CMA
Competition & Markets Authority

Completed merger on the acquisition of Footasylum plc by JD Sports Fashion plc

Final report

6 May 2020

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Members of the Competition and Markets Authority who conducted this inquiry

Kip Meek *(Chair of the Group)*

Susan Hankey

Claire Whyley

Paul Muysert

Chief Executive of the Competition and Markets Authority

Andrea Coscelli

The Competition and Markets Authority has excluded from this published version of the report information which the inquiry group considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✂]. Some numbers have been replaced by a range. These are shown in square brackets.

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Glossary

Summary

Overview of our findings

1. The Competition and Markets Authority (CMA) has concluded that the merger between JD Sports Fashion plc (JD Sports) and Footasylum plc (Footasylum – together, the Parties) (the Merger) would result in a substantial lessening of competition (SLC) in sports-inspired casual footwear and apparel products sold both in stores and online. As a result, shoppers would be worse off.

2. Although JD Sports has already bought Footasylum, the two businesses are currently held separate. Therefore, we have decided that the most effective way to address the competition issues we identified is for JD Sports to sell Footasylum in its entirety to a suitable buyer, who will maintain and invest in the business. We will allow JD Sports a reasonable timeframe to do so, particularly given the current Coronavirus (COVID-19) pandemic. Selling Footasylum means it will continue to operate as an independent business separate from JD Sports, ensuring that shoppers - many of whom are young consumers - continue to benefit from having the good deals and quality, range and other benefits that competition brings.

Impact of Coronavirus (COVID-19)

3. At the time of publishing this final report, many retailers are currently facing uncertain and challenging trading conditions due to COVID-19, which arose during the final stage of our investigation. This is having a significant impact on many businesses and the economy. In particular, all retail stores selling non-essential goods have been closed by government requirement since 23 March 2020, including the Parties' and other retailers' physical stores. Other aspects are also likely to be affected including retailers' online businesses, their warehouse operations and their supply chain.

4. The evidence gathering for this investigation was mostly completed before the effects of COVID-19 arose, so it largely reflects the market prior to this. However, we have looked at the impact of COVID-19 on our assessment, as far as possible, to see if it changes our views on the Merger. The extent and duration of the impact of COVID-19 in the medium to long term is uncertain. All retailers are subject to the same change in market conditions, although it is difficult to predict the effect on different retailers and how each will respond to the circumstances. While the sector is clearly being impacted by COVID-19, it is not clear that either of the Parties is being hit harder relative to other retailers, such that either would be in a much weaker competitive position in comparison to each other and other retailers, or that other competitors would

become significantly stronger. While recognising the uncertainties from the impact of COVID-19, we do not consider that it will significantly increase the constraints on the Parties now or in the foreseeable future, such that there would no longer be competition concerns from the Merger. The Parties have not told us that either of them will go out of business (ie that it is a 'failing firm').

5. Although we are required to form a final view on the Merger in this final report, there is flexibility in our remedies implementation process which means we can respond to any relevant developments throughout the sale process. For example, we will ensure that the timeframe for the sale is sufficient and will assess the suitability and availability of potential buyers. Given we cannot predict how the situation will develop, we will remain responsive to any issues in the sale process as they arise.

Who are these businesses and what do they sell?

6. JD Sports is an international retailer, operating a number of different store brands in the UK, its largest being JD Sports, which consistently performs very well financially and is growing substantially (operating 375 stores and online). Footasylum, although a smaller UK retailer, is a sizeable business having grown over the last decade to operate 70 stores in the UK and online. Both are multi-million-pound businesses with millions of customers shopping in their stores and online. Their UK revenues in 2018/19 were £2.1 billion for JD Sports and £227 million for Footasylum.

7. There are many similarities between these two businesses. Broadly speaking, both sell 'sports-inspired casual footwear and apparel' ie fashionable branded sportswear used primarily for leisure rather than for sport, sometimes known as 'athleisure'. Branded products by Nike and adidas make up the majority of their footwear sales and are also important in apparel, although they sell a wider range of apparel brands including own-brand apparel. Both businesses also target a similar demographic - 16-24 year olds, with a focus on males.

8. Many different types of trainers and apparel can be bought from a large number of retailers, both on the high street and online. But JD Sports and Footasylum are among only a small number of retailers selling specific types of fashionable branded sports-inspired casual trainers and apparel. Consumers want to shop at these retailers who have built their retail brand and reputation around these sought-after products, using for example the latest social media influencers or sports personalities to market their products. The Parties therefore offer a distinctive retail experience for their trend-savvy shoppers, compared to fashion retailers like Next or more 'value end' sports retailers like Sports Direct.

9. Shoppers are also increasingly looking at and buying sports-inspired casual products online; for example, online footwear sales accounted for around 37% in 2018 versus 22% in 2015 and this is similar for apparel. The Parties both have sizeable online businesses in addition to their physical stores. Some retailers like ASOS sell only online. However, shopping in stores remains important for many consumers in these markets - 60% of sports-inspired footwear sales were made in stores in 2018 - and retailers have been opening and investing in their stores to attract shoppers. We recognise that many consumers in these markets shop both in-store and online interchangeably, which is why we have treated them as a single, combined market and looked at the national constraint from all retailers including online-only and those who also have stores.

Our assessment

How have we examined this Merger?

10. Competition between retailers drives good outcomes for shoppers (in terms of better deals, quality, service, range and other continuous improvements). It is therefore necessary to understand how each of the merging businesses competes against the other and how they compete against other retailers. In some mergers the markets can be clearly delineated (for example, those with homogeneous products/services) so that measures like market shares are more important in understanding competition between businesses. However in other cases, like this, where the boundaries of markets are less clear-cut (with differentiated products/services ie there is a wide range of products and different service offerings), other evidence tells us much more about how closely the merging businesses compete and therefore what effect a merger will have on shoppers.

11. We looked at whether JD Sports competes closely with Footasylum and vice versa, and which other retailers are close competitors to them. Firms are close competitors if their customers view them as alternatives to each other ie customers would be willing to switch between the two firms, and, as a result, the two firms compete to win and retain customers by offering a better product and service. Two closely competing firms place a stronger immediate constraint on each other than do other retailers within the same market, and customers benefit from this competitive rivalry. If those closely competing firms merge, each will be under less competitive pressure which means they will not work as hard to offer good deals for their customers or make improvements to their businesses than they otherwise would have done.

12. In assessing this Merger, we looked at a wide range of evidence which we considered in the round to reach our decision.

13. We examined the Parties' own internal documents which show how they run their businesses and how they view their rivals in the normal course of business. If firms regularly monitor each other and pay particular attention to each other in such documents, this indicates they are close competitors. We undertook a widescale review of each Party's internal documents and examined over 2,500 documents.

14. We carried out two large surveys of the Parties' customers, interviewing over 10,000 shoppers at JD Sports and Footasylum stores and their online businesses. We asked the customers' views on how they purchase the Parties' products, and what alternative retailers they would consider shopping at. For example, if a JD Sports customer tells us that they would shop at Footasylum if JD Sports were no longer available (or vice versa for a Footasylum customer), then this would be evidence that the two are close competitors.

15. We assessed how shoppers actually behave by looking at how different retailers impact each other's revenue. For example, if Footasylum opens a new store near a JD Sports store and the JD Sports store loses money, this is evidence they are close competitors. We assessed JD Sports' own data to look at the impact on its revenues of different retailers opening and closing stores.

16. We looked at how similar the Parties are in terms of what they sell, where their stores are and the type of customers they have, as well as how similar other retailers are to the Parties. We spoke to and gathered evidence from many other retailers and suppliers to see what they thought of the Merger and who they considered to be the Parties' key competitors.

17. We also calculated market shares. But, in markets like this where there is such a wide range of products and offerings, retailers work hard at differentiating themselves from each other, and it is difficult to define the boundaries of a 'market'; market shares do not fully show how closely these firms compete in practice.

18. As well as looking at how retailers currently compete, we recognise that markets change over time. Our assessment is forward-looking and evidence-led. We therefore assessed how these markets might develop in the foreseeable future (ie within two years) to see if some retailers might become closer competitors than they are currently. We examined retailers' commercial plans and their internal documents, in particular those of Sports Direct which

is elevating some of its stores and online business (ie further improving the quality of its stores and website), and the big brands like Nike and adidas, which are retailers in their own right (as well as supplying products to retailers) and are growing their own direct to consumer (DTC) sales.

19. We also looked at whether brands like Nike and adidas, through their role as suppliers, provide a constraint on the Parties which might prevent or disincentivise them from deteriorating their offer after the Merger. Getting access to branded products, particularly the most sought-after, is important for retailers as they are in such high demand from shoppers. But suppliers control, through their selective distribution arrangements, what types and volumes of products are given to different retailers to sell. This gives suppliers an important role and influence in shaping retail competition. We looked at a range of different evidence, including suppliers' terms and conditions, behaviour and internal documents, to assess the nature and extent of the constraint from suppliers.

What did this evidence tell us about how closely the Parties compete?

20. We found that the Parties regularly monitor each other as well as some other retailers. Footasylum's internal documents show that it monitors JD Sports more closely than any other retailer, and therefore that JD Sports is a particularly significant competitor to Footasylum. Footasylum is also one of the retailers most closely monitored in JD Sports' internal documents, along with Foot Locker, ASOS, Nike and adidas. Other retailers are monitored by the Parties but to a much lesser extent, showing they are more distant competitors. We have also seen a small number of examples which show that such monitoring is likely to have influenced their commercial decisions and was sometimes followed by responsive actions (for example relating to student discounts). It is unlikely that the Parties would undertake such extensive regular monitoring of each other, if it were not to inform their business decisions.

21. Our surveys show that the Parties' customers also consider them to be a strong alternative to each other. We found that JD Sports is by far the closest competitor to Footasylum. A very high proportion of Footasylum's customers said that they would shop at JD Sports if they could no longer shop at Footasylum – more than two-thirds of in-store customers (68%) and almost half of online customers for footwear (46%). This was similar for apparel where 69% of Footasylum's in-store customers and 61% of online customers said they would go to JD Sports. These figures were substantially higher than for any other retailer.

22. The proportions of JD Sports' footwear customers who said they would go to Footasylum were lower (21% of in-store customers and 16% of online customers), although this in-store level is still higher than for any other retailer and online Footasylum is a close second to Nike at 18%. This was similar for apparel where 17% of JD Sports' in-store customers would go to Footasylum (with only Sports Direct being comparable) and 13% of its online customers (second to Nike at 14%).

23. These numbers are important as they tell us how strong the incentives would be on the Parties to worsen their offerings after the Merger or not improve them as much or as quickly as they would have otherwise done. Using these survey results, we calculated the strength of this incentive at the national level for both Parties using the 'gross upward pricing pressure index' (GUPPI), which is commonly used in the CMA's merger investigations. The GUPPI results are high for both of the Parties, and particularly for Footasylum (the in-store footwear and apparel GUPPIs were [19-27%] for Footasylum and [4-7%] for JD Sports).

24. Our analysis of the impact of store openings and closures also indicates that Footasylum is a competitive constraint on JD Sports. Entry by Footasylum is associated with a fall in nearby JD Sports store revenues for footwear and apparel. We did not have enough data to test the impact of JD Sports' store openings on Footasylum stores.

25. All of this evidence shows a consistent picture - JD Sports and Footasylum are close competitors, with JD Sports providing a particularly strong constraint on Footasylum, which would be removed by the Merger.

26. This is also supported by a range of other evidence – JD Sports and Footasylum stock a similar range of branded sports-inspired casual footwear and apparel, although the product overlap is less clear in apparel than in footwear; they both target young consumers with a focus on males; their stores are in similar areas (all Footasylum stores are near to at least one JD Sports store) and many other retailers told us that they consider JD Sports and Footasylum to be close competitors to each other.

27. However, the market share figures show that the share increment from the Merger is fairly low; JD Sports is clearly the largest retailer in the market with an estimated share in each of sports–inspired casual footwear and apparel of [20-40]% and Footasylum is smaller with a share of [0-10]%. But delineating a 'market' in this case is somewhat artificial, given there is such a wide range of different products. This means that these market shares are not particularly informative and do not help us to understand fully how closely retailers compete in this case. That is why we looked at a range of other evidence that

tells us more about competition in these markets and the effects of this Merger.

What about competition from other retailers or suppliers?

28. Having found that the Parties are close competitors, we looked at how much other competition there is from other retailers (ie the competitive constraint they have on the Parties – both now and in the foreseeable future) such that there would not be competition problems from the Merger. We looked at retailers like the Parties who sell multiple brands and operate both in-store and online, like Foot Locker, Sports Direct, Office and Schuh, and online-only retailers like ASOS and Amazon; as well as Nike and adidas, who operate both in-store and online but who sell only a single brand. We found that while there are numerous other retailers in these markets, only Foot Locker provides a strong constraint in footwear, with some constraint from Nike and Sports Direct in both footwear and apparel, though less than the constraint the Parties have on each other. Other retailers provide a more limited constraint in both footwear and apparel. This means there would still be a substantial loss of competition from this Merger.

29. **Foot Locker** is a strong competitor to JD Sports and Footasylum in footwear but less so in apparel, in which it currently has a relatively limited offering. The Parties both closely monitor Foot Locker and our surveys found that their footwear customers consider Foot Locker to be the next best alternative after the Parties themselves. It has a similar number of stores to Footasylum and has recently opened two much larger stores. This constraint could be strengthened further if it continues to open larger stores. However, the evidence does not show that Foot Locker, on its own, would provide sufficient constraint to prevent an SLC.

30. **Sports Direct** also currently exerts some competitive constraint, more so in apparel than in footwear. But despite it being a significant retailer with a large number of stores, it currently has some key differences from the Parties. Most of its stores do not sell the types of higher-end branded trainers or apparel that the Parties do, and instead it sells more 'value end' products. It is more focussed on sporting goods and most of its stores currently give shoppers a different retail experience from the Parties. This is supported by the views of customers, most of whom do not consider Sports Direct to be a close alternative, particularly Footasylum's customers.

31. We also looked in detail at whether the competitive constraint from Sports Direct may increase over the next two years, given it has been elevating some of its stores and its online offer and is starting to sell some higher-end branded products. It has opened over 30 elevated stores (as at March 2020)

and has plans to open more. Sports Direct has also been given access to some types of higher-end branded products similar to those given to the Parties, albeit in small volumes. On balance, while it is possible that Sports Direct through its elevated stores may become a more direct competitor to the Parties to some extent, we cannot say with sufficient certainty that it will become a significantly stronger constraint in the foreseeable future.

32. We also considered the competitive constraint from **Nike and adidas** as retailers through their DTC sales, and found that Nike exerts some constraint and adidas provides a weak constraint. While both have retail stores, most of these are factory or clearance outlets. They also sell only their own brands rather than offer the mix of brands that the Parties sell. There is evidence that the Parties, particularly JD Sports, monitor both Nike and adidas, and some evidence that Nike store openings have an impact on JD Sports store footwear and apparel revenues. But our surveys found that they impose less of a competitive constraint than the Parties do on each other. There is a trend of increasing sales direct to consumers, predominantly online, and future growth is forecasted. However, in our view, the evidence does not indicate that the ratio of DTC sales to wholesale will change significantly. So while Nike and adidas may continue to grow their DTC sales, we cannot say with sufficient certainty that this will increase materially their competitive constraint on the Parties over the next two years.

33. **ASOS** exerts some competitive constraint, particularly for apparel, but to a much lesser extent than either of the Parties. For example, our surveys found that in footwear less than 2% of the Parties' in-store customers would go to ASOS and only 6% of their online customers, which is significantly lower than those who would go to either of the Parties. In apparel in-store the results were similar but higher for online (10% for JD Sports and 8% for Footasylum). ASOS is one of the retailers most closely monitored by JD Sports, but is monitored to a lesser extent by Footasylum. The evidence shows overall that the competitive constraint from ASOS is relatively limited and this is not likely to change over the next two years.

34. While there are other large online-only retailers such as Zalando and Amazon, these are not close competitors. The Parties' customers clearly do not consider them to be significant alternatives. Amazon does not currently sell Nike or adidas products directly. Other retailers with in-store and online offerings such as Schuh and Office exert only a relatively limited constraint (for example they are monitored to a lesser extent, and far fewer customers would go to their stores than to either of the Parties' stores).

35. In addition to the competitive constraint from retailers, we also looked at whether the Parties face **constraints from suppliers of branded products,**

in particular Nike and adidas. While suppliers have an important role in these markets, more so in footwear than in apparel, we do not consider that they would prevent the competition problems arising from this Merger. We found that suppliers are influential and exert some constraint on retailers, particularly through controlling the products and volumes that retailers can access and setting criteria for in-store quality and product presentation. In general Nike and adidas are the most restrictive of the suppliers. But suppliers do not provide a constraint on all aspects of retail competition.

36. Retailers can and do compete on many different aspects of business such as discounts, promotions like Black Friday, delivery charges and the mix of brands they offer, as evidenced by the variation seen in their offerings. Suppliers do not monitor and engage in all of these aspects of retail competition, in some cases have little (if any) incentive to constrain any deterioration (eg reduction in student discounts or loyalty schemes) and are not likely to perceive some changes as deteriorations (such as the mix of brands offered). Shoppers value and benefit from these aspects of competition, which would be reduced if this Merger went ahead. The constraint from suppliers is also weaker in apparel, as a greater proportion of apparel sales comes from a range of suppliers other than Nike and adidas so there is less dependency on them and because suppliers are also less restrictive in apparel than in footwear. Retailers also stock their own-brand apparel which does not face the same constraints.

37. We found that while in aggregate other retailers impose some constraint on the Parties, this is only moderate at best. Suppliers like Nike and adidas provide some additional constraint on aspects of retailers' offerings, but this also has limitations and is less in apparel. When combined, on balance, these constraints would not be sufficient to prevent the substantial loss of competition resulting from the removal of a significant direct competitor. We consider this to be the case having fully explored and accounted for any market developments in the foreseeable future and the impact of COVID-19 on these.

38. We also looked at whether entry and expansion by other retailers over the next two years or any customer benefits arising from this Merger would offset the competition problems from this Merger but found no evidence that either would. In particular, no retailer has significant plans to enter these markets.

Conclusion

39. This Merger would bring together two strong competitors which would be bad for shoppers. On the basis of a significant amount of evidence, we concluded that the Merger has resulted or may be expected to result in a substantial

lessening of competition in the markets for sports-inspired casual footwear and apparel. That is why we consider it necessary for JD Sports to sell Footasylum, so that they can continue to compete against each other as independent businesses. We do not consider that there is any remedy other than a full sale which would be effective and, given the substantial loss of competition that would be brought about by the Merger, this is a proportionate step to take.

40. We recognise the challenges arising from COVID-19 and the significant impact this is having on all retailers. While much remains uncertain at this stage, we do not envisage that the impact of COVID-19 will remove the competition concerns resulting from this Merger. All retailers, including the Parties, are being impacted and it is not clear that the effects of COVID-19 would disproportionately impact the Parties more than any other retailers, such that JD Sports and Footasylum would no longer be close competitors or the constraints from other retailers would significantly increase.

41. We consider that the sale of Footasylum is an effective and proportionate remedy and that there is flexibility in the sales process to respond to any further developments.

Findings

1. The reference

1.1 On 1 October 2019, in exercise of its duty under section 22(1) of the Enterprise Act 2002 (the Act), the Competition and Markets Authority (CMA) referred the completed acquisition by JD Sports Fashion plc (JD Sports) of Footasylum plc (Footasylum)[1] (the Merger) for further investigation and report by a group of independent panel members (the Inquiry Group).[2] The terms of reference, along with information on the conduct of the inquiry, are set out in Appendix A. Having extended the statutory timetable by eight weeks, the Inquiry Group was required to publish its final report by 11 May 2020.[3]

1.2 In exercise of its duty under section 35(1) of the Act, the CMA must decide:

(a) whether a relevant merger situation has been created; and

(b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition (SLC) within any market or markets in the UK for goods and services.

1.3 This requires that the CMA assesses what effect the Merger will have on competition, which is the process of rivalry over time between businesses seeking to win consumers' business by offering them a better deal. An SLC occurs when rivalry is substantially lessened after a merger than would otherwise have been the case, resulting in a worse outcome for consumers.[4]

1.4 During the final stages of our investigation, the effects of cases of Coronavirus (COVID-19) arose in the UK and the situation was declared a global pandemic by the World Health Organisation on 11 March 2020. On 23 March 2020, the UK government required all retail stores selling non-essential goods to close for an initial period of three weeks, which was extended by a further three weeks on 16 April. This closure applied to the physical stores of all retailers relevant to this Merger - including the Parties. Retailers are also subject to the government social distancing and self-isolation guidance. Other aspects of these markets are therefore likely to be affected including retailers'

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[1] JD Sports' offer for Footasylum was declared wholly unconditional on 12 April 2019. Consequently, Footasylum was delisted from the Alternative Investment Market on the London Stock Exchange, and on 19 September 2019, Footasylum changed its name from Footasylum plc to Footasylum limited. References to Footasylum in this document should be interpreted as covering both Footasylum plc (in the period prior to 20 September 2019) and Footasylum limited (in the period since 20 September 2019).
[2] Section 22(1) of the Act provides that the Inquiry Group is to be constituted under Schedule 4 to the Enterprise and Regulatory Reform Act 2013.
[3] CMA, Notice of extension, 11 February 2020.
[4] CMA, Quick guide to UK merger assessment (CMA18), paragraph 3.1.

online businesses, their operations and their supply chain. We recognise that all retailers are therefore facing uncertain and challenging trading conditions.

1.5 It is clear that COVID-19 is having a significant impact on retailers and the economy. At the time of publishing this report, there remains considerable uncertainty about the extent and duration of the impact of COVID-19 in the medium to long term. It is therefore difficult to predict what impact there may be on the markets relevant to this investigation.

1.6 The evidence gathering for this investigation was mostly completed before the effects of COVID-19 arose and therefore it largely reflects the market prior to this. However, we have looked at the impact of COVID-19 in our investigation and considered how COVID-19 might affect our competitive assessment and in turn the extent to which it would affect any SLC finding.

1.7 Although we are required to form a final view on the impact on competition and the appropriate remedy in this final report, there is flexibility in our remedies implementation process which means we can to respond to any relevant developments. This is considered further in chapter 13.

1.8 This document together with its appendices constitutes the Inquiry Group's provisional findings, published and notified to JD Sports and Footasylum in line with the CMA's rules of procedure.[5] Further information relevant to this inquiry, including non-confidential versions of the submissions received from JD Sports, Footasylum and third parties, as well as summaries of evidence received in oral hearings, can be found on the CMA's website.[6]

1.9 Throughout this document we refer to JD Sports and Footasylum collectively as 'the Parties'.

2. Industry background

Introduction

2.1 In this chapter we provide an overview of the UK footwear and apparel retail sectors, in particular sports-inspired casualwear, in which the Parties are active (see also chapter 7).

[5] CMA, Rules of procedure for merger, market and special reference groups (CMA17), paragraphs 11.1-11.7.
[6] JD Sports/Footasylum phase 2 merger inquiry webpage.

Overview of the industry

Wider sportswear and fashionwear sectors

2.2 The footwear and apparel retail sectors include a range of different product types, including sportswear and fashionwear.

2.3 Sportswear encompasses products that are largely used by consumers for sports or fitness activities (often referred to as sports performance), but which may also be used for leisure activities or dressing casually. Fashionwear includes a wide range of different types, styles and brands of products sold to consumers by a large number of different retailers. Fashion products are bought and used by consumers for different purposes, including as formalwear, business attire, for leisure and sports, among others. The distinction between sportswear and fashionwear and consumers' perceptions of them is often fluid, with sportswear also being worn as fashionwear. Both the footwear and apparel sectors are trend-driven and influenced by marketing, events, designers, social media, celebrities and other factors. This being the case, retailers typically seek to differentiate themselves from others, for example by focusing on particular types of footwear and apparel or on different consumer segments.

2.4 The UK sportswear sector was estimated to be around £5.5 billion in 2018,[7] making it the third largest in Europe, behind Germany and France,[8] with apparel and footwear having a roughly even share. The sector was forecast to grow by around 20% between 2018 and 2023, and reach £6.7 billion by 2023,[9] growing faster than the wider apparel and footwear industry.[10] This growth has been reportedly driven by shifting consumer lifestyle preferences for healthy living and greater participation in sports and fitness,[11] but also as a result of the growing 'sports-inspired casualwear' sector.

Sports-inspired casualwear sector

2.5 Growth in sportswear has also been attributed to the 'sports-inspired casualwear' sector, also known as 'sports casual', 'athleisure' or 'activewear'. This growth has arisen as a result of consumers becoming more conscious about their health and wellbeing, the influence of social media photo/video-sharing platforms, and the trend among younger consumers particularly to

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[7] GlobalData, The UK sportswear market 2018-2023, page 13.
[8] Credit Suisse, European sporting goods (December 2018), page 8.
[9], GlobalData, The UK sportswear market 2018-2023, pages 3 and 13.
[10] Berenberg, Sports retail, page 5.
[11] Berenberg, Sports Retail, page 4.

wear sportswear as fashion items. For example, in footwear, trainers are increasingly worn for purposes other than sports. Sports-inspired casual products, which are products 'not designed to enhance sporting performance, but are instead geared towards fashion trends', are estimated to account for approximately half of the sportswear sector, with performance (38%) and outdoor (11%) comprising the remainder.[12]

Retail offer

2.6 There is a wide range of different types of retailer operating in the sector, including retailers with physical stores and those with an online offer.

2.7 Multi-brand retailers specialising in sports-inspired casual products, which include the Parties, have become increasingly important in the sector.[13] There is a range of multi-brand retailers, some of which sell primarily footwear such as Foot Locker, Office, and Schuh, and others which sell both footwear and apparel, such as Sports Direct and the Parties. These retailers typically stock a range of products from suppliers of branded products such as Nike and adidas[14] and in some cases the retailer's own-brand apparel. Some suppliers, including Nike and adidas, are also retailers in their own right and sell products directly to consumers, as discussed in paragraph 2.20. These retailers (including suppliers when selling directly to consumers) sell their products both in-store and online.

2.8 There is also a number of online-only retailers (ie retailers that do not have any physical stores and sell their products exclusively online) such as ASOS, Amazon and Zalando which sell branded sports-inspired casual products. Some of these retailers - such as ASOS - have also launched their own athleisure brands.[15]

2.9 In addition, fashion specialists, such as Zara, Topshop, H&M, Gap, Primark, Next, Joules and Boohoo, have introduced or expanded their own activewear ranges. Some of these fashion specialist retailers have also started selling some branded sports-inspired casual products, for example Next (only online) and Topshop. Other retailers of footwear and apparel, including more generalist retailers like supermarkets, also sell non-branded sports-inspired casual products including trainers.

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[12] Berenberg, Sports Retail, page 9.
[13] GlobalData, Clothing and footwear retailing in the UK, Market shares, Summary and forecasts to 2021, page 29.
[14] Nike and adidas also supply products under other brands - Converse and Jordan, and Reebok respectively. In this report we refer to Nike and adidas as suppliers of branded products of the same name, unless indicated otherwise.
[15] GlobalData, The UK sportswear market 2018-2023, page 6.

2.10 As the sports-inspired casualwear sector has grown and demand for these types of products has increased, retailers have sought to differentiate their offerings to consumers. Some examples of this include: partnering with brands/designers to launch new ranges; being the first retailer to launch branded products/ranges; getting access to exclusive colourways or designs from brands; or retailers developing their own-brand product ranges and lines. Retailers can also differentiate themselves through the type of sports-inspired casual products they sell which are available across a range of price and quality points, focused on different age groups, and to men, women and children. As well as their product range, retailers in this sector use their wider proposition, such as their in-store environment (interior layout and design, music, etc), the design of their website/apps, and their own retail brand, to appeal to consumers.[16]

2.11 Consumers therefore can choose between a variety of different sports-inspired casual products from a range of differentiated retailers. Within this sector some products are more highly sought after and considered most desirable and valued by consumers, such as certain models of branded sports-inspired casual footwear and apparel (see paragraphs 2.18 and 2.19, and chapter 7). These types of products typically are sold by a smaller number of retailers. Which products are considered desirable is influenced and shaped by fashion trends and consumer tastes, as well as other factors as set out in paragraph 2.3. Consumers also value the look and feel of retailers' propositions - including branding and reputation - which can influence their choice of retailer from which to purchase products, as well as the products themselves.[17]

[16] For example, see JD Sports, Response to Issues Statement, page 29, paragraphs 121 - 129 which highlights the interaction between in-store and online, including how retailers differentiate their offer to appeal to consumers on these channels. Regarding the former, JD states that '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 consumer'.
[17] For example, see JD Sports, Response to Issues Statement, page 29, paragraphs 121 - 129.

Key trends

Importance of in-store and online

2.12 Sports-inspired casual products are sold to consumers through different routes, namely in-store or online (which are referred to as 'channels').

2.13 Consumer demand in the sports-inspired casualwear sector increasingly centres on multi-channel retail experiences. These start online through social media, with consumers then having the ability to shop in-store and online through websites and apps on smartphones, tablets and other devices.[18]

2.14 While there has been a general decline in the UK high street retail sector in recent years,[19] this has not been the case in the sports-inspired casualwear sector which has continued to grow and where both the in-store and online channels play an important role (see also chapter 3 which sets out the Parties' offer across both channels). Consumers increasingly browse and buy in both channels. Consumers can purchase products online and collect and/or return them in-store (known as 'click and collect'). There is evidence that shopping in-store remains an important part of the buying experience; for example, research shows that many consumers still want to try trainers on in-store, prior to buying, as it is important to get the fit of footwear right.[20] Retailers are also increasingly investing in their in-store environments in order to attract and engage consumers, including through promotional in-store experiences such as DJ events and the use of technology in their stores.[21] Many retailers have been continuing to open new and/or larger stores on the high-street to meet growing demand, as well as growing their online businesses.[22]

2.15 Online is growing faster than in-store in the sector and is a key driver of growth. Online accounted for 31.6% of sportswear sales in 2018 versus 13.8%

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[18] Berenberg, Sports retail, page 16.
[19] For example, the British Retail Consortium reported declines in footfall in August 2019 across town centres, high streets, retail parks and shopping centres.
[20] Mintel, Sports and outdoor fashion - UK, December 2018, page 82.
[21] GlobalData, The UK sportswear market 2018-2023, page 10. For example, the report states that 'store staff need to be clued up on the latest trends and products and understand shopper needs' and that sportswear retailers are 'introducing events instore such as classes, or one-off sessions with trainers to encourage return visits'.
[22] The Parties submitted ONS statistics published on 24 April 2020 on British retail in March, and submitted comments by the ONS's head of retail stating that 'retail sales saw their biggest monthly fall since records began over 30 years ago with large declines in clothing and fuel, only partially offset by strong food sales.' We note that all retail stores selling non-essential goods have been closed by government order since 23 March 2020 due to COVID-19, including the Parties and other retailers of sports-inspired casual products. We recognise that retailers are facing uncertain and challenging trading conditions. The extent and duration of the impacts of COVID-19 on the UK retail sector in the medium to long term are uncertain.

of sales in 2013, and online sales were worth around £1.7 billion in 2018.[23,24] This is due to a combination of the growth of online-only retailers, such as ASOS, and retailers with physical stores growing online sales.[25] Online sales comprise about a third of sales in this sector in the UK. In-store sales, which represent two thirds of sales, therefore continue to be important.

2.16 The rise of the online channel in the sports-inspired casualwear sector may also be partly reflective of its core demographic, which is more weighted towards young consumers, including students (16-24 year olds) than the overall apparel and footwear sectors. Across all markets, younger consumers are the most likely to shop online.[26] The Office for National Statistics (ONS) reports that clothing or sports goods are the most likely products to be purchased online.[27]

Importance of brands and access to products

2.17 While a number of retailers offer non-branded or own-brand sports-inspired casual products, brands are very important to consumers of these products, and particularly for younger consumers in this sector, which make up the majority.[28] In the UK sportswear market, Nike and adidas are the two biggest brands, particularly for footwear, with estimated combined market shares of around 53% of sports footwear and around 18% of sports apparel.[29] Based on data of retailers' revenues split by brand in 2018, Nike and adidas have a majority combined share in the UK of [✂]% in sports-inspired casual footwear ([✂]% and [✂]%, respectively) and a significant combined share of [✂]% in sports-inspired casual apparel ([✂]% and [✂]%, respectively). We therefore refer to Nike and adidas as 'the key suppliers', throughout this report. There is also a range of smaller brands in this sector including Vans, Puma, Under Armour and The North Face. Suppliers of branded products therefore have a

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[23] GlobalData, The UK sportswear market 2018-2023, pages 12, 18, 22 and 23.
[24] We estimated the shares of in-store and online for our defined relevant markets in paragraphs 7.47 (footwear) and 7.94 (apparel) respectively.
[25] GlobalData, Clothing and footwear retailing in the UK, Market shares, Summary and forecasts to 2021, page 29. A number of UK sportswear retailers offer an online service. The range of products offered is generally the same as products sold in-store (if not wider), as is the price of individual products.
[26] 97% of all 16-24 year olds have shopped online in the last 12 months, ONS, Internet access – households and individuals, Table 12.
[27] 60% of all adults have bought clothing or sports goods online in the last 12 months, ONS, Internet access – households and individuals, Table 15.
[28] Research by GlobalData shows that '52.1% of sports clothing shoppers and 58.2% of sports footwear shoppers agree that the brand is important to them when purchasing an item, with the figure rising among younger consumers'. GlobalData, The UK sportswear market 2018-2023.
[29] Berensberg, Sports retail, page 14. 'Sportswear' covers sports-inspired, performance and outdoor products. We note that the market share estimate presented for Nike excludes its other brands ie Converse, and similarly for adidas, excludes Reebok.

critical role in shaping and driving consumer demand in the sector, which we explore further in chapters 8 and 9.

2.18 Suppliers offer a range of branded products across a range of styles and price points. As set out in paragraphs 2.10 and 2.11, in this sector products are highly differentiated and specific types or models of branded products are considerably more popular than others.[30] Access to branded products, particularly the more sought after higher-tier or exclusive products (including 'top-of-the-range' limited range products) from suppliers such as Nike and adidas, is therefore an important competitive parameter. Multi-brand retailers generally seek greater access to these types of products, including 'exclusive' products, to help differentiate their offer and position their proposition as unique. This helps to attract and retain consumers, and to build the retailer's brand and reputation.[31] The value placed on branded products by consumers and as a result, by multi-brand retailers, has meant that suppliers of these products have an influential position in the sector.

2.19 There are several interrelated ways in which suppliers create and drive consumer demand:

(a) they design and manufacture the products, which are considered desirable and are sought after by consumers;

(b) they engage in substantial marketing activities, with high amounts of spend including investing in partnerships with celebrities and social media influencers;[32] and

(c) as well as generating demand for their branded products generally, suppliers may also shape consumer perceptions and preferences across a range of their products. Their distribution decisions can influence demand for particular products, especially where limited editions or limited volumes of products lead these products to be seen as more desirable from a consumer perspective due to the associated status effects (see chapter 8 and 9 where we consider suppliers' distribution decisions as part of our competitive assessment).

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[30] For example, as reflected in JD Sports' response to the Issues Statement which emphasised the importance of branded products in this sector; and submissions from Company A regarding the importance of particular 'restricted products' - Nike and adidas special make-up/exclusive and high-end/premium products that are currently supplied to only a limited number of large-scale multi-brand retailers in the UK - which are in demand by consumers, for a retailer to have access to in order to be successful.
[31] GlobalData, The UK sportswear market 2018-2023, page 10.
[32] For example, JD Sports submitted in its response to the Issues Statement that Nike's advertising spend in 2018 was $3.8bn while adidas's was $3bn. Partnerships with non-sports celebrities have helped with both adidas's and Nike's 'desirability'. The adidas Kanye West collaboration was expected to raise $1.3 billion in 2019. adidas and Nike have also collaborated with designers such as Victoria Beckham, Stella McCartney and Virgil Abloh, a Louis Vuitton designer.

Growth in DTC sales

2.20 Suppliers of branded products, particularly Nike and adidas, but also others such as Puma and Under Armour, are expanding their own retail 'direct to consumer' (DTC) offering, particularly online but also through their own stores. These suppliers operate internationally and while suppliers' DTC channels currently account for a minority of their overall sales, globally this proportion has increased in recent years and this growth is forecast to continue. However in the UK, the relative importance of DTC [✂].

2.21 Although suppliers' DTC offering is growing, the wholesale distribution market remains large, for example accounting for the [✂]% of Nike's and [✂]% of adidas's UK footwear revenue,[33] and as a result, multi-brand retailers continue to play a critical role in the marketplace. We also note that some suppliers are shifting how they allocate their products globally, with their higher-tier product allocations going to a smaller number of 'key' retailers, which over time may reduce the number of overall retailers that they supply.[34]

2.22 We have considered the impact of DTC further in chapters 8 and 9 as part of our competitive assessment of horizontal unilateral effects.

3. The Parties, the Merger and its rationale

3.1 In this chapter we provide an overview of the Parties, the Merger and the Parties' rationale for the Merger.

The Parties

Pentland

3.2 Pentland acquired 57% of the shares of JD Sports in 2005 and currently holds 55%.[35] Pentland is a privately-owned global group with wholesale and retail businesses supplying branded apparel and footwear products in the areas of sports, fashion and outdoor.[36] The vast majority of sales from Pentland's

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[33] July 2018 to June 2019.
[34] For example, reports about Nike consolidating its retailer base as reported on in 2017 and more recently in 2019.
[35] At the time of the reference, JD Sports was 57.47% owned by Pentland Group plc, which was incorporated in the UK and was also the parent company of the Pentland group of businesses, including JD Sports. Pentland Group plc had a corporate restructuring on 21 November 2019, which resulted in Pentland Group Limited becoming the new ultimate parent company. References to Pentland means Pentland Group plc prior to 21 November 2019 and Pentland Group Limited from 21 November 2019 onwards. On 11 December 2019, Pentland sold a 2.47% stake in JD Sports and, as a result, Pentland now owns 55.0% of JD Sports.
[36] Pentland, Financial Accounts 2018, page 2.

brands are at a wholesale level[37] to retailers including JD Sports[38] and Footasylum.[39]

3.3 The relationship between Pentland and JD Sports is governed by an arms-length 'Relationship Agreement' dated 30 October 2014. This agreement requires that Pentland does not take any action which precludes or inhibits any member of JD Sports from carrying on its business independently of any member of Pentland.[40]

JD Sports

Background

3.4 JD Sports was established in 1981 and listed on the London Stock Exchange in 1996.[41] It is an international[42] multi-brand multi-channel retailer of sportswear, sports-inspired casualwear, fashionwear and outdoorwear, operating both stores and online.[43]

3.5 JD Sports' core fasciae that are active in the retail supply of sportswear, sports-inspired casualwear and fashionwear are: JD Sports (375 stores in the UK and online), Size? (25 stores in the UK and online), Footpatrol (one store in London and online), Tessuti (which includes Scotts, Choice, Xile, Infinities – 67 stores in the UK and online), Hip (two stores in the UK and online) and Activinstinct (online-only and operating on an arms' length basis).[44]

3.6 JD Sports stocks its own-brand labels including McKenzie, Sonneti, Status, Pink Soda, Supply & Demand and The Duffer of St George, as well as having third party brand partnerships. JD Sports also operates an 'Outdoor' division,[45] which supplies outdoor clothing, footwear and equipment in the UK and is not focused on sports-inspired casual products.

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[37] The majority (more than [✂]%, with the exception of [✂], [✂]% and [✂], [✂]%) of sales from Pentland's brands are made at the wholesale level.
[38] [✂].
[39] [✂].
[40] [✂].
[41] See: JD Sports website.
[42] JD Sports revenue in the UK accounts for [✂]% of global revenue. Prior to JD Sports' acquisition of Finish Line Inc. in 2018, UK sales accounted for [✂]% of JD Sports' global revenue.
[43] See: JD Sports website.
[44] As of July 2019.
[45] Comprising the following fasciae: Blacks, Millets, Ultimate Outdoors, Tiso Group, Go Outdoors and George Fisher.

3.7 JD Sports' global revenue for the financial year 2018/19 was £4.7 billion. In the UK, JD Sports' total revenue increased by around £700 million from £1.4 billion in 2015/16 to £2.1 billion in 2018/19. The UK accounts for the largest part of JD Sports' total revenues (45%) followed by the rest of Europe (29%), US (21%), and the rest of the world (5%).[46] JD Sports' financial performance in relation to the UK retail supply of sports-inspired casualwear (split between apparel and footwear) is shown in Table 3.1.

Table 3.1: JD Sports' UK retail supply of sports-inspired casualwear revenue and cost

								£m
	FY 2015/16		FY 2016/17		FY 2017/18		FY 2018/19	
Number of JD Sports fascia brick and mortar stores in UK and ROI at year end	**361**		**369**		**385**		**390**	
	Store	Online	Store	Online	Store	Online	Store	Online
Footwear	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Apparel	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Other	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Segment revenue	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Footwear gross profit	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Apparel gross profit	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Other gross profit	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Total segment gross profit	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Total UK revenue (Sports Fashion and Outdoor)[i]	**1,408**		**1,656**		**2,059**		**2,138**	

[i] JD Sports annual accounts 2017, page 113 and JD Sports annual accounts 2019, page 133.
Note (i) Functional sport categories (regardless of brand), accessories and concessions are included in 'Other'; (ii) JD Sports moved to a new system to manage its financial information and therefore, data prior to February 2015 is currently inaccessible.

3.8 JD Sports' store portfolio has grown year on year, and in 2019/20, its UK footfall was around [✂] million customers.

3.9 JD Sports' total revenue from its UK retail supply of sports-inspired casualwear increased by a compound annual growth rate (CAGR) of [✂]% over the last four years (from 2015/16 to 2018/19). The growth in its online revenue was [✂] times the growth in its in-store revenue. JD Sports' apparel revenue increased by a CAGR of [✂]% over the last four years and its footwear revenue increased by a CAGR of [✂]% over the same period. [✂].

[46] JD Sports, Annual report 2018.

3.10 JD Sports' overall average gross margin[47] was [✂]% over the last four years. [✂].

Footasylum

Background

3.11 Footasylum was formed in 2005 and is a retailer of fashionwear and sports-inspired casualwear mainly in the UK, operating both stores and online.[48] Its shares were listed on the Alternative Investment Market (AIM) in November 2017.[49]

3.12 Footasylum owns and operates 70 stores in the UK, including one store under the Drome Men fascia and another under the Seven fascia. Drome focuses on higher end menswear, while Seven focuses on sports apparel and footwear, and contemporary fashionwear.[50] Footasylum has dedicated online channels for each of its three fasciae: Footasylum; Drome; and Seven.

3.13 Footasylum sells third party apparel and footwear brands, as well as a number of own-brands such as Kings Will Dream, allesandro zavetti, Zavetti, Zavetti Sport, Glorious Gangsta, Asylum, footasylum, Forena, Métissier, Monterrain, Projekts NYC and Loyalti. In 2017, Footasylum started to supply its own-brands in the wholesale channel, which currently accounts for 2% of Footasylum's total revenue.[51]

3.14 In 2012, Footasylum started to support developing third party 'Bedroom Brands',[52] [✂]. Some of these Bedroom Brands are supplied in other retailers.

Financial information

3.15 Footasylum's financial performance in the retail supply of sports-inspired casualwear (split between footwear and apparel) is shown in Table 3.2.

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[47] [✂].
[48] UK revenues account for around [✂]% of global revenues (including the rest of Europe and the rest of the world). Footasylum's financial accounts 2018/19, page 24.
[49] The Financial Times, JD Sports founders' Footasylum chain valued at £171m in IPO (accessed on 09 January 2020).
[50] Footasylum, Annual report and accounts 2018, page 15.
[51] Top three wholesale partners based on revenue in 2019 are: [✂].
[52] Bedroom Brands are start-up brands created on a limited budget and marketed on social media.

Table 3.2: Footasylum's retail supply of sports-inspired casualwear revenue and cost

£m

	FY 2014/15		FY 2015/16		FY 2016/17		FY 2017/18			FY 2018/19		
Number of Footasylum fascia brick and mortar stores at year end[i]	**34**		**44**		**56**		**65**			**69**		
	Store	Online	Store	Online	Store	Online	Store	Online	Wholesale	Store	Online	Wholesale
Footwear	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Apparel	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Other	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Segment revenue	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Footwear gross profit	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Apparel gross profit	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Other gross profit	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Segment gross profit	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
Total gross profit		[✂]		[✂]		[✂]			[✂]			[✂]
Segment revenue[ii]	**n/a**	**n/a**	**n/a**	**n/a**	**n/a**	**n/a**	**133**	**59**	**5**	**146**	**76**	**3**
Total revenue[ii]	**78**		**111**		**147**		**195**			**227**		
Adjusted EBITDA[ii]	**2**		**6**		**11**		**12**			**2**		

Footasylum 2018/19 annual account for financial year 2018/19

[ii] Footasylum annual accounts from 2014/15 to 2018/19

Notes: (i) 'Other' contains accessories and any footwear/apparel which are not considered sports-inspired casual (ie performance wear); (ii) for the purposes of limiting this response to sports-inspired casualwear only, Footasylum has removed all denim products from the apparel category and all products falling within the Birkenstock, Dr Martens, Forena, Kickers and UGG brands from the footwear category.

3.16 Footasylum's total revenue increased by £117 million from £110 million in 2015/16 to £227 million in 2018/19.

3.17 Footasylum's total revenue increased by a CAGR of [✂]% over the last five years (from 2014/15 to 2018/19) as Footasylum increased its number of stores from [✂] to [✂]. The revenue per store increased from £[✂] in 2015/16 to £[✂] in 2018/19. The [✂]

3.18 The retail sales for apparel (excluding wholesale) accounted for [✂]% of Footasylum's retail revenue in 2015/16, with footwear accounting for the remaining [✂]%. In 2018/19, this proportion increased to [✂]%, with footwear accounting for [✂]% and wholesale [✂]% of its overall retail revenue.

3.19 [✂].

The Merger

3.20 The Merger was carried out by way of a public offer made by JD Sports for the entire issued ordinary share capital of Footasylum on 18 March 2019.

3.21 On 12 April 2019, JD Sports completed the acquisition[53] of Footasylum for approximately £90 million. Footasylum's shares were delisted from trading on AIM on 16 May 2019. Under the terms of the transaction, on 5 June 2019 JD Sports acquired the remaining issued ordinary share capital of Footasylum as well as its associated assets and liabilities.

3.22 The Merger is not subject to review by any other competition authority.

Rationale for the Merger

JD Sports

3.23 JD Sports told us that the Parties' activities were complementary as it viewed Footasylum's brand as more fashion-led (with a higher percentage of sales of denim and T-shirts) than JD Sports' offering (which was more sports-led, for example football boots and other sports performance products).

3.24 JD Sports also told us that the Merger presented it with an opportunity to:

(a) [✂];

(b) [✂]; and

(c) [✂].

3.25 JD Sports stated that its intention had been to maintain a separate operational management structure within Footasylum and that it would also:[54]

(a) maintain Footasylum's differentiated brand mix, product range and its multi-channel proposition; and

(b) optimise the efficiency of the Merged Entity's combined operations, by consolidating certain central functions and leveraging potential economies of scale.

[53] On 12 April 2019, JD Sports announced that it had received acceptances representing around [✂]% of the Footasylum shares and declared that, as a result, the offer for the remaining shares had become unconditional and it had reached the threshold required to commence the compulsory acquisition process for the remaining shares.
[54] Public offer document, page 17.

Footasylum

3.26 Footasylum told us that due to its precarious financial position and retail trading challenges, the acquisition by JD Sports would secure its stores and online presence.

3.27 Footasylum also told us that:

(a) [✂];

(b) [✂];

(c) [✂]; and

(d) [✂].

4. Relevant merger situation

Introduction

4.1 As described in chapter 1, pursuant to section 35 of the Act and our terms of reference (see Appendix A) we are required to decide whether a relevant merger situation has been created.

4.2 A relevant merger situation is created if:

(a) two or more enterprises cease to be distinct; and

(b) the value of the turnover in the UK of the enterprise being taken over exceeds £70 million (the 'turnover test') or the 'share of supply test' is satisfied.[55]

Enterprises ceasing to be distinct

Enterprises

4.3 The Act defines an 'enterprise' as 'the activities or part of the activities of a business'.[56]

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[55] Section 23 of the Act. The 'share of supply' test is met where the result of the enterprises ceasing to be distinct creates or enhances a share of supply of 25% or more in respect of goods or services of any description which are supplied in the UK, or a substantial part of the UK.
[56] A 'business' is defined as including 'a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge'. Sections 129(1) and (3) of the Act.

4.4 JD Sports and Footasylum are each active in the retail supply of sports-inspired casual products in the UK, both in-store and online. We are satisfied that each of JD Sports and Footasylum is a 'business' within the meaning of the Act and that, accordingly, the activities of JD Sports and Footasylum are 'enterprises' for the purposes of the Act.

Ceasing to be distinct

4.5 The Act provides that two enterprises 'cease to be distinct' if they are brought under common ownership or common control.[57]

4.6 As a result of the Merger, JD Sports acquired the entire issued ordinary share capital of Footasylum. Accordingly, we are satisfied that both businesses have ceased to be distinct prior to the date on which the reference was made.

4.7 The enterprises must have ceased to be distinct either not more than four months before the date on which the reference was made or, where the merger took place without having been made public and without the CMA being informed of it, four months from the time that material facts are made public or the time the CMA is told of material facts, whichever is earlier.[58] The four month period may be extended under section 25 of the Act.

4.8 The Merger completed on 12 April 2019. The statutory deadline to refer was 8 October 2019, following an extension under sections 25(1) and 25(2) of the Act. The Merger was referred to a phase 2 investigation on Tuesday 1 October 2019. We are therefore satisfied the reference was made within the statutory time limit.

Turnover test

4.9 The turnover test is satisfied where the UK turnover of the enterprise being acquired exceeds £70 million.

4.10 The turnover of JD Sports in the financial year ending 2 February 2019 was £2.14 billion in the UK. The turnover of Footasylum for the financial year ending in 2019 was £227.4 million in the UK.

4.11 We are therefore satisfied that the value of the annual UK turnover of Footasylum exceeds £70 million and that the turnover test is met. We are not required to consider whether the share of supply test is also met.

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[57] Section 26 of the Act.
[58] Section 24 of the Act.

Conclusion

4.12 In light of the above assessment, we have concluded that the Merger has resulted in the creation of a relevant merger situation. As a result, we must consider whether the creation of that situation has resulted or may be expected to result in an SLC within any market or markets in the UK for goods or services.

5. Counterfactual

Introduction

5.1 The assessment as to whether the creation of a relevant merger situation has resulted or may be expected to result in an SLC involves a comparison of the prospects for competition with the merger against the competitive situation that would exist in the absence of the merger. This situation, referred to as the 'counterfactual', is the benchmark against which we assessed the competitive effects of the Merger.

5.2 In this chapter we set out:

(a) the CMA's framework for assessing the counterfactual;

(b) the Parties' views on the appropriate counterfactual; and

(c) our assessment and conclusion on the counterfactual.

