the CMA believes that the Parties monitor each other closely but do not support the existence of a wide range of similarly significant competitors.

- *Third party comments*

370. As mentioned in paragraph 253 above, overall third parties contacted by the CMA during its merger investigation indicated that the Parties compete closely against each other in footwear. Relative to other retailers, most third parties scored each of the Parties as the 'top' competitor to the other party.

⁴⁵⁰ Headline over para. 7.12 of FMN; para. 148 above.

⁴⁵¹ See paras. 143 to 151 above.

⁴⁵² Annex 764 of Footasylum's section 109 consolidated response, [REDACTED].

⁴⁵³ Annex 714 of Footasylum's section 109 consolidated response, [REDACTED].

⁴⁵⁴ Annex 763 of Footasylum's section 109 consolidated response, [REDACTED].

- *Footasylum's financial position*

371. As noted in the Counterfactual section above, the Parties made various submissions regarding Footasylum's financial performance and its impact on Footasylum's ability to compete.⁴⁵⁵
372. However, as mentioned in paragraph 40 above, the results of the CMA's review of the Parties' evidence and internal documents suggest that, contrary to the Parties' submissions, Footasylum's financial performance would not have reduced its ability to compete.
373. The CMA therefore believes that the available evidence, in relation to Footasylum's financial circumstances, both current and future, does not support the position that Footasylum would cease to be a significant competitive constraint on JD Sports.

Conclusion on closeness of competition for the retail supply of sports-inspired casual footwear (online)

374. The CMA therefore believes that the Parties compete closely with each other in the retail supply of casual footwear online due to (i) similarity of product offering and customer target; (ii) the Parties' internal documents, which closely track and monitor each other; and (iii) third party views indicating that the Parties are close competitors. The CMA also does not believe that Footasylum's financial circumstances have prevented, or are likely to prevent, the Parties from competing closely in the future.

Competitive constraints: alternative retailers

375. The Parties submitted that they face a diverse range of competitors in the online supply of sports-inspired casual footwear.⁴⁵⁶
376. In determining which of these third retailers pose effective competitive constraints on the Parties in the online sports-inspired casual footwear frame of reference, much of the evidence considered by the CMA is similar to that outlined above with respect to the in-store frame of reference. That evidence is not considered in full again but should be considered in conjunction with the additional information and evidence set out below that is specific to the footwear online frame of reference. Where third-party retailers have online and in-store operations (as the majority of retailers considered below do),

⁴⁵⁵ See from para. 11.6 of the FMN.

⁴⁵⁶ FMN para. 7.21(b)

these operations are considered together (with the in-store operations being considered an out-of-market constraint for the purposes of this section).

- *Foot Locker*

377. Foot Locker's online business size (measured by its online revenue) is relatively smaller than its in-store business. Foot Locker has a small presence in the online footwear frame of reference where it has [0-5]% share of supply and where its competitive constraint is likely to be weak.⁴⁵⁷ Nonetheless, an internal document from JD Sports focuses on Foot Locker's [X].⁴⁵⁸

378. For the same reasons set out above with respect to the in-store frame of reference, overall, the CMA believes that the available evidence indicates that Foot Locker competes closely with the Parties in the retail supply of sport-inspired casual footwear online. However, according to the available evidence, the CMA believes that Foot Locker's competitive constraint in the online frame of reference may be more limited than in in-store, given Foot Locker's more limited presence in the retail supply of sports-inspired casual footwear online.

- *ASOS, Shop Direct and Zalando*

379. Although the CMA does not consider that shares of supply are, within the context of the relevant markets in this case, indicative of closeness of competition, they may nevertheless be indicative of the significance of certain competitors in the online market as compared to the in-store market. The CMA estimates ASOS has [10-20]% share of supply in the retail supply online of sports-inspired casual footwear, Shop Direct has [5-10]% and Zalando [0-5]%.⁴⁵⁹ Based on the available evidence, the CMA believes that the constraint posed by these competitors is likely to be stronger in the online markets than in the in-store markets due to these online/pure players' focus on customers' online experience and offering.

380. As mentioned in paragraph 202, the Parties' internal documents suggest that the Parties view ASOS as a significant competitor in online sales, while viewing Shop Direct and Zalando as weak players posing limited constraint.

