

Linklaters



FOOTASYLUM 

JD SPORTS / FOOTASYLUM

Initial Phase 2 Submission

SUBMITTED ON BEHALF OF JD SPORTS FASHION PLC

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I. Overview

- (1) As explained in this initial submission (the "**Response**"), the acquisition by JD Sports Fashion plc ("**JD Sports**"¹) of Footasylum Limited ("**Footasylum**" and together, the "**Parties**") (the "**Merger**") has not resulted, and cannot be expected to result, in a substantial lessening of competition ("**SLC**") in the UK.
- (2) The unilateral effects theory of harm advanced in the Issues Statement and Phase 1 Decision (for each of footwear and apparel, in-store and online) is that the Merger may substantially reduce competition on each market (segment) at the UK national level. This is broadly based on two premises: first, that JD Sports is a large and successful UK sport-inspired retailer (which is true, but not probative of the SLC question) and second, that the Merger eliminates one of few national rivals (which is incorrect).
- (3) In essence, the theory of harm fails to fit the facts in each market (segment) on two counts:
 - The theory does not adequately (or at all) explain or account for the key constraints – horizontal and vertical – faced by JD Sports and Footasylum pre-Merger; and
 - The theory also fails to capture why and how the acquisition of Footasylum (a small rival in a weak condition) materially affects these constraints leading to a likelihood of consumer harm.
- (4) In summary, the commercial and competitive reality is that:

(i) Brands set the competitive framework especially in footwear

The characteristics of this sector are unlike other retail sectors, in that JD Sports (and Footasylum) are constrained by the major brand owners (specifically Nike and adidas) on which each is dependent. The major brand owners not only constrain horizontally as JD Sports' fastest-growing direct competitors at the retail level, but also substantially influence (i) the structure of the retail market via their selective distribution models; and (ii) individual retailers' setting of price, quality, range or service ("**PQRS**") within it;

(ii) The markets in question are dynamic; demand is volatile and trend-driven and competition is intense

Given that the global brands stimulate demand in particular through social media and use of influencers via apps and other digital tools aimed at a young audience, footwear and apparel markets are both characterised by dynamic and volatile demand and intense competition (shaped by the brands' selective distribution systems and fast fashion alternatives);

(iii) Given intense market-wide rivalry it makes sense that the Parties' focuses and customer offer are different and that Footasylum by itself is not a material constraint on JD Sports' PQRS

The Parties have a differentiated offer in apparel, and are "vertically differentiated" in footwear (as will be explained below);

Consequently, in light of the aggregate competitive pressures on JD Sports, it is not surprising that Footasylum is not a material constraint on PQRS (or vice versa) even before accounting for the fact that in the counterfactual, Footasylum was a declining force, not only facing serious short-

¹ In the remainder of this submission, references to JD Sports should be understood as referring to the JD Sports brand/fasciae (comprising the 344 JD Sports stores and its multi-channel activities). As the CMA is aware, the JD Sports group also houses a number of other brands/fasciae, including Foot Patrol, Size?, Tessuti, Go Outdoors, Blacks and Millets. These are referenced separately where relevant. The 344 JD Sports brand stores excludes: Republic of Ireland, Northern Ireland, UK Airports, Channel Islands, Isle of Man, and Jersey.

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term issues but also being poorly placed as a standalone operator to benefit from the likely evolution of the market toward the supply of brands to larger European players; and

(iv) The Parties strongly believe the Merger will benefit consumers

Finally, the Merger has a pro-competitive rationale and benefits, and was not motivated by "market power" considerations with respect to either the consumers or brands that JD Sports must continue to serve well if it is to maintain its success. The Parties strongly believe that given the benefits set out in Part E below, that the Merger will be good for consumers.

- (5) These conclusions apply regardless of how the markets for the retail supply of "sports-inspired casual footwear and apparel" are defined and whether online or in-store are segments of the same market, or if, despite significant (and growing) online sales, online is treated as an outside market constraint. This is because on any lens no SLC arises for the reasons given above and elaborated below.

II. The Parties have quite different "sweet spots" in their brand and own-label representation

- (6) From a **top-level view**, the Parties each have a different focus, having pursued a significantly differentiated customer offer, which makes sense in the context of highly competitive retail markets.

(a) **JD Sports' mainstream sports heritage² brand focus.** JD Sports seeks to have broad appeal across male, female and children's categories (with [X]% of purchases made by women); its sweet spot and dominant brand association is as a retailer of iconic global brands with sports heritage. In particular, JD Sports is predominantly a reseller of Nike and adidas (combined, they account for [X]% of total sales). Even in apparel, almost [X]% of sales were Nike/adidas and almost [X]% of sales were of sports-heritage brands with only [X]% own-label or so-called "bedroom brands"³ (in the year to Sep 2019).

(b) **Footasylum's own-label fashion focus on the urban male.** Footasylum, on the other hand, has its sweet spot in own-label and bedroom brands, whose look might broadly be summarised as "urban" or "street" fashion-inspired⁴ with a largely male customer base (in FY2018, menswear (including both apparel and footwear) represented [X] of Footasylum's total revenue)⁵. Approaching [X] of Footasylum's sales are its own-label and bedroom brands and only [X]% of apparel sales were Nike/adidas. Footasylum's total Nike/adidas apparel sales of these brands amounted to [X] in the year to 30 September 2019: [X] by Nike/adidas of sales (whether direct-to-consumer ("DTC") or via other retailers) would [X]

- (7) As apparel and footwear are separate markets, the competitive assessment also differs in each:

(a) Parties' horizontal differentiation in apparel – distinct brand and own-label skew

- Footasylum's retail offer is skewed far more towards own-label or bedroom brands (which may broadly be thought of as "urban" or "streetwear" inspired). For Footasylum, [X]% of apparel sales are non-Nike, non-adidas, of which almost [X] are ("urban" or "street" or, in any event, "fashion"-inspired) own-label brands such as *Kings Will Dream*, *Glorious Gangsta*, *Métissier (Paris)* and *Alessandro Zavetti (Milan)*, or bedroom brands such as

² See glossary in Annex A.

³ A term used to describe emerging fashion brands that start life in their founders' bedrooms (i.e. are founded by individual entrepreneurs).

⁴ Please note that this is not in reference to Footasylum's "urban" tribe, but is instead intended to capture the fashion-focused "streetwear" nature of Footasylum's offering more broadly. Any specific references to Footasylum's "urban" tribe will be clearly identified throughout this submission.

⁵ Footasylum Annual Report and Accounts 2018, provided at Annex 001 of Footasylum's Phase 1 Consolidated Index. Footasylum's revenue figures also take into their wholesale sales.

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Prè (London) or Hoodrich. JD Sports, on the other hand, has a [X]% branded apparel offer (of which over [X]% is Nike and adidas). To the extent there is an overlap between the Parties in sports-heritage branded apparel (i.e. in relation to [X]% of Footasylum apparel sales), Footasylum's 4% national share in a broader "sports-inspired casual apparel" "market" needs to be seen in the light of the fact that [X]% of that translates to a national share of only around +/- [X]% – a small increment not at all consistent with being a particularly close national competitor to JD Sports in this respect.

(b) **Parties' vertical differentiation in sports footwear – product range and non-price offer**

- **All suppliers skew towards Nike and adidas.** Among large global brands, Nike and adidas stand out: in footwear, in their use of social media such as Instagram (with a combined global following of over 1 billion people), their own Nike, Nike SNKRS and adidas smartphone apps, influencers (aka global "assets") in the form of major celebrities and sportsmen) and marketing budgets amounting to several billion dollars to create demand. While the Parties are not particularly horizontally differentiated in the sense that they both depend for footwear sales largely on the resale of Nike and adidas, this fact does not make them "close" relative to, and distinguishing them from, other UK sports footwear retailers: all serious multi-brand sports footwear resellers must focus on Nike and adidas, because that is where consumer demand lies, and resellers align themselves around this demand – to the extent allowed by Nike and adidas. As a result, the top-selling styles ("franchises") can be bought from a wide range of retailers. For example, [X], the Nike Air Force 1, which represented [X]⁶ is available on 32 other pure-play webstores (including Amazon, ASOS, Zalando, etc) as well as multichannel players such as Foot Locker, Office, Offspring and Schuh.
- **JD Sports is a global/EMEA strategic partner of Nike and adidas.** JD Sports receives treatment from the brands which is consistent with its position within the brands' selective distribution hierarchies. It obtains a number of "JD Exclusives" and/or special make-up products ("SMU"s) from Nike and adidas (though it is not alone in this and Foot Locker and others receive similar products). Its 344 UK stores are of a consistently high quality, alongside its high-quality digital offer and strong multichannel proposition and the brands do not discriminate in product allocation policies between JD Sports' individual stores or channels.⁷
- **Footasylum is differently situated.** [X].
- [X], as demonstrated by the fact that [X]

III. **The Merger does not alter the fact that global brands shape branded retail competition**

- (8) The major brand resale overlap between the Parties is in Nike and adidas footwear, which together account for [X]% of JD Sports' net sales; and [X]% of Footasylum's footwear net sales. This is unlikely to be materially different for all rivals, whether pure play online retailers such as ASOS and Zalando or multi-channel players such as Foot Locker, Sports Direct and Deichmann. In this regard, the dependence of the Parties (and other retailers) upon two global footwear suppliers with must-stock brands, which are also their fastest-growing competitors, is unique, and makes the combined horizontal/vertical constraints facing the Parties quite different to all other retail sectors the CMA has previously considered. Nike and adidas dwarf the Parties both in terms of sheer scale (in 2018/19 Nike's global revenues were \$39 billion

⁶ For the first 39 weeks of the current financial year.

⁷ The 344 JD Sports brand stores excludes: Republic of Ireland, Northern Ireland, UK Airports, Channel Islands, Isle of Man, and Jersey.

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and adidas' were \$25.8 billion); and marketing spend (in 2018/19 Nike and adidas combined spent over \$6.8 billion on advertising alone – more than the global revenue of JD Sports).

- (9) These two brands, and others such as The North Face, Vans, Puma and others, are not mere "suppliers" or "wholesalers" of products given that they have a strategy (Nike refers to it as its "*Consumer Direct Offence*") of significantly growing their DTC sales as direct competitors to the Parties in tandem with the growth of in-house apps such as Nike's SNKRS app, an exclusive channel for many of its new launches and product releases. Critically, DTC provides the brands with the opportunity to: (i) generate higher margins; (ii) retain full control on the pricing and merchandising of their products (reinforced by initiatives such as connected inventory), alongside the broader marketing of their products; and (iii) obtain direct access to consumers, enabling the collection of valuable data and a deeper understanding of their customers, which in turn results in a greater ability to adapt to consumer demand and deploy marketing efforts more effectively. In its most recent quarterly earnings call, for example, Nike noted that its overall growth was fuelled by growth "*in digital, which grew very strong 42%, showing the power of more personal relationships with the consumer.*"⁸ Nike's focus on its digital and DTC growth is expected to continue with the appointment of John Donahoe as CEO (who was formerly Chairman of PayPal and President and CEO of eBay).
- (10) The growth of DTC sales also poses a substantial disintermediation threat for retailers, as brands increase allocation to their own channels and cut supply to retailers (particularly those whom the brands consider do not meet their standards – either in terms of scale or quality). JD Sports considers that [REDACTED]. In contrast, the growth of DTC is fuelling the brands' share price: today's announcement in relation to Nike's decision to stop selling direct to Amazon⁹ and Nike Inc's shares moved 2% on the day of the announcement.¹⁰
- (11) The brands also determine which retailers are supplied with what product/range; the volumes which are supplied as part of their selective distribution networks; suggested retail prices ("**SRP**"); and the store quality and service criteria required to qualify for (a certain tier of) supply. Furthermore, retailers understand that they need to maintain a highly attractive offer to secure future allocations and seek to avoid disintermediation or favourable treatment within their distribution hierarchies of other retailers. As a result, if the CMA focuses only on the traditional tools of demand and supply side substitution and reactions by customers and reseller rivals, it will fail to capture the most immediate and central constraints on the Parties, horizontal and vertical, given the key role of brands (and more specifically Nike and adidas) as both competitors and suppliers.
- (12) Fundamentally, and for the reasons explained in (IV) below, the Parties' prices, quality and available product ranges are primarily determined by the brands and not by reference to competitor activity. For this reason, as is discussed below, JD Sports expects that any hypothetical deterioration in PQRS would lead to brand-owners diverting supply, and consumers switching demand, to an array of alternatives to the Parties' stores and webstores, including further accelerating the unrelenting growth of the DTC channel.
- (13) [REDACTED]¹¹

⁸ Nike Q1 2020 Earnings Call Transcript, found at < https://s1.q4cdn.com/806093406/files/doc_financials/2020/Q1/NIKE-Inc.-Q120-OFFICIAL-Transcript-with-QA-FINAL.pdf >.

⁹ <https://www.retail-week.com/fashion/nike-cuts-ties-with-amazon-to-focus-on-direct-to-consumer/7033470.article?authen=1>.

¹⁰ <https://www.bizjournals.com/portland/news/2019/11/13/nike-shares-climb-after-split-with-amazon.html>.

¹¹ [REDACTED]

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IV. A worsening of the consumer offer would not survive dynamic demand forces and brand and supply-side disruption

- (14) The Parties' core demographic is the "Instagram generation" of 16-24 year olds. UK smartphone ownership among this customer base has grown to 95% by 2018¹² – and UK users check their mobile phone on average 150-250 times per day and spend, on average, almost two hours per day on social media engagement. In particular, Instagram penetration among UK 16-24 year olds is among the highest in the world: there are around 7.85m 15-24 year olds in the UK, and estimates suggest around 7.5m UK Instagram users in this age range. This implies a ratio of 96 Instagram users for every one hundred 16-24 year olds in the UK.
- (15) Moreover, to quote Mintel, [REDACTED]¹³ 80% of users follow a business or a brand so are looking for inspiration.¹⁴ Consequently, social media has a direct causal link to the commercialisation of sports and fashion for this demographic, and is demand at its most volatile and unpredictable.
- (16) These market features mean that consumers literally carry the Parties' competitors with them via their phones in the Parties' stores or when surfing online on the Parties' websites: online competitors are always "in-store". This renders the "in-store" channel no less transparent as to the appeal of brands, retailers, and prices as well as reinforcing the brands' power referred to in (II) above.
- (17) Accordingly, in addition to the horizontal and vertical constraints resulting from the brands, the Parties face a range of competition across the spectrum of products that they offer, including a number of rivals selling branded footwear such as:
- Foot Locker, ASOS, Zalando, each of whom are global strategic partners of Nike and adidas with access to a wide range of products, and significant expansion plans.
 - Sports Direct, which has a large store estate and has embarked on a significant "elevation strategy" involving a number of new stores and the upgrade of existing stores in strategic locations. Sports Direct also offers a range of premium fashion products via its USC and Flannels fascia. While Sports Direct is currently unable to insist on the supply of certain footwear products by Nike and adidas, it has access to a significant number of branded products (including Nike and adidas products), and its access to certain key products is increasing.
 - Schuh, Office, and Next's growing online platforms, all of which offer a wide range of branded products including many of the most popular Nike and adidas products.

V. The Merger will not remove a close constraint on JD Sports' pricing or non-price offer

- (18) The Parties agree with the CMA's findings in Phase 1 that "*important elements of the Parties' competitive offering* [REDACTED]¹⁵. However, Phase 1 gave insufficient regard to [REDACTED].
- [REDACTED].
 - Quality relates to two factors: (i) the resale product, which is the result of brand innovation and production and (ii) store quality, which is consistent across JD Sports' estate and the result of JD Sports' international standards, much of which is responsive to brand requirements. It can be readily observed that these standards are consistent throughout JD Sports' estate, including in regions and territories where Footasylum is not present, and that the presence (or absence) of Footasylum therefore has no meaningful impact on store quality.

¹² <https://www.statista.com/statistics/271851/smartphone-owners-in-the-united-kingdom-uk-by-age/>.

¹³ "Clothing Retailing - UK - October 2018", Mintel, page5, Annex 349.

¹⁴ See <https://www.avocadosocial.com/latest-social-media-statistics-and-demographics-for-the-uk-in-2019/>.

¹⁵ Phase 1 decision, para 7, page 2.

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- Similarly, the brands determine the range which is available to stock by an individual retailer. JD Sports' policy with respect to range is [REDACTED].
- Finally, service does not vary by reference to competition. [REDACTED]. Footfall in JD Sports in the UK is [REDACTED] and therefore the need for high standards of in store experience is driven by, in particular, differentiation relative to the transaction efficiency of online.

(19) Given these constraints (and the lack of Footasylum as a constraint), it is not credible to expect that consumers will be worse off as a consequence of the Merger and it is the Parties' strong belief that the Merger will benefit consumers.

VI. Footasylum's small share does not even account for its declining state absent the Merger

(20) Whatever precise methodology is used, the Parties' combined shares are not at a level that should cause concern. In particular, an increment of [REDACTED]% (on the CMA's own calculations) is not likely on any basis, regardless of the degree of differentiation in the market, to give rise to an SLC. If resale of Nike and adidas products were considered a separate market, the Parties estimate that the increment arising from the Merger would be less than [REDACTED]% for both footwear and apparel which is small in itself, but also not indicative of any SLC due to the substantial power exerted by Nike and adidas over the retailing of their own products. Shares of supply for resale of non-Nike and non-adidas products are very low.

(21) [REDACTED].

VII. The Merger preserves a differentiated customer offer – with a much-improved brand position, scale, and IT and back office – to the benefit of consumers

(22) [REDACTED]

VIII. Conclusion

(23) The Merger has not and cannot be expected to result in an SLC given that the merged entity operates in dynamic, trend-driven and fiercely competitive markets in which the “must stock” global brands set the competitive framework (especially in footwear). The merged entity will continue to be subject to aggregate competitive pressures from the brands (via their own competing and growing DTC sales), and an array of instore and online competitors (who are also sourcing product via the brands' selective distribution arrangements or offering fast fashion alternatives). Footasylum did not, pre-Merger represent a material competitive constraint on JD Sports given its differentiated customer offer, its weakened competitive state and given the drivers of JD Sports' [REDACTED] PQRS setting. The Merger generates a number of efficiencies including the preservation of Footasylum's existing brand supply that will, as a result, benefit consumers.

INTRODUCTION

DIGITALLY-INSPIRED RETAILING FOR THE INSTAGRAM GENERATION

I. Volatility of social media-driven fashion trends

- (24) The Parties' core demographic is 16 to 24-year olds. With respect to this demographic:
- **Mobile usage.** UK smartphone ownership among this customer base had grown to 95% by 2017.¹⁶ Moreover, according to ONS, 100% of 16-24 year olds in Great Britain accessing the internet in the last three months used (among other devices) a mobile/smartphone to do so.¹⁷ Users check their mobile phone between 150-250 times per day.¹⁸
 - **Social media usage.** By 2017, some 96% of 16 to 24 year olds were using social media;¹⁹ the average time spent on social media is 1 hr 50 mins per day²⁰ (though other global estimates indicate a 3 hours per day average for the 16-24 age range.²¹
 - **Instagram usage.** Estimates of UK users of Instagram are in the 22-24 million range, with an estimate of 34% the age of 24 or under, so the number of UK Instagram users that are aged 24 or less is around 7.5 million.²² There are only around 7.85m 15-24 year olds in total the UK, so the Instagram penetration among UK 16-24 year olds will be very high, and among the highest in the world.
- (25) Moreover, "[><]."²³ 80% of users follow a business or a brand so are looking for inspiration.²⁴ Consequently, social media has a direct causal link to the commercialisation of sports and fashion for this demographic, and helps fuels demand at its most volatile and unpredictable. Celebrity- and influencer-fuelled brand ambassadors, particularly via social media (but also classic advertising channels, such as TV and out-of-home) drive consumer engagement with footwear and fashion brands and trends. The most notorious big-ticket example involving Nike vs. adidas rivalry was Kanye West's switch from Nike (*Air Yeezy*) to adidas (*adidas Yeezy Boost*) which fuelled the popularity of adidas in 2014-2016.
- (26) However, as quickly as adidas rose in demand and took global market share from Nike, it declined in the 2017-2019 period due to the same fickle trends. [><].
- (27) In the Nike vs. adidas brand battle to inspire brand loyalty (and hence drive e-commerce sales) among social media users, both brands leverage their worldwide presence with global celebrities, including athletes, musicians and other influencers. Nike has 95 million Instagram followers for its @Nike main account and 200 million across a number of its associate accounts and adidas has 35.9 million followers for its @adidasOriginals account and 104.2 million across a number of its associated accounts.

¹⁶ <https://www.statista.com/statistics/271851/smartphone-owners-in-the-united-kingdom-uk-by-age/>.

¹⁷ <https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/bulletins/internetaccesshouseholdsandindividuals/2019>.

¹⁸ <https://www.flowsa.com/news/reasons-to-move-you-advertising-budget-to-digital-media>.

¹⁹ <https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/adhocs/007401socialnetworkingbyagegroup2011to2017>.

²⁰ <https://www.avocadosocial.com/latest-social-media-statistics-and-demographics-for-the-uk-in-2019/>.

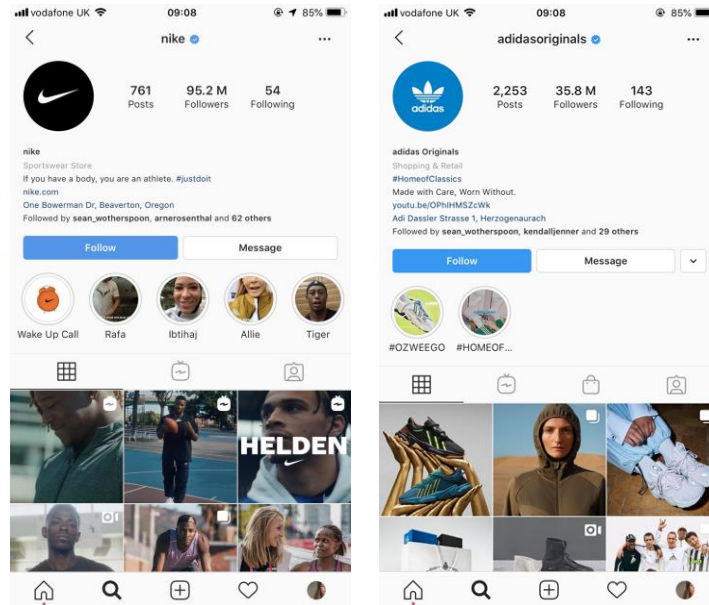
²¹ <https://socialbuddy.com/how-much-time-do-people-spend-on-social-media/>.

²² <https://www.avocadosocial.com/latest-social-media-statistics-and-demographics-for-the-uk-in-2019/> (24 million) and <https://www.statista.com/statistics/1018012/instagram-users-united-kingdom/> (22.22 million).

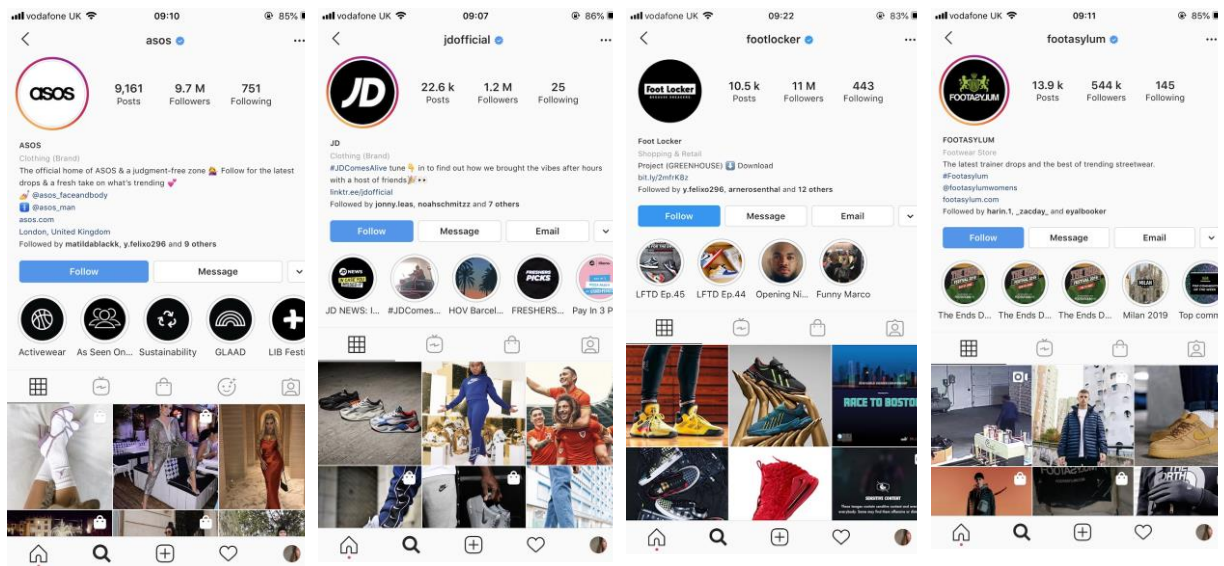
²³ "Clothing Retailing - UK - October 2018", Mintel, page5, Annex 349.