The CMA's counterfactual assessment framework

5.3 As part of its counterfactual assessment, the CMA may examine several likely scenarios, one of which may be the continuation of the pre-merger situation. The CMA will select the most likely of these, based on the facts of the case, as the counterfactual scenario.[59] It will incorporate into the counterfactual only those aspects of scenarios that appear likely, based on the facts available to it and the extent of its ability to foresee future developments.[60] The foreseeable period can sometimes be relatively short.[61] However, even if an event or its

[59] CMA Guidance, paragraph 4.3.6. In contrast, at phase 1, the effect of the merger is compared with what is considered to be the 'most competitive' counterfactual (provided that this situation is considered to be a realistic prospect).
[60] CMA Guidance, paragraph 4.3.6.
[61] CMA Guidance, paragraph 4.3.6.

consequences are not sufficiently certain to include in the counterfactual, they may be considered in the context of the competitive assessment.[62]

5.4 The CMA seeks to avoid spurious claims to accurate prediction or foresight in the assessment of the appropriate counterfactual. Given that the counterfactual incorporates only those elements of scenarios that are foreseeable, it will not in general be necessary to make finely balanced judgements about what is and what is not included in the counterfactual.[63] Where we consider that the choice between two or more counterfactual scenarios will make a material difference to the competitive assessment, the CMA will carry out additional detailed investigation before reaching a conclusion on the appropriate counterfactual.[64]

5.5 Depending on the evidence, the choice of the counterfactual could be a situation either more or less competitive than the competitive conditions prevailing at the time the merger occurred. Therefore, the selection of the appropriate counterfactual may increase or reduce the prospects of an SLC finding.[65]

Parties' views on the appropriate counterfactual

5.6 The Parties submitted that it was not realistic to assess the Merger on the basis of a static view of competition. The Parties submitted that absent the Merger, Footasylum would have been a 'significantly weakened and less effective competitor'[66] going forward for two main reasons:

(a) the impact of market developments, in particular: the Parties' submitted that Nike's and adidas's shift towards their DTC channels had resulted in their becoming direct competitors to Footasylum; consumers increasingly buying products online; and high street retailers' expanding athleisure ranges; (we separately consider the Parties' submissions relating to COVID-19 in the next section, from paragraph 5.21) and

(b) certain negative repercussions from Footasylum's poor financial performance and worsened financial position in 2018/2019, including:

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[62] CMA Guidance, paragraph 4.3.2.
[63] CMA Guidance, paragraphs 4.3.2 and 4.3.6.
[64] CMA Guidance, paragraph 4.3.6.
[65] CMA Guidance, paragraph 4.3.4.
[66] The Parties, Response to Provisional Findings, section 8.

issuing three profit warnings during that period which resulted in a significant decrease in its share price; [✂];[67] [✂];[68] and [✂][69] [✂].[70]

5.7 [✂].

5.8 The Parties' external economic advisers submitted a counterfactual paper on 3 December 2019 which had been prepared for the purpose of informing the CMA's phase 2 Merger inquiry, which started on 1 October 2019. The paper presented a 'downside scenario' based on a central forecast and sensitivities (prepared by Footasylum's management prior to the Merger, in January and February 2019)[71] for Footasylum's financial performance in 2019/20 [✂]. It sets out the [✂]. The paper states that [✂].[72] The paper sets [✂]. It states that this [✂].

5.9 The counterfactual paper takes Footasylum's 2019/20 central forecast as its starting point, then applies a downside scenario which was drawn up by Footasylum's management after a Board meeting on 24 January 2019 using the following assumptions:

(a) [✂];

(b) [✂];

(c) [✂]; and

(d) [✂].

5.10 Footasylum's external financial adviser at the time of the Merger submitted a witness statement in response to our Provisional Findings [✂]. The financial adviser noted that, in their understanding, prior to the Merger, Footasylum's primary lender [✂].[73] [✂][74] [✂]. The adviser had discussed various strategic options in December 2018 and January 2019 (see Appendix B) with the Board but these options were limited. [✂].

5.11 JD Sports told us that [✂]. It added that [✂].

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[67] [✂].
[68] [✂].
[69] [✂].
[70] [✂].
[71] The Parties, Response to Provisional Findings, paragraph 5.21.1.
[72] [✂].
[73] [✂].
[74] [✂].

Our assessment of the appropriate counterfactual

5.12 This section covers our assessment of the Parties' arguments. A summary of the evidence submitted to us on these points is set out in Appendix B.

5.13 As set out in chapter 1, as far as possible, we have considered how COVID-19 affects our assessment at various points in the report. Our guidance provides a framework within which to assess the impact of any economic and market conditions in terms of considering whether firms may exit the market or become considerably weaker. The guidance sets out three questions to consider:[75,76]

(a) Would the firm have exited in the absence of the Merger?

(b) Would there have been an alternative purchaser for the firm or its assets?

(c) What would have happened to the sales of the exiting firm?

5.14 At the time of publishing this final report, we have not seen evidence that either of the Parties meets the conditions set out in the exiting firm scenario. The Parties have not submitted that, absent the Merger, either JD Sports or Footasylum would exit the markets, or that the conditions for an exiting firm counterfactual are met, so we have not considered this scenario in this case.

5.15 Shortly before publication of the final report, the Parties submitted an analysis of the potential impact of COVID-19 on Footasylum's finances and its ability to compete in the absence of the Merger. We have taken this into account in our counterfactual assessment and consider this further in paragraphs 5.21 to 5.32.

5.16 COVID-19 is having a significant impact on many businesses and on the economy. The extent and duration of the impact of COVID-19 in the medium to long term is considerably uncertain. Because we cannot predict the impact of COVID-19 with any confidence, we have given it limited consideration in our counterfactual assessment.[77] We have considered it as far as possible in our competitive assessment set out in chapters 8 and 9 and in our remedy assessment in chapter 13.

5.17 The Parties submitted that prior to the Merger, suppliers [✂] were already reducing the products available to retailers outside the DTC channel, and noted the growth of online-only and non-specialised retailers. While we note

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[75] CMA Guidance, paragraph 4.3.8.
[76] CMA, Annex A: Summary of CMA's position on mergers involving failing firms, paragraphs 6-23.
[77] CMA Guidance, paragraph 4.3.2.

that Nike's and adidas's DTC channels have been growing and each has made changes in its wholesale distribution strategy, we consider that this would have taken place under both the counterfactual and the post-Merger scenarios such that it does not support an alternative counterfactual scenario. We explore further the growth of DTC and other market developments, and how these might affect competition, in our competitive assessments in chapters 8 and 9.

5.18 The Parties submitted that Footasylum would be a significantly weaker competitor absent the Merger, [✂].

5.19 As part of our assessment we considered whether there is evidence that, in the absence of the Merger, Footasylum would have been acquired by another purchaser. We also considered whether Footasylum's financial performance in the period prior to the Merger, and its financial position at the time of the Merger, would have impacted its ability to compete using its existing store portfolio and online channel, both before and following the onset of COVID-19 in the UK. In this regard, we identified four areas for consideration:

(a) the impact of COVID-19 on Footasylum's financial position;

(b) the prospect of an alternative purchaser of Footasylum's business;

(c) the downside scenario presented to us by the Parties' external advisers; and

(d) the impact of Footasylum's financial position at the time of the Merger on its ability to compete.

5.20 We set out our assessment of each of these areas in turn.

The impact of COVID-19 on Footasylum's financial position

5.21 Shortly before publication of the final report, the Parties submitted an analysis, undertaken by its external advisers, based on Footasylum's management financial scenario planning, of the impact of COVID-19 on Footasylum's ability to compete in the absence of the Merger.

5.22 The analysis presented three scenarios [✂]. In each scenario, [✂].

5.23 Under the 'high' (most optimistic) scenario, EBITDA[78] for 2020/21 was forecast to be [✂]. Under the 'mid' scenario EBITDA was [✂], and under the

[78] Earnings before interest, taxes, depreciation and amortisation.

'low' (most pessimistic) scenario an EBITDA [✂] was forecast. The Parties submitted that the high scenario was not plausible, and that the low scenario was a 'plausible and foreseeable counterfactual'.[79]

5.24 Under all three scenarios, Footasylum was forecast to [✂]. Based on this analysis, the submission makes the following conclusions:

(a) absent the acquisition by JD Sports, COVID-19 would have [✂];

(b) in the low scenario, [✂]; and

(c) even under the more optimistic scenarios, [✂].

5.25 We considered this analysis, although as it was submitted at the end of our investigation we were unable to further examine the scenarios in detail. It is clear that COVID-19 would have a material impact on Footasylum's short term financial performance in each scenario. While the size of this impact is highly uncertain and cannot currently be foreseen with any accuracy, it would be [✂]. We therefore consider that it is plausible that Footasylum would have [✂] absent the Merger.

5.26 However, there are two areas of uncertainty which, in our view, make it difficult to determine Footasylum's competitive position in 2020 absent the Merger with any accuracy.

5.27 First, it is unclear what further mitigating actions Footasylum might be able to take, in particular [✂]. The Parties' analysis recognises this: the Parties submitted that the scenarios '[✂].' We also note press reports that [✂].[80]

5.28 Second, it is uncertain what potential actions Footasylum's [✂]. Given the hypothetical nature of these scenarios it is difficult to predict what would happen in the counterfactual. However, we would make the following observations:

(a) the [✂]; and

(b) under each of the scenarios described above, Footasylum is forecast to [✂]. While we recognise there are uncertainties over the medium to long term effects of COVID-19, this analysis suggests that the effects of COVID-19 may not be enduring.

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[79] We note that Footasylum submitted that a [✂].
[80] [✂].

5.29 As a result, in our view, [✂]. On that basis, we consider that [✂].

5.30 We also received evidence from Footasylum that [✂]. Footasylum also said that [✂].[81]

5.31 We accept the Parties' submission that absent the Merger, as a result of COVID-19, Footasylum's financial position would have been negatively impacted and, [✂]. However, given the uncertainties we have set out above, we consider that the evidence indicates that [✂] continue to compete. In addition, we note other mitigating actions, such as [✂], [✂], might also be available. We note further the possibility that Footasylum could have been acquired by another purchaser (ie not JD Sports) absent the Merger, and as such would not have been a standalone entity during COVID-19. Our analysis on this is set out in the following section.

5.32 We consider the effect of COVID-19 on competitive conditions and the competitive constraint between the Parties and from other retailers in chapters 8 and 9.

The prospect of an alternative purchaser

5.33 We considered whether there is evidence that, in the absence of the Merger, Footasylum would have been acquired by another purchaser (ie not by JD Sports).

5.34 Appendix B sets out various strategic options considered by Footasylum at the time of the Merger such as [✂]. Footasylum told us that [✂].

5.35 Footasylum also told us that, following this advice, it had not conducted a full sales process of its business. [✂].

5.36 One third party ([✂]) told us that two retailers ([✂]) had mentioned their interest in a potential acquisition of Footasylum. Another third party ([✂]) also told us that a third retailer ([✂])[82] had mentioned potentially acquiring an interest in Footasylum.[83]

5.37 [✂]. Further, Footasylum's financial adviser told us that [✂].

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[81] [✂].
[82] [✂].
[83] [✂] had also told us that it was aware of [✂] interest as well.

5.38 On 18 February 2019, JD Sports acquired approximately 8.3% of Footasylum shares from one institutional shareholder.[84] [✂].[85] On 18 March 2019, JD Sports publicly announced that it would acquire all of the issued shares of Footasylum that it did not own at 82.5p in cash.

5.39 Footasylum told us that its advisers said that [✂]. However, we note this advice was provided in March 2019[86] - after JD Sports had already acquired around 21% of Footasylum's shares from 18-20 February 2019, and had stated that it was prepared to increase its holding to 29.9%.[87] JD Sports submitted a Letter of Intent on 28 February 2019 to the Footasylum Board for the acquisition of the remaining approx. 79% of Footasylum's shares (see Appendix B for a chronology of events of JD Sports' acquisition of Footasylum's shares). Footasylum's adviser had also told Footasylum that JD Sports acquiring 29.9% of Footasylum's shares, as intended, would act as a [✂]. For our counterfactual analysis we generally consider what would have happened in the absence of the Merger, and so place limited weight on this advice as evidence of a lack of alternative institutional buyers.

Conclusion on the prospect of alternative purchasers

5.40 Footasylum did not undertake an open sales process and as such there is limited evidence on the likelihood and identity of an alternative purchaser in the absence of the Merger. However, there is also no clear evidence that there would not have been an alternative purchaser. The Footasylum Board had considered that [✂], and in our view, it would have been likely to pursue that option during 2019 [✂]. Whilst Footasylum [✂], we consider that it is feasible there could have been other alternative purchasers. Given Footasylum's financial position, it is also our view that it would have considered lower offers than the one from JD Sports, which would have increased the number of potential buyers, including from non-trade investors such as private equity.

5.41 As a result, our view is that it is possible that in the absence of the Merger, Footasylum would have been able to find an alternative purchaser. The alternative purchaser was likely to have provided sufficient investment in Footasylum for it to continue to compete effectively.

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[84] https://www.theguardian.com/business/2019/feb/18/footasylum-shares-soar-as-jd-sports-buys-stake (accessed on 14 April 2020).
[85] Public offer document, page 16.
[86] The valuation paper was required under Rule 3 of the Takeover Code (Rule 3 of the Takeover Code requires the Board of the target to obtain competent independent advice as to whether the financial terms of any offer are fair and reasonable), which advised the Footasylum Board that JD Sports' offer was fair and reasonable.
[87] 29.9% is the permitted maximum mandatory bid threshold level without triggering a takeover bid. Rule 2.8, The City Code on Takeovers and Mergers.

The Parties' downside scenario

5.42 Although there is a possibility that the Parties' downside scenario as set out in the counterfactual paper submitted in December 2019 would have occurred, we do not consider that this would have been the most likely scenario for a number of reasons:

(a) we consider that the assumptions underlying this scenario are very pessimistic, even for a downside scenario. In particular, the paper does not provide a rationale or evidence for why Footasylum's management would have [✂]. The assumption that [✂] does not take into account the largely one-off [✂] (see paragraphs 5.49 to 5.53);

(b) further, we consider the assumed revenue [✂] to be very conservative, given the historic and forecast growth of the sector, and Footasylum's historic trends in online sales growth; and

(c) we consider it highly unlikely that all of the assumptions would have occurred together and that Footasylum, despite the combination of adverse circumstances, would not have taken any mitigating actions.

5.43 We note that Footasylum's management had run a number of downside scenarios on its central forecast for the Board in January/February 2019. [✂].

5.44 We recognise that some of the mitigating actions considered under the downside scenarios prepared in early 2019 by Footasylum (see paragraph 5.43) such as [✂], would have affected Footasylum's competitiveness. However, Footasylum would have had a strong incentive to take these actions in order to [✂]. This would make the scenario set out in the Parties' counterfactual paper, where the [✂], unlikely.

Impact of Footasylum's financial position on its ability to compete

5.45 We considered the evidence concerning Footasylum's ability to compete absent the Merger in the following sections:

(a) financial position and financial performance;

(b) cashflows and ability to borrow;

(c) relationships with suppliers;

(d) relationships with lenders; and

(e) Footasylum's [✂].

Footasylum's financial position and financial performance

5.46 Footasylum's in-store revenue for 2018/19 had [✂] but its online revenue was [✂] compared to the previous year.[88] Therefore, we have found that overall Footasylum's revenue had [✂]. However, its profitability had [✂], with EBITDA before exceptional cost [✂][89], [✂].

5.47 Footasylum had taken some steps in the months before the Merger [✂]. We examined evidence from Footasylum and third parties to determine whether the effect of [✂] would have been likely to persist beyond the short term, or whether Footasylum's financial performance would have improved such that it would have been able to [✂] to enhance its competitiveness.

5.48 Footasylum's EBITDA had been steadily growing year-on-year prior to 2018/2019 (see Table 1 in Appendix B). We consider that the decline in Footasylum's 2018/19 EBITDA performance can largely be explained by a number of specific events and non-recurring costs. In particular, EBITDA for 2018/19 had reduced due to large [✂], warehouse migration (£0.6 million) and restructuring cost (£0.4 million). These costs were exceptionally high compared to previous years.[90]

5.49 In relation to the [✂], Footasylum submitted that it had [✂] that had [✂] on its profitability for the 2018/19 financial year. We understand that these [✂] related to certain [✂]. This appears to have been a largely one-off issue, although we recognise that there are continued risks involved in [✂].

5.50 In this case, we understand that this issue was resolved, as Footasylum told us that it had taken [✂] regarding the [✂] after a difficult financial year.

5.51 Third party analysts also considered that these problems had been resolved. On 8 January 2019, Peel Hunt stated:

> [✂]

5.52 On the same date, Liberum stated: '[✂]'.

5.53 While Footasylum's [✂], this was not viewed as a cause for concern by third party analysts. For instance, Peel Hunt stated that this was [✂]. Liberum also recognised that Footasylum had made '[✂]'.

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[88] In-store revenue [✂] and online revenue [✂] for 2018/19 compared to the previous year.
[89] See Table 1, Appendix B.
[90] [✂].

5.54 Footasylum management's central forecast submitted to its Board in February 2019 showed a [✂] for the following financial year 2019/20 (see Table 5.1).

Table 5.1: Footasylum management's central forecast for 2019/20 (prepared in February 2019)

		£'m
	FY 2018/19	FY 2019/20
Total revenue	[✂]	[✂]
Cost of sales	[✂]	[✂]
Gross Profit	[✂]	[✂]
Operating cost	[✂]	[✂]
EBITDA	[✂]	[✂]
Depreciation	[✂]	[✂]
SBP charge	[✂]	[✂]
Exceptional	[✂]	[✂]
EBIT	[✂]	[✂]
Profit after tax	[✂]	[✂]
CAPEX	[✂]	[✂]
GP margin (%)	[✂]	[✂]
EBITDA margin (%)	[✂]	[✂]

5.55 We consider that the central forecast is an important document prepared by Footasylum's management for its Board, [✂], and the Footasylum Directors have a fiduciary obligation to remain objective and responsible when producing the forecasts. Therefore, notwithstanding the Parties' response to the Provisional Findings and [✂], our view is that these central forecasts are Footasylum's best estimate and the most reliable evidence available to the CMA.

5.56 [✂], the projections made by Peel Hunt and Liberum dated 8 January 2019 (set out in Table 5.2 and Table 5.3) show that Footasylum was on course to grow its annual revenue to between £[✂] and £[✂] and EBITDA to around £[✂] over the next two financial years.

Table 5.2: Footasylum's third party analyst (Peel Hunt) projections

[✂]

Table 5.3: Footasylum's third party analyst (Liberum) projections

[✂]

5.57 We also considered Footasylum's central forecast and previous years spend for capital expenditure, marketing and IT. We note the following:

(a) Footasylum [✂] its spend for the previous year (2018/19) was significantly higher compared to historic years because of the cash

available from the IPO proceeds when Footasylum shares were listed in November 2017. Therefore, we consider that capital expenditure for 2019/20 was more in line with historic spend, with the exception of the financial year 2018/19;

(b) Footasylum's budget for its net marketing spend had [✂] from [✂] of sales in 2018/19 to [✂] of sales in 2019/20. However, the gross marketing budget had [✂] from [✂] in 2018/19 to [✂] in 2019/20;[91]

(c) in our view, Footasylum's [✂] of its IT spend by around [✂] under the [✂] and was unlikely to have materially impacted its competitive position. Further, Footasylum's IT spend under the [✂]; and

(d) under the central forecast, Footasylum had forecast that an EBITDA of [✂] through its cashflows during the financial year and [✂] (see also paragraph 5.62).

5.58 [✂] third party analyst reports show increased revenues and EBITDA for the period after the Merger. These forecasts showing improved performance would have meant, in our view, that [✂] would not have persisted beyond the short term. It is therefore our view that the most likely scenario is that any [✂] would not have materially affected Footasylum's competitive strength, other than potentially in the short term.

5.59 We also note that, although [✂], Footasylum's financial performance after the Merger stabilised [✂]. By December 2019, [✂]. Footasylum has therefore continued to trade successfully as an independent business, with its management taking independent decisions, in competition with JD Sports. The Parties submitted that Footasylum's performance since the Merger was not relevant to the CMA's assessment of the counterfactual. We have placed some but not full weight on this evidence because we consider that Footasylum's post-Merger trading results is a relevant indicator of what might have happened absent the Merger, although we recognise that JD Sports' ownership [✂].

Cashflow and ability to borrow

5.60 Footasylum had issued three profit warnings to the market in the financial year prior to the Merger and its share price had dropped significantly. We

[91] Gross marketing spend is calculated as marketing spend (£[✂] million in 2018/19 and £[✂] million in 2019/20) and added the total income received (£[✂] million in 2018/19 and £[✂] million in 2019/20).

therefore consider that the low market expectations of Footasylum's performance were likely to constrain its ability to borrow in the short term.

5.61 Footasylum estimated that the [✂] . While we recognise that [✂] in the short term, in our view this would not have undermined Footasylum's overall financial position and viability.

5.62 We also considered Footasylum's [✂] under its central forecast. Footasylum was forecasting to [✂] in November 2019. Further, Footasylum was forecasting to [✂]. This was [✂], demonstrating that [✂] Footasylum to continue to trade effectively under its central forecast.

Figure 5.1: [✂]

[✂]

Relationships with suppliers

5.63 Footasylum had previously invested significantly in its store portfolio and online to meet expectations of its main suppliers in order to maintain and increase its access to 'must have' products.

5.64 We have seen evidence [✂]. However, we note that [✂].[92]

5.65 We have not seen evidence that [✂] suppliers had changed their supply and payment terms for Footasylum. [✂] told us that while [✂] were aware of Footasylum's profit warnings, [✂] were not at that stage concerned about its overall financial position because historically Footasylum had had a good credit history [✂]. One supplier ([✂]) offered support ([✂]) to Footasylum's management to help improve its sales.

5.66 We recognise that had Footasylum continued to have sustained financial problems, this may have reduced its investment in its store portfolio. Any such reduction could have negatively impacted its relationship with its suppliers and potentially led to a decrease in product access and/or volume allocations.[93]

5.67 However, as set out in paragraph 5.57, and taking account of the Parties' submissions set out in paragraph 5.7, we do not consider this to be the most likely outcome and in our view, any reduction in competitiveness caused by [✂] would not have been material and would not likely have persisted beyond the short term. As such, we would expect that under the most likely central

[92] [✂]
[93] [✂].

forecast scenario, Footasylum's store-level investment would have [✂] once its financial performance stabilised.

5.68 Therefore, in light of each of the points above, we do not consider there is sufficient evidence that, in the absence of the Merger, Footasylum's main suppliers would have withdrawn support or access to key products.

Relationships with lenders

5.69 We note the concerns about [✂], and the submission from Footasylum on this matter.[94] However, we also note that minutes of a Board meeting held on 24 January 2019 [✂].

5.70 Further, Footasylum management's central forecast for 2019/20 show that the [✂]. Therefore, although we recognise that there were concerns in this regard, the evidence shows that under its central forecast, Footasylum [✂]. We also note that, were trading conditions to be less favourable than forecast, Footasylum's management would have been able to take mitigating actions, such as [✂].

5.71 [✂]. However, we also saw evidence that its [✂]:

(a) Footasylum's [✂]. Moreover, we note that Footasylum had also been able to [✂]; and

(b) [✂].

5.72 [✂]. However, we also note that Footasylum's external advisers had told Footasylum to [✂].[95] In particular:

(a) [✂]; and

(b) [✂].

5.73 In our view, this suggests that while Footasylum had concerns about [✂], its advisers were of the view that Footasylum continued to have options here that it should explore - as reflected in their advice.[96]

5.74 Further, Footasylum told us that its primary lender's [✂]. Footasylum's adviser also told us that [✂]. [✂], and our view is that absent the Merger, Footasylum would have continued [✂] as its advisers had suggested.

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[94] Evidence from Footasylum on this issue is summarised in Appendix B.
[95] [✂].
[96] [✂].

Footasylum's [✂]

5.75 [✂]. We discuss Footasylum's actual 2019/20 financial performance in paragraph 5.59.

5.76 Further, we note that Footasylum's [✂]. In our view, [✂] would have scrutinized Footasylum's central forecasts and mitigating plans that had been available to Footasylum. For the reasons set out above, it is likely that [✂] would have agreed with Footasylum's central forecast, and this would have [✂].

Summary of our assessment

5.77 We do not have evidence to rule out an alternative potential counterfactual scenario that Footasylum could have been acquired by a purchaser other than JD Sports, absent the Merger. We consider that it is a possibility that Footasylum would have been acquired, whether it was trading in line with its central forecast or not. In that case, an alternative purchaser could have invested in Footasylum sufficiently for it to continue to compete effectively.

5.78 Prior to 2018/2019, Footasylum had grown successfully since its formation in 2005 to become a significant national competitor. The key issue we have considered in this chapter is whether, absent the Merger, Footasylum would have been able to rebound from the poor performance and difficult trading conditions it faced in 2018/2019 prior to the Merger sufficiently to remain an effective competitor.

5.79 We considered whether Footasylum's competitive position may have been impacted by its financial issues around the time of the Merger, and our view is that:

(a) Footasylum's profit margins had decreased [✂] in 2018/19. [✂]. Although this may have had some impact on its competitiveness, we do not consider this effect would have been material or sustained beyond the short term;

(b) Footasylum's share price had decreased significantly and this had constrained its ability to raise additional finance and therefore make investments in its business in the short term until its position had improved; and

(c) [✂]. However, we do not consider that this would have had a material effect on Footasylum's overall competitiveness.

5.80 In our view Footasylum would have remained an effective competitor despite its financial issues, based in particular on the following evidence:

(a) Footasylum's financial difficulties during 2018/19 were largely one-off in nature and it had taken steps to mitigate them;

(b) the central forecast prepared by Footasylum's management around the time of the Merger showed that it expected continued access [✂], to operate [✂], and [✂];

(c) third party analysts had [✂] forecast increasing revenues and EBITDA for Footasylum;

(d) [✂];

(e) [✂]; and

(f) Footasylum's [✂] told us that [✂] were not concerned about Footasylum's overall financial position and therefore we do not consider that in the foreseeable future (ie broadly within two years)[97] [✂] would have withdrawn access or support.

5.81 As a result, we consider it is likely that, absent the Merger, Footasylum would have continued to trade in line with its management's central forecast and [✂], it would have made a significant effort to '[✂]'.

5.82 We also consider that absent the Merger, Footasylum would have been likely to have continued to take steps to improve and stabilise its business performance, [✂], without materially affecting its competitive position. This is in line with evidence showing [✂].

5.83 We consider that while Footasylum's [✂] would have resulted in Footasylum [✂], this would only have been necessary in the short term. In any case, even if Footasylum had [✂], we consider it likely that Footasylum would have still been able to compete effectively [✂]. Once its financial position had stabilised in the short term ([✂]), we would expect Footasylum thereafter [✂]. We would also expect Footasylum's [✂] once its financial performance had stabilised.

5.84 We placed more weight on the central forecast prepared by Footasylum's management than the downside scenario presented in the counterfactual paper submitted in December 2019 for the purpose of this Merger inquiry, and

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[97] See chapter 8, paragraph 8.12.

consider that it represents a more likely outcome, in particular for the following reasons:

(a) the downside scenario relies on very pessimistic assumptions. While it is possible that this scenario would have occurred, we think this is an unlikely outcome as set out in paragraph 5.42. The assumptions made in the central forecast seem to us to be more reasonable, and we note that [✂] third party analyst reports; and

(b) the [✂] that would result from [✂] were unlikely, because of the mitigating actions available to Footasylum that would have helped it avoid [✂].

5.85 While undoubtedly detrimental, the effects of COVID-19 on Footasylum's financial position in the absence of the Merger cannot be foreseen with any accuracy. However, we consider that [✂].

Conclusion

5.86 As stated in paragraph 5.3, the CMA seeks to select the most likely counterfactual scenario. Overall, we recognise that Footasylum had been in a weaker financial position around the time of the Merger which may have had some impact on its competitiveness in the short term, while it was recovering from this position. However, we concluded that, on the balance of the evidence set out above and taken in the round, the most likely counterfactual is one in which Footasylum would have continued to compete effectively absent the Merger.

5.87 We considered the effects of COVID-19 on Footasylum's financial position in the absence of the Merger. While it is clear that it would have been negatively impacted, on the basis of the evidence we have seen, we concluded that it would have continued to compete. However, in line with our Guidance,[98] we consider that the impact of COVID-19 on the strength of Footasylum's competitive constraint is not sufficiently clear to incorporate into the counterfactual. Therefore, we have given further consideration to the impact of COVID-19 in our competitive assessment in chapters 8 and 9.

6. Overview of our approach and the evidence gathered

6.1 In this chapter we set out our approach to assessing the Merger and the evidence we gathered during our inquiry to inform this assessment.

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[98] CMA Guidance, paragraph 4.3.6.

Our approach

6.2 We assessed a number of areas in reaching our decision. We briefly outline these below; further details on each is set out in subsequent chapters.

Market definition

6.3 As set out in CMA Guidance, we defined the market within which the Merger may give rise to an SLC (the relevant market). We used that market definition as a framework for our analysis of the competitive effects of the Merger. We note that while market definition is a useful analytical tool, it is not an end in itself, and identifying the relevant market involves an element of judgement.[99]

6.4 The relevant market(s) contain the most significant alternatives available to the customers of the Parties and includes the most relevant constraints on the behaviour of the Parties.[100] Therefore in defining the relevant market(s), we considered the retail products which both of the Parties supply (footwear and apparel), the distribution channels in which these products are sold (ie in-store and online), and the geographic basis of the Parties' product offerings.

6.5 We set out our assessment of market definition in chapter 7.

Theories of harm

6.6 Theories of harm describe the possible ways in which an SLC may be expected to result from a merger.

Horizontal unilateral effects theories of harm

6.7 As set out in our Issues Statement, we assessed whether there are any horizonal unilateral effects arising from the Merger.[101] Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged entity to worsen its offering profitably or not improve that offering as much as it would otherwise have done (for example by increasing prices, and/or reducing quality, range and/or service levels – collectively referred to as PQRS).[102]

6.8 Horizontal unilateral effects are more likely when the merging parties are close competitors. After the merger, it is less costly for the merged entity to

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[99] CMA Guidance, paragraph 5.2.2.
[100] CMA Guidance, paragraph 5.2.1.
[101] CMA, Issues Statement, paragraph 27.
[102] CMA Guidance, from paragraphs 5.4.1.

worsen or not improve its offering because it will recoup the profit on recaptured sales from those consumers that switch to the other merging party and which would have been lost absent the merger.[103]

6.9 We considered whether an SLC may arise as a result of horizontal unilateral effects in footwear and apparel in chapters 8 and 9 respectively.

Coordinated effects theory of harm

6.10 During the course of our inquiry, we received submissions from some third parties raising concerns about coordination, to varying degrees of detail.

6.11 Coordinated effects may arise when firms operating in the same market recognise that they are mutually interdependent and that they can reach a more profitable outcome if they coordinate or align their behaviour to limit their rivalry.[104] Such coordination may take different forms: explicit, achieved through communication and agreement between the parties involved; or tacit, which does not require any direct contact between firms and is not based on any formal arrangements or direct communications.

6.12 Under such theories, the harm arises as a result of the merged entity and others in the market jointly aligning their behaviour. Our focus has been on whether the Merger would make it easier for coordination which limits rivalry to take place and therefore gives rise to an SLC.

6.13 We considered whether an SLC may arise as a result of a coordinated effects theory of harm in chapter 10.[105]

Countervailing factors

6.14 We considered whether there are any countervailing factors which are likely to prevent any SLC that we may have found. Specifically, we looked at whether entry by new retailers or expansion by retailers would be timely, likely and sufficient to prevent any SLC. We also considered whether the Merger would result in any efficiencies that would prevent any SLC that we may have found.

6.15 We set out our assessment of countervailing factors in chapter 11.

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[103] CMA Guidance, from paragraphs 5.4.8.
[104] CMA Guidance, from paragraphs 5.5.1.
[105] This theory of harm was considered after publication of our Issues Statement.

Evidence

6.16 We gathered and have taken account of a large range of evidence in our assessment. We considered the views of the Parties and third parties, conducted two large surveys of the Parties' customers (in-store and online), analysed the impact of retailer store entry and exit over time, assessed financial data, and reviewed an extensive number of internal documents from the Parties and third parties.

6.17 This evidence reflects current competition in the markets (eg the survey results and the entry/exit analysis) and also changes in the markets over the foreseeable future ie broadly within two years (see also chapter 8, paragraph 8.12) (eg through the plans, strategies and forecasts of the Parties and third parties). We therefore considered both the static and dynamic aspects of the markets in our assessment. We set out briefly here the different pieces of evidence we considered; our detailed assessment of the evidence is provided in chapters 7 - 11.

6.18 In considering the weight to be placed on each piece of evidence, we have taken into account factors such as its robustness, age, and the purpose for which it was produced. We have not relied on any one piece of evidence to inform our decision. We assessed all of this evidence together in the round to consider the aggregate competitive constraint on the Merged Entity.

6.19 The Parties made submissions on the evidence which we assessed. We set out these submissions and our assessment of the Parties' points in subsequent chapters.

Evidence from the Parties

6.20 We considered evidence from the Parties submitted during the phase 1 inquiry, responses to our informal and formal requests for information during phase 2, the Main Party Hearings and other phase 2 submissions.

6.21 We gathered a large volume of internal documents and reviewed over 2,500 relevant internal documents. The CMA often uses such documents to inform its competitive assessment. They provide insights into such issues as the nature of competitor monitoring, how the Parties' make commercial decisions and their views of future developments.

6.22 We gathered financial data for the Parties' individual stores, which we used, among other things, to assess the impact from entry or exit of other retailers' stores on the Parties' performance (see chapter 8, entry-exit analysis section, and Appendix C for further details).

Evidence from third parties

6.23 We gathered evidence and views on the nature of competition in the relevant markets from a range of third parties, including through submissions, hearings and requests for information including those issued under our formal powers.

6.24 We received responses to our information requests from more than twenty different retailers, including sportswear retailers, footwear retailers, high street fashion retailers, DTC retailers (covering their views as both retailers and suppliers), online-only retailers and department store retailers.[106] We also requested internal documents using our formal powers from several third parties related to their business strategy and plans in the relevant markets.

6.25 We also assessed data from the Parties and third parties on their access to Nike and adidas branded products, and revenue data from their footwear and apparel product sales.

Evidence from consumers

6.26 The views of consumers, their behaviour and potential future responses to the Merged Entity's offering are important evidence for our investigation. We therefore commissioned two surveys - a store exit survey and an online survey of the Parties' customers - to help assess consumer decision-making, closeness of competition and competitive constraints. In particular, the surveys focussed on shopping behaviours, attributes of choice and hypothetical diversion behaviour, eg what consumers said they would have done if all of JD Sports' or Footasylum's stores (depending on which they had shopped at) had closed. We describe these briefly here and further detail is set out in separate reports published on our inquiry webpage (see also chapters 8 and 9 and Appendices E and F).[107]

6.27 The store exit survey was of consumers who had purchased footwear or apparel products in-store at a JD Sports or Footasylum store. The survey was conducted at 28 of JD Sports' stores and 28 of Footasylum's stores during October 2019.[108] A total of 6,876 interviews was conducted. The stores included in the survey sample reflected different store types across different

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[106] See chapter 7 for further description of these broad categorisations.
[107] See: DJS Research, Exit survey for retail customers for a merger inquiry: JD Sports and Footasylum, January 2020 and DJS Research, Survey of online retail customers for a merger inquiry: JD Sports and Footasylum, January 2020.
[108] One of the Footasylum stores included in the sample was a Drome fascia store. We excluded its results from our competitive assessment.

areas of the UK. We applied weighting to make the results representative of the Parties' entire store estate.[109]

6.28 The online survey was of consumers who had shopped for footwear or apparel online with JD Sports or Footasylum. It was designed to be representative of the Parties' online businesses, by surveying a sample of orders dispatched for home delivery within the UK[110] over two weeks in October 2019.[111] A total of 3,289 online interviews was completed.

6.29 The response rates for the online survey (3.8% amongst JD Sports customers and 4.7% amongst Footasylum customers) were below the 5% minimum threshold that we consider necessary to give full evidential weight to survey results.[112] We have therefore not given full evidential weight to the online survey results in our competitive assessment. While in this report we cited the actual results from the online survey, we treated the precise figures as indicative and considered the overall magnitudes instead to inform our assessment. We also considered the extent to which the online survey results are consistent with the store exit survey. We generally assessed the results alongside other evidence.

6.30 We used diversion ratios from both of our surveys, combined with estimates of margins, to calculate a nationally representative gross upward pricing pressure index (GUPPI) for each of the Parties. The GUPPI is a commonly used measure that aims to capture or score the incentive that merging parties have to increase prices or deteriorate their offering post-merger.[113] We set out further details on GUPPIs and our assessment of them, including the Parties' submissions on GUPPIs, in chapters 8 and 9 (see also Appendix F).

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[109] Additionally, the CMA often weights respondents according to the amount they have spent. This may be considered conceptually appropriate as it gives more weight to customers who have spent more and are, therefore, considered more valuable in revenue terms to the Parties. The purpose of weighting is to reduce error of survey estimates. However, while weighting aims to reduce bias, it usually increases sampling error. As a result, an assessment needs to be made of the overall effect of any weighting. We found that spend weighting had very little impact on either survey and therefore did not apply any.
[110] Home delivery (within the UK) being the largest part of the Parties' online businesses ([✂]% JD Sports; [✂]% Footasylum), compared with click and collect orders.
[111] The number of orders during this period was higher for JD Sports than for Footasylum, however it was decided that in the interests of consistency and interpretation of the results across the Parties we would use the same two-week reference period for both Parties and select a random sub-sample for JD Sports. More details of this and data cleaning are in DJS Research, Survey of online retail customers for a merger inquiry: JD Sports and Footasylum, January 2020.
[112] CMA, Good practice in the design and presentation of customer survey evidence in merger cases, May 2018, section 4,38, page 51.
[113] The variable margins refer to the difference between revenue and all cost which vary with the volume of goods produced.

7. Market definition

Introduction

7.1 In this chapter we have defined the relevant market(s) which framed the analysis of the competitive effects of the Merger.[114] In general, the boundaries of the market do not determine the outcome of the analysis of the competitive effects of a merger, as it is recognised that there can be constraints on merging parties from outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others.[115] We have taken these factors into account in our assessment in chapters 8, 9 and 10.

7.2 This Merger is in a sector where the offerings of retailers are highly differentiated. Differentiation typically means that a spectrum of offerings exists that are close but imperfect substitutes; for example retailers may have a wide range of products covering different types of footwear, from trainers to formal shoes. Delineating a relevant market on such a spectrum can be difficult and somewhat artificial, for example it might lead to very narrow markets, such as for a specific trainer type or brand. Therefore, as stated above, the boundaries of the market do not determine the outcome of our competitive assessment in chapters 8 and 9.

7.3 This chapter is structured as follows:

(a) background;

(b) general approach to market definition;

(c) product market definition;

(i) footwear and apparel;

(ii) footwear;

(iii) apparel;

(d) geographic market definition; and

(e) conclusion.

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[114] CMA Guidance, paragraph 5.2.1.
[115] CMA Guidance, paragraph 5.2.2.

Background

7.4 As set out in chapter 2, the Parties are retailers of footwear and apparel specialising in sports-inspired casualwear (ie sportswear worn as fashionwear rather than for sports performance). They offer ranges of different branded products, including from the two key suppliers of branded footwear, Nike and adidas, and a broad range of other suppliers' footwear and apparel brands.

7.5 The growth in sports-inspired casualwear as a trend is a common feature of the wider fashion industry. Fashion is trend-driven and influenced by marketing, events, designers, social media, celebrities and other factors. Suppliers change their available products, typically seasonally, and retailers can also change their proposition, both in terms of their product offering and positioning.

7.6 Demand creation appears increasingly to start online through social media, with consumers then having the ability to browse and shop online or in-store. Consumers can also purchase products online and collect and/or return them in-store. Therefore, we recognise that there is fluidity between how consumers browse, purchase and receive products across these channels.

7.7 Overall, the fluidity in the sector means that drawing clear distinctions between product types, channels and retailers is likely to be difficult and of limited analytical value, particularly recognising that such distinctions may change over time.

General approach to market definition

7.8 The purpose of market definition is to provide a framework for our analysis of the competitive effects of the Merger. Our analysis of competitive effects looked at the level of competition between the Parties, and with other retailers, and the competitive constraint from suppliers, in aggregate.

7.9 In practice, the analysis underpinning the market definition and the assessment of competitive effects overlap, with many of the factors being relevant to both. In our assessment of whether the Merger may give rise to an SLC, we took into account constraints outside of the relevant market(s), and to the extent necessary, segmentation within the relevant market(s), or other ways in which some constraints are more important than others.

7.10 The relevant market(s) contain the most significant alternatives available to the customers of the Parties and includes the most relevant constraints on the behaviour of the Parties.[116]

7.11 In defining the relevant market(s), we looked at two dimensions: a product dimension and a geographic dimension.[117] The relevant product market is a set of products that consumers consider to be close substitutes, for example in terms of utility, brand or quality. The relevant geographic market is primarily the area in which competition occurs and may be local, regional, national or international.

7.12 In this chapter we first assess the relevant product market and then turn to the relevant geographic market.

Product market definition

7.13 We took the products where the Parties overlap as our starting point for determining the relevant product market.[118]

7.14 The Parties both supply footwear and apparel products both in-store and online. We investigated different aspects of these products and the extent to which different types of products belong in the same relevant market.

Footwear and apparel

Parties' views

7.15 The Parties submitted that footwear and apparel were separate markets and that this accorded with industry practice and common sense on demand-side substitutability.[119]

Our assessment

7.16 We consider that it is appropriate to define each of footwear and apparel as separate markets, as these markets are sufficiently distinct to justify separate examination. From a demand-side perspective, they are functionally different and so substitution between the two is unlikely. From a supply-side perspective, some retailers focus on apparel, some on footwear and some on both. Therefore, across footwear and apparel there are different relevant

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[116] CMA Guidance, paragraph 5.2.1.
[117] CMA Guidance, paragraph 5.2.5.
[118] CMA Guidance, paragraph 5.2.11.
[119] JD Sports, Response to the Issues Statement, November 2019, paragraph 86.

competitors (and constraints), which indicate that they are separate markets. Further, while supply-side substitution (at the retail level) is possible, we recognise that it would require obtaining access to a different set of products, repositioning of the retail brand and changes to store and website layouts and operations. This suggests that retailers are unlikely to be able to change whether they supply footwear or apparel sufficiently quickly (ie generally within a year)[120] and effectively for us to consider classifying both product types within a broad market.

7.17 Defining separate markets for footwear and apparel is in line with previous CMA merger inquiries, such as in JD Sports/Go Outdoors, in which the CMA defined separate markets for the retail supply of outdoor footwear on the one hand, and the retail supply of outdoor clothing on the other.[121]

7.18 We have not found any evidence that it is appropriate to assess a separate market for bundles of footwear and apparel and the Parties supported this approach in their submissions.

Footwear

Different types of footwear

7.19 There are many different types of footwear including formal footwear, sports performance footwear and sports-inspired casual footwear. As explained in chapter 2, demand for sports-inspired casual footwear has grown rapidly in recent years. We recognise that some types of footwear may be bought and used differently by different consumers eg some shoes designed for use for a particular sport may also be purchased and worn casually. Nevertheless, we considered which types of footwear belong within the relevant market, as set out in this section.

Parties' views

7.20 The Parties submitted that the relevant product frame of reference for footwear was:

> the retail supply of casual fashion footwear (such as trainers and classic trainers (including hi-tops), boots, slides, canvas and plimsolls, brown and black casual shoes or brogues, espadrilles and Flip Flops).

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[120] CMA Guidance, paragraph 5.2.17.
[121] Completed acquisition by JD Sports Fashion Plc of Go Outdoors Topco Limited, ME/6648/16, dated 7 June 2017 (JD/Go Outdoors).

7.21 JD Sports also submitted that the CMA should conduct a brand-by-brand assessment of footwear sales, although it did not have strong views on how this assessment should be distributed across market definition (eg whether these brands were defined as separate markets, segments or looked at through a separate lens).[122]

Third parties' views

7.22 One third party submitted that it was appropriate to consider a narrower product market than sports-inspired casual footwear, specifically a market for 'restricted products' (these are Nike and adidas special make-up/exclusive and high-end/premium products that are currently supplied to only a limited number of multi-brand retailers in the UK).

7.23 That third party submitted that there was not any substitution from restricted products to other products. Further, it submitted that restricted products are materially and noticeably distinct from other products and that the high diversion ratios between the Parties found by the CMA's survey were because each of the Parties sells restricted products (see chapters 8 and 9 for details on our surveys).

7.24 The third party told us that even though products may change from being restricted to non-restricted, this did not prevent these categories from being a suitable basis for a market definition. It submitted that market definition was not a static concept and the fact that the exact set of products contained within the definition may differ slightly from season to season was not evidence of a lack of a separate market. It submitted that at any given time, there was a distinct set of restricted products that was well understood by the key suppliers and offered to only some retailers, and that the core of these products remained more or less constant.

Our assessment

7.25 We recognise that the Parties stock a range of footwear that may fall across different categories such as sports-lifestyle or fashion. However, for the purpose of market definition we started by classifying the category where the Parties overlap and then considered the constraints on these products.[123]

7.26 We have defined a category of footwear as sports-inspired casual footwear, which are products designed to reflect athletic fashion trends and used

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[122] JD Sports, Response to the Issues Statement, November 2019, paragraph 92.
[123] CMA Guidance, paragraph 5.2.11.

primarily for leisure purposes.[124] For the purposes of illustration, we consider that this would include products such as Nike Air Max 720, adidas Originals Ozweego, Puma RS-X Winterised, vans Brux Wc and Jordan Mars 270. However, we have not exhaustively defined the precise products or suppliers that fall within this category.

7.27 We consider that the Parties overlap in the supply of sports-inspired casual footwear. For example, both Parties stock Nike Air Max 720 and adidas Originals Ozweego. Indeed, more generally, for Nike and adidas footwear, [✂]% of Footasylum's Nike branded footwear products and [✂]% of its adidas branded footwear products are also stocked by JD Sports.

7.28 We have therefore taken as our starting point the retail supply of sports-inspired casual footwear.

Restricted products

7.29 Before discussing restricted products and whether it is appropriate to define a separate market for them, it is helpful to first summarise suppliers' general approach to determining which products individual retailers can access.

7.30 Suppliers in this market typically have internal segmentation policies whereby they place retailers into different categories (eg sport or lifestyle/fashion-focussed) and sometimes tiers within these categories (see paragraph 8.35 for more detail). A retailer's category then largely determines the assortment of products that a supplier will offer that retailer. Suppliers also classify products to determine to which retailer categories they will be offered. Some products are available to only one category/tier of retailers while others might be available to multiple categories/tiers or all retailers.

7.31 It is this segmentation of retailers and products that appears to underpin the definition of restricted products raised by a third party (paragraph 7.22). This third party submitted that it was appropriate to consider a narrower product market than sports-inspired casual footwear, specifically a market for 'restricted products'.

7.32 In our competitive assessment (see chapters 8 and 9), we have taken account of constraints within the market including segments within that market. As such, a broader market definition does not preclude us from finding an SLC within a segment of that broader market. Nevertheless, we considered

[124] This excludes non-sports-inspired casual products, such as boots, performance sport footwear, outdoor footwear and formal footwear.

whether a market definition focused on restricted products would be appropriate.

7.33 The third party submitted that restricted products are materially different from non-restricted products. We acknowledge that suppliers undertake substantial efforts to differentiate themselves and certain products. However, we consider that consumers' preferences and behaviour are a better indicator of whether or not such products are so differentiated from each other that they are not substitutes. We do not consider the claim that restricted products are materially different to non-restricted products to be a strong indicator that restricted products comprise a separate market.

7.34 On the demand-side, it has been put to us that one of the benefits of restricted products is that they drive footfall, which helps to generate sales of other products. This means that retailers are likely to benefit most from having both restricted products and other products. This presence of 'spill-over' effects from restricted products to other products means the extent of substitutability from restricted product to other products is not clear, making it difficult to determine whether a narrower market for restricted products exists or whether the market should be defined more broadly, to include restricted and other products. It is possible that when considering a purchase of a restricted product, some consumers would be willing to substitute to an alternative (implying a broader market definition covering restricted and other products). For example, our store exit survey found that only 9% (JD Sports) to 13% (Footasylum) of footwear customers listed 'products that other stores don't have' as a reason for why they chose to shop at one of the Parties' stores.[125] The evidence does not support a finding that consumers have strong preferences for restricted products to the exclusion of non-restricted products.

7.35 On the supply-side, we note that restrictions in access to branded products are based on suppliers' categorisation of retailers and products (see paragraph 7.30), which can, at least in principle, be amended by suppliers at any time post-Merger (see also paragraph 8.74). A supplier's unilateral decision to make a branded product available to more retailer categories would in effect change that product from being 'restricted' to 'non-restricted'. For example, we have seen evidence that suppliers manage their products over a product life cycle (throughout which they expect to sell different volumes of the product) and products may be made more widely available over that life cycle. Therefore suppliers control whether or not a product is considered to be restricted.

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[125] DJS Research, Exit survey for retail customers for a merger inquiry: JD Sports and Footasylum, January 2020.

7.36 We agree with the third party's submission that given that the markets in question are influenced by fashion trends, it is likely that the products within the relevant markets and/or market segments will change over time (particularly between seasons). However, this can present a practical difficulty in identifying a clear delineation of these products for the purpose of market definition.

7.37 Therefore, we do not consider it appropriate to define a narrower product market for restricted products. Nevertheless, we consider that access to these products plays a key role in assessing competition, as reflected in our competitive assessment in chapters 8 and 9.

Other types of footwear

7.38 We considered whether there was any basis to widen our product market definition from the retail supply of sports-inspired casual footwear to include other types of footwear. Nike, adidas and other suppliers of branded sports-inspired casual footwear typically also produce sports performance footwear but not other types of footwear.

7.39 On the demand-side, for at least some sports performance products such as football boots, due to their functional differences, demand-side substitutability from sports-inspired casual footwear is limited. Therefore, these performance type products are generally unlikely to belong in the relevant market. Equally, other types of footwear (eg formal shoes and boots) are unlikely to be seen as demand-side substitutes to sports-inspired casual footwear, due to their functional differences, as well as not generally being available from the same suppliers and hence not having equivalent appeal to consumers with strong brand preferences.

7.40 On the supply-side, with regard to sports performance products, suppliers typically allocate their branded products into different categories which are only available to certain retailer categories and while these can change, we found little evidence that they do. Nike submitted that it was 'not uncommon' for it to re-categorise products over the long term, although it only identified one instance of re-categorisation between product segments since January 2018 – the VaporMax, which was reclassified from a running shoe to a lifestyle product. As such, we consider that these products should not be included in the market on the grounds of supply-side substitution. With regard to other types of footwear (eg formal shoes and boots), the suppliers are typically different from those of sports-inspired casual footwear, such that the

conditions of competition are different, suggesting a lack of supply-side substitution.[126]

7.41 Our view on the basis of the evidence set out above is that the relevant product market is the retail supply of sports-inspired casual footwear.[127] However, we acknowledge that the boundaries of the market are blurred and we have therefore taken account of constraints from outside the market. As such we considered the strength of the constraint from retailers stocking other types of footwear, including sports performance footwear, casual fashion footwear, and/or other categories of footwear, in our competitive assessment (see chapter 8).

In-store and online sales

7.42 We also considered whether the product market for footwear should be segmented by distribution channel, ie between in-store and online sales (including both online delivered and online click and collect).

7.43 We note that all retail stores selling non-essential goods, including the Parties' and those of other retailers of sports-inspired casual products, have been closed by government order since 23 March 2020 due to COVID-19. JD Sports reported that its online sales during the week ending 28 March 2020 were [✂]% on a like-for-like basis. [✂]. We consider that the medium and long term impact of COVID-19 is uncertain. However, given that we combined the in-store and online channels in the same market based on a range of other evidence (as set out below), we consider that it does not impact our conclusions on market definition.

Relative size of in-store and online

7.44 As relevant context, we first reviewed the relative size of the in-store and online channels in the relevant product market. The in-store channel is currently the larger of the two channels. Our analysis of data received from the Parties and third parties suggests that in 2018 in-store accounted for 60%

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[126] CMA Guidance, paragraph 5.2.17.
[127] We note that even within sports-inspired casual footwear and apparel there are different types of branded products that may not be close substitutes (eg higher-tier and lower-tier branded products). If two products perform the same purpose, but one is of higher price and quality, they might be included in the same market. The question is whether the price of one constrains the price of the other. Although one is of lower quality, consumers might still switch to this product if the price of the more expensive product rose such that they no longer felt that the higher quality justified the price differential. CMA, CA98 Market definition guidelines, paragraph 3.5.

and online accounted for 40% of total sports-inspired casual footwear sales.[128]

7.45 The proportion of in-store and online sales varies across retailers. JD Sports has a larger in-store proportion ([✂]%) than the sports-inspired casual footwear market as a whole, whereas Footasylum has a proportion ([✂]%) that is more in line with the overall market.[129] Nike's and adidas's in-store footwear sales account for [✂]% and [✂]% of their total DTC footwear sales, respectively.[130]

7.46 This indicates that in-store is currently the main channel, but online accounts for a substantial proportion of sales. We recognise that the market is dynamic to some extent and that these proportions may therefore change in the foreseeable future (we examined the role of DTC expansion in our competitive assessment in chapter 8). Having reviewed the proportion of in-store and online sales, we then turned to the growth of online sales.