381. Overall, the CMA believes that the evidence indicates that ASOS, Shop Direct and Zalando constrain the Parties to some extent. With respect to ASOS, the

⁴⁵⁷ See Table 8 above. However, for the reasons mentioned in para.117 above, the CMA places limited weight in these shares of supply.

⁴⁵⁸ Annex 115 to the FMN, [X].

⁴⁵⁹ See Table 8 above. However, for the reasons mentioned in para.117 above, the CMA places limited weight in these shares of supply.

CMA recognises that it exerts a degree of competitive constraint on the Parties, and that this constraint is greater in the online market than the in-store market, on the basis that the Parties monitor this retailer regularly in their internal documents. The strength of the constraint from Shop Direct and Zalando, although greater than in the in-store market, is substantially limited in the online market given their limited scale in the UK, the feedback received from third parties and its limited appearance in the Parties' internal documents.

- *Sports Direct*

382. The CMA estimates that Sports Direct has one of the largest shares of supply in the online market for sports-inspired casual footwear [10-20]%.⁴⁶⁰ For the same reasons set out above with respect to the in-store frame of reference, however, the CMA believes Sports Direct to pose a substantially weaker constraint on the parties than Foot Locker, ASOS or the other Party, due to its differentiated product offering, its broader and less-targeted consumer focus and lack of access to SMUs/exclusive products and/or high-end/premium products.

- *Nike and adidas*

383. Nike and adidas have [10-20]% and [5-10]% share of supply respectively in the online frame of reference for sports-inspired casual footwear.

384. For the reasons mentioned in paragraph 343 above, the CMA believes Nike and adidas DTC sales are a stronger constraint online than in-store. However, the CMA believes that the constraint imposed is relatively limited due to a combination of factors including their different offering, as they are not able to offer a multi-branded product range as the Parties do. The CMA also notes that Nike and adidas are predominantly wholesale operators, and this may also dilute these suppliers' incentives to compete strongly with the merged entity post-Merger.

- *Office and Schuh*

385. Schuh has [5-10]% share of supply in the online footwear market.⁴⁶¹

⁴⁶⁰ See Table 8 above. However, for the reasons mentioned in para.117 above, the CMA places limited weight in these shares of supply.

⁴⁶¹ See Table 8 above. However, for the reasons mentioned in para.117 above, the CMA places limited weight in these shares of supply. As mentioned in Table 8, Office did not provide any information on their revenues, and consequently it has not been possible to calculate its market share.

386. Internal documents show that both Office and Schuh's online activities are monitored by the Parties. For example, [REDACTED].⁴⁶²
387. For the same reasons set out above with respect to the in-store frame of reference, overall, the CMA considers that both Office and Schuh provide a competitive constraint on the Parties in the footwear market, although more limited than the constraint imposed by other retailers such as Foot Locker, ASOS, Nike or adidas.
- *Other retailers*
388. For the same reasons outlined at paragraphs 293 to 295 of the in-store horizontal unilateral effects section above, the CMA does not consider that the long tail of other competitors submitted by the Parties impose a strong constraint on the Parties post-Merger in the retail supply of sports-inspired casual footwear online (either individually or in aggregate). This is consistent with the evidence the CMA has received, including internal documents and the CMA market testing.
389. The Parties submitted at the Issues Meeting that Amazon imposes a strong competitive constraint on the Parties. However, as explained in paragraph 210(b) above, based on the available evidence, the CMA believes that Amazon's competitive constraint is substantially limited. Although the feedback received from three third parties suggests that Amazon may impose a constraint on the Parties,⁴⁶³ Amazon rarely appears in the Parties' internal documents. A third-party industry report highlights Amazon's recent launch of its own private label activewear but remarked that its range and price point makes it likely to compete against "the grocers, H&M, ASOS and Primark."⁴⁶⁴ Another third-party industry report states that "Amazon does not have direct relationships with the major sports brands in the UK."⁴⁶⁵ Moreover, as stated above, in a recent interview with the BBC, when asked about what protects JD Sports from large online players such as Amazon, JD Sports' CEO, Peter Cowgill, said that JD Sports offers a 'consumer experience first of all in-store and I think [JD Sports] select our ranges very

⁴⁶² Annex 514 of Footasylum's section 109 consolidated response, [REDACTED] and Annex 83 to the FMN, [REDACTED].

⁴⁶³ With respect to footwear, Amazon was mentioned as a competitor to the Parties by only three third parties. Of these three, for footwear, one third party rated Amazon's closeness to JD Sports and Footasylum as 5 and 4, respectively, a second third party gave scores of 8 and 9, respectively, whilst another rated the closeness to both as 8.