²⁴ See <https://www.avocadosocial.com/latest-social-media-statistics-and-demographics-for-the-uk-in-2019/>.

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- (28) It is effectively mandatory for sports/fashion resellers of Nike and adidas (et al) to have an Instagram account. At global level, Foot Locker (11m) and Asos (9.7m) have large followings, which will include UK users. These are shown below; along with more UK-centric examples such as the respective largest of those of the two Parties, JD Official (1.2m) and Footasylum (544k):



Not shown are Zara (36.4m), H&M (33.6m), River Island (2.2m), Next (1.4m), Zalando (800k), Office (372k), Sports Direct (172k), Schuh (138k) amongst others. Many brands and retailers including the Parties have either multiple official Instagram accounts or also unofficial ones, or both.²⁵

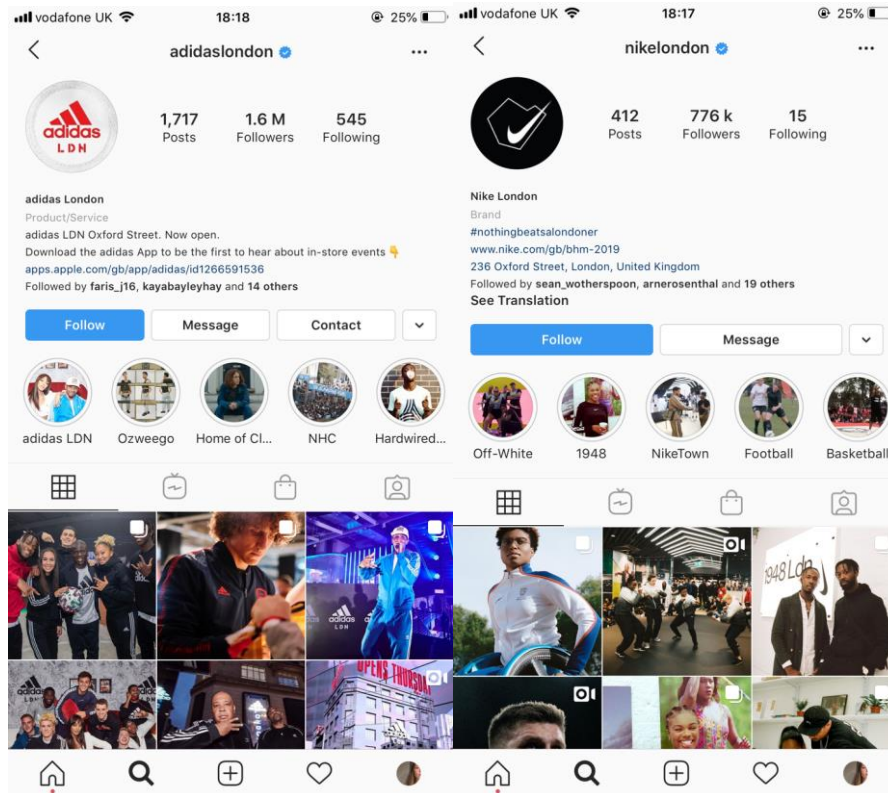
- (29) Turning back to UK-centric accounts, what is telling is that the brands themselves have made a major UK-centric push via London, including via flagship stores and Instagram. There are now 400,000 more followers on adidas LDN @ Instagram (which ties in with its brand new digitalised Oxford Street flagship)

²⁵ For example, there is @nike 95,213,450, @nikewomen 7,641,363; @nikesportswear 7,578,882; @nikefootball 42,959,616; @nikerunning 5,648,757; @niketraining 1,704,059. For JD Sports, there are numerous other accounts though JD Official is the largest.

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than there are on JD Official worldwide and 232,000 more followers on Nike London @ Instagram (776k) which has its own Nike Town Oxford Street flagship, than there are on Footasylum.

- (30) The Parties encourage the CMA to visit both these stores; screenshots of the Instagram accounts of adidas LDN and Nike London are shown below, which the Parties also encourage the CMA to browse:



- (31) The two London accounts of the brands combined have a total of 2.4 million followers (equivalent to 30% of all UK 15 to 24 year olds). Many Instagram users will of course follow multiple brand and/or retailer accounts.

II. Cultivation of strong sports and fashion brand preferences

A. Global sports and fashion brands (premium)

- (32) Consistent with the billions spent on advertising by global fashion brands, and global sports heritage brands (Nike spend: \$3.8bn; adidas spend: over \$3bn), brand is a significant driver of customer purchasing decisions (in particular for 16 to 24 year olds). Globaldata notes that [REDACTED].

[REDACTED]

- (33) The advertising spend and demand creation strategies of Nike and adidas, in particular, in footwear, are set out in Part B below. For footwear, Globaldata notes that "[REDACTED]."²⁶
- (34) Similarly, Berenberg notes that in sports footwear: "[REDACTED]."²⁷

²⁶ Globaldata UK Sportswear Market 2018-2023, page 49.

²⁷ Annex 347, page 14.

INTRODUCTION

B. Own-label fast fashion and bedroom brands (mid-price)

- (35) Meanwhile, own-label fast-fashion occupies more accessible "mid-price" price points than their global brand equivalents, and is much more nimble in product design and launch lead-times as the retailer (and not a powerful third-party brand) controls the design and production process/negotiation. As will be highlighted in the remainder of this submission, Footasylum's apparel range is heavily tilted towards own-label and bedroom brands, for which its closest competitors are fast-fashion retailers such as River Island, TopShop/TopMan, H&M and Zara, and not a retailer of global sports-heritage brands, such as JD Sports.

III. E-commerce drivers: Instagram, mobile-commerce apps, webstores

- (36) **Instagram.** Instagram is increasingly an e-commerce platform or facilitator itself,²⁸ launching its shopping checkout in the US in March 2019 with the likes of adidas, Nike, Uniqlo and H&M included in its initial list of partner brands.²⁹ The feature allows users of the app to view products (including various size and colour options) and proceed to payment without leaving Instagram itself, improving sales with increased ease of access.³⁰ This had a direct positive impact on adidas e-commerce sales, up 40% in Q1 19 year on year.³¹ Given Instagram penetration and UK demand, the UK can be expected to be early in the next wave of roll-out.
- (37) **Nike and adidas apps and webstores.** Nike and adidas have invested in their own Nike, Nike SNKRS and adidas smartphone apps with early- and limited- release product and other temptations to keep consumers in each brand's own ecosystem.³² According to a survey by GlobalData into the UK sportswear market in 2018, [X]. Nike, Nike SNKRS and adidas app screenshots give an idea:

²⁸ Instagram allows influencers to provide an option for followers to "swipe up" on stories containing products or to follow links attached to specific products featured in posts in order to be taken directly to the sites where the products can be purchased.

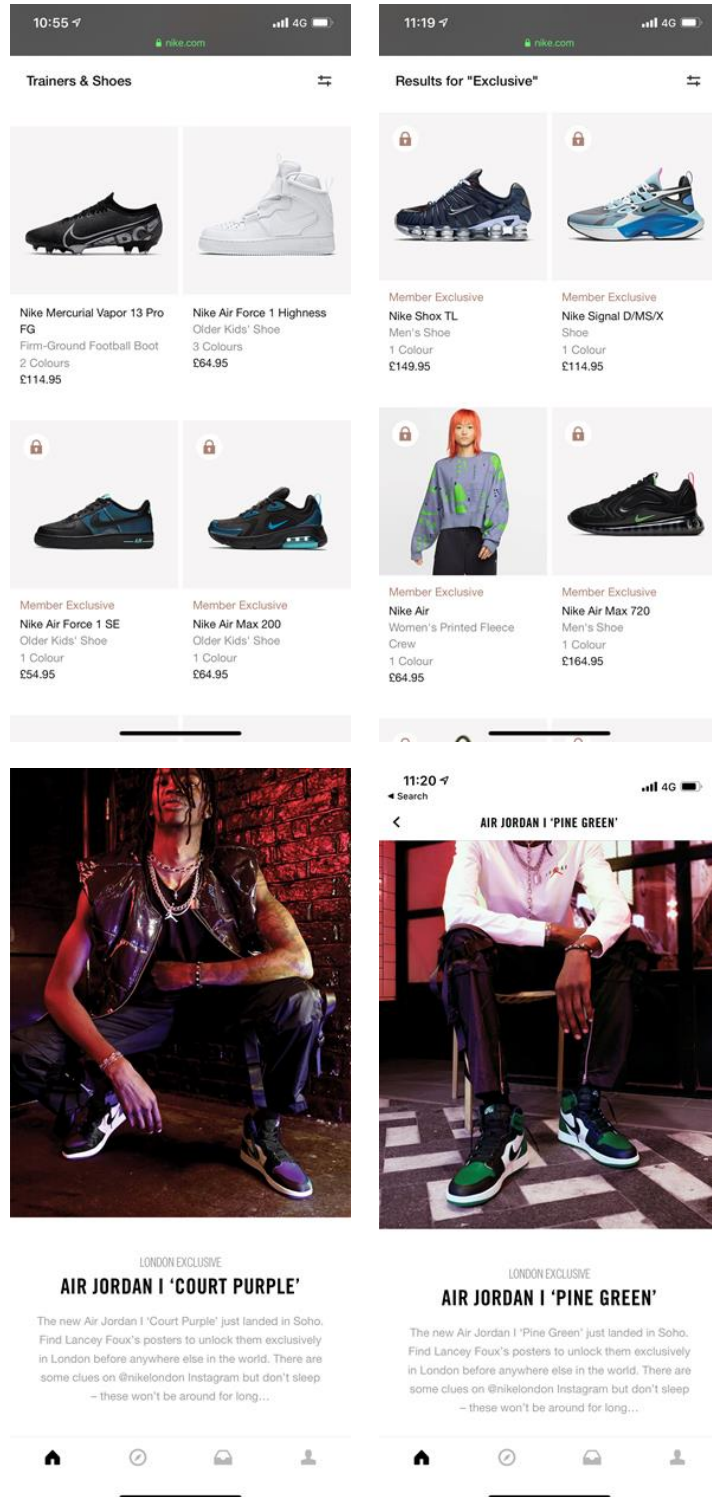
²⁹ Ibid. The feature allows users of the app to view products (including various size and colour options) and proceed to payment without leaving Instagram itself, improving sales with increased ease of access.

³⁰ < <https://instagram-press.com/blog/2019/03/19/instagram-checkout/> > accessed 7 November 2019.

³¹ Seb Joseph, Digiday, "'It's having a positive impact': Instagram is driving adidas' online sales", 7 May 2019 < <https://digiday.com/marketing/its-having-a-positive-impact-instagram-is-driving-adidas-online-sales/> > accessed 7 November 2019. Kasper Rorsted, CEO of adidas, praised the new feature, noting that "there was no doubt that Instagram had a positive impact for our online business in the first quarter...product launches and Instagram's checkout tool were the two most important things for our online sales business in the first quarter." In the first quarter of 2019, adidas' online sales grew by 40% year over year.

³² Vanguard Software Corporation, "How Nike and adidas have shifted towards e-commerce", 15 August 2018.

INTRODUCTION



(38) **Third-party multi-brand apps and webstores.** Beyond the brands, all third-party multi-brand players are growing much faster online than (for the multichannel operators) their store channels: for 16 to 24-year old shoppers, [3x] % of sports apparel and [3x] % of sports footwear is bought online (GlobalData). Overall, online sales already count for around [3x] % of sales of sportswear,³³ and this is expected to continue to grow.

³³ Phase 1 Decision, Paragraph 49.

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- (39) **Search engines.** As noted in paragraph (68) search engines have eradicated barriers to online switching and comparison between webstores.

IV. Conclusion

- (40) The Parties encourage the CMA to browse the apps referenced in this submission in order experience how social media drives, in particular, brand sales. This app development is a clear example of the use of digital innovation to create a digital facsimile of a store experience – not the same, but the curation involved is far superior to older-generations of e-commerce webstores for desktop.
- (41) Notwithstanding digital encroachment and channel blurring (though, for example, click-and-collect, kiosks in store), if high non-price retail ambience is maintained and continually invested in, the store channel can perform well, at least for now. But it is clear that when it comes to research, comparison shopping and price comparisons in particular, the footwear and apparel shopping journey for the Instagram generation begins online, and never really goes "offline", not even when "in-store".
- (42) [REDACTED].³⁴ It also, as will be developed later, highlights their vulnerability given that their market position only survives at the discretion of the brand.

³⁴ GlobalData, The UK Sportswear Market 2018-2023, p. 26.

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- Market definition should aid the competitive assessment by providing a useful framework. The Phase 1 approach does not assist and requires a fresh start at Phase 2.
- Footwear and apparel retailing are separate markets.
- Within these two overall markets, a useful analytical framework is provided by brands, which guide how consumers and retailers think and act. The pivotal role of Nike and adidas in particular is relevant to segmentation.
- In **footwear**, the entire “sports-inspired market” is skewed towards Nike and adidas, so the issue of intra-brand competition between Nike DTC and various Nike resellers (and the same for adidas) is important. Each brand favours its own DTC channel and decides how much its resellers compete with its own DTC channel and each other (explored further in Part B for footwear).
- In **apparel**, teasing out the skew in brand representation highlights differentiation. Footasylum is skewed towards own label/bedroom brand “urban male fashion” ([x] % of its sales). JD Sports is skewed towards reselling sports-heritage brands ([x] % of sales, of which [x] ([x] % of total) is Nike/adidas).
- For **channels**, the digitally-inspired customer journey, evidence of actual store to online substitution (e.g. via gift card redemption), the immediate price constraint of online, and the pressure to differentiate the store through a premium retail experience or ambience, means that online is an important constraint on all of PQRS factors in-store, regardless of market definition.
- The geographic lens to assess competition is national in line with centrally-set PQRS.

I. Introduction

A. Background

- (43) The CMA's Issues Statement describes market definition as a framework for the analysis of the competitive effects of the Merger, in particular any potential SLC. It adds that the relevant market "*includes the most relevant constraints on the behaviour of the merging parties*".³⁵ The Issues Statement also indicates that the CMA's SLC assessment may have regard to so-called "out of market" constraints and whether some constraints are more important than others.³⁶
- (44) Mergers between retailers can often pose some challenges for market definition in differentiated settings where either the products or services, or the retail proposition or business models, or both, vary across retailers, and where the best way to frame the competitive effects (or SLC) question is not immediately obvious. That said, some retail sectors (recent CMA Phase 2 examples being pharmacies, betting shops and groceries) are perhaps easier to tackle than others.
- (45) This Merger requires the CMA to grapple with these issues in a retail sector that is probably as volatile and dynamic as one could find on both the demand- and supply-side, and which is shaped by the brands in a dual role -- as both (1) key rivals and (2) exclusive sources of branded supply -- in a manner not generally seen in other UK retail cases, and novel for a Phase 2 Merger inquiry.³⁷

³⁵ Issues Statement, paragraph 13.

³⁶ Issues Statement, paragraph 14.

³⁷ Comparable issues have not arisen in a Phase 2 retail Merger case under the Enterprise Act regime.

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- (46) However, in Phase 1 terms such as "multi-brand", "multichannel" (and within the latter, the traditional distinction between national store networks ("in-store") and national e-commerce web-stores ("online")) were used to describe supply-side similarities, in terms of business models -- to try to frame questions of closeness. This paper explains why this approach does not get to the heart of identifying relevant and indeed pivotal constraints.

B. Factoring the pivotal role of brands into market definition to frame the analysis

- (47) The missing angle of Phase 1 is central to the analysis in this case -- to the point where it is formative of retail competition itself: both Parties are participants in sophisticated selective distribution systems subject to vertical restraints (often implicit) by the relevant brand owners/suppliers who are equally the fastest-growing direct retail competitors, a channel that they will favour at the expense of the "reseller" channel in which the Parties sit.
- (48) Ignoring this central reality would fail to capture "*the most relevant constraints*" on the Parties. Indeed, it would fail to capture *the single most relevant constraint* given the linchpin role of the brands. Brands' vertical "restraints" are "constraints" just like horizontal "constraints" are, and should be weighted in proportion to their intensity, and their immediacy.
- (49) Brands' determination of product line allocation and volumes for the relevant branded product lines allows them to calibrate "intra-brand" (Nike retailer vs. Nike retailer) competition, and "vertical differentiation" (higher- or lower-tier Nike status) between those retailers within the selective distribution network. In plain terms, Nike decides the Nike retailer competitor set and closeness of competition within the Nike system (i.e. to a large extent it can determine the scope of intra-brand competition for Nike products), all of course with preference to its own higher-margin DTC channel in mind. Of course, in making its decisions with respect to resellers, Nike will take into account what a chosen retailer does (or fails to do) for Nike brand equity, and how popular that retailer's proposition is with consumers so as to maximise Nike's ability to compete with other brand owners (i.e. to promote the appeal of Nike's products to end consumers and thus its own inter-brand competitiveness). Accordingly, Nike's shaping of retail competition is not independent of consumers voting with their wallets as they allocate spend among retailers of Nike product; see further Part B below.
- (50) However, consumer preference metrics (market shares, diversion) reflects retailers' positions *as currently determined* by the brands' "carrot and stick" points of retail leverage with product allocations, and not -- which is what really matters centrally for the question of SLC -- what brands would do in response to a worsening (or improvement) of the retail offer of a given retailer (such as "store elevation").
- (51) As the dual vertical/horizontal role of brands is so critical, it is not useful to approach the question of competitive effects via a market definition framework that ignores -- or indeed is not based centrally -- around the brands that the retailers resell.
- (52) Moreover, given the weight attached by the CMA to the Parties both selling Nike and adidas at Phase 1, it seems sensible to consider systematically whether the Merger gives rise to unilateral effects in: (i) the resale of **Nike & adidas footwear** (which account for the large majority of the Parties' sales (which could of course look at Nike (including its *Converse* brand) and adidas (including its *Reebok* brand) individually, and together), and (ii) the resale of **other brands of footwear** sold by the Parties ([X]%) of the relevant question) such as *Puma*, *Vans*, *Timberland*, *Asics* etc. Within these categories, (i) there is vertical differentiation between the Parties (in terms of stock keeping unit ("SKU") overlap for Nike and adidas), and (ii) horizontal differentiation (both Parties do not stock all brands). These points are developed below at sections III-IV.
- (53) Beyond setting up the competitive effects analysis to ask the right questions, this approach to market definition also enables a definition of the competitor set and the calculation of market shares. Market shares, or shares of supply, may, of course, not perfectly capture rivalry between differentiated

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competitors, but they at least highlight the overall scale of rivals and the actual purchase choices made by consumers for similar products.

II. The Phase 1 analysis: examples of the binary fallacy in action

A. Introduction

- (54) In order to be useful, a market definition "frame" should not be so small as to leave large parts of the picture canvas sticking out well "beyond the frame". However, when Merger market definition is overlaid on top of a competitive reality of a differentiated spectrum of retailers, two of which are merging parties that are themselves differentiated from each other, there is the risk of poor framing via the so-called "binary fallacy" error whereby:
- suppliers or supply within a desktop-defined market are treated as being on an equal competitive footing or on a 1:1 basis (per unit of sales or other measure), regardless of differentiation; and/or
 - suppliers or supply outside the market are, in effect, given zero weight (even if this is sometimes labelled more gently as "limited" weight).
- (55) This risk has been recognised for some time in UK Merger control, and the traditional tool of mitigation has been by way of "weighting" competitors, especially where local SLC analysis is appropriate.³⁸ At national level, market shares are themselves weighted measures by revenue. For this reason, the Parties submit that considering market shares is a useful way of mitigating against binary fallacy risk.
- (56) Phase 1 is subject to time and resource constraints, which the Parties recognise. For these purposes, a close reading of the Phase 1 decision shows that, even if not expressly styled in terms of supply or competitors being "in" or "out" of the market, or "frame of reference", precisely the same substantive binary fallacy issues arise if instead one substitutes the terms "close" and "not close" which are employed to include or exclude players from the competitor set altogether, or the set of "close" competitors. The "close" vs. "not close" dichotomy which, with the best intent, necessarily relies on qualitative (subjective) labels the Parties and rivals as either close or not. And it does this without any empirical economics to underpin it. This concept is at the core of the Phase 1 decision, which uses the word "close" 165 times.
- (57) Closeness as a term has also displaced numbers (such as market shares) to such a degree that questions of materiality – important to the substantiality or the "S" in the "SLC" question – are obscured. This criticism applies to the Phase 1 analysis even on a static, snapshot basis, before factoring in any dynamism of demand (among fashion trends for 16-24 year olds) or supply (from ASOS to Zalando).
- (58) While it is common ground that market shares are not a decisive guide for unilateral effects in differentiated markets, quantification still matters, and share of supply increments should, at Phase 2 at the very least, be an important initial measure of what difference the Merger makes before considering all other forms of evidence, quantitative and qualitative. If across the UK as a whole, a competitor has a low national market share it would at least suggest that across UK consumers as a whole it is not an important source of supply relative to the overall set of choices, and consequently not a relatively close competitive constraint on other suppliers.
- (59) The following sections highlight two examples by way of illustration of the "binary fallacy" points with respect to the Phase 1 analysis.

B. Footwear online

- (60) At Phase 1, the CMA decided that, in the round, the Parties' only "close" footwear competitors online were ASOS and Foot Locker (para. 396). If true, it follows that this would make the Merger a "4 to 3" Merger in online sports footwear. Excluded on grounds of insignificance of constraint were the brands' own online

³⁸ This is particularly useful for local market weighting otherwise based on "binary" traditional fascia counts, where a player either counts as a fascia (one) or not (zero).

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stores -- nike.com/gb and adidas.co.uk – along with Nike's European pure play online strategic partner, Zalando, as well as other notable footwear multichannel players, such as Sports Direct, Office and Schuh among other. The consequence of this approach, stepping back, is as follows:

In competitor set	Out of competitor set
jdsports.co.uk footlocker.co.uk footasylum.com asos.com	nike.com/gb adidas.co.uk zalando.co.uk office.co.uk schuh.co.uk sportsdirect.co.uk Office.co.uk etc.

- (61) One of the many difficulties with the above is that the Google search function (which will be widely used by the Parties' respective core customer bases, and amongst whom smart phone penetration is nearly 100%), and Google shopping algorithms, are not programmed to return results only for the Phase 1 competitor set and exclude results from the "out of market" set. Indeed, any Google search for "Nike", for "adidas", or for any particular franchise ("Nike Air Force One", "adidas Stan Smith", etc.) or particular SKU will return the nike.com/gb and adidas.co.uk webstores at the very top of the Google search results. The third-party results ranks will of course vary but under no permutation consistently yield the Parties, Foot Locker and ASOS and exclude third parties not considered part of the competitive set.
- (62) While at Phase 1 the CMA dismissed the brand's own webstores as they (by definition) only stock one brand, not competing brands, there are two salient points on considering whether “**mono-brand**” (i.e. brands’ DTC) competes closely with “**multi-brand**”.
- (63) First, for many consumers, the journey begins with a Google search rather than selecting two webstores directly and comparing. It is worth thinking about three types of consumers to illustrate this point.
 - **Consumers with a strong preference or loyalty for one of the two most popular footwear brands (e.g. “just Nike” or “just adidas”) for the purchase in question.** Due to the intensity of brand preferences that flow from the brand’s marketing and demand creation strategies (see further Part B), some UK consumers will have one or other brand, brand franchise or SKU in mind before they visit either Party's webstore. The multi-brand vs. mono-brand distinction is irrelevant for the online customer journey for these customers. For example, a search on Google UK for Footasylum's best-selling Nike franchise, Nike Air Force One, using the search term "Nike air force 1" yields in the below instance nike.com, footlocker.co.uk and a set of third parties outside the Phase 1 competitor set; the shopping comparison box features four rivals outside the Phase 1 competitor set (zalando.co.uk, Nike Official i.e. nike.com, Schuh and Office) but not two rivals in the set: Footasylum or ASOS. At different times, with different permutations, the results may well feature ASOS or Footasylum but the sheer volatility of results (other than DTC always first, whether as a paid placement or organic result) simply drives home the point on binary fallacy:

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Google search for "nike air force 1".

Page 2 of about 162,000,000 results (0.56 seconds)

The Official Nike Site | NIKE: Air Force 1 | Step Into Greatness
www.nike.com/Air_Force
 Get The Latest Nike Air Force 1 Collection Before Anyone Else! Shop Now At Nike.com. Styles: Air Max, Air Max 270, Air Force, VaporMax, Air Zoom Pegasus, Roshe, Cortez, Presto, React, Tech Fleece.
 London · 3 locations nearby

Women's Air Force 1
 The Court Legend Lives On. Redefine Your Look With This Game-Changer.

Men's Air Force 1
 Power-Up Your Style With The Shoe That Revolutionised The Game!