Growth of online

7.47 Sales across the whole market have grown (19% in the in-store channel and 154% growth in the online channel respectively between 2015 and 2018), but the online channel has grown faster, leading to an increase in its relative size.[131] Online's share of the total revenue of sports-inspired casual footwear has risen, from around 22% of total revenue of sports-inspired casual footwear in 2015 to around 37% in 2018.[132]

7.48 Looking specifically at the Parties, between September 2014 and September 2019, JD Sports' revenue from footwear within the relevant product market sold through its online channel increased from approximately % to approximately [✂]% of its total footwear revenue. Between September 2014 and September 2019, Footasylum's revenue from such footwear sold through its online channel increased from approximately [✂]% to approximately [✂]% of its total footwear revenue.

7.49 Given that in-store sales are still growing (albeit at a much lower rate than online),[133] it is likely that the growth of online is explained both by new market

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[128] CMA analysis of the Parties' and third parties' data.
[129] Values based on September 2019. CMA analysis of the Parties' data.
[130] CMA analysis of Nike and adidas data.
[131] CMA analysis of the Parties' and third parties' data.
[132] Comparison based on a sub-set of retailers which provided data back to 2015, hence the 2018 value differs from that stated in 7.444. Source: CMA analysis of the Parties' and third parties' data.
[133] We note that this does not reflect the effects of retailers' non-essential stores being closed by government order since 23 March 2020 due to COVID-19.

growth and some migration of consumers who previously purchased only, or primarily, in-store, to increasingly purchasing online. Such migration can cause a competitive tension between channels and retailers can compete to slow down or speed up such migration, or encourage the use of a particular channel, for example through making gift cards redeemable in both channels or only one channel or making discounts greater in one channel than another.[134] It is also possible that continuing migration may over time reinforce in-store and online preferences in distinct sets of consumers who primarily use one channel or the other.

Parties' views

7.50 JD Sports submitted that the distinction between the in-store and online channels was blurred and that it was not appropriate to identify distinct frames of reference for in-store and online sales.

7.51 It submitted that the CMA's surveys supported the view that there was a market that included online and in-store due to the extent of diversion across these channels.

7.52 JD Sports also submitted that 'the digitally-inspired customer journey, evidence of actual store to online substitution, the immediate price constraint of online, and the pressure to differentiate the store means that online is an important constraint on in-store, regardless of market definition'.[135]

Our assessment

7.53 We recognise that there are significant linkages between the in-store and online channels in this market. Each of the channels can be used for different aspects of the consumer journey – search, comparison and purchase – and these can be done interchangeably across channels. While some consumers may have strong preferences for one channel, others use these channels as substitutes or in combination. For example, consumers may first see products online, including on social media (eg on Instagram) or in-store (eg at a flagship store) and then purchase in the other channel. Some consumers might search online and then buy in-store, or the other way around, for example trying on products in-store and then buying online.

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[134] JD Sports submitted that prior to 13 February 2019 its physical gift cards were only redeemable in-store and there was no e-gift card, but after this date physical gift cards were made redeemable online and e-gift cards were introduced in response to customer feedback that gift cards should be redeemable both in-store and online and to [✂]. JD Sports, Response to the Issues Statement, November 2019, paragraphs 115-116.
[135] JD Sports, Response to the Issues Statement, November 2019, page 13.

7.54 Given the above, we acknowledge that the linkages between in-store and online are sufficiently material such that the distinction between the two channels is blurred and that it is therefore important not to consider each channel in isolation without recognising these linkages. On that basis, we assessed whether the two channels are in the same market for the purposes of market definition.

- *Qualitative difference between in-store and online*

7.55 We consider that the shopping experience is qualitatively different between the two channels. In-store, consumers are able to touch and try on footwear in a way that they cannot online. In-store service can be delivered in person. Further, purchases made in-store are received immediately whereas online purchases have a short delivery delay before receipt by the consumer.[136]

7.56 However, these types of differences are not in themselves sufficient to indicate whether or not the two channels are seen as substitutes by consumers themselves. We therefore consider that consumer behaviour and stated preferences are more informative of whether the two channels are in the same market.

- *Past-spending behaviour*

7.57 Our store exit survey found that 41% of JD Sports and 36% of Footasylum in-store customers bought all or nearly all of their footwear products in-store over the last year.[137] About a third (28% JD Sports; 32% Footasylum) did the same for most of their footwear and around a fifth (22% JD Sports; 20% Footasylum) spent about the same amounts on footwear in-store and online.[138]

7.58 Although we have not given full evidential weight to our online survey (see paragraph 6.29), our best estimates for online customers are from this survey, where around a quarter of the Parties' customers (27% JD Sports, 28% Footasylum) said that they had bought all or nearly all of their footwear products online over the last year.[139] About a third (35% JD Sports; 33% Footasylum) said that they had bought most of their items online and over a

[136] The range of available delivery options, such as next day delivery or standard delivery allow consumers some discretion over the length of this delay and the associated cost of delivery.
[137] CMA analysis of exit survey data with responses weighted to be nationally representative.
[138] CMA analysis of exit survey data with responses weighted to be nationally representative.
[139] DJS Research, Survey of online retail customers for a merger inquiry: JD Sports and Footasylum, January 2020.

fifth (21% JD Sports; 24% Footasylum) had bought about the same online and in physical stores.

7.59 When examining actual behaviour rather than reported behaviour, the proportions of multi-channel shoppers are lower for one sub-group - members of UNLCKD (Footasylum's loyalty scheme) - than we found in our surveys. For example, only [✂]% of UNLCKD customers have made a purchase both in-store and online.

- *Search and comparison before purchase*

7.60 We considered where consumers actively search or learn of a product prior to purchase. There is evidence that a proportion of consumers search in the other channel than that of their final purchase. This may be looking in-store, on a website or on an app on a smartphone, tablet or other device.

7.61 For in-store customers, around a third (32% JD Sports, 35% Footasylum) of customers had visited a relevant retailer's website, compared prices online or seen the item online, in advance of purchasing in-store.[140]

7.62 Our online survey[141] found that around a quarter of the Parties' customers (24% JD Sports; 22% Footasylum) said that they had looked for the item in a physical store before placing their order online.[142]

- *Willingness to divert*

7.63 In terms of the potential for direct substitution between the channels, 45% (JD Sports) and 35% (Footasylum) of all in-store footwear customers said that they would switch to online if all of the stores of the retailer they had purchased from closed.[143] We note that the wording of these survey questions stated that in this scenario the relevant Party was still selling online, which may have prompted customers to think of that Party's online channel. As such the diversion estimates to online may have some upward bias. This appears to be reflected in the results to the following question, where customers were subsequently asked which online retailer they would have been most likely to

[140] CMA analysis of exit survey data with responses weighted to be nationally representative.
[141] As set out in chapter 6, we have not put full evidential weight on our online survey results due to low response rates.
[142] DJS Research, Survey of online retail customers for a merger inquiry: JD Sports and Footasylum, January 2020.
[143] CMA analysis of exit survey data with responses weighted to be nationally representative.

switch to. The majority stated the relevant Party's own online channel (about 77% for JD Sports and 60% for Footasylum).[144]

7.64 Our online survey provides some evidence of the potential for direct substitution from online to in-store, where 40% of JD Sports online customers and 31% of Footasylum online customers said that they would switch to a physical store if the relevant Party had stopped selling online. A large proportion of this switching was to the relevant Party's own stores (53% for JD Sports and 30% for Footasylum).[145]

- *Customer demographics and use of in-store and online*

7.65 The Parties' focus is on the 16-24 year old age group[146] (99% of whom use the internet),[147] suggesting that their customers' access to and use of online stores is likely to be high. Indeed, 79% of this entire age group had bought clothes or sports goods online in the last 12 months.[148] The Parties also have a proportion of customers outside this age group, who may also purchase online. For example, 65% of people in the 45-54 age group had bought clothes or sporting goods online in the last 12 months.[149]

7.66 Our surveys do not indicate a clear segmentation in customer type between in-store and online, with respondents to both surveys having a broadly similar composition of age categories, though we note that a higher proportion of respondents to the store exit survey were male, compared with the online survey.[150]

- *Retailer operations*

7.67 All national in-store retailers of sports-inspired casual footwear also have an online offering. These retailers operate their in-store and online businesses together, typically using the same distribution centres to supply both, purchasing from suppliers without commitments to the channel through which stock must be sold. Retailers also increasingly facilitate consumers' switching between channels, for example the availability of click and collect at JD Sports has recently started to be introduced via in-store kiosks, allowing its online

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[144] CMA analysis of exit survey data with responses weighted to be nationally representative.
[145] DJS Research, Survey of online retail customers for a merger inquiry: JD Sports and Footasylum, January 2020.
[146] Footasylum's Annual Report and Accounts 2018 states that its target audience is '16-24 year-old digital natives. JD Sports' checkout survey found that [✂].
[147] Ofcom, Adults Media Use and Attitudes, 2019, page 2.
[148] Office for National Statistics, Internet Access – Households and Individuals, 12 August 2019, Table 16.
[149] Office for National Statistics, Internet Access – Households and Individuals, 12 August 2019, Table 16.
[150] DJS Research, Exit survey for retail customers for a merger inquiry: JD Sports and Footasylum, January 2020 and DJS Research, Survey of online retail customers for a merger inquiry: JD Sports and Footasylum, January 2020.

range to be accessed in-store. The Parties also do not generally distinguish between competitors' in-store and online propositions in their internal documents (see paragraph 8.169). Some retailers are online-only eg ASOS, Amazon, and Zalando.

7.68 There are some similarities and differences between the offerings of retailers in this market (including the Parties) in-store and online. Retailers in this market, including the Parties, as a matter of policy tend to align their list prices between in-store and online. However, there is evidence of some discounts being available online but not in-store (eg JD Sports' year-round student discount of 10% is available online[151] but not in-store) and delivery charges apply online (below a certain threshold). The Parties' full range of stock is typically available online, but not all products are available in-store due to limited space. JD Sports submitted that [✂].

Conclusion on footwear

7.69 We recognise that the evidence discussed above is not clear-cut. The survey evidence shows that, in relation to the demand-side, there is an apparent willingness of a sizeable proportion of consumers within each channel to divert to the other channel and that past spending behaviour of consumers is consistent with these switching proportions. We consider that these switching proportions are likely to be large enough to act as a constraint on the alternative channel. On the supply-side, generally retailers operate their in-store and online businesses together, although we recognise some retailers are present only online.

7.70 On balance, our view is that a sufficient proportion of consumers currently shop in both the in-store and online channels, or would be prepared to move between the two channels, in order for the two channels to be considered within the same product market.[152] Nevertheless, we examined any material differences between the channels in the constraints on the Parties and the strength of constraint on the Parties of retailers who operate only or primarily in each channel, in our competitive assessment (see chapter 8).

Apparel

7.71 As with footwear, apparel can be differentiated based on many factors such as price, materials, creative content and marketing. While there are many different types of apparel, from formalwear to leisurewear, the extent to which

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[151] JD Sport website, as visited on 23 January 2020.
[152] The surveys were commissioned at phase 2 and so the results were not available at phase 1. At phase 2, they have informed our conclusion to combine the in-store and online channels.

these can be considered substitutes and within the same market is largely dependent on consumer preferences.

Parties' views

7.72 The Parties submitted that they competed in a broad fashion segment. The Parties submitted that the relevant product frame of reference for apparel was:

> the retail supply of casual fashion apparel/clothing (such as T-Shirts and polo shirts, shirts, gilets, tracksuits, denim, sweatshirts, hooded tops, shorts and swim shorts, leggings, skirts and dresses, replica football kits, chinos, formal or printed shirts etc).

7.73 The Parties further submitted that a narrower market segmentation such as athleisure or activewear/sportswear was not appropriate in this case because, among other reasons, athleisure forms part of the wider casual fashion apparel market and the boundaries were not clear.[153]

7.74 The Parties submitted that within the fashion segment they each had a different focus. JD Sports submitted that it focused more on reselling sports heritage brands[154] and Footasylum focussed more on own-brand/Bedroom Brand[155] 'urban male fashion'.[156] Footasylum submitted that [✂].

7.75 The Parties submitted that Footasylum own-label brands such as Glorious Gangsta and Kings Will Dream were not sports-inspired.[157]

Third parties' views

7.76 One third party submitted that, as with footwear, it was appropriate to consider a narrower product market for restricted products.

Our assessment

7.77 We recognise that the Parties stock a range of apparel that may fall across different categories of fashion. However, for the purpose of market definition

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[153] CMA, Phase 1 decision, paragraph 64.
[154] JD Sports, Response to the Issues Statement, November 2019, page 13 and in [✂].
[155] A term used by the Parties to describe emerging fashion brands that start life in their founders' bedrooms (ie are founded by individual entrepreneurs).
[156] JD Sports, Response to the Issues Statement, November 2019, page 13.
[157] The Parties, Response to Provisional Findings, paragraph 79.

we started by classifying the category where the Parties overlap and then considered the constraints on these products.[158]

7.78 We have defined a category of apparel as sports-inspired casual apparel, which are products designed to reflect athletic fashion trends and used primarily for leisure purposes.[159] For the purposes of illustration, we consider that this category would include products such as Vans Classic Logo t-shirt, Nike Futura t-shirts, Nike Tech Fleece Joggers, adidas Originals 3 Stripes Tee and adidas Originals Essential Overhead Hoodies. However, we have not exhaustively defined the precise products or suppliers that fall within this category.[160] Indeed, this category is intended to be representative of the Parties' product overlap, ie it is a loose term and not determinative.

7.79 We consider that the Parties overlap in the supply of sports-inspired casual apparel. For example, both Parties stock the Nike and adidas products listed in 7.78 and, more generally, [✂]% of Footasylum's Nike branded apparel products and [✂]% of its adidas branded apparel products are also stocked by JD Sports. Although their degree of specific product overlap is lower than it is in footwear, we consider that it is still sizeable and as assessed further in chapter 9, there is evidence from our surveys that consumers consider the Parties' apparel offerings to be substitutable.

7.80 We have therefore taken as our starting point the supply of sports-inspired casual apparel.

Restricted products

7.81 For the same reasons given in paragraphs 7.29 - 7.37 for footwear, we consider that it is not appropriate to define a narrower product market for restricted products. Rather we consider that the most appropriate product market is the retail supply of sports-inspired casual apparel.

Other types of apparel

7.82 We considered whether there is any basis to widen our product market definition from the retail supply of sports-inspired casual apparel to include other types of apparel.

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[158] CMA Guidance, paragraph 5.2.11.
[159] This excludes non-sports-inspired casual products, such as denim.
[160] We note that for the purposes of market definition the category should include products which customers view as substitutes to each other, which may include some products which are not themselves directly sports-inspired.

7.83 The Parties submitted that they competed in a wider fashion segment. For example, [✂].

7.84 In general, we consider that highlighting the apparent similarity between certain products is not informative of the extent to which consumers consider these products (and the retailers they are stocked in) to be significant alternatives to the Parties' products in a differentiated frame of reference. Objectively identifying constraints in fashionwear markets, where perceptions of products and brands are subjective, is challenging.

7.85 We consider that evidence of consumer behaviour is the most informative source in assessing the extent to which other fashionwear products compete with sports-inspired casual apparel. Our store exit survey found that the closest competitors to the Parties were those that also stock sports-inspired casual apparel. Customers did not state that more general fashion retailers were close substitutes. For example, our store exit survey found that only 1% of Footasylum customers gave [✂] as their next best alternative.[161] [✂] itself did not view itself as a competitor of Footasylum or JD Sports, stating:

> We fundamentally believe [✂] not to compete directly with either of JD Sports, Foot Asylum [sic], or any other sports inspired business. We are a fashion retailer that offers casual clothing in addition to smarter products.

7.86 Evidence from the Parties and third parties shows that the Parties are focussed on sports-inspired casual apparel:[162]

(a) the Parties' range is different from the range offered by non-specialist general retailers, with the Parties more focussed on branded products from suppliers such as Nike or adidas (see chapter 9) that other high street retailers do not typically offer. This suggests that the Parties' offerings would not be considered substitutable by consumers with the non-branded offerings of non-specialist high street retailers;

(b) third parties submitted that the Parties focussed on sports-inspired apparel for the purpose of casual fashion rather than practising sports. Several non-specialist retailers, such as [✂] and [✂],[163] stated that they did not compete with the Parties or did so to only a limited extent, further

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[161] DJS Research, Exit survey for retail customers for a merger inquiry: JD Sports and Footasylum, January 2020.
[162] CMA, Phase 1 decision, paragraph 71.
[163] See chapter 9, section on retailers' offerings.

suggesting a distinction between retailers of sports-inspired apparel and casual fashionwear more generally; and

(c) the Parties' internal documents suggest that their competitor monitoring focusses mainly on retailers that either exclusively sell sports-inspired casualwear, or that devote a substantial portion of their offering to sports-inspired casualwear (see chapter 9).

7.87 We therefore consider that there is unlikely to be significant demand-side substitution between sports-inspired casual apparel and broader casual fashionwear. However, we considered the strength of the constraint from other types of apparel, including casual fashionwear and other categories of clothing in our competitive assessment (see chapter 9).

In-store and online sales

7.88 We next considered whether the product market for apparel should be segmented by channel, ie between in-store and online sales (including both online delivered and online click and collect).

7.89 Much of the discussion set out in paragraphs 7.42 - 7.68 for footwear is also relevant for apparel. The Parties' and third parties' submissions on the roles of the in-store and online channels for footwear were made also for apparel and are therefore not repeated here.

7.90 As for footwear, we have the same considerations regarding COVID-19 as set out in 7.43.

Relative size of in-store and online

7.91 As relevant context, we reviewed the relative size of in-store and online channels. The in-store channel is currently the larger of the two channels. Our analysis of data received from the Parties and third parties suggests that in 2018 in-store accounted for 70% and online accounted for 30% of total sports-inspired casual apparel sales.[164]

7.92 The proportion of in-store and online sales varies across retailers. JD Sports has a larger in-store proportion ([✂]%) than the sports-inspired casual apparel market as a whole, whereas Footasylum has a slightly smaller

[164] CMA analysis of Parties' and third parties' data.

proportion ([✂]%).[165] Nike's and adidas's in-store apparel sales account for [✂]% and [✂]% of their total DTC apparel sales, respectively.[166]

7.93 This indicates that in-store is currently the main channel, but online accounts for a substantial proportion of sales. We recognise that the market is dynamic to some extent and that these proportions may change in the foreseeable future (we examined the role of DTC expansion in our assessment of competitive effects in chapter 9). Therefore, building on the proportions of in-store and online sales, we next examined the growth of online sales.

Growth of online

7.94 Sales in the market have grown (45% growth in the in-store channel and 167% growth in the online channel respectively between 2015 and 2018), but the online channel has grown faster, leading to an increase in its relative size.[167] Online's share of the total revenue of sports-inspired casual apparel has risen, from around 20% in 2015 to around 31% in 2018.[168]

7.95 Looking specifically at the Parties, between September 2014 and September 2019, JD Sports' revenue from apparel within the relevant product market sold through its online channel increased from approximately [✂]% to approximately [✂]% of its total apparel revenue. Between September 2014 and September 2019, Footasylum's revenue from such apparel sold through its online channel increased from approximately [✂]% to approximately [✂]% of its total apparel revenue.

7.96 As for footwear (eg see paragraph 7.69), we recognise that in-store sales are still growing (albeit at a much lower rate than online) and it is likely that the growth of online is explained both by new market growth and some migration of consumers who previously purchased only, or primarily, in-store, to increasingly purchasing online. Such migration can cause a competitive tension between channels, and retailers can compete to slow down or speed up such migration, or encourage the use of a particular channel, for example through making gift cards redeemable in both channels or only one channel. It is also possible that continuing migration may over time reinforce in-store and online preferences in distinct sets of consumers who primarily use one channel or the other.

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[165] Values based on September 2019. CMA analysis of Parties' data.
[166] CMA analysis of Nike and adidas data.
[167] CMA analysis of the Parties' and third parties' data.
[168] Comparison based on a sub-set of retailers which provided data back to 2015, hence the 2018 value differs from that stated in 7.91. CMA analysis of Parties' and third parties' data.

Parties' views

7.97 JD Sports submitted several points relevant to the distinction between the in-store and online channels which apply across footwear and apparel (paragraphs 7.50 - 7.52). In summary, it submitted that the distinction between the in-store and online channels was blurred.

Our assessment

7.98 As for footwear (see paragraphs 7.53 and 7.54), we acknowledge that the linkages between the in-store and online channels are sufficiently material such that the distinction between the two channels is blurred and that it is therefore important not to consider each channel in isolation without recognising these linkages. On that basis, we assessed whether the two channels are in the same market for the purposes of market definition.

- *Qualitative difference between in-store and online*

7.99 For the same reasons as for footwear, we consider that the shopping experience is qualitatively different between the two channels (see paragraph 7.55).

7.100 However, again on the same basis as for footwear, we consider that consumer behaviour and stated preferences are more informative of whether the two channels are in the same market, than observations about differences between the two channels.

- *Past spending behaviour*

7.101 Our store exit-survey found that around a third (34% JD Sports; 31% Footasylum) of the Parties' in-store apparel customers bought all or nearly all of their apparel in-store over the last year.[169] About a quarter (26% JD Sports; 28% Footasylum) did the same for most of their apparel and around a quarter (28% JD Sports; 26% Footasylum) spent about the same amounts on apparel in-store and online.[170]

7.102 Our online survey of the Parties' customers found that between a fifth and a quarter (23% JD Sports; 21% Footasylum) said they had bought all or nearly all of their apparel products online over the last year.[171] A further two-fifths (38% JD Sports; 39% Footasylum) said they had bought most of their items

[169] CMA analysis of exit survey data with responses weighted to be nationally representative.
[170] CMA analysis of exit survey data with responses weighted to be nationally representative.
[171] DJS Research, Survey of online retail customers for a merger inquiry: JD Sports and Footasylum, January 2020.

online, and over a quarter (26% JD Sports; 28% Footasylum) said they had bought about the same online and in stores.

7.103 Footasylum's assessment of UNLCKD customer purchases shows a lower proportion of multi-channel shoppers (see paragraph 7.59).

- *Search and comparison before purchase*

7.104 We considered where consumers actively search or learn of a product prior to purchase. There is evidence that a proportion of consumers search in the other channel than that of their final purchase. This may be looking in-store, on a website or on an app on a smartphone, tablet or other device.

7.105 Between a quarter and a third of the Parties' customers (26% JD Sports; 31% Footasylum) of in-store apparel had visited a relevant retailer's website, compared prices online or seen the item online, in advance of purchase in-store.[172]

7.106 Our online survey found around a fifth of the Parties' customers (19% JD Sports; 19% Footasylum) said that they had looked for the item in a physical store before placing their order online.

- *Willingness to divert*

7.107 In terms of potential for direct substitution between channels, 47% (JD Sports) and 39% (Footasylum) of all in-store apparel customers said that they would switch to online if all of the stores of the retailer they had purchased from closed.[173] The wording of these survey questions stated that in this scenario the relevant Party was still selling online. As such the diversion estimates to online may have some upward bias. This appears to be reflected in the results to the following question, where respondents were subsequently asked which online retailer they would have been most likely to switch to. The majority stated the relevant Party's own online channel (about 77% for JD Sports and 66% for Footasylum).[174]

7.108 Our online survey provides some evidence of the potential for direct substitution from online to in-store, where 36% of JD Sports online customers and 34% of Footasylum online customers said that they would switch to a store if the relevant Party stopped selling online. A large proportion of this

[172] CMA analysis of exit survey data with responses weighted to be nationally representative.
[173] CMA analysis of exit survey data with responses weighted to be nationally representative.
[174] CMA analysis of exit survey data with responses weighted to be nationally representative.

switching was to the relevant Party's own stores (58% for JD Sports and 36% for Footasylum).[175]

- *Customer demographics and use of in-store and online*

7.109 As for footwear, the Parties' consumer bases are likely to be familiar with and frequent users of online shopping (see paragraph 7.65). Our surveys did not indicate a clear segmentation in customer type between in-store and online.

- *Retailer operations*

7.110 On the same basis as for footwear, we consider that all national in-store retailers in this market also have an online offering and that there are some similarities and differences between the offerings of retailers in this market (including the Parties) in-store and online (see paragraphs 7.67 and 7.68).

Conclusion on apparel

7.111 As with footwear, we recognise that the evidence discussed above is not clear-cut. The survey evidence shows that, in relation to the demand-side, there is an apparent willingness of a sizeable proportion of consumers within each channel to divert to the other channel and that past spending behaviour of consumers is consistent with these switching proportions. We consider that these switching proportions are likely to be large enough to act as a constraint on the alternative channel.

7.112 On balance, our view is that a sufficient proportion of consumers currently shop in both the in-store and online channels, or would be prepared to move between the two channels, in order for the two channels to be considered within the same product market.[176] Nevertheless, we examined any material differences between the channels in the constraints on the Parties and the strength of constraint from retailers who primarily operate only or in each channel, in our competitive assessment (see chapter 9).

Geographic market definition

7.113 We also considered the relevant geographic market definition, which sets out the area within which we assessed the Merger. A relevant geographic market definition could be, for example, local, regional, national or international. The

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[175] DJS Research, Survey of online retail customers for a merger inquiry: JD Sports and Footasylum, January 2020.
[176] The surveys were commissioned at phase 2 and so the results were not available at phase 1. At phase 2, they have informed our decision to combine the in-store and online channels.

scope of the geographic market influenced the consumers, retailers, stores and websites that we considered in our competitive assessment in chapters 8 and 9.

Parties' views

7.114 JD Sports submitted that there was no difference in the geographic market between footwear and apparel and that in-store demand was locally driven.

7.115 It also submitted that the precise geographic market could be left open, as no SLC would arise regardless of the geographic frame of reference adopted.

Our assessment

7.116 We consider that the geographic aspect of the sports-inspired footwear and apparel markets is likely to be the same. On that basis, we have not assessed each of these separately. The degree of demand-side substitutability across different geographies is likely to be the same for each of footwear and apparel. Further, the Parties stock both footwear and apparel in the majority of their physical stores as well as online.

7.117 We found that the in-store and online channels for footwear (paragraph 7.69), and separately for apparel (paragraph 7.111), are in the same market. Within each market we recognise that aspects of geographic competition may differ between the two channels, as we have considered below.

Demand-side substitution

7.118 Consumers generally choose to make their purchases either at stores in their local area or online. Where they purchase online, this is usually for delivery to a home or work address or click and collect at a store in the same local area.

7.119 In the in-store segment of the market, consumers generally choose among in-store retailers in the local area where they live (or work). Our store exit survey asked customers about the duration of their trip to the store. It found that less than 20% of the Parties' customers travelled for more than 30 minutes to reach the store.[177,178] This would suggest that their demand is locally based.

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[177] DJS Research, Exit survey for retail customers for a merger inquiry: JD Sports and Footasylum, January 2020.

[178] It is possible that some consumers may not be particularly time sensitive for purchases of apparel and footwear. That is, they may be willing to defer purchases until they are going to another nearby destination. Nevertheless, our store exit survey suggested that demand-side substitution between local areas is limited and demand is locally driven.

7.120 In the online segment, consumers generally purchase for delivery to a fixed location (eg home or work address) or click and collect at a store in the same local area. Therefore, there is unlikely to be any significant demand-side substitution by consumers to retailers that do not deliver to their preferred address or store, although all significant online retailers typically deliver nationally.

7.121 Given the above, we consider that demand is locally driven. However, we also considered various relevant supply-side factors.

Supply-side considerations

7.122 In defining the geographic market, we considered the supply-side of the market and took into account whether retailers compete at the national level, or more locally, and how this affects our competitive assessment.

7.123 We considered whether retailers flex elements of their PQRS locally in their stores or online in response to local competition or whether PQRS is set centrally and applied uniformly across all of their stores and their online offerings. We set out below our key considerations on this point while Appendix D sets out the submissions and evidence from the Parties and further detail on our assessment.

Homogeneity of competitive conditions

7.124 We considered whether the same retailers compete across different geographic areas and whether the conditions of competition between them are the same in each area. Where they are the same, there is a case for aggregating the local supply of these products and analysing them as one national market.[179]

7.125 We found the following:

(a) based on store location data provided to us by the Parties we observed that all Footasylum stores have a JD Sports store and a Sports Direct store within a 20-minute drivetime.[180] Further, [✂] of Footasylum's stores have [✂] Schuh, Foot Locker or Office within 20 minutes. [✂] of the JD Sports stores [✂];

[179] CMA Guidance, paragraphs 5.2.17 and 5.2.24.
[180] [✂].

(b) for JD Sports stores, [✂]% have a Sports Direct store within 20 minutes. [✂] of JD Sports stores [✂] Footasylum, Schuh, Foot Locker and Office within 20 minutes;[181,182]

(c) therefore, for the in-store segment: for Footasylum, the competitive environment (ie the presence of other retailers' stores) and the time taken to drive to the nearest JD Sports store is broadly similar across the country. This homogeneity limits the potential for local variation to be driven by differences in local competitive conditions;

(d) however, there is more variation in competitive conditions for JD Sports stores because it faces greater variation in competitive conditions across the local areas in which it has stores; and

(e) for the online segment, both of the Parties' online offerings are available to consumers throughout the UK and this is the case for their competitors too.[183,184] Therefore, retailers with an online presence are able to serve all individual local areas and so operate nationally overall. Since all relevant online retailers offer their products nationally, there is homogeneity of competitive conditions.

Local flexing of parameters of competition

7.126 We considered whether there is evidence of the Parties engaging in local flexing of competitive parameters in response to local competition, which would indicate that the market is local.

7.127 We found that:

(a) on price: retailers told us that their starting point was typically suppliers' RRPs, although we note discounting does occur (eg see paragraphs 8.67-8.69). The evidence shows that most pricing is set nationally. There are exceptions to this in terms of student discounts, student events, clearance and discounting of damaged goods. Our view is that such exceptions are not sufficient to alter the overall view that pricing is broadly set on a national basis;

(b) on quality: the Parties conduct store refurbishments at individual stores (rather than across their national store estate as a whole). However,

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[181] Figures calculated by the CMA using the store location data provided by the Parties.
[182] We consider the proportion of customers captured by different drivetimes further in chapter 8.
[183] See: Footasylum website and JD Sports website, as visited on 07 February 2020.
[184] We note that in some markets online retailers do not deliver across the whole UK. This is typically the case where services are delivered from local or regional distribution services, such as for online delivered groceries.

where store refurbishments have occurred, internal documents do not show that local competitive conditions were a material factor in these decisions (see Appendix D);

(c) on range:

(i) Footasylum [✂] its in-store range [✂] as part of its national [✂]. We consider that Footasylum's [✂],[185] [✂]. In internal documents, [✂] our view that local competition is not a material factor in Footasylum's range decisions but that those decisions are instead based on consumer preferences;

(ii) there is no evidence that JD Sports flexes its range in response to local competition in-store or online; and

(d) on service: from our review of internal documents we found that service levels are on the whole set nationally. Staffing decisions appear to be based on policy decisions made centrally, rather than in direct response to local competition, and the bulk of marketing spend is national. There is evidence that local events (such as DJ nights) are flexed locally but that this is not generally a response to local competitive conditions.

7.128 In our view, the evidence set out above indicates that there is limited local flexing of the Parties' in-store offerings and no local flexing of their online offering.[186] To the extent there is any local flexing on range in-store, this is not generally a response to local competitive conditions. Therefore, we conclude that the extent of local flexing is limited and that local competition is not a material factor in driving the limited variation that is observed. There is no evidence that local flexing by the Parties would become more likely post-Merger and we have not seen plans to do so.[187]

Geographic basis of our competitive assessment

7.129 As the parameters of competition are set nationally, we focused our competitive assessment of the Merger (as set out in chapters 8 and 9) on a national basis, taking account of the aggregation of any local effects but not undertaking separate analyses in each local area. We note that submissions from the Parties and third parties support this approach. For the purpose of

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[185] [✂].
[186] Although websites may be configured to display different products depending on local areas, the offering available is the same.
[187] We consider that across Footasylum stores the conditions of competition are homogenous and across JD Sports stores, the Merger makes the conditions of competition more homogenous rather than less. As such the Merger does not increase incentives to flex locally.

conducting the competitive assessment in this case, we therefore defined the relevant markets as national.[188]

Conclusion on geographic market definition

7.130 In forming our view on the relevant geographic markets for both footwear and apparel we recognise that there are some differences between the in-store and online segments of these markets, such as the main competitors being present nationally in the online channel whereas in the in-store channel the main competitors are present in local areas.

7.131 For the in-store segment, we found that demand is locally driven. However, we also found that the main parameters of competition are uniformly and centrally set. As such, we found that competition occurs predominately nationally and therefore it would be appropriate to assess the in-store segment on a national basis.

7.132 For the online segment, we found that demand is locally driven. However, online delivery (and click and collect) is offered nationally and the conditions of competition are homogenous nationally, such that it is appropriate to consider the geographic scope of this segment to be national.

7.133 On that basis, and in light of the evidence set out above, we found that the appropriate geographic market definition for both sports-inspired casual footwear and apparel is national ie the whole of the UK.

Conclusion

7.134 We defined the relevant markets as:

(a) the retail supply of sports-inspired casual footwear (in-store and online) in the UK; and

(b) the retail supply of sports-inspired casual apparel (in-store and online) in the UK.

[188] If it was the case that there was local flexing in stores due to local competition and national online offerings constrained in-store offerings (they were part of the same market), we could define local markets where the online constraint could be considered as additional competitors in each local market. The French Competition Authority has adopted this approach in two recent cases 19-DCC-65 and 16-DCC-111.

8. Our competitive assessment of horizontal unilateral effects - footwear

Introduction

8.1 In this chapter, we set out our assessment of the effect of the Merger on the retail supply of sports-inspired casual footwear at a national level.

COVID-19

8.2 As noted in chapter 1, the evidence gathering for this investigation was mostly completed before the effects of COVID-19 arose and therefore it largely reflects the market prior to this. However, we have looked at the impact of COVID-19 in our investigation and considered how COVID-19 might affect our competitive assessment and in turn the extent to which it would affect any SLC finding.

8.3 On 23 March 2020 the UK government required all retail stores selling non-essential goods to close for an initial period of three weeks which was extended by a further three weeks on 16 April. This closure applied to the physical stores of all retailers relevant to this Merger – including the Parties. Retailers are also subject to the government social distancing and self-isolation guidance. Other aspects of this market are therefore likely to be affected including retailers' online businesses, their operations (eg head offices, warehouses and distribution centres) and their supply chain. As a result of the restrictions, there has been lower consumer demand and product sales.[189] At the time of publishing this report, it was not clear when these restrictions might be relaxed and stores reopened. We therefore recognise that all retailers are currently facing uncertain and difficult trading conditions.

8.4 There remains considerable uncertainty about the extent and duration of the impact of COVID-19.[190] We note that all retailers in the relevant markets are subject to the same change in market conditions, although it is difficult to predict the effect on different retailers and how each will respond to the circumstances.

8.5 Our merger assessments are forward-looking and evidence-led, and typically look beyond the short term in considering what lasting structural impacts a

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[189] The Parties told us that Footasylum had seen a [✂] and that JD Sports expected its in-store sales to be [✂] from 30 March 2020 and 'going forward for the foreseeable future'. For the week ending 28 March 2020 (compared to the equivalent week last year), JD Sports told us that its UK in-store sales were [✂] its UK online sales [✂], resulting in a like-for-like [✂] in weekly sales of [✂].
[190] CMA, Merger Assessments during the Coronavirus (COVID-19) pandemic, paragraph 22.

merger might have on the relevant markets. In this case, as far as possible, we have considered the impact of COVID-19 in our assessment on competition between the Parties and the constraints from other retailers and suppliers, both now (see overview of current constraints section, from paragraph 8.305) and in the foreseeable future (see market developments section, from paragraph 8.444).[191]

Approach to our competitive assessment

8.6 Market definition, as set out in chapter 7, identifies products/services that can be considered in the same market, but it does not provide information on the nature of competition within it. In some markets where products are very similar, measures of concentration like market shares can usefully inform an assessment of the structural change as a result of a merger. But in other markets, where products are more differentiated, not all firms within a market compete with each other in the same way. As such, within that market some firms will be closer competitors than others. In these cases, shares provide some relevant evidence but are not as informative about the effect of a merger, as such shares do not fully capture the closeness of competition between firms.

8.7 Therefore, a range of other information and evidence on firms' closeness of competition is also relevant for a merger assessment.

8.8 In this chapter we have assessed whether the Merger has removed a competitor from the sports-inspired casual footwear market which previously provided a competitive constraint. The ultimate purpose of this assessment is to determine whether, as a result of the Merger, the Merged Entity would have the ability and/or incentive to deteriorate (worsen or not improve its offering as much as it would otherwise have done absent the Merger) for example, by increasing prices, and/or reducing quality, range and/or service levels – collectively referred to as PQRS. As explained in chapter 6, this is referred to as a 'horizontal unilateral effects' theory of harm.

8.9 An SLC based on horizontal unilateral effects is more likely when the merging parties are close competitors. Generally, the closer two firms are, then the stronger their competitive constraint is on each other, which would be lost as a result of a merger.

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[191] The CMA needs to ensure that its decisions are based on evidence and not speculation and will carefully consider the available evidence in relation to the possible impacts of COVID-19 on competition in each case. See: CMA, Merger Assessments during the Coronavirus (COVID-19) pandemic, paragraph 22.

8.10 Firms are close competitors if their customers view them as alternatives to each other ie customers would be willing to switch between the two firms, and, as a result, the two firms compete to win and retain customers by offering a better product and service. Two closely competing firms place a stronger immediate constraint on each other than do other firms within the same market, and customers benefit from this competitive rivalry. If those closely competing firms merge, each will be under less competitive pressure which means they will not work as hard to offer good deals for their customers or make improvements to their businesses than they otherwise would have done.

8.11 We therefore considered how closely the Parties compete with one another and whether the removal of the constraint that the Parties place on each other is likely to lead to an SLC in the sports-inspired casual footwear market. As part of this assessment, we also considered in aggregate current competitive constraints on the Parties from other retailers, in addition to the constraints from suppliers given their importance in this market (as set out in chapter 2).

8.12 We also considered whether any market developments are likely to affect our assessment of competitive constraints. This includes assessing whether there are any changes underway or likely to happen in the foreseeable future (ie broadly within the next two years),[192] such as other retailers in the market repositioning their offer or substantially growing, that might materially change the nature of the existing competitive constraints on the Parties.

8.13 We reviewed a wide range of evidence collected from the Parties, other retailers and suppliers, as well as evidence from the Parties' customers gathered via our surveys (see chapter 6). In reaching our decision, we assessed all of the evidence in the round.

8.14 We note that a number of submissions from the Parties and third parties covered both the footwear and apparel product markets, and these are referred to in detail in this chapter and are not repeated in full in chapter 9. Where there are specific comments on footwear, we also set these out in this chapter. Submissions that were specific to apparel are set out in chapter 9.

[192] We consider that in this case and given the nature of these markets, the relevant period over which we can reasonably assess future market developments is broadly the next two years. We note that a period of two years is also consistent with the period over which we would typically assess the prospect of entry or expansion (see chapter 11). Where we have specific evidence on future developments covering a different time period, we have taken that into account in our assessment.

8.15 The structure of this chapter is set out below and we assessed the evidence in each of these areas to help us understand the aggregate competitive constraint on the Merged Entity:

(a) impact of suppliers on retail competition: we considered the extent to which suppliers have an impact on retail competition within the sports-inspired casual footwear market and whether they would provide a constraint on the Merged Entity's PQRS offering post-Merger;

(b) how retailers compete: we considered in further detail how retailers compete in this market and the different aspects of the Merged Entity's PQRS offering which could be flexed post-Merger to the detriment of consumers;

(c) market shares: we looked at market shares as an indicator of the presence that different retailers have in the relevant market, although for reasons explained in paragraph 8.6 these shares do not fully capture closeness of competition and therefore we also looked at a range of other evidence to assess closeness of competition and the effect of this Merger, as set out in sections d) - j);

(d) retailers' offerings: we assessed the similarities and differences between different retailers' offerings, including those of the Parties, which gives an indication of their likely strength and closeness;

(e) internal documents: we analysed a large number of the Parties' internal documents to look at how closely the Parties monitor each other and other retailers, which is evidence on how the Parties view the market and their competitors in the ordinary course of their business;

(f) surveys: we undertook two large surveys of the Parties' customers to understand their views on how they purchase the Parties' products, and which alternative retailers they would consider if the retailer and/or channel that they shopped in was no longer available;

(g) GUPPIs: we used nationally representative diversion ratios between the Parties to calculate national GUPPIs. The GUPPI is a commonly used metric which estimates the incentives that the merged entity has to increase prices or degrade the offering of one of its fascia post-merger taking into account the remaining aggregate constraints;

(h) entry-exit analysis: to assess the strength of the competitive constraint from a given retailer on the Parties, we assessed the impact of that retailer's stores opening or closing near to one of JD Sports' stores;[193]

(i) overview of current constraints: this section draws together the wide range of evidence on how closely the Parties currently compete and the nature of current competitive constraints from other retailers and the constraints from suppliers, to inform our assessment of the current aggregate constraints on retail competition; and

(j) market developments: we assessed whether there are any changes underway or likely to happen in the foreseeable future that may materially change the nature of the existing constraints on the Parties. We focussed our assessment on retailers already present in the market and considered any repositioning or significant expansion, including by Frasers Group (formerly Sports Direct International) and Nike and adidas through their DTC channels, as well as other retailers.

8.16 Within each of these sections, we first set out any relevant submissions made by the Parties and third parties, before setting out our own assessment of these.

8.17 Last, we set out our conclusion on competitive effects in the sports-inspired casual footwear market.

Background to the sports-inspired footwear market

8.18 As discussed in chapters 2 and 7, the Parties and other retailers are part of the broader retail sector in the UK and sit alongside a wide range of other retailers of different types of footwear. Many of these retailers sit outside of the sports-inspired casual footwear market, but nevertheless may pose some degree of constraint – small numbers of consumers with weak preferences for sports-inspired casual footwear products, would consider other products as alternatives. However, among the Parties' customers the number who would switch to these other retailers is sufficiently small, that such retailers are unlikely to pose any material constraint on the Parties.

8.19 The Parties specifically offer sports-inspired casual footwear and even within this market there is a range of different retailers, each of which is competing to attract consumers through differentiated offerings.

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[193] It was only possible to carry out this analysis on JD Sports stores and not on Footasylum stores as there was not sufficient data for statistically robust estimation for Footasylum stores. See paragraph 8.252 for further details.

8.20 Some key elements of differentiation for retailers in this market are:

- the broad product type (some retailers focus more on fashion footwear and others on sports footwear and the boundaries between these are blurred - see chapters 2 and 7);
- the range of branded products from suppliers;
- the value proposition (some retailers focus on higher-price branded products, others on lower-priced branded products);
- the network of retailers' stores and/or online offering (with some retailers operating only online) and the quality of these; and
- the consumer target market (including age and/or gender).

8.21 This is to some extent a dynamic market, which is growing and where the products available reflect changing fashions and trends, some of which change between seasons or between years, although others remain popular over a long time frame, such as Nike Air Max 97. However, although there have been some changes in the individual retailers within the market and their positioning, broadly speaking the same major retailers are present now as were five years ago.[194]

8.22 As highlighted in paragraph 8.20, in this market a key element of retailers' differentiation comes from their relative access to branded products from suppliers, in particular from Nike and adidas. Nike and adidas have a majority combined market share as suppliers of sports-inspired casual footwear of approximately [✂]% ([✂]% and [✂]% respectively in 2018), and represent the majority of the Parties' footwear sales.[195] Suppliers therefore have an important role in this market and the Parties submitted that they would act as a constraint on the Parties post-Merger.

8.23 Given this we have considered the impact of suppliers on retail competition in the next section.

[194] Our analysis of data from retailers found that out of the top 10 retailers with the largest market shares in 2018, seven of them were also in the top 10 in 2015 and for the other three we did not have data from 2015.
[195] In 2018, Nike and adidas represented [✂]% of JD Sports' UK footwear sales and [✂]% of Footasylum's UK footwear sales.

The impact of suppliers on retail competition

8.24 In this section we consider the extent to which suppliers have an impact on retail competition within the sports-inspired casual footwear market and whether and to what extent they would constrain the Merged Entity from deteriorating its post-Merger offering. We use the term 'deterioration' in this section and throughout our report to cover both any worsening in absolute terms of the Merged Entity's offering (eg a reduction in discounting) and/or any lack of improvement that might have happened faster or to a greater extent, absent the Merger.

8.25 Suppliers of branded products impact this market in several ways, including by:

(a) creating and driving consumer demand (see chapter 2);

(b) competing at the retail level through their DTC channels (further explored in our assessment of the constraints of Nike's and adidas's DTC channels both currently (see 8.298 and 8.300) and in the foreseeable future (see 8.400-8.436)); and

(c) wholesale supply of their products to retailers – where they control the type and volume of products that are provided to retailers (as explored further in this section).

8.26 We begin this section with a description of the general approach most suppliers take to the DTC and wholesale supply of their products, involving a combination of selective distribution arrangements and segmentation of retailer accounts. We then assess the extent to which suppliers have an impact on retail competition within this market. This assessment focusses on the two biggest suppliers in the market by revenue, Nike and adidas, dealing with other suppliers mainly in areas where it is relevant to identify distinctions between the influence of Nike and adidas relative to that of other suppliers.

Suppliers' DTC and wholesale offerings

8.27 As noted in chapter 2, a key trend in this market is an increased focus by suppliers on offering their products directly to customers through their DTC channels. Key suppliers, namely Nike and adidas, have seen an associated expansion in their sales via these channels and both forecast their UK DTC to grow in the future, [✂] (see market developments section, paragraphs 8.403-8.439).

8.28 In terms of revenue, while DTC is growing, suppliers' wholesale sales to retailers [✂], accounting for [✂]% of Nike's and [✂]% of adidas' UK footwear

revenue.[196] Suppliers' forecasts [✂] (see Table 8.14 and Table 8.15 in market developments section).

8.29 Suppliers take both DTC and wholesale channels into account in setting their distribution strategies. Given that suppliers' DTC and wholesale channels typically serve different purposes, suppliers may not have the same incentives to allocate products to each channel, but instead will allocate them across channels in the way that best furthers their interests overall. Since DTC channels compete with the retailers to which suppliers wholesale, in some instances suppliers may use distribution strategies to promote their DTC channels (eg releasing products first via these channels).

Selective distribution arrangements and retailer segmentation

8.30 Most suppliers in this market wholesale their products to retailers through some form of selective distribution arrangement, which grants them a degree of control over where and how their products are resold and marketed. This means suppliers have control over which retailers sell their products and can control the type and volumes of products provided to different retailers.

8.31 These arrangements enable suppliers to require that retailers observe a minimum standard of quality and service in selling suppliers' products, whether in-store or online. The ultimate purpose of such arrangements is to ensure that products are marketed in a manner consistent with the supplier's brand image generally or in-line with the perception of a particular product, for example as being high-end or luxury. This approach in turn helps suppliers to shape consumer perceptions and preferences across a range of their products (see also chapter 2).

8.32 A standard feature of such arrangements is that the supplier agrees to supply only those retailers which meet certain specified criteria (eg financial and quality requirements)[197] and only supply a certain volume of its product to these retailers. An inherent consequence of suppliers controlling volumes by narrowing distribution is a potential reduction of intra-brand price competition. It has long been recognised that this potential impact on price competition is in principle offset by an increase in authorised retailers' incentives to compete

[196] July 2018 to June 2019.
[197] For example, adidas's global policy manual sets out the criteria for '[✂]'). For Nike, one of the criteria to become a Nike authorised retailer is to have '[✂]'.

on other relevant parameters of competition, including in particular quality and service.[198,199]

8.33 These selective distribution arrangements are incorporated into the supplier's standard terms and conditions and individual trade terms with retailers.

8.34 Suppliers in this market typically also have segmentation policies whereby authorised retailers are placed into different categories (eg sport or lifestyle/fashion-focussed) and suppliers tailor the product ranges made available to retailers accordingly.[200] Suppliers use this segmentation to optimise their overall supply to consumers and may review their general approach to such segmentation over time.[201]

8.35 Within each category, some suppliers [✂] define different tiers which further tailors the type and volume of products that are made available to retailers.[202] In addition, suppliers may assign retailers that operate different store formats into more than one category/tier. In that case, a store-by-store assessment is performed by the supplier and the categorisation/tiering applies to each specific store. A product may also be allocated to more than one category/tier and therefore in some instances, products may be available to retailers in multiple categories.[203] Suppliers' decisions on the categorisation/tiering of both products and retailers (including of retailers' individual stores) may change over time, with such changes typically based on information obtained through monitoring and auditing activities (see paragraphs 8.88 to 8.93 for further detail). As a result, in practice a given retailer is generally able to select from a cut-down version of a given supplier's catalogue that contains only the products that are currently available to that retailer's applicable categories and/or tiers.

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[198] For example, see Judgement of 25 October 1983, *AEG v Commission*, C-107/82, EU:C:1983:293, paragraph 42 ('A restriction of price competition must however be regarded as being inherent in any selective distribution system in view of the fact that prices charged by specialist traders necessarily remain within a much narrower span than that which might be envisaged in the case of competition between specialist and non-specialist traders. That restriction is counterbalanced by competition as regards the quality of the services supplied to customers, which would not normally be possible in the absence of the appropriate profit margin making it possible to support the higher expenses connected with those services.')
[199] In this context, we note that the European Commission has recognised that, in certain circumstances, there may be legitimate reasons (including the efficient operation of a selective distribution arrangement) why a supplier may seek to have some form of control over retail pricing. See: European Commission Vertical Guidelines.
[200] For example [✂].
[201] For example, an internal document from [✂].
[202] For example, [✂] UK 2020 segmentation includes, among others, [✂] high level categories ([✂]), within each of these are various 'channels' [✂]. Within the [✂] Channel there [✂].
[203] CMA analysis of segmentation policies of [✂].

8.36 In light of the above, the process by which suppliers determine a given retailer's product access may be quite complicated in practice.[204] Suppliers' decisions in this context may also take into account more general action taken by a retailer to reposition its offering (for example, Frasers Group's elevation strategy, discussed further in the market developments section from paragraph 8.328). There is a broad understanding among retailers about a supplier's segmentation policy and where the retailer sits within it. However, the criteria on which suppliers classify certain retailers into different categories or tiers is not always fully transparent, and it is not always clear how this impacts the products that retailers can access. Nike's and adidas's segmentation policies appear to be less transparent than other suppliers', which means that it is harder for retailers to understand and engage with such policies.[205]

8.37 We note that there appears to be limited ability for retailers to change their allocated segmentation category once this is unilaterally determined by a supplier.[206] Further, some suppliers [✂] include broad [✂] cancellation provisions within their standard terms and conditions, enabling [✂].[207,208]

Parties' views

8.38 JD Sports submitted that the Parties were subject to a 'significant degree of control and influence' from key suppliers (Nike and adidas) who were 'must-stock' brands.[209]

8.39 JD Sports submitted that the key suppliers' influence and control over retailers' offerings manifested itself in a number of ways, namely that they controlled:

(a) who participated at the retail level for supply of their products by placing retailers into segments or tiers;

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[204] [✂].
[205] CMA analysis of segmentation policies of [✂]. [✂] stated that it is 'only shown the products that Nike and Adidas choose to show […], and these do not include those outside of its distribution allocation'. [✂] stated that 'selective distribution agreements […] are never shared with their retail partners & no details are ever disclosed. Requests by the retail customers to see these agreements are always refused.' We note that by contrast [✂].
[206] For example, see discussion of the success of the Frasers Group's elevation strategy in enabling Frasers Group to obtain additional products from [✂] (see section on market developments from paragraph 8.328).
[207] [✂] submitted that 'Nike or Adidas can cancel [orders]: (i) at will; (ii) without any penalty; and (iii) without any reason.'
[208] [✂] told us 'Sometimes the order is cancelled by the brand – sometimes with a reason, sometimes without any justification at all'.
[209] For example, JD Sports, Response to Issues Statement, paragraph 8.

(b) distribution of products within these segments, both in terms of the particular products that were allocated to individual retailers, and the volumes made available to them; and

(c) the PQRS offerings of downstream retailers via detailed selective distribution arrangements.