⁴⁶⁴ Annex 355 to the FMN, The UK Sportswear Market 2018-2023 [GlobalData], page 6

⁴⁶⁵ Annex 347 to the FMN, Berenberg Sports Retail, page 25.

carefully and very appropriately, so we have the best and edgiest offers to the consumer' (emphasis added).⁴⁶⁶

Conclusion on alternative retailers

390. Based on the evidence above, the CMA believes that there are certain retailers that may pose a degree of competitive constraint on the Parties in the retail supply of sports-inspired casual footwear online. These retailers are, for the reasons outlined in this section: Foot Locker, ASOS, Shop Direct, Zalando, Sports Direct, Nike, adidas, Office and Schuh.
391. However, the markets affected by this Merger are characterised by highly differentiated retailers and accordingly, the CMA believes that the competitive constraint posed by each of these retailers varies to a significant degree and has taken this into account in its competitive assessment.
392. In addition, the CMA believes that it does not have sufficient evidence to consider that other retailers identified by the Parties provide a significant competitive constraint on the Parties.

Conclusion on horizontal unilateral effects in the retail supply of sports-inspired casual footwear (online)

393. As set out above at paragraph 362, JD Sports' strong existing position will be further strengthened by the addition of Footasylum. The merged entity would be the largest retailer in the retail supply of sports-inspired casual footwear (online) in the UK.
394. Based on the evidence described above, the CMA believes that the Parties compete closely with each other in the retail supply of sports-inspired casual footwear online. The CMA therefore believes that the Merger will lead to the removal of one of JD Sports' closest competitors.
395. The CMA does not believe that the remaining fringe of suppliers would be sufficient to effectively constrain the Parties post-Merger. In particular:
- (a) Foot Locker competes closely with the Parties as it has a similar product offering, but may be a less significant constraint online because of its more limited online presence;
 - (b) The constraint offered by online players – such as ASOS, Zalando, Shop Direct – is liable to be more significant within the online frame of reference,

⁴⁶⁶ "Today" programme – 10 September 2019, BBC Radio 4; interview with Peter Cowgill commencing at 1:24:41.

but the available evidence suggests that only ASOS of these players offers any kind of meaningful constraint to the Parties;

- (c) While Sports Direct has a large presence and significant geographic overlap with the Parties, it offers only a weak constraint because of its differentiated product offering, [X], and its lack of access to SMUs/exclusive and/or high-end/ premium products;
- (d) While the DTC sales of Nike and adidas have grown in recent years, and they seem to be stronger in online than in-store (in particular in footwear), they ultimately offer only a relatively limited constraint because of the differences in their offering (as they are not able to offer a multi-branded product range). The CMA also considers that Nike and adidas are predominantly wholesale operators, which may dilute their incentive to compete strongly with the Parties post-Merger;
- (e) Office and Schuh also pose only a limited constraint, in particular because of material differences in their offerings;
- (f) There is little evidence to support the position that any meaningful constraint is offered by the very long list of other retailers that the Parties suggested they compete against.

396. In the round, the CMA believes that ASOS, and to a more limited extent, Foot Locker, are the only close competitors to the Parties in the retail supply of sports-inspired casual footwear (online). The CMA does not believe that the fringe of other (most of them significantly weaker) constraints would, in addition to ASOS or Foot Locker, be sufficient to constrain the Parties post-Merger.

397. Accordingly, the CMA found that the Merger raises significant competition concerns within a market or markets in the UK as a result of horizontal unilateral effects in relation to the retail supply of sports-inspired casual footwear online at the national level.

Conclusion on horizontal unilateral effects

398. For the reasons set out above, the CMA believes that the Merger raises significant competition concerns.

399. In the round, the CMA believes that the Merger will lead to the removal of one of JD Sports' closest competitors in each of the frames of reference considered. The CMA does not believe that the remaining fringe of suppliers would be sufficient to effectively constrain the Parties post-Merger within any of these frames of reference.