Nike | Sneakers | 1-Day Delivery on 24S.com | Free Returns
www.24s.com/Nike/Sneakers
 Treat Yourself with the most coveted Designer Pieces on 24S! All New Fashion Arrivals Online on 24S. Secure Payment. Loyalty Program. Next Day Delivery. Free Returns. Live Chat. New Season, New Boots · Personal Shopper on 24S · What To Buy this Season

Nike Air | Code:SHOP25 and get 20% off | FootLocker.co.uk
www.footlocker.co.uk/
 Nike Air Online. Check Out Our Latest Release! The hottest sneaker drops online and in...

Nike Air Force 1 - Sneakersstuff | sneakers & streetwear ...
<https://www.sneakersstuff.com/nike-air-force-1>
 Find the latest Nike Air Force 1 at Sneakersstuff.com - the world's leading boutique sneaker store since 1999.

END. Features | Nike x Travis Scott Air Force 1 - Register Now ...
<https://www.endclothing.com/features/nike-x-travis-scott-air-force-1-regi...>
 2 days ago - Continuing his sought-after collaboration with the American sportswear legends, La Flame adds his own unique spin on the Air Force 1. Nike x ...

CLOT x Nike Air Force 1 Game Royal Raffles | The Sole Supplier
<https://thesolesupplier.co.uk/raffles/clot-x-nike-air-force-1-game-royal-...>
 3 hours ago - The CLOT x Nike Air Force 1 'Game Royal' is unlike anything else out there at the moment. Made in collaboration with fashion icon Edizoo...

See nike air force 1 (Sponsored)

Products Comparison Sites

Mens Nike Air Force 1 GORE-TEX £125.00 Size? By Shoptail	Nike Sportswear AIR FORCE 1 GORE-TEX £74.99 Zalando.co.uk 100-day return By Shoptail	Nike Air Force 1 GORE-TEX £124.95 Nike Official By Pricegear
Nike Air Force 1 Low - Grade £49.99 Footlocker.co.uk Special offer By Google	NIKE AIR FORCE 1 07 £80.00 Schuh 365-day returns By Google	Nike Air Force One (m) £74.99 Office Shoes ★★★★★ (9k+) By Comparis...
Nike Air Force 1 '07 LV8 £84.95 Nike Official	Nike Air Force 1 '07 - Green £80.00 JD Sports	Nike Air Force 1 '07 WHITE £74.99 Office Shoes

(64) The same picture applies to adidas. For example:

Google search for "adidas".

About 1,460,000,000 results (0.60 seconds)

adidas® Official Website | Be the difference
www.adidas.co.uk/
 ★★★★★ Rating for adidas.co.uk: 4.7 - Order accuracy: 95–100%
 Browse through our extensive range of products and shop your favourites now. Versatile design and the forward-thinking aesthetics - Get inspired by adidas®. Free Click & Collect. adidas Training. adidas Football. adidas Running. Brands: adidas Originals, adidas Cloudfoam.
 15 Foubert's Place, London - Open today · 10:00 am – 7:30 pm

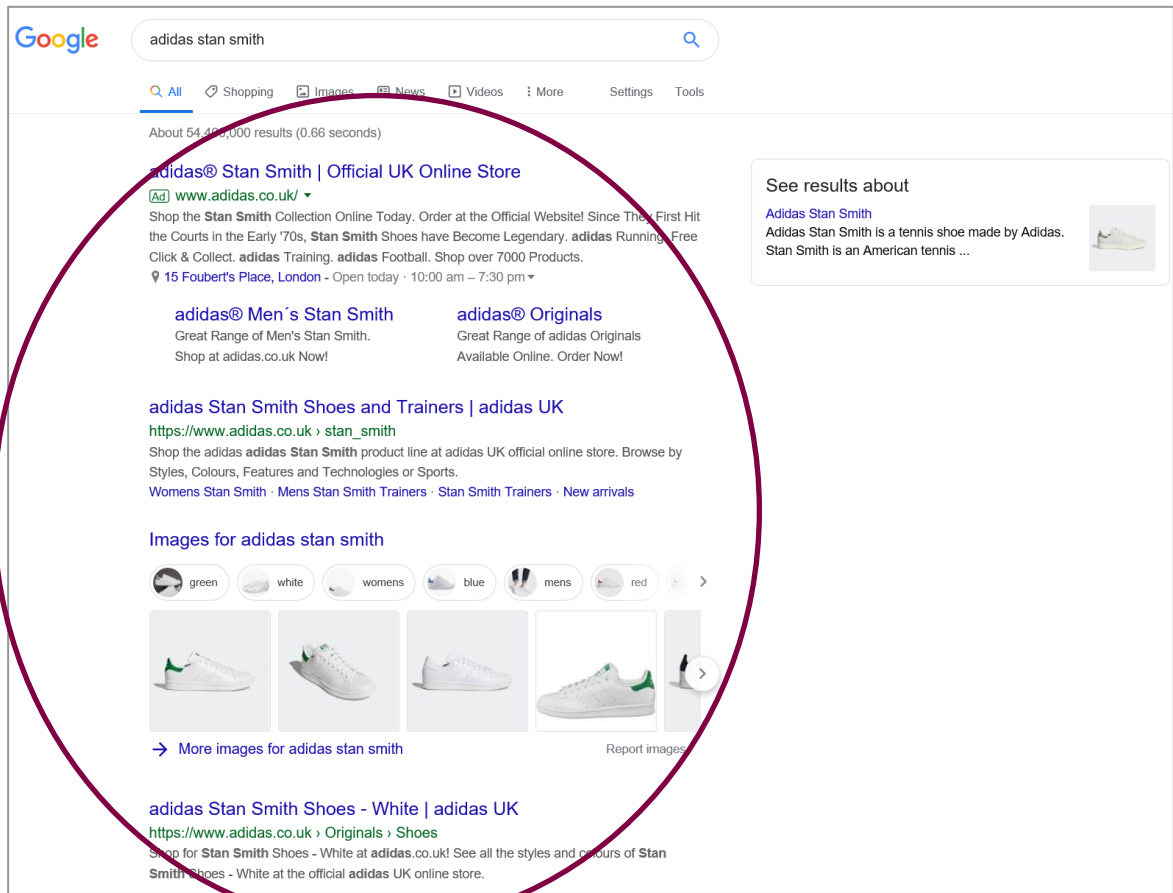
adidas® Official Website UK | Sportswear
<https://www.adidas.co.uk>
 Sports shop for adidas shoes and sportswear: Originals, Running, Football & Training on the official adidas UK website. Return for free for 30 days!

Shop now (Sponsored)

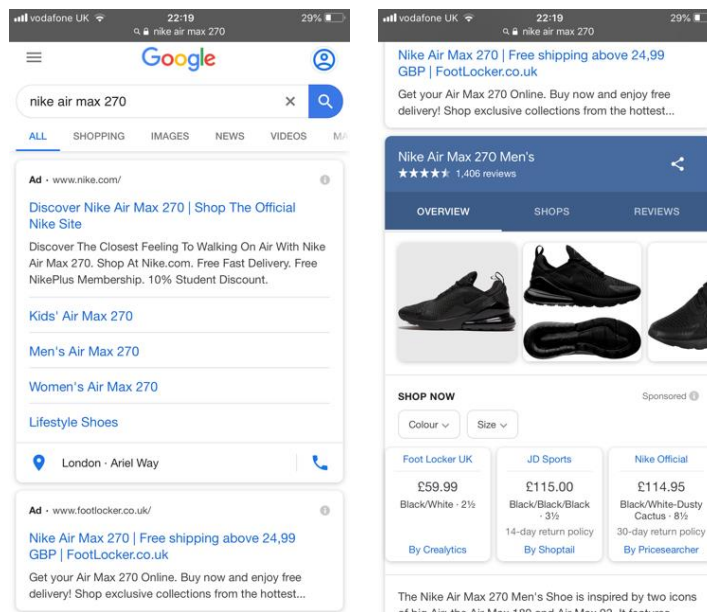
adidas Originals Continental 80's £56.00 ASOS By Google	adidas Stan Smith Shoes £44.95 adidas.co.uk ★★★★★ (9k+) By Google	adidas Originals 3MC in triple ... £50.00 ASOS By Google	adidas Originals Supercourt ... £58.50 ASOS By Google	adidas Originals continental £69.95 ASOS By Google

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(65) and:

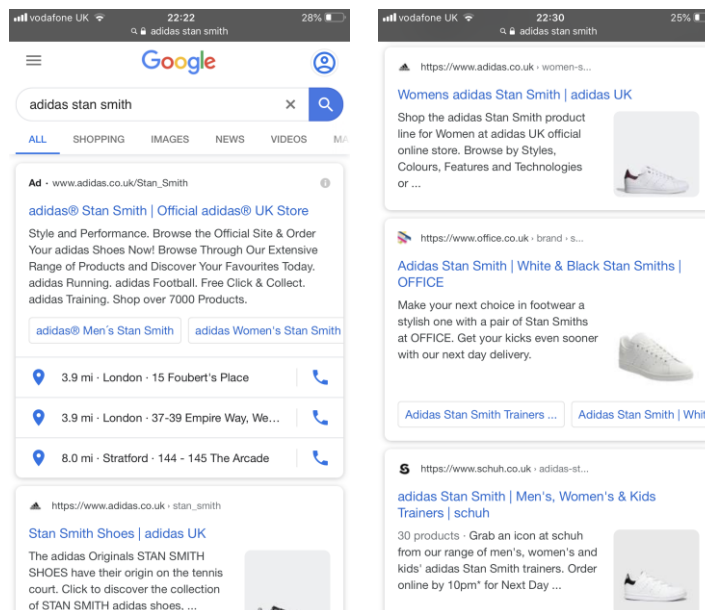


(66) More importantly, given that the majority of visitors to JD Sports website do so on their mobiles, the prominence of the Nike and adidas webstores is more pronounced when viewed on a mobile format:³⁹



³⁹ c. [35] % of visitors to JD Sports' website do so on a mobile phone.

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- **Consumers happy to choose between the two far and away most popular brands (e.g. “Nike or adidas”).** Second, for those marginal “multi-brand” consumers weighing up, say, Nike vs. adidas, their online browsing choices are not limited to multi-brand webstores. The unilateral effects SLC concern in this context is that many marginal consumers would compare two webstores (or apps) – and switch from jdsports.co.uk to footasylum.com (or vice versa) in response to higher online prices (or worse webstore offer). The theory of harm is based on the idea that the sales lost to the other Party’s webstore would be recouped to make the price rise profitable post-Merger. However, for the theory to work this requires such consumers to switch between these two webstores (or apps) without considering switching, instead, to another webstore or app. But in this respect: two webstores such as nike.com and adidas.co.uk webstores can just as easily be visited in rapid succession by consumers weighing both brands. Equally, it is self-evidently no more difficult or time-consuming to switch between jdsports.co.uk and nike.com, or between jdsports.co.uk and adidas.co.uk (or between nike.com and adidas.co.uk, or any other permutation of rival webstores). Finally, using the common route of Google search, those weighing Nike or adidas can run two Google searches in succession (one for Nike trainers, one for adidas) and have them open in separate tabs to toggle back and forth if desired.
- **Consumers with no strong brand preferences for sports footwear (e.g. happy with 3 or more brands: Nike, adidas, Puma, Vans etc).** The Parties doubt given their skew of UK industry demand sales towards Nike and adidas that many consumers are brand-indifferent in footwear. As such, they doubt that the 16-24 demographic is less likely to run searches indifferent to brands e.g. simply for “black trainers” – as evidenced by the fact that around [X]% of the Parties’ footwear sales are one of these two brands. Nevertheless, for those simply looking for “black trainers”, or “white trainers”, a Google shopping result immediately returns multiple options including, almost invariably, an adidas.co.uk and a nike.com/gb result. Again, there is no basis for excluding “mono-brand” DTC from the competitor set for “multi-brand” webstores.

(67) The above examples are illustrative rather than being systematic or representative. But the Parties would encourage the CMA to test any number of permutations of popular Nike and adidas footwear franchises or products that one or both Parties stock (such as Air Force One, Air Max 97, Air Max 270, adidas Originals, adidas Stan Smith, etc.).

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- (68) In summary, consumer search behaviour in the Parties' core demographic is not limited to multi-brand websites. In particular, the way that Google search results work gives *prominence* to – rather than *down-weighting* or even excluding the official Nike and adidas “mono-brand” webstores when searching for the relevant branded products. Of course, Google is not the only search engine. And starting with google.co.uk is not the only way that customers begin their search online. However, in light of consumers' brand preferences and Google search and Google Shopping, the Parties doubt that many (if any) consumers would browse directly only (or largely) the four web-stores “in” the competitor set and rarely check out either the excluded “mono-brand” nike.com, adidas.co.uk or any of the set of excluded multi-brand online retailers. As a consequence, to turn to the textbook market definition question: could a hypothetical monopolist comprising the four retailers “in” the Phase 1 competitor set raise prices (e.g. above the SRPs set by Nike and adidas) because enough consumers would pay higher prices and too few would themselves notice (and also be immune to dissemination of information by those who do notice) that the price is higher than on nike.com or adidas.co.uk or zalando.co.uk etc.? The answer must surely be no.
- (69) In lieu of further points the Parties could make with respect to the above, suffice to say that they trust that after the site visits, and review of analyst reports and Nike's and adidas' own public statements, the CMA will understand why the Parties urge a different approach for Phase 2.

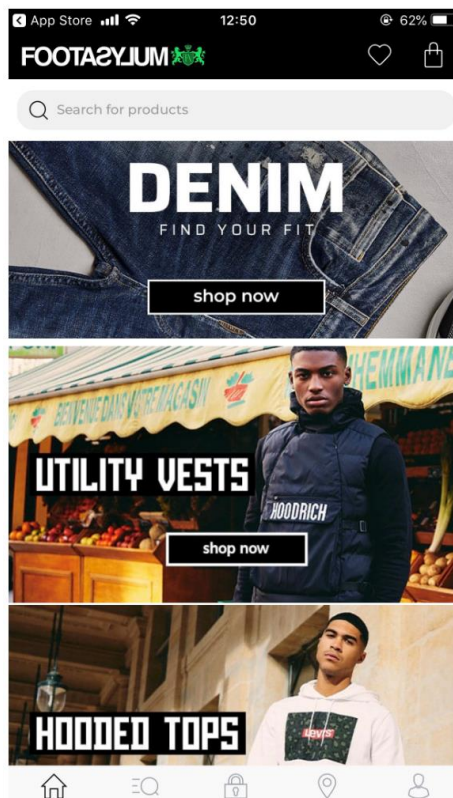
C. Apparel in-store

- (70) In apparel in-store, the binary fallacy is just as acute. The nub of the issue lies in the fact that Footasylum's retail offer is skewed far more towards urban- or street-inspired “fashion” than “sports-inspired”. [REDACTED] are sales of own-label or bedroom brands or in any event “fashion”-inspired own-label brands such as *Kings Will Dream*, *Glorious Gangsta*, *Métissier (Paris)*, and *Alessando Zavetti (Milan)* or bedroom brands⁴⁰ such as *Prè London* or *Hoodrich*.
- (71) In light of the recent site visits, other than a brand by brand analysis, perhaps two accessible lenses to consider this “urban” vs. “sports” question as a non-industry insider are as follows.⁴¹
- **Relative prominence of denim.** Denim is not a “sports-inspired” look: as one cannot seriously run or play sports in denim (jeans) and thus there is no sports-inspired association. Rather, denim is a classic fashion look, and when paired with the right upperwear (such as black jackets, hoodies etc.), can be an urban fashion look. Consistent with their respective sports-inspired and fashion-inspired heritage, JD Sports [REDACTED] sells any denim ([REDACTED] percent of sales) while denim is [REDACTED] part of Footasylum's own label apparel offer as evident from the site visit and, for example, Footasylum's app:

⁴⁰ A term used to describe emerging fashion brands that start life in their founders' bedrooms (i.e. are founded by individual entrepreneurs).

⁴¹ Please note that this is not in reference to Footasylum's “urban” tribe, but is instead intended to capture the fashion-focused “streetwear” nature of Footasylum's offering more broadly. Any specific references to Footasylum's “urban” tribe will be clearly identified throughout this submission.

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- Store ambience and share of apparel floorspace for own-label and/or black/B&W apparel in the Romford and White City stores.** The CMA will have noticed the differences between the store ambience and feel between the Parties’ stores, and the preponderance of black or charcoal (often with white or gold/silver accents or contrast) in Footasylum’s own label/bedroom brand apparel range in its Romford and White City stores, consistent with a male “urban” or “street” feel, and which was accorded substantial share of total floorspace/visual display devoted to apparel. Though Nike, adidas, Puma and/or North Face apparel was also stocked, much of that apparel was in black/B&W (e.g. black with white logos/trim) consistent with the overall look achieved in the Footasylum own-label/bedroom brand ranges. The visual display presentation and square footage of the Nike and adidas footwear was also noticeably distinct. Overall, the store ambience in those two stores was quite distinct relative to the JD Sports stores, consistent with Footasylum being pitched at a more male demographic and different look and feel relative to the more mainstream JD Sports stores in terms of lighting, music, apparel mix and apparel colour mix on display, which, while displaying some product, were not dominated by own-label and/or black in terms of the overall proportion of store floorspace.⁴² (At national level, in 2018, [X] was the most popular apparel colour for JD Sports but [X]% of its apparel sales were in colour codes other than the colour “black”.) Footasylum did not, it would suggest, come across as a “sports-inspired apparel destination” easily confused with JD Sports. Nor were the JD Sports’ stores easily confused for Footasylum.

(72) This common-sense differentiation visible in any store visit should not be lost in the analysis. Meanwhile, the binary fallacy approach of Phase 1 counts the entirety of the predominantly own-label and other fashion-label sales of Footasylum as “in” the sports-inspired apparel market and deems it to be a “close” constraint on JD Sports’ **sports**-inspired range.

⁴² This is true even if both an “urban” and a “sporty” look might, on footwear, be paired with, say, Nike’s Air Force One triple-white, which sells across both looks. See further the Footasylum site visit materials.

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- (73) In terms of the reverse -- that is, the constraint on Footasylum's **urban** apparel range – by obscuring this differentiation the decision effectively treats JD Sports as a very close rival despite its unarguably modest range of urban-look SKUs and denim, occupying a [X] of JD Sports' store floorspace. ⁴³
- (74) Conversely, the Phase 1 decision goes on to exclude as "out" of the markets an array of **fast-fashion** retailers, any of whom [X]. In this respect, Top Shop/Top Man at Phase 1 just made it "into" the market, but then still fell short of the "close competitor" set as a "limited" constraint. On the other hand, none of Zara, River Island, Next, H&M, Urban Outfitters or Primark was worthy of inclusion in the market at all, not even on a token basis or a "limited" constraint.⁴⁴
- (75) The framing of the competitive assessment was therefore:

Apparel in-store

In/close competitors

Out/not close

JD Sports
 Foot Locker (72 stores)
 Footasylum (70 stores)⁴⁵

Top Shop/Top Man (in, but not "close")
 (234 stores)
 Zara (66 stores)
 River Island (244 stores)
 H&M (233 stores)
 Next (451 stores)
 Urban Outfitters (32 stores)
 Primark (192 stores) etc.
Subtotal: 1,452 stores excluded

- (76) With Footasylum's urban fashion apparel emphasis in mind, the Phase 1 conclusion that, on the one hand, Foot Locker and JD Sports are close competitors to Footasylum despite both hardly even offering any urban-look clothing, while on the other hand, Zara, River Island et al (all packed with such ranges) are not even in the market (cf. para 228), is the second-most surprising element to the Parties of the Phase 1 decision (after the notion that Nike.com/gb does not belong in the market for the online sale of Nike footwear in the UK; cf. para. 396).
- (77) What has instead happened is that, despite Footasylum's urban fashion focus (which makes it roughly [X]), the frame of reference and competitor set definition has bent Footasylum to be 100% in the direction of JD Sports and thus a "close" sports-inspired apparel competitor. Meanwhile, all similar retailers to Footasylum in urban apparel are given 0% weight.
- (78) The net effect of this is that market definition and competitor set identification at Phase 1 thus far has hindered rather than helped frame the competitive assessment for a Phase 2 in-depth inquiry.

⁴³ Foot Locker is no more close a competitor to Footasylum for urban fashion than JD Sports is, so in this respect the Phase 1 decision is wrong on both counts, from a Footasylum perspective, when it finds that the only close store-based competitors in apparel are JD Sports, Foot Locker and Footasylum (para. 228), which if true would make the Merger a "3 to 2".

⁴⁴ It is true that e.g. Zara and River Island do not sell Nike or adidas branded footwear; they sell own-label equivalents at lower price points - but footwear is a separate market from apparel, and the competitive assessment is quite different.

⁴⁵ This includes Footasylum's three Drome stores which are collocated.

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Accordingly, the Issues Statement's understandable inspiration from Phase 1, in these respects, requires a completely fresh start.

- (79) This fresh start requires, among others things, recognition of:
- the central dual horizontal/vertical role of the brands especially given the heavy Nike/adidas skew in footwear that all footwear resellers have;
 - the (i) absence of barriers to search and switching online for (ii) a high-value considered purchase by (iii) digitally-engaged 16-24 year olds in light of (iv) the brands' own online-centric DTC offensive, which when taken together, all mean that a narrow online competitive set is misplaced in the extreme; and
 - the differentiation in apparel such that Footasylum's male/"urban" own-label offer competes closely with an array of fast-fashion retailers and cannot be treated 1:1 with the Nike/adidas-centric resale of sports apparel by JD Sports (all while fast-fashion itself, perversely, receives a score of zero).

III. A fresh approach at Phase 2

- (80) Ultimately, the SLC or "Merger effects" question is whether: (i) the Merger would allow the Parties materially to "take their foot off the gas" and durably and profitably worsen their offer in terms of satisfying consumers on any dimension of PQRS (where service includes, in particular, digitally-driven innovation); or (ii) whether the aggregate force of horizontal DTC, other online, and hybrid multichannel constraints, combined with formal and informal vertical restraints from the brands, would continue to drive the Parties to satisfy consumers in all dimensions of PQRS.

A. Using brands as the lens within footwear and apparel

- (81) At Phase 2, market definition should aid this Merger effects assessment, not distract from it. Using brands as the lens is far and away the most compelling framing tool for market definition for four reasons:
- **Consumers think and act in terms of brands.** First, because brands spend billions (Nike/adidas alone combined spend over \$18m a day or \$6.8bn/year on advertising) to cultivate brand loyalty and compete at manufacturer/brand level, UK consumers base much of their purchasing behaviour around specific brand loyalty and preferences (see Part B, subsection C).
 - **Retailers think and act in terms of brands.** Second, due to brands and consumers, the reseller-retailers that connect brands and consumers' wallets (in a pre-DTC world) think and act also in terms of brands. This includes not only resale of third-party brands (JD Sports' focus) but developing own-label mid-price brands (Footasylum's forté).
 - **Two global brands, Nike and adidas, play such a pivotal role in this case.** There is genuine dichotomy in this case between these two brands and all others, due to the c. [X]% dependence of both Parties on these brands in footwear, the [X]% exposure of JD Sports to these same brands in apparel, and the fact that both these brands are particularly aggressive and growing DTC competitors.
 - **Brands add clarity to the antitrust analysis.** Last, brands bring the intellectual clarity of hard-edged distinctions and boundaries: a product line either is/is not sold under the Nike (or adidas, or Puma) brand. Because brand really is binary, there is no binary fallacy of imposing bright-line boundaries over a complex spectrum.

- (82) Application of the brands-first principle is set out below.

B. Digital encroachment on store-based competition

- (83) On the issue of retail distribution channels, the key question becomes whether looking at each channel in isolation as a separate market is too narrow to be appropriate given the "digitally native" customer demographic. The Parties would encourage individual examination of the constraints they face with

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respect to their online webstores and their national store network offers. The Parties are also confident that it will become apparent that the Merger does not create a likely SLC whether this conclusion is arrived at via the framing of separate markets for online and in-store or on the basis of a single multichannel market (as per both Parties' business models).

- (84) The predominant concern and caution the Parties have is if the store analysis was inadequate in one of two respects. First, if it is too static and fails to spot the direction of travel (of online growth in general and brands' DTC in particular, which cannot fail to "cannibalise" store sales). Secondly, if the "PQRS" analysis of the store network assessment was to fail to consider carefully how online competition (not least horizontal constraints from brands' DTC webstores) constrains in-store sales: (i) directly and intimately on price; and (ii) indirectly on the non-price offer (innovation, store quality, store product range, and staff service so as to persuade consumers to purchase instore rather than online), in tandem with the vertical restraints of the brands on the non-price offer (see further Part B below).
- (85) These facts hold whether online (at around one-third of industry sales and growing) is deemed to be a stunningly powerful species of "out of market" retail constraint for stores, or is "in" the multichannel market alongside stores, albeit with obvious distinctions and trade-offs (convenience/efficiency of online vs. tactile "look, touch, feel, try on" in-store, but in an environment where online is growing rapidly).