8.40 JD Sports submitted that Nike and adidas '[✂]; and unilaterally controlled who was able to participate (and to what extent)' in the market. This resulted in substantial ongoing influence as a result of the constant threat of being disintermediated (ie suppliers no longer using retailers to sell products) or receiving less product access relative to other retailers in future.

8.41 The Parties submitted that in relation to supplier constraints the Provisional Findings addressed the wrong question, applied the wrong test, were a misdirected and incomplete analysis, failed to take account of, and/or gather, relevant evidence, misinterpreted evidence and reached the wrong conclusion. The Parties submitted that the Provisional Findings had also misrepresented the constraints imposed by suppliers.

8.42 The Parties submitted that the Provisional Findings' concern with the question of the Parties' ability to flex their offering post-Merger was the wrong question and that for the purpose of our assessment of the Merger the relevant question was whether post-Merger, retailers would have the incentive to significantly and permanently degrade their offer, taking account of the ability and incentives of suppliers to react to any such degradation.

8.43 In assessing incentives, the Parties submitted that having accepted that retail competition was heavily influenced by suppliers that had the ability and incentive to condition it (indeed, that key suppliers 'shape' the retail market), we should not treat the degree of retail competition independently of supplier constraints or ignore the effect on retailers' incentives from the threat of reduced allocations and disintermediation (including the effect on retailers' incentives today from the threat of reduced allocations or disintermediation in future).

8.44 The Parties submitted that our assessment of supplier restrictions as set out in the Provisional Findings, was incorrectly concerned with the notion of a floor above which retailers set their offer. They submitted that this ignored the Parties' evidence that they were not constrained to any explicit minimum standard (and that the threat of reduced allocations entailed substantial influence for suppliers across all aspects of their PQRS-setting) and that it failed to include any meaningful analysis or evidence establishing that retailers were above the notional floor.

8.45 The Parties submitted that: (i) there was evidence consistent with the proposition that suppliers would discipline worse retail quality / service in the Provisional Findings; (ii) the Provisional Findings ignored evidence that suppliers imposed granular compliance standards on retailers' quality and service offering; and (iii) there was no contrary evidence in the Provisional Findings on this point, such that a material degradation in quality/service would be met with adverse responses by suppliers (such as reduced allocations) and that this was a strong disciplining factor on all aspects of the Parties' quality and service offering. Further, the Parties submitted that we had failed to ask suppliers directly how they would respond to any such degradation by retailers.

8.46 The Parties submitted that in relation to suppliers' DTC offerings dampening suppliers' incentive to resist a reduction in competition between the Parties in relation to store openings, the basis for the CMA's concern was not clear. The Parties submitted this was unclear since suppliers had both this ability and incentive pre-Merger and there was no evidence cited in the Provisional Findings that this ability and incentive would be moderated or removed as a result of the Merger, and therefore that there would be any Merger effect.

8.47 The Parties submitted that the CMA's theory of harm was that there was pre-Merger competition on price, that the Merger would reduce this discounting and that suppliers would be happy with this outcome and would therefore not act to restore pre-Merger pricing. They submitted that the problem with this theory was that if suppliers preferred less discounting post-Merger, they would also prefer it pre-Merger and they had the ability to achieve this pre-Merger via product allocations.

8.48 The Parties submitted that the CMA failed to assess the key issue of whether they had the incentive to degrade their PQRS offering post-Merger, taking account of the threat of reduced access to products or volumes or disintermediation from suppliers.[210] The Parties submitted that it was not the existence of any explicit minimum standards that acted as a constraint on them but rather the potential threat of reduced access. Progressive disintermediation and a great deal of uncertainty about the standards that they were expected to adhere to meant that, as well as suppliers having direct influence over given PQRS parameters, the threat of being disintermediated

[210] The Parties accepted that retailers had the ability to degrade their offering but said that the relevant question was whether they had the incentive to do so, taking account of the threat of reduced allocations from or disintermediation by suppliers. As we set out in paragraphs 8.62 and 8.63, we do not consider the distinction between ability and incentive to be binary nor such a distinction to be the key issue.

or at least relatively disfavoured in the future entailed substantial influence for suppliers across all aspects of retailers' PQRS-setting.

8.49 JD Sports submitted that 'Nike and adidas also exercise quality control over JD Sports' national-level, non-price offer, with high expectations regarding store and product presentation.'[211] According to JD Sports, Nike and adidas did this by (i) [✂], (ii) [✂], and (iii) implicitly threatening to move the retailer to another segment if the quality of the stores decreased.

8.50 The Parties submitted that the key suppliers, Nike and adidas, would discipline any worsening of their offering in terms of quality or service. In support of this proposition, the Parties submitted the following evidence:

(a) evidence of [✂] standards and protocols provided to the Parties by Nike and adidas;

(b) internal documents containing correspondence with Nike and adidas which in their view showed that [✂]; and

(c) internal board documents showing that [✂].

8.51 The Parties also submitted that the key suppliers' control extended to their forward-looking strategy, as well as their retail store offering. The Parties submitted as examples evidence that: [✂].

Third parties' views

8.52 A number of third parties highlighted in their submissions that suppliers had an important and influential role in the market, particularly in terms of retailers' access to branded products. Some examples are set out below.

8.53 [✂] submitted that:

(a) adopting a belief that the key suppliers would maintain minimum standards for consumers would imply that the CMA could allow a retail level monopoly and that this would have no effect on consumers;

(b) JD Sports' own arguments that it faced retail competition were inconsistent with an argument that there would be no meaningful impact on PQRS because the key suppliers constrained PQRS;

(c) the key suppliers set a minimum standard for QRS and there was significant competition above this minimum, which is why the Parties

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[211] JD Sports, Response to the Issues Statement, paragraph 212. Footasylum similarly stated [✂].

offered different store experiences and invested at the retail level in their in-store environment, marketing etc, and that many of these investments were being made to improve the retail offer vis-à-vis retail competitors;

(d) there was price competition across a wider set of products, and retailers such as Footasylum discounted products more often than JD Sports; and

(e) JD Sports was arguing that no parameter of competition was responsive to any retail competition (other than dictated by suppliers) and that consequently there would be no impact on PQRS. There was a particularly high evidential threshold to show this, which JD Sports' submission had not met.

8.54 [✂] submitted that the Parties claimed that suppliers' constraint on PQRS was binding and they then asked what would happen if the Parties deteriorated their offering. The Parties' framework suggested that:

(a) JD Sports had no negotiating strength or leverage over suppliers of branded products at all ([✂]) and the retailers merely acted as an agent for suppliers. If that were the case, JD Sports [✂] should not make any profit on sales of Nike or adidas products as Nike and adidas would dictate PQRS and the investment to meet those standards and then set the wholesale price to capture that profit, yet both were very profitable retailers (in an extremely challenging retail environment in recent years); and

(b) there was no process of rivalry between retailers, and competition between the Parties (and between each of the Parties [✂]) created no incentives to improve the competitive offer that would be lost as a result of the Merger or indeed a subsequent merger [✂].

8.55 [✂] said that consequently the Parties in effect argued that there was coordination in the sector.

8.56 [✂] said that 'some products are limited by supply constraints (for example: production capacity) and this [is] more prevalent for footwear than it is apparel.'

8.57 [✂] said 'From time to time we are refused products from [brands other than Nike and adidas] - not just sportswear brands. It's part of the usual course of business. Often, it's because there is demand for the most popular products, across multiple retailers, that exceeds the quantity manufactured or available in a territory.'

8.58 [✂] stated that it had 'very little leverage over the major suppliers (adidas and Nike) on these particular issues' which included 'enhanced margin discount support on selected styles, product access and distribution policies, level of marketing support, allocations (restriction of buying volume applied by suppliers)'.

Our assessment

8.59 In order to explore to what extent suppliers affect retail competition, we assessed a wide range of information provided by retailers and from suppliers on their selective distribution arrangements, segmentation policies, standard terms and conditions and individual trade terms with retailers.

8.60 In this section, we assess the possible impact suppliers have on retailers' offerings as a result of their wholesale relationship with retailers. In particular, we consider the extent to which retailers' ability and/or incentives to flex the PQRS aspects of their retail offerings are constrained by suppliers - that is, whether the relationship is such as to prevent retailers from deteriorating PQRS in light of how suppliers could in theory or do in practice respond to any such deterioration.[212]

8.61 This assessment is relevant to our investigation because it informs our determination of whether the Merged Entity would have the ability and/or incentive to deteriorate its offering post-Merger.

8.62 To some extent, we can distinguish between the impact of suppliers' actions on a retailer's ability and on a retailer's incentives to deteriorate their PQRS, for example:

(a) suppliers may impact a given retailer's ability mainly by imposing or enforcing a contractual condition of sale. For example, the Merged Entity would have no ability to deteriorate its offering post-Merger if suppliers, in effect, determined all aspects of its offering as part of contractual requirements; and

(b) suppliers may impact a given retailer's incentives directly through the provision of recommendations, or indirectly by comparing it to other retailers. We consider that a given retailer's incentives to comply with any such recommendations or feedback depend mainly on the extent to which these are (or that retailer perceives that they are) connected directly or indirectly to product access or volumes. For example, the Merged Entity

[212] For the purpose of this assessment, we use the term 'deterioration' to cover both any worsening in absolute terms and/or any lack of improvement that might have happened faster or to a greater extent, absent the Merger.

may not have an incentive to deteriorate its offering post-Merger if it perceived that suppliers' reaction (or the threat of potential reaction), in terms of cancelling orders or reducing access to its products, outweighed the gains from such a deterioration.

8.63 We note the Parties' submissions at paragraph 8.42, however, in many cases, suppliers' actions may impact both retailers' ability and incentives. As such there can be some overlap between ability and incentive, and in some cases it may therefore be unclear whether a factor should be categorised as impacting on a retailers' ability or its incentive. Therefore, in our assessment we focussed on the ways that suppliers may impact on retail competition in this market in general, considering both aspects but without distinguishing between whether this is through influence on ability or incentives.[213]

8.64 We consider that there is a spectrum of constraints that suppliers may possibly exert on retailers' offerings and the level of such constraint may depend on the precise element of PQRS under consideration. Within this spectrum, we consider that there are broadly three levels of any such constraint:

(a) no constraint – suppliers do not act as a constraint on retailers' ability and/or incentive to deteriorate their offering. For example, this may be because suppliers do not actively monitor aspects of retailers' PQRS offerings so that any potential deterioration would not be subject to detection or observation, and/or because any such deterioration would not harm suppliers' interests;

(b) some constraint – suppliers exert some constraint on retailers' ability and/or incentive to deteriorate their offering. Retailers perceive that there is a likelihood that some potential deterioration of aspects of their PQRS offering would be detected and responded to by suppliers, either in the form of some reduction in product access or volume allocation (including through re-segmentation), worse future trade terms, or, at the extreme, through disintermediation. As a result, retailers' ability and/or incentive to deteriorate PQRS is reduced; or

(c) a significant constraint – suppliers exert a significant constraint on retailers' ability and/or incentive to deteriorate their offering. Retailers will not deteriorate most aspects of their PQRS offering due to the expectation that suppliers will detect and respond to any such deterioration either

[213] We recognise that suppliers' actions may in some cases impact both retailers' ability and incentives and as such there is some overlap between those categories. Nonetheless, the CMA considers that this framework sufficiently covers each of the relevant ways that suppliers may impact on retail competition in this market.

through reduced product access or volume allocation, worse future trade terms, or through disintermediation.

8.65 In considering whether the relationship between retailers and suppliers is such as to prevent retailers from deteriorating PQRS we considered: (i) whether the extent of any constraint we have found, taken alone, is so significant as to sufficiently discipline the Merged Entity's ability and/or incentive to deteriorate its offering post-Merger (the focus of this section); and, if not (ii) whether the extent of any constraint we found is sufficient in aggregate with other constraints on the Merged Entity to prevent the Merged Entity from deteriorating its offering post-Merger.

Suppliers' impact on retailers' ability and/or incentive to flex PQRS

8.66 Below we assess whether and the extent to which suppliers constrain aspects of retailers' PQRS. We then consider the extent to which suppliers monitor PQRS aspects of retailers' offerings as a potential means to impact PQRS.

Pricing

8.67 In terms of retail pricing, and as noted in paragraph 8.32, the presence of suppliers' selective distribution arrangements may cause a potential reduction of intra-brand price competition in this market. Notwithstanding that context, retailers are contractually free to set their own prices in the relevant markets. We note that suppliers usually include recommended retail prices (RRPs) in the product catalogue presented to retailers in this market. Retailers told us that their starting point was typically the RRPs, although we note discounting does occur.[214] Some retailers told us that they felt some pressure (at least implicitly) to sell products at RRP. This pressure is perceived by retailers to be greater as regards Nike and adidas than other suppliers. This indicates that suppliers may be at least perceived to exert some upward pressure on the retail pricing of their branded products.

8.68 We consider that suppliers may not be concerned about or react adversely to a reduction in price competition post-Merger (for example a reduction in discounting or less competition over other pricing elements, such as the minimum spend thresholds for free delivery).[215] Suppliers may not have an incentive to drive retail price competition where it undermines consumers' perceptions of their branded products. For example, suppliers take great care

[214] As set out in our analysis of the Parties' historic discounting behaviour, a sizeable proportion of the Parties' sales in 2018 had been discounted. See paragraph 8.109.
[215] See for example paragraph 8.90.

to establish their products as 'status' products and enforce this through their selective distribution arrangements which control volumes of and access to their products. Discounting of branded products may in certain instances undermine this to some extent.[216]

8.69 As noted above, notwithstanding suppliers' use of selective distribution arrangements and RRP, we observed that there is discounting in this market, for example JD Sports conducts discounting (clearance and non-clearance) worth around [✂]% of its revenues ([✂]% clearance and [✂]% non-clearance) (see paragraph 8.109(a)). There could be less discounting post-Merger as a result of any loss of competition between the Parties.[217] It is also unlikely that suppliers would react negatively to a reduction in discounting post-Merger (for the reason given in paragraph 8.68). On that basis, we disagree with the Parties' submission at paragraph 8.47 that the stance of suppliers would result in the Merger being unlikely to have a material impact on price competition.

Range

8.70 In terms of range, and as discussed in paragraphs 8.30 to 8.37, we consider that a supplier's selective distribution arrangements and its segmentation decisions typically have a direct impact on a given retailer's product access and, in turn, provide a constraint on its retail offering in terms of product range.

8.71 Retailers however can and often do offer less than the full range available to them in their stores due to limitations in store size, although they typically offer a fuller range online.

8.72 In this context, there is limited evidence that suppliers may influence retailers' incentives to flex their range of other suppliers' brands and products. For example, [✂] said that 'certain audits review other brands offered in store and this helps to determine the account segmentation'. However, [✂] said that changes in the range of other brands stocked by a retailer were not considered in themselves to demonstrate a deterioration in the quality or services offered by a retailer. We have not seen any evidence of suppliers

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[216] We recognise that discounting in some instances, such as for end-of-range products, may support suppliers' efforts to establish newer products as 'status' products.
[217] Regarding clearance discounting, we consider it is driven by a range of factors including product lifecycle/seasonal changes. However, we also consider that competition influences clearance discounting, because where seasonal changes in products apply equally to all retailers, multiple retailers may engage in clearance discounting and compete with each other. As such, we consider that the Merged Entity could reduce such discounting post-Merger as a result of any loss of competition between the Parties.

taking action in response to retailers flexing their range of other supplier's brands or products.

8.73 In relation to product access, suppliers vary in the level of restrictions they impose on retailers. Nike's and adidas's segmentation policies are materially more restrictive compared to those of smaller suppliers such as [✂].[218] In particular, the evidence indicates that compared to smaller suppliers, Nike and adidas are [✂]. We received evidence on this from both of the Parties and other retailers,[219] for example:

(a) JD Sports submitted that:

> if a product that JD Sports would like to sell is not included in the catalogues, then [✂]. However, in JD Sports' experience Nike and adidas are [✂] grant access to products that are not already listed in the catalogues and JD Sports does not consider that [✂]. These discussions are typically [✂];[220]

(b) Footasylum stated that a retailer '[✂]' and that '[✂];and

(c) [✂].[221] [✂].

8.74 However, we note that the restrictions we observed on product access (including volume) arise from suppliers' own strategic decisions.[222] As such, and as noted in paragraph 8.29, these restrictions reflect suppliers' aggregate incentives across their DTC and wholesale channels. On the basis of the evidence available, we do not consider that suppliers' incentives in this regard are likely to change significantly in the foreseeable future (see market developments section from paragraph 8.400), although we recognise that, at least in principle, selective distribution arrangements and segmentation policies could be amended by suppliers at any time post-Merger.[223]

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[218] CMA analysis of segmentation policies of [✂].
[219] Other third party submissions include: [✂] stated that 'Despite making presentation after presentation to our key suppliers, and constantly asking for such top selling styles we are, without meaningful reason, always rebuffed.' [✂] submitted that it had more negotiating power with smaller brands than with more successful ones. [✂] stated that [✂].
[220] JD Sports stated that 'Other footwear suppliers can occasionally be [✂] with the products that are available to retailers, but this is [✂]… The process operates largely the same for non-Nike and adidas suppliers of apparel and accessories. However, usually the arrangements are [✂], and JD Sports is [✂]. JD Sports' expectation is that this is the same for other retailers.' We note that JD Sports has made other submissions on this issue which we have also taken into account in our assessment.
[221] [✂] also stated that 'it does have some potential to negotiate with other smaller brands.'
[222] Suppliers can change their retailer distribution strategy, for example Nike announced in 2017 (as reported by trade press) that it would be looking to globally focus on a number of its retailers as it believes they will be able to drive a differentiated consumer experience going forward. Nike submitted that this concentration of resources on selected retail partners was to accommodate shifting consumer preferences and to help retailers offer the best possible Nike products and services to the different consumer audiences they serve. [✂].
[223] We note in this context that [✂].

8.75 [✂] submitted that it agreed that its distribution strategy and policies could be changed at any time, but stressed that it would always want to ensure its products were presented in the best possible way in the best environment and it was very unlikely to amend its distribution and/or segmentation policies in the future to require a lower level of service or quality from its retailers.

8.76 We recognise that access to branded products, particularly from the key suppliers, is important to retailers and the risk of losing this access can provide a material disincentive for retailers in terms of deteriorating certain aspects of their offerings. We consider that, potentially, suppliers could withdraw/lessen retailers' access to their products, (for example through different segmentation, reduction of the available catalogue choices or cancellation of product orders), or threaten to do so, as a way to exert influence on retailers. We consider that the presence of those provisions may create a degree of uncertainty for retailers as regards product access.[224] Access to range can be viewed as an actual or potential means by which suppliers may respond to or constrain deterioration of retailers' offerings. However, in principle we consider this would be the case only if the deterioration of PQRS damages suppliers' sales or brand image.

Quality and service

8.77 Quality and service are often related, and some aspects of a retailer's offering could be placed in either category. In general, for the purpose of our assessment, in this case we consider quality to capture aspects of the retail presentation of the products (such as store environment, website design) and service to capture aspects related to the customer journey and the process of purchase (eg staff knowledge and availability, queuing times and payment terms).

8.78 Suppliers impose some explicit restrictions affecting the consumer experience offered by retailers in relation to quality and service levels (both in-store and online) through their standard terms and conditions. Many of these requirements capture aspects related to a store or website as a whole and therefore apply equally to footwear and apparel (eg requiring there to be a 'FAQ' section on a retailer's website), whereas others apply to specific products (ie some of the [✂] requirements).[225]

8.79 Where restrictions on quality and service are imposed under suppliers' standard terms and conditions, suppliers establish a minimum contractual

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[224] [✂] submitted that 'Nike or Adidas can cancel [orders]: (i) at will; (ii) without any penalty; and (iii) without any reason.'
[225] CMA analysis of selective distribution arrangements of [✂].

standard, beyond which retailers can, at least in principle, flex their offering. In setting such 'floors', suppliers enable retailers to differentiate aspects of their QRS offering above this floor, while still ensuring that their minimum standards are met. In the following section on how retailers' compete (see paragraphs 8.101-8.119) we have considered evidence on the extent to which retailers flex their PQRS offerings.

8.80 We have seen evidence that some quality and service requirements for retailers' in-store and online offerings are set out in granular detail by suppliers.[226] An example of such a requirement affecting quality in-store is that [✂] typically provide very detailed instructions on how [✂] products should be displayed (including requirements on, for example, [✂]).[227] An example of supplier requirements affecting service online is that [✂] standard trade terms include detailed requirements concerning the functionality of retailers' websites (including that it be possible to view footwear from at least five different angles and that it be possible to zoom in on any images). We note that the granularity with which certain aspects of the offering are specified by suppliers does not extend to every area of retailers' quality and service offerings.

8.81 We recognise that the presence of such granular requirements impacting specific aspects of quality and service, means that there may not be deterioration of those aspects in absolute terms. However, this may still be an area where improvement could happen more slowly than it would have done absent the Merger.

8.82 Other requirements on quality and service are specified in broader terms, which introduces a degree of subjectivity (eg [✂]).[228] As a result, this may lead to some uncertainty for retailers as to what exactly suppliers will require in practice (we consider in the next section the extent to which such uncertainty impacts on retailers' incentives to flex quality and service).[229]

8.83 As noted above, retailers can in principle compete above and beyond any such minimum contractual standards. The use of broad terms can also be considered as giving retailers some leeway to differentiate their offer. We have seen evidence of such differentiation in practice with variation in retailers' offerings on important aspects of quality and service (see further the examples listed in paragraph 8.111 of the how retailers compete section), and

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[226] The Parties submitted evidence of [✂].
[227] We also note that [✂].
[228] CMA analysis of selective distribution arrangements of [✂]. Another example is that one of [✂] trade terms with [✂] includes in part that 'each season, Customer shall create bespoke and innovative content'.
[229] We note that the converse of this uncertainty is that suppliers may face some difficulty in enforcing such restrictions.

consider this is indicative of such competition. We note that overall such differentiation appears to be largely in areas other than in-store quality (ie where in-store quality covers factors such as [✂] and display screens). We would also expect suppliers to encourage such competition in accordance with their use of selective distribution arrangements (see paragraph 8.32). There is evidence of this occurring in practice; for example, [✂].

8.84 We observed the following examples of competition above minimum contractual standards imposed by suppliers (we set out other examples of variation in retailer offerings in the following section on how retailers compete (paragraphs 8.111-8.113)):

(a) [✂], yet retailers can and do compete to offer faster deliveries than these minimal requirements. For orders below the free delivery threshold, Footasylum offers Next Day evening delivery at a cost of £6.99 and JD Sports offers Next Day evening delivery at a cost of £5.99.[230] JD Sports also offers unlimited Next Day delivery for the year for a one-off payment of £9.99 to members of its 'JDX' app;[231]

(b) [✂] require retailers to have a returns policy and to comply with applicable consumer laws, yet retailers clearly do compete to offer policies that are more advantageous than that required by such laws (for example on the options for making returns). While [✂] requires that consumers have at least 14 days to make returns there is clear competition above this threshold (eg JD Sports and Footasylum both offer 28 days to make returns);[232] and

(c) [✂] requires that retailers' websites meet minimum loading speeds, yet retailers do compete to offer websites that load more quickly than this minimum.[233]

8.85 In our view, store numbers, locations and openings can be thought of as part of retailers' quality and service offering because they are relevant factors for consumers. Suppliers may therefore act to prevent retailers from deteriorating these aspects. However, suppliers' DTC channels, which compete directly with retailers, may reduce their incentive to encourage increased retail competition in this regard, particularly in locations near their own DTC stores.[234] We consider that the magnitude of this effect is likely to be small

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[230] Taken from Footasylum's website and JD Sports' website as of 30 January 2020.
[231] Taken from JD Sports' website, February 2020.
[232] CMA analysis of [✂] selective distribution arrangements.
[233] CMA analysis of [✂] standard terms and conditions. One of [✂]. We note that Footasylum regularly monitors its performance in relation to [✂].
[234] For example, [✂]. After some further review, [✂].

because the key suppliers have relatively few stores, and the majority of these are clearance stores with a somewhat different consumer proposition from the Parties' stores. Despite the likely small magnitude, we disagree with the Parties' view (as set out in paragraph 8.46) that there is no possible Merger effect on store locations, since the incentive for any Merger effect arises between the Parties themselves (eg they may wish to close locally competing stores) and where suppliers have nearby DTC stores they would likely benefit from this outcome such that they would not act to prevent it.

8.86 Suppliers are able to use wholesale pricing as a way to incentivise retailers on other aspects of QRS. Retailers can receive individual discounts from suppliers' wholesale price, which are often subject to the retailer meeting certain conditions or key performance indicators (KPIs) set by the supplier. Such individual discounts (and the components of this) are typically set out in the selective distribution arrangement between the retailer and supplier. These KPIs may include meeting certain thresholds for volumes, growth, returned orders and store quality. Accordingly, such discounts create some incentive for retailers to meet any such targets.

8.87 Suppliers also sometimes provide financial assistance for [✂]. In doing so they exercise a degree of control over the quality of this part of the retail offer ([✂]). However, they do not pay for [✂] of an individual retailer nor for [✂] at all retailers and therefore this remains an aspect over which retailers have some control.

Suppliers' monitoring of retailers and potential response to deterioration

8.88 As a means both to support and enforce compliance with their selective distribution arrangements, suppliers conduct both general monitoring of retailers' behaviour[235] and more comprehensive (typically less frequent) audits of their retail offerings.[236] Suppliers can use the information gathered as a basis to give retailers either mandatory instructions or non-binding recommendations. We consider that a supplier's ability to respond to any deterioration on the part of retailers' PQRS offerings would depend in practice on the scope and frequency of any such monitoring and audit activities.

8.89 We assessed the extent to which the Parties' ability and/or incentive to flex their PQRS offerings may be impacted by such monitoring. In this context, we consider that the following factors are of particular relevance:

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[235] We note that JD Sports has submitted examples of correspondence with Nike and adidas which show those suppliers [✂], as referred to in paragraph 8.50.
[236] For example, [✂] last conducted a full audit of all of its retail accounts in 2016. Since then, it has conducted specific audits of the retailers falling within its [✂].

(a) suppliers typically monitor and audit retailers' compliance with the minimum requirements for quality and service included in their standard terms and conditions;

(b) suppliers may find it difficult in some cases to detect a deterioration of retailers' offerings, particularly if the deterioration involves a lack of improvement relative to what otherwise would have been achieved; for example, retailers may not decide to reduce the levels of their offering but may slow their rates of innovation or other improvements which would be much more difficult for suppliers to monitor and detect; and

(c) suppliers may monitor retailers infrequently such that there are periods of time during which a change in a retailer's standards may occur unobserved. This means that a supplier may not identify any deterioration until some time after it was first initiated. This may make it more difficult for suppliers to respond directly to such deterioration. Suppliers would still be able to take any such deterioration into account in the context of their full audits of retailers, though as noted above these occur relatively infrequently.[237]

8.90 Evidence from suppliers on the scope of their monitoring and audit activities shows that they do not seek to monitor all aspects of retailers' PQRS offerings.[238] Given this and factors (a)-(c) we consider that suppliers' monitoring is such that they are likely to have some but not full visibility over some aspects of retailers' offerings.

8.91 Suppliers are likely to benefit from competition between retailers on quality and service, and hence have an incentive to encourage such competition. We have seen evidence that suppliers monitor retailers and use this to benchmark retailers against each other to incentivise them to improve their offerings. For example, there is evidence that suppliers compare and monitor retailers' store quality, app capabilities, payment and checkout, customer services, delivery, and the quality of marketing campaigns across retailers. We note that the Merger reduces the extent to which suppliers can rely on such benchmarking to improve the Parties' offerings as they can no longer benchmark JD Sports and Footasylum operating as independent competitors against each other post-Merger.

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[237] For example, [✂] conducted a full audit of its retail accounts in 2016 and 2019.
[238] For example, [✂] submitted that the following aspects of retailers' offerings were not formally monitored or taken into account for customer segmentation: [✂]. [✂] submitted that these aspects may be reviewed on ad hoc basis by the account manager or shared with [✂] by the retailer [✂]. [✂] submitted that it did not generally monitor [✂].

8.92 We also considered how suppliers may respond to any observed deteriorations in retailer offerings and the potential consequences of this for retailers:[239]

(a) suppliers may have little (if any) incentive to respond to some deteriorations eg reduction in student discounts or loyalty schemes as these may improve consumer demand due to associated status effects, making products more desirable, or are not likely to consider some changes to be deteriorations from their perspective eg changes in the retail of other suppliers' products (where we have seen evidence for example from [✂] that it does not monitor this);[240]

(b) even if suppliers did identify and respond to a deterioration by one of the fascia of the Merged Entity post-Merger (eg if Nike were hypothetically to reduce product access for Footasylum), there is a likelihood that some customers would react by diverting to the other fascia of the Merged Entity.[241] The higher that likelihood the greater the incentive on the Merged Entity to engage in any such deterioration at one fascia post-Merger, despite any constraint exerted by suppliers.[242] Based on the results of our consumer surveys, we found that the diversion ratios between the Parties are high (particularly from Footasylum to JD Sports, see paragraphs 8.208-8.212). This indicates that the Merged Entity would have an incentive to engage in such deterioration post-Merger, even if customers responded to the deterioration itself and/or to any response from suppliers by diverting away from their first choice retailer; and

(c) there is very limited evidence of Nike and adidas having taken action to respond to a retailer for a deterioration in quality and/or service.[243,244] We recognise that the threat of any action being taken may to some extent act as some constraint without evidence of direct response. We note the two

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[239] We also recognise that in making any decision suppliers will be conscious of their wider strategies and the implications for both their DTC channels and their wholesale relationships with retailers. For suppliers with active DTC channels, the consequences of adversely affecting wholesale partners may be less if their DTC channel is one of the beneficiaries, however, we consider that their wholesale channel as a whole [✂]. See also the market developments section (paragraphs 8.402-8.432) where we consider further developments in suppliers' DTC channels over the foreseeable future.
[240] See paragraph 8.72.
[241] The Parties may take account of suppliers' reactions when deteriorating their offerings.
[242] Assuming that any deterioration is fascia-specific and any response from suppliers is also specific to that fascia rather than to the Merged Entity as a whole.
[243] We asked Nike and adidas to provide any examples where they took general action in reaction to a deterioration of retail quality or service in the last couple of years. [✂] submitted that [✂]. We consider that, [✂], it was not clear [✂] was in direct response to a deterioration in the quality and service of any individual retailer. [✂] stated that [✂] We note we have also seen evidence from [✂].
[244] We note the Parties submitted that [✂]. For example, they submitted [✂]. We consider that this is evidence of suppliers ensuring compliance with existing standards and it therefore does not suggest a significantly greater constraint beyond that already imposed by the standards themselves.

examples of response to deterioration raised by the Parties in paragraph 8.50. We consider that it is not clear that either of these are direct responses to deterioration. The [✂] example could equally be explained as a more general recalibration of its segmentation policy.[245] [✂] described the impact of this change for retailers in positive terms, noting that it would help retailers to sell more appropriately targeted products. In the [✂].

8.93 Taking into consideration the evidence set out in a)-c), we consider that suppliers have some impact on aspects of retailers' PQRS through monitoring and benchmarking. However, suppliers have little incentive to respond to some deteriorations post-Merger and suppliers would be unlikely to identify all instances of any deterioration. Further, we have seen limited evidence of suppliers responding to deteriorations of retailers' PQRS.

Conclusion on the impact of suppliers on retail competition

8.94 Suppliers play an important role in the sports-inspired casual footwear market. Their overall strategies take account of both their DTC channel and their wholesale supply [✂]. They use selective distribution arrangements and segmentation policies to control the access and volumes of their products that are available to retailers.

8.95 Given suppliers' importance in this market, we considered their impact on retailers' ability and incentives to flex PQRS. We found that:

(a) suppliers exert some influence over retailers' pricing, for example by providing the RRP for products, although while retailers generally adopt RRPs, they do discount prices and flex other elements of pricing such as delivery costs, which could be deteriorated post-Merger;

(b) suppliers can control retailers' range through the products and volumes that they can access and can implement this primarily through their segmentation policies. In the short term and in relation to specific orders, the use of, or threatened use of, suppliers' cancellation provisions may create a degree of uncertainty for retailers as regards product access;

(c) suppliers exert some influence on retailers' quality and service offerings. While suppliers place restrictions on retailers' offerings in this regard through minimum contractual standards, retailers can and do flex their offerings above those standards (as shown by the variation in their

[245] We note that [✂] did not take targeted action impacting only [✂] this change to its retailer categorisation would have impacted other retailers and not only [✂].

offerings, see also the following section on how retailers compete, paragraphs 8.108-8.119). On some aspects of retailers' offerings, suppliers impose and ensure compliance with granular standards [✂], but these do not encompass all aspects of retailers' offerings. However, we have seen evidence that suppliers may also encourage retailers to compete with each other beyond minimum requirements; and

(d) suppliers undertake engagement, feedback, monitoring and benchmarking of retailers on some but not all aspects of PQRS, which can directly or indirectly influence retailers' choices over their PQRS offerings. We note that post-Merger, suppliers' ability to benchmark would be hindered by the loss of one independently owned retail comparator.

8.96 We therefore consider that suppliers play an important role in shaping retail competition in this market.[246] In particular, we consider that Nike and adidas impose the most restrictions and have the greatest influence, given their importance for retailers in this market. Other suppliers also have some influence, but this is considerably less than that of Nike and adidas.

8.97 However, we note that these restrictions and requirements arise primarily from suppliers' own strategic decisions. Further, their incentives as to how they allocate products are derived from an overall view taking account of both their wholesale and DTC channels. We also found that the constraint suppliers exert on retailers has limits (eg they do not monitor all aspects of a retailer's offering) and, as such, retailers have the ability and incentive to flex important aspects of their offering in relation to PQRS.

8.98 We consider that suppliers can, and to some extent do, act as a constraint on retailers' ability and/or incentive to deteriorate their offering. On that basis we found that suppliers exert some constraint on the Merged Entity's ability and/or incentive to deteriorate PQRS. However, taking account of the evidence set out in this section in the round, we found that on balance this constraint is not so significant as to sufficiently discipline the Merged Entity's ability and/or incentive to deteriorate its offering post-Merger. In particular this is for the following reasons:

(a) retailers can and do compete on various aspects of PQRS as is evidenced by variations in their offerings including levels of discounting, delivery charges and times, customer service and innovation;

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[246] We note that the Parties submitted that this includes playing a role in determining JD Sports' long term strategy/investment decisions (The Parties, Response to Provisional Findings, chapter 4), which is evidence there might be some influence on strategy but we consider this is only relevant to the extent that it ultimately influences PQRS.

(b) there are limits to suppliers' ability to detect a deterioration of retailers' offerings, for example less and slower rates of innovation or other improvements and we note the Merger reduces the ability to benchmark; and

(c) suppliers have no incentive to discipline retailers where any deterioration of a retailer's offering does not harm supplier interests or where such deterioration may benefit suppliers, for example less discounting.

8.99 As set out in paragraph 8.65, given this, we also considered whether the extent of the constraint we found is sufficient, when taken in aggregate with other constraints on the Merged Entity, to prevent the Merged Entity from deteriorating its retail offering post-Merger (see the overview of current constraints section, paragraphs 8.278-8.310). The aggregate constraint is evaluated directly in some of the evidence, eg diversion ratios, but more generally we considered the aggregate constraint by recognising that it is appropriate to consider the effect of all of the retailers and suppliers together as a combined constraint on the Parties.

8.100 We assess how retailers compete on important parameters of competition in the next section.

How retailers compete

8.101 We found that suppliers affect some aspects of retailers' offering. In this section we have considered in further detail how retailers compete in this market and the different aspects of the Parties' PQRS offering which could be flexed post-Merger to the detriment of consumers.

Parties' views

8.102 JD Sports submitted that the footwear and apparel markets were each subject to intense market-wide rivalry,[247] and that it faced dynamic and disruptive competition from a wide range of other retailers.[248]

8.103 JD Sports also submitted that there was a number of reasons why the Merged Entity would have no incentive to worsen PQRS. These reasons included the aggregate competitive pressures of horizontal and vertical constraints from suppliers of branded products, intense competition from rivals across the

[247] JD Sports, Response to Issues Statement, paragraph 4(iii).
[248] JD Sports, Response to Issues Statement, Part C.

spectrum of products the Parties offered, and its view that Footasylum under the counterfactual was not a material constraint on JD Sports.

8.104 The Parties submitted that the CMA did not find evidence that the Parties were materially influencing and/or responding to each other on the parameters in relation to which the CMA considered the Parties could worsen their consumer offer post-Merger (or indeed any other parameter) at the national level.[249] Moreover, JD Sports submitted that JD Sports sets many of its QRS parameters at a group level (including its UK and international businesses) and that therefore, an analysis of incentive which was rooted in a single fascia (or two fasciae) in the UK did not correctly capture the investment decisions that the JD Sports group makes, for example in respect of technological improvements.[250]

8.105 With regard to pricing, the Parties submitted that there was insufficient evidence to show that competition between them pre-Merger had any material effect on price or in any event that the loss of such competition would not be replaced dynamically by other retailers.

8.106 The Parties also submitted that the CMA failed to consider whether the extent of costs saved from a worsening of non-price parameters would be sufficiently profitable to justify an SLC finding (which it must be for the incentive to degrade to exist), taking into account the likelihood of adverse responses by the suppliers of branded products to a deterioration of the retail offer which can be expected to be a strong disciplining factor on all aspects of the Parties' quality and service offering.[251]

Third parties' views

8.107 Overall, third parties who offered a view submitted that the market was competitive and that retailers competed on different areas of PQRS, for example:

(a) [✂] submitted that the sports-inspired casual footwear market was competitive and comprised a range of competing retailers, from well-known high street retailers to small boutiques. It also submitted that suppliers competed in the market through their DTC offer, though less directly with multi-brand retailers;

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[249] The Parties, Response to Provisional Findings, paragraphs 42, 290 and 314.
[250] The Parties, Response to Provisional Findings, paragraph 315.
[251] The Parties, Response to Provisional Findings, paragraph 316.

(b) [✂] explained that the market had three tiers,[252] and that the middle tier - 'sportswear-inspired fashion' was the most competitive. [✂] submitted that within this middle tier, in which it and the Parties sat, retailers competed on their differentiated offer which was largely based on access to exclusive products;

(c) [✂] submitted that retailers competed on different aspects of PQRS including: the size and location of new store openings; in-store environment, including through collaborations with suppliers to improve the in-store experience for consumers; loyalty schemes; marketing; and through access to 'exclusive' branded products. It asserted that retailers made such investments to strengthen their retail offer, which reflected the fact that there was significant retail competition in the market; and

(d) [✂] submitted that it and other retailers competed on price, particularly through student discounting.

Our assessment

8.108 We considered whether the Parties are able to, and do, compete on PQRS and therefore whether the Merged Entity could flex aspects of its offering post-Merger to the detriment of consumers. We would expect an SLC to occur if the Merged Entity worsened its PQRS offering or did not improve its offering as much or as quickly as it otherwise may have done absent the Merger.

8.109 Regarding price, we found that retailers generally price in line with RRP provided by suppliers, but that they also undertake discounting. We consider that discounting is evidence of competition between retailers. For example, a sizeable proportion of the Parties' sales in 2018 had been discounted:

(a) the value (ie the difference in gross sales value against the sales value if sold at full price) of JD Sports' footwear clearance discounts amounted to £[✂] ([✂]% of its footwear net revenue);

(b) the value of JD Sports' footwear non-clearance discounts amounted to £[✂] ([✂]% of its footwear revenue);

(c) the value of Footasylum's total (footwear and apparel) clearance discounts were £[✂] ([✂]% of revenues); and

[252] [✂] noted that, in its view, there are three main tiers in the sports-inspired casualwear market in the UK. First, is the 'aspirational tier'; the 'middle tier' is 'sportswear-inspired fashion' and the final tier is the 'value', 'discount' or 'commodity' tier.

(d) the value of Footasylum's total (footwear and apparel) promotional discounts (temporary reductions in price) amounted to £[✂] ([✂]% of revenues).

8.110 The Parties are also generally free to choose the minimum spend thresholds on their online delivery services and the pricing of other delivery elements. They also choose whether to take part in cashback websites such as TopCashback and Quidco, which give discounts to consumers online.[253] The Parties also choose whether to offer student discounts and the level of those discounts.[254]

8.111 Similarly, the Parties compete on other aspects of their QRS offering; examples include their marketing activity (on which they spend a sizeable amount[255] and is a key way for retailers to differentiate themselves), store opening times, refurbishment plans, store fittings, in-store queuing times, staff training and knowledgeability, website functionality, loyalty programmes, the range of brands offered and staffing levels and quality.[256] As discussed in the previous section (paragraphs 8.59-8.99), we recognise that suppliers may have some control or influence over some of these aspects.

8.112 We have seen documentary evidence of the Parties monitoring some of these aspects of QRS (which we consider further in paragraphs 8.183-8.185), such as: [✂].[257] We considered the level of this monitoring and its impact on the strategic decisions of the Parties, in paragraphs 8.183-8.185.

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[253] As at 23 January 2020, the Parties were offering cashback of between 4% and 12.15% to customers who click through these two websites (see for example JD Sports on Topcashback and Quidco) before completing their purchase on the Parties' websites as normal.
[254] The Parties submitted two chronologies on student discounts. The Parties submitted that the first chronology on the introduction of student discounts showed that JD Sports did not respond to Footasylum when it launched its student discount in 2012 (The Parties, Response to Provisional Findings, paragraph 329). The Parties submitted that the second chronology showed no evidence that JD Sports followed Footasylum when setting its student discount. However, we note that JD Sports' internal documents [✂]. See the internal documents section (paragraphs 8.165-8.190) for more details.
[255] JD Sports' total marketing spend in calendar year 2019 was £[✂] while Footasylum's total marketing spend in financial year 2019 was £[✂].
[256] For some of these aspects the Parties submitted that no evidence was cited by the CMA in relation to competition between the Parties on this parameter (The Parties, Response to Provisional Findings, chapter 5, section V). We considered this argument in paragraphs 8.59-8.99 and the internal documents section (paragraphs 8.165-8.190).
[257] The Parties submitted that the CMA cited 'a very small number of instances in which JD Sports has engaged in local marketing initiatives (such as an in-store DJ) in response to a new Footasylum store opening. However, such activities are also used in a range of other circumstances, for example JD Sports store openings / anniversary events, to promote JD Sports stores in the event of roadworks or local factors that may be impacting the store, as well as other competitor activities' (The Parties, Response to Provisional Findings, paragraph 344). Further, the Parties submitted that local marketing represents a [✂] of its overall marketing spend and that the Provisional Findings cite no evidence to support the proposition that the Parties are strategically influencing or responding to each other in relation to national marketing activities (The Parties, Response to Provisional Findings, paragraph 345). We note that the fact that these promotional activities are also used for reasons other than reacting to Footasylum does not diminish the value of this finding.

8.113 In addition to the competition which occurs on these existing aspects of competition, innovation also plays a role in this market in terms of changes and improvements to retailers' services and offerings. For example technological improvements such as: JD Sports' introduction of in-store kiosks, which give consumers access to a broader range of products than is available in a specific store; improvements to website and app functionality and design; digital content displays in-stores; more efficient in-store product retrieval systems; and running different forms of marketing campaigns or partnerships with social media influencers and celebrities, including 'live streaming' of in-store promotion events online. While such innovation is, by its nature, hard to predict, we have seen retailers making improvements across these areas.[258]

8.114 These aspects of competition are all features that consumers value and from which they benefit.[259] Our store exit survey shows that around a third of customers reported 'quality' or 'service' as a reason for choosing to shop at the Parties' stores.[260]

8.115 In our view, store numbers, locations and openings are also aspects of a retailer's offerings via which it competes with other retailers. We considered whether in the event of an SLC finding the Merged Entity could be incentivised to close some or all Footasylum fascia stores post-Merger, to the detriment of consumers. Our estimates suggest that closing all Footasylum stores would likely be profitable for the Merged Entity post-Merger.[261] Further, the likelihood of these closures to be profitable (or the amount of additional profits) increases if, instead of closing all Footasylum stores, only the least profitable/most loss-making Footasylum stores were to close. We interpret these results with caution as we recognise that estimating the cost of closing some or all Footasylum stores is difficult for several reasons, including:

(a) the need for a detailed assessment of several cost items (eg exiting leases, redundancies, unwinding contracts and stock etc); and

(b) the difficulty in estimating any costs to JD Sports of recapturing additional sales (these might be significant due to material increase in sales,

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[258] For example, the use of new technology, [✂], and the introduction of in-store kiosks at JD Sports' stores.
[259] For example, an online survey by [✂]l used by JD Sports found that respondents ranked factors as most important in the following order: [✂] in response to the question 'Which factors are most important to you when deciding where to buy footwear? Please rank up to 3 in order of importance, with 1 being the most important'. [✂], JD Sports submitted that it [✂] UK as this is something its customers value and expect.
[260] DJS Research, Exit survey for retail customers for a merger inquiry: JD Sports and Footasylum, January 2020.
[261] If all Footasylum stores were to close, the Merged Entity would recapture a profit margin of £[✂] (Footasylum revenue of £✂] * [✂]% estimated diversion ratio * [✂]% profit margin on sales). This is compared to an active Footasylum net profit of £[✂]. The difference is a positive £[✂] million profit.

although the recaptured sales from Footasylum are likely to be spread across a number of nearby JD Sports stores).

Conclusion on how retailers compete

8.116 We found there is evidence that the Parties compete head-to-head, as well as with other competitors, on various different PQRS aspects in a bid to attract consumers and generate sales. Retail competition in this market manifests in many different ways and these aspects are important to consumers. Indeed, we consider that the evidence of the Parties' market monitoring discussed in paragraphs 8.183-8.185 indicates that there is retail level competition across all aspects of PQRS. This supports our view that, while suppliers impose some constraint on retailers in this market (as considered in the previous section, see paragraphs 8.94-8.100), there is retail competition on various important aspects of PQRS which could be lost as a result of the Merger.

8.117 While we accept that some of the Parties' competitive parameters are influenced by factors other than competitive constraints (eg vertical constraints from suppliers, stocking decisions, sales performance, etc) and that JD Sports operates in areas where Footasylum is not present (within or outside the UK),[262] the evidence assessed above suggests that the Merged Entity could change some aspects of its offering in the UK in response to changes in competitive pressure post-Merger.

8.118 We considered the Parties' argument that the CMA did not find evidence that the Parties are materially influencing and/or responding to each other on any of the identified aspects of PQRS, and that the CMA failed to consider whether the extent of costs saved from a worsening of non-price parameters would be sufficiently profitable. In this regard, we note that:

(a) the parameters assessed above represent what the CMA believes are the most straightforward ways in which an SLC could manifest, but this is not necessarily exhaustive;

(b) the effect of the Merger on the Merged Entity's incentives may not be uniform across all aspects of PQRS. Evidence such as our survey results and our GUPPI estimates (set out in further detail in paragraphs 8.206-8.216, and 8.227) capture the overall incentive of the Merged Entity to deteriorate its offering post-Merger, but we note that the GUPPI is agnostic as to the specific PQRS parameter that could be flexed post-Merger;

[262] We note that the same argument does not apply to Footasylum.

(c) we accept that any quantification of the Merged Entity's incentive to deteriorate (worsen or improve relatively more slowly or to a lesser extent than in absence of the Merger) specific aspects of PQRS post-Merger is subject to uncertainty and should be interpreted with caution; and

(d) nonetheless, we note that the evidence assessed above suggests that the Parties can and do flex some competitive parameters, and therefore we expect that if there were a substantial lessening in the competitive constraints due to the Merger this would create the incentive for the Merged Entity to deteriorate (worsen or improve relatively more slowly or to a lesser extent than in absence of the Merger) any of these aspects of PQRS.

8.119 In subsequent sections we have looked at a range of evidence relating to the closeness of competition and the constraints from other retailers, to understand the aggregate competitive constraint on the Merged Entity in footwear.

Market shares

8.120 We looked at market shares as an indicator of the presence that different retailers have in the relevant markets. However as explained in chapter 7 and the introduction to this chapter (see paragraph 8.6), delineating markets in this type of differentiated sector can be somewhat artificial which can make calculating market shares difficult. Therefore, in line with our Guidance,[263] we focussed our assessment on closeness of competition primarily using a range of other evidence, which we set out in subsequent sections.

Parties' views

8.121 JD Sports submitted that, while market shares were not 'determinative' of unilateral effects, their quantification still mattered since it helped 'identify the structural change arising from the Merger and the national scale and identity of existing competitors'.

8.122 JD Sports submitted that the Merger had a modest effect on retail market concentration,[264] and given that Footasylum had a share of selling Nike and adidas footwear in the UK of [✂],[265] the Merger resulted in a small share increment in the resale of Nike and adidas products. It told us that this was relevant because 'the smaller the change of national market structure, and the

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[263] CMA Guidance, paragraph 5.49.
[264] The Parties, Response to Provisional Findings, paragraph 54(f).
[265] JD Sports, Response to Issues Statement, paragraph 7(b).

more significant existing competitors, the most [sic] easily any lost constraint (even a relatively 'close' one) would be addressed, in aggregate, by the brands' influence over the retail market and/or replaced by expansion, entry or repositioning of rivals'.

8.123 The Parties submitted that the market share increment arising from the Merger was still low if market shares were calculated individually for Nike/adidas products and non-Nike/adidas products.

8.124 The Parties stated that the Provisional Findings referred to Footasylum as a large national multi-brand retailer yet had found its market share to be 0-5%.[266,267] They submitted that a market share of at most 5% was not 'large' by any rational standard.[268]

8.125 The Parties submitted that they had a number of concerns regarding the robustness of the CMA's market share estimates and believed that they should not be given any weight by the CMA in its analysis.[269] Regarding the practicality of calculating market shares, the Parties commented that respondents had discretion to categorise their revenues and that without consistency across retailers, our market share estimates could not be relied upon.[270]

8.126 The Parties submitted that under CMA 'Methodology 1', Frasers Group was consistently the largest retailer for footwear (both in-store and online) and that this undermined the conclusion in the Provisional Findings that Frasers Group was a limited constraint on the Parties.[271] They also said the CMA had not interrogated the shares for Frasers Group and that the estimates of Frasers Group shares as between the CMA's two methodologies were so substantially different as to be meaningless.[272]

8.127 The Parties submitted their own analysis of shares of Nike and adidas products and non-Nike and adidas products and said that the CMA had not

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[266] The Parties said that the range of [0-10%] market share for Footasylum, could have been replaced by [0-5%] for consistency with apparel. We note that the range of [0-10%] was used deliberately to encompass the range across the two methodologies set out in appendix G. Methodology 1 found a range of [0-5%] and Methodology 2 a range of [5-10%], hence the estimate across these two Methodologies was appropriately [0-10%]. See Appendix G for further details.
[267] The Parties, Response to Provisional Findings, paragraph 77.
[268] The Parties, Response to Provisional Findings, paragraph 78.
[269] The Parties, Response to Provisional Findings, paragraph 229.
[270] The Parties, Response to Provisional Findings, paragraph 229.
[271] The Parties, Response to Provisional Findings, paragraph 228.
[272] The Parties, Response to Provisional Findings, paragraph 229b.

conducted a reconciliation between their submission and its own market shares analysis.[273]

8.128 The Parties submitted that Footasylum's share did not capture that it was 'at best' a weakened competitor prior to the Merger.[274,275]

Our assessment

8.129 We consider that the Parties are both large, national, multi-brand retailers of sports-inspired casual footwear. They each serve a large number of customers (eg JD Sports' footfall was around [✂] million customers in 2019/20), have national reach (JD Sports has around 370 stores in the UK and Footasylum has 70 stores and both have nationally operating online delivery services), they each employ thousands of employees and each have turnover in the hundreds of millions of pounds (see also chapter 3). It is in this context that we refer to Footasylum as a large retailer and not solely on the basis of its market shares, as implied by the Parties' submission (see paragraph 8.124) that Footasylum is not 'large'.

8.130 In terms of their position within the relevant market, we estimated that JD Sports is the largest retailer in this market with a share of [20-30%] ([✂]).[276,277] Footasylum is smaller, with a share of [0-10%] ([✂])There are also a number of other retailers which have a presence in this market. Sports Direct has a share between [0-30%] ([✂]), depending on how its revenues are categorised, and Nike has a share of [5-20%] ([✂]), but no other retailer has a share above 10%. This wide variation in market shares estimates shows the difficulty in accurately estimating market shares in a differentiated market such as this.