400. As noted above, although the CMA believes that competition between retailers in the in-store frames of reference affected by this Merger has a local element and believes that the geographic frame of reference is primarily local, the CMA's competitive assessment also takes into account the fact that the Parties are national, large-scale operators, with nationally-recognised brands with integrated and centralised operations. Important elements of the Parties' competitive offering are set centrally and applied uniformly across all stores on a national basis. Therefore, in the competitive assessment, the CMA has assessed the effects of the Merger (and any reduction in competition) on the Parties' conduct at a national level, and thereby in every local area where either Party operates a store.
401. The CMA believes that the loss of competition between the Parties as a result of the Merger would give rise to an incentive to degrade important elements of the Parties' competitive offering, including aspects of price, quality, range and service, across all of the Parties' stores, resulting in the realistic prospect of an SLC, in each of the retail supply of sports-inspired casual apparel in-store and the retail supply of sports-inspired casual footwear in-store, in each local area where one or more of the Parties' stores is present.
402. The CMA also believes that the loss of competition between the Parties' online offerings would result in the realistic prospect of an SLC in each of the retail supply of sports-inspired casual apparel online and the retail supply of sports-inspired casual footwear in online on a national basis.
403. The CMA therefore believes that the Merger raises significant competition concerns within a market or markets in the UK as a result of horizontal unilateral effects in relation to:
- (a) The retail supply of sports-inspired casual apparel in-store on a national basis (and, thereby, in every local area where either Party operates a store);
 - (b) The retail supply of sports-inspired casual footwear in-store on a national basis (and, thereby, in every local area where either Party operates a store);
 - (c) The retail supply of sports-inspired casual apparel online at a national level; and
 - (d) The retail supply of sports-inspired casual footwear online at a national level.

Barriers to entry and expansion

404. Entry, or expansion of existing firms, can mitigate the initial effect of a merger on competition, and in some cases may mean that there is no SLC. In assessing whether entry or expansion might prevent an SLC, the CMA

considers whether such entry or expansion would be timely, likely and sufficient.⁴⁶⁷

Parties' submissions

405. The Parties submitted that there are low barriers to entry and expansion as (i) branded suppliers can easily sponsor expansion – they determine the routes to market for their products and how the products should be marketed; (ii) the brands are increasingly determining their own routes to market by increasing DTC sales/presence; and (iii) there is no shortage of retail space on high streets and in shopping malls across the UK.⁴⁶⁸
406. In particular, the Parties submitted that Deichmann (including Snipes) is currently expanding into the UK and it has recently been announced that Flannels (owned by Sports Direct) intends to open 60 new stores across the UK in the next three years. The Parties also submitted that Foot Locker is pursuing a strategy of expansion including in the UK and has opened large stores in key areas such as Liverpool and London in the past couple of years.⁴⁶⁹
407. Finally, the Parties submitted that the online channel has very low barriers to entry, and marketplaces such as Amazon and ebay, as well as Farfetch and ASOS, allow small independent retailers (either online only or multi-channel) to easily gain an online presence and the web infrastructure required to operate an online retail business and generate online sales in the relevant markets.⁴⁷⁰

Third party views

408. The evidence received by the CMA from third parties does not indicate that entry or expansion will be timely, likely or sufficient to mitigate any SLC arising.
409. Some third parties have confirmed that they plan to open some stores within the next two years. However, some of them ([REDACTED], [REDACTED] and [REDACTED]) have closed more stores than they have opened in the last two years.
410. With respect to the Parties' arguments on potential expansion by different retailers in these markets:

⁴⁶⁷ [Merger Assessment Guidelines](#), from para. 5.8.1.

⁴⁶⁸ FMN, para. 18.3.

⁴⁶⁹ FMN, para. 11.1 and 11.2 and section 21.

⁴⁷⁰ FMN, para. 11.3 and section 21.

- (a) [REDACTED] has confirmed that [REDACTED].
- (b) [REDACTED] has confirmed that their future strategy will consist of a combination of both online and in-store. However, they have confirmed they plan to open only [REDACTED] stores in the next two years.
- (c) [REDACTED] has confirmed that they plan to open [REDACTED] stores in the next two years.