IV. Separate markets for footwear and apparel

- (86) The clear distinction between footwear and apparel accords with industry practice and common sense on demand-side substitutability.
- (87) Some retail industries are characterised by the sale of a basket of complementary goods, each of which are not substitutes, such as the weekly grocery shop. However, as a matter of hard numbers, most purchases by the Parties' customers are not a "bundle" sale or "basket of goods" (e.g. trainers plus two items of apparel plus accessories) but rather [X] per sale (on average [X] items per basket for JD Sports and [X] items for Footasylum).⁴⁶
- (88) Moreover, while there is some footwear commonality between the Parties in terms of their status as largely resellers of Nike and adidas footwear, that is true of UK sports footwear demand and supply as a whole, and only the starting point of the footwear competitive effects analysis (see further below); in apparel, the Parties are substantially differentiated, and are not correctly or usefully described as two of few "sports-inspired apparel" destination retailers.
- (89) Accordingly, the umbrella term at Phase 1 of "sports inspired casual fashion", which is not a recognised industry term, does not assist in capturing (rather, it distorts) the reality of competition between the Parties. First, the Parties do not really compete on a basket-level basis. Second, on the apparel side they have quite differentiated ranges and emphasis and it requires untenable distortion to shoehorn urban fashion-focused Footasylum into a "sports-inspired" segment in apparel at all.
- (90) Beyond the fundamental footwear vs. apparel distinction, the Parties have the following points to make with respect to market definition, including for these purposes the identification of the competitor set and teasing out the question of differentiation among retailers and between the Parties.

V. Segmentation within footwear and apparel

A. Footwear: the assessment should align around Nike and adidas vs. the rest

- (91) As consumer demand for "athleisure" has blurred the distinction between sports and fashion gear, in footwear, this boils down to consumers wearing trainers/sneakers whether intended or actually used for sports/training or leisure/general purpose, or both. This may explain the CMA's Phase 1 use of the term "sports-inspired casual footwear".

⁴⁶ Excluding all Accessories and is for the period October 2018 to September 2019.

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(92) While JD Sports and Footasylum are both undoubtedly "multi-brand" retailers, as far as footwear is concerned, "multi-brand" in very large part in reality means "dual-brand": Nike- or adidas-supplied products account for around [X]% of each of JD Sports' and Footasylum's footwear sales. There is therefore great merit – practically and substantively - in systematically considering whether the Merger gives rise to unilateral effects in the resale of:

- Nike & adidas footwear ([X]% of the relevant question), which could of course look at Nike (including its core *Nike* as well as *Converse* brands) and adidas (including its core *adidas*, *adidas Originals* and *Reebok* brands) individually, and together; and
- the resale of other brands of footwear sold by the Parties ([X]% of the relevant question) such as *Puma*, *Vans*, *Timberland*, *Asics*, etc.

Within these categories, as will be set out below, in footwear, there is vertical differentiation between the Parties (in terms of SKU overlap for Nike and adidas). The Parties have no strong views on how this issue is distributed across questions of market definition (i.e. defining separate markets for the resale of Nike footwear, resale of adidas footwear) or as segments or lenses within the competitive effects analysis.

(93) From a CMA perspective, the Parties suggest that this more rigorously systematic brand-by-brand approach would capture all footwear sales and not fail to spot any conceivable "closeness of competition" angles that a blurrier lens would catch.

B. Apparel: given the Parties' different sweet spots, the assessment is best split into three brand-based categories

(94) JD Sports has no major objection to the CMA's use of "sports-inspired casual" apparel, which could more concisely be summarised using an industry term, athleisure apparel (as discussed in the Merger Notice at Phase 1). However, whether sports-inspired or athleisure, this lens does not yield a systematic, useful competitive assessment to test for unilateral effects.

(95) As the change brought about by the Merger in apparel is the acquisition of control of the smaller Footasylum by the larger JD Sports, it makes sense to consider the apparel range starting from the perspective of Footasylum apparel brand representation, and breaking it down according to the following three categories:

- **own-label and bedroom brands** (being Footasylum's sweet spot at [X]% of its sales);
- **sports-heritage brands** (a sizeable [X] JD Sports' sales); and in particular;
 - **Nike and adidas**-branded apparel ([X]% of JD Sports sales, and its sweet spot, vs. only [X] for Footasylum, amounting to only £[X] in sales); and
- **other brands** (various fashion brands that do not belong in either of the above categories, whether or not labelled "fashion", "athleisure" or in other imprecise terms).

(96) This more granular and therefore systematic approach to apparel categories should not result in any missing of "the wood for the trees": the Parties cannot be such close competitors across all three categories to result in a likely unilateral effects SLC if they are not particularly close competitors in any of the three categories. Indeed, as is clear from the following, the Parties are differentiated and each faces an array of closer third-party competitors in each category than in aggregate, which entirely dwarfs the relatively marginal role they play vis-à-vis each other as competitors in apparel.

1. Own label and bedroom brands

([X]% of Footasylum sales vs. [X]% for JD Sports)

(97) To gauge closeness of competition and the constraint that JD Sports places on Footasylum, it makes sense to start with the [X]% of Footasylum sales that are own-label which, for these purposes, can

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include bedroom brands given Footasylum's "incubator" credentials (note that, even where there is bedroom brand overlap, JD Sports will [REDACTED]).

- (98) This largest segment of Footasylum apparel sales should be excluded from any "sports-inspired" apparel market lens or assessment. Footasylum's own label and bedroom brands could be described as often giving an "urban" or "street" look, and are at far lower price points than the premium international fashion houses which are sources of inspiration.
- (99) There are many close competitors to Footasylum for these types of product lines, of which none particularly stands out as the fashion and urban fashion market is fragmented, and barriers to entry and expansion are low. However, obvious own label competitors that must be in the competitor set are the fast fashion multichannel players **Zara, River Island, H&M, Next, Top Shop/Top Man**, and **Primark**. Pure play online competitors include ASOS, Boohoo and Very, among others.
- (100) Conversely, JD Sports is a small-scale and self-evidently distant competitor in own-label or bedroom brands, both in absolute terms and relative to all Footasylum's rivals. Only [REDACTED]% of its apparel sales fall into this category. The Parties cannot see a credible basis for suggesting that JD Sports is a particularly close competitor to Footasylum for this [REDACTED]% of product range (nor the reverse, for the small JD Sports sales that might qualify in this category) such that a likely unilateral effects SLC finding is a plausible possibility. Rather, this differentiation explains in part the rationale for the Merger, as explained at the site visit and set out further in Part E below.
- (101) To the extent this category is viewed as a separate market from other categories, shares of supply would need to capture all the fast-fashion retailers' relevant sales. However, a conclusion of unlikely unilateral effects appears self-evident from the overall qualitative evidence, and should not necessarily require this market share calculation exercise to prove the point.
- (102) Although a footwear example, the same thinking applies with [REDACTED]. Footasylum has been a retailer of [REDACTED]. [REDACTED].

2. Sports-heritage brands

(a) Sports-heritage brands including Nike and adidas

([REDACTED] of Footasylum sales vs. [REDACTED] for JD Sports)

- (103) As its brand name implies, and as highlighted at the site visit, JD Sports is a "sports-inspired" multichannel retailer. Its heritage is the resale to consumers of iconic global brands with sporting heritage, predominantly Nike and adidas in footwear and largely also in apparel, along (in apparel) with other significant brands with sports heritage such as The North Face and Lacoste. Some [REDACTED]% of its apparel sales are of sports-heritage brands.
- (104) Conversely, sales of sports-heritage brands other than Nike or adidas account for only [REDACTED]% of Footasylum sales, while Nike and adidas combined are only a further [REDACTED]% for a total of around one-third ([REDACTED]%).
- (105) However, this conclusion becomes yet more compelling in relative terms, in light of the third-party competitor set for the resale of the brands' apparel, which includes the brands' own DTC retail offer and multi-brand retailers such as Foot Locker, Zalando and ASOS, as described in Part C below.

(b) Nike- and adidas brand only

([REDACTED]% of Footasylum sales vs. [REDACTED]% for JD Sports)

- (106) The differentiation is even more pronounced in terms of the resale of Nike/adidas apparel alone. This makes up less than [REDACTED] of Footasylum's apparel sales, but almost [REDACTED] of that of JD Sports. This shows that not only is JD Sports strongly associated in apparel with sports-heritage brands (a total of [REDACTED]%)

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combining Nike, adidas and all other sports- or outdoor-heritage brands) but in particular with Nike and adidas apparel, consistent with its brand image and its strategic partner status with these brands.

- (107) The above does not suggest that FA is a particularly close competitor to JD Sports for resale of Nike, adidas and other sports brand apparel in absolute terms or relative to rivals. Of its national apparel sales comprising an increment in share of 4%, if less than [X] of those sales are Nike/adidas, that does not imply a close constraint on resale of Nike and adidas apparel, even disregarding all other points made in the following sections. The same point applies more widely in relation to the [X] of Footasylum sales that are of sports- or sports/outdoor-heritage brands.

3. Other brands

([X] of Footasylum sales vs. [X]% for JD Sports)

- (108) The category of “other” brands is diverse, but does not capture the apparel sweet spots of either Footasylum (own label or bedroom) or JD Sports (sports heritage). This category includes the resale of various fashion brands some of which are “pure” fashion and some may loosely be described as “athleisure” but in any event the brands themselves do not typically have the sports-heritage set out above.
- (109) This category is a mix of brand-level overlap and lack of overlap between the Parties. Examples of such “other” brands that Footasylum sells that JD Sports (under the JD Sports brand fascia) does not include high end global fashion brands such as *Dolce & Gabbana* or UK fashion labels such as *Ted Baker*.
- (110) Moreover, within brands, the brand owners at the level of labels within the brand family in appropriate cases distinguish between JD Sports' sports heritage brand association and Footasylum's fashion association.
- (111) Irrespective of whether a given “other” brand overlaps or does not overlap between the Parties, within this category, the diverse competitor set for this diverse category includes the mono-brand retailers themselves (invariably online and depending on the brand also with store networks in key UK cities), multichannel retailers such as the major department stores, and pure play online retailers such as ASOS, Zalando, Farfetch, Net-a-Porter/Mr. Porter, and so forth. The Parties are far from being able meaningfully to be characterised as close competitors for the resale of any of these brands individually or in aggregate.

VI. Multichannel: online vs. in-store

- (112) While the case for clearance does not rest on a multichannel-defined market, on balance, the Parties suggest that conducting the analysis of constraints on the Parties' PQRS across their store networks within a more inclusive, wider market including online is less prone to missing the “wood for the trees” in terms of multichannel interaction and the customer journey.
- (113) While the alternative option of an in store only lens is also a possible route to frame the assessment, there are more steps involved in, first, excluding online constraints from the store market, despite first accounting for over [X]% of online sportswear sales⁴⁷ and given the hybrid nature of many sales (e.g. click and collect, kiosk in-store made online sales, returns in store of online purchased product), and then, secondly, attempting to correct for the problem of total exclusion by treating online as an out-of-market constraint and trying to calibrate it.

A. Internal JD Sports evidence about the threat and actual switching of sales from stores to online

- (114) In grappling with whether online or store sales are complements or substitutes (or in theory, cater to quite different customer groups), the textbook question is one of evidence of switching sales, notably evidence of substitution or “cannibalisation” of sales from store to online within JD Sports' own multichannel

⁴⁷ Phase 1 Decision, Paragraph 49.

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environment. In terms of customer groups, the core digitally-inspired Instagram generation of 16-24 year-old demographic does not lend itself to a hypothesis of separate customers for separate channels: the demographic is the epitome of “multichannel blur”. As far as the issue of competition between online and in-store for this demographic is concerned, illustrative evidence of the clear threat of, or actual, substitution, includes the following:

- **Internal threat assessment documents from pure play operators.** First, in qualitative terms in internal analysis such as its “[X]”. A multichannel operator still weighted in sales towards stores worrying about the threat of pure play operators is evidence of an ordinary course of business belief that stores sales will be lost to pure play online.
- **Gift card redemption:** substitution from stores to online. In more quantitative terms, a very recent example is that of JD Sports’ gift cards. These gift cards come in two formats: a physical gift card (which can now be redeemed online as well as in-store⁴⁸ and an e-gift card that is digital and can be sent electronically and instantly (but only redeemable for online purchases).

(115) Until 13 February 2019, physical gift cards could only be redeemed in-store and there was no e-gift card. Apart from needing to make technical changes to enable the redemption of gift cards online, JD Sports had some concern about cannibalisation and loss of footfall in-store if gift cards were also redeemable online.

(116) However, from 13 February 2019 JD Sports enabled the relevant webstore functionality as regards its physical gift card and introduced a separate e-gift card solely for online purchases due to the weight of adverse customer comments to the effect of: what good is a gift card if it can’t also be used online? (This timing was chosen to avoid Christmas, which is traditionally JD Sports’ second busiest online shopping day.) Accordingly, the concern of losing gift card sales entirely (i.e. to external rivals) outweighed the concern of cannibalisation of internal sales, i.e. loss of footfall/store sales to online.

(117) Since its introduction on 13 February 2019, the share of online gift card redemptions amounts to [X]% of total redemptions by value ([X]).⁴⁹ In addition, the online usage rate is increasing and is currently tracking at around [X]%.

(118) The evidence indicates that these online redemptions are by customers who would have previously redeemed in-store. There has been a [X].

B. Non-price factors: the online threat spurs non-price investment to prolong the continued relevance and successful differentiation of the in-store experience

1. Some fair questions about store-based vs. digital retailing

(119) Beyond this evidence, which was not part of the site visit, some fair questions arose. In effect, the thrust of such questions are: if online is so fast-growing, cheaper to operate (no high street/shopping centre rent to pay landlords, less capex, fewer staff etc.) and such a substitute for in-store visits, then:

Question 1: Why do "digitally native" consumers still visit stores rather than migrate fully online (and hence why is in-store still the Parties' main channel)?

Question 2: Looking forward, given DTC and general online growth, why do the Parties and their multichannel rivals continue to invest in store refurbishment or elevation, and/or add new stores to their network?

⁴⁸ The statement on JD’s website that the physical gift card can only be used in-store is incorrect.

⁴⁹ The e-gift card accounted for only [X]% of all gift card sales over this period, reflecting no doubt the greater appeal of physical gift cards as they can be used both in-store and online.

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- (120) The answers to the above are not, of course, because stores do offer or could afford to offer cheaper prices. As is clear from the RFI responses, stores are never cheaper, across the piece, than online channels. This would not make any sense, not least as operating stores as a channel is more expensive per unit sold than online. Further consideration on the price constraint from online are set out in the next section.

2. Answers

- (121) The answer to the above lies in non-price factors but has two elements.

Answer pt. 1: "Relevance": stores can survive, and even thrive, with continual investment in store experience to make it worth the journey, and differentiate themselves sufficiently to trump or at least seek to offer other benefits to the convenience and efficiency of online

- (122) The answer lies in the trade-offs between in-store and online. A trip to a store cannot ever outdo using a mobile app in sheer transaction time efficiency. Conversely, a store visit can offer a tactile experience: handling individual SKUs and trying them to see how they look or fit.
- (123) That said, this is less relevant e.g. for Nike and adidas as the brands make sure to make sizes consistent, not least given their own interest in DTC online and minimising wrong-size returns. In JD Sports' experience, brand-loyal 16-24 year olds often know their Nike or adidas size, and for residual wrong-size issues, online has made the returns process as painless as possible. While digital can never be a 100% direct substitute for the overall experience provided in store the digital channel is on the march to compensate: (i) technology innovation especially for apps is directed at making the browsing experience as vivid and 3D/immersive as is possible on a mobile/desktop screen as "virtual fitting rooms" (ii) the prevalence of free returns and the ability to return or exchange products in-store; and (iii) [X].
- (124) These basic points of difference between online and store are not in dispute, nor are the ways in which each channel has over time compensated for its relative efficiency or experiential disadvantages – but they are not the end of the analysis on market definition; they are the start.
- (125) At their best, stores can compete with online channels by offering more than the tactile element. In doing so, they must strive to provide a better offering than online channels, which they can do by offering differentiation. Done well, a store will offer a good physical retail experience: a store should feel "nice" and be a "good environment" to browse in, suitably lit, with product appealingly presented, uncluttered and well laid out. If the store ambience is appealing, store visits can be part of a social occasion to meet friends and go shopping and/or grab food before or after. Just because such consumers spend a lot of time online does not mean they always want to be at a desktop or looking at a mobile phone screen. This is in part why JD Sports' visual merchandise team devote so much time to presenting stores in a way that is as attractive as possible to consumers.
- (126) However, stores will only succeed in overcoming the efficiency disadvantage if the differentiation is sufficiently compelling – and that is where online as a source of competitive pressure (i.e. a constraint on worsening of the non-price offer) arises. The JD Sports store visit in particular on the high street/in the shopping centre still has to be relevant and "worth it" in terms of spending the additional time required for a store visit. In JD Sports' view, its stores must offer and maintain through forward investment a more premium experience that online can never offer in order to be worth consumers' time and effort in terms of convenience (and shopping feel-good factor) to make the trip and visit the store. This applies to opening hours, as well as the occasional in-store promotional event e.g. Anthony Joshua visiting the Oxford Street store, DJs or other atmospheric.
- (127) This is competition by differentiation. Competition by differentiation between e-commerce and store commerce is not different as a species to the competition within the in-store channel between differentiated retailers.

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- (128) The overall decline of the high street, however, also tells a story. If stores are crowded, or run-down, dilapidated, poorly-lit, never have a customer's size, have staff that are rude or too few in number, have long waiting times, or in some other way let the ambience or overall non-price retail experience worsen, then the textbook issue of "cannibalisation" by online of store sales, or substitution from store to online, would accelerate with rapid speed. Then the question for footwear really would be: why waste time visiting an unpleasant or merely "ok" or "average" store for a trainer when you can much more efficiently buy it online?
- (129) What this means, in summary, is that while online is an immediate price constraint, explained further below, it is also perhaps a powerful constraint on the worsening of the non-price store offer. If store standards slip, accelerated cannibalisation and migration to online will occur. But having a strong retail format with very high and consistent standards is a recipe to mitigate the degree of online substitution, at least for the near future. In this manner, the threat of online substitution serves to spur JD Sports to invest in its stores, including making them more convenient and efficient in turn-around times (stock availability, waiting times etc.) so as to narrow the disadvantages and maximise the advantages relative to online as consumers weigh the pros and cons of each through their spending behaviour going forward.

Answer pt. 2: Many consumers value having both channels pure play

- (130) A second aspect is not that a distinct group of consumers want only online, and a distinct group only want in-store: many value having both channels, though as noted at the site visit, the journey very largely starts online, even for store transactions. For example, many like being able to research online first (which may very well be on mobile or on the go, rather than a desktop search at home) to prepare for a later store visit; conversely, they may browse in a JD Sports store as a 'showroom for the brands' without purchasing on the spot, but then buy online later potentially with another retailer.
- (131) However, it is incorrect to assume that the channels must be wholly complementary (and not at all substitutes) if many consumers want/use them both. Many customers in principle like both channels, but the share of spend tilts over time more towards online: online is growing for all players, while the market is growing, and stores sales are relatively flat. This is indicated by the gift cards example above, and while JD Sports does not have exhaustive data to prove direct substitution beyond all doubt,⁵⁰ the strong inference from macro trends (for example, the observation that footfall in JD Sports stores [X] % last year) is that it must be occurring. Moreover, the heavily online-centric DTC strategies of Nike and adidas demonstrate that the brands are not worried about the relative paucity of their store networks outside key cities and know that DTC growth will take share from the wholesale (bricks and mortar) channel too.
- (132) Further, consumers do not need every credible retailer to be multichannel: pure play online retailers such as ASOS and Zalando effectively free-ride from having JD Sports stores, among others, in 300+ locations as showrooms on the high street or in shopping centres.
- (133) As explained at the site visit, [X] JD Sports judges it is worth investing to be part of this group. Failure to invest would mean it would not be part of the group. [X]. Thus, by investing in its omni-channel offer, JD Sports prolongs its relevance at the retail level. As also explained at the site visit, *beyond* the medium term, it is uncertain whether even a smaller group of larger and more heavily-invested retailers will have a secure future given the risk of large scale or complete disintermediation by the brands (i.e. the brands start to cut out existing retailers and sell products directly to consumers).

⁵⁰ From 7 June to 23 July 2019 JD Sports recently ran a Cardlytics promotion whereby customers could sign up to receive cashback on JD Sports' purchase both instore and online. The promotion was sent out entirely via email yet [X] % of customer chose to redeem the cashback instore. JD Sports considers that this demonstrates the extent to which consumers journeys begin online and end instore.

PART A – MARKET DEFINITION, COMPETITOR SET AND DIFFERENTIATION

C. Pricing: how online is as close and immediate a competitive constraint on store pricing as other store competitors such that price competition truly is multichannel

- (134) Online as a pricing constraint on a retailer's stores is no less intense than the constraint of other store retailers as a pricing constraint: with mobile smartphones attached to users, competition is in the consumer's hand at all times. In fact, consumer price comparison between physical stores is far more efficiently achieved through online comparison on the mobile (which is how it is typically done), rather than shuffling back and forth between two stores. The reasons for this are as follows.
- **Digitally native customers.** The "digitally native" social, search and shopping behaviour of the main 16-24 demographic, who typically carry and use a mobile smartphone with internet search functionality during all high street or shopping centre visits.
 - **Researched and high-value purchase.** The fact that for footwear at least, the product is a high-value and sometimes luxury purchase explains the degree of customer research and comparison online *before* (and the option of also doing *during*) a store visit with "all our competitors in our customers' pocket" as JD Sports puts it. Accordingly, these are not purchases driven by store visit habit and any infra-marginal consumers who do act on spontaneity in-store will be protected by the large majority that shop around online first (and will also be protected by dissemination of information about cheaper prices discovered by consumers who do search online).
 - **Product homogeneity across all retailers/channels, once the chosen SKU is identified.** The homogeneity of the product once chosen (i.e. a Nike Air Max 97 triple-black is the same regardless of channel or retailer) makes price transparency a perfect tool, without having to weigh issues of differentiation (price/quality trade-offs). This is particularly important as many customers will know which product they want to buy before they go into a store or on to a retailer's website or app.
 - **Known/standardised sizes.** Consumers come to know their sizes in Nike and adidas, making it easier to make repeat purchases online without trying on.
 - **Perfect consistency by all rivals of online and store prices.** The above work in tandem with perfect consistency and coherence of online and store pricing by all retailers.

VII. Multi-brand vs. mono-brand retailers

- (135) The Phase 1 Decision appears to suggest that the provision of a "multi-brand, multichannel environment" may be a relevant factor in the assessment of the closeness of competition between the Parties.
- (136) The issue of multichannel has been addressed above and will be discussed further in relation to the brands' DTC strategies in Part B below. As far as the fact that both Parties are multi-brand is concerned, the implications for the unilateral effects assessment are as follows.
- (137) First, on footwear, the key point is that multi-brand competition facing each Party is logically the sum of mono-brand DTC competition and multi-brand competitors: for JD Sports, a lost sale to Nike.com is no different than a lost sale to Footasylum, or Foot Locker or Sports Direct.
- (138) Secondly, multi-brand in footwear pretty much means "two brands", not 20 or 200. Nike and adidas account for around [X]% of the Parties' footwear sales and consumers made [X]million searches for Nike or adidas in the last year⁵¹; they did not limit themselves to "Nike, but not sold by Nike itself", or "adidas Stan Smith, but not sold by adidas.co.uk". By comparison only [X]million searches were made for JD Sports and [X] million searches for Footasylum during the same period. Similarly, there were [X] million searches for Sports Direct, [X]million for ASOS and [X]million for Next. When DTC is growing at 30% annually and Nike.com is the top of the Google search results for Nike, the idea of down-weighting

⁵¹ Google analytics June 2018 – 2019.

PART A – MARKET DEFINITION, COMPETITOR SET AND DIFFERENTIATION

Nike or excluding it from the frame of "Nike sold by multi-brand retailers only" becomes untenable (see further discussion at paragraph (63)). If the CMA becomes comfortable that there is no SLC in the resale of Nike footwear, nor in adidas footwear (and similar for other brands) then there can be no vague and residual risk of SLC that is the sum of the parts (the individual footwear brands).