8.131 The Parties submitted that the share increment, and subsequently any loss of constraint, was low and therefore any loss in constraint was easily addressed. We examined market shares primarily in order to identify which other retailers

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[273] The Parties, Response to Provisional Findings, paragraph 229f.
[274] The Parties, Response to Provisional Findings, paragraph 4.
[275] We considered Footasylum's competitive position absent the Merger in chapter 5, which sets out our assessment of the counterfactual, concluding that Footasylum would have continued to compete effectively. As such we have not considered this further here. We note that we primarily considered other sources of evidence as a means to assess the closeness of competition between the Parties.
[276] Our approach to calculating shares used two methodologies, each including or excluding different products. Ranges for retailers' shares under each of these methodologies are set out in Appendix G, however, for presentational purposes we combine the two ranges for each retailer in this paragraph. The main driver of differences between the two methodologies was the extent to which Sports Direct's footwear revenues are classified as sports-inspired casual footwear (and therefore included in the relevant market) or other footwear segments (and therefore not included). This is explained in more detail in Appendix G. We consider that further work to narrow down the precise market share was not necessary given the limited use to which we put this market share evidence.
[277] JD Sports is the largest retailer when the mid-point of our retailer's range is used as the estimate for that retailer.

supply goods within the relevant markets. However, we consider that these market shares give only a basic indication of the Parties' presence in terms of the current structure of the market and do not fully capture the closeness of competition between retailers in differentiated markets, such as this one (see Appendix G for further detail on the different share estimates and their limitations). We note that even if there is a small share increment, competition can still be substantially lessened by a merger (for example if the merging parties are close competitors) when all the available evidence is considered in the round.

8.132 Further, we note that there were also practical limitations to calculating all of the retailers' market shares in this case (ie identifying a consistent set of products across retailers), as submitted by the Parties and as explained in Appendix G. This means there are significant uncertainties around the share calculations.[278] This is a further reason why we have made limited use of the market share evidence in our assessment. We consider that other evidence is more informative for our assessment of this Merger, including internal documentary evidence, econometric evidence and the survey evidence which can better capture the significance of pricing incentives, than concentration measures based off market shares. Therefore, we did not consider it necessary to seek to address these limitations.[279]

Retailers' offerings

8.133 One way for us to identify relevant potential competitors is to assess the similarities and differences between retailers' offerings. This provides an indication of their likely strength and closeness.

Parties' views

8.134 JD Sports submitted that, while there were similarities between the Parties' respective footwear offerings, these must not be overstated. In particular, it told us that there was vertical differentiation between the Parties in that [✂]. JD Sports submitted estimates of the degree of product overlap between the Parties. It stated that the overlap was considerably lower from JD Sports' perspective than from Footasylum's perspective, because JD Sports' product

[278] This is particularly the case for Frasers Group, which is why we use a range of other evidence to assess its constraint and do not consider that because it has a large market share under methodology 1 (as referred to by the Parties, see paragraph 8.126, this undermines the conclusion from that other evidence.
[279] In regard to the Parties' submission of its own market shares calculations, we note that these used the CMA's market shares as calculated in the Provisional Findings as a starting point and as such we do not consider that a 'reconciliation' with our approach is required.

range was considerably greater.[280] JD Sports submitted that the overlapping products between JD Sports and Footasylum were available in a large number of other retailers and that a national analysis overstated the degree of overlap at the individual store level.

8.135 The Parties submitted that the CMA's focus on Nike and adidas in its product overlap analysis failed to capture the actual product overlap and therefore did not capture the rivalry the Parties faced when selling brands other than Nike or adidas. They questioned why the CMA had not run a sales-weighted sensitivity of the results. The Parties also stressed that the CMA's analysis overstated the actual level of overlap at the local level.

8.136 The Parties submitted that Nike and adidas both supplied a wide range of retailers with footwear and that to suggest that these retailers did not provide an effective competitive constraint either individually or as a sum of parts would be an extreme conclusion. They submitted that the evidence suggested a significant aggregate constraint on the Parties (particularly from Footasylum's perspective), rather than just from Foot Locker as the CMA had suggested.

8.137 The Parties submitted that the CMA's provisional finding that ASOS was strongly focussed on female customers was erroneous.[281] They said that this was not borne out by the evidence which showed that ASOS was a significantly larger competitor than Footasylum in footwear (and apparel). The Parties submitted evidence that ASOS offered more men's trainers than Footasylum. Similarly, the Parties submitted that the CMA's provisional conclusion gave no weight to the Parties' internal documents which clearly showed the Parties monitoring ASOS across both male and female products.

Our assessment

8.138 As discussed in chapters 2 and 7 there is a range of retailers in this market and below we have considered their propositions and how similar they are, for example in terms of their products, geographic coverage, and consumer base. We also considered rankings of closeness between retailers as submitted by retailers themselves.

8.139 As part of this, we examined supplier/product overlap and shares of branded products which provide some indication on the offerings of retailers and

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[280] JD Sports submitted that from JD Sports' perspective there was an unweighted overlap of [✂]% and a sales-weighted overlap of [✂]%, and that from Footasylum's perspective there was an unweighted overlap of [✂]% and a sales-weighted overlap of [✂]%.
[281] The Parties, Response to Provisional Findings, paragraph 243a.

subsequently, their potential competitive constraints. We note that products do not have to be identical to be substitutes[282] and that consumer behaviour and stated preferences as evidenced in our surveys, provide evidence of the degree of substitutability of the Parties' offerings.

8.140 We consider that the more similar other retailers' offerings are to those of the Parties, the stronger their constraint is likely to be. For example, a retailer is likely to be a stronger constraint on the Parties the more similar it is to the Parties across the following factors: its overlap across the Parties' distribution channels;[283] its access to and volumes of relevant branded products; how appealing its retail fascia is to the Parties' customers; and how appealing its in-store and online shopping experience is to the Parties' customers.

The Parties

8.141 The Parties both have an in-store and an online offering. There is a high degree of geographic overlap of the Parties' physical stores; all Footasylum stores overlap with at least one JD Sports store.[284] Both of their online offerings are important channels for their respective businesses (representing [✂]% of JD Sports' revenue and [✂]% of Footasylum's revenue, see paragraph 7.48). While a lower proportion of its revenue, JD Sports has a significant online presence. For example, our online survey results suggest that of the Footasylum customers who had looked online somewhere other than Footasylum's own website before purchasing in-store at Footasylum, 74% had looked JD Sports' website.

8.142 The Parties both target a similar demographic - 16-24 year old consumers with a focus on males, although the focus on males is more pronounced for Footasylum.[285] JD Sports submitted that more than half of its customers were [✂]. However we note that the majority of the footwear the Parties sell is [✂] footwear, although they both also sell [✂] and [✂], with the latter making up a minority of their footwear sales.[286]

8.143 Both Parties stock a similar range of branded footwear, and a large proportion of these are Nike and, to a lesser extent, adidas products. As set out in Table

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[282] The Parties also acknowledged this, albeit in the context of apparel. They submitted that [✂].
[283] Through a presence in both distribution channels (in-store and online) and/or greater geographic overlap with the Parties in-store.
[284] Where overlap is defined as being present within a 20-minute drivetime. See Phase 1 decision, paragraphs 140-142.
[285] JD Sports, Response to Issues Statement, paragraphs 6 and 14.
[286] JD Sports, Response to Issues Statement, paragraph (6)(a). JD Sports' 2018 footwear sales were split, [✂]% men's footwear, [✂]% junior/infant footwear, [✂]% women's footwear. Footasylum's 2018 footwear sales were split, [✂]% men's footwear, [✂]% junior/infant footwear, [✂]% women's footwear.

8.1, for JD Sports, [✂]% of its total footwear sales came from Nike and [✂]% from adidas. For Footasylum, [✂]% of its total footwear sales came from Nike and [✂]% from adidas.[287]

Table 8.1: Suppliers' share of the Parties' sports-inspired casual footwear revenues (2018)

JD Sports				*Footasylum*		
1	[✂]	[✂]		1	[✂]	[✂]
2	[✂]	[✂]		2	[✂]	[✂]
3	[✂]	[✂]		3	[✂]	[✂]
4	[✂]	[✂]		4	[✂]	[✂]
5	[✂]	[✂]		5	[✂]	[✂]
6	[✂]	[✂]		6	[✂]	[✂]
7	[✂]	[✂]		7	[✂]	[✂]
8	[✂]	[✂]		8	[✂]	[✂]
9	[✂]	[✂]		9	[✂]	[✂]
10	[✂]	[✂]		10	[✂]	[✂]
	[✂]	[✂]			[✂]	[✂]
Total		100%		Total		100%

Source: CMA analysis of the Parties' data.

8.144 As discussed in chapter 7, we recognise that there is a spectrum of different types of footwear. Each of the Parties has access to some of the higher-tier footwear products that are not available to all retailers. Since Nike and adidas are the most important suppliers of branded products to the Parties, we considered whether their offering of Nike and adidas footwear products is similar (see Table 8.2 and Table 8.3, and Appendix G for more detail).[288]

Table 8.2: Number of Nike footwear products sold by the Parties that were also sold by other retailers (six months to June 2019)

Retailer	Number of products	Proportion of products	Retailer	Number of products	Proportion of products
JD Sports	[✂]		Footasylum	[✂]	
Retailer 1	[✂]	56%	Retailer 1	[✂]	83%
Retailer 2	[✂]	40%	Retailer 2	[✂]	78%
Retailer 3	[✂]	33%	Retailer 3	[✂]	62%
Retailer 4	[✂]	32%	Retailer 4	[✂]	41%
Retailer 5	[✂]	32%	Retailer 5	[✂]	39%
Retailer 6	[✂]	28%	Retailer 6	[✂]	32%
Retailer 7	[✂]	22%	Retailer 7	[✂]	30%
Retailer 8	[✂]	19%	Retailer 8	[✂]	26%
Retailer 9	[✂]	18%	Retailer 9	[✂]	25%
Retailer 10	[✂]	16%	Retailer 10	[✂]	24%

Source: CMA analysis of data received from Nike and adidas.

[287] We also examined the sales-weighted brand cross-over at phase 1 and found a crossover of [✂]% from JD Sports' perspective and [✂]% from Footasylum's perspective. See phase 1 decision, Table 5.
[288] In our analysis we treated each colourway (but not size) of a separate footwear item as a distinct product. We also examined a more aggregated product level (treating different colourways as the same product) and found similar results.

Table 8.3: Number of adidas footwear products sold by the Parties that were also sold by other retailers (six months to June 2019)

Retailer	Number of products	Proportion of products
JD Sports	[✂]	
Retailer 1	[✂]	24%
Retailer 2	[✂]	24%
Retailer 3	[✂]	22%
Retailer 4	[✂]	20%
Retailer 5	[✂]	20%
Retailer 6	[✂]	17%
Retailer 7	[✂]	15%
Retailer 8	[✂]	13%
Retailer 9	[✂]	12%
Retailer 10	[✂]	6%

Retailer	Number of products	Proportion of products
Footasylum	[✂]	
Retailer 1	[✂]	51%
Retailer 2	[✂]	42%
Retailer 3	[✂]	38%
Retailer 4	[✂]	36%
Retailer 5	[✂]	31%
Retailer 6	[✂]	28%
Retailer 7	[✂]	28%
Retailer 8	[✂]	25%
Retailer 9	[✂]	11%
Retailer 10	[✂]	4%

Source: CMA analysis of data received from Nike and adidas.

8.145 We found that [✂]% of [✂] Nike footwear products and [✂]% of its adidas footwear products were available at [✂] while [✂]% of [✂] Nike footwear products and [✂]% of its adidas footwear products were available at [✂]. [✂] is the retailer which has the highest overlap with [✂] (ie more products available at [✂] were also available at [✂] than any other retailer, excluding the DTC retailer itself). [✂] is the retailer with the fourth highest overlap with [✂]; behind [✂].[289]

8.146 Of the Nike and adidas footwear products sold by JD Sports, a [✂] were sold by other retailers. Of the smaller number of products sold by Footasylum, [✂] were also sold by other retailers.

8.147 We recognise the Parties' submission that this analysis focusses on Nike and adidas and therefore does not capture the rivalry the Parties face when selling other suppliers' branded products. However, given the importance of Nike and adidas products to the Parties in footwear (see Table 8.1) we consider it to be informative of a substantial part of the overlap between the Parties and other retailers.

8.148 We recognise the Parties' submission that a sales-weighted analysis could have produced different results. We note that unweighted product overlap provides an indication of the degree of similarity of product offerings, rather than focussing on products with the highest sales. Further, the results of the Parties' own analysis suggest that sales-weighting would likely increase the degree of overlap between the Parties and hence we consider our approach to be conservative. We also note that by sales-weighting the degree of overlap between the Parties and their competitors would also likely increase.

[289] The data received from Nike and adidas reflected the location of their accounts and not necessarily where sales of products were made. As such, if those retailers with [✂], did not offer all of their products [✂], their overlaps may be overestimated.

8.149 The Parties submitted that this type of analysis overstated the degree of overlap at a local store level. We recognise that could be the case for the in-store segment, but it does not apply to their online offerings, or where their online offerings are available in-store (eg through JD Sports' in-store kiosks). Further, we also note that the scope for overstatement would apply to all retailers assessed.

8.150 Overall, we found that the Parties have very similar footwear offerings. While neither Party offers all of the products offered by the other, they both have a large proportion of Nike and adidas footwear products and have a large degree of overlap in these products, particularly for Footasylum to JD Sports.

8.151 As discussed in paragraph 8.138 we asked third parties to rank the Parties in terms of their closeness of competition to each other.[290] We assessed their views on rankings by examining the average scores they gave in terms of closeness of competition. The average score out of 10 given by third parties in response to the question on closeness of competition between the Parties was 8.5 (Footasylum on JD Sports) and 8.2 (JD Sports on Footasylum) for the retail supply of sports-inspired casual footwear.[291] This demonstrates that third parties view JD Sports and Footasylum as close competitors.

Other retailers

8.152 We also considered the offerings of other prominent retailers of sports-inspired casual footwear. In subsequent sections we have assessed further evidence of the constraint they impose on the Parties.

8.153 Foot Locker is a large global retailer of sports-inspired casual footwear. In the UK, its store estate is of comparable size to Footasylum but smaller than that of JD Sports. It also has an online channel, which accounts for [✂]% of its footwear sales. It is predominantly focussed on footwear and has access to some of the higher-tier branded footwear products. It has [✂] overlap of branded products with both Parties (eg for Nike products a [✂]% overlap with JD Sports and [✂] overlap with Footasylum). It has a relatively high geographic overlap with both Parties ([✂]% with JD Sports and [✂]% with Footasylum). [✂] the majority of its customers are male ([✂]%). This suggests it has a similar offering to the Parties (or at least Footasylum) by size.

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[290] Closeness in this context was measured on a one (not close at all) to 10 (very close) scale
[291] These estimates differ from those given in the Phase 1 decision, paragraph 25, due to addition of further retailer rankings gathered at phase 2; CMA analysis of third party questionnaires during phase 1 and phase 2.

8.154 Sports Direct is a major retailer in the UK (and is part of the Frasers Group, which also owns USC among other fasciae).[292] It has a large number of stores (approximately 500), with a high geographic overlap with the Parties ([✂]% with JD Sports and [✂]% with Footasylum) and operates online. It has [✂] product overlap with the Parties (eg for Nike products a [✂]% overlap with JD Sports and [✂]% overlap with Footasylum), albeit this is [✂] compared to other retailers. [✂][293] [✂]we note it is opening some 'elevated stores'. [✂]. This indicates that despite its size, there are some important differences in Sports Direct's offering in comparison with the Parties, and we explore further evidence on this in later sections (see market developments section, from paragraph 8.325).

8.155 Schuh, Office and Sole Trader are all multi-brand retailers with in-store and online channels that focus on footwear, including both sports-inspired casual footwear and more general types of footwear. [✂]. Office has two fascia, Office and Offspring, each of which has its own website and stores. Office targets predominately female consumers. [✂] demographic, aged between 16 and 45 years and both genders. Office has [✂] product overlap with the Parties for Nike products and along with [✂] overlap of adidas products. [✂] has [✂] product overlap with the Parties. This indicates that these retailers have some similarity to the Parties' offerings but there are differences. Schuh and Office have a relatively high geographic overlap with the Parties ([✂]% with JD Sports and [✂]% with Footasylum for Schuh, and [✂]% with JD Sports and [✂]% with Footasylum for Office), while Sole Trader has a lower geographic overlap with the Parties ([✂]% with JD Sports and [✂]% with Footasylum).

8.156 ASOS is an online-only retailer that has been growing its sales of sports-inspired casual footwear (it started selling sports-inspired products only in 2016).[294] It sells a broad range of products, including sports-inspired casual footwear, and submitted that its target was both males and females [✂] that its sales were [✂]. In response to the Parties' submission that ASOS was not

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[292] The Parties submitted that Sports Direct has incorporated USC concessions into its elevated stores and website (under the name 'USC by Sports Direct') and customers can now browse and purchase USC's products directly from Sports Direct's website rather than having to visit a separate website as they did previously. They submitted that 'This change means that all Sports Direct and USC's products, including the latter's premium apparel offering, are now available in one location' and that the distinction between the two offerings is increasingly blurred and that they should be viewed as a single retailer in the CMA's assessment. We have taken account of both Sports Direct and USC (both owned by Frasers Group, formerly Sports Direct International) throughout our competitive assessment as well as the aggregate effect of all retailers, and suppliers. We have considered the role of combined Sports Direct and USC elevated stores in our assessment of market developments, see for example paragraph 8.322 and from 8.339. We also note that some suppliers treat the two fasciae separately, including for the purposes of product access, see paragraph 8.362.
[293] [✂].
[294] [✂].

'strongly female focused' (see paragraph 8.137), we consider that [✂] of ASOS's sales are to males, [✂] are to female customers. It has [✂] product overlap with both Parties (eg for Nike products a [✂]% overlap with JD Sports and [✂]% overlap with Footasylum). This indicates that [✂], its overall sports-inspired casual footwear offering has some differences to that of the Parties. ASOS is particularly strong in the student segment, and we note that the Parties submitted ASOS started to offer student discounts in 2011 before either Party, Schuh, Office, adidas or Nike.[295,296,297]

8.157 There are various other online-only retailers. For example, Zalando sells a broad range of products, including sports-inspired casual footwear, and is active in a number of European markets.[298] Its marketing is principally aimed at 20 to 49 year olds, and the majority of its customers are females aged 25 to 55 (56% for footwear). It [✂] product overlap with both Parties (eg for Nike products a [✂]% overlap with JD Sports and [✂]% overlap with Footasylum). [✂] it is focussed on a different consumer market and has a much smaller presence in the UK.

8.158 Amazon also sells a broad range of products, including sports-inspired casual footwear, although we note it does not currently directly supply products from Nike or adidas.[299] It does not target a specific demographic. This indicates that its offering is relatively different from that of the Parties.

8.159 Suppliers including Nike and adidas have been growing their retail sales through their DTC channels. They both have online offerings that deliver to all parts of the UK.[300] They also both have a number of physical stores, a few of which are large flagship stores, but the majority of which are forms of factory or clearance stores [✂].[301] The geographic overlap of these stores to the Parties' stores is also low.[302] Since these suppliers are also brands themselves, they typically offer all of their own products online, and more than they make available to their retailer customers. However, as mono-brand footwear propositions they do not offer other brands alongside these products.

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[295] Response hearing, Internal Documents slides, slide 3.
[296] The Parties also view [✂]. See paragraph 8.180(g)(iii).
[297] [✂].
[298] Zalando is active in 15 European countries and is Europe's biggest online fashion retailer.
[299] Amazon stated that it '[✂]'. We also note that as reported (for example as reported by Bloomberg in November 2019), Nike announced that it's ending a pilot programme with Amazon launched in 2017, which attempted to stop counterfeit third party sellers by giving Amazon access to Nike products.
[300] [✂].
[301] Nike has 42 stores in the UK, of which only five are core or flagship stores, whereas the remaining 37 are Factory Outlet stores. Nike estimated that a Factory Outlet store would stock around [✂]-[✂]% of clearance products, whereas other non-outlet stores typically stock only [✂]% of clearance products (Where clearance products are defined as products which have become permanently discounted below RRP). adidas has 26 stores, four of which are flagship stores, three are core stores, two brand centres and the rest are Factory Outlets.
[302] Based on a 20-minute drive-time catchment area, we calculated that [✂]% of Footasylum's stores overlap with a Nike store and [✂]% with an adidas store; [✂]% and [✂]% for JD Sports, respectively.

Overall, we consider that Nike and adidas have some similarities to the Parties but there are also some important differences.

8.160 There is a number of other retailers who we consider have very different offerings from either of the Parties. Nonetheless we considered the constraint from these retailers through our assessment of other evidence (eg our review of internal documents, our surveys and our econometrics analysis). With respect to their offerings we found that:

(a) Deichmann is a general retailer for footwear and not focussed solely on sports-inspired casual footwear. It currently has 102 stores open in the UK. Deichmann submitted that it estimated that 75% of its sport-inspired casual footwear was sold to females. It targets all ages but mainly less affluent consumers. Much like Sports Direct, its offering could be characterised as more of a value proposition than either of the Parties. This indicates that its offering is relatively different from that of either of the Parties;

(b) Decathlon and D W Sports are sports-led retailers who sell sports-inspired casual footwear. Decathlon is a large global sporting goods retailer that sells a broad range of products, including its own brands. It has 44 stores in the UK, which tend to be very large, and an online presence. D W Sports operates 76 stores, many of which are attached to fitness clubs, and has an online presence.[303] This indicates that these retailers are more relevant to sports-performance and have a very different offering to either of the Parties;

(c) there is a number of department stores selling sports-inspired casual footwear, including Debenhams and John Lewis. Debenhams has 162 stores[304] and an online presence; 85% of its customers are female, and 79% are aged 35 and above. John Lewis operates 51 stores and has an online presence. It also has a high proportion of female customers; and

(d) in addition to Nike and adidas, Puma and The North Face also sell DTC. Puma has six stores in the UK and an online presence. The North Face has 28 stores and an online presence.

8.161 We asked third parties (covering both competitors and suppliers) to rank other retailers in terms of their closeness of competition to each of the Parties and to other retailers, as shown in Table 8.4.

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[303] It has a relatively low geographic overlap with the Parties ([✂]% with JD Sports and [✂]% with Footasylum).
[304] Collectively in the UK, Republic of Ireland and Denmark.

Table 8.4: Third parties' rankings of retailers' closeness to the Parties in footwear[305]

Retailers	Number of responses included in closeness average	Number of mentions included in closeness average	Closeness to:	
			JD Sports	Footasylum
The Parties				
JD Sports	21	-	-	8.2
Footasylum	21	-	8.5	-
Third parties				
Foot Locker	-	11	8.7	8.4
Sports Direct	-	11	5.7	5.0
ASOS	-	10	6.8	6.7
Schuh	-	10	5.0	5.2
Office/Offspring	-	8	7.8	7.8
Amazon	-	3	7.0	7.0
Shop Direct	-	3	7.0	7.0
Nike	-	3	9.0	8.7
adidas	-	3	9.0	8.7
Footpatrol	-	3	6.5	6.5

Notes:-
Rankings are on a scale of 1 to 10, with 10 being the closest and 1 being the least close.
Our third party questionnaires asked third parties directly to provide a ranking of the Parties' closeness to each other. The table reports the number of third parties that responded to this question and the average ranking of closeness to each other.
Our questionnaire, also asked third parties to provide rankings for other retailers, but the identities of these other retailers were unprompted. For these retailers, the table reports the number of mentions and the reported ranking of closeness to the Parties. The number of mentions is therefore relevant to which retailers third parties considered they should raise, however closeness of competition is a more direct measure of the significance of the mentioned retailers in terms of competition. Views do not include third parties' views of their own position relative to the Parties.
Only retailers mentioned by three or more third parties are included. Footpatrol is a JD Sports' fascia.

8.162 We asked third parties to score retailers in the market in terms of closeness of competition to each of the Parties. The Parties scored highly, as did Foot Locker, Nike and adidas. However, Nike and adidas were all mentioned by fewer third parties than Sports Direct which was mentioned the same amount of times as Foot Locker but given a lower score than the Parties, Foot Locker and other retailers. ASOS and Schuh were also mentioned fairly frequently by third parties but given a lower score than the Parties and other retailers.

Conclusion on retailers' offerings

8.163 As noted above, our assessment of retailers' offerings indicates which retailers have a similar offering and therefore gives an indication of how closely they compete with other retailers. Both Parties stock a similar range of branded footwear, and large proportions of these are Nike and, to a lesser extent, adidas products. We found that overall the Parties have a very similar offering in footwear. Foot Locker has a similar offering to the Parties. Nike, adidas, ASOS, Office and Schuh also have some similarities to the Parties although to a lesser extent than the Parties to each other. Other retailers have less similar offerings to the Parties.

[305] These estimates differ from those given in the Phase 1 decision, paragraph 25, due to addition of further retailer rankings gathered at phase 2; CMA analysis of third party questionnaires during phase 1 and phase 2.

8.164 We asked third parties to score retailers in the market in terms of closeness of competition to each of the Parties. The Parties were scored highly, as was Foot Locker (Nike and adidas were also scored highly but mentioned by far fewer third parties). We therefore consider that third parties view the Parties as competing closely against each other with few other close constraints, except for Foot Locker.

Internal documents

8.165 We analysed a large number of the Parties' internal documents, which, in our view, are informative evidence of how the Parties viewed the market and their competitors in the ordinary course of their business prior to the Merger.[306]

Parties' views

8.166 JD Sports submitted that while the Parties referenced each other in their internal documents, these documents simply reflected the respective Party's monitoring of market activities. It said that many of its documents discussed a wide range of competitors in addition to Footasylum. Further, it submitted that [✂]. It also submitted that closeness of competition was not a simple function of the number of mentions in or across a given set of internal documents.

8.167 JD Sports further submitted that 'on a correct analysis of the Parties' internal documents, there is no basis for a finding that they are closer competitors to one another than they are to the host of other competitors mentioned in those documents.'[307] It also submitted that:

> the Parties remain of the strong view that the simple fact and degree of competitor monitoring of each other as reflected in the internal documents cited in the PFs does not sustain a finding of "closeness" of competition between them and is in any event clearly insufficient to support an SLC finding without evidence that the Parties are reacting to <u>each other</u> when they choose to set

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[306] In our requests for internal documents from the Parties we generally defined internal documents as 'Internal documents refer to documents in any form (including, but not necessarily limited to, reports, presentations, studies, internal analyses, analyst reports, industry/market reports or analysis, including customer research and pricing studies) which have been prepared by or for, or received by, any member of the board of directors (or equivalent body) or senior management or the shareholders' meeting of [either Party] (whether prepared internally or by external consultants).' The timeframes and precise definitions varied depending on each specific question, but generally covered the last two years.

[307] The Parties, Response to Provisional Findings, paragraph 281. The Parties also stated that 'the PFs misrepresent a number of the documents cited, fail to acknowledge explanations made by the Parties in previous submissions with respect to particular documents and fail to take proper account of a number of documents submitted by the Parties which have <u>not</u> been referenced in the PFs.' The Parties, Response to Provisional Findings, paragraph 282.

their national PQRS variables (as opposed to competitive pressure in aggregate, or other rivals).[308]

8.168 The Parties also submitted that we had: (i) not identified any document which evidenced JD Sports responding to Footasylum in the implementation of its student discounts scheme, though we had recognised that JD Sports' documents referred to ASOS as the 'dominant' retailer in relation to student discounts;[309] (ii) misrepresented a number of documents cited; (iii) failed to acknowledge explanations made by the Parties in previous submissions with respect to particular documents; and (iv) failed to take proper account of a number of documents submitted by the Parties which had not been referenced in the Provisional Findings.[310] We consider these submissions throughout the following paragraphs as we assess each type of internal document.

Our assessment

8.169 We found evidence that the Parties regularly monitor both each other and some other retailers. References to competitor retailers in the Parties' internal documents do not usually distinguish between footwear and apparel, or in-store and online. Rather, they cover competing retailers in general and as such they tell us about competition in the relevant markets.

8.170 As explained in chapter 6, we have undertaken a targeted review of a sub-set of the Parties' relevant internal documents.[311] We carried out an overall assessment of the documents as part of this review, rather than applying any mechanistic or arithmetic assessment (eg by adding up mentions or counts of competitors). In our review, we have been cognisant of the purpose of each document, the timeframe over which it was produced and/or relates to, its author and its audience, and considered its context, including whether it is part of a series of documents or standalone. In general, we placed more weight on documents prepared by or for more senior levels of decision making within the Parties.

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[308] The Parties, Response to Provisional Findings, paragraph 293.
[309] The Parties, Response to Provisional Findings, paragraph 308.
[310] The Parties, Response to Provisional Findings, paragraphs 39, 282 and 294.
[311] During the course of phase 1, we gathered a large volume of internal documents from each Party (over 1,400 documents in total). We used a set of criteria to identify documents of most relevance to our assessment of the Parties' monitoring of competitors and identified over 200 relevant documents for which an in-depth review was undertaken. The Parties also submitted additional documents during the course of phase 2 which have also been reviewed. The CMA estimates to have reviewed in total more than 2,500 internal documents, more than 900 of them have been explicitly assessed in the internal documents section.

8.171 The internal documents provided by the Parties include the following categories of documents:

(a) from JD Sports: [✂]; and

(b) from Footasylum: [✂].

8.172 Both Parties also provided other documents that did not belong to any of the categories set out above, but that either they considered relevant for the CMA's Merger inquiry or which were submitted as they fell within the scope of the CMA's information requests. We considered these documents (where we have found them to be relevant) either as part of our targeted review of internal documents or elsewhere in our assessment as appropriate.

8.173 The Parties submitted in response to the Provisional Findings that the CMA failed 'to take proper account of a number of documents submitted by the Parties which have not been referenced in the PFs,' and that the CMA drew 'conclusions about an entire category of documents from an analysis of a small proportion of those documents.'[312] We have carefully assessed the Parties' submissions and the internal documents to which their submissions relate. This is reflected in our analysis, as set out in this section.

8.174 In our analysis, we also considered the Parties' submission that 'many of the documents were created over two years ago […] and thus do not reflect the current competitive dynamics of the market.' We accept that older documents may be less reflective of current market dynamics than more recent documents, and have therefore carefully considered market developments in a separate section (from paragraph 8.311). As a result, we have interpreted internal documents in light of these market developments and exercised caution in interpreting older documents. We consider that internal documents can provide informative evidence on the Parties' views during the ordinary course of business at a point in time (ie pre-Merger) and as such have assessed these to inform our assessment of current competitive constraints. Moreover, we note that the Parties did not point to any specific evidence that contradicts findings based on older documents. We have also separately considered internal documents which set out future plans and strategies, as relevant to our assessment of market developments over the next two years (see paragraphs 8.372-8.381).

8.175 In the final days of our investigation, the Parties submitted that 'the rapid changes in the market as a result of the COVID-19 pandemic mean that the body of internal documents provided to the CMA during the merger

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[312] The Parties, Response to Provisional Findings, paragraph 39, 282 and 304(b).

investigation are no longer reflective of the competitive dynamics in this market', although they did not provide any explanation of how COVID-19 has affected the competitive dynamics set out in the internal documents. As set out above, we have considered the internal documents as providing informative evidence on the Parties' views during the ordinary course of business. As with much of our evidence base, we recognise that the internal documents do not take account of COVID-19. There is considerable uncertainty about the extent and duration of the impact of COVID-19, but as far as possible we have considered its impact in our assessment, both now (see overview of current constraints section, from paragraph 8.280) and in the foreseeable future (see market developments section, from paragraph 8.448).

Footasylum's internal documents

8.176 For Footasylum, we found that monitoring of JD Sports is highly prominent in its internal documents.[313,314]

(a) [✂] reports by executive management [✂] to senior management and heads of department (and are, therefore, particularly useful in gaining an insight into the issues which inform Footasylum's strategic thinking). [✂] in 2019 included information about competitors; the remaining reports were created in 2018 and 2017.[315] [✂].[316] [✂]. Some documents also include other retailers [✂].[317]

(b) Footasylum prepares [✂] which monitor [✂]. These were prepared by the Head of Ecommerce for Footasylum's senior management as well as heads of department.[318] These reports monitor [✂].[319] [✂].[320] [✂].[321]

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[313] Across several of the documents described here, Footasylum submitted that [✂]. We consider this argument after our assessment of relevant internal documents (see paragraphs 8.183-8.187).
[314] The Parties stated that 'Even if JD Sports is "highly prominent" in the documents in which Footasylum refers to competitors, this is not commensurate to any particular closeness of competition between the Parties' and that 'the CMA fails to note that other competitors are also highly prominent in Footasylum's documents. Footasylum consistently monitors a wide range of competitors throughout its internal documents' (The Parties, Response to Provisional Findings, paragraph 300). We address these arguments in paragraphs 8.179-8.180,8.183-8.190.
[315] Footasylum submitted that 'the Provisional Findings do not address the fact that over a third of these documents were created over two years ago and may no longer reflect the competitive dynamics in the market.' As set out in paragraphs 8.170 and 8.174 , we considered the time period over which documents were produced, in our assessment. However, we note that the Parties have not submitted any explanation on why the facts reported in these documents do not reflect the current competitive dynamics in the market.
[316] Footasylum submitted [✂]. We note that [✂].]
[317] JD Sports submitted that a large portion of these documents were created over two years ago and may therefore not reflect the current competitive dynamics of the market. We have addressed this submission in paragraphs 8.170 and 8.174.
[318] [✂].
[319] [✂]
[320] We could only find one exception: [✂].
[321] [✂].

(c) [✂] are prepared by Footasylum's Retail Sales and Operations Manager for senior management and heads of department. [✂].[322] Footasylum submitted that [✂]. Although we accept that [✂] may make it more likely to be mentioned in the internal documents, we believe this reflects [✂] and does not limit the internal documents' relevance to our competitive assessment. Moreover, we note that the argument that the frequency with which a competitor is mentioned is simply a reflection of the size of its estate is undermined by the fact that [✂] is monitored in these documents as closely as [✂] despite having a smaller store estate.[323] Moreover, some comments in these documents highlight [✂]. For example, one document states: '[✂].'[324] Another document states [✂]. There are a limited number of other documents that [✂].[325,326]

(d) [✂], prepared by Footasylum's Head of Retail for senior management and heads of department, [✂].[327] [✂].[328]

(e) [✂] produced by Footasylum's CFO to report Footasylum's financial information to its Board. In the (limited number of such) documents which refer to competitors, [✂] we note that there are instances in these documents where [✂]. For example, one document states that '[✂]'.

(f) [✂][329] [✂].[330] [✂]. Most of the information reported about these retailers is factual; however, we note the [✂]. Footasylum submitted that [✂].[331]However, some quotes indicate that Footasylum considers [✂], eg [✂].

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[322] [✂].
[323] And equally other retailers with a store estate of a similar size to that of [✂] (eg [✂]) are not monitored to the same extent as [✂] and [✂].
[324] [✂]. We consider that the document nonetheless constitutes an example of Footasylum monitoring [✂] activities and specifically [✂].
[325] Retailers mentioned only occasionally are: [✂].
[326] Footasylum also submitted that [✂]). We accept that [✂], however, our assessment showed that [✂] is highly prominent in these documents relative to other competitors.
[327] [✂].
[328] [✂].
[329] We reviewed a random sub-sample of five documents per area for the calendar year 2018. Reports for 2019 have been reviewed under [✂] documents above. We also considered these documents to assess the level of local flexing undertaken by the Parties.
[330] This information is fed back to the relevant area manager and compiled into a report which is then submitted to [✂]. Footasylum submitted that 'local store managers are inevitably exposed to the activity of local JD Sports stores given the large number of JD Sports stores compared to other competitors in the market (there are sometimes two or three JD Sports stores in an area where Footasylum is present), and their observations are likely to be influenced by this. As such, the content of these reports is likely to be influenced by geographic proximity rather than any particular competitive closeness.' However, we believe that this type of evidence, assessed in aggregate, has some evidential value for our competitive assessment as evidence of competitive constraints which have been communicated to the central management of Footasylum to inform commercial decisions which are made and set nationally, albeit informed by local conditions.
[331] As set out earlier, we also note that although we accept that [✂] size and activity makes it more likely to be mentioned in the internal documents, we believe this reflects [✂] rather than limiting the internal documents'

(g) [✂].[332] [✂][333], [✂]; [✂].

(h) Several Footasylum internal documents suggest that [✂]. For example:

(i) [✂]; [334]

(ii) [✂],[335] [✂]; and

(iii) one internal document which [✂].

(i) Several documents refer to the impact of [✂]. For example, one document [✂]. In our view, the fact that the Parties [✂]. [336] Other documents note that Footasylum [✂].

(j) [✂]prepared by Footasylum's Retail Sales and Operations Manager for senior management and heads of department, track the financial performance of individual stores [✂]. [✂],[337] [✂].' [✂]. [✂].' [338]

(k) [✂] prepared for senior management and heads of department, [✂]. From our assessment however, we note that [✂] of the documents that mention competitors referred [✂],[339] while the remaining documents referred to [✂].[340]

(l) [✂].[341] Footasylum submitted that '[✂].' We note this, but do not consider it to be a valid reason to discount this document as evidence of closeness of competition between the Parties; [✂]. In this case, Footasylum's monitoring of [✂] as an active retailer in the market, suggests it considers itself to compete with [✂].

(m) One document contained notes prepared by Footasylum's Buying and Marketing Director highlighting that [✂]. It states: '[✂].' [✂], as set out in paragraphs 8.20 and 8.22, access to branded products from suppliers,

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relevance to our competitive assessment. Equally, other retailers with a store estate of a similar size to that of [✂] (eg [✂]) [✂].

[332] [✂] however we have not deemed these reports to be informative for this inquiry as our review did not find information on other competitors or competitive parameters contained in these.

[333] [✂].

[334][✂]. nevertheless are of the view that this type of monitoring constitutes evidence of closeness of competition.

[335] We note that [✂].

[336] Footasylum submitted that the Parties each have a different focus, having pursued a significantly differentiated customer offer [✂]. We believe the explanation offered by Footasylum is not consistent with the comment which states that Footasylum has [✂].

[337] Footasylum submitted that '[✂].'

[338] Footasylum submitted that it is '[✂]' as '[✂].' We responded to a similar argument in paragraph 8.176c.

[339] [✂].

[340] [✂]

[341] We note that the analysis presented in the Footasylum document may be biased due to the other factors that are not accounted for. [✂].

particularly Nike and adidas, is a key element of differentiation for retailers in this market to be able to compete effectively. This has been reflected in submissions received from the Parties and third parties. Therefore, we interpret the monitoring of [✂] by Footasylum in this area as evidence of closeness of competition between [✂].

(n) A presentation circulated in advance of a Board meeting shows how [✂].

8.177 The documents described above are consistent with internal documents prepared by independent third parties for or about Footasylum, for example:

(a) one document prepared by Peel Hunt[342] notes that [✂]. Footasylum submitted that 'this document was produced by an independent third party, Peel Hunt, [✂]. However, we note that we have seen no evidence that Footasylum [✂] Peel Hunt's statement [✂]; and

(b) the valuation document prepared by Footasylum's independent advisers in the context of its acquisition by JD Sports notes the following: '[✂]'.

8.178 In addition to the Footasylum documents in which monitoring of JD Sports is highly prominent, several Footasylum documents also mention JD Sports though it is not the most prominently retailer monitored, for example:

(a) an internal document [✂].[343] [✂]; and

(b) one internal document shows, [✂].

8.179 On balance, we consider that the nature and magnitude of the monitoring evidenced in Footasylum's internal documents demonstrates that JD Sports is the competitor most closely monitored by Footasylum. These documents show that Footasylum also closely monitors Foot Locker (though not to the same extent as JD Sports). They also show some monitoring by Footasylum of other retailers, including ASOS, Schuh, Office, H&M, Nike, adidas, River Island, Next, Sports Direct, and Topshop/Topman, but to a lesser extent.

[342] Peel Hunt is a Broking House - a firm that provides financial services on a commission basis.
[343] [✂].

JD Sports' internal documents

8.180 For JD Sports, we found that Footasylum is also prominent in the monitoring that it conducts, alongside other retailers.[344]

(a) JD Sports submitted weekly reports referred to as [✂], which monitor elements of its [✂]. These documents were described by JD Sports as being prepared by and for its multi-channel team. JD Sports submitted that 'a large portion of these documents were created over two years ago and may no longer reflect the competitive dynamics in the market;'[345] however, we note that the majority of the documents are from 2018. These reports typically include [✂].[346]

(b) [✂] are used by JD Sports in the ordinary course of business to analyse the impact of competitor store openings, closures and refurbishments at a local level. This analysis is prepared for the property, merchandising, retail, marketing and finance teams at JD Sports and compiled on a monthly basis. We have considered these documents to be particularly relevant as they specifically assess the constraint of other competitors' stores on JD Sports: each report [✂]. In these documents, JD Sports consistently [✂].[347] JD Sports submitted that 'the assessment contained in these documents did not affect its decision-making [✂].[348] However, we consider these documents to provide evidence of monitoring of a limited set of retailers [✂].[349] As part of our assessment, we also analysed [✂].

(c) [✂]prepared by JD Sports' retail marketing team record data for general information-gathering purposes on trading conditions, as well as noting other factors – [✂].JD Sports submitted 33 of these reports drafted at

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[344] Across several of the documents described here, JD Sports submitted that these documents are largely factual and provide no strategic commentary on Footasylum. We consider this submission after our assessment of relevant internal documents from paragraph 8.182.
[345] JD Sports also added that 'Given recent developments it is clear that these documents do not reflect the current competitive dynamics of the market.' We considered this argument in paragraphs 8.170 and 8.174.
[346] JD Sports submitted that in these documents, competitors are addressed in a consistent manner throughout/ However, our assessment highlights that [✂] examined individually and more extensively than any other retailer.
[347] We note that JD Sports stated that 'JD Sports often prepares competitor impact reports that look at a far wider range of competitors.' JD Sports submitted one document, prepared for the purpose of the Merger, which includes [✂]. We consider that as this document was prepared for the purpose of the Merger, it is reasonable to consider that they are less likely to reflect the usual running of the business and as such we have not given it the same weight. [✂].' We consider that the fact that, despite the information being available for a range of retailers, internal reports were created [✂], reflects their particular consideration by JD Sports.
[348] JD Sports also submitted that 'these reports are reflective of competitor activity at the time they are prepared. The competitor impact analysis referenced in this extract is now almost three years old and is, therefore, no longer reflective of current competitive conditions (particularly given the ongoing Covid-19 crisis)'. We addressed these arguments in paragraphs 8.170 and 8.174.
[349] Additional [✂] These reports [✂]. However, we note that, while information is available for a wide set of competitors, before this Merger, JD Sports had prepared reports only for [✂]. Moreover, we note that the analysis does not give any perspective of the relative scale of the impact. For example, [✂].

different points in time between 2017 and 2019 (mostly in 2018).[350] JD Sports submitted that when competitor activity was discussed, [✂].We note that while most of these reports include a section called [✂], there are also references elsewhere in these reports which reflect monitoring of and reaction to competitors, as set out below:

(i) in these [✂]. Excluding references [✂];[351] [✂];

(ii) [✂];

(iii) in some instances, [✂];

(iv) [✂];[352] and

(v) [✂].[353]

(d) In a number of other documents, [✂].[354] These documents cover comparisons of competitors' discounts for Black Friday[355] and some of the documents discuss JD Sports' student customer segment (documents on the student segment are discussed further below).

(e) Two internal presentations prepared by the merchandising team for JD Sports' Merchandising Director dated 2017 and 2018 [✂]. The presentations [✂] JD Sports submitted to us that [✂]. JD Sports also submitted that the presentations did not contain any analysis that [✂]. However, we consider the existence of these presentations is evidence of JD Sports' monitoring of [✂], and we note that no similar presentations were prepared [✂], and that these presentations were prepared for two consecutive years and not as a one-off.

(f) Another internal document prepared by and for the multi-channel team [✂].[356] While we do give limited weight to the results of the analysis,

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[350] JD Sports submitted that 'a significant portion of these [✂] are now over two years old and no longer reflect competitive conditions' and that 'Given recent developments it is clear that these documents do not reflect the current competitive dynamics of the market. This is now especially true given the ongoing Covid-19 crisis.'. These arguments are addressed in paragraphs 8.170 and 8.174. JD Sports also submitted that '[✂].' These arguments are addressed in chapter 5 on the counterfactual and market developments section of this chapter (from paragraph 8.311).
[351] [✂].
[352] [✂].
[353] For example, [✂].
[354] JD Sports submitted that it '[✂]. However, our assessment of these internal documents shows that Footasylum is the most prominent. [✂]. We have addressed these arguments from paragraph 8.185.
[355] See for example, [✂]. We found no evidence that supported JD Sports' statement and therefore interpreted the significantly larger space dedicated to Footasylum in these documents as evidence of closeness of competition.
[356] JD Sports submitted that 'This document is from November 2017 and is no longer representative of current competitive conditions or the way the Parties currently price their products.'

given the date it was produced and the period covered [✂], we consider the existence of this product comparison as informative evidence of JD Sports' monitoring of [✂].

(g) Several internal documents discuss and monitor competition in the student customers segment:[357]

(i) the majority of documents [✂];[358]

(ii) these and other internal documents focussing on student customers [✂]; and

(iii) some strategic documents [✂].[359] [✂] but consider that it is still relevant evidence of JD Sports monitoring and considering potential commercial action conditional on [✂].

(h) Some of the documents described above were based on analysis performed by Cardlytics on purchases made by JD Sports customers.[360] Similar data and analysis were used by JD Sports in areas [✂]. The analysis may be subject to some limitations (eg the representativeness of the customer sample is not clear, and spending might not be restricted to an appropriate set of products). Moreover, as some of the analysis in these documents is from 2016/17, it may be less reflective of current market dynamics than more recent documents and analysis.[361] For these reasons, we have given limited weight to these documents (and the results the contain). However, we note that in different analyses [✂].

8.181 In addition to the JD Sports documents in which monitoring of Footasylum is prominent, several of JD Sports' documents mention Footasylum though not as the most prominent retailer, for example:

(a) [✂].[362] The most cited retailer in these documents is [✂].[363] [✂];

(b) one internal note dated 21 June 2017 assessed the '[✂]';

(c) some documents include data on [✂];

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[357] [✂].
[358] [✂].
[359] We have not assessed in detail the segment for students, but we recognise that JD Sports' documents refer to [✂].
[360] [✂].
[361] For example, as JD Sports highlighted, we accept that 'the document referring to [✂] precedes Footasylum's financial difficulties.'
[362] We note that more than half of these reports [✂].
[363] We accept the Parties' submission in The Parties, Response to Provisional Findings, paragraph 296(f).

(d) out of home (OOH) advertising monitoring reports prepared by [✂] for JD Sports. Except for one presentation dated 2017 which was dedicated solely to [✂]. The Parties submitted that these documents 'contain no information at all about Footasylum, but contain information for a range of other competitors.'[364] We note that these reports rarely contain any data for the following [✂], contrary to what may be expected given these retailers sell sports-inspired casual products like JD Sports;[365] and

(e) an email from [✂].[366]

8.182 On balance, we consider that the nature and extent of the monitoring evidenced in JD Sports' internal documents demonstrates that Footasylum is one of the competitors most closely monitored by JD Sports, alongside Foot Locker, ASOS, Nike and adidas. These documents show some monitoring by JD Sports of other retailers including Sports Direct, Schuh, Office, Zalando and End, though to a lesser extent.

The extent to which the Parties' monitoring of each other indicates closeness of competition

8.183 The Parties submitted that 'simple monitoring' does not of itself support an SLC finding without evidence that the Parties are reacting to each other when they choose to set their national PQRS variables (as opposed to competitive pressure in aggregate, other rivals or consumer expectations)'[367] and that 'monitoring in and of itself does not evidence closeness of competition.'[368]

8.184 We observed a small number of examples showing that competitor monitoring is likely to inform the Parties' commercial decision making and is sometimes followed directly by responsive actions (with this also being the case for other retailers). For example:[369]

(a) one Footasylum document states [✂], and another document [✂];[370]

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[364] The Parties, Response to Provisional Findings, paragraph 296(e).
[365] [✂].
[366] [✂]. We note that the Parties submitted this email and that it does not fall into the definition of internal document as per footnote 306, alongside the date of the email and therefore we have not put weight on this in our assessment.
[367] The Parties, Response to Provisional Findings, paragraph 283.
[368] The Parties, Response to Provisional Findings, paragraph 302.
[369] We amended this section after considering the Parties' arguments in sections III and IV of chapter 5 of the Parties' response to the Provisional Findings. The Parties' submissions covered documents previously referenced in the Provisional Findings including documents on student discounts (some references to student discounts are retained where we did not accept the Parties' arguments), Footasylum's strategic documents, and pay-later options.
[✂].

(b) another Footasylum document [✂];[371]

(c) one Footasylum document [✂];[372]

(d) a few JD Sports documents report marketing [✂];[373] [✂];[374] and

(e) as discussed above, a strategic document by JD Sports suggests that [✂].[375]

8.185 These documents show that, in some instances, the Parties' monitoring of each other and of other retailers is likely to have influenced their commercial decisions and was sometimes followed by competitive responses to each other (for example around student discounts). This supports our view that the purpose of monitoring competitors' activities is likely to be to inform business decisions either indirectly or directly.

8.186 Notwithstanding this evidence in the Parties' internal documents which suggests that in some cases they have taken action in response to their monitoring of each other's activity, we do not consider that a direct response to competitor monitoring is required in order to demonstrate closeness of competition. We consider that monitoring in itself is demonstrative of close competition, noting that:

(a) it is unlikely that the Parties would undertake extensive regular monitoring of competitors' activities if it were not to inform business decisions either indirectly or directly. The fact that the results of that monitoring are reported to the Parties' senior management is a significant indication that this is indeed the case; and

(b) the Parties' internal documents do not tend to include detailed reasoning for each commercial decision, so we would not expect to frequently see clear trails from a reference to a competitor in an internal document to a commercial reaction.

8.187 In light of the above, the fact that the Parties undertake extensive regular monitoring of each other supports a more general finding that they are close competitors.[376] This position would not be undermined even if the internal

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[371] See paragraph 8.176(g).
[372] See paragraph 8.176(i).
[373] See paragraph 8.180(c)(i).
[374] See paragraph 8.180(c)(iii). JD Sports submitted that this type of local marketing activity may be employed for a range of reasons, and that spend on local marketing represents a [✂] of JD Sports' overall marketing spend. However, we believe that the documents are still valid evidence of JD Sports monitoring and reacting to Footasylum.
[375] See paragraph 8.180(g)(iii).
[376] We note that we based our finding that the Parties are close competitors on a range of evidence (set out throughout this chapter and in chapter 9), which we considered in the round.

documents contained no specific record of the Parties having taken responsive actions, either as regards each other or as regards other retailers, as a result of such monitoring.

Conclusion on internal documents

8.188 The detailed monitoring of each other in the Parties' internal documents is evidence supportive of a finding of closeness of competition between them. It is unlikely that the Parties would engage in detailed monitoring of retailers which they do not consider to be close competitors, and which does not feed indirectly or directly into their commercial decisions. Indeed, there is some evidence of it influencing their decisions directly, although this is not extensively reported in these internal documents for any retailers.

8.189 In particular, we found that:

(a) Footasylum's internal documents demonstrate that JD Sports is the competitor most closely monitored by Footasylum. These documents show that Footasylum also closely monitors Foot Locker (though not to the same extent as JD Sports); and

(b) JD Sports' internal documents demonstrate that Footasylum is one of the competitors most closely monitored by JD Sports, alongside Foot Locker, ASOS, Nike and adidas.

8.190 The Parties' internal documents show a low degree of monitoring by the Parties of a range of other competitors,[377] showing that they are seen as more distant competitors. It is notable that Sports Direct, which is a large retailer in the industry, is monitored to a much lesser extent, especially by Footasylum. More generalist retailers, including department stores, are hardly mentioned at all.

Surveys

8.191 The way that retailers compete in this market and the extent of their constraint on each other is influenced by consumer preferences.