CMA's assessment

411. According to the available evidence, the CMA does not believe that entry or expansion in these markets will be timely, likely or sufficient to mitigate any SLC arising. In this regard, the CMA notes the following:
- (a) The importance of Nike/adidas DTC channels may be overstated. As noted in paragraph 52 and in the section on the competitive constraint posed by these brands in paragraphs 183 to 191 above, the available evidence shows that although branded suppliers have increased the proportion of their sales made through DTC channels in the period between 2013 and 2018, such sales remain only a limited part of the market.⁴⁷¹
 - (b) With respect to the Parties' arguments regarding Sports Direct, the CMA notes that Sports Direct recent annual results show that Sports Direct is facing some challenges, and notes that their elevated stores and Flannels fasciae continue to significantly outperform much of the rest of the high street.⁴⁷²
412. In addition, while the CMA accepts that some retailers are currently expanding in the UK, this expansion has not necessarily led to these retailers having better access to SMUs/exclusive products and/or high-end/premium products from major brands.
413. For the reasons set out above, the CMA believes that entry or expansion would not be sufficient, timely and likely to prevent a realistic prospect of an SLC as a result of the Merger.

Third party views

414. The CMA contacted competitors and suppliers of the Parties. Most competitors raised concerns regarding JD Sports' already dominant position in the sports-inspired fashionwear market. Many competitors were concerned

⁴⁷¹ Annex 347 to the FMN, Berenberg Sports Retail, page 5.

⁴⁷² <https://www.investgate.co.uk/sports-direct-intl---spd-/rns/final-results/201907261719269335G/> (last access on 29 August 2019).

that this would lead to the limiting of product allocation from branded suppliers as JD Sports would have increased buyer power to negotiate increased access to premium or exclusive products from these brands. No other third parties raised concerns about the Merger.

415. Third party comments have been taken into account where appropriate in the competitive assessment above.

Conclusion on substantial lessening of competition

416. Based on the evidence set out above, the CMA believes that it is or may be the case that the Merger has resulted, or may be expected to result, in an SLC as a result of horizontal unilateral effects in relation to:
- (i) the retail supply of sports-inspired casual apparel in-store on a national basis and thereby in each local area where one or more of the Parties' stores is present;
 - (ii) the retail supply of each of sports-inspired casual footwear in-store on a national basis and thereby in each local area where one or more of the Parties' stores is present;
 - (iii) the retail supply of sports-inspired casual apparel online at a national level; and
 - (iv) the retail supply of sports-inspired casual footwear online at a national level.

Decision

417. Consequently, the CMA believes that it is or may be the case that (i) a relevant merger situation has been created; and (ii) the creation of that situation has resulted, or may be expected to result, in an SLC within a market or markets in the United Kingdom.
418. The CMA therefore believes that it is under a duty to refer under section 22(1) of the Act. However, the duty to refer is not exercised whilst the CMA is considering whether to accept undertakings under section 73 of the Act instead of making such a reference.⁴⁷³ JD Sports has until 26 September 2019⁴⁷⁴ to offer an undertaking to the CMA.⁴⁷⁵ The CMA will refer the Merger

⁴⁷³ Section 22(3)(b) of the Act.

⁴⁷⁴ Section 73A(1) of the Act.

⁴⁷⁵ Section 73(2) of the Act.

for a phase 2 investigation⁴⁷⁶ if JD Sports does not offer an undertaking by this date; if JD Sports indicates before this date that it does not wish to offer an undertaking; or if the CMA decides⁴⁷⁷ by 3 October 2019 that there are no reasonable grounds for believing that it might accept the undertaking offered by JD Sports, or a modified version of it

419. The statutory four-month period mentioned in section 24 of the Act in which the CMA must reach a decision on reference in this case expires on 8 October 2019. For the avoidance of doubt, the CMA hereby gives Pentland and JD Sports notice pursuant to section 25(4) of the Act that it is extending the four-month period mentioned in section 24 of the Act. This extension comes into force on the date of receipt of this notice by Pentland and JD Sports and will end with the earliest of the following events: the giving of the undertakings concerned; the expiry of the period of 10 working days beginning with the first day after the receipt by the CMA of a notice from Pentland and JD Sports stating that it does not intend to give the undertakings; or the cancellation by the CMA of the extension.

Colin Raftery
Senior Director, Mergers
Competition and Markets Authority
19 September 2019

END NOTES

ⁱ The CMA notes that the shares of supply for Sports Direct included in this Decision are estimates only and may overstate Sports Direct's shares of supply in the relevant markets identified by the CMA, for the purposes of this merger investigation. This is due to the fact that Sports Direct provided data on the basis of focal markets which differed from (and may have been defined more broadly by Sports Direct than) the relevant markets defined by the CMA.

⁴⁷⁶ Sections 22(1) and 34ZA(2) of the Act.

⁴⁷⁷ Section 73A(2) of the Act.