- (139) Thirdly, on apparel, once the differentiation of the Parties is properly understood, the "multi-brand" label is a moot point that does not add to the analysis: the Parties are skewed towards different multi-brand representation.
- (140) Fourthly as far as [REDACTED].
- (141) Fifthly, the average basket size for each Party is [REDACTED] so there is no meaningful multi-brand basket competition as might apply in a grocery Merger.
- (142) Sixthly, as far as the non-price retail store experience goes, the broader environments in which the Parties operate are inherently multi-brand. Customers shopping in one of the Parties' stores on a high street or in a shopping centre (or shopping in a Nike or adidas store) have ready access to a range of other stores offering a range of brands. The entire essence of a shopping centre is a multi-brand store environment under one roof (or along one or two high street/main shopping malls). Additionally, the internet is by its very nature a multi-brand environment for online shoppers.
- (143) For these reasons, it is not meaningful to exclude mono-brand retailers from a multi-brand candidate market definition, competitor set or "closeness" analysis. In fact, the term mono-brand retailers has connotations of a "limitation" ("mono" is lesser than "multi") but does not do justice to the fact that by this term is meant both (i) a direct retail competitor to the Parties and (ii) the only source of supply for the brand in question. These themes, and the horizontal and vertical constraints that apply to the Parties as a consequence, are explored in more detail in Part B below.

VIII. Geographic market

- (144) For the reasons set out in Part B below, competition among JD Sports, Footasylum and their rivals is predominantly a matter of setting competitive variables for:
- their respective webstores on a uniform UK-wide or "national" or "central" basis; and
 - as a consequence, their respective store networks centrally, with respect to price, in line with their webstores, with respect to non-price aspects of the store retail offer, centrally across the store network. For this, the shorthand "national" can be used interchangeably with "UK- or GB-wide" or "centrally-set, uniformly-applied".
- (145) Consistent with this approach, around [REDACTED]% of advertising by JD Sports was national in 2018.⁵²
- (146) An area-by-area competitive assessment would be useful and add material value if the "PQRS" retail offer of a given store were set by store managers individually (at their discretion). However, while there are of course local variations across stores, for both Parties, all significant decisions that affect the PQRS of local stores are set centrally pursuant to national strategies set at headquarters.
- (147) [REDACTED]
- (148) The issue of local proximity between Footasylum's stores and one or more of JD Sports' nationwide network of stores is covered in Part D below.

⁵² JD Sports Media spend split CMA OCT 19 VS (Annex 444).

PART B - THE MERGER HAS NO IMPACT ON BRANDS' DTC AND VERTICAL CONSTRAINTS THAT IN TANDEM DISCIPLINE THE PARTIES' RETAIL OFFER

Global brands have a decisive role in shaping competition at the retail level

As the CMA is aware, "sports-inspired" footwear and apparel retailing in the UK consists in large part of reselling Nike and adidas products in particular, and other global brands (such as Puma, The North Face, Vans), under selective distribution systems applied to the EMEA region/UK. Brand concentration among "sports-inspired" brands is highest in sports footwear (with Nike and adidas representing "must have" products which account for a significant majority of the total sales of both Parties); however it is also an important consideration in apparel.

The Issues Statement does not engage with the pivotal role of the brands in constraining the ability of JD Sports to worsen PQRS post-Merger. The competitive dynamics in this sector are very different from many other sectors in the retail space; Nike and adidas (and other brands) are not mere vertical "wholesalers" of products, they are also significant horizontal competitors underpinned by aggressive strategies to grow their DTC sales and have substantial influence over the PQRS of those retailers who they choose to supply as part of their selective distribution networks.⁵³ The constraint that the brands impose is therefore not properly captured in a static analysis.

The presence of Nike and adidas will constrain the ability of JD Sports to worsen PQRS at the retail level post-Merger for the following reasons:

- (a) Nike and adidas are owners of two "must-stock" brands with significant marketing spend to cultivate consumer brand loyalty and preferences for their franchises and products (Section I).
- (b) For reasons of enhanced profit margins, customer relationships (including data) and demand trends, they aggressively promote DTC, which Nike terms its "Consumer Direct Offence". They are consequently the fastest growing e-commerce retail players for their own Nike and adidas-branded goods, and pose a substantial disintermediation threat to the reseller channel which becomes proportionately less important to reach customers, to earn margin, and to gain insights on sales/demand. Not only will Nike and adidas compete more directly with JD Sports at the retail level, but the reduced importance of the brands' "wholesale" or "retail partner" channel will also reinforce the dependence of retail partners, even strategic ones such as JD Sports, on the brands (Section II).
- (c) Nike and adidas are the only source of wholesale supply. As they are entitled to do, like any selective distribution system, they determine the competitor set of authorised resellers in the UK. They determine quantity. They determine product range by retailer – of "who gets what and how much" in terms of Nike's or adidas' branded allocation to retailers. They set SRP (and apply these in their own DTC sales). On non-price aspects of retail partners' store offers, they also have substantial formal or informal influence over other aspects of JD Sports', Footasylum's (and other resellers') non-price offer (Section III).
- (d) The Merger will have no impact on these dynamics – Nike and adidas will continue to exercise tight practical control over JD Sports' resale activity. JD Sports will therefore be unable to worsen its competitive offering post-Merger given the risk that the brands would then reduce access to their products (Section IV).
- (e) Given that the brands' determining role in the supply available to retailers, they can and do have a pivotal role in sponsoring new entry and expansion and have done so in many territories; the key issue for all sports-inspired footwear retailers is whether Nike and adidas want them to thrive (Section V).

⁵³ Pan Kwan Yuk, "Nike tops forecasts as direct-to-consumer strategy pays off", *Financial Times*, 20 December 2018 < <https://www.ft.com/content/855491a6-0495-11e9-9d01-cd4d49afbbe3> > and "How ecommerce became adidas's most important channel", 3 May 2019 < <https://www.marketingweek.com/ecommerce-adidas-most-important-channel/> > both accessed 12 November 2019.

PART B – CONSTRAINT IMPOSED BY THE BRANDS

I. Nike and adidas are must-stock brands for sports inspired retailers

A. Nike and adidas invest to maintain strong consumer preferences for their respective brands.

- (149) Nike is one of the world's most recognised brands, ranking 14th in Forbes' list of the World's Most Valuable Brands.⁵⁴ In 2018/19 Nike's global revenues were \$39 billion and Nike spent almost \$3.8 billion on advertising.⁵⁵ Similarly, adidas is currently ranked 61st in the Forbes' list,⁵⁶ with revenues of \$25.8 billion and total advertising spend of over \$3 billion in 2018.⁵⁷ Forbes estimates that Nike's and adidas' brand equity with consumers is worth \$48 billion globally.⁵⁸ Nike and adidas spend more on advertising than the global revenue of JD Sports and Nike's budget alone is over ten times that of Footasylum's total revenues. By contrast, JD Sports' advertising spend for 2018 was £[REDACTED]⁵⁹ and Footasylum's advertising spend for FY 2019 (covering the majority of calendar year 2018) was [REDACTED].
- (150) The top brands thus invest huge amounts in global/UK advertising spend to foster consumer brand loyalty and preferences for their products and consequently brand equity. As discussed in further detail below, Nike, adidas and other brands continually invest in developing consumer brand equity through advertising and promotional partnerships with sports, music and other celebrities.

B. Nike and adidas have programmes of “demand creation” (via icons, franchises, celebrity partnerships) fuelled by the Nike v adidas “arms race”.

- (151) Nike and adidas have both experienced significant growth in popularity in recent years, driven by strategic collaboration with athletes and non-sports celebrities and their rationalisation of styles and careful allocation of products. Both Nike and adidas have experienced consistent revenue growth in recent years, with Nike's revenue growing from \$30.6 billion in 2015⁶⁰ to \$39.1 billion in 2019⁶¹ and adidas increasing from EUR16.9 billion in 2015⁶² to EUR21.9 billion in 2019.⁶³
- (152) Sports sponsorship has been a core strategy for both Nike and adidas and collaborating with athletes has allowed both brands to showcase their sports credentials. For example, in its letter to shareholders in July 2019, Nike highlighted its collaboration with elite athletes such as Alex Morgan and Megan Rapinoe (US women's football world cup); Eliud Kipchoge (marathon running); Simone Biles (gymnastics); Sue Bird (basketball); Rafael Nadal (tennis); and Tiger Woods (golf).⁶⁴ Nike has adopted a similar approach to sports teams and recently signed a sponsorship deal with Liverpool at the expense of New Balance.⁶⁵ Similarly, in adidas' 2018 shareholder letter, Kasper Rørsted emphasised adidas'

⁵⁴ "The world's most valuable brands", *Forbes* < <https://www.forbes.com/powerful-brands/list/#tab:rank> > accessed 12 November 2019.

⁵⁵ "Revenues" and "Demand creation expense" in Nike's 2019 Form 10-K, p.94 < https://s1.q4cdn.com/806093406/files/doc_financials/2019/annual/nike-2019-form-10K.pdf > accessed 12 November 2019.

⁵⁶ "The world's most valuable brands", *Forbes* < <https://www.forbes.com/powerful-brands/list/> > accessed 12 November 2019.

⁵⁷ The figure of \$25.8 billion was calculated by taking the "net sales" of €21,915 million as reported in adidas'2018 Annual Report (p.4) and converting this using the annual average ECB exchange rate for 2018. The figure of over \$3 billion was calculated by taking the "marketing and point-of-sale expenses" figure of €3,001 million from adidas'2018 Annual Report (p.150) and converting it using the same ECB rate for 2018. adidas'2018 Annual Report can be found here: < https://report.adidas-group.com/fileadmin/user_upload/adidas_Annual_Report_GB-2018-EN.pdf >.

⁵⁸ "The world's most valuable brands", *Forbes* < <https://www.forbes.com/powerful-brands/list/> > accessed 12 November 2019.

⁵⁹ JD Sports Media spend split CMA OCT 19 VS (Annex 444).

⁶⁰ "Revenues", Nike 2019 Form 10-K, page 107.

⁶¹ "Revenues", Nike 2019 Form 10-K, page 94.

⁶² "Net sales", adidas 2015 Annual Report, page 184 < https://www.adidas-group.com/media/filer_public/e9/73/e973acf3-f889-43e5-b3c0-bc870d53b964/2015_gb_en.pdf > accessed 12 November 2019.

⁶³ "Net sales", adidas 2018 Annual Report, page 4.

⁶⁴ Mark Parker, Nike, Letter to Shareholders, 23 July 2019 < https://s1.q4cdn.com/806093406/files/doc_financials/2019/annual/nike-shareholders-letter-2019.pdf > accessed 12 November 2019.

⁶⁵ <https://ftalphaville.ft.com/2019/11/08/1573237244000/How-big-a-deal-is-Liverpool-s-switch-to-Nike/>.

PART B – CONSTRAINT IMPOSED BY THE BRANDS

profile as “the most influential brand at the [Football] World Cup’ with a total of 147 million video views and a 24% engagement rate.”⁶⁶

- (153) However, partnerships with non-sports celebrity partnerships and ambassador deals have also helped both brands' desirability, to make them appear more fashionable and trend-led. This is particularly true of adidas, which has adopted a marketing approach focused on collaborations with music and celebrity influencers to capitalise on the athleisure trend. In 2014, adidas partnered with Kanye West to launch the adidas-branded Yeezy trainer in February 2015, with sales of Yeezy apparel and footwear expected to generate \$1.3 billion in 2019.⁶⁷ Similarly, adidas has recently teamed up with Beyoncé, while its "Open Source" programme has also led to creative collaborations with Pharrell Williams (music producer), Victoria Beckham and Stella McCartney.⁶⁸ Nike also views creative collaborations as central to its product innovation work with respect to both footwear and apparel, and has partnered with a range of fashion designers, streetwear brands and celebrities in recent years. These include, inter alia, its partnership with the streetwear brand Supreme; ongoing collaboration with Off-White founder and Louis Vuitton designer Virgil Abloh and its recent partnership with US rapper Travis Scott.
- (154) As explained in further detail below, the brands exercise tight control over the allocation of their products to manage consumer demand and bolster the desirability of their products. Controlling, and indeed limiting, access to products has played a key role in fostering desirability. Nike and adidas will often manufacture a limited number of products for a particular “franchise”⁶⁹, intentionally failing to satisfy demand, and thereby promoting a product's scarcity value. For example, if it is the anniversary of a piece of footwear's launch then both brands will deliberately limit supply in the preceding quarters (to build customer anticipation and demand) before releasing new versions and colours in the quarter being considered. JD Sports understands that [REDACTED].

C. Nike and adidas are essential suppliers of sports footwear in the UK

- (155) As the CMA acknowledges in the Phase 1 Decision, the [REDACTED] of JD Sports' sales and products come from Nike and adidas. Although Nike is currently in a leading position, both have for some time been absolute must-stock brands in the UK (and other territories) for a sports footwear retailer such as JD Sports.
- (156) The importance of the brand is particularly pivotal in footwear, where (based on YTD 2019 numbers), JD Sports dependent on resale of Nike and adidas products for its commercial viability and success. [REDACTED] brands account for only [REDACTED]% of JD Sports' UK footwear sales, and Nike and adidas together account for [REDACTED]% of footwear sales alone (Nike: [REDACTED]%; adidas: [REDACTED]% (this is of total sales)). However, Nike and adidas also have a strong position in apparel, where: [REDACTED]% of JD Sports' total UK apparel sales are accounted for by Nike and adidas (and circa [REDACTED]% of JD Sports' total branded apparel sales).⁷⁰
- (157) Footasylum's [REDACTED], and from the perspective of Footasylum's customers, these are "must stock" brands. As set out in the [REDACTED]:⁷¹, in 2018 [REDACTED] represented [REDACTED]% of Footasylum's gross sales of footwear and over [REDACTED]% of its gross profit value; and over the three-year period 2016 to 2018, [REDACTED] together represented over [REDACTED]% of Footasylum's gross sales of footwear and over [REDACTED]% of its gross profit value. [REDACTED].

[REDACTED]

⁶⁶ Kasper Rorsted, adidas, Letter to Shareholders, 2018 Annual Report, pages 19-20.

⁶⁷ Laura Holson, "Kanye West's new Yeezy shoes draw comparisons to Crocs and a colander", *The New York Times*, 13 September 2019 < <https://www.nytimes.com/2019/09/13/style/kanye-west-crocs-yeezy.html> > accessed 12 November 2019.

⁶⁸ Kasper Rorsted, adidas, Letter to Shareholders, 2018 Annual Report, page 19.

⁶⁹ In this context the term "franchise" refers to the model or style of trainer, such as the Nike Air Max or adidas Stan Smith.

⁷⁰ JD Apparel sales split by brand for period 01-Oct-18 to 30-Sep-19.

⁷¹ [REDACTED]

PART B – CONSTRAINT IMPOSED BY THE BRANDS

(158) Third-party analysts emphasise that brand is a significant driver of customer purchasing decisions (in particular for younger shoppers) for both sports-inspired footwear and apparel, and that Nike and adidas hold a strong market position. GlobalData notes that branding is important for both sports clothing and sports footwear, with [REDACTED]% of sports clothing shoppers and [REDACTED]% of sports footwear shoppers considering that brand is important (as shown by the [REDACTED]). Moreover, for footwear, GlobalData notes that "[REDACTED]".⁷² Similarly, Berenberg also notes that in sports footwear: "[REDACTED]".⁷³

[REDACTED]

(159) The "must have" nature of the Nike and adidas brands in footwear is supported by the Parties' internal documents, public statements of the Parties' competitors and the brands themselves, which all emphasise the "must have" nature of these products. For example:

- [REDACTED]⁷⁴
- Sports Direct, for example, recently emphasised that Nike and adidas are both "*must-have*" brands with an "*extremely strong bargaining position*" over retailers.⁷⁵
- Nike's president of products and categories, Michael Spillane, said at the company's October 2017 Investor Day presentation: "*We're the largest footwear brand at \$21 billion. We're the largest athletic apparel brand at \$9.6 billion. And in footwear, we hold the #1 market share in all markets and all major categories. It means we can amplify our brand message into a global conversation.*"⁷⁶

(160) The Phase 1 Decision notes that (in dismissing the Parties' arguments with respect to the counterfactual) "*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.*" [REDACTED].⁷⁷

II. Nike and adidas are each aggressively expanding digital e-commerce (DTC) that bypasses and constrains wholesale channel resellers

(161) While the Phase 1 decision recognises that both Nike and adidas are growing their DTC sales, it does not sufficiently take into account the brands' growth potential (as evidenced by recent financial results) and aggressive expansion plans in this respect. Moreover, the Phase 1 Decision cites third-party respondents' evidence 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)*". However the stores do compete and DTC plainly is competition, and other retailers are dependent on the brands.

(162) Conversely, this Section will demonstrate that the strategic threat to wholesalers from the brands' DTC channels is manifested in the observable market conduct of Nike and adidas, the Parties' internal documents and commentary from third-party analysts. The growth of the DTC sales of adidas and Nike (and relative decline in the importance to the brands of their wholesale channels) is expected to strengthen the negotiating position of the brands, in particular with respect to product allocations.

⁷² GlobalData, "The UK Sportswear Market 2018-2023", August 2019 (**Annex 355**), page 49.

⁷³ Berenberg, General Retail, "Sports retail: the game is changing", 9 November 2018 (**Annex 347**), page 14.

⁷⁴ **Annex 1154.**

⁷⁵ Media Statement issued by Sports Direct via RNS, 14 October 2019 < https://www.investegate.co.uk/sports-direct-intl/spd/media-statement/201910141611138273P/?fe=1&utm_source=FE%20Investegate%20Alerts&utm_medium=Email&utm_content=Announcement%20Alert%20Mail&utm_campaign=Sports%20Direct%20Intl.%20Alert > accessed 14 October 2019.

⁷⁶ Pamela Danziger, "Nike's new consumer experience distribution strategy hits the ground running", *Forbes*, 1 December 2018 < <https://www.forbes.com/sites/pamdanziger/2018/12/01/nikes-new-consumer-experience-distribution-strategy-hits-the-ground-running/#3726b4aaf1d0> > accessed 12 November 2019.

⁷⁷ **Annex_1154.**

PART B – CONSTRAINT IMPOSED BY THE BRANDS

Major brands are growing their DTC channel and rationalising their supplier base

- (163) Given that Nike and adidas constitute "*must have*" brands for the reasons noted above, they have always had significant power over their products. Historically, in the UK Nike and adidas products have been distributed primarily through the wholesale channel. However, the brands have recently focused on growing sales in the DTC channel, which has enabled Nike and adidas to expand their relationships with consumers, increase their profitability, and enhance their control over distribution of their products.
- (164) As explained by Berenberg,⁷⁸ there are a number of key reasons for the focus of Nike and adidas on the DTC channels, including:
- [REDACTED].
- (165) As evidenced by the Figure below, the growth in the DTC business of Nike and adidas has been rapid in recent years (and has outpaced the growth of the brands' wholesale business):
- Nike's DTC business has grown at a Compound Annual Growth Rate ("**CAGR**") of more than 20% over the last five years and accounted for 30% of group sales in FY 2018.⁷⁹ Indeed, Nike's DTC strategy is yielding significant success in 2019 with Nike Direct digital commerce sales up by 35% in 2019 alone and Nike's total revenue up 7% to \$9.7 billion.⁸⁰ By the latest quarterly earnings report, digital growth was 42% for Nike.⁸¹
 - adidas' DTC sales have experienced similarly rapid growth and accounted for 30% of group revenues in 2018. On 6 November 2019, adidas announced "*continued double-digit growth in the company's direct-to-consumer business*" in its third quarter results.⁸²
- (166) The drive of Nike and adidas to grow their DTC sales has been underpinned by the launch of loyalty apps (and membership programmes). These apps provide the brands with significant insights into their customers and reduce their dependency on retailers with respect to consumer data. This wealth of customer data enables Nike and adidas to target their marketing spend more effectively through greater personalisation, placing them in an advantaged position compared to other retailers. Nike, for instance, has highlighted that, via its NikePlus App, "*we deliver the exact right product, experience and storytelling – it makes a tremendous difference*"⁸³, with NikePlus members spending four times as much with the brand compared to regular Nike shoppers. Similarly, adidas vice-president of brand activation Roy Gardner stated that the launch of the adidas' Creators Club membership programme in the UK would "*allow us to continually refine our offering and react to what they want to see from us. It's a personalised connection to the best of sport and style with creativity at its heart.*"⁸⁴ Nike and adidas' apps are discussed in further detail below.

⁷⁸ Berenberg, General Retail, "Sports retail: the game is changing", 9 November 2018 (Annex 347), page 15.

⁷⁹ Based on an assessment of Nike and adidas' annual reports for the last five years.

⁸⁰ Investor News Details: Nike, Inc. Reports Fiscal 2019 Fourth Quarter and Full Year Results, Nike 27 June 2019 < <https://investors.nike.com/investors/news-events-and-reports/investor-news/investor-news-details/2019/NIKE-Inc-Reports-Fiscal-2019-Fourth-Quarter-and-Full-Year-Results/default.aspx> > accessed 12 November 2019.

⁸¹ Nike First Quarter FY2020 results earnings call transcript p. 3 (24 September 2019), available at < https://s1.q4cdn.com/806093406/files/doc_financials/2020/Q1/NIKE-Inc.-Q120-OFFICIAL-Transcript-with-QA-FINAL.pdf >.

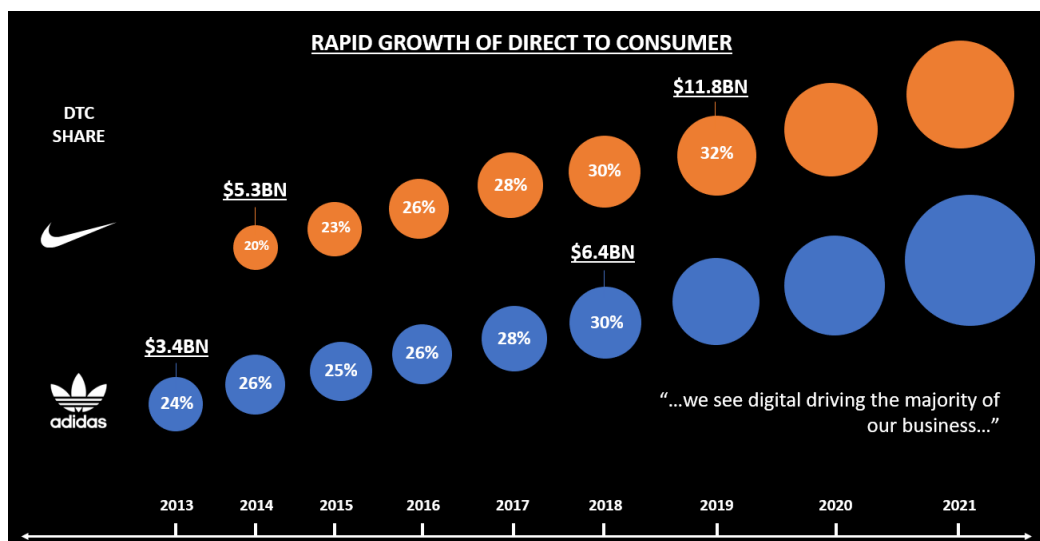
⁸² adidas Q3 2019 press release, 6 November 2019 < <https://www.adidas-group.com/en/media/news-archive/press-releases/2019/adidas-track-another-record-year-full-year-outlook-confirmed/> > accessed 12 November 2019.

⁸³ <https://www.retailwire.com/discussion/segmentation-is-central-to-nikes-success/>.

⁸⁴ <https://www.decisionmarketing.co.uk/news/adidas-opens-uk-loyalty-club-as-springboard-to-europe>.

PART B – CONSTRAINT IMPOSED BY THE BRANDS

Growth in DTC sales of Nike and adidas



1. Nike

(167) Nike has deliberately targeted growth in the DTC channel in recent years, manifested in its "Consumer Direct Offense" strategy, a company-wide strategy which allows Nike to "better serve the consumer personally, at scale".⁸⁵ A core part of this strategy for Nike is to focus on DTC sales, as evidenced by the following initiatives:

- Nike has been investing heavily in improving its online and app offerings. Nike has produced two apps: "Nike" is a general e-commerce portal, while the other, "SNKRS", is Nike's exclusive channel for many of its new launches and product releases and as such is an important part of the company's thriving digital sales. When discussing earnings for the 2019 fiscal year, outgoing CEO Mark Parker announced that SNKRS (which launched in 2015) had acquired more new members than any other digital channel for Nike. Parker noted that SNKRS had "more than doubled its business, doubled its number of monthly active users, and now accounts for roughly 20% of our overall digital business". Nike's digital business grew 35% overall in 2019.⁸⁶ The SNKRS app provides running statistics and other services which are not linked to sales. This gives Nike access to important data which allows them to market and sell products more effectively than wholesalers such as JD Sports.
- Nike sees the link between its digital and in-store strategy as of paramount importance to its DTC offering, with Nike's global head of digital products noting in 2019 that "the way we look at digital and in-store is not channel-by-channel, or one channel helping the other. Instead, we architected the entire notion of why someone with a phone in their pocket would walk into a store."⁸⁷
- Nike has been investing in its flagship stores. In the UK, its Nike Town Oxford Street flagship store is complemented by a Nike store in Westfield White City, a Nike Central store in Pancras Square (King's Cross), a NikeWomen store (Chelsea) and a network of some 35 Nike Factory Outlet or Nike Clearance. In June 2019, Nike's Oxford Street store reopened its women's department with a host of technological features such as Nike's "scan the look" concept (which allows customers to scan a QR code near a mannequin to find the items being displayed).⁸⁸ On

⁸⁵ Nike press release, 15 June 2017 < <https://news.nike.com/news/nike-consumer-direct-offense> > accessed 12 November 2019.