8.192 As explained in chapter 6, we have undertaken two large surveys of the Parties' customers to understand their views on how they purchase the Parties' products, and what alternatives they would consider if the retailer and/or channel that they shopped in was no longer available. We have not placed full evidential weight on the online survey results due to the low

[377] These were [✂].

response rates (see paragraph 6.29). Further detail on the surveys and their methodology is set out in Appendix E.

Parties' views

8.193 The Parties made a number of submissions on the survey questions, design and robustness of the survey results, including on the phrasing of the diversion questions and particularly in relation to the store exit survey. These submissions are summarised here and set out in more detail in Appendix E, alongside our assessment of them.

8.194 The Parties submitted that the number of stores sampled was too limited to be representative of the UK store network and thus insufficient to draw robust estimates of diversion, and that the diversion question should have asked specific questions about the products bought, rather than about the basket, as the diversion responses would be clearer and more economically meaningful when customers considered and compared specific individual items, rather than assessed the overall choice and value of their basket.

8.195 The Parties also submitted that they had specific concerns about the wording of some of the questions, which could have led to bias in the survey results. In particular, they considered that the use of the word 'today' in the diversion question, may have limited the options that customers would consider and reduced the range of retailers the customer could consider to be viable alternative.

8.196 The Parties submitted that they had the following conceptual concerns about the reliability of the diversion results:

(a) that diversion between the Parties did not necessarily imply diversion of sales since there was no guarantee the customer would find a suitable product at the alternative store;

(b) that analyses of footwear and apparel customers should have excluded customers who purchased both footwear and apparel together because they were able to give only a single response to our questions; and

(c) that the question we had used to identify marginal customers was based on a price rise and this may not be appropriate unless there was a combined theory of harm (between online and in-store).

Our assessment

8.197 The evidence from the store exit survey is highly informative of the constraint that the Parties place on each other and the constraint from other retailers, as

this is derived from the views of the Parties' customers on which retailer is their next best alternative.

8.198 We first reviewed customers' reasons for shopping with the Parties to indicate what customers value, then their search behaviour to indicate which retailers they look at before purchase (if any) and finally their stated next best alternatives (diversion) to indicate which retailers constrain each of the Parties.

Survey results for footwear customer shopping behaviour

8.199 Our surveys asked the Parties' customers why they had chosen to shop with the Parties.[378] We found that footwear customers reported a wide range of reasons for purchasing from the Parties, covering both price and non-price features of the Parties' offerings in both surveys.

8.200 Our store exit survey found that 26% of Footasylum's footwear customers and 13% of JD Sports' footwear customers mentioned 'good prices' as the main reason to shop there.[379] Our online survey suggests that price is the most important factor for nearly half (54%) of Footasylum footwear customers and two-fifths (41%) of JD Sports' footwear customers when choosing to shop on that Party's website.[380]

8.201 Footwear customers also find quality and service to be of value. Indeed, more JD Sports in-store footwear customers stated that their main reason to shop at JD Sports is to do with either the quality, range or the service provided, rather than its prices.[381]

8.202 Product range is also important to the Parties' customers. When asked about the main reason that led them to buy at Footasylum, 34% of in-store footwear customers gave reasons associated with a good product range (eg good range of branded products, wide range of products, products that other stores do not have).[382] The percentage is even higher for JD Sports (42%). Good product range is mentioned by around two-thirds of respondents as the main

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[378] In the case of the exit survey, respondents were not prompted in any way, while for the online survey respondents were presented with a comprehensive list.
[379] DJS Research, Exit survey retail customers for a merger inquiry: JD Sports and Footasylum, January 2020.
[380] DJS Research, Survey of online retail customers for a merger inquiry: JD Sports and Footasylum, January 2020.
[381] DJS Research, Exit survey retail customers for a merger inquiry: JD Sports and Footasylum, January 2020.
[382] DJS Research, Exit survey retail customers for a merger inquiry: JD Sports and Footasylum, January 2020.

reason why they had shopped at either JD Sports (63%) or Footasylum (64%) online. [383]

8.203 Our store exit survey asked footwear customers what actions they had taken before visiting the JD Sports or Footasylum store where they made their purchase. A sizeable minority of footwear customers had looked at another physical store (19% of JD Sports' footwear customers and 39% of Footasylum's footwear customers) and a few (6% JD Sports; 15% Footasylum) had looked at other retailer websites.[384] In total, 25% of JD Sports' in-store customers and 54% of Footasylum's in-store customers had visited either the stores or websites belonging to other retailers prior to making their purchase. Of those customers who had looked elsewhere, this was most commonly at the other Party.[385]

8.204 Overall, the Parties' customers gave a range of price and non-price elements of the Parties' offering as the main reason why they shop with the Parties. This is consistent with consumers valuing elements of QRS as well as price.

8.205 Around a quarter of JD Sports' in-store footwear customers and half of Footasylum's in-store footwear customers had looked at the offering of other retailers before making their purchase decision and most commonly this comparison was made with the other Party.

Survey results for footwear customer diversion behaviour[386]

8.206 Our store exit survey asked customers what they would do if all the stores of the Party that they had shopped at were closed. Similarly, our online survey asked customers what they would have done if the Party they had shopped at had stopped selling online.[387]

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[383] DJS Research, Survey of online retail customers for a merger inquiry: JD Sports and Footasylum, January 2020.
[384] CMA analysis of DJS surveys. See: DJS Research, Exit survey for retail customers for a merger inquiry: JD Sports and Footasylum, January 2020 and DJS Research, Survey of online retail customers for a merger inquiry: JD Sports and Footasylum, January 2020.
[385] Of the Footasylum customers that had looked elsewhere 74% of those that had looked at other websites had looked at JD Sports and 79% of those that had looked at other physical stores had looked at JD Sports. Of the JD Sports customers that had looked elsewhere 40% of those that had looked at other websites had looked at Footasylum and 39% of those that had looked at other physical stores had looked at Footasylum.
[386] Estimates of diversion reported in this section have been weighted to make them nationally representative of the Parties' entire store estate. This is different from the unweighted diversion tables in the DJS exit survey report (see: DJS Research, Exit survey retail customers for a merger inquiry: JD Sports and Footasylum, January 2020).
[387] Those customers whose first choice would have been to divert to JD Sports' own online channel, were asked for their next best alternative after this and are instead reported under this next best alternative (this is what we refer to as excluding own-party diversion).

8.207 The responses to these questions gave an indication of which other retailers customers view as alternatives to the Parties. Nationally representative diversion ratios to retailers receiving more than 2% of total diversion (across both channels) are shown in Table 8.5.[388]

Table 8.5: Footwear diversion ratios for JD Sports' customers (with no spend-weighting, excluding own-party diversion)

						%
Retailer	JD Sports' customers					
	In-store customers			Online customers		
	In-store to any channel	In-store to in-store	In-store to online	Online to any channel	Online to online	Online to in-store
Footasylum	21	17	4	16	10	6
Foot Locker	16	12	4	13	7	7
Sports Direct	10	9	1	9	6	3
Nike	7	4	3	18	12	6
adidas	6	4	2	8	6	2
Schuh	6	5	1			
DW Sports	4	3	1			
Amazon				6	6	
ASOS				6	6	
M and M				2	2	
Other third party	16	9	7	12	7	5
Not shop	14			9		
Total	100	63	23	100*	62	29

Source: CMA calculations based on DJS surveys.

Note: The tables show diversion ratios from JD Sports to other retailers from the store exit survey and the online survey.
The tables only include parties for which the total level of diversion from a given channel exceeds 2%.
The 'Other third party' or 'Not shop' category includes a long tail of retailers with lower diversion ratios (for the column in question) including, as applicable, retailers such as: TK Maxx, Next, Debenhams, House of Fraser, and River Island.
If a retailer is included as a row in the table but a cell is empty this means that the diversion ratio was less than 2% for the column in question.
The store exit survey, in particular, was designed primarily to estimate diversion between the two Parties; as such the level of sampling error is larger for third parties. The implication of this is that while the estimates for third parties are unbiased, the margin of error is larger.
*Due to rounding the sum of diversion to each listed individual party, other third party and not shop is not equal to 100.

8.208 JD Sports' in-store customers are most likely (21%) to divert to Footasylum to make their footwear purchase. Other than Footasylum, Foot Locker (16%) and Sports Direct (10%) are the next most commonly given diversion alternatives. Other retailers with diversion above 2% are Nike, adidas, Schuh and DW Sports; 16% of customers would have gone to one of a number of other retailers and 14% would not have shopped at all. While the majority of diversion is to in-store, 23% would have diverted online. Diversion from in-store to online shows a similar pattern in terms of the retailers listed and the relative size of diversion to these retailers as for in-store to in-store diversion.

[388] We note that although our store exit survey was designed to provide national estimates of diversion, we also examined some store level results. We looked at whether there was any apparent material difference in diversion between the Parties depending on the presence of other specific retailers. We found that diversion between the Parties in overlap areas where both Nike and adidas were present broadly exhibited the same pattern as between other stores where only one or neither of them were present. Further, we assessed whether diversion was different in overlap areas where Sports Direct had an elevated store (Thurrock, Denton, Dudley and Leicester). Again, we found that the levels of diversion between the Parties in these areas appeared to be broadly in-line with at other stores.

8.209 JD Sports' online customers are most likely to divert to Nike (18%). Other than Nike, Footasylum (16%) and Foot Locker (13%) are the most popular destinations. Other retailers with diversion above 2% are: Sports Direct; adidas; Amazon; ASOS; and M and M. 12% of customers would have gone to a number of other retailers and 9% would not have shopped at all. While the majority of diversion is online, 29% would have diverted in-store. Diversion from online to in-store shows a similar pattern in terms of the retailers listed and the relative size of diversion to these retailers as for online to online diversion, the main difference being that those retailers that do not have an in-store presence are not included.

8.210 Table 8.6 shows the diversion ratios from Footasylum to other retailers for its footwear customers.

Table 8.6: Footwear diversion ratios for Footasylum's customers (with no spend-weighting, excluding own-party diversion)

						%
	Footasylum's customers					
	In-store customers			Online customers		
	In-store to any channel	In-store to in-store	In-store to online	Online to any channel	Online to online	Online to in-store
JD Sports	68	57	11	46	31	15
Foot Locker	7	4	2	9	5	4
Schuh	3	3		7	5	2
Nike	2	1	1	9	5	4
Sports Direct	2	2				
ASOS				6	6	
Office				4	3	1
adidas				3	2	1
Amazon				2	2	
Other third party	6	4	2	6	5	1
Not shop	12			7		
Total	100	71	16	100*	64	28

Source: CMA calculations based on DJS surveys.

Note: The tables show diversion ratios from Footasylum to other retailers from the store exit survey and the online survey. As mentioned in paragraph 6.26, we gave the results of the online survey limited evidential weight. The tables only include parties for which the level of diversion exceeds 2%.
The 'Other third party' or 'Not shop' category includes a long tail of retailers with lower diversion ratios (for the column in question) including, as applicable, retailers such as: TK Maxx, Next, Debenhams, House of Fraser, and River Island.
If a retailer is included as a row in the table but a cell is empty this means that the diversion ratio was less than 2% for the column in question.
The in-store survey, in particular, was designed primarily to estimate diversion between the two Parties; as such the level of sampling error is larger for third parties. The implication of this is that while the estimates for third parties are unbiased, the margin of error is larger.
*Due to rounding the sum of diversion to each listed individual party, other third party and not shop is not equal to 100.

8.211 Footasylum's in-store customers are by far most likely to divert to JD Sports (68%) to make their footwear purchases. Other than JD Sports, Foot Locker, Schuh, Nike and Sports Direct have diversion greater than 2%. 6% of customers would have gone to one of a number of other retailers and 12% would not have shopped at all. While the majority of diversion is to in-store, 16% would have diverted online. A similar pattern in terms of the retailers listed and the relative size of their diversion ratios emerges when looking at in-store to in-store diversion and in-store to online diversion.

8.212 Footasylum's online customers are by far most likely to divert to JD Sports (46%). Foot Locker, Schuh, Nike, ASOS, Office, adidas and Amazon also had diversion greater than 2%; 6% of customers would have gone to one of a number of other retailers and 7% would not have shopped at all. While the majority of diversion remains online, 28% would have diverted in-store. Diversion from online to in-store shows a similar pattern in terms of the retailers listed and the relative magnitude of their diversion ratios as for online to online diversion, the main difference being that those retailers that do not have an in-store presence are not included.

Conclusion on footwear customer diversion

8.213 In both the store exit survey and the online survey, substantially more Footasylum customers would divert to JD Sports than any other retailer. This shows that Footasylum's footwear customers view JD Sports as their closest substitute.

8.214 A sizeable proportion of JD Sports' in-store footwear customers state that their next best alternative is Footasylum. For JD Sports' online footwear customers, Nike is seen as the next best alternative with Footasylum and Foot Locker also seen as close substitutes. This shows that JD Sports' footwear customers view Footasylum as one of a small number of close substitutes.

8.215 Diversion to JD Sports for in-store Footasylum footwear customers is substantially higher (61 percentage points) than the next best alternative (Foot Locker), whereas diversion to Footasylum for in-store JD Sports footwear customers is much closer (five percentage points) to the next best alternative (Foot Locker). A similar pattern emerges from the results of the online survey.

8.216 This evidence shows that their customers view the Parties as the closest substitutes to each other in-store and as close substitutes online (along with Foot Locker for JD Sports' in-store customers and Nike and Foot Locker for JD Sports' online customers) and therefore that the Parties exert a strong constraint on each other in-store and online. The constraint that JD Sports imposes on Footasylum is larger than vice versa.

GUPPIs

8.217 As explained in chapter 6, the GUPPI is a commonly used metric designed to indicate the upward pricing incentive for merging parties post-merger.[389] The rationale underpinning the GUPPI is that it is less costly for a merged entity to

[389] The same incentive applies to deterioration of QRS as to increasing prices.

deteriorate its offering post-merger (for either or both of the merging parties) as it will recoup the profit on recaptured sales from those customers that divert and purchase products from the other merging party. GUPPIs are calculated by combining diversion ratios and profit margin information (see Appendix F for more detail). The CMA has used GUPPIs in its assessment in a number of merger inquiries.[390]

8.218 To illustrate the relevance of the GUPPI specifically in this case, consider an example where Footasylum increased its prices post-Merger. It is reasonable to consider that a proportion of Footasylum's customers (price marginal customers) would switch to purchase the same or comparable product(s) at an alternative retailer or to forego the purchase altogether. Of these customers, some would complete their purchases at a JD Sports store (or on the JD Sports website). Pre-Merger, Footasylum would have lost the margin from the price marginal customers who divert to JD Sports. However, post-Merger these sales would remain within the Merged Entity. This recapture alters the incentives of the Merged Entity as it reduces the cost (in lost margin) associated with deteriorating PQRS in the Footasylum fascia. Post-Merger, and all else equal, this change will provide an incentive to set higher prices, or provide lower quality, than before the Merger. Unless this incentive is offset by other changes in the market in response to the Merger (such as the expansion or repositioning of existing competitors) consumers are likely to be worse off post-Merger.

8.219 We used the nationally representative diversion ratios between the Parties to calculate national GUPPIs.[391] These provide an estimate of the incentive for the Parties to increase prices (or deteriorate their QRS offering) throughout their store estate and/or online offering. We calculated GUPPIs for the in-store segment on the basis of our store exit survey. For the online segment and the combined (in-store and online) market, our GUPPI estimates rely on the online survey and therefore we have not placed full evidential weight on them.

8.220 In practical terms, Footasylum's GUPPI is equal to the product of the diversion ratio from Footasylum to JD Sports, JD Sports' variable profit margin and the price ratio of the Parties. The diversion ratio is the proportion of Footasylum's customers who state that, if they knew that all Footasylum (and other Footasylum fascia) stores had closed and their website was closed down, they would have completed their purchases at JD Sports. The variable profit margin is the difference between incremental sales revenue and the

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[390] Examples of where GUPPIs were used include: Ladbrokes/Coral merger inquiry (2016), Cineworld/City Screen merger inquiry (2013) and Sainsbury's/Asda merger inquiry (2019).
[391] Both our store exit and online surveys were designed to allow us to calculate nationally representative diversion ratios. These have been used to calculate national GUPPIs.

incremental cost of achieving this revenue. If prices are different across the Parties, the GUPPI would also need to be scaled according to the corresponding price ratio. GUPPIs are not dependent on our market definition and are not impacted by any classification by the CMA of different retailers. Instead, the diversion ratios which feed in to the GUPPIs use the views of the Parties' customers on the closeness of different retailers, to estimate incentives post-Merger.

Parties' views

8.221 The Parties made a number of submissions regarding the use of GUPPIs. The Parties submitted that the GUPPIs were not probative of an ability to worsen PQRS in this case due to the specific market dynamics from both a demand and supply-side. The Parties submitted that:

(a) the GUPPI measure did not consider the extent to which demand may materially shift as a result of a change in PQRS. Specifically, if consumers were very responsive to changes in PQRS it may lead to no incentive to worsen PQRS;

(b) similarly, the GUPPI measure did not account for the threat of a supply-side response in the form of reduced allocations (and/or the reduction or withdrawal of discounts) from suppliers (with products being reallocated to the suppliers' DTC channels or to other retailers, whether in the short or longer term; and

(c) the GUPPI measure did not consider the impact of entry, expansion and repositioning; factors which the Parties submitted were important parameters in the relevant markets.

8.222 The Parties further submitted that the GUPPI estimates in this case did not in themselves demonstrate a durable incentive to worsen PQRS as they could not take into account either: (i) supplier/rival responses reacting directly to worsened PQRS by the Merged Entity; or (ii) supplier/rival and customer dynamics occurring in any event. Thus, whether the Merged Entity had a sustainable incentive to worsen PQRS needed to be assessed in light of all relevant constraints that would operate on any apparent short term incentive to worsen PQRS as a result of recaptured diversion post-Merger.

8.223 The Parties submitted that in the Provisional Findings the CMA gave 100% decisive weight, or close to it, to the survey and derived GUPPI data.[392] They

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[392] The Parties, Response to Provisional Findings, paragraph (58)(a).

submitted that the CMA had a 'binary' approach which wrongly treated a static GUPPI as a powerful SLC predictor in a dynamic market while giving market shares no value at all.[393]

8.224 The Parties submitted that the GUPPIs were static quantitative evidence whereas the markets are dynamic. They quoted CMA CEO, Andrea Coscelli and other recent phase 2 merger cases to show that static evidence was of limited weight in assessing dynamic markets.[394] The Parties also submitted that even a perfectly constructed model that generated a 'high' GUPPI was not a 'strong' indicator let alone presumptive of an SLC in any (and especially this) dynamic market.

8.225 The Parties submitted that in terms of GUPPI thresholds, the CMA's approach to GUPPI outputs, even in less digitally-inspired and dynamic retail market than the current case, had been that a GUPPI under 5% was a 'safe harbour' indication that concerns could presumptively be ruled out.[395] They further submitted that the Footasylum GUPPIs, and only those GUPPIs, could fairly be called high, and that the JD Sports GUPPI ranged around 4-6% and therefore could not be considered 'high' as the CMA had referred to it in its Provisional Findings.[396]

Our assessment

8.226 Our GUPPI estimates for footwear are set out in Table 8.7. We tested the robustness of these GUPPI figures with respect to a range of factors outlined in detail in Appendix F.[397]

Table 8.7: GUPPI estimates - footwear (%)

Market segment		%
	JD Sports *	Footasylum†
In-store	[4-7]	[19-27]
Online	[3-5]	[10-16]
Combined	[4-7]	[15-22]

Source: CMA calculations based on DJS surveys and CMA variable margin estimates. The ranges presented represents the CMA's ranging of the margin for the purposes of publication.

* These GUPPIs are calculated on the basis of diversion from JD Sports to Footasylum and Footasylum's variable margins.
† These GUPPIs are calculated on the basis of diversion from Footasylum to JD Sports and JD Sports' variable margins.

Note: Combined estimates calculated on the basis of weighted in-store and online diversion (based on 2018 proportions of the Parties' in-store and online revenues) and the relevant margins.

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[393] The Parties, Response to Provisional Findings, page 12.
[394] The Parties, Response to Provisional Findings, paragraphs 62-65.
[395] The Parties, Response to Provisional Findings, paragraph 91.
[396] The Parties, Response to Provisional Findings, paragraph 103.
[397] If we had focussed on price or range marginal consumers, estimated diversion ratios allowing consumers to select other fasciae belonging to the Parties, using spend-weighted diversion ratios or the Parties' submitted variable margins, the impact on the estimated GUPPI would not be sufficient to change our overall conclusion.

8.227 We consider that the GUPPI figures are high, particularly for Footasylum but also for JD Sports.[398] In the in-store segment of the market, we estimated GUPPIs of [19-27%] for Footasylum and [4-7%] for JD Sports. We did not place full evidential weight on the online GUPPIs or the combined GUPPIs as they have both been derived using the online survey results, but note that, although lower than the GUPPIs in-store, they still indicate a strong incentive to increase prices (or deteriorate other aspects of QRS) for both JD Sports and Footasylum. The asymmetry of the GUPPIs between Footasylum and JD Sports is consistent with other evidence we reviewed, including the Parties' internal documents.

8.228 We have considered and responded to the Parties' submissions on the use of GUPPIs (see paragraphs 8.221 - 8.225):

(a) we considered the GUPPIs as part of a wide range of evidence and based our decision on all of this evidence taken in the round. It is not the case that we used the GUPPIs as decisive in our assessment, to the exclusion of other evidence;

(b) it is not the case, as the Parties submitted, that the CMA considers 5% to be a 'safe harbour' indication. We do not consider that there is any such safe harbour threshold and have not applied one in this case. We also note that in fact our combined estimate and our in-store estimate for JD Sports' GUPPI was not below 5% (see Table 8.7). In response to the Parties' submission that only the Footasylum GUPPIs can be considered high, in our judgement the JD Sports GUPPI is also high in the context of this market;

(c) we recognise that the relationship between the GUPPI and any increase in price or deterioration of QRS will depend in part on the demand response.[399] Given the magnitude of the GUPPIs, particularly for Footasylum, we note that under any standard assumptions about the nature of demand, the impact of the Merger on the Merged Entity's incentive would be significant. We do not have sufficient evidence on the responsiveness of demand to changes in PQRS in this market, and in any case, do not consider it necessary to undertake alternative approaches to

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[398] We have not set a specific GUPPI threshold above which an SLC would arise in our national level assessment of this Merger. A 'threshold' is sometimes necessary in the context of using a decision rule to help identify local SLCs, where there are too many local areas to assess individually but is not necessary in this case given our national assessment.

[399] The nature of demand in a market influences the rate of cost pass-through ie the rate at which a business increases its prices or deteriorates QRS in response to a change in its costs. The higher the level of cost pass-through, the more significant the deterioration of PQRS for a given GUPPI.

assessing post-Merger incentives (eg indicative price rises or merger simulation), which would require such evidence;

(d) the Parties submitted that the GUPPIs did not account for the threat of reduced allocation and/or discounts from suppliers. We considered in earlier sections the role of suppliers and how the Parties compete (paragraphs 8.24-8.100, and 8.101-8.119). In particular, we found that there are aspects of PQRS which retailers compete on and it is this competition that could be reduced, as indicated by the incentives implied by the GUPPI estimates; and

(e) we agree with the Parties that GUPPI estimates do not capture the impact of entry, expansion and repositioning. We also agree with the Parties that the relevant markets are to some extent dynamic (although as set out in 8.21 this generally applies to the types of products more than it does to the structure of the markets). As such we recognise that substantial changes in this market could limit the relevance of findings derived from a static GUPPI. We have therefore considered the impact on competition in the foreseeable future from market developments in paragraphs 8.311-8.460 and potential entry and expansion in chapter 11.

Conclusion on GUPPIs

8.229 As noted in paragraph 8.216, the diversion ratios from the store exit survey and online survey show that the Parties' customers view the Parties as the closest substitutes to each other in-store and as close substitutes online. We found that the Parties exert a strong constraint on each other in-store and online, and the constraint that JD Sports imposes on Footasylum is larger than vice versa. When combined with estimates of the Parties' variable margins, this results in high in-store GUPPIs, particularly for Footasylum.

8.230 In the in-store segment of the market we have estimated GUPPIs of [19-27%] for Footasylum and [4-7%] for JD Sports. GUPPI figures of this magnitude show a strong incentive for the Merged Entity to deteriorate its offering post-Merger for example through raising prices or deteriorating elements of QRS. The asymmetry of the GUPPIs is consistent with other evidence presented elsewhere in this chapter, for example the Parties' own internal documents. Although the online and combined GUPPIs are lower than the in-store GUPPIs, they still indicate a strong incentive on the Merged Entity to deteriorate PQRS for example through raising prices or deteriorating elements of QRS.

8.231 We considered the surveys and the GUPPIs as part of a wide range of evidence reviewed in our investigation and based our decision on all of this evidence in the round.

Entry-exit analysis

8.232 One way to assess the strength of the competitive constraint from a given retailer on the Parties is to assess the impact of stores belonging to different retailers opening or closing near to the Parties' stores — an 'entry-exit analysis'.

8.233 The entry-exit analysis complements other evidence sources on the extent to which different retailers constrain each other, by providing information on consumers' actual behaviour rather than their stated behaviour. We note that this analysis is focussed on store-level data and, as such, is relevant to the in-store segment of the relevant markets.

8.234 The next section sets out the Parties' views on our entry-exit analysis. Further detail on our results, methodology and responses to the Parties' submissions is set out in Appendix C, as well as in this section.

Parties' views

8.235 The Parties stated that the CMA's analysis was retrospective and did not reflect:

(a) the prospective competitive landscape;

(b) the weakened position of Footasylum in the counterfactual; and

(c) the impact of Sports Direct's elevation strategy.

8.236 The Parties submitted that the results of the CMA's entry-exit analysis showed that a number of other retailers impacted JD Sports' in-store revenue to a [✂] as estimated for Footasylum.[400] In footwear, the Parties submitted that this included retailers such as [✂] in certain specifications of the model.

8.237 The Parties also noted that some coefficients in the estimated entry-exit models were positive and statistically significant[401] or were otherwise counterintuitive. The Parties submitted that these results suggested a degree

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[400] JD Sports also conducted its own form of entry impact analysis, discussed at later in this chapter - see paragraphs 8.376-8.389.
[401] We understand that the Parties have considered statistical significance at the 5% level unless indicated otherwise; see also Appendix C.

of misspecification in the models and limited the weight that the CMA should place on the results.

8.238 The Parties stated that the entry-exit analysis did not consider whether combinations of retailers collectively acted as a sufficient constraint on JD Sports.

8.239 The Parties submitted that the direction of bias in the entry-exit analysis could in theory be upward or downward. The Parties noted that there were various factors that could be related to both the number of stores belonging to other retailers and the revenue of JD Sports' stores in a positive or a negative way.

8.240 The Parties submitted that the robustness[402] of econometric results was key. To investigate this, in its submission, the Parties presented various alternative econometric specifications to those employed by the CMA. The Parties stated that they were not saying that these alternative approaches were strictly better than the CMA's, nor did they consider that the CMA could say its approach was strictly better to the alternatives presented by the Parties.

8.241 The Parties submitted that historical data over a longer time span had limited utility given the general market dynamics. The Parties stated that this variation particularly applied to Footasylum who had become weaker in recent times and Sports Direct/USC who had carried out very large expenditure on repositioning and was gaining access to new products.

(a) The Parties provided an example where they supposed that the impact of Footasylum entry on JD Sports was large in 2014, but had the same episode happened in 2020 the impact would be smaller. In this scenario, the estimated average effect would likely be an overestimate of the current and future competitive constraint exerted by Footasylum.[403]

(b) The Parties estimated the econometric model using data from three time periods: August 2014 to September 2019 (the original period used in PFs), September 2014 onward (original plus 'new data') and August 2017 onward (only 'new data'). The Parties found that when attention was restricted to the new data the results changed and the impact of Footasylum ceased to be statistically significant in most cases.

8.242 The Parties submitted that omitted variable bias was likely to be present in the entry-exit analysis and that it was crucial to assess whether the results were robust to alternative ways of addressing this problem. To account for local

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[402] Robustness refers to the extent to which the findings from a piece of analysis remain unchanged when elements of the modelling approach are changed.
[403] The reverse would be true if the constraint that a competitor exerts was to grow over time.

omitted factors, the Parties used a specification which incorporated fixed effects at the postcode area level rather than the region-level as used by the CMA. The Parties found that when this modelling approach was used the results changed and the impact of Footasylum ceased to be statistically significant. This was also the case when attention is restricted only to the most recent data.

8.243 The Parties submitted that a crucial role in the entry-exit analysis was played by the way that entry/exit episodes were identified in the data. They submitted that an imprecise measurement that suffered from systematic errors would necessarily lead to a biased estimate. To address this issue the Parties conducted a sensitivity analysis which varied the drive-time threshold used from 20 minutes to 10 minutes, which they stated was consistent with the approaches adopted in previous cases.[404] When this approach was used the Parties found that the impact of Footasylum entry and exit on JD Sports' apparel revenue ceased to be statistically significant. Further to this, the Parties also noted that in some specifications using this approach, Sports Direct and USC were found to have statistically significant effects on the performance of JD Sports' stores.

8.244 The Parties submitted that in the entry/exit analysis it was not appropriate to make a distinction between elevated Sports Direct entries and exits and those that were not elevated. The Parties submitted that this was because:

(a) Sports Direct/USC's elevation strategy was ongoing meaning that the date of elevation (which in any case was generally also very recent) did not fully capture the extent of the threat and growing competitive constraint that the elevation strategy posed to JD Sports' stores;

(b) there were only [✂] Sports Direct/USC elevation events impacting JD Sports stores (none of which constituted retailer entry). This was [✂] than the number of events for JD Sports on Footasylum for which the CMA concluded there was not sufficient data to estimate an entry-exit model for Footasylum in the Provisional Findings; and

(c) many of the Sports Direct/USC elevations were relocations and/or the upsizing of existing stores. The Parties stated that [✂]% of Sports Direct/USC elevated entry episodes affecting a JD store were relocations/upsizing compared to [✂]% for non-elevated Sports Direct/USC stores.

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[404] Sainsburys/Asda CMA Final Report, 25 April 2019, Appendix C, the following drive-time bands were considered: 0-5, 5-10 and 10-15-minute drive-times. Ladbrokes/Coral CMA Final Report, 26 July 2016, Appendix E, the following drive-time bands were considered: 0-200m, 200-400m and 400m+.

8.245 We have considered these points below and in detail in Appendix C.

Our assessment

8.246 We examined the impact of store openings and closures by different retailers on JD Sports' store performance as measured by revenue.

8.247 The impact on revenue provides an indication of the extent to which that retailer competes with JD Sports. We would expect the opening of a new store by a retailer that does not compete closely with JD Sports (for example Boots) to have no effect on the revenue of a JD Sports store. Conversely, we would expect the opening of a store by a retailer that is a close competitor to have a negative (and statistically significant) effect on the revenue of a JD Sports store.[405]

8.248 We acknowledge that the analysis is retrospective as submitted by the Parties but consider this has the benefit of allowing us to examine actual consumer behaviour. We recognise that it may fail to capture changes in the market, but we consider these in our analysis of market developments, later in this chapter (from paragraph 8.311).

8.249 The analysis investigates whether different retailers individually have an impact on the store revenue of JD Sports. The entry-exit analysis does not therefore cover the extent to which any combinations of retailers exert a competitive constraint on JD Sports. We do not believe that this undermines the usefulness of this piece of evidence and consider the aggregate effect of competitive constraints in the next section (see from paragraph 8.291).

8.250 The analysis is likely to be subject to some uncertainty, for example, bias in a statistical sense. This bias relates to differences between the true causal impact of entry/exit by different retailers and that estimated using the econometric model. The bias arises in this setting because we are using observational data meaning that there are likely to be other factors related to entry and exit that also effect JD Sports' store performance outside of the model. In theory, the direction of the bias could be upward or downward, but we believe that the most likely direction is upward. We consider that the most important unobserved factor is local demand which is positively associated with both the number of stores belonging to other retailers and the performance of JD Sports stores and this is discussed in detail in Appendix C. The implication of the upward bias is that evidential weight is only given to results that are negative and statistically significant. This is because if a result

[405] The conventional cut-off for placing weight on estimated results is a significance threshold of 5%. We have considered statistical significance at the 5% level unless stated otherwise, see also Appendix C, paragraph 80.

is statistically insignificant or positive and significant this may be the result of the upward bias.

8.251 The robustness of the results is also sensitive to the number of store openings and closures in conjunction with the number of JD Sports stores affected by such openings and closures. While there is no cut-off for a sufficient number of affected stores, we acknowledge that the robustness of our conclusions for the impact of entry by retailers decreases when the number of affected JD Sports stores decreases.[406] We consider that entry-exit analysis remains informative of the relative constraint exerted by different retailers, particularly when the analysis is considered in the context of other evidence.

8.252 It was only possible to carry out a robust entry-exit analysis for JD Sports as Footasylum has significantly fewer stores than JD Sports and the number of observed entry and exit events impacting Footasylum is therefore smaller. As a result, there was not sufficient data for statistically robust estimation.

8.253 The weekly data that we used for the analysis was supplied by JD Sports and covered the period 2014 to 2020.[407] The data was aggregated to the monthly level. The estimated effects relate to an average across all JD Sports stores and the entire period under consideration. A full discussion of the econometric methodology is provided in Appendix C.

8.254 The impact of the opening of a new store may be less if the retailer opening the store already has many stores in the local market. An analysis of all entry and exit events by retailers may underestimate the closeness of competition between the two retailers. We therefore analysed separately two different forms of entry (and equivalent forms of exit).[408] First, we analysed retailers' opening of stores in areas where JD Sports is present, regardless of whether or not the entering retailer has an existing store(s) in the area (store entry).[409] Second, we analysed retailer entry into areas where JD Sports is present, but the entering retailer does not have an existing store (retailer entry).[410]

8.255 To test the robustness of our results we used two different econometric methods. The first approach accounted for store-specific and time-specific

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[406] Appendix C shows the number of observations in the data affected by entry and exit events by retailer.
[407] Data on Footasylum store locations was provided by Footasylum. Data on other retailer store locations was provided by JD Sports. Weekly revenue for each of the Parties' stores. To smooth out the random variation that exists from week-to-week, the data was aggregated to a four-weekly (monthly) and 12-weekly (quarterly) basis.
[408] We have examined a change in the number of a retailer's stores in the local area by one meaning that these estimates are derived from both entries and exits.
[409] Store entry uses any change in the number of stores belonging to a given retailer for estimation.
[410] Retailer entry occurs when the number of stores belonging to a given retailer changes from zero to one (or more), while retailer-level exit occurs when the number of stores belonging to a given retailer changes from one (or more) to zero.

factors which if not accounted for, could lead to biased estimates. The second specification additionally accounted for region-specific factors that vary over time.[411] A more detailed explanation of the econometric approach is provided in Appendix C.

8.256 We also considered how the results change when we use a 10-minute drivetime to identify entry and exit events rather than a 20-minute drivetime. While we have taken into account the results of the narrower drivetime, our preferred approach is to attach more importance to the 20-minute drivetime rather than a narrower definition for the following reasons:

(a) the use of a 20-minute drivetime is based on evidence from our exit survey of JD Sports customers which found that while 60% of customers had travelled 20 minutes or less only 25% had travelled 10 minutes or less;[412]

(b) when interpreting these results, if we observe a statistically significant effect using a 20-minute drivetime definition but do not when a 10-minute drivetime definition is used, this does not fundamentally undermine the finding. The lack of statistical significance could be due to the fact that there are fewer entry and exit events when a 10-minute drivetime is used.[413] As such the loss of significance is likely to be due to the loss of statistical power; and

(c) if a retailer is found to have an effect only in the specification using a 10-minute drivetime, this may suggest a weaker constraint than retailers that have an effect when a 20-minute drivetime is used. This interpretation arises because in order to have a statistically detectable effect the entry/exit event must be closer (within a 10-minute drivetime) to the JD Sports store.

8.257 We also considered how the results change when we use only the last three years of data rather than all available years. While we have taken into account the results using only the narrower time period, our preferred approach is to attach more importance to all available data as it gives us the greatest level of statistical precision by ensuring that there are a sufficient number of entry and exit events to identify their impact.

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[411] As an example of why this might be important, suppose that both the number of new store openings by Footasylum and JD Sports' store performance in region A increased due to higher demand in months one to six, if not adjusted for this could lead to the incorrect finding of a positive relationship between Footasylum store openings and JD Sports store performance.
[412] Responses weighted to be nationally representative. CMA analysis of our exit survey.
[413] As an example, for Footasylum using all data there are [✂] entries/exits when a 20-minute definition is used compared to [✂] when a 10-minute definition is used.

8.258 When interpreting these results, if we observe a statistically significant effect using all available data but do not when only the last three years of data are used, we note there are multiple possible explanations for this. The loss of statistical significance could be consistent with a reduction in the competitive constraint, but alternatively it may reflect that by restricting the dataset to the last three years the number of observations and entry and exit events is reduced, and therefore one is less likely to be able to detect statistically significant impacts from entry and exit. This means that if a result ceases to be statistically significant when attention is restricted to the most recent years it is not possible to determine whether this is as a result of a change in the competitive constraint that the retailer exhibits or due to a loss of statistical power.[414]

8.259 As well as the loss in statistical precision, a change in the nature of entry and exit events may result in a change in the coefficient value and statistical significance even when the competitive constraint that the retailer exerts on JD Sports does not change. The simplest example of this would be changes in the proportion of entry/exit events that are entries. If one believes that the impact on revenue of exits is less than the impact of entries due to the retailer adopting a policy of closing underperforming stores, a smaller proportion of entry/exit events that are entries in the most recent data could lead to a loss of statistical significance.[415]

Results – impact of entry/exit on revenue on footwear revenue

Store entry/exit

8.260 When all available data is used, and an entry/exit event is defined using a 20-minute drivetime (our preferred specification), store entry by the following retailers is statistically significant in reducing the footwear revenue of JD Sports stores:

(a) Footasylum ([✂]%)

(b) Nike ([✂]%);

[414] As an example of this there were [✂] observations affected by Footasylum store entry/exit in the full dataset and only [✂] in the last three years. Also, while there were 24,958 store-month combinations in the model used for estimating the impact on footwear revenue using all years of data, this falls to 14,407 when the last three years are considered.
[415] In the case of Footasylum, when all years of data are used 76% of store entry/exit events are entries compared to 62% when the last three years of data are considered.

(c) Deichmann ([✂]% but only when region-time fixed effects are not used); and

(d) USC[416] ([✂]% but only when region-time fixed effects are used).

8.261 When only the last three years of available data are used, and an entry/exit event is defined using a 20-minute drivetime, store entry by the following retailers is statistically significant in reducing the footwear revenue of JD Sports stores:

(a) Schuh ([✂]% but only when region-time fixed effects are not used, and quarterly data is used);

(b) Nike ([✂]% but only when quarterly data is used);

(c) River Island ([✂]% but only when region-time fixed effects and monthly data are used or when region-time fixed effects are not used, and quarterly data is used);

(d) Skechers ([✂]% but only when region-time fixed effects are not used); and

(e) USC ([✂]% but only when region-time fixed effects are not used, and monthly data is used).

8.262 When a 20-minute definition of entry/exit events is used there is evidence that store entry/exit by Footasylum and Nike affects the revenue of JD Sports on average between September 2014 and February 2020. There is also weak evidence[417] that store entry/exit by Deichmann and USC has an effect during this period. There is also weak evidence using only the last three years of data that store entry/exit by Schuh, Nike, River Island, Skechers and USC may have some effect.

8.263 The opening or closure of a Footasylum store within 20-minutes of a JD Sports store is estimated to reduce the footwear revenue of the JD Sports store by [✂]% on average between September 2014 and February 2020. However, if attention is restricted to the three-year period February 2017 to February 2020 there is no statistically significant effect. It is not possible to distinguish whether the absence of an effect is driven by the loss of statistical

[416] For the purposes of the entry/exit analysis, USC refers to standalone USC stores. Sports Direct/USC includes any Sports Direct store, including those that are co-located with a USC store.
[417] If a result is statistically significant regardless of whether the data is monthly/quarterly or the region time fixed effects are included/excluded, it is given full evidential weight. If in at least one of these specifications a result is not statistically significant it is deemed weak evidence.

precision or a material change in the competitive constraint that Footasylum exerts on JD Sports in the supply of sports-inspired casual footwear.

8.264 When a 10-minute definition of entry/exit events is used there is evidence that store entry/exit by Footasylum, Foot Locker, Office, Schuh and Nike affects the footwear revenue of JD Sports on average between September 2014 and February 2020. There is evidence using only the most recent data that store entry/exit by Schuh, Nike and USC has an effect. There is also weak evidence using only the last three years of data that store entry/exit by Footasylum, Foot Locker and Sports Direct/USC[418] may have some effect.[419]

8.265 The opening or closure of a Footasylum store within 10-minutes of a JD Sports store is estimated to reduce the footwear revenue of the JD Sports store by [✂]% on average between September 2014 and February 2020. However, if attention is restricted to the three-year period February 2017 to February 2020 the magnitude of the estimated effect falls to [✂]% and ceases to be statistically significant when region-month fixed effects are added to the model. It is not possible to distinguish whether the absence of an effect is driven by the loss of statistical precision or a material change in the competitive constraint that Footasylum exerts on JD Sports in the supply of sports-inspired casual footwear.

Retailer entry/exit

8.266 When all available data is used, and an entry/exit event is defined using a 20-minute drivetime, retailer entry by the following retailers is statistically significant in reducing the footwear revenue of JD Sports stores:

(a) Footasylum ([✂]%);

(b) Foot Locker ([✂]%); and

(c) Outfit ([✂]% but only when region-time fixed effects are not used).

8.267 When only the last three years of available data are used, and an entry/exit event is defined using a 20-minute drivetime, retailer entry by the following retailers is statistically significant in reducing the footwear revenue of JD Sports stores:

(a) Office ([✂]%);

[418] Sports Direct/USC includes any Sports Direct store, including those that are co-located with a USC store.
[419] These results are available in full in Appendix C.

(b) Schuh ([✂]% in all specifications except for when quarterly data is used, and region-time fixed effects are used);

(c) Nike ([✂]% in all specification except for when quarterly data is used, and region-time fixed effects are used);

(d) Offspring ([✂]% but only when region-time fixed effects are not used); and

(e) River Island ([✂]% in all specifications except for when quarterly data is used, and region-time fixed effects are not used).

8.268 When a 20-minute definition of entry/exit events is used there is evidence that retailer entry/exit by Footasylum and Foot Locker affects the footwear revenue of JD Sports on average between September 2014 and February 2020. There is weak evidence that retailer entry/exit by Outfit has an effect. There is evidence using only the most recent data that retailer entry/exit by Office has an effect. There is also weak evidence using only the last three years of data that retailer entry/exit by Schuh, Nike, Offspring and River Island may have some effect.

8.269 The opening or closure of the only Footasylum store within 20-minutes of a JD Sports store is estimated to reduce the footwear revenue of the JD Sports store by [✂]% on average between September 2014 and February 2020. However, if attention is restricted to the three-year period February 2017 to February 2020 the estimated effect ceases to be statistically significant. It is not possible to distinguish whether the absence of an effect is driven by the loss of statistical precision or a material change in the competitive constraint that Footasylum exerts on JD Sports in the supply of sports-inspired casual footwear.

8.270 When a 10-minute definition of entry/exit events is used there is strong evidence that retailer entry/exit by Footasylum, Foot Locker and Office affects the footwear revenue of JD Sports on average between September 2014 and February 2020. There is evidence using only the most recent data that retailer entry/exit by Schuh, Nike and Offspring has an effect. There is also weak evidence using only the last three years of data that retailer entry/exit by Foot Locker and USC may have some effect. [420]

8.271 The opening or closure of the only Footasylum store within 10-minutes of a JD Sports store is estimated to reduce the footwear revenue of the JD Sports store by [✂]% on average between September 2014 and February 2020.

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[420] These results are available in full in Appendix C.

However, if attention is restricted to the three-year period February 2017 to February 2020 the estimated effect ceases to be statistically significant. It is not possible to distinguish whether the absence of an effect is driven by the loss of statistical precision or a material change in the competitive constraint that Footasylum exerts on JD Sports in the supply of sports-inspired casual footwear.

8.272 There is consistent evidence that both store entry and retailer entry within 10-minutes or 20-minutes by Footasylum has an effect on the footwear revenue of JD Sports on average between September 2014 and February 2020.

8.273 Our analysis is unable to shed light on the extent to which this constraint may have changed in the most recent years of data. The finding of no impact by Footasylum in the last three years of data is consistent with a reduction in the competitive constraint that it imposes on JD Sports. However it is not possible to distinguish between whether the lack of statistical significance is driven by the loss of statistical precision which occurs because we have less data or whether there has been a genuine change in the competitive constraint that Footasylum exerts on JD Sports in the supply of sports-inspired casual footwear. Further, the potential for upward bias means that throughout this analysis we only place evidential weight on results that are negative and statistically significant.

Summary of results on impact of entry/exit on footwear revenue

8.274 Overall, the entry-exit results indicate that Footasylum is a competitive constraint on JD Sports when it comes to sports-inspired casual footwear. Footasylum store and retailer entry has a consistently high negative impact on the footwear revenue of JD Sports. Store entry by Nike, Deichmann and USC and retailer entry by Foot Locker and Outfit was also found to reduce the revenue from footwear at the local JD Sports store in our preferred specification. In other specifications, there is evidence that Schuh, River Island, Skechers, Office, Sports Direct/USC (only when located within 10 minutes of the JD Sports store), Outfit and Offspring may also have an effect.

8.275 Only for Footasylum does both store entry and retailer entry result in a statistically significant and negative fall in the local JD Sports store's footwear revenue across all variations of our preferred specification; this gives us confidence in the robustness of the results when it comes to the constraint from Footasylum on JD Sports. This result also holds regardless of whether one uses a 20-minute or 10-minute drivetime to identify entry and exit events.

8.276 The entry-exit analysis indicates that the retailers which exert a competitive constraint on JD Sports include at least Footasylum, Foot Locker, Nike,

Deichmann and USC.[421] To a lesser extent there is also evidence that Schuh, River Island, Skechers, Office, Sports Direct/USC (only when located within 10 minutes of the JD Sports store), Outfit and Offspring may exert a competitive constraint on JD Sports. Given the potential for upward bias, any estimates which were not negative and statistically significant have been treated as being indicative of an absence of evidence for the impact of these retailers on the revenue of JD Sports, rather than evidence for the absence of a competitive constraint. It is not possible to rule out that other retailers may also exert a competitive constraint on JD Sports in the same market.

Conclusion on entry-exit analysis results

8.277 Looking at the entry-exit analysis in the round, Footasylum is the only retailer that has a negative impact on JD Sports that is robust to reasonable model variation in terms of both retailer and store entry. This indicates that Footasylum is a close competitor to JD Sports and exerts a constraint on JD Sports in this market. We also note that entry by Foot Locker, Nike, Deichmann and USC also has an impact on JD Sports' revenue, indicating they impose some constraint. To a lesser extent there is also evidence that Schuh, River Island, Skechers, Office, Sports Direct/USC (only when located within 10 minutes of the JD Sports store), Outfit and Offspring may exert a competitive constraint on JD Sports in footwear.

Overview of current constraints

8.278 We reviewed a wide range of evidence on market shares, the nature of retailers' offerings and third parties' rankings of competitive closeness, internal documents, our surveys (covering diversion ratios and our GUPPI analysis) and our entry-exit analysis, in addition to the impact of suppliers, in assessing the current aggregate constraints on retail competition.

Parties' views

8.279 JD Sports submitted that there was a broad range of effective competitors, both online and in-store, in the relevant markets, and that the Merged Entity would continue to compete with a significant number of retailers post-Merger.

8.280 JD Sports submitted that while each of the Parties relied on the resale of Nike and adidas footwear products, this did not make them 'close competitors'

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[421] We note that in analysis carried out by JD Sports in December 2019, it estimated that recent Foot Locker store openings reduced revenue at the nearest JD Sports store by [✂], while Foot Locker store closures had up to [✂] on the same basis.

since this did not distinguish them from other UK sports footwear retailers.[422] The Parties also submitted that they were 'vertically differentiated' in the sense that suppliers treated JD Sports and Footasylum [✂] and [✂].[423]

8.281 JD Sports submitted that few consumers were brand indifferent in footwear and that mono-brand retailers competed closely with multi-brand retailers.[424] It added that Nike and adidas (and other suppliers) were not mere vertical 'wholesalers' of products, but that they were also significant retail competitors underpinned by aggressive strategies to grow their DTC sales.[425]

8.282 JD Sports submitted that the Parties faced 'fierce competition […] from a wide range of retailers, including Foot Locker, ASOS, Sports Direct […], the brands' DTC channels, Office, Schuh, End, Zalando, Next, DW Sport, Amazon and Very'. In aggregate, the constraints from other retailers contributed to severe competitive pressure on the Parties.[426] It told us that the Parties had regard to a range of competitors in their internal documents and that the CMA's survey identified a wide range of competitors.

Third parties' views

8.283 We received submissions from a number of third parties,[427] most of whom considered that the Parties competed closely and that there were few other close constraints on the Parties both currently and post-Merger.

Competition between the Parties

8.284 At phase 1, we asked third party retailers to rank the Parties in terms of their closeness of competition to each other.[428] Overall, third parties indicated that the Parties competed closely against each other (see paragraph 8.162 where we have explored this further).

8.285 Several retailers submitted that the Merger would decrease competition in the market and expressed general concerns about the Merger. These concerns

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[422] JD Sports, Response to Issues Statement, paragraph 7(b).
[423] JD Sports, Response to Issues Statement, paragraph 4(iii).
[424] JD Sports, Response to Issues Statement, paragraph 66.
[425] JD Sports, I Response to Issues Statement, paragraph 9.
[426] JD Sports, Response to Issues Statement, page 52.
[427] We note that JD Sports submitted that 'As in all cases where there are complainants with commercial incentives to frustrate a deal there will be a question of how much weight should be given to their views about the effect of a merger (as opposed to other grievances) and a need to ensure their submissions are supported with evidence.' As in any inquiry, we have given due regard to a range of factors including: the incentives of the party giving that evidence; the extent to which the party had knowledge that was relevant to the statutory questions we are required to answer; and the extent to which the evidence was corroborated by other evidence available to us.
[428] Closeness in this context was measured on a one (not close at all) to 10 (very close) scale. See: CMA, Phase 1 decision, paragraph 253.

predominantly referenced the Merger as strengthening JD Sports' position in the market. For example, one retailer ([✂]) told us that JD Sports and Footasylum could be considered as competing and that JD Sports was one of the two closest competitors to Footasylum.[429] Another ([✂]) submitted that JD Sports and Footasylum competed quite hard for their target market, ie consumers aged 13 to 21/22.

8.286 Several retailers submitted that: the Merger would decrease competition; increase the leverage that the Merged Entity would have over suppliers and enable the Merged Entity to have better access to branded products, sub-brands, franchises and specific footwear products that were most desired and in demand by consumers, but which would be unavailable to other retailers.

Constraints from other retailers

8.287 We asked third party retailers to rank other retailers in terms of their closeness of competition in footwear to each of the Parties. Based on these rankings, Foot Locker was frequently mentioned as a close competitor,[430] while Sports Direct, ASOS, Office and Schuh, were ranked as medium constraints (see paragraph 8.162). One retailer submitted that as a result of the Merger 'you will basically have a duopoly' in the sports-inspired casual footwear market, comprising the Merged Entity and Foot Locker.

8.288 Three retailers[431] submitted that they regarded JD Sports as a 'powerful' competitor, with one of these retailers commenting that JD Sports affected 'the way in which we compete largely because of the ability to control the supply of branded footwear in the market'. A fourth retailer ([✂]) identified both Parties as its closest competitors in footwear, which would become stronger in the market post-Merger.

8.289 Retailers submitted a number of similar, additional points, for example:

(a) [✂] and [✂] told us that the Merger would leave only one real competitor – Foot Locker – to the Merged Entity in the market;

(b) [✂] submitted that any competitive constraints on the Merged Entity by [✂] (or any other competitor in the market, aside from [✂]) were (and would continue to be) limited and that other retailers did not receive sufficient offerings from suppliers to enable them to act as a meaningful constraint on the Parties;

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[429] Summary of hearing with Company B, 12 November 2019, paragraph 8.
[430] CMA analysis of third party questionnaires during phase 1.
[431] Summaries of hearings with Companies A, D and F.