⁸⁶ Marc Bain, "Nike's app for sneakerheads is fuelling its digital business", 28 June 2019 < <https://qz.com/quartz/1655111/nikes-snkrs-app-is-fueling-its-digital-business/> > accessed 1 November 2019.

⁸⁷ Hilary Milnes, "In effort to grow direct sales, Nike integrated its app strategy into its stores", *Digiday*, 26 March 2019 < <https://digiday.com/retail/nike-integrated-app-strategy-stores/> > accessed 12 November 2019.

⁸⁸ Ben Sillitoe, "Niketown London unveils tech-enabled women's department", *Essential Retail*, 5 June 2019 < <https://www.essentialretail.com/news/niketown-unveils-technabled/> > accessed 12 November 2019.

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a global basis, Nike has also developed a new "Nike Live" store concept, a data-driven, small-store format.⁸⁹

(168) Another core component of Nike's strategy has been its decision to rationalise its retail partners.

- In 2017, Nike announced that it would be rationalising its distribution partners to focus primarily on only 40 retail partners globally, with Nike Brand President Trevor Edwards noting that *"undifferentiated, mediocre retail won't survive."*⁹⁰
- In October 2019, Nike appointed John Donahoe as CEO (Chairman of PayPal and former President and CEO of eBay). Given this technology background, this was widely seen as an acceleration of Nike's digital transformation. Moreover, following this announcement, Nike announced that it will *"look to reduce its wholesale arm and end supply arrangements with a number of independent retailers over the next two years"*. In doing so, Nike aims to grow its DTC sales from \$6.6 billion in 2015 to \$16 billion in 2020.⁹¹ Accordingly, Nike intends to work with a reduced set of 40 (larger) differentiated retail partners and *"dr[i]ve an intentional decline in undifferentiated multi-brand wholesale"*.⁹²
- In this context, recent public evidence that this applies specifically to the fortunes of UK retailers is the 13 October 2019 press on *"Nike's killer blow for small stores"*.⁹³ It was reported that Nike had notified many independent retailers that access to its products would end in two years, stating that their way of stocking its goods was *"no longer aligned"* with Nike's distribution strategy.
- In November 2019, Nike announced that it had ended its long-term pilot programme with Amazon. This was reported to be part of Nike's focus on selling DTC and a move which *"has put the likes of Sports Direct and JD Sports on notice in the UK, as well as a number of smaller, independent retailers"*.⁹⁴ Nike shares moved by 2% of the day of this announcement.⁹⁵

2. adidas

(169) Similarly, adidas' strategy is focused on growing its DTC offering, with a strategic aim to derive 60% of sales from channels it controls. This is evidenced by the following initiatives:

- adidas has been developing its digital strategy, with adidas CEO Kasper Rørsted emphasising that *"the most important store we have in the world is.com, period"*. This is reflected in its e-commerce revenue target of EUR4 billion by 2020, up from EUR1.5 billion in 2017, and continued investment in investing in its e-commerce business and logistics.⁹⁶
- Following its successful launch in the US, adidas launched its membership programme, Creators Club, to the UK in June 2019. The aim of the programme is to engage customers and reward them for brand loyalty, as well as for shopping directly with adidas.
- adidas has invested in flagship stores globally, including its London flagship stadium store concept in Westfield in March 2018 (with a focus on experiences such as Adidas Running Club

⁸⁹ < <https://chain-storeage.com/nike-expands-its-local-store-concept> >.

⁹⁰ George Anderson, "Nike turns its back on 'undifferentiated, mediocre' retailers", *Retail Wire*, 26 October 2017 < <https://www.retailwire.com/discussion/nike-turns-its-back-on-undifferentiated-mediocre-retailers/> > accessed 12 November 2019.

⁹¹ Hugh Radojev, "How Nike's new boss will accelerate its digital transition", *Retail Week*, 29 October 2019 < <https://www.retail-week.com/sports-and-leisure/analysis-how-nikes-new-boss-will-accelerate-its-digital-transition/7033322.article> > accessed 4 November 2019.

⁹² Nike Q1 2020 Quarterly Earnings Call Transcript. See further <https://www.forbes.com/sites/pamdanziger/2018/12/01/nikes-new-consumer-experience-distribution-strategy-hits-the-ground-running/#df9964ff1d06>.

⁹³ Sam Chambers, "Nike's killer blow for small stores", *The Times*, 13 October 2019 < <https://www.thetimes.co.uk/article/nikes-killer-blow-for-small-stores-5trqhtxl> > accessed 13 October 2019.

⁹⁴ < <https://www.retail-week.com/fashion/nike-cuts-ties-with-amazon-to-focus-on-direct-to-consumer/7033470.article?authen=1> >.

⁹⁵ <https://www.bizjournals.com/portland/news/2019/11/13/nike-shares-climb-after-split-with-amazon.html>.

⁹⁶ "How ecommerce became adidas's most important channel", *Marketing Week*, 3 May 2019 < <https://www.marketingweek.com/ecommerce-adidas-most-important-channel/> > accessed 12 November 2019.

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and a football goal simulator). On 24 October 2019, adidas launched a (replacement) high tech flagship outlet on Oxford Street in London with over 27,000 sq ft of retail space and new technology such as adidas' "Bring It to Me" feature which allows customers to scan a product, request their size and purchase a product on the spot without the need to queue. The store also houses the largest digital footwear screen in the world.⁹⁷

- adidas has rolled out a more responsive website that displays content specifically tailored to the customer viewing the page, together with an app which, by the end of 2018, was live in 25 countries, with more than seven million downloads.⁹⁸

(170) Press reports have noted that retailers fear that adidas will follow a similar approach to Nike and significantly reduce the number of smaller stores that resell its products.⁹⁹ The view that adidas is likely to prioritise its DTC channel with respect to the supply of premium products is also shared by third-party analysts.¹⁰⁰

3. Other brands are promoting their DTC offerings

(171) A number of other branded retailers have also prioritised growth in the DTC channel in recent years. As GlobalData notes with respect to athleisure products: "[>]."¹⁰¹

(172) This is further evidenced by the following specific examples:

- **Asics** has also been concentrating on new, innovative stores as part of its revised strategic plan. In 2017, it opened six new concept stores across Europe, including one in London (with a focus on technology and features such as a juice bar and DJ booth).¹⁰²
- **Puma** in February 2019 announced that "*our direct-to-consumer business has been able to grow through expansion of our retail store network, like-for like sales growth in our existing stores and the continued strong growth of our eCommerce business*".¹⁰³ Puma recently reopened its UK flagship store on Carnaby Street, London, based on the brand's new "Forever Faster" positioning, which aims to emphasise its collaborations with well-known designers and streetwear labels.
- **Under Armour** at the end of 2018 launched a new five-year plan, which targeted DTC as one of the "largest long-term growth opportunities", alongside international, women's, and footwear. Under Armour therefore planned to invest more in premium stores that carry full-price product, undertake more exclusive product drops online and in-stores, and invest more in personalisation.¹⁰⁴

4. The growth of brands' DTC sales poses a substantial disintermediation threat for retailers

(173) The growth of the brands' DTC businesses exerts a key competitive threat on the Parties' businesses. Not only is the promotion of the brands' DTC channels intensifying horizontal retail competition for JD Sports (and its competitors), but the relative growth of their DTC sales is expected to give Nike and adidas

⁹⁷ Jonathan Prynne and Lizzie Edmonds, "Adidas unveils new high-tech Oxford Street flagship store", *Evening Standard*, 24 October 2019 < <https://www.standard.co.uk/fashion/adidas-flagship-oxford-street-high-tech-a4270056.html> > accessed 12 November 2019.

⁹⁸ Annual Report 2018, adidas, page 66.

⁹⁹ Sam Chambers, "Nike's killer blow for small stores", *The Times*, 13 October 2019 < <https://www.thetimes.co.uk/article/nikes-killer-blow-for-small-stores-5trqhtxl> > accessed 13 October 2019.

¹⁰⁰ See the annex named "Note re adidas DTC (Morgan Stanley) 4 December 2018" submitted by Addleshaw Goddard in response to Question 1 of the Phase 2 s.109 dated 1 October 2019.

¹⁰¹ GlobalData, "Global Athleisure Market 2018-2023", August 2019(Annex 355), page 50.

¹⁰² Arc, 23 April 2018 < <https://www.arc-magazine.com/asics-uk/> > accessed 12 November 2019.

¹⁰³ Puma Delivers Strong Growth in Sales and Profitability in 2018, *Puma*, 14 February 2019 < <https://about.puma.com/en/newsroom/corporate-news/2019/2019-02-14-puma-full-year-and-q4-2018-results> > accessed 12 November 2019.

¹⁰⁴ Anna Hensel, "Under Armour's direct-to-consumer business is declining", *Digiday*, 3 May 2019 < <https://digiday.com/retail/armours-direct-consumer-decline/> > accessed 12 November 2019.

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enhanced bargaining power and incentives to reserve supply of premium and/or exclusive products for their DTC channels.¹⁰⁵

- (174) The CMA acknowledges in the Phase 1 decision that both JD Sports and Footasylum "[REDACTED]." There is also clear evidence in the Parties' internal documents that [REDACTED].
- (175) [REDACTED]¹⁰⁶[REDACTED]¹⁰⁷
- (176) As explained at the site visit, and consistent with the brands' statements referred to above, JD Sports strongly disagrees with the suggestion in the Phase 1 Decision that the brands are not incentivised to compete with their retail partners. Rather, [REDACTED].
- (177) As shown on the site visit, JD Sports offers connected inventory whereby customers are able to purchase products directly from Nike and adidas via a retailer's website in instances where the retailer doesn't have that product in stock, with Nike and adidas using the Anatwine technology (which is part-owned by Zalando). [REDACTED] Thus, even for sales made in JD Sports' stores or on its website, there is a substantial risk of progressive value transfer to the brands.
- (178) Third-party analysts also believe that the global brands' disintermediation strategies pose a threat to retailers, even if differentiated retailers (such as JD Sports) are unlikely to see their supply of Nike and adidas products discontinued entirely in the short to medium term. Berenberg notes that it considers that the [REDACTED].¹⁰⁸
- (179) Similarly, an analyst report produced by Morgan Stanley in December 2018 noted that "[REDACTED]" and that "[REDACTED]."¹⁰⁹
- (180) The Parties have seen some evidence that this is already happening in practice. [REDACTED]
- (181) Finally, the competitive threat from the brands' DTC strategies has also been reflected in share price movements. For instance, the announcement of Nike's "Consumer Direct Offense" strategy in 2017 had a marked impact on the share price of JD Sports, as shown by the figure below. This is not unique to JD Sports; for example, shares in Foot Locker fell 28% following its earnings report in August 2017 – which was widely reported to be a reaction to the DTC strategies of Nike and adidas.¹¹⁰

Impact of Nike's DTC announcement on JD Sports' share price

[REDACTED]

III. Branded suppliers exercise tight control over PQRS of UK sports-inspired retailers

A. Branded suppliers determine the degree and mix of product allocation to resellers to shape the wholesale channel

- (182) Paragraph 7 of the Phase 1 Decision notes that players in the sports fashion space compete by "*carefully selecting the range of brands that they offer*". This implies that the Parties (and their competitors) have the ability to determine the range of brands that they offer. This statement underestimates the brands'

¹⁰⁵ See the annex named "Note re adidas DTC (Morgan Stanley) 4 December 2018" submitted by Addleshaw Goddard in response to Question 1 of the Phase 2 s.109 dated 1 October 2019.

¹⁰⁶ **Annex 1154.**

¹⁰⁷ JD Sports Board Minutes, dated 23 January 2018, **Annex 491.**

¹⁰⁸ Berenberg, General Retail, "Sports retail: the game is changing", 9 November 2018 (**Annex 347**), page 20.

¹⁰⁹ See the annex named "Note re adidas DTC (Morgan Stanley) 4 December 2018" submitted by Addleshaw Goddard in response to Question 1 of the Phase 2 s.109 dated 1 October 2019.

¹¹⁰ Tonya Garcia, "Foot Locker shares plunge 28% as brands like Nike and adidas go direct-to-consumer", *Market Watch*, 21 August 2017 < <https://www.marketwatch.com/story/foot-locker-shares-plunge-26-as-brands-like-nike-and-adidas-go-direct-to-consumer-2017-08-18> > accessed 12 November 2019.

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ability to dictate the products that sports fashion retailers stock in their stores. This position has been acknowledged by other retailers such as Sports Direct, who noted in a recent public statement that a number of must-have brands, including Nike and adidas, hold an "extremely strong bargaining position" over retailers and implement "market-wide practices aimed at controlling the supply and, ultimately, the pricing of their products".

- (183) The Parties consider that the tightly-controlled tiering systems operated by the brands grant the brands ultimate discretion over the products that third-party retailers are able to sell (including the exclusives that they offer) and the volumes that they are allocated. This practice is not just restricted to Nike and adidas, with other retailers such as Puma, Under Amour and fashion brands (Dr Martens and others) also restricting the products that retailers are able to access.

1. The brands' tiering system dictates the products retailers can access

- (184) A key feature of the selective distribution systems operated by the brands is the control that the brands retain over the products that they make available to their retail partners, which is referred to the industry as "product allocation".
- (185) For example, for both footwear and apparel, Nike, adidas and other retailers segment their retail partners into distinct tiers. JD Sports and Footasylum's current understanding of their position within the current rankings is as follows.

[REDACTED]

- (186) Due to the high-quality homogeneity of the fit of JD Sports' stores, all JD Sports stores are ranked in the same category and to the best of its knowledge the same is true, for example, of Foot Locker, another strategic partner of Nike with a large international presence including a UK store network.
- (187) Nike and adidas' selective distribution systems are a key component of their demand creation strategies. JD Sports' view of the brands' tiering system is that [REDACTED].
- (188) Footasylum's view of the tiering system is similar (although Footasylum [REDACTED]).
- (189) Each stage of this process is carefully choreographed by the brands, and retailers are only given access to the products allocated to their tier. These are presented in bespoke catalogues that list the products that are available for the recipient retailer to purchase. The catalogues frequently list SRPs and, in some instances, the maximum volumes available to purchase. This tightly-controlled distribution system has the following key implications, in particular for footwear:

- **Lower ranked retailers are not given access to products allocated to higher tiers:** This can mean that retailers are unable to access particularly desirable products for that season. For example, Sports Direct's recent public statements have noted that the brands have "[refused] to supply key products [to Sports Direct]... with no apparent justification".¹¹¹ In particular, Sports Direct have complained about their lack of access to adidas originals, one of the Parties' bestselling products.¹¹² Similarly, and as noted above, both Nike and adidas have begun to restrict (or in some cases remove) the range available to smaller retailers who do not provide sufficient scale to warrant a place in the lower tiers or sufficient exclusivity to earn a place in the top tiers. Retailers in the medium tiers, such as JD Sports, are also unable to access the most exclusive products with the highest customer demand and anticipation (for example the Nike and Off White collaboration).

¹¹¹ Media Statement issued by Sports Direct via RNS, 14 October 2019 < <https://www.londonstockexchange.com/exchange/news/market-news/market-news-detail/SPD/14265424.html> > accessed 14 October 2019.

¹¹² Media Statement issued by Sports Direct via RNS, 30 October 2019 < <https://www.londonstockexchange.com/exchange/news/market-news/market-news-detail/SPD/14285737.html> > accessed 30 October 2019.

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- **Higher ranked retailers may not be allowed to sell products designed for lower tiers:** JD Sports' position in the hierarchy allows it to access a relatively wide range of products from both Nike and adidas. If a product that JD Sports would like to sell is not included in the catalogues, then JD Sports is able to request access to that product during its meeting with the brands. However, in JD Sports' experience, [REDACTED].
- **Nike and adidas can sell across all tiers:** the brands position themselves in all of the tiers and have the widest access to products. In effect, this means that they are in a privileged position and are not forced to operate under the same limitations as the wholesale retailers like JD Sports and Footasylum.
- **The brands have ultimate discretion over access to exclusive products:** as explained further below.

2. Brands control not only retailers' access to products, but also the volumes that they receive

(190) In addition to dictating the products that retailers can purchase, Nike and adidas set the volumes available, or "allocated" to each retailer. Based on their experience, the Parties consider that there is little scope for retailers to obtain greater volumes, even if they have historically sold all of their allocation of a particular products on a consistent basis across a number of quarters.

(191) For example, while JD Sports [REDACTED].

(192) The Parties understand that the brands grant greater volumes to their DTC channels (where their margins are higher) to the detriment of retailers. This situation is made more acute by the rollout of connected inventories, whereby customers are able to purchase products directly from Nike and adidas via a retailer's website in instances where the retailer doesn't have that product in stock. [REDACTED].

3. Negotiations with Nike and adidas in relation to product allocations are asymmetric

(193) [REDACTED]. In particular, in addition to the brands' control over product allocation described above, JD Sports considers that it has [REDACTED].

(194) [REDACTED].

4. Retailers strive to improve their position within the tiers

(195) As noted above, a retailer's position in this hierarchy has the greatest influence on its ability to purchase products from Nike and adidas. One of the consequences of this system is that retailers strive to raise their position within the hierarchy by improving their stores and working to ensure that their brand image is consistent with the message that both Nike and adidas want to convey about their products to customers. However, retailers are also at risk of demotion within the hierarchy or being ejected entirely from the wholesale channel.

(196) For example, and as described in more detail in Section C, Sports Direct has recently embarked on a national elevation programme whereby it improves the quality of its stores with the hope that this will increase its ranking within Nike and adidas' hierarchies and enable Sports Direct to access products that are currently inaccessible to it.

(197) If retailers do not continually maintain the standards of their stores, then they risk falling down the brands' ranking and receiving less preferential products. This position is particularly stark for the retailers already at the bottom of the hierarchy. For example, the Parties understand that [REDACTED]. Moreover, it has been widely reported that Nike will significantly reduce the number of independent retailers that stock its products in the UK: "*Nike [has] notified retailers that access to its products would end in two years, stating that their way of stocking its goods was "no longer aligned" with Nike's distributions strategy. The terminations*

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could begin as early as next year."¹¹³ Given their similar push to DTC, the Parties expect that adidas will adopt a similar strategy.

5. Other brands operate similar systems

- (198) The position for other suppliers is similar regardless of whether it is footwear or apparel. For example, [REDACTED].
- (199) Both Puma and Under Armour's systems are implemented in a similar way to Nike and adidas; [REDACTED]
- (200) Similarly, other brands will also restrict retailers' access to only particular sub-brands depending on their profile and positioning.
- (201) Additionally, and as noted during the site visit, JD Sports is [REDACTED].

B. Brand-related retail pricing constraints in practice

- (202) As set out in above, the brands present catalogues to retailers that list the products available to purchase, retailers' designated volumes and an SRP. Both the brands and retailers are conscious of, and careful to avoid, any conduct that may contravene the rules on resale price maintenance. However, fundamentally price is driven by the SRP from branded suppliers.

C. Brands' indirect quality control with respect to other aspects of the Parties' retail non-price offer

1. JD Sports

- (203) Nike and adidas also exercise quality control over JD Sports' national-level, non-price offer, with high expectations regarding store and product presentation. The brands achieve this control in three key ways: first, they [REDACTED]; and third, there is always the potential threat that, if a retailer allows its store quality to decline, it will fall down the rankings and receive a more limited allocation or no products at all. Each of these methods is considered in detail in the following section.
- (204) Both Nike and adidas incentivise the Parties to meet certain standards or pursue certain strategies by [REDACTED]. These targets can be extremely granular and often cut-across all aspects of the Parties' businesses – [REDACTED]. For example, JD Sports' agreement with adidas for 2018 requires that [REDACTED]¹¹⁴[REDACTED].¹¹⁵
- (205) In order to ensure that their quality standards are enforced and implemented in practice, Nike and adidas make frequent visits to the Parties' stores, particularly in key cities, to audit the Parties' compliance with their standards. JD Sports often [REDACTED].¹¹⁶ Similarly, the Parties also provide the brands with [REDACTED]
- (206) As noted during the JD Sports' site visit, [REDACTED] Similarly, Nike and adidas will frequently collaborate with retailers to roll out new initiatives both in-store and online. For instance, [REDACTED].
- (207) The most powerful tool that the brands have to control aspects of the Parties' retail non-price offer is the threat of demotion and eventually withdrawal of supply. As noted above, the Parties consider that their position in the brands' tiers is as a result of their store quality and brand image. In the event that JD Sports did not live up to the standards of the brands, it would be at risk of reduced supply or demotion within the brands' tiers, which could severely impact its business.¹¹⁷ Previous instances when this has happened include:

¹¹³ Sam Chambers, "Nike's killer blow for small stores", *The Times*, 13 October 2019 < <https://www.thetimes.co.uk/article/nikes-killer-blow-for-small-stores-5trqghtxl> > accessed 13 October 2019.

¹¹⁴ Annex_1210.

¹¹⁵ [REDACTED]

¹¹⁶ Annexes 1211 and 1212.

¹¹⁷ There are also examples of this outside of fashion retailers – see for example, Phone4u.

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- [REDACTED].

2. Footasylum

(208) As well as [REDACTED]. For example:

- [REDACTED].

IV. The Merger has no impact on the array of constraints applied by the global brand owners over JD Sports' resale activity

(209) As explained above, Nike and adidas exercise a significant degree of practical control over the retail activities of both JD Sports and Footasylum pre-Merger. The Merger will have no impact on these dynamics and the nature of the relationship between the global brands and JD Sports will continue to be asymmetric post-Merger. JD Sports' positioning in the UK market for sports-inspired retailers (like that of its competitors) will continue to be decisively shaped by the brands' decisions, and it will therefore have no ability or incentive to worsen any aspect of PQRS

A. The brands' ability to dictate retailers' strategies

(210) The need to keep both Nike and adidas "onside" means that both brands in effect have a veto right over retailers' strategies.

(211) [REDACTED]:

(212) These examples show that even strategic global retail partners of Nike, such as JD Sports, do not have the ability to pursue a particular strategy without giving consideration to how it would be viewed by both Nike and adidas. If, for whatever reason (e.g. an intractable commercial dispute), Nike were to demote a player such as JD Sports within the retail partner hierarchy, this would, at the very least, have a fundamentally damaging impact on the commercial success (and share prices) of the business.

(213) Similarly, Sports Direct has previously stated that it was unable to pursue its attempted acquisition of Office in 2014 due to concerns that adidas would reduce the products it supplied following the acquisition.¹¹⁸

(214) Similarly, the brands also dictate the Parties' strategies through the annual agreements they ask them to sign up to. For example, [REDACTED]¹¹⁹[REDACTED]

B. The paramount importance of the brands constrains any ability to worsen PQRS

(215) For the reasons explained in detail in this Response, the Merger will not result in any incentive to deteriorate any aspect of JD Sports' PQRS. Moreover, even assuming that JD Sports had the incentive to reduce PQRS as a result of the Merger (which is not the case), given that Nike and adidas represent "must have" brands and exercise a high degree of control over JD Sports' PQRS, JD Sports would not have the ability to worsen any aspect of its competitive offering without prejudicing its current level of access to branded products.

1. The Merger will not impact the brands' approach to product allocation

(216) As noted above, Nike and adidas operate tiering systems which determine the products which they make available to their retail partners (both globally and in the UK). These tiering systems are carefully choreographed to promote the desirability of the brands' products, and are not simply predicated on the bargaining position (implied by the scale) of an individual retailer. For example, EndClothing operates

¹¹⁸ Graham Ruddick, "Sports Direct hits out at 'anti-competitive' adidas", *The Telegraph*, 01 July 2014 < <https://www.telegraph.co.uk/finance/10939366/Sports-Direct-hits-out-at-anti-competitive-adidas.html> > accessed 12 November 2019.

¹¹⁹ [REDACTED].

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only two stores and a website in the UK, yet it receives access to a wide-range of products including exclusive products from both Nike and adidas.

- (217) Given that both [REDACTED] of these tiering systems, [REDACTED]. Given that Nike and adidas both operate separate product allocations for different fascia within the same economic group, the allocations of Nike and adidas products accessible by Footasylum and JD Sports (respectively) are unlikely to be substantively impacted by the Merger. Equally, there is no reason to believe that the current positioning of any third-party competitor within the brands' product tiering systems would be in any way affected by the Merger.
- (218) Indeed, the Merger is likely to preserve the quality of Footasylum's [REDACTED]

2. Merger will not impact JD Sports' incentive to maintain high QRS

- (219) A retailer's position in the Nike and adidas products hierarchy has the greatest influence on its ability to purchase products from Nike and adidas; were JD Sports to worsen other aspects of its QRS post-Merger, this would also risk its positioning within these tiering systems (and hence its allocation of branded products). As explained above, this risk is material given that Nike and adidas exercise tight control over JD Sport's national non-price offer including, *inter alia*, with respect to store and product presentations.