(c) [✂] told us that it considered itself to be a 'close competitor' to both JD Sports and Footasylum; and

(d) [✂] submitted that 'when you think about [✂]. It recognised that other retailers with a 'footwear presence' - such as River Island and Topshop - also competed in the market to an extent.

8.290 A number of retailers considered that there was a broad competitor set within the sports-inspired casual footwear market,[432] and one retailer noted that it 'considered other retailers in the market [as] being capable of drawing customers away from it'.[433]

Our assessment

8.291 The Parties are both large multi-brand retailers of sports-inspired casual footwear operating nationally through their stores and online offerings, with each serving a large number of customers.

8.292 For JD Sports, while it is a larger retailer than Footasylum, overall we found its offering to be very similar to Footasylum, internal documents demonstrate that JD Sports sees Footasylum as one of its close competitors, a sizeable proportion of its in-store customers are most likely to divert to Footasylum and among its online customers, Footasylum was the second closest alternative in terms of customer diversion, the opening or closure of Footasylum stores affects nearby JD Sports store footwear revenues and third parties rank Footasylum highly as a close competitor to JD Sports.

8.293 For Footasylum, although it is a smaller retailer than JD Sports, overall we found its offering to be very similar to JD Sports, internal documents demonstrate that Footasylum sees JD Sports as its closest competitor, its in-store and online customers are by far most likely to divert to JD Sports and third parties rank JD Sports highly as a close competitor to Footasylum.

8.294 We found that, taken together and in the round, the evidence strongly demonstrates that the Parties are close competitors to each other in footwear although JD Sports provides a stronger constraint on Footasylum than vice versa.

8.295 We considered the current aggregate constraints from other retailers on the Parties in this market, based on the same evidence.

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[432] Summary of hearing with Companies B, D and G.
[433] Summary of hearing with Company D, paragraph 5.

8.296 The GUPPIs we calculated for JD Sports and Footasylum using the diversion ratios are high, particularly for Footasylum, which shows that the Merged Entity would have a strong incentive post-Merger to deteriorate PQRS (worsen or improve PQRS to a lesser extent or not as quickly as it would have done absent the Merger) post-Merger. The GUPPIs take into account the aggregate current constraint from all other retailers.

8.297 Foot Locker is closely monitored by both Parties, with its footwear offering being similar to that of the Parties. In addition, our surveys show it is generally the next best alternative after the Parties themselves and the entry-exit analysis indicates that the entry or exit of a Foot Locker store impacts nearby JD Sports store footwear revenues. On the basis of this evidence we consider that Foot Locker is a close competitor and therefore imposes a strong constraint on the Parties in footwear. However, we do not consider that, on its own, it would sufficiently constrain the Merged Entity so as to prevent an SLC from arising.

8.298 Similarly, Nike's DTC offering is seen to have an impact on the Parties. We found that it is monitored by both of the Parties in their internal documents. Our entry-exit analysis indicates that the opening of a Nike store impacts nearby JD Sports store footwear revenues. However, our surveys show that diversion to Nike in-store was relatively low for both Parties. Further, our store exit survey shows that the presence of a Nike store nearby only has a relatively small impact on the number of customers who would divert to the Parties' stores. This is consistent with the fact that the majority of its physical stores are factory outlets, [✂]. The online survey suggests that Nike may be a closer competitor to the Parties for online customers than for in-store customers. On this basis we found that Nike exerts some constraint on the Parties, but less than each does on the other.

8.299 The evidence shows that Sports Direct exerts some constraint on the Parties in footwear. However, despite being a large national retailer, it does not currently exert a strong constraint. The Parties' internal documents demonstrate a low degree of monitoring of Sports Direct. We consider that there are some key differences in Sports Direct's offering in comparison with that of the Parties. It has a [✂] product overlap with the Parties, is more focussed on sporting goods and has more of a value proposition than the Parties (although it has opened some elevated stores - we consider how any continued elevation might change its constraint in the next section). Therefore, although Sports Direct does impose some constraint, particularly for JD Sports according to our surveys, this is substantially less than that imposed by the Parties on each other.

8.300 We found that adidas's DTC offering is a weaker constraint on the Parties than that exerted on them by Nike's DTC offering. adidas is monitored by both Parties in their internal documents. However, our surveys show that while it imposes some constraint on JD Sports, it has a much weaker constraint on Footasylum both in-store and online, and we did not find evidence of a constraint from adidas in our entry/exit analysis.

8.301 There are some other multi-brand competitors such as ASOS (online-only) which the Parties monitor and other competitors, such as Schuh and Office (which offer only footwear, including non sports-inspired casual products), which the Parties monitor to a lesser extent. Office is strongly focussed on female consumers (unlike the Parties). Our surveys found that some customers would divert to ASOS's website and Schuh and Office's stores or website but to a much lesser degree than to the other Party. On that basis, we consider that overall the evidence shows that although these competitors impose some competitive constraint, this is relatively limited.

8.302 We analysed other online-only retailers (eg Zalando and Amazon). We recognise that the Parties consider these retailers in terms of potential future threats to their business and this is evidenced in their internal documents. However, the evidence overall suggests that none is currently a close competitor to the Parties. This lack of direct competition is supported by our store exit survey, where Zalando and Amazon had levels of diversion below 2%. Amazon had higher levels of diversion in our online survey, albeit still less than the Parties and other retailers.

8.303 In addition to the constraint from other retailers, we also assessed the constraint that suppliers exert on retailers in this market (including on the Parties). Suppliers play an important role in shaping retail competition in this market. Suppliers, in particular Nike and adidas, exert some constraint on the Parties' ability and/or incentive to deteriorate their offering. However, this constraint is not so significant as to sufficiently discipline the Merged Entity's ability and/or incentive to deteriorate its offering post-Merger.

8.304 Overall, while we found that numerous other retailers offer sports-inspired casual footwear, taken in the round, the evidence indicates that only Foot Locker provides a strong constraint, with Nike and Sports Direct exerting some constraint but less than the Parties do on each other, with other retailers providing relatively limited constraint. Taking these current constraints in aggregate, we found that the constraint on the Parties is only moderate at best (eg the aggregate diversion to other retailers was low) and would not be sufficient to prevent an SLC. While suppliers exert some constraint, in addition to retailers, as noted above this constraint has limitations. Taking the evidence in the round, and on balance, we found that the aggregate

constraints[434] from retailers and suppliers would not be sufficient to prevent the Merged Entity from deteriorating PQRS post-Merger.

Impact of COVID-19

8.305 We also considered the impact of COVID-19 on our assessment, as far as possible, to see if it changes these findings. While the market is clearly being impacted by COVID-19, the impact on our assessment of the competitive effects of the Merger is less certain. There remains considerable uncertainty about the extent and duration of the impact of COVID-19.[435]

8.306 We note submissions from the Parties on the impact of COVID-19 and social distancing measures, received during the final days of our investigation. The Parties submitted that Footasylum would need to undertake [✂],[436] and that 'Footasylum seems [✂] to an extended period of social distancing restrictions, even after stores are reopened'. The Parties submitted that 'The business relies on delivering sales with a relatively low level of square footage and stores tend to be very busy during key periods, such as weekends.' The Parties submitted that it was likely that after non-essential stores reopen, the government would continue to enforce social distancing measures for an extended period of time, and that even if these measures were relaxed, consumers were likely to avoid crowded shopping centres. The Parties submitted that this was likely to have a [✂] on Footasylum's sales for an extended period of time. The Parties also made submissions with respect to the impact COVID-19 would have on the growth of the online channel and growth of DTC, which we have considered in paragraphs 8.398, 8.406, 8.412-8.414 and 8.448-8.450.

8.307 We note the Parties' submissions regarding the impact of COVID-19 on Footasylum, and consider that it is likely that Footasylum, much like many other retailers, will be negatively impacted to an extent. We note that all retailers in this market are subject to the same change in market conditions and measures put in place by the government as a result of COVID-19, although it is difficult to predict the effect on different retailers and how each will respond to the circumstances. We also note that online sales are not being impacted to the same extent as in-store sales,[437] and that online sales make up a sizeable proportion of the Parties' sales. We also note that the

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[434] The aggregate constraint is evaluated directly in some of the evidence, eg diversion ratios, but more generally we have considered the aggregate constraint by recognising that it is appropriate to consider the effect of all of the retailers and suppliers considered as a combined constraint on the Parties.
[435] CMA, Merger Assessments during the Coronavirus (COVID-19) pandemic, paragraph 22.
[436] The Parties submitted three scenarios assessing the impact of COVID-19 on Footasylum's business and [✂] absent the Merger, which we have considered in chapter 5 as part of our counterfactual assessment.
[437] See for example chapter 7, paragraph 7.43 and footnote 189 in this chapter.

Parties submitted forecasts of Footasylum's online sales [✂] compared to the same period in 2019/20 (though they submitted this was optimistic).

8.308 Overall, it is not clear to what extent COVID-19 is affecting the relative constraints posed by different retailers and suppliers in the footwear market. We have not seen evidence to suggest that either of the Parties is being more negatively impacted by COVID-19 relative to each other or relative to other retailers in this market. Therefore, it is not clear that, as a result of COVID-19, either of the Parties would be in a much weaker competitive position to each other and to other retailers, or that other competitors would become significantly stronger. For example, in our view, it is likely that all retailers are [✂] given the current circumstances. Therefore, while recognising these uncertainties, we do not envisage that the impact of COVID-19 is likely to reduce materially the extent to which the Parties are close competitors, or to increase materially the current competitive constraints on the Parties in footwear. We consider the impact of COVID-19 on competitive constraints in the foreseeable future in terms of market developments, in the next section (paragraphs 8.444-8.446).

8.309 Therefore, based on our assessment of the aggregate constraints from retailers and suppliers, we found that the Merger would result in the removal of a direct and significant constraint on each of the Parties and that overall the remaining constraints post-Merger would not be sufficient to prevent an SLC.

8.310 We recognise that this is to some extent a dynamic market and therefore in addition to evidence illustrating current constraints on the Parties, it is important to consider the impact of future market developments on the competitive constraints on the Merged Entity which we have considered below.

Market developments

8.311 Our Guidance states that changes to market conditions in the foreseeable future will often be assessed as part of our competitive assessment.[438] We have assessed whether there are any changes underway or likely to happen in the foreseeable future (ie broadly within the next two years - see also paragraph 8.12) that may materially change the nature of the existing constraints on the Parties. We focussed our assessment on retailers already present in the market and considered any repositioning or significant expansion by them. We separately assessed new market entry, including

[438] CMA Guidance, paragraph 4.3.2.

entry from adjacent markets, when we considered countervailing factors (see chapter 11).

8.312 As set out in paragraphs 8.2-8.5, we recognise there remains considerable uncertainty about the extent and duration of the impact of COVID-19 and that this could affect market developments that would have occurred otherwise. Our assessment necessarily involves our taking a view on future developments in the relevant markets. All retailers in the relevant markets are subject to the same change in market conditions, but it is difficult to predict the effect on different retailers and how each will respond to the circumstances. Notwithstanding this, in our assessment below we consider the impact of COVID-19 on specific market developments in light of submissions we have received. Where submissions were made following the onset of COVID-19 in the UK this is indicated; otherwise we note that submissions referenced were received prior to COVID-19 arising.

Parties' views

8.313 The Parties submitted that the sector in which they operated was 'subject to substantial disruptive expansion and repositioning by rivals', which 'is not hypothetical (it is happening), […] is not binary (it is happening progressively) and […] is not resting on one entrant (there are many)'. The Parties cited the following factors as evidence that 'many' rivals were disruptively expanding and repositioning themselves:

(a) development of the DTC channel and upstream control by Nike and adidas;[439]

(b) the repositioning of Sports Direct through its 'elevation strategy';

(c) the expansion of Foot Locker's presence in the UK; and

(d) the Parties' understanding that [✂].

8.314 The Parties submitted that they also faced the threat of 'potential brand-sponsored entry' and that suppliers 'can and do sponsor entry into the market when the incumbent retailers are under-performing', in particular where the retail market in question was 'not well served by existing retailers', [✂].We considered potential supplier-sponsored entry as part of our assessment of countervailing factors in chapter 11.

[439] We understand upstream control to refer to suppliers' control of retailers.

8.315 The Parties submitted that this expansion and repositioning of other retailers would be 'large relative to the scale of Footasylum, meaning that the constraint from Footasylum on JD Sports would be replaced, several times over, by new constraints'. The Parties summarised their submissions on expansion and repositioning by stating: 'the relevance of entry, expansion and repositioning is that it (or the prospect of it) defeats any incentive to worsen PQRS today. Why go backwards when the rest of the market is aggressively moving forwards?'.[440]

8.316 The Parties submitted that repositioning and expansion by Frasers Group pointed to no SLC. They submitted that Frasers Group was aggressively pursuing its elevation strategy, there was evidence of it having greater access to high-tier sports-inspired casual products, this access was having an impact on the Parties' store sales and that there was evidence that the store elevation strategy was supported by suppliers of branded products.[441]

Third parties' views

8.317 Third parties who commented on market developments highlighted suppliers' role in the market and particularly their DTC offer which they submitted was changing, for example:

(a) [✂] submitted that 'As brands are looking to consolidate within the market, and improve their own DTC (direct to consumer) channel, they are likely to focus on larger scale operations and sacrifice smaller chains and independents'. [✂] also noted that the 'small chains and independents are pushed out by the large chains', with these retailers losing market share every year;

(b) [✂] submitted that 'Nike was reported to have recently altered its distribution strategy to focus more on growing its DTC channels, comprising its own website and network of own-branded stores'. It went on to state that 'The consequences of the implementation of these strategies is that UK consumers would experience significantly reduced levels of competition in the sneaker footwear retailing market in the coming years';

(c) [✂] submitted that 'digital DTC business has increased substantially over recent years and continues to have a marked effect on our ability to

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[440] We note that elsewhere in the same submission, the Parties stated that they had no incentive to worsen PQRS, setting out that: 'Ultimately, the threat of adverse supplier reactions to worsening PQRS and the threat of entry, expansion and repositioning eliminates any material incentive to worsen PQRS even in circumstances where the GUPPI model or diversion ratios in isolation suggest an apparently high incentive to worsen PQRS.'
[441] The Parties, Response to Provisional Findings, chapter 2, section II.

compete to attract consumers into our doors and onto our website. Our expectation is to see this trend continue'; and

(d) [✂] said that the constraint from [✂] on the Parties had not changed during the course of the CMA's investigation. It said the majority of products which [✂] submitted that [✂] access to these particular products (which it clearly did not) they would [✂].

Our assessment

8.318 In this section, we assess whether significant changes in retailers' positioning or significant expansions of their offerings could lead to a material increase in the aggregate constraint faced by the Merged Entity post-Merger.

8.319 Since sports-inspired casual footwear is trend driven, retailers of such products may reposition themselves in terms of what they stock, the fascia under which they trade, the branding that they use, the branding of a given fascia, marketing and the consumers they target. If a given retailer were to change some or all of these elements of its offering, this could change the extent of the constraint that it exerts on the Merged Entity in the foreseeable future. Alternatively, a retailer may materially expand under its current proposition. These types of changes would not be captured by the retrospective or point-in-time nature of some of the evidence we have considered, such as our entry-exit analysis and the surveys (including the GUPPIs) respectively. However, some internal documents may capture the Parties' views about market developments, and we considered these in our assessment where appropriate.

8.320 We focussed our assessment on whether retailers who are already present in the market are likely to reposition or expand their offer. In particular, we considered Frasers Group, DTC growth, Foot Locker, Amazon and other multi-brand retailers.

Frasers Group

8.321 Frasers Group is a retailing Group containing a number of fasciae including Sports Direct and USC. It has publicly outlined its intentions to continue to elevate and change the retail proposition of some of its fasciae (including Sports Direct) in the coming years, to improve the quality of its stores and digital offer in order to elevate the consumer experience of its Sports Direct

fascia, USC fascia and the wider Frasers Group.[442,443] [✂]. In Frasers Group's half-year results for 2019, elevation was listed as a strategic priority.[444]

8.322 We considered whether this elevation strategy would mean that the Sports Direct fascia and the USC fascia or a combination of these Frasers Group fasciae would become a closer competitor to the Parties in the foreseeable future, while recognising that some parts of the elevation strategy have already been implemented.

8.323 The renaming of Sports Direct International to Frasers Group is a part of its elevation strategy. As part of this, the Sports Direct fascia has also changed its branding in some settings, for example changing the logo that it uses and the visual merchandising which supports its product offerings.[445]

8.324 Another part of Frasers Group's elevation strategy is to convert, or open new stores, as 'elevated stores'.[446] As well as being larger than traditional Sports Direct stores, elevated stores typically include multiple fasciae. A number of elevated stores include Sports Direct together with a USC fascia while other stores are also adjacent to a Flannels store.

The scale of elevation

8.325 Frasers Group opened its first elevated store, its London Oxford Street flagship store, in May 2014. It opened a further 17 elevated stores, until it began opening/elevating a 'new generation' of stores, starting with its Thurrock store, in July 2018. This new generation of elevated stores are typically larger format stores and 'led by a third-party branded area' (ie with a prominent section featuring a specific brand). [✂].[447]

8.326 In total, there are currently [30-40] elevated Sports Direct fascia stores in the UK, 16 of which are [✂], as set out in Table 8.8, all of which have opened (or re-opened) [✂].

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[442] Frasers Group, Interim Results for the 26 weeks to 27 October 2019.
[443] Frasers Group possesses a number of fasciae within the retail of footwear and clothing. Within the Sports Direct segment of sports retail sits the Sports Direct and USC fasciae. Frasers Group also has fascia that fall into the premium lifestyle segment, namely, Flannels, Cruise and van Mildert.
[444] Frasers Group, Interim Results for the 26 weeks to 27 October 2019.
[445] The previous logo used red and blue text on a white background with the text 'Sports Direct', the new logo uses the text 'SD' in white set inside a black circle. JD Sports submitted that the [✂].
[446] Note that 'opening an elevated store' could be either opening an entirely new store or upgrading an existing store.
[447] [✂]. For the purpose of our assessment we have taken account of all of the elevated stores, noting that for all existing stores, their effect should be captured by our assessment of current competitive constraints and for future plans we wish to capture any changes in Frasers Group's constraint regardless of the type of elevation of its stores. We also note that [✂].

8.327 [✂]. Over a longer time horizon, [✂] these are the latest plans as of 13 March 2020, subject to any changes arising due to COVID-19 (see paragraph 8.337).

Table 8.8: Number of elevated Sports Direct stores in UK

	Open as of March 2020	Planned to be open by end 2020	Planned to be open by end 2021
Number of elevated Sports Direct fascia stores	[30-40]	[✂]	[✂]

Note: Plans accurate as of 13 March 2020 and do not reflect any changes that may or may not arise due to COVID-19.

8.328 The recent increase in the number of elevated stores is set against a backdrop of a net reduction in Sports Direct stores by nine as documented in Frasers Group's half-year results for 2019.[448]

8.329 The Parties submitted that the size of Frasers Groups' elevated stores estate would soon be broadly comparable to Footasylum and that Frasers Group was capable of expanding its elevated estate very rapidly if there is a business case.[449] We note that should its plans be fully realised, [✂], whether this will significantly change the constraint Sports Direct exerts on the Parties depends on the products these stores will stock, customer perceptions and the impact on the Parties' stores eg any reduction in the Parties' sales in stores nearby elevated stores (we examine these in paragraphs 8.376-8.389).

8.330 In terms of the size of investment, in its half-year results presentation on 8 December 2016, Frasers Group (Sports Direct International at the time) stated that its programme of store elevation would see it invest around £1 billion in property assets over five to 10 years from 2017, of which approximately £300 million would be spent per annum for the first two to four years from 2017.[450]

8.331 The Parties submitted that it could be inferred from the ongoing investments made by Frasers Group that it expected the elevation strategy to work and that the annual size of investment was equivalent or greater to Footasylum's turnover.[451] We accept that Frasers Group would only engage in such investment with an expectation of a return, however, such a return could be generated in several ways (eg increase in sales of sporting goods, increase in sales of higher margin products) and the size of the investment being made does not in itself necessarily indicate any specific change in competitive constraint on the Parties.

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[448] Sports Direct, Preliminary results, 26 July 2019, page 22.
[449] The Parties, Response to PFs, paragraph 190.
[450] See: Frasers Group, Annual Report 2018, page 7 and Frasers Group, Annual Report 2017, page 44.
[451] The Parties, Response to Provisional Findings, paragraph 187.

8.332 [✂] Frasers Group noted that in the 2018/19 financial year it opened [✂] stores and closed [✂], store closures accounted for approximately [✂] square feet of retail space while store openings accounted for approximately [✂] square feet. This shows that as well as being elevated in terms of fixtures and fittings, new [✂] elevated stores are significantly larger.[452,453] The 16 existing [✂] elevated stores are also described by Sports Direct as 'best-in-class' and built to the highest specifications and quality.

8.333 As well as elevating its in-store proposition, Frasers Group has upgraded the digital offering of its core fasciae. In its 2019 Annual Report, Frasers Group stated that the websites for each of its core fasciae in the UK, which include Sports Direct, USC and Flannels, had undergone 'significant enhancements in order to facilitate optimum appeal to consumers'. It added that its 'product offering across these core fasciae both in-store and online, aims to create a compelling shopping experience in key categories that include, among others, Football, Women's, Kids, Running, Cycling, Lifestyle, Fashion and Luxury'.[454]

Frasers Group's strategy for its elevation

8.334 In order to understand Frasers Group's rationale and intention for its elevation strategy, we issued a broad information request to Frasers Group [✂] relevant to its strategy for elevation, [✂]. We concluded that the rationale, like the elevation strategy itself, is wide-ranging [✂].

8.335 [✂]:

(a) [✂];

(b) [✂]; and

(c) [✂].

8.336 [✂].We note that while in this example elevation [✂], the Sports Direct fascia primarily stocks sporting products and from this example alone it is not clear which types of products have driven this [✂].

8.337 Frasers Group made the following public comments on 20 March 2020 regarding COVID-19:[455]

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[452] [✂].
[453] See also discussion in the internal documents section of this chapter, paragraphs 8.169-8.190.
[454] Frasers Group, Sports Direct International plc Annual Report and Accounts 2019, 26 July 2019, page 9.
[455] https://www.londonstockexchange.com/exchange/news/market-news/market-news-detail/FRAS/14469957.html.

> Frasers Group has been monitoring the potential impact of COVID-19 across its UK and international businesses. Whilst it is too early to estimate what the full impact from COVID-19 will be on the Company's performance for the current financial year ending 26 April 2020, and future periods, the Board expects that COVID-19 will cause significant disruption to its business, including reducing customer footfall […]. Accordingly, and given the ongoing uncertainty, the Company is no longer giving formal guidance in relation to the financial year 2020.
>
> Frasers Group's year-to-date performance had been in-line with expectations prior to COVID-19. The Company has a strong management team which can adapt and respond quickly to challenges and changing market conditions. Over the longer term, the Board remains confident in focussing on the Company's elevation strategy.

8.338 In terms of accounting for the impact of COVID-19 in our assessment of market developments, we set out our approach in 8.312 and in our conclusions to this section (see paragraphs 8.444-8.446).

Frasers Group's access to products for elevated stores

8.339 A key element of competition in this market is access to relevant sports-inspired casual footwear products (rather than sporting goods) and within this, access to the most desirable products from key suppliers. We consider that for its elevation strategy to significantly change the competitive constraint that Sports Direct exerts on the Parties (as set out in paragraph 8.311) in the foreseeable future, this would need to lead to access to products similar to those stocked by the Parties in the sports-inspired casual footwear market, as well as a change in how consumers perceive the Sports Direct offering (which may be linked to changes in product access as well as encompassing general perceptions of the fascia's brand and reputation).

8.340 The Parties submitted that as a result of its repositioning, Frasers Group was 'increasingly gaining access to the same premium sports-inspired products as the Parties, including some of the Parties' best-selling footwear franchises and apparel lines'.[456] The Parties submitted that Sports Direct/USC had gained access to a number of higher-tier sports-inspired footwear products/franchises 'in the last three months' (ie since start December 2019).[457] In support of this,

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[456] The Parties, Response to Provisional Findings, paragraph 180.
[457] The franchises listed by the Parties were [✂].

the Parties submitted [✂],[458] [✂]. The Parties submitted that these products were 'some of the Parties' best-selling franchises' including Nike and adidas branded products, as well as others. [✂].

8.341 The Parties also submitted that the CMA had relied upon submissions from Frasers Group regarding product access and had undertaken little interrogation of these for completeness or accuracy. The Parties submitted that the Provisional Findings ignored fundamental documentary evidence from verifiable sources in favour of evidence from a key competitor.

8.342 We subsequently assessed a range of information obtained from Frasers Group, and also data and submissions from the key suppliers Nike and adidas, in order to determine the actual extent of Frasers Group's access to products in the relevant market(s) (as opposed to sports performance products) and in particular its access to the same key suppliers' products as the Parties. In response to the Parties' submission that Frasers Groups' access had changed during the course of our investigation, we collected data and sought views covering the most recent periods possible (including data up until end February 2020 and submissions during March 2020). We also examined whether there was evidence of Frasers Group's product and volume access changing in the foreseeable future.

- *Frasers Group's view on product access*

8.343 [✂]:

[✂].

8.344 [✂][459] [✂].

8.345 [✂]:

[✂].

8.346 [✂][460] [✂]:

(a) [✂].; and

(b) [✂].

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[458] [✂].
[459] [✂].
[460] [✂].

- *Frasers Group's internal documents*[461]

8.347 [✂]:

(a) [✂];

(b) Fraser Group's 2019 annual report states that even though Sports Direct believes that it is delivering the elevation strategy in-line with the benchmarks set by suppliers, the suppliers remain 'sceptical' of the elevation;[462]

(c) [✂];

(d) [✂];

(e) [✂]and

(f) [✂].

8.348 The above evidence from internal documents suggests that at as a result of the elevation strategy Frasers Group has been able to access some branded higher-tier lifestyle products that it could not previously. However, this internal documentary evidence is mixed and unclear as to the extent of access that Frasers Group has received to such products. We therefore also carried out empirical assessments as set out in paragraphs 8.354-8.362 on Frasers Group's access to branded higher-tier lifestyle products from its elevation strategy, alongside [✂]. [✂].

- *Views of the key suppliers*

8.349 We asked Nike and adidas about the level of product access received by Frasers Group and whether the elevation of its stores had affected this. [✂] stated that as a result of Frasers Group's store elevation strategy, the product assortment it offered to Sports Direct [✂][463] [✂]. In comparison, the Parties [✂]. We consider that this means that Frasers Group is only able to access some of the products for its Sports Direct fascia that are available to the Parties.

8.350 [✂] stated that Sports Direct's elevated stores and online offer received access to product ranged in [✂].Sports Direct's non-elevated stores received

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[461] We note that Frasers Group's internal documents [✂] for the purpose of our assessment we focussed particularly on the impact of its elevation strategy on its access to premium lifestyle products.
[462] Frasers Group Annual Report 2019, page 6 - Brand Relationships.
[463] [✂].

access to products ranged in the '[✂].[✂], with the enhanced access allowing Sports Direct to access higher-tier sporting products. By contrast, the Parties received access to products ranged in the '[✂]'.[464]

8.351 Notwithstanding the above, we note [✂] submitted that it is responding to Frasers Group's elevation strategy. [✂].[465] [✂] also said that as Sports Direct continues investing in the number of elevated bricks and mortar stores and also its online store, leading to improved consumer experience and an increase in the extent to which Sports Direct becomes known by consumers for this improved experience, [✂] expects the growth in volumes and allocations to continue.

8.352 [✂] submitted that some Frasers Group elevated stores have improved product access – specifically [✂]. However we note that this channel is different from that of the Parties and the evidence cited earlier in paragraph 8.350 indicates that [✂] does not intend for the Parties and Frasers Group to get access to the same products. We note [✂], which is consistent with our assessment of suppliers' selective distribution arrangements in paragraph 8.35. Further, some elevated stores receive '[✂]' products which provides a retailer with elevated access for one category or product type or gender. In this case, those elevated Frasers Group stores receive higher tier product access in certain sports eg for football they receive premium tier football access. We examined further data on changes in Frasers Group's access to [✂] products in paragraph 8.357.

8.353 The Parties submitted that we should consider how suppliers and Frasers Group would react if the Merged Entity sought Post-Merger to reduce its PQRS. The Parties submitted that 'it is clear that key suppliers are already giving SDI/USC access to premium sports-inspired casual products and there is no evidence to suggest that this trend would not continue or accelerate if the Parties opted to deteriorate the PQRS of their stores and online offering'.[466,467] We accept that post-Merger, if the Merged Entity were to deteriorate aspects of its PQRS which went against the key suppliers'

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[464] JD Sports is in the [✂] Footasylum is in the [✂].
[465] To place these volumes in some context Frasers Group's supply of total footwear (excluding studded footwear ie football boots) from [✂] in 2019 was around [✂] units of footwear products in 2019; JD Sports received around [✂] units of footwear and Footasylum around [✂] units of footwear. We do not have estimates for the total volumes of 'better' and 'best' [✂] products provided to the Parties or all retailers, but have analysed some specific products, including products within these categories in paragraphs 8.358.
[466] The Parties, Response to Provisional Findings, paragraph 226.
[467] The Parties also submitted that 'the Merger Assessment Guidelines make clear at paragraph 5.4.11 the importance of considering responses to any attempt by the merger group to impose a reduction in PQRS'. Source: The Parties, Response to Provisional Findings, paragraph 226. We accept this and note that we have assessed how suppliers might respond to deteriorations by the Merged Entity when considering the impact of suppliers on retail competition (see paragraphs 8.94-8.99), where we found that there were some aspects of PQRS which the Merged Entity could have the ability and/or incentive to deteriorate post-Merger, which would not be sufficiently constrained by suppliers.

interests eg negatively impacting sales of their products or their reputation, Nike and adidas may have an incentive to reallocate products to Frasers Group in light of its elevation strategy. However we have seen no evidence that Nike and adidas would favour allocating products to Frasers Group over other retailers to which they already supply higher volumes of products, and which are [✂] categorised as 'best' and 'better' retailers in their respective [✂] and [✂] retailer segments. We therefore cannot say with sufficient certainty what actions the suppliers may take in terms of allocating their products should the Merged Entity deteriorate its PQRS. Even if the key suppliers were to reallocate products to Frasers Group, it is not clear over what timeframe this might result in a material increase, if at all, in the strength of Frasers Group's constraint.

- *Data on product supply and sales*

8.354 We note that in their response to the Provisional Findings the Parties had submitted [✂] Sports Direct's access to branded higher-tier lifestyle footwear and apparel products, which they submitted were 'some of the Parties' best-selling franchises'.[468]

8.355 Therefore as well as considering the key suppliers' views, we analysed data received from Nike and adidas, to assess whether Frasers Group's elevation strategy appears to have resulted in improved product access, and particularly access to products that would allow it to compete closely with the Parties. This analysis was conducted at the product-level, ie not taking colourway or size into account.[469]

8.356 For [✂] footwear, we found that of the [✂] products that featured in one or both of the Parties' monthly top 10 best-selling product lists from January 2019 to February 2020, Frasers Group had accessed [✂] products by the end of 2019.[470,471] However, in comparison to the Parties, the average monthly volume of these products supplied to Frasers Group was low.[472] For instance, the average monthly volume of [✂] supplied in 2019 was [✂] for

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[468] The Parties, Response to Provisional Findings, paragraphs 203-215.
[469] We acknowledge that access to appropriate sizes and the most desirable colourways is also a relevant aspect of understanding product access, but we examined first at a more aggregate level, since if changes in access at an aggregate level appear limited then this in itself implies a limited change in constraint.
[470] This analysis focused on the products that the Parties received the highest volumes of in 2019. For example, one of the products in the Parties' monthly [✂] best-selling product lists was [✂]. The product in the [✂] data with a name containing '[✂]' that the Parties received the highest (combined) volumes of was [✂]. This is the [✂] product that therefore features in this analysis.
[471] We requested updated product level data from [✂] on 6 March 2020, asking for data up until end February 2020 or until the most recently available full month. The most recently available full month was December 2019. Recognising the Parties submitted that changes in product access occurred since December 2019, we also drawn on data received from Frasers Group to cover product sales up until end February 2020.
[472] This is consistent with [✂].

Sports Direct, compared with [✂] for JD Sports and [✂] for Footasylum. Similarly, the average monthly volume supplied in 2019 of [✂] was [✂] for Sports Direct, compared with [✂] for JD Sports and [✂] for Footasylum. In addition, while average monthly volumes for Frasers Group exhibit some variation, there has not been a clear and sustained upward trend (ie month on month increases) for any individual product over 2019.

8.357 For [✂] footwear, [✂] products featured in one or both of the Parties' monthly top 10 best-selling product lists from January 2019 to February 2020. Frasers Group had received access to [✂] of these products by the end of February 2020.

8.358 For the [✂] footwear products/franchises highlighted by the Parties in their response to the Provisional Findings, [✂] of them are Nike or adidas franchises. We set out in Table 8.9 the average monthly volumes of these franchises supplied to Frasers Group and each of the Parties.

Table 8.9: Supply of Nike and adidas footwear products to retailers

Footwear product	First month supplied			Average monthly volume (2019)		
	FG	JD	FA	FG	JD	FA

Source: CMA analysis of Nike and adidas data. Abbreviations used FG = Frasers Group, JD = JD Sports, FA = Footasylum

Notes: For [✂] the model included is '[✂]', this was only present in the data for [✂] and hence only [✂] was included. The product was first supplied to all retailers [✂]. As volumes are only known for the [✂], these were divided by six to estimate average monthly volumes.

For [✂] products, the volumes represent revenue data based on invoices and credit notes raised by [✂] to these retailers during this time period, i.e. for goods shipped, returned or other credit notes raised during these months. Separately, [✂] submitted that Fraser Groups's order volumes [✂] had increased significantly; [✂]. Order volumes include orders placed for delivery in later months. We note that [✂].

8.359 We also analysed data on retail sales received from Frasers Group. Specifically, we requested data from Frasers Group on all products that had featured in the Parties' monthly top 10 best-selling product lists from January 2019 to February 2020 (not limited to just Nike and adidas products), of which there were [✂] products.[473] We found that Frasers Group had had access to [✂] of the [✂]footwear products.[474,475] Further, we did not find evidence of a significant change in the volumes of these products in aggregate, from September 2019 to February 2020. As shown in Figure 8.1, [✂], but not clear evidence of a sustained upward trend.

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[473] In addition to the [✂] products mentioned in paragraph 8.356 and the [✂] products mentioned in paragraph 8.357, we requested sales data from Frasers Group on [✂] products not manufactured by Nike or adidas – [✂].
[474] [✂].
[475] [✂] of the [✂] footwear models, [✂] are not sold in any [✂], [✂] are not sold in any [✂], [✂] has only been sold after being sourced from a third party and [✂] are sold in [✂] in only extremely limited quantities and restricted to [✂], and for [✂] of these [✂ has now withdrawn supply to [✂] none of the [✂] products have sold more than [✂] pairs per month on average between [✂].

Figure 8.1: Frasers Group monthly aggregate sales of selected footwear products (units)

[✂]

Source: CMA analysis of data received from Frasers Group.

Note: products included are [✂].

8.360 Looking at [✂] sales of the individual franchises of branded products [✂],[476] some products appeared to be on an upward trend (although we note with [✂] data points we would place limited weight on any trend) during the period September 2019 to February 2020, [✂]. However, other products, [✂], appeared to be on a downward trend in terms of sales. This evidence therefore shows mixed success in terms of sales of branded higher-tier lifestyle products.

8.361 Finally, we note [✂]. This is consistent with submissions from [✂] which said '[✂]'. We note therefore that where Frasers Group has received access to higher-tier sports-inspired casual products, the impact of this enhanced product access may arise across both its online and wider store estate and not just at elevated stores. Therefore, the impact of changes in product access might arise across more of Sports Direct's offering than just its current and planned elevated stores (see Table 8.8).

8.362 We also note that Frasers Group's USC fascia, which is included in its elevation strategy, with elevated stores combining the Sports Direct and USC fascia, currently has no access to Nike footwear products.[477] Nike submitted that it was [✂]. USC has a lifestyle offering which includes footwear and therefore the absence of Nike products limits its ability to compete with the Parties. We note that USC has access to some adidas products (but not to adidas Originals).[478]

8.363 Overall, we found evidence of Frasers Group accessing some branded higher-tier sports-inspired products that are best-sellers for the Parties. However, we have not found clear evidence of an upward trend in Frasers Group receiving and selling these products and the latest evidence suggests that its volumes of these products remains low.

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[476] We note that retail sales of products is not an equivalent metric to product access. However, given we are here considering products that are best-sellers for the Parties, we consider it unlikely that Frasers Groups' access to volumes of these products is materially higher than its sales of these products.
[477] Nike submitted that it does not supply any (footwear or apparel) products to USC as USC [✂].
[478] [✂]. We note that this was prior to the Frasers Group elevation strategy. Nike submitted that [✂].

- *Summary of findings on product access*

8.364 Overall, there is some evidence of [✂] granting Frasers Group access to some higher-tier products stocked by the Parties, and some evidence of these being sold across its sales channels, but the volumes of these are currently low in comparison to those sold by the Parties (individually and jointly). While [✂] in particular seems supportive of Frasers Group's elevation strategy, its plans still appear to limit the branded higher-tier lifestyle products available to Frasers Group (in-line with [✂] segmentation policies). There is predicted future growth in volumes, but the evidence does not support a finding that volumes will materially increase to a level similar to that of either of the Parties in the foreseeable future. For [✂], the changes in product access relate primarily to sporting goods and the evidence suggests (8.350) that [✂] does not intend to change Fraser Group's access to products to be more aligned with the Parties' in the foreseeable future.

8.365 Fraser Group's USC fascia currently has no access to Nike footwear products and in our view the evidence suggests (paragraph 8.362) this is unlikely to change in the foreseeable future, though it does have access to some adidas products (but not adidas Originals) and other suppliers' products.

The Parties' consideration of Frasers Group's elevation strategy

8.366 To inform our assessment, we also asked JD Sports and Footasylum to provide any internal documents, including board papers, strategy documents or email correspondence between their personnel over the last three years that refer to, or discuss:[479,480]

(a) response to new market entry or expansion events in the relevant markets (including of Frasers Group);

(b) the perceived level of threat of potential entry and/or expansion; and

(c) new entry from an international retailer in the relevant markets.

8.367 Footasylum submitted 19 documents in response to our request. [✂].

8.368 Within these documents were three store trade packs where competitor activity is discussed [✂].These trade packs were produced in June/July 2019, after the Merger and during the course of the CMA's phase 1 Merger inquiry, and we are therefore mindful that it may not be appropriate to consider them as being produced during the ordinary course of business without any

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[479] [✂]
[480] [✂]

influence from the Merger. Nevertheless, they are relatively recent documents which may reflect up-to-date thinking of the business. Annexes [✂] of these documents note the [✂]. Two of the trade packs note that [✂].

8.369 JD Sports submitted [✂]. Of these documents, only [✂] were dated prior to 2018. The lack of documents prior to 2018 could be due to less elevation activity by Sports Direct. For the documents dated 2018 or later, we note that the content and focus of the more recent documents could be influenced by the CMA's Merger investigation. Nevertheless, they are relatively recent documents which may reflect up-to-date thinking of the business. The majority of the submitted documents relate to the routine monitoring of competitor behaviour in terms of [✂].

8.370 In an email from 2017, JD Sports discussed its [✂]. Peter Cowgill, Executive Chairman of JD Sports, notes that [✂].[481] The Group Property Director concludes by stating that '[✂].'[482]

8.371 One of the internal documents is an email exchange in August 2018 between JD Sports staff regarding the opening of an elevated Sports Direct store in [✂]. The newly opened elevated Sports Direct store in question is described as a '[✂]'and it recommends [✂]. This suggests that JD Sports was worried about the potential growing threat from Sports Direct due to its elevation strategy.

8.372 An internal JD Sports email chain from July 2019 discusses the impact of elevated Sports Direct stores on JD Sports stores. It identifies the following issues as being relevant:

(a) [✂];

(b) [✂];

(c) [✂]; and

(d) [✂].

8.373 The same email goes on to state that [✂].This supports the notion that even if Sports Direct were to elevate its store proposition successfully and get access

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[481] The Parties submitted that this statement was not supported by recent evidence which showed that Frasers Group was rolling out its new elevated stores in prime city-centre locations which were in close proximity to the Parties' stores. The Parties, Response to Provisional Findings, paragraph 227(d). We recognise that the email cited here is from 2017 and captures the Parties' view at that time. We put limited weight on it given its timeframe. We recognise that new elevated stores are in a range of locations and capture the effect of all of these on the Parties' stores in our analysis of the impact of elevation in later in this section, see paragraphs 8.376-8.389 .

[482] We note that JD Sports submitted that [✂] Sports Direct is focussing its strategy on opening new and elevated stores in prime city-centre locations in direct proximity to JD Sports' stores.

to more similar products to JD Sports, it would still take time for perceptions of Sports Direct to change and for it to earn recognition as a more premium retailer among consumers, comparable to the Parties. This is supported by our store exit survey, which found that the Parties' customers were most likely to have visited the other Party's store (39% of JD Sports footwear customers had looked in Footasylum stores and 79% of Footasylum footwear customers had looked in a JD Sports store), before going to a JD Sports or Footasylum store where they made a purchase. A smaller proportion (19% for JD Sports customers and 9% for Footasylum customers) had visited a Sports Direct store beforehand.[483,484]

8.374 An email in December 2018 from a third party analyst, [✂], to JD Sports recaps an 'analysts meeting' attended by [✂], noting that at the meeting [✂].

8.375 The Parties submitted that relying on one email and one-off negative events to extrapolate for the future of the elevation strategy was inconsistent with our approach to Footasylum's future prospects.[485] The Parties submitted that it was unclear why similar weight was not given to positive prospective forecasts regarding Frasers Group's elevation strategy in the Provisional Findings as was given to such evidence in the analysis of Footasylum's future prospects. We consider that Frasers Groups' actual plans for elevation are the most reliable source for evaluating the extent of future elevation (see Table 8.8). However, we recognise that exogenous factors, such as COVID-19, may occur, meaning that [✂] may not necessarily be realised in the future, in the event of unfavourable trading conditions. We therefore consider that while [✂] remain the most likely scenario, there is some uncertainty around them.

The impact of elevation on the Parties

8.376 The Parties submitted that the opening of an elevated Frasers Group store typically had a significant and negative effect on nearby JD Sports and Footasylum store revenues.

8.377 They submitted evidence from 13 JD Sports stores and three Footasylum stores located near elevated Sports Direct stores, which compared the performance of these stores in the period after the elevation to the equivalent period one year ago (and before the elevation) and relative to all other of the respective Parties' stores. This is shown in Table 8.10 and Table 8.11.

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[483] For comparison, 18% of JD Sports customers had looked in a Foot Locker store and 18% of Footasylum customers had looked in a Foot Locker store.
[484] DJS Research, Exit survey for retail customers for a merger inquiry: JD Sports and Footasylum, January 2020.
[485] The Parties, Response to Provisional Findings, paragraph 192.

Table 8.10: The Parties' analysis of the impact of the opening of an elevated Sports Direct store on JD Sports store revenue

Store Name	Elevation date	Weeks Post	Var (Store LFL vs. Company)
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]

Table 8.11: The Parties' analysis of the impact of the opening of an elevated Sports Direct store on Footasylum store revenue

Store Name	Elevation date	Weeks Post	Var (Store LFL vs. Company)
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]

8.378 We reviewed the evidence provided by the Parties.

8.379 For JD Sports stores, [✂]of the stores in the analysis submitted by the Parties had fewer than 26 weeks of post-elevation revenue, in isolation, this is unlikely to be a sufficiently long period to make a judgement on the impact of elevation for the store in question. Of the [✂] with more than 26 weeks of post-elevation revenue data, there is significant variation in the magnitude of the estimated effect of elevation. While there is variation in the estimated impact, the performance of [✂] appears to have been adversely affected by the elevation of the local Sports Direct store.

8.380 For Footasylum stores, there were [✂] that were affected by the elevation of a local Sports Direct store. [✂] had only two weeks of post-elevation data and thus a robust estimate of the impact of elevation cannot be obtained [✂]. For the [✂], the impact is estimated to be negative, and the magnitude is large. The analysis suggests that the elevation of Sports Direct may have had an impact on the performance of the studied Footasylum stores.

8.381 We agree with the Parties that examining the impact of elevated stores on the Parties' store revenues is relevant for investigating whether elevation might change the degree of constraint Sports Direct poses on the Parties. However, examining individual stores, as the Parties have done and as we have done in paragraphs 8.379-8.380 and 8.383-8.389, does not allow for estimation of a robust average effect.

8.382 Ideally, we consider it would be appropriate to investigate the impact of elevation via the same entry/exit approach we have used when investigating current constraints (see section on entry-exit analysis, paragraphs 8.246-8.277). Indeed, that analysis included within the assessment of Sports Direct as a whole, any existing elevated stores. Such an approach allows us to control for a wider range of factors (eg entry of other competitors). However, we did not consider that there were a sufficient number of elevation events to robustly determine the impact of elevation itself via that analysis.[486]

8.383 We therefore explored the store-level estimates provided by the Parties in more detail through a closer examination of the evolution of those stores revenues. In Appendix J, we set out charts showing the weekly store revenue for each JD Sports and Footasylum store respectively for which a Sports Direct elevation event occurred within 20-minutes drivetime. The graphs identify elevated stores on the basis of stores identified as [✂] 'new generation of stores' [✂]. The figures are only provided when there are at least 26 weeks of pre- and post-elevation data in the sample under consideration. The use of a 26-week window on either side gives us six months of data on either side (ie one year in total) which should be a sufficiently long period to uncover the impact of elevated store openings.

8.384 This graphical analysis is limited in scope since it does not give us an estimate of the total average effect. It does illustrate whether there are individual instances of Sports Direct elevation which impact the revenue of JD Sports and Footasylum stores. We agree with the Parties' submission that this type of analysis does not control for other confounding factors.[487] The Parties

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[486] We also considered using a difference-in-difference model across all stores affected by elevation in order to estimate an average effect, but like the entry/exit analysis, did not consider that there were sufficient observations for these results to be robust.

[487] The Parties submitted that JD Sports' Competitor Impact analysis attempts to control for local/idiosyncratic factors affecting JD Sports' store revenues. They also identified some specific factors potentially distorting any conclusions the CMA might draw from its graphical analysis if not accounted for eg the presence of a toll-bridge between the [✂] and the nearby Sports Direct. We acknowledge that our graphical analysis does not control for these factors but consider that any such factors should be identified in a systematic way and as such without consistent information we have not adjusted our analysis, but are cognisant of the possibility of other factors in our interpretation.

made a number of other submissions related to this analysis, details of which can be found in Appendix J.

8.385 Table 1 in Appendix J summarises the store-by-store analysis for JD Sports. There were [✂] JD Sports stores affected by a Sports Direct elevation event with sufficient data before and after the elevation event to consider whether the evolution of revenue was affected by elevation.

8.386 In [✂] of these cases[488] the proportionate difference in revenue to the average of other unaffected JD Sports stores is lower after the elevation of Sports Direct when compared to the period before. In the remaining [✂] cases, the difference is either positive or there is no discernible difference.

8.387 Table 2 in Appendix J summarises the store-by-store analysis for Footasylum. There were [✂] Footasylum stores affected by a Sports Direct elevation event with sufficient data before and after the elevation event to consider whether the evolution of revenue was affected by elevation.[489]

8.388 In [✂] the revenue is lower after the elevation of Sports Direct compared to the period before. [✂] of the stores considered underwent a negative step-change in revenue after the opening of the elevated Sports Direct. The [✂] that is considered undergoes a more gradual decline in revenue. The [✂] stores which undergo a step-change in revenue are located [✂] minutes from the elevated Sports Direct respectively, the [✂] that does not [✂] minutes away.

8.389 Overall the graphical analysis (see Appendix J) suggests that in the majority of cases Sports Direct elevation has a negative impact on the performance of the Parties' stores. However, for a significant minority of the Parties' stores there is no clear negative impact. The Parties submitted that these cases are either more than 10 minutes away from the nearest elevated Sports Direct/USC store or explained by confounding issues not controlled for in the CMA's analysis (in addition to a number of other methodological issues). We recognise that the closeness of these stores to the elevated Sports Direct/USC store appears to be an important factor in this. There is evidence that when the elevated store is located within 10 minutes of the Parties' store there is a negative impact. This suggests that as the number of elevated Sports Direct/USC stores increases those that are located close to existing JD Sports stores are more likely to have an effect. For Footasylum there are only [✂] stores for which we could undertake the graphical analysis and therefore

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[488] [✂].
[489] This table was constructed [✂] and does not cover the same [✂] stores and data used in the Parties' impact analysis.

there is more uncertainty in the impact of Sports Direct elevation on Footasylum. Therefore, while there is some evidence that Sports Direct elevation has adversely affected some JD Sports' stores, this impact does not seem to be consistent across all elevated stores.

Conclusion on changes in Frasers Group's positioning

8.390 We considered evidence submitted to us [✂] on the success of its elevation strategy, particularly in relation to its Sports Direct fascia and access to branded products from the key suppliers, Nike and adidas, both looking at its internal documents and data on sales. We also considered internal documents and data from the Parties considering Frasers Group's (particularly in relation to Sports Direct) elevation and its impact on them. Additionally, we examined data from the key suppliers to verify the extent of Sports Direct's product access and its similarity to that of the Parties.

8.391 The evidence shows that elevation on the part of Sports Direct is [✂], we consider that its future commitment to elevation is subject to some risks, eg product lead-time, suppliers' support and the impact of COVID-19, albeit uncertain. [✂]. We also consider that it may take time for consumers to change their view of the Sports Direct fascia and accordingly update their search habits.

8.392 As discussed in paragraphs 8.34-8.37, we recognise that suppliers can restrict retailers' access to products through their segmentation policies and that these are strategic decisions, which suppliers are in principle able to change. We have seen some evidence that the key suppliers are improving Sports Direct's product access and that it is getting increasing volumes of products similar or the same as those which are best-sellers of the Parties. However, we have not seen evidence to suggest that the key suppliers are likely to significantly change their approach to the segmentation of Sports Direct and the Parties and in our view are likely to continue to place them in different segments. As such we consider that Sports Direct will continue to be able to access only some of the products available to the Parties in the foreseeable future. While the volumes of the products that it can access may increase, we did not find it was likely it would get access to sufficient volumes of the most desirable lifestyle segment products to significantly change the strength of its constraint on the Parties, in the foreseeable future.

8.393 Further, we consider that the evidence on the overall impact of Frasers Group's elevation strategy on the Parties is mixed. Overall, there appears to be a negative impact on JD Sports stores in [✂] of the relevant cases but there is no clear impact in the remainder of cases. For Footasylum, we

consider that the number of affected stores is too small to draw robust conclusions.

8.394 Based on the evidence from JD Sports' internal documents, we consider that JD Sports is unsure of the likely success of Frasers Group's elevation strategy but considers that if it was to be successful it would increase the strength of Sports Direct as a competitor.

8.395 Frasers Group is a significant and successful player in the retail sector and the effects of its elevation strategy in the context of this Merger investigation has required careful consideration. However, overall, on the basis of the evidence currently available, we cannot conclude with sufficient certainty that Frasers Group's elevation strategy will significantly change the strength of the competitive constraint on the Merged Entity from Sports Direct in the market for the retail supply of sports-inspired casual footwear in the foreseeable future.

DTC

8.396 As discussed in chapter 2, some suppliers (in particular Nike and adidas) offer their branded products to consumers through two channels – their wholesale offering to retailers and their own DTC retail offering.

8.397 Our analysis set out earlier in this chapter (including our review of internal documents, our surveys and our entry-exit analysis) accounted for the constraint that DTC currently has on the Parties in footwear.[490] However, we recognise that as the market develops, there is the potential for the competitive constraint exerted by the suppliers' DTC offering to increase.

8.398 The Parties submitted that 'the COVID-19 crisis will further strengthen the key brands such as Nike and adidas as they increasingly focus on their online offering and DTC strategies'.