C. No Merger-specific effect on access to exclusive products

- (220) The Issues Statement states (at paragraph 30) that, when considering the competitive constraints on the Parties, it will consider competitors' "*access to limited/exclusive and/or high end/premium products*". The CMA's Phase 1 Decision notes that the "*ability to access exclusive and/or high-end premium products are important competitive parameters*."¹²⁰ Insofar as this proposition is correct, the Parties submit that there will be no Merger-specific effect on competition, given that: (i) Footasylum's access to exclusive products (also referred to as SMUs) is inherently limited; and (ii) there is no evidence that the Merger will strengthen JD Sports' bargaining power with the brands with respect to exclusive products.

1. The brands have ultimate discretion over access to exclusive products

- (221) It is important to understand that access to exclusive products remains (alongside access to branded products more generally) at the complete discretion of the brands. In addition to managing the allocation of non-exclusive/mass-market products the brands also curate: (i) which retailers are given exclusive products; and (ii) the products that are exclusive.
- (222) As explained in JD Sports' response to the s109, [REDACTED].
- (223) [REDACTED].

2. No Merger-specific effect with respect to exclusive products

- (224) If access to "exclusive" products is an important competitive parameter, the Parties submit that this is a significant differentiator between the Parties' activities, given that Footasylum's access to exclusive products is inherently limited, a fact which is not properly reflected in the Phase 1 Decision. In particular, the Phase 1 Decision contains a quote from a third-party that "*not only JD Sports but also Footasylum has access to these products*" and that JD Sports and Footasylum "*have successfully built a reputation for model exclusivity, and use this as a key marketing story*".¹²¹ The Phase 1 decision concludes at paragraph 135 that "*Footasylum is one of a limited set of retailers with comparable access to these SMUs/retailers*".
- (225) These statements are incorrect and are not supported by the evidence, as the reality is that Footasylum has very little access to exclusive products. As the CMA acknowledges in the Phase 1 decision, JD

¹²⁰ Phase 1 Decision, paragraph 7.

¹²¹ Phase 1 Decision, paragraph 133.

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Sports' sales due to SMUs were [REDACTED] than for Footasylum: for example, in footwear, [REDACTED]% of JD Sports sales are attributable to SMUs, whereas for Footasylum sales of SMUs are [REDACTED].¹²²

(226) [REDACTED]. By way of example:

- [REDACTED];

(227) The Phase 1 Decision quotes a Footasylum internal document which states: "[REDACTED]" and a third-party statement that it "***discusses*** SMUs/exclusives only with seven retailers active in the UK, including Footasylum"¹²³ (emphasis added). Neither of these evidential points demonstrate that Footasylum receives access to exclusive products, let alone that it has access analogous to that of JD Sports.

(228) Conversely, JD Sports is aware of a number of other UK retailers which receive access to exclusive products, notably Foot Locker, ASOS, Zalando, Schuh and Office. Moreover, whilst JD Sports may have the exclusive right to sell a product in the UK, it is possible that other retailers in different countries may be able to sell the same product in-store and online. Similarly, both Nike and adidas can sell "JD exclusives" on their own website if they choose to do so. For example, whilst Nike does not typically sell JD Sports' exclusive footwear in its own stores and website, it may do so – for a current example (among many), see JD Sports' exclusive Women's Nike Air Max 270 React (Winter) which is also available on Nike's website.¹²⁴

3. No evidence that the Transaction will strengthen JD Sport's access to exclusive products or deteriorate access of third parties

(229) The Phase 1 Decision cites third-party feedback that "*JD Sports has a privileged position to access SMUs/exclusive and/or high-end /premium products due to its scale*" with one retailer stating that "*JD has an incredibly high level of buyer power.*"¹²⁵

(230) However, the Phase 1 Decision does not adduce any evidence in support of the fact that access to "exclusives" is correlated with size, far less that the acquisition of Footasylum would make any material difference, or that the Merger will have any impact on JD Sport's negotiating position (given that Footasylum does not currently have privileged access to such products). In particular, the Parties note that the Phase 1 Decision does not cite any evidence from Nike or adidas, or evidence from the Parties' internal documents to support such either proposition.

(231) As explained above, control over access to exclusives is determined by the brand. [REDACTED]. Moreover, JD Sports understands that Foot Locker, ASOS, Zalando, Schuh and Office also receive exclusive products. There is therefore no evidence that the Merger would result in a reduction in the access of third parties to exclusive products (and, given the nature of negotiations and information asymmetry with the brands, there would in any case be no mechanism for JD Sports to monitor or enforce such a reduction). The Parties note that Nike and adidas may reduce the access of retailers to exclusive products as a corollary of their DTC strategies, however this is not a Merger-specific effect.

V. The brands already sponsor entry and expansion and would readily shape retail market structure further if incumbent retailers under-perform

(232) As outlined in the sections above, the pivotal issue for all sports-inspired footwear retailers is whether Nike and adidas want them to participate in the resale of their products. This applies regardless of retailer size, regardless of whether the retailer is an incumbent or an entrant, and regardless of whether the

¹²² Phase 1 Decision, paragraph 242.

¹²³ Phase 1 Decision, paragraph 135.

¹²⁴ <https://www.jdsports.co.uk/product/black-nike-air-max-270-react-winter/15962457/> & <https://www.nike.com/gb/t/air-max-270-react-winter-shoe-hgXMB/CD2049-001>.

¹²⁵ Phase 1 Decision, paragraph 132.

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retailer is multichannel or "pure play" online. A favoured retailer will gain access to the allocation of the more desirable or the hottest product lines, and/or a greater allocation quantity. This ability enables Nike and adidas to sponsor retailers to enter territories where they do not consider there is sufficient retailer competition.

- (233) As the rationing of product allocation by Nike and adidas applies to incumbents and entrants alike, it is not therefore strictly speaking a barrier in the sense of applying to entrants (and expanders) but not to (larger) incumbents: it is the fundamental rule of the game for all retailer contestants, and an incumbent that has fallen out of favour with the brands is in a worse position than a new entrant that is favoured (i.e. sponsored).
- (234) In any case, if Nike and adidas favour an entrant with the "carrot" or reward of product allocation of the most desirable lines, the entrant will most likely be successful because most players (and certainly those identified as sponsorship candidates by the brands) can easily and swiftly execute on standard ancillary aspects of reselling the brand's footwear to consumers (for which barriers to entry and expansion are not material). This is more likely if incumbent retail partners fail to meet the brands' expectations.
- (235) Conversely, if the brands were satisfied with the performance of existing partners, and neither Nike nor adidas supported a particular entrant, then it would be unprofitable if not irrational for that player to enter or expand with respect to footwear, regardless of how good the entrant might otherwise be.
- (236) Accordingly, brand-led or brand-sponsored expansion or entry form critical components of the overall constraints on JD Sports' retail offer competitiveness. This includes DTC expansion by the brands themselves, and using (the threat of) sponsored entry and expansion to favour third-party retailers or enhanced allocation to existing retailers (of note in this regard is Sports Direct's recent store elevation strategy which will likely lead to allocation of exclusives etc). These brand-led constraints work in tandem with product allocation levers to discipline JD Sports through a product allocation process of rationing, with variable degrees of "reward" or "punishment".
- (237) Similar to [REDACTED], JD Sports is aware that the brands have also encouraged or sponsored other retailers to expand. JD Sports does not have relevant direct documentary evidence of brand sponsorship or lack thereof with respect to third parties, and it would therefore encourage the CMA to [REDACTED]:
- Nike and adidas sponsored the German-based **Snipes** (www.snipes.com), France-based **Courir** (www.courir.com) and the Italy-based **AW Lab** (<https://en.aw-lab.com/>) to enter the Spanish market where the brands considered that the retail market incumbents were under-performers and that the market would be improved by the entry of these retailers. Snipes entered the Spanish market in 2015 and currently has 25 Spanish stores. Courir entered the Spanish market in 2018 and currently has 10 Spanish stores.¹²⁶ There is no reason to think that Nike and adidas would not be equally as willing to sponsor these retailers to enter into the UK market if they considered that the standards of current incumbents had slipped.
 - Nike and adidas' sponsorship of **Lifestyle** – an Irish-origin player that has an online presence across the UK and a store presence in Northern Ireland (Belfast, Derry, Craigavon and Enniskillen). [REDACTED].
- (238) In summary, the retail level is evolving – and is likely to continue to evolve – with (i) a falling channel share for wholesale due to DTC, and within wholesale, in the short- to medium-term; (ii) disintermediation of less favoured retailers; and (iii) support for preferred retailer partners, whether incumbents, or entrants or expanders from one territory to another. However, [REDACTED].

¹²⁶ These statistics are set out in **Annex_492**.

PART C – CONSTRAINTS FROM OTHER RETAILERS

PART C - BEYOND THE DTC OFFENSIVE OF THE BRANDS: CONSTRAINTS FROM OTHER RETAILERS

Dynamic entry, expansion, elevation and growth of a range of on-line and in-store retailers

- In addition to the powerful vertical and horizontal constraints imposed by the brands, the Parties face dynamic and disruptive competition from an existing wide range of third-party retailers across all categories of footwear and apparel.
- Many of these competitors are present both online and via store networks, and many are dynamic and growing (both in the UK and internationally), with frequent partnerships being struck which, for example, enable online retailers to take advantage of physical store networks for their click & collect operations.
- A summary of the activities of a (non-exhaustive) number of competitors is included in this Part, including Foot Locker, Sports Direct, ASOS, Zalando and others.
- The disruptive and constraining force of the brands is not revisited in this section, and nor are sponsored entry or expansion candidates such as Lifestyle and Snipes discussed in Part B above.
- The net effect of the (i) vertical restraints of the brands; (ii) brands' DTC offensives as a horizontal constraint and (iii) aggregate effect of the additional horizontal constraints from other retailers is that both JD Sports and Footasylum face severe competitive pressure in aggregate.

I. Dynamic actions by UK and pan-European retail rivals in sports footwear

A. Foot Locker's UK expansion

- (239) Foot Locker, a Fortune 500 member, describes itself as a "*leading global youth culture brand that connects the sneaker obsessed consumer with the most innovative and culturally relevant sneakers and apparel*"¹²⁷ via various formats including stores, its online websites, mobile apps and social media.
- (240) As of 2018, Foot Locker had around 3,200 stores globally, of which 636 were in Europe and 72 in the UK.¹²⁸ Its stores have an average of 1,600 selling square feet to provide the customer with "*an immersive shopping experience*".¹²⁹ Foot Locker achieved group revenues of almost \$8 billion in its 2018 financial year.
- (241) Foot Locker has been Nike's strategic partner for over four decades and is also Nike's biggest global customer, with its sales of the brand only surpassed by Nike itself through Nike Direct¹³⁰ (the brand's fast-growing online DTC channel). As discussed in Part B, Foot Locker gets similar levels of product allocations to JD Sports (and much greater access to exclusive products than Footasylum). Foot Locker is the only retailer (aside from Nike itself) to feature Nike's proprietary digital technology in its stores.

¹²⁷ https://www.footlocker-inc.com/content/dam/flincfoundation/footlockerinc_documents/annual-reports/Foot_Locker_2018_Annual_Report-Final-POSTING%2004-12-19.pdf at page 15 of the 10-K document

¹²⁸ https://www.footlocker-inc.com/content/dam/flincfoundation/footlockerinc_documents/annualreports/Foot_Locker_2018_Annual_Report-Final-POSTING%2004-12-19.pdf.

¹²⁹ Foot Locker Inc., Annual report 2017, p.15 <http://www.annualreports.co.uk/HostedData/AnnualReportArchive/f/NYSE_FL_2017.pdf> accessed 10 November 2019.

¹³⁰ <https://www.ft.com/content/c470ca84-e069-11e9-9743-db5a370481bc>.

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- (242) Foot Locker recently announced that it is prioritising internal growth¹³¹ and to achieve this, it is opening a number of "Power Stores" in the UK and worldwide.¹³² The first UK-based Power Store opened in Liverpool and was branded as "*a hub for local sneaker culture, art, music and sports*", with a second Power Store in London. The stores are capable of hosting pop-up nail salons and Xbox gaming sessions.¹³³ Foot Locker reportedly plans to open 200 Power Stores globally over the next five years.¹³⁴
- (243) Foot Locker also recently announced its plans to move to larger premises in Manchester¹³⁵ which will be almost double the square footage of its previous location.¹³⁶ It has similar plans for its store in Plymouth.¹³⁷ Foot Locker has also launched an FLX membership (similar to the JDJ programme) in the Netherlands and has plans to roll this out globally.

B. Sports Direct's UK store elevation and its Flannels entry

- (244) Sports Direct operates a diversified portfolio of sports, fitness, fashion, lifestyle and department store fasciae. It is structured across six business segments, namely, UK Sports Retail, Premium Lifestyle, House of Fraser Retail, European Sports Retail, Rest of World Retail and Wholesale & Licensing. Sports Direct remains JD Sports' biggest overall competitor in sports footwear (and apparel, discussed further below), and its strategic size and approach cannot sensibly be ignored in any assessment, whether static or dynamic.
- (245) Sports Direct offers a complete range of sporting apparel, footwear and equipment through its largest fascia, SPORTSDIRECT.com, within its UK Sports Retail segment. This segment (which comprises 540 stores, gross revenue of £2,187.3 million, a gross margin of 42.1%) also includes the lifestyle fascia USC which retails brands including Tommy Hilfiger, adidas, Calvin Klein and Champion. The UK Sports Retail segment accounts for 59.2% of Sports Direct's total revenue¹³⁸. In addition, 80% of JD Sports stores have a Sports Direct store within a mile (74% within a half mile).
- (246) Sports Direct's "Premium Lifestyle" segment primarily consists of the Flannels fascia, along with Cruise and van mildert which offer "*fashion-conscious consumers a luxurious, multi-brand retail destination with high-end and on-trend products*", including Balmain, Burberry, adidas and Moschino. Flannels is Sports Direct's fastest growing fascia with a number of store openings across the UK in a relatively short time period: there are currently 43 Flannels stores (over double the number there were two years ago) with plans to add an additional 15-20 stores each year until there are 100 sites in the UK. It recently opened a £10 million flagship store on Oxford Street. Flannels currently anticipates that it will be able to achieve this goal in three years. Earlier this year, Sports Direct reported that sales increased by 26.3% to £ 204.8 million in its Premium Lifestyle segment, mostly due to new Flannels stores and increased web sales.

¹³¹ Robin Driver, "Foot Locker reorganises global operating model for international growth", 6 February 2019 < <https://uk.fashionnetwork.com/news/Foot-locker-reorganizes-global-operating-model-for-international-growth,1065135.html> > accessed 30 October 2019.

¹³² Robin Driver, "Foot Locker reorganises global operating model for international growth", 6 February 2019 < <https://uk.fashionnetwork.com/news/Foot-locker-reorganizes-global-operating-model-for-international-growth,1065135.html> > accessed 30 October 2019.

¹³³ Andria Cheng, "Foot Locker gets back to center of sneaker culture by focusing on more than shoes" 29 March 2019 < <https://www.forbes.com/sites/andriacheng/2019/03/29/how-foot-locker-plans-to-stay-at-the-center-of-sneaker-culture/#20b00660283d> > accessed 30 October 2019.

¹³⁴ Sheena Butler-Young, "These are Foot Locker's biggest plans for the next five years", 28 March 2019 < <https://footwearnews.com/2019/business/retail/foot-locker-investor-day-2019-2023-plan-1202765777/> > accessed 30 October 2019.

¹³⁵ Georgia Wright, "Foot Locker to open new regional flagship in Manchester", 13 September 2019 < <https://www.retailgazette.co.uk/blog/2019/09/foot-locker-flagship-manchester-arncliffe-uniqlo-all-saints/> > accessed 30 October 2019.

¹³⁶ Shelina Begum, "Foot Locker doubles footprint with new Manchester flagship store", 11 September 2019 < <https://www.business-live.co.uk/retail-consumer/foot-locker-doubles-footprint-new-16899568> > accessed 30 October 2019.

¹³⁷ Jess Morcom, "New Foot Locker store could be opening in Plymouth", 29 October 2019 < <https://www.plymouthherald.co.uk/whats-on/shopping/new-foot-locker-store-opening-3479576> > accessed 30 October 2019.

¹³⁸ SportsDirect.com, Annual Report and Accounts 2019, p.22 <<https://www.sportsdirectplc.com/~media/Files/S/Sports-Direct/annual-report/annual-report-2019.pdf>>.

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- (247) Sports Direct's mission statement is to be "Europe's leading elevated sporting goods retailer"¹³⁹. To this end, it has embarked on a significant 'elevation strategy' whereby it upgrades existing stores and constructs new ones. It has promised to invest £1 billion in property assets over the next five to 10 years (approximately £300 million per annum for the first two to four years). This investment includes large-format flagship-style megastores in strategic retail locations that may include one or more of the Sport Direct's fascia (e.g. a combined SPORTSDIRECT.com and USC store) under one roof, plus a fitness gym where appropriate, thus bringing together a wide range of products and services to meet customer demand. Recent elevated store openings include stores in Watford, Didcot and Goole, with a 50,000 sq ft store announced in Portsmouth. Sports Direct, along with its third-party brand partners, is also aiming to connect with customers via multiple platforms to complement its in-store and online operations. Its elevation strategy also involves improving Sports Direct's offering to customers across all channels, including marketing, social media, product, digital and in-store.
- (248) The Parties note Sports Direct's recent public statements on the Merger and on the brands more generally. The Parties do not dispute that, consistent with the power of Nike and adidas, Sports Direct is currently unable to insist on the allocation of certain products. However, Sports Direct has access to a significant number of branded products, including a wide range of Nike and adidas products, and its access to certain key products is increasing. For example, Sports Direct has begun selling the Nike Huarache shoe, one of the so called Nike icons, and a model which is frequently searched for on the [X] (but not available to [X]). It is also expected that Sports Direct's 'elevation strategy' will lead to enhanced brand allocation of exclusive/SMU products.
- (249) It is therefore simply not credible to suggest that Sports Direct is in a separate market. Even leaving aside the direct product overlaps between Sports Direct and the Parties, many customers will not see a difference between an "exclusive" shoe which may only be available at JD Sports or Foot Locker, and a "non-exclusive shoe" from the same franchise or brand that is available at Sports Direct.
- (250) For these customers, Sports Direct is a direct competitor to the Parties and must not be overlooked. GlobalData indicates that [X]; while the Parties accept that the GlobalData research does not provide a precise indication of the degree to which retailers are regarded as substitutes for each other, rather than complements, the fact that JD Sports consumers also buy similar products in Sports Direct is informative.
- (251) In any event, the Merger makes no difference to Sports Direct's position (or the position of any other competitor), as it does not increase the alleged buyer power of JD Sports at the expense of either the brands, or Sports Direct. As set out above, [X] similarly does not have access to the exclusive products that are offered to JD Sports, Foot Locker and ASOS.
- (252) Ultimately, should JD Sports drop its standards, there is no reason to think that the brands would not consider leveraging Sports Direct's position (bearing in mind also that options are not limited to the SPORTSDIRECT.com fascia or its current in-store approach). Sports Direct has in the past made no secret of the fact that it wishes to expand its position, and its public statements provide further evidence that it represents a significant actual and potential threat.

C. ASOS' expansion to reach over 6 million active UK customers

- (253) ASOS is an online fast-fashion retailer marketed towards "fashion loving 20-somethings".¹⁴⁰ It offers a wide range of clothing and footwear, including both footwear and apparel from major brands such as Nike, adidas, Vans and New Balance.¹⁴¹ Its mobile app and desktop-based site are available in 10 languages and in over 200 markets. As of 31 August 2019, it had 20.3 million active customers (10% increase since

¹³⁹ <https://www.sportsdirectplc.com/~media/Files/S/Sports-Direct/annual-report/annual-report-2019.pdf>.

¹⁴⁰ ASOS PLC Annual Report and Accounts 2019 < <https://www.asosplc.com/~media/Files/A/ASOS-V2/reports-and-presentations/annual-report-2019-24102019.pdf> > accessed 31 October 2019.

¹⁴¹ ASOS website < https://www.asos.com/ctas/commercial-edits/commercial-edit-3/cat/?cid=28645&ctaref=shop|giftingcarousel|ww_bigbrands > accessed 31 October 2019.

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the previous year), of which 6.4 million were located in the UK. In August 2019, ASOS's websites attracted 187.4 million visits.¹⁴²

- (254) ASOS has continued to grow and outperform its peers despite a challenging retail environment. Five years ago, the company set an ambition to grow to £2.5 billion of annual revenues by financial year 2020 and this has been achieved nearly two years early. In terms of its geographical retail sales performance, 2018 had been an outstanding year for the UK, delivering full year sales growth of 23%, accelerating as the year progressed, and representing a further market share gain with UK active customers growth by 15%.
- (255) ASOS's CEO has stated that there are still considerable opportunities for growth in its key markets and ASOS is well-placed to capitalise on this growth with continued focus on its investments. In 2018, ASOS invested £ 242 million of capex across technology and transformation programmes (c. 50% of total capex) and the balance in physical infrastructure across supply chain infrastructures.¹⁴³
- (256) Given its positioning, ASOS is highly regarded by brands because it presents the product and brand in a premium way, with best-in-class digital capabilities. ASOS carries close to 1,700 Nike products and almost 1,200 adidas products. ASOS' Nike offering includes the Nike Air Force 1, Air Max 270 and Air Max 90 trainers, while its adidas products include adidas originals footwear and apparel. As discussed earlier, ASOS gets similar product allocations to JD Sports and Foot Locker (and much greater access to exclusive/SMU products than Footasylum).

D. Zalando's European growth including free shipping to the UK

- (257) Zalando is Europe's leading online fashion platform. It provides an online delivery service for clothing and footwear and is now active in at least 15 European markets. In 2018, the platform had net global sales of EUR5.4 billion. The retailer has a target of an annual gross merchandise volume of EUR20 billion globally by 2023/2024. At the end of last year, the retailer reported revenue increase of 20% at EUR5,387.9 million and EBITA of EUR205.7 million. The rise in revenue has been mainly attributed to a larger customer base and an increase in the number of orders. As of 31 December 2018, it had 26.4 million active customers, which corresponded to an increase of 14.4% from the previous year. Zalando's strong performance continued in 2019 and it achieved growth and improved profitability well into the third quarter of 2019. Its revenues increased by 26.7%, with more than one billion site visits.
- (258) Both Nike and adidas consider Zalando to be one of their most important European partners. In September this year, Nike announced that it plans to integrate NIKE App at Retail to bring new experiences to Zalando in Europe. Zalando offers over 7,800 Nike products on its UK website, including Nike Air Force 1, Air Max 90 and Air Max 270 trainers. It also offers over 7,300 adidas products, including originals apparel and footwear.
- (259) As one of Nike's strategic partners, Zalando enjoys a certain measure of exclusive access to Nike footwear. For example, Nike released exclusive new colours for its Air Force 1 shoe on Zalando's website.¹⁴⁴ In its prospectus for its IPO, Zalando explained that its brand relationships allow for "*full product range access, and fast provision of our partner brands' latest materials*".¹⁴⁵
- (260) Notably, Zalando has an equity stake in Anatwine, which has developed the "connected inventory" technology used by the brands to seamlessly connect a brand's inventory to the front end of a partner retailer (including JD Sports). With this partner programme, brands can integrate their stock directly on

¹⁴² ASOS plc Global Online Fashion Destination Final Results for the year to 31 August 2019 <<https://www.asosplc.com/~media/Files/A/ASOS-V2/reports-and-presentations/final-results-statement-2019.pdf>>.

¹⁴³ ASOS PLC, Annual Report and Accounts 2018 <http://www.annualreports.co.uk/HostedData/AnnualReports/PDF/LSE_ASOS_2018.PDF>.

¹⁴⁴ < <https://retailinasia.com/in-shops/zalando-seeks-more-brand-partnerships-to-fend-off-amazon/> > accessed 11 November 2019.

¹⁴⁵ Zalando SE, prospectus for the IPO dated 17 September 2014 < https://corporate.zalando.com/sites/default/files/media-download/Zalando-SE_IPO_prospectus.pdf > accessed 11 November 2019, p. 201.

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the Zalando platform. Zalando charges a commission for this service and also provides digital and infrastructure services such as analytics and logistics for its partner brands. Nike stated in September this year that its inventory partnership program has continued to grow with Zalando.¹⁴⁶

E. Deichmann's store network growth under its own and the Snipes brand

- (261) Deichmann is a German brand that is currently active in 29 countries outside Germany and has approximately 4,053 stores globally.¹⁴⁷ Its website positions Deichmann as the market leader in the German and European shoe business with "*possibly the most comprehensive selection on the market*". Deichmann opened its first branch in the UK over a decade ago, but has been expanding rapidly recently with nine stores added in the last year, taking the current number of Deichmann stores in the UK to a total of 102.
- (262) Deichmann also owns Snipes, one of the largest trainers and streetwear retailers in Europe, with over 230 stores across 9 European locations. The Snipes fascia is also aligned with Deichmann's extensive growth plans, rapidly expanding with its recent acquisition of 64 KicksUSA trainers outlets in the US.
- (263) According to a press release by the company earlier this year, Deichmann continued to grow in 2018 despite difficult market conditions. It reported an increase in both the number of shoes sold as well as turnover. The retailer also continued to add more stores and increase online sales. In 2018, the planned investments for the entire group amounted to EUR285 million which was a record high. Investments were made both in the modernisation of the store network and the opening of new bricks-and-mortar stores, as well as in internationalisation and digitalisation.
- (264) For the year 2019, Deichmann has announced that it is set on further growth in its store estate and digital business, as well as in new markets.¹⁴⁸ It plans to open 229 new stores worldwide and modernise 256 stores.
- (265) Deichmann also made substantial investments in its digital platforms. A new version of its app was launched at the beginning of March 2018 making it easier for customers to browse the online shop on their mobile phones. The retailer also extended its "Online Exclusive" collection. This collection includes particularly fashionable shoes that are only available online. Shoes for sports that were not previously available were added to the range.
- (266) Deichmann has also been working on different levels with bloggers and influencers – for example on blogger collections with various influencers since 2014. The company also wishes to develop this segment further, with the "Deichmann Influencer Club": a platform on which influencers with a passion for fashion and unique shoes are offered support and a place to communicate among one another. The club is a community of selected participants and offers exclusive insights into the world of footwear fashion and, for example, also seminars, workshop and events.¹⁴⁹

F. Next's entry into resale of Nike and adidas footwear

- (267) Next is a multinational clothing, footwear and home products retailer with around 700 stores in total, of which about 500 are in the UK. Over the last five years, Next has joined the race to create a multi-brand "Online Platform"¹⁵⁰ for its own and third parties' brands, including Nike and adidas alongside many

¹⁴⁶ NIKE, Inc. (NKE) CEO Mark Parker on Q1 2020 Results - Earnings Call Transcript, 24 September 2019 at P.9.

¹⁴⁷ Deichmann, "International Expansion" Brochure; < https://corpsite.deichmann.com/gb-en/wp-content/uploads/sites/2/2019/10/2019_09_Deichmann_Expansion_EN_fin_.pdf > accessed 30 October 2019.

¹⁴⁸ Deichmann Press Release, 14 March 2019 <<https://corpsite.deichmann.com/en/blog/press-releases/growth-despite-difficult-overall-climate-on-fashion-marketdeichmann-group-makes-biggest-acquisition-in-companys-history/>>.

¹⁴⁹ Deichmann Press Release March 2018 < <https://corpsite.deichmann.com/wp-content/uploads/2018/03/Jahresmeldung-2017-EN.pdf> >.

¹⁵⁰ NEXT plc, "Results for the Half Year Ending July 2019" released 19 September 2019 < <https://www.nextplc.co.uk/~media/Files/N/Next-PLC-V2/documents/2019/half-year-end-July%2019-final.pdf> > accessed 31 October 2019, p. 4.

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others. Its website now offers over 2,400 Nike products and over 2,000 adidas products. The range includes the Nike Air Max 270 and Air Max 90 trainers and adidas originals apparel and footwear.¹⁵¹

- (268) Next's online platform has continued to deliver strong growth. In the UK alone, online sales were reported at £668 million with a growth of 9.3%. In its half-yearly report for 2019, Next stated that its objectives are *"To be our customers' first choice online destination for clothing and homeware. To be our partner brands' most profitable third-party route to market. To deliver a level of service and integrity that matches the aspirations of our own-brand and those of our partners."*¹⁵² The company expects an EBIT of £178 million which is £15 million higher than its previous year due to a better-than-expected second quarter trading update.¹⁵³ Next reported that the number of units sold online per annum saw an increase by 47%, with particularly high growth over the last two years at 34%.
- (269) Earlier this year, Next partnered with Amazon to produce a new service for UK customers called Amazon Counter. This service allows customers to order products from Amazon and pick them up from Next stores, which, according to Amazon's reports of the programme's trials, increases footfall and therefore the potential sales of bricks-and-mortar stores.¹⁵⁴ The programme is in line with Next's bid to utilise the popularity of online shopping to bolster its in-store offering; Next's CEO noted that Amazon Counter would help Next stay relevant in the somewhat challenging high street retail environment.¹⁵⁵

G. Schuh


- (270) Schuh is a footwear specialist with a total of 128 stores which include both shopping centre and high street locations in the UK, Republic of Ireland and Germany. It has a strong relationship with a number of brands including Nike, adidas and Vans, as illustrated by its strong product offering on its online website. Schuh currently offers over 450 Nike products, over 500 adidas products and over 400 Vans products on its online website, including adidas Originals, the Nike Air Max 270 and Vans Old Skool trainers.

H. Office

- (271) The Office Group is a leading fashion footwear specialist that targets a 16 to 25-year-old consumer base through its OFFICE and Offspring fascia. These operate as both independent stores and concessions through its network of retail partners including, Selfridges and Arcadia (Topshop). The retailer's range is curated by its in-house design team and key partnerships with global brands such as Nike, adidas and Vans. It owns a total of 156 stores in Europe, with 148 in the UK and Ireland.

The Office Group maintains strong partnerships with key branded suppliers to provide up-to-date in-line trends. It currently offers over 350 adidas products via its online shop, including trainers like the Superstar, Stan Smith and Gazelle. Its Nike offering is also significant, totalling just under 500 products and including trainers such as Nike's Air Force 1.

I. Amazon as the e-commerce pace-setter

- (272) Amazon is the world's biggest online retailer. The online giant is strong across a diverse mix of categories including sports and fashion apparel/footwear through its own-branded and third-party branded offerings.
- (273) According to a Mintel report, Amazon is now ¹⁵⁶ 51.4% of UK consumers shop every month with the retailer, enabling Amazon to market branded products to a vast consumer base, with amazon.co.uk

¹⁵¹ < <https://www.next.co.uk/shop/brand-nike-0> > and < <https://www.next.co.uk/shop/brand-adidas-brand-adidasgolf-brand-adidasoriginals-0> > accessed 11 November 2019.

¹⁵² Ibid.

¹⁵³ UBS Report, Next Label gains beat macro pains, 13 September 2019.

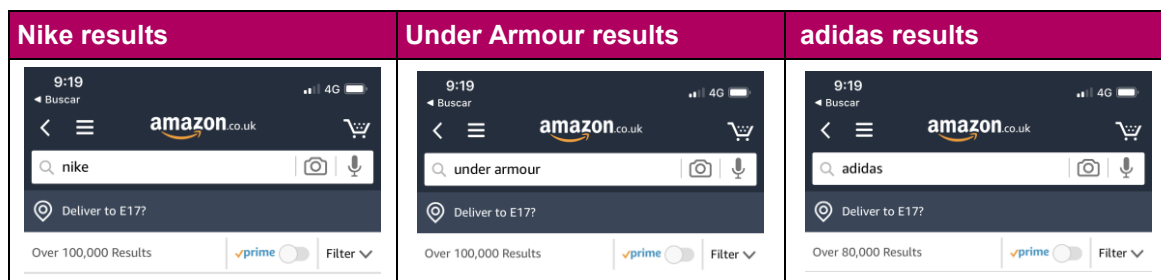
¹⁵⁴ Fiona Garcia, "Amazon partners with Next to offer click-and-collect service", 28 May 2019 < <https://www.diyweek.net/amazon-partners-with-next-to-offer-click-and-collect-service> > accessed 11 November 2019.

¹⁵⁵ Elias Jahshan, "Amazon partners with Next in click-and-collect service", 14 May 2019 < <https://www.retailgazette.co.uk/blog/2019/05/amazon-partners-with-next-in-click-and-collect-service/> > accessed 11 November 2019.

¹⁵⁶ Mintel Report, Sports & Outdoor Fashion - UK - December 2018 at p.10.

PART C – CONSTRAINTS FROM OTHER RETAILERS

stocking over 100,000 Nike and Under Armour products and over 80,000 adidas products online and through its mobile app:



Amazon mobile app – 09 Nov 2019

- (274) Amazon's growth in the segment is underlined by the growing strength of its partnership with key global branded suppliers. Over the past two years, Amazon has dramatically improved relationships with suppliers and signed deals with a vast array of premium third-party brands including adidas, Hugo Boss and Calvin Klein. Such brands had previously been reticent to engage with this global online threat. However, analysts cite the rationale behind the brands' strong relations with Amazon is to take back control of how Amazon sells and markets their products, as so many third parties were already selling the brands on Amazon¹⁵⁷. In 2018, adidas reversed a ban on Amazon retailing its products on the proviso that it adhered to strict guidelines for high customer standards¹⁵⁸.
- (275) As noted in Part B, Nike has recently ended its wholesale pilot with Amazon. It has been reported that Amazon has been preparing for this and has been recruiting third-party sellers with Nike products so that Nike merchandise remains widely available on its site.¹⁵⁹

II. Apparel rivals are growing and diversifying

- (276) As described in Part A the competitive dynamics for apparel are quite different from footwear given the much greater presence of smaller brands and own-label apparel (particularly in Footasylum). Further, as discussed in Part A, while JD Sports is skewed towards reselling sports-heritage brands (in particular, Nike and adidas), Footasylum is primarily focused on urban male fashion, which is in stark contrast to JD Sports' offering of 'sports-inspired' range.

A. Own label / fast fashion

- (277) As set out in Section A, Footasylum has made significant investments in a number of "bedroom brands" and own brands, with a focus on fashion and developing trends. JD Sports has a very limited own label apparel offering, which is primarily focused on "basic" ranges offered under its McKenzie brand. It is clear that the Parties are not close competitors with respect to these brands. Rather, retailers such as TopShop/TopMan, Zara and River Island are significant competitive constraints (and closer competitors to Footasylum) as they are fashion oriented and similarly focused on developing trends with fast product turnaround.

B. Global fashion brands

- (278) As set out in Section A, many premium international fashion labels have developed their own sports sub-labels, or have developed athleisure wear ranges under their primary brands (such as Hugo Boss and Calvin Klein). The overlap between the Parties in this respect is limited, as even where there is brand overlap, the range available to the Parties may be distinct.

¹⁵⁷ <https://www.standard.co.uk/lifestyle/esmagazine/amazon-zarah-high-street-fashion-a4064261.html>.

¹⁵⁸ <https://www.marketingweek.com/adidas-u-turns-on-amazon-and-ebay-sales-ban/>.

¹⁵⁹ <https://adage.com/article/cmo-strategy/nike-stop-selling-its-products-amazon-e-commerce-pivot/2214851>.

PART C – CONSTRAINTS FROM OTHER RETAILERS

(279) The competitor set for the resale of these ranges include the brands themselves, together with a range of multichannel retailers (including Sports Direct's USC and Flannels fascia).

C. Global sports brands

(280) As set out above, in addition to the brands' DTC sales, a number of competitors also stock apparel supplied by the major brands, in particular Nike and adidas. In particular Foot Locker, Sports Direct, ASOS, Zalando, Deichmann, Next (online) and Amazon supply a broad range of Nike and adidas branded apparel.

(281) By contrast, Footasylum sells a much smaller proportion of branded apparel overall accounting for only [X]% of its total sales. In addition, the relatively small stock of branded sports apparel available at Footasylum stores is consistent with its overall offering which is to cater to the urban male with a preference for "street feel" rather than sports-inspired apparel.

(282) A number of established, non-athleisure retailers also have begun to offer "athleisure" lines (alongside a wider offering that directly competes with Footasylum's broader, urban, offering) over the last five years, including H&M, ASOS and Primark, among others.

(283) Further discussion of the differentiation between the Parties and the competitive dynamics they face is set out in Section A above.

III. Customers have a wealth of choice

(284) The table below sets out JD Sports' top selling Nike and adidas trainers, and top selling Nike and adidas apparel products. There are on average 30 websites selling the two footwear products, and between 17-23 websites selling the apparel products. All four products are available on Amazon, with other key competitors including the brands themselves, ASOS, Next, Foot Locker, EndClothing, Zalando and Very.

Product	Category	Number of websites*
Nike Air Force 1 '07	Nike - Footwear	32
Adidas Gazelle	Adidas - Footwear	28
Adidas Originals 3-Stripes Trefoil Leggings	Adidas - Apparel	23
Nike Tech Fleece Joggers	Nike - Apparel	17

*Number of websites includes the parties

PART D - THE MERGER HAS NO "PQRS" EFFECT

**SUBTRACTING THE CONSTRAINT OF THE OTHER PARTY DOES LITTLE
TO AFFECT OVERALL HORIZONTAL AND VERTICAL CONSTRAINTS**

Neither Party has particular regard to the other when setting the parameters of its offering

This Part demonstrates that no matter how the frame of reference is calibrated:

- Footasylum has a relatively small presence in the UK, and the increment in market share resulting from the Merger is well below the level at which concerns may be expected to arise (even taking into account the degree of differentiation in this sector).
- Neither Party has particular regard to the other when setting the key parameters of its offering, whether locally or nationally.
- JD Sports' relative size or commercial success is also not a relevant consideration given that the degree of its success is subject to significant constraints from the brands, and the Merger will not therefore result in any increase in JD Sports' buying power.
- It is not the case that consumers will be worse off following the Merger.

I. The increment in share resulting from the Merger is low

- (285) The Parties note the comment in the Issues Statement that the CMA intends to assess shares of supply (among other sources of evidence) as a measure of closeness of competition¹⁶⁰.
- (286) JD Sports is proud of, and does not deny, that it is a successful UK and international retailer whose consistent performance has made it a strategic partner of both Nike and adidas, and whose performance has been recognised by investors. However, the purpose of the SLC test and Merger inquiry is to assess what difference the Merger makes, which in this case is the addition of Footasylum to the JD portfolio of brands.
- (287) JD Sports notes a number of references in the Phase 1 Decision to its apparently strong market position. The fact that JD Sports has a large store network relative to a number of other competitors (although smaller than that of Sports Direct) and has reported strong financial results is, however, irrelevant to the consideration of the Merger. The acquisition of Footasylum, which does not benefit from the same degree of allocations from the brands, will have no impact on this dynamic, and there will be no increase in JD Sports' buyer power.
- (288) Furthermore, the Parties note that the increment found on the CMA's Phase 1 calculations is low – at 4%. The Parties acknowledge the CMA's view that "*[i]n 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 closeness of competition between the Parties*". The Parties agree that market shares should be considered in the round, alongside other evidence. However, while market shares do not in themselves amount to a full competitive effects assessment they are relevant to such an assessment.
- (289) In particular, even if the CMA were to assess the existence of some competitive effects (which the Parties consider is refuted by the evidence), such a finding would need to be conditioned on the existence of a very low increment to JD Sports' share. This is because a low increment in a market characterised by demand and supply side dynamism is not likely to give rise to any enduring adverse competitive effects. So market shares are relevant for the interpretation of all subsequent analysis. If the CMA continues to find a low increment, the Parties submit that that in itself should be a material factor in support of a no-SLC finding if the CMA agrees that the markets are characterised by demand and supply side dynamics

¹⁶⁰ Issues Statement paragraphs 29, 38.

PART D – THE MERGER HAS NO PQRS EFFECT

(and, as a corollary, sets a high bar for any SLC finding). All else equal, a small increment does not require the same degree of rivalry to replace the "loss" implied by that increment than a much larger, e.g. double-digit increment.

- (290) As set out during Phase 1, the Parties do not monitor their precise shares of supply or the shares of their competitors, and market share estimates for the casual fashion market were provided using a range of alternative market sources. These demonstrated that the Parties' combined share of the broader casual fashion market would, on any basis, be extremely low (far lower even than the 4% increment above).
- (291) The Parties note that for the purposes of the Phase 1 Decision, the CMA estimated shares using revenue data received directly from "most retailers" listed by the Parties as their competitors in the Merger Notice, and sought to verify these by asking for each of the brands' sales revenues from their top 10 customers.
- (292) The Parties remain of the view that the market share estimates presented by the CMA in the Phase 1 Decision are not likely to be robust. Certain important players have not provided data, and the market share estimates for the brands' DTC sales appear, based on the Parties' own understanding of DTC sales to be understated. [X].
- (293) Whatever precise methodology is used, the Parties remain of the strong view that their combined shares are not at a level that would cause concern. In particular, and as noted above, an increment of 4% (on the CMA's own calculations) is not likely on any basis, regardless of the degree of differentiation in the market, to give rise to a substantial lessening of competition. Even if Nike and adidas are considered as a separate frame of reference, the Parties estimate that the increment arising from the Merger would be less than 5% for both footwear and apparel.

II. Footasylum does not affect JD Sports' national pricing, product range or other non-price decisions

A. Approach to store location

(294) [X].

B. National pricing across web-store and stores

(295) JD Sports aims to offer a seamless and consistent customer experience via a multichannel retail approach: online, through mobile apps, and through traditional "bricks-and-mortar" stores. All product prices are consistent across all channels.

(296) JD Sports sets its prices (for both footwear and apparel) as follows:

(a) [X].

C. Product range decisions across retail stores

(297) [X].

D. Retail store format and 'ambience' - quality and service parameters

(298) [X]

E. Product quality and product innovation

(299) [X]

F. Marketing campaigns

(300) [X]

PART D – THE MERGER HAS NO PQRS EFFECT

G. Competitor monitoring/Internal documents

(301) [X]

III. JD Sports does not affect Footasylum's national pricing, product range or other non-price decisions

A. Approach to store location

(302) At Phase 1, the CMA correctly noted that “every Footasylum store is particularly close to a JD Sports store, i.e. within the same town centre or shopping centre”.

(303) The question arises of what significance to draw from this fact: can it be inferred from geography that JD Sports is a “particularly close” competitor to Footasylum because of the way Footasylum has chosen its store locations, and was this driven by the existing location of a JD Sports store?

(304) [X]

(305) In Romford, the Footasylum store was "close" to the JD Sports store – and so was the store of every other bricks and mortar sports footwear competitor – Foot Locker, Office, Schuh, Sports Direct, Deichmann (and in the case of White City, the adidas and Nike stores together with other mono-brand stores such as The North Face, Timberland and Vans). The same is true of other footwear store rivals with the same or more stores, such as Office (108 stores), Schuh (105), Deichmann (102), DW Sports (76) and Foot Locker (62). While Sports Direct often has larger destination stores that are in the same shopping centres or at the edge of town retail parks rather than the high street, the catchment overlap within Sports Direct's 439 stores will be very significant.

(306) The same is true of Footasylum's fast fashion competitors; one could also posit that Footasylum always or almost always situates itself near a Next (428 stores), a River Island (244), and H&M (233) or a Zara (66), for example.

(307) Accordingly, while 100% of Footasylum stores are within 1 mile of a JD Sports store, materially the same point applies to other retailers of fashion apparel (e.g. 99% of Footasylum's stores compete with a local River Island store within 1 mile), of sports footwear and apparel (e.g. 94% of Footasylum stores have a Sports Direct within 1 mile, even the latter's bigger “destination” stores are more often edge-of-town than high street) and indeed outlets such as Boots (100% of Footasylum stores have a Boots within 1 mile) and McDonalds (100%) – both retailers frequented by 16-24 year olds that are in the same shopping centres, shopping districts and high streets as Footasylum. Accordingly, there is nothing profound that can be drawn from the Parties' shopping centre locations about “closeness of competition” between them.

Selected range of UK retailers who overlap with Footasylum's store network 90-100% of the time

#	Competitor	0.5 miles	1.0 miles	% of FA Estate (0.5 miles)	% of FA Estate (1.0 miles)
1	Boots The Chemist	65	67	97%	100%
2	River Island	65	66	97%	99%
3	McDonalds	65	67	97%	100%
4	JD Fascia	65	67	97%	100%
5	Clarks	63	65	94%	97%

PART D – THE MERGER HAS NO PQRS EFFECT

6	Next	62	64	93%	96%
7	Topshop	62	63	93%	94%
8	Sports Direct	61	63	91%	94%
9	Topman	61	62	91%	93%
10	Boots Opticians	60	61	90%	91%
11	H&M	59	61	88%	91%
12	WHSmith	58	60	87%	90%

B. National pricing across web-store and stores

(308) [X]

C. Product range decisions across retail stores

(309) [X]

D. Retail store format and "ambience" – quality and service parameters

(310) [X]

E. Product quality and product innovation

(311) Although Footasylum has no influence over the product quality and product innovation of its third-party brand suppliers, its aim is always to gain access to the best franchises/product range possible in order to enable it to meet the expectations of its customers. [X]

(312) [X]

F. Marketing campaigns

(313) [X]

PART E - THE MERGER OFFERS SYNERGY BENEFITS RELATIVE TO THE SEVERE STANDALONE PROBLEMS OF FOOTASYLUM

The Parties acknowledge that the conditions for concluding that Footasylum was a "failing firm" for the purposes of the CMA's counterfactual assessment are not established.

However, the financial position of Footasylum in the run-up to the Merger must be taken into account as relevant evidence in the context of its competitive assessment. Footasylum [REDACTED].

Moreover, [REDACTED], the CMA should have regard to [REDACTED]. JD Sports expects that in the medium term there will be increasing rationalisation towards a smaller number of larger independent retailers of Nike and adidas products in Europe and, [REDACTED].

By contrast, the Merger is expected to result in a number of benefits for customers, including:

- [REDACTED]

I. Background

(314) The Parties accept that, given the circumstances that preceded the Merger, and in particular the absence of evidence of potential alternative bidders, the conditions for concluding that Footasylum was a "failing firm" for the purposes of the CMA's counterfactual assessment cannot be established.

(315) However, the CMA cannot fail to take into account the financial position of Footasylum in the run-up to the Merger as relevant evidence to be taken into account in the context of its competitive assessment. It does not follow from the fact that the Merger may not meet all formal failing-firm criteria that the competitive assessment can therefore rationally pretend that Footasylum is in a fully-fit competitive state. As set out below, Footasylum was in substantial financial difficulties prior to the Merger, and these would be likely to continue absent the Merger. As such, it is foreseeable that Footasylum's position would have been as a weakened and less effective competitor.

(316) At the time of Footasylum's IPO in November 2017 it had EBITDA expectations of £[REDACTED] with an aggressive growth strategy including the opening of [REDACTED] stores per annum. By the end of January 2019, the FY19 outturn expectations with consensus had dropped to [REDACTED]. By this point, Footasylum had also scaled back its strategy to [REDACTED] starting from the 2019-2020 fiscal year.

(317) During FY 19 Footasylum had had to issue three profit warnings as its financial position deteriorated:

- **19 June 2018:** with declining EBITDA, the market expectation decreased from c. [REDACTED] to [REDACTED] triggering Footasylum's first profit warning [REDACTED];
- **3 September 2018:** continued reduction in the last 12 months' EBITDA triggered a further announcement to the market as expectations were downgraded to half of the £12.5m reported EBITDA in FY18. [REDACTED] [REDACTED]; and
- **8 January 2019:** following difficult Christmas trading in December 2018 and continued reduction in EBITDA, Footasylum made a third market announcement that EBITDA would be set at the lower end of market expectations.

(318) Moreover, [REDACTED], the CMA should have regard to [REDACTED].

PART E – MERGER RATIONALE

(319) In any event, the CMA does not need to take a definitive position on the precise counterfactual as JD Sports' ownership of Footasylum does not result in a substantial lessening of competition relative to either Footasylum continuing on a standalone basis, or any alternative owner.

II. Footasylum's standalone position in the counterfactual

(320) [REDACTED]

III. JD Sports' perspective on Merger rationale and benefits

A. Public offer document statement

(321) As set out in JD Sports' letter of 22 March 2019 included as part of its public offer document, JD Sports' expectation is that the outcomes of the Merged Entity strategy review will include:

- JD Sports and Footasylum maintaining separate operational management structures;
- ensuring that Footasylum's differentiated brand mix and product ranges in its multichannel proposition are preserved and enhanced for the longer-term benefit of the consumer experience; and
- optimising the efficiency of JD Sports' and Footasylum's combined operations by:
 - consolidating certain central functions into JD Sports' site whilst ensuring that Footasylum maintains its separate commercial identity; and
 - identifying potential economies of scale across the two companies.

(322) [REDACTED]

B. Non-public expected synergies and benefits

(323) Notwithstanding the lack of scope for strategic collaboration between the two management teams to date, JD Sports expects that the Merger will yield a number of synergies and efficiencies that were not spelled out in detail in the public offer document of 22 March 2019. As foreshadowed in JD Sports' response to F4 of the s109 notice financial questionnaire issued by the CMA on 15 October 2019, a fuller account of the competitive threats and commercial drivers facing the Parties, and the environment in which the Merger has taken place, is set out here.

1. [REDACTED]

(324) [REDACTED]