8.399 Nike and adidas are the two most important suppliers in the sports-inspired casual footwear market and we therefore focussed our assessment of DTC growth on these suppliers.

Recent growth

8.400 Globally, the relative importance of DTC has increased at a significant rate in recent years; for example, Berenberg estimated that DTC sales from Nike

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[490] Although we note that the entry-exit analysis does not capture the role of online constraints.

(globally) grew from roughly 18% of its total revenues in the financial year 2012/13 to 30% in the financial year 2017/18.[491] However, in the UK, the relative importance of DTC [✂]. Nike DTC footwear sales grew [✂], the share of sales generated through its DTC channel [✂] between calendar year 2015 and 2018 to reach [✂]% of its total UK sales, see Table 8.12. Similarly, adidas's DTC sales in the UK grew from [✂]% of its overall business in the calendar year 2015 to [✂]% in 2018, see Table 8.13.[492]

Table 8.12: Nike's share of footwear revenues and annual growth rate by channel in the UK

	Share of revenues			Annual growth rate		
Calendar year	DTC in-store	DTC online	Wholesale	DTC in-store	DTC online	Wholesale
2015	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
2016	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
2017	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
2018	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]

Source: CMA analysis of Nike's data

Table 8.13: adidas's share of footwear revenues and annual growth rate by channel in the UK

	Share of revenues			Annual growth rate		
Calendar year	DTC in-store	DTC online	Wholesale	DTC in-store	DTC online	Wholesale
2015	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
2016	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
2017	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
2018	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]

Source: CMA analysis of adidas's data

8.401 We consider that the data shows that [✂] through which revenue is generated for both Nike and adidas. In support of this view, Nike told us that it:

> does not operate in isolation but works together with its retailers to continuously improve its offering to deliver a seamless brand and shopping experience throughout the market. It is therefore in Nike's express interest to have successful retailers, especially as they sell multiple brands and the vast majority of consumers will always compare offerings from different brands.

[491] Berenberg Sports Retail, Sports Retail: the game is changing report, 9 November 2018, Figure 14.
[492] CMA analysis of data provided by Nike and adidas.

Future growth

8.402 Both Nike and adidas have made public statements about their future strategy and desire to grow their DTC global offering, primarily online.[493,494] We asked about their future plans and for internal strategy documents in order to understand how their UK DTC sales are likely to evolve in the foreseeable future.

- *DTC growth forecasts*

8.403 Both Nike and adidas forecast that their UK DTC channel will increase in size.

8.404 Nike forecast that its UK DTC online sales will grow from £[✂] in the financial year 2019/20 to £[✂] in the financial year 2022/23, roughly a [✂] in size.[495]

8.405 Nike's UK in-store growth is set [✂].[496]

8.406 Regarding the impact of COVID-19, Nike submitted that it continues to track market conditions and anticipates that the currently developing situation connected with the spread and containment of COVID-19 may have an impact on UK sales, but it remains to be seen.

8.407 The Parties submitted that there had been recent changes in Nike's management, eg the appointment of a new President and CEO, new President of Consumer and Marketplace and new COO, and noted that all three of these appointees had been central to Nike's DTC strategy to date. The Parties submitted that these three appointments indicated a clear DTC focus in Nike's top leadership particularly as they replaced long term Nike veterans whose background had been in wholesaling rather than DTC. In particular the Parties pointed to the appointment of John Donahoe as new President and CEO which was 'widely seen as an acceleration of Nike's digital transformation given his technology background'.[497]

8.408 We asked Nike about the rationale for these personnel changes. Nike said [✂]. In terms of Nike's strategy, Nike said it was 'working on the basis of its Consumer Direct Offense and the company is focused on its strategic execution to deliver strong, sustainable growth over the long term. [✂].

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[493] Nike, NIKE, Inc. Announces New Consumer Direct Offense: A Faster Pipeline to Serve Consumers Personally, At Scale, 15 June 2017.
[494] [✂].
[495] Nike forecasts were provided in $, we converted to £ at 30 March 2020 spot rate of £1 = $1.24. We note that online DTC represents a constraint on the Parties' sales both in-store and online.
[496] We note that in-store DTC represents a constraint on the Parties' sales both in-store and online.
[497] The Parties, Response to Provisional Findings, Footnote 3.

8.409 We note that Nike's personnel changes relate to Nike's global business and are not specifically targeted at the UK. We also consider that given Nike's strategy [✂] and [✂], the personnel changes are not sufficient to materially change the constraint posed by Nike on the Parties.

8.410 adidas forecasts that its online DTC revenues for the UK and the Republic of Ireland combined for both of its adidas and Reebok brands will grow from £[✂]in 2019 to £[✂]2021[✂].[498]

8.411 adidas plans to [✂]. adidas forecasts to increase its in-store DTC revenues for the UK and Republic of Ireland combined, from £[✂] in 2019 to £[✂] in 2021.[499] adidas [✂] were still to be confirmed post COVID-19.

8.412 Regarding the impact of COVID-19 on its forecasts adidas said:

> the current disruption caused by the COVID-19 pandemic effectively renders the previously submitted short term forecasts for 2020 and 2021 obsolete. As many retailers close their bricks and mortar doors in the short term there will inevitably be a shift to more online consumption for both WHS partners and Brands D2C channels alike. In addition, we anticipate a significant overall contraction of demand in the short term.

8.413 [✂] the impact of COVID-19 may change the ratio of its DTC and wholesale sales as physical stores are closed for a proportion of the year.

8.414 While we acknowledge the significant uncertainty around any short term forecasts in light of COVID-19, we consider that these were the best forecasts available at the time of this report, although it is reasonable to consider that these may be upper bounds given the potential for demand to contract as a result of COVID-19, at least in the short term.

- *DTC to wholesale ratio forecasts*

8.415 While both Nike and adidas forecast that their UK DTC channel will grow over the next few years, as set out in Table 8.14 and Table 8.15, [✂].

8.416 Nike forecast that its share of wholesale revenue [✂] from [✂]% of total revenue (footwear and apparel) in the financial year 2019/20 to [✂]% in the financial year 2022/23.

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[498] adidas forecasts were provided in €, we converted to £ at 30 March 2020 spot rate of £1=€1.13. We note that online DTC represents a constraint on the Parties' sales both in-store and online.
[499] Forecasts for both adidas and Reebok. We note that online DTC represents a constraint on the Parties' sales both in-store and online.

8.417 adidas forecasts that its share of wholesale revenue will [✂] from [✂]% in 2019 to [✂]% in 2021.

Table 8.14: Nike's share of revenues by channel in the UK (footwear and apparel combined) – past data and Nike's own forecast

Financial year	DTC (online and in-store)	Wholesale
2015/16	[✂]	[✂]
2016/17	[✂]	[✂]
2017/18	[✂]	[✂]
2018/19	[✂]	[✂]
2019/20	[✂]	[✂]
2020/21	[✂]	[✂]
2021/22	[✂]	[✂]
2022/23	[✂]	[✂]

Table 8.15: adidas's share of revenues by channel in the UK (footwear and apparel combined) – past data and adidas's own forecast

Calendar year	DTC (online and in-store)	Wholesale
2015	[✂]	[✂]
2016	[✂]	[✂]
2017	[✂]	[✂]
2018	[✂]	[✂]
2019	[✂]	[✂]
2020	[✂]	[✂]
2021	[✂]	[✂]

8.418 The Parties submitted that the CMA's view that the DTC-wholesale ratio will remain constant going forward is: (i) inconsistent with the evidence submitted by the Parties during the course of the Merger Inquiry on DTC growth and progressive disintermediation of the wholesale channel; and (ii) is an incorrect reading of the facts provided by suppliers of branded products in relation to their predicted DTC growth.[500]

8.419 We note that [✂] our view that DTC will gradually become more important relative to wholesale but will not significantly change in its relative importance in the foreseeable future.

8.420 The Parties also submitted that the CMA's Provisional Findings failed 'to consider the relevant issue of how DTC will grow relative to Footasylum.'[501] We note that the growth of DTC does not in itself make suppliers with DTC channels become closer competitors to the Parties. DTC is already present in the market and the customers of the Parties may value the differentiated multi-brand offers of the Parties.[502] As such comparing the size of two

[500] The Parties, Response to Provisional Findings, paragraph 236.
[501] The Parties, Response to Provisional Findings, paragraph 238.
[502] For example, our store exit survey highlighted how product range is important to the Parties' customers. When asked about the main reason that led them to buy at Footasylum, 34% of in-store footwear customers gave reasons associated with a good product range (eg good range of branded products, wide range of products,

retailers provides limited information about the extent of their competitive constraint (see also the section on market shares, paragraphs 8.120-8.132).

8.421 The Parties also said that in light of the forecast DTC growth the diversion ratios from the Parties to Nike's and adidas's DTC channels could be expected to grow in future relative to the diversion ratios between the Parties.[503] We accept that this is possible, but note that, as explored below, DTC growth may derive fully or partly from overall market growth. As such, the extent to which it will necessarily involve substitution from the Parties is not clear. Moreover, several other factors may influence (both increase and decrease) the diversion ratios from the Parties to the key suppliers' DTC channels. For example, future consumer preferences will influence how mono-brand retailers like Nike or adidas will be perceived as a substitute to multi-brand retailers like the Parties.

- *Assessing the DTC to wholesale ratio forecasts*

8.422 The Parties submitted that the CMA's view in its Provisional Findings that the DTC-wholesale ratio will remain constant going forward implies an implausibly large increase in the growth of wholesale revenues relative to current and historic growth.[504] We considered this submission, and note that:

(a) the forecasts do not assume an exactly constant DTC-wholesale ratio: [✂]. This is contrary to the Parties' submission that the CMA should have clarified with Nike and adidas [✂].We note that, [✂];

(b) the DTC growth referred to by the Parties was growth of DTC online, whereas [✂]; and

(c) the forecasts provided by Nike and adidas are subject to uncertainty. This is particularly true in light of the COVID-19 outbreak, and as reflected by statements from Nike and adidas, who we consider are in the best position to provide such forecasts. However, we note that while COVID-19 is having a significant impact there is considerable uncertainty around its impact in the medium to long term.

8.423 Nevertheless, we examined several scenarios to test whether the Parties' submission that a constant DTC-wholesale ratio combined with [✂] implies an implausibly large increase in the growth of wholesale revenues relative to

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products that other stores do not have). The percentage is even higher for JD Sports (42%). Good product range is mentioned by around two-thirds of respondents as the main reason why they had shopped at either JD Sports (63%) or Footasylum (64%) online. See paragraph 8.202 for more details.

[503] The Parties, Response to Provisional Findings, paragraph 239.

[504] The Parties, Response to Provisional Findings, paragraph 236.

current and historical growth. In this regard, the Parties submitted projections of JD Sports' revenues of Nike products under two scenarios:

(a) assuming a constant compound annual growth rate (CAGR) based on the historical CAGR between calendar years 2015 and 2018; and

(b) assuming that (i) Nike's own forecast for online DTC as described above,[505] (ii) Nike's DTC-wholesale ratio remains unchanged from calendar year 2018 onwards, and (iii) JD Sports' sales of Nike products grows in line with Nike wholesale growth.

8.424 The Parties submitted that the revenues in financial year 2022/23 forecast by the two scenarios suggests that 'a constant DTC-wholesale ratio implies implausible wholesale revenue growth.'

8.425 In addition to the scenarios submitted by the Parties, we also assessed a third scenario under which the share of DTC sales relative to total sales increases by [✂]% every year from 2019/20.[506] This scenario[✂].[507] Figure 8.2 shows JD Sports revenue from Nike products up to 2018/19 and the different projections implied by the scenarios described above.[508]

Figure 8.1: JD Sports sales of Nike products under different scenarios

[✂]

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

8.426 As noted above, we recognise that the forecasts provided by Nike and adidas (as with any forecast) are subject to uncertainty and might not fully reflect the development of the market in the foreseeable future. Notwithstanding these uncertainties, we consider that the scenarios described above show that a [✂].

- *Initiatives to achieve DTC growth*

8.427 In addition to assessing DTC forecasts by the key suppliers, we also asked Nike and adidas how they anticipate achieving their projected DTC growth. We asked this in order to assess whether there was evidence of a likely clear change in the key suppliers' retail offerings or overall strategy that could indicate a forthcoming change in the nature of the constraint posed by their

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[505] In our own version of this scenario, we assumed a [✂]% annual growth of in-store DTC.
[506] This implies a DTC-wholesale ratio increasing by roughly [✂]% a year.
[507] We considered a scenario which assumes (i) Nike's DTC-total revenue ratio to increase by [✂]% a year from financial year 2018/19 onwards, (ii) JD Sports' sales of Nike products grows in line with Nike wholesale growth, and (iii) Nike's own forecast for online DTC as described above. This scenario projects JD Sports revenues of Nike products to be £[✂] lower than the Parties' constant CAGR scenario.
[508] We replicated the Parties' scenarios directly using the data provided by the Parties and Nike.

DTC channels. We note that these views were submitted prior to the COVID-19 pandemic and therefore do not reflect the impact of this.

8.428 Referring to the growth of its online DTC sales, Nike stated:

> growth opportunities exist [✂].

8.429 adidas's [✂].

8.430 We also note that wider market developments may occur in the foreseeable future that could strengthen the key suppliers' ability to sell directly to consumers. For example, Instagram is developing Instagram Shopping and Instagram Checkout to give businesses a storefront for people to explore products and purchase within the app. We asked Instagram about its UK plans for Instagram Shopping and Instagram Checkout. [✂]. We note that, in addition to [✂].

Conclusion on DTC growth

8.431 Nike's and adidas's DTC offer is currently present in both the in-store and online segments of the market. We consider that it is likely that their DTC offer will continue to grow strongly in the UK, predominantly online. In particular, there is evidence, as set out in Table 8.14 and Table 8.15, which indicates that such growth is likely reflective of general growth in the market and that the ratio of DTC sales to wholesale sales will not change significantly in the foreseeable future. We consider that the initiatives which they are undertaking in order to achieve their projected DTC growth do not appear to amount to a substantial repositioning of their offering.

8.432 On that basis, our view is that over time the two key suppliers' DTC offer may become more of a constraint. However, the evidence does not show with sufficient certainty that Nike's and adidas's DTC offer across their channels will become a significantly stronger constraint on the Merged Entity in the market for the retail supply of sports-inspired casual footwear in the foreseeable future.

Foot Locker

8.433 The Parties submitted that the CMA had not considered the Parties' internal documents regarding Foot Locker's expansion plans. The Parties said the CMA's Provisional Findings did not take account of the fact that Foot Locker's new store openings were typically large stores which stocked both apparel and footwear, with this being true even for those stores which it did not categorise as 'power stores'. The Parties also said that Foot Locker planned

to open 'Community Stores' in 'lower grade locations' as reflected in JD Sports' internal documents.[509]

8.434 We recognise that JD Sports' internal documents consider information about future Foot Locker store openings and store types. We consider this is consistent with JD Sports monitoring Foot Locker (see paragraph 8.189(b)) and considering it a close competitor (see paragraph 8.297). However, as set out in paragraph 8.174, the Parties' internal documents provide informative evidence of their views at a point in time. Therefore, to assess the prospect of a change in the constraint from Foot Locker in the foreseeable future we asked Foot Locker directly about its recent store openings and its future store opening plans (including their type).

8.435 Foot Locker has recently begun to open new 'power stores', which are stores that are significantly larger than its traditional stores. It has two power stores in the UK, in London and Liverpool, both of which were opened before 2019. Foot Locker submitted that 'the increased space in Power Stores is to allow for events such as room for a DJ, video consoles and other events such as temporary barber shops'.

8.436 [✂] its most recent openings and [✂]. Foot Locker's number of stores in the UK was stable in 2019 with six store openings and six store closures. [✂] of the stores which Foot Locker plans to open were identified as [✂] and Foot Locker submitted that it expected the proportions of footwear, apparel and other product types (eg accessories) [✂].We also did not find evidence that recently opened or planned future stores are significantly larger than its current stores. Foot Locker submitted that its average core store size is [✂]. Four of the five stores opened in 2019 were within 10sqm of the average [✂] store size [✂].

8.437 As set out in paragraph 8.297, we found that Foot Locker is currently a strong constraint on the Parties in the sports-inspired casual footwear market. We recognise that this constraint could be strengthened further if more larger stores were opened in future. However, we consider that the evidence does not show that it will become a significantly stronger constraint on the Merged Entity in the market for the retail supply of sports-inspired casual footwear in the foreseeable future.

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[509] The Parties, Response to Provisional Findings, paragraph 242.

Amazon

8.438 JD Sports submitted that Amazon [✂]. JD Sports submitted that this evidence suggested that Amazon [✂].[510]

8.439 We consider that Amazon is already present within the sports-inspired footwear market but has not been found to be a strong constraint on the Parties currently.

8.440 In order to understand whether the constraint it poses may change in the foreseeable future, we asked Amazon about its plans in the UK sports-inspired casual footwear market:

(a) Amazon said that it was constantly working to expand its product offerings, including its selection of sports-inspired casual footwear in the UK, and improving the experiences of selling partners and customers on Amazon's stores;

(b) In support of that answer, Amazon provided internal documents which demonstrate that [✂]. It confirmed that the Amazon presentation [✂] was used to pitch to [✂];

(c) Amazon delivered the presentation to [✂]. It did not intend to pitch to [✂]; and

(d) Nike and adidas both confirmed that they do not currently have formal supply agreements with Amazon in the UK, although [✂]. Products currently on sale at Amazon have been sourced through third parties.

8.441 We consider that, since Amazon does not source products directly from Nike or adidas in the UK, and in our view there is uncertainty about whether it will in the future, the evidence does not show that Amazon will become a significantly stronger constraint on the Merged Entity in the foreseeable future.

Other retailers

8.442 Some multi-brand retailers such as ASOS and Next have recently started selling sports-inspired products. Therefore, it is possible that they may grow, though we cannot say how significant such growth might be. We recognise that in keeping with normal commercial pressures, some retailers are likely to be successful and others less successful. However, we have not seen

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[510] In support of this, the Parties submitted that 'Amazon released financial results for the first quarter of this year – its sales had increased by 26% compared to the same period last year and Amazon recorded $74.5bn of revenue (equivalent to $33m per hour)'. We note that these results are global and across the Amazon business, rather than being specific to the relevant markets.

evidence of [✂] from these retailers such that any of them would become a significantly stronger constraint on the Merged Entity in the market for the retail supply of sports-inspired casual footwear in the foreseeable future.

8.443 Overall, it is our view that while there is some scope for the strength of the competitive constraints on the Parties in the market for the supply of sports-inspired casual footwear from other retailers to increase over time, the evidence does not show with sufficient certainty that this would result in a significantly stronger constraint on the Merged Entity in the foreseeable future.

Impact of COVID-19

8.444 We note the Parties' submissions that COVID-19 and social distancing measures will result in long term structural market changes as retailers and particularly the key suppliers through their DTC offerings, shift to online, and that '[i]t is not clear how long it will take for UK retail markets, especially the bricks-and-mortar channel, to reopen following Covid-19, and what the recovery will look like'.[511] The Parties further submitted that 'in this environment, the most robust conclusion is likely to be that prominent among key survivors will be the brands, Nike and adidas, that control the product allocation and themselves are skewed towards online sales in DTC.'[512]

8.445 We agree that it is uncertain what the market will look like in the medium to long term. Therefore, while a greater shift to online could be a potential outcome, we cannot determine with sufficient certainty whether this is likely to be the enduring structure, once stores have reopened and other restrictions

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[511] The Parties submitted that '… it is reasonable to assume that consumer shopping habits, even when stores reopen, will have been affected by the pandemic and accelerate the relative growth of online at the expense of store sales'. The Parties also submitted that a 22% increase in Amazon's first quarter sales in 2020 from the same period in 2019 was evidence of this. The Parties reiterated these and similar points in their email submission on 1 May 2020 which referred to Amazon's financial results for Q1 2020 released on 30 April, submitted that 'During its results Amazon noted that it intended to spend $4bn or more on coronavirus-related expenses (equivalent to their entire profit for the next quarter). This demonstrates the challenges that all retailers will face to keep their employees and customers safe while following the Government's guidance on appropriate social distancing. It is clear that Covid-19 and the subsequent social distancing measures will result in long-term and/or structural changes to the UK retail market.' The Parties also submitted comments by the Chief Executive of the British Independent Retailers Association to the Business, Energy and Industry Strategy Committee 'that it is "the worst time ever for retail" and that that one in five retailers do not intend to reopen after the lockdown restrictions are relaxed. He added that for retailers that do choose to reopen there will be a huge caveat about the level of trade they will be able to achieve and it may be more expensive to re-open and apply appropriate social distancing measures than to remain closed. Finally, he noted that "what implementing social distancing will mean is that normal capacity to serve customers will be restricted and, certainly from a public perspective, I have no doubt that people will be very cautious about how they shop, for safety reasons and because of pressure on money in their pockets."'

[512] In support of this, the Parties submitted in their most recent financial results Nike reported that its digital sales had grown by 36% compared to the prior year and that digital remains its fastest growing distribution channel. The Parties submitted that adidas in its most recent financial results noted that e-commerce sales were up 55% in March compared to last year, and that adidas is targeting more than €4bn of e-commerce sales in FY20 representing growth of over 50%. The CMA notes that these figures reflect Nike's and adidas's global growth rather than being UK-focussed.

have been lifted. We also consider that the figures the Parties have submitted regarding Nike's and adidas's projected online sales growth are [✂] and therefore do not necessarily reflect a structural market change as the Parties submitted.

8.446 We also note that, in principle should there be a greater shift to online more permanently, while the constraint from some retailers might be strengthened as a result, it is possible that the strength of other retailers who currently exert a stronger in-store constraint, may be weakened. Therefore, we do not consider that we can be sufficiently certain that any such market changes, were they to arise, would increase materially the aggregate competitive constraints posed by retailers (including suppliers through their DTC offerings) in the round.

Conclusion on market developments

8.447 On balance, we have concluded that the Sports Direct fascia of Frasers Group exerts some constraint currently in footwear, and may, through its elevated stores, become a more direct competitor to the Parties to some extent within the next two years. Some of its elevated stores appear to affect the revenues of the Parties' stores adversely and there is evidence of it receiving some access to the footwear products that are among the Parties' best-selling footwear products, although its volumes of these are substantially smaller. However, its future commitment to elevation is subject to some risks and it may take time for consumers to change their view of the Sports Direct fascia. Therefore, we consider that, on the basis of the evidence currently available, we cannot conclude with sufficient certainty that it will become a significantly stronger constraint on the Merged Entity in the market for the retail supply of sports-inspired casual footwear in the foreseeable future.

8.448 The evidence shows that Nike and adidas are likely to continue to grow their DTC sales, primarily online. In particular, there is evidence which indicates that such growth is likely reflective of general growth in the market and that the ratio of DTC sales to wholesale sales will not change significantly in the foreseeable future. On that basis, our view is that over time Nike and adidas' DTC offer may become more of a constraint. However, the evidence does not show with sufficient certainty that each of Nike's and adidas's DTC offering across their channels will become a significantly stronger constraint on the Merged Entity in the market for the retail supply of sports-inspired casual footwear in the foreseeable future.

8.449 For Foot Locker, while we recognise that it is already a strong constraint on the Parties in the sports-inspired casual footwear market, the evidence does not show that it will become a significantly stronger constraint on the Merged

Entity in the market for the retail supply of sports-inspired casual footwear in the foreseeable future.

8.450 For Amazon, its lack of direct access to products from the key suppliers means that the evidence does not show that the constraint from Amazon will become significantly stronger in the foreseeable future.

8.451 We also did not find clear evidence of any particular other retailer repositioning or expanding its offering in a way which would materially change its constraint.

8.452 Having found some evidence of changes across several retailers' offerings, we also considered whether the aggregate effect of these market developments might be such as to constitute a material change in the market constraints on the Parties. Overall and on balance, the evidence does not show with sufficient certainty that the aggregate effect of the market developments examined above would amount to a materially stronger competitive constraint in the market for the supply of sports-inspired casual footwear on the Merged Entity in the foreseeable future.

8.453 We also considered the impact of COVID-19 on the likelihood of these market developments arising and materially increasing the constraints on the Merged Entity.

8.454 As noted in the introduction to this chapter, we recognise that COVID-19 is having a significant impact on retailers in this market and on the economy. There is considerable uncertainty about the extent and duration of the impact of COVID-19. It is difficult to predict the effect on different retailers and how each will respond to the circumstances, and therefore how it might impact market developments in the foreseeable future. However, we do not envisage that COVID-19 would increase the likelihood of success of any retailer's future plans, which involve substantial investment. This includes the market developments examined in this section. Therefore, we do not consider that it would reduce materially the extent to which the Parties are close competitors or increase materially the constraints on the Merged Entity so as to reduce the likelihood of an SLC.

8.455 We also considered the Parties' submissions that there will be a greater shift to online in the market as a result of COVID-19 (see paragraphs 8.444 - 8.446). While we recognise that this could be a potential outcome, we cannot determine with sufficient certainty whether this is likely to be the enduring structure. We also note that even if it were the case, the impact on retailers' constraint may be mixed ie some retailers' constraint could be strengthened and the constraint from other retailers, weakened. Therefore, we do not

consider that we can be sufficiently certain that any such market changes, were they to arise, would increase materially the aggregate competitive constraints posed by retailers in the round.

8.456 Overall and on balance, we found that, taken together, the evidence does not show with sufficient certainty that the aggregate effect of the market developments examined above, would amount to a materially stronger competitive constraint on the Merged Entity in the market for the supply of sports-inspired casual footwear in the foreseeable future.

Conclusion

8.457 In our competitive assessment, we considered the degree of competition between the Parties and other retailers, both now and in the foreseeable future, as well as the constraints from suppliers. We looked at a range of evidence, which we then considered in the round to reach our conclusion as to whether the Merger has resulted or may be expected to result in an SLC in the market for the retail supply of sports-inspired casual footwear (in-store and online) in the UK.

8.458 We assessed the impact of suppliers on retail competition and the ways in which retailers in this market compete. We found that suppliers play an important role in the sports-inspired casual footwear market, particularly Nike and adidas. We found that there are various ways in which suppliers control and influence some aspects of retail competition. Suppliers exert some influence over retailers' pricing and can control retailers' range as they determine the products and volumes that retailers can access, which can also be used as a mechanism to exert influence over other aspects. Suppliers also exert some influence over quality and service aspects of retailers' offerings to some extent by including minimum contractual standards on quality and service as a precondition of product access. Suppliers also undertake engagement, monitoring, benchmarking and provide feedback on some aspects of retailers' PQRS.

8.459 We found that on balance, while suppliers exert some constraint on retailers' PQRS, there remains significant scope for retail competition in this market which could be lost as a result of the Merger. In particular we found that:

(a) retailers compete head-to-head, on various different PQRS aspects in a bid to attract consumers and generate sales (eg through discounting, delivery charges and times, customer service and other innovations); and

(b) suppliers can leverage their influence (eg through benchmarking of retailers) to encourage retailers to compete above and beyond their

minimum standards, and we note that the Merger reduces this ability to benchmark.

8.460 We also found that the constraint suppliers exert on retailers has limitations. In particular we found that:

(a) suppliers do not monitor all aspects of retailers' offerings;

(b) there are limits to suppliers' ability to detect a deterioration of retailers' offerings, for example less and slower rates of innovation or other improvements; and

(c) suppliers have no incentive to discipline retailers where any deterioration in a retailer's offering does not harm supplier interests or where such deterioration may benefit suppliers eg less discounting.

8.461 Overall, we found that, taking the evidence in the round and on balance, suppliers would not act as a sufficient constraint on the Merged Entity's ability and/or incentive to deteriorate its PQRS offering post-Merger.

8.462 We considered the competitive constraints between the Parties and other retailers. With respect to market shares, we found that the Parties are both large national multi-brand retailers of sports-inspired casual footwear. JD Sports is the largest retailer in this market, Footasylum is smaller and a small number of other retailers have a significant presence, including in particular Sports Direct and Nike. However, we consider that market shares only give a basic indication of the Parties' presence in terms of the market structure and do not fully capture the closeness of competition between retailers in differentiated markets, such as this one. Further there were also limitations in the data used to calculate the market shares, as evidenced by the wide variation between some of the different share estimates, which means there are significant uncertainties around these calculations.

8.463 Our assessment of the Parties' offerings showed that the Parties have very similar footwear offerings. Foot Locker has a similar offering to the Parties. Nike, adidas, ASOS, Office and Schuh also have some similarities to the Parties although to a lesser extent than the Parties to each other. Other retailers have less similar offerings.

8.464 We asked third parties to score retailers in the market in terms of closeness of competition between the Parties and to other retailers. The Parties scored highly, as did Foot Locker (Nike and adidas also scored highly but were mentioned by far fewer third parties). On that basis, we consider that third parties view the Parties as competing closely against each other with few other close constraints, except for Foot Locker.

8.465 We examined the Parties' internal documents, considering in particular the extent to which they monitor each other and other retailers, which is evidence supportive of a finding of closeness of competition. We found that:

(a) Footasylum's internal documents demonstrate that JD Sports is the competitor most closely monitored by Footasylum and that it also closely monitors Foot Locker (though not to the same extent as JD Sports); and

(b) JD Sports' internal documents demonstrate that Footasylum is one of the competitors most closely monitored by JD Sports, alongside Foot Locker, ASOS, Nike and adidas.

8.466 Their internal documents show a low degree of monitoring by the Parties of a range of other retailers, including Sports Direct, showing that they are seen as more distant competitors.

8.467 Through our store exit and online surveys, we obtained information from the Parties' customers about their shopping behaviour and their next best alternatives to the Parties' stores and websites. We note that we have not placed full evidential weight on the online survey results due to the low response rates (see paragraph 6.29).

8.468 In both the store exit survey and the online survey, substantially more of Footasylum's customers would divert to JD Sports than to any other retailer, which shows that Footasylum's footwear customers view JD Sports as the closest substitute for Footasylum. JD Sports' in-store footwear customers are most likely to state that their next best alternative is Footasylum. For JD Sports' online footwear customers, Nike is seen by customers as the next best alternative with Footasylum and Foot Locker also seen as close substitutes.

8.469 We used the diversion ratios to calculate GUPPIs and found these to be high, particularly for Footasylum but also for JD Sports. The asymmetry of the GUPPIs is consistent with other evidence, for example the Parties' own internal documents. We consider that the in-store GUPPIs, for both JD Sports and Footasylum demonstrate a strong incentive for the Merged Entity to deteriorate (worsen or improve relatively more slowly or to a lesser extent than in the absence of the Merger) PQRS across the Parties' sports-inspired casual footwear offerings post-Merger. Although the online and combined GUPPIs are lower than the in-store GUPPIs, they still indicate a strong incentive to deteriorate PQRS.

8.470 We analysed the impact of store openings and closures by Footasylum and other retailers on the revenues of JD Sports' stores and JD Sports' offering. This entry-exit analysis indicates that Footasylum is the only retailer that has a

negative impact on JD Sports in terms of both retailer and store entry, which holds when looking at a number of different reasonable variations of the analysis. This evidence indicates that Footasylum is a close competitor to JD Sports and exerts a constraint on JD Sports. Other retailers have some negative impact, but this varies when looking at different variations of the analysis.

8.471 Taken together and in the round, the evidence shows that the Parties are close competitors to each other, with JD Sports providing a stronger constraint on Footasylum than vice-versa. There are currently few other strong competitors to the Parties, with only Foot Locker providing a strong constraint and Nike and Sports Direct exerting some constraint but less than each Party does on the other.

8.472 Therefore while we found that numerous other retailers offer sports-inspired casual footwear, taken together and in the round the evidence shows that their aggregate constraint on the Parties is only moderate at best (eg aggregate diversion to other retailers was low) and would not be sufficient to prevent an SLC. While suppliers also exert some constraint, in addition to retailers, as noted above this has limitations. Taking the evidence in the round, and on balance, we found that the aggregate constraints[513] from retailers and suppliers would not be sufficient to prevent the Merged Entity from deteriorating PQRS post-Merger and to prevent an SLC.

8.473 We considered whether there is scope for the strength of the competitive constraints from other retailers on the Parties to increase, including in particular via the repositioning of Frasers Group's Sports Direct fascia, the growth of Nike's and adidas's DTC channels, Foot Locker's number and type of stores in the UK, and Amazon's online offering. We found that, on the basis of the evidence available, we cannot conclude (and with sufficient certainty regarding in particular Frasers Group's Sports Direct fascia and Nike's and adidas's DTC channels) that the repositioning or growth of any retailer will significantly change their competitive strength in the foreseeable future. Overall and on balance, we found that, taken together, the evidence does not show that the aggregate effect of such market developments would amount to a materially stronger competitive constraint on the Merged Entity in the market for the supply of sports-inspired casual footwear in the foreseeable future.

8.474 We considered the impact of COVID-19, the effects of which arose during the final stages of our investigation, including submissions from the Parties and

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[513] The aggregate constraint is evaluated directly in some of the evidence, eg diversion ratios, but more generally we have considered the aggregate constraint by recognising that it is appropriate to consider the effect of all of the retailers and suppliers considered as a combined constraint on the Parties.

third parties on this. We considered how COVID-19 might affect our competitive assessment (both now and in the foreseeable future) and in turn the extent to which it would affect any SLC finding.

8.475 It is clear that COVID-19 is having a significant impact on retailers in this market and on the economy, and we recognise that retailers are facing uncertain and challenging trading conditions. At the time of publishing this report, there is considerable uncertainty about the extent and duration of this impact in the medium to long term. It is difficult to predict the effect on different retailers and how each will respond to the circumstances, and therefore its impact on current competition and market developments in the foreseeable future.

8.476 While COVID-19 is clearly impacting the market, we have not seen evidence to suggest that either of the Parties is being more negatively impacted by COVID-19 relative to each other or relative to other retailers in this market. We also do not envisage that COVID-19 would increase the likelihood of success of any retailer's future plans, which involve substantial investment. Therefore, we do not consider that COVID-19 would reduce materially the extent to which the Parties are close competitors, or increase materially the aggregate constraints posed by retailers on the Parties, now or in the foreseeable future, such that it would not be likely, on the balance of probabilities, that the Merger would or may be expected to result in an SLC.

8.477 Based on our assessment, we found that the Merger would result in the removal of a direct and significant constraint on each of the Parties and that overall the remaining constraints post-Merger (both now and in the foreseeable future) would not be sufficient to prevent an SLC.

8.478 On the basis of the evidence set out above taken in the round, we concluded that the Merger has resulted or may be expected to result in a SLC in the market for the retail supply of sports-inspired casual footwear (in-store and online) in the UK.

8.479 We have considered whether there are any countervailing factors (such as entry or expansion by other retailers or efficiencies) which would be timely, likely and sufficient to prevent this SLC, in chapter 11.

9. Our competitive assessment of unilateral effects - apparel

Introduction

9.1 In this chapter, we set out our assessment of the effect of the Merger on the retail supply of sports-inspired casual apparel at a national level.

COVID-19

9.2 As set out in chapter 8, we have looked at the impact of COVID-19 in our investigation and considered how COVID-19 might affect our competitive assessment and in turn the extent to which it would affect any SLC finding.

9.3 There remains considerable uncertainty about the extent and duration of the impact of COVID-19.[514] We note that all retailers in the relevant markets are subject to the same change in market conditions, although it is difficult to predict the effect on different retailers and how each will respond to the circumstances. As far as possible, we have considered the impact of COVID-19 in our assessment on competition between the Parties and the constraints from other retailers and suppliers, both now (see overview of current constraints section, from paragraph 9.223) and in the foreseeable future[515] (see market developments section, from paragraph 9.276).[516]

Approach to our competitive assessment

9.4 We adopted the same approach to our assessment as for footwear, which is described in paragraphs 8.6 - 8.12.

9.5 In our assessment, we considered how closely the Parties compete with one another and whether the removal of the constraint that the Parties place on each other is likely to lead to an SLC in the sports-inspired casual apparel market. As part of this assessment we also considered in aggregate current competitive constraints on the Parties from other retailers, in addition to the constraints from suppliers given their importance (as set out in chapter 2). We

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[514] CMA, Merger Assessments during the Coronavirus (COVID-19) pandemic, paragraph 22.
[515] As set out in chapter 8, we consider that in this case and given the nature of these markets, the relevant period over which we can reasonably assess future market developments is broadly the next two years. We note that a period of two years is also consistent with the period over which we would typically assess the prospect of entry or expansion (see chapter 11). Where we have specific evidence on future developments covering a different time period, we have taken that into account in our assessment.
[516] The CMA needs to ensure that its decisions are based on evidence and not speculation and will carefully consider the available evidence in relation to the possible impacts of COVID-19 on competition in each case. See: CMA, Merger Assessments during the Coronavirus (COVID-19) pandemic, paragraph 22.

also considered whether any market developments are likely to affect our assessment of competitive constraints. This includes assessing whether there are any changes underway or likely to happen in the foreseeable future, such as other retailers in the market repositioning their offer or substantially growing, that might materially change the nature of the existing competitive constraints on the Parties.

9.6 We reviewed a wide range of evidence collected from the Parties, other retailers and suppliers, as well as evidence from the Parties' customers gathered via our surveys (see chapter 6). We assessed all of the evidence in the round to reach our decision.

9.7 We note that some evidence, including submissions from the Parties and third parties, covered both the footwear and apparel product markets. We set out those specific to apparel in this chapter, whereas those applicable to both footwear and apparel are referred to in detail in chapter 8 and are not repeated in full in this chapter.

9.8 The structure of this chapter is set out below and follows the same structure as chapter 8; we assessed the evidence in each of these areas to help us understand the aggregate competitive constraint on the Merged Entity:

(a) impact of suppliers on retail competition;

(b) how retailers compete;

(c) market shares;

(d) retailers' offerings;

(e) internal documents;

(f) surveys;

(g) GUPPIs;

(h) entry-exit analysis;

(i) overview of current constraints; and

(j) market developments.

9.9 Within each of these sections, we first set out any relevant submissions made by the Parties and third parties, before setting out our own assessment of these.

9.10 Last, we set out our conclusion on competitive effects in the UK sports-inspired casual apparel market.

Background to the sports-inspired casual apparel market

9.11 As discussed in chapters 2 and 7, and similarly to footwear (see paragraphs 8.18 and 8.19) there is a range of different retailers that are relevant to the sports-inspired casual apparel market, many of which sit outside the market but nevertheless may pose some degree of constraint. The Parties specifically offer sports-inspired casual apparel and even within this market a range of retailers compete to attract consumers through differentiated offerings. However, among the Parties' customers the number who would switch to these other retailers is sufficiently small, that such retailers are unlikely to pose any material constraint on the Parties.

9.12 Many of the key elements of differentiation in this market are similar to those for footwear, for example:

- the broad product type (some retailers focus more on fashion apparel and others on sports apparel and the boundaries between these are blurred - see chapters 2 and 7);
- the range of branded apparel from suppliers and retailers' own-brand apparel;
- the value proposition (some retailers focus on higher-priced products, others on lower-priced products);
- the network of retailers' stores and/or online offering (with some retailers operating only online) and the quality of these; and
- the consumer target market (including age and/or gender).

9.13 As with footwear, sports-inspired casual apparel is to some extent a dynamic market; it is growing and its products reflect changing fashions and trends, some of which change over time. However, although there have been changes in the retailers within the market and their positioning, broadly speaking the same major retailers are present now as were five years ago. [517]

9.14 Much like in footwear, part of retailers' differentiation comes from their relative access to branded products from suppliers (in particular Nike and adidas), therefore suppliers have an important role in this market. Nike and adidas are

[517] Our analysis of data from retailers from that out of the top 10 retailers with the largest market shares in 2018, eight of them were also in the top 10 in 2015 and for the other two we did not have data from 2015.

the two most prominent suppliers with a significant combined market share of [✂]% in sports-inspired casual apparel ([✂]% and [✂]%, respectively). However, Nike and adidas are less important in apparel than they are in footwear (compared to their majority combined share of [✂]% in footwear, see paragraph 8.22), with retailers stocking a wider range of other suppliers of branded products as well as their own-brands, therefore Nike and adidas constitute a much smaller proportion of retailers' apparel revenues.

9.15 Given this we have considered the impact of suppliers on retail competition in the next section.

The impact of suppliers on retail competition

9.16 In this section we consider the extent to which suppliers have an impact on retail competition within this market and whether and to what extent they would constrain the Merged Entity from deteriorating its post-Merger offering. As for footwear, we use the term 'deterioration' in this section and throughout our report to cover both any worsening in absolute terms of the Merged Entity's offering (eg a reduction in discounting) and/or any lack of improvement that might have happened faster, or to a greater extent, absent the Merger.

9.17 In apparel, like in footwear, branded products comprise the majority of the market.[518] However, sales are dispersed across more suppliers of branded products in apparel than in footwear and the Parties also stock more apparel brands than footwear brands.

9.18 We note that the lower concentration of supplier brand sales in apparel means that individual brands are less influential in apparel than in footwear since retailers are less dependent on each individual supplier for sales revenue. Nike and adidas are the two largest suppliers of branded products in the market but they account for a smaller proportion of sales in apparel than in footwear. For the Parties, they accounted for [✂]% of JD Sports' 2018 apparel revenues and [✂]% of Footasylum's, compared to [✂]% and [✂]% respectively in footwear.

9.19 As noted in chapter 8, suppliers of branded products impact this market in several ways, including by:

(a) creating and driving consumer demand (see chapter 2);

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[518] For example, across the market as a whole, together adidas, Nike, Puma, Under Armour, Reebok, New Balance, Converse, The North Face, Vans, Ellesse, Fila and Asics accounted for 80% of revenue.

(b) competing at the retail level through their DTC channels (further explored in our assessment of the constraints of Nike's and adidas's DTC channels both currently and in the foreseeable future - see paragraphs 9.257-9.268 in the market developments section); and

(c) wholesale supply of their products to retailers – where they control the type and volume of products that are provided to retailers (as explored further in this section).

9.20 Own-brand products are also a significant part of the apparel market and account for a greater proportion of the Parties' sales than in footwear. Footasylum has a number of own-brands, including Kings Will Dream and Glorious Gangsta, and own-brand accounted for [✂]% of its apparel revenue in 2018.[519] JD Sports also sells own-brands including Supply & Demand and McKenzie, and own-brand accounted for around [✂]% of its apparel revenue in 2018.[520]

9.21 Much of the framework of our assessment is similar as for our assessment in footwear (see paragraphs 8.59-8.65) and therefore much of the discussion for footwear in chapter 8 applies equally to apparel. Accordingly, we refer to that assessment in this chapter, except where there are relevant differences in apparel which we consider here.

9.22 We begin this section with a description of the general approach most suppliers take to the DTC and wholesale supply of their products, involving a combination of selective distribution arrangements and segmentation of retailer accounts. We then assess the extent to which suppliers have an impact on retail competition within this market. This assessment covers all suppliers of branded products in the market. Where relevant we focus on the two biggest suppliers in the market by revenue, Nike and adidas, particularly because they account for [✂] of JD Sports' apparel sales, [✂] of Footasylum's apparel sales. Where relevant, we identify distinctions between the influence of Nike and adidas relative to that of other suppliers.

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[519] We note that our estimate of the proportion of Footasylum's own-brand revenues relates to its total sports-inspired casual apparel revenues (eg excluding denim, underwear, bags etc). The Parties submitted that for the same period (calendar year 2018) [✂]% of Footasylum's apparel sales were from its own-label Bedroom brands and for January-September 2019, the equivalent proportion was [✂]%.
[520] We note that our estimate of the proportion of JD Sports' own-brand apparel revenues relates to its total sports-inspired casual apparel revenues (eg excluding denim, underwear etc).

Suppliers' DTC and wholesale offerings

9.23 As noted in chapter 2, a key trend in this market is an increased focus by suppliers on offering their products directly to customers through their DTC channels. For example, Nike and adidas have growing DTC channels alongside their wholesale channels. In terms of revenue, their wholesale sales to retailers [✂], accounting for [✂]% of Nike's and [✂]% of adidas's UK apparel revenue,[521] and [✂] (see Table 9.8 and Table 9.9 in the market developments section).

9.24 As for footwear, suppliers take both DTC and wholesale channels into account in setting their distribution strategies for apparel. Given that suppliers' DTC and wholesale channels typically serve different purposes, suppliers may not have the same incentives to allocate products to each channel, but instead will allocate them across channels in the way that best furthers their interests overall. Since DTC channels compete with the retailers to which suppliers wholesale, in some instances, suppliers may use distribution strategies to promote their DTC channels (eg releasing products first via these channels).

Selective distribution arrangements and retailer segmentation

9.25 As discussed in chapter 8 for footwear, most suppliers in this market use selective distribution arrangements and segmentation policies to control where and how their products are made available to retailers and the volume of their product supplied to retailers (see paragraphs 8.30 - 8.37). These arrangements enable suppliers to require that retailers observe a minimum standard of quality and service in selling suppliers' products, whether in-store or online. An inherent consequence of suppliers controlling volumes by narrowing distribution is a potential reduction of intra-brand price competition. It has long been recognised that this potential impact on price competition is in principle offset by an increase in authorised retailers' incentives to compete on other relevant parameters of competition, including in particular quality and service.[522,523]

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[521] July 2018 to June 2019.
[522] For example, see Judgement of 25 October 1983, *AEG v Commission*, C-107/82, EU:C:1983:293, paragraph 42 ('A restriction of price competition must however be regarded as being inherent in any selective distribution system in view of the fact that prices charged by specialist traders necessarily remain within a much narrower span than that which might be envisaged in the case of competition between specialist and non-specialist traders. That restriction is counterbalanced by competition as regards the quality of the services supplied to customers, which would not normally be possible in the absence of the appropriate profit margin making it possible to support the higher expenses connected with those services.').
[523] In this context, we note that the European Commission has recognised that, in certain circumstances, there may be legitimate reasons (including the efficient operation of a selective distribution arrangement) why a

9.26 These selective distribution arrangements are incorporated into the supplier's standard terms and conditions and individual trade terms with retailers.

9.27 We have seen evidence that, while suppliers control volumes of branded products that retailers can access (as in footwear), the volume restrictions that are part of suppliers' selective distribution arrangements are less restrictive for apparel than they are for footwear. Typically once a retailer is given access to branded apparel it does not face restrictions on the volume of that product which it can order (see paragraph 9.51).

9.28 Where suppliers categorise retailers into segments, retailers are generally allocated to the same category and tier for apparel as they are for footwear. As set out in further detail in chapter 8 (paragraphs 8.36 - 8.37), the process by which suppliers determine a given retailer's product access may be quite complicated in practice. The criteria on which suppliers classify certain retailers into different categories or tiers is not always fully transparent, and it is not always clear how this impacts the products that retailers can access. We also note that there appears to be limited ability for retailers to change their allocated segmentation category once this is unilaterally determined by a supplier, and that some suppliers [✂] include broad [✂] cancellation provisions within their standard terms and conditions, enabling [✂].[524,525]

Parties' views

9.29 Footasylum submitted that there were [✂]. It highlighted that [✂]. However, it also submitted in contrast to footwear that [✂].

9.30 JD Sports submitted that other suppliers were [✂] with regard to [✂] than [✂], and that the arrangements for apparel allocations were usually '[✂]' than for footwear, with JD Sports [✂].[526]

9.31 Further submissions from the Parties which apply to both footwear and apparel are set out in chapter 8 (see paragraphs 8.38 - 8.51).

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supplier may seek to have some form of control over retail pricing. See European Commission Vertical Guidelines.

[524] [✂] stated that 'Nike or Adidas can cancel [orders]: (i) at will; (ii) without any penalty; and (iii) without any reason.'

[525] [✂] told us 'Sometimes the order is cancelled by the brand – sometimes with a reason, sometimes without any justification at all'.

[526] We note that JD Sports also made submissions on the role of suppliers other than Nike and adidas in the market, which we considered in our assessment.

Third parties' views

9.32 Some third parties which operate in both the footwear and apparel markets highlighted in their submissions the important role of suppliers in the market, including in terms of retailers' access to branded products, though less so in apparel than in relation to footwear (see paragraphs 8.53 - 8.58 for details).

9.33 As set out in paragraph 8.56, [✂]said that 'some products are limited by supply constraints (for example: production capacity) and this [is] more prevalent for footwear than it is apparel.'

9.34 [✂] submitted that while suppliers set a minimum standard for QRS, retailers did engage in retail competition on QRS over and above this minimum, as outlined in paragraph 8.53, which is also relevant to apparel.

Our assessment

9.35 In order to explore to what extent suppliers affect retail competition, we assessed a wide range of information provided by retailers and suppliers on suppliers' selective distribution arrangements, segmentation policies, standard terms and conditions and individual trade terms with retailers.

9.36 In this section, we assess the possible impact suppliers have on retailers' offerings as a result of their wholesale relationship with retailers. In particular, we consider the extent to which retailers' ability and/or incentives to flex the PQRS aspects of their retail offerings are constrained by suppliers - that is, whether the relationship is such as to prevent retailers from deteriorating (or not improving) PQRS in light of how suppliers could in theory or do in practice respond to any such deterioration.[527]

9.37 This assessment is relevant to our investigation because it informs our determination of whether the Merged Entity would have the ability and/or incentive to deteriorate its combined offering post-Merger.

9.38 As explained in paragraphs 8.62 and 8.63, suppliers' actions can sometimes affect a retailer's ability and/or its incentives to deteriorate PQRS. Therefore, in our assessment we focussed on the ways that suppliers may impact on retail competition in this market in general, considering both aspects and without distinguishing between whether this is through influence on ability or incentives.

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[527] For the purposes of this assessment, we use the term 'deterioration' to cover both any worsening in absolute terms and/or any lack of improvement that might have happened faster or to a greater extent, absent the Merger.

9.39 We applied the same framework for assessing constraints in apparel as we did for footwear (see paragraph 8.64).

9.40 We consider that there is a spectrum of constraints that suppliers may possibly exert on retailers' offerings and the level of such constraint may depend on the precise element of PQRS under consideration. Within this spectrum, we consider that there are broadly three levels of any such constraint:

(a) no constraint – suppliers do not act as a constraint on retailers' ability and/or incentive to deteriorate their offering. For example, this may be because suppliers do not actively monitor aspects of retailers' PQRS offerings so that any potential deterioration would not be subject to detection or observation, and/or because any such deterioration would not harm suppliers' interests;

(b) some constraint – suppliers exert some constraint on retailers' ability and/or incentive to deteriorate their offering. Retailers perceive that there is a likelihood that some potential deterioration of aspects of their PQRS offering would be detected and responded to by suppliers, either in the form of some reduction in product access or volume allocation (including through re-segmentation), worse future trade terms, or, at the extreme, through disintermediation. As a result, retailers' ability and/or incentive to deteriorate PQRS is reduced; or

(c) a significant constraint – suppliers exert a significant constraint on retailers' ability and/or incentive to deteriorate their offering. Retailers will not deteriorate most aspects of their PQRS offering due to the expectation that suppliers will detect and respond to any such deterioration either through reduced product access or volume allocation, worse future trade terms, or through disintermediation.

9.41 In considering whether the relationship between retailers and suppliers is such as to prevent retailers from deteriorating PQRS we considered: (i) whether the extent of any constraint we have found, taken alone, is so significant as to sufficiently discipline the Merged Entity's ability and/or incentive to deteriorate its offering post- Merger (the focus of this section); and, if not (ii) whether the extent of any constraint we found is sufficient in aggregate with other constraints on the Merged Entity to prevent the Merged Entity from deteriorating its offering post-Merger.

Suppliers' impact on retailers' ability and/or incentives to flex PQRS

9.42 We assessed whether and the extent to which suppliers constrain aspects of retailers' PQRS. We then considered the extent to which suppliers monitor PQRS aspects of retailers' offerings as a potential means to impact PQRS.

Pricing

9.43 In terms of retail pricing, we considered the retail pricing of both branded and own-brand products given the latter is also important in apparel, unlike in footwear.

9.44 For branded products, as noted in chapter 8 (paragraph 8.67) retailers are contractually free to set their own prices in the relevant markets. However, suppliers usually include (RRPs in the product catalogue presented to retailers in this market. Retailers told us that their starting point was typically the RRPs, although we note discounting does occur.[528] Some retailers told us that they felt some pressure (at least implicitly) to sell products at RRP. This pressure is perceived by retailers to be greater as regards Nike and adidas than other suppliers. This indicates that suppliers may be at least perceived to exert some upward pressure on the retail pricing of their branded products.[529]

9.45 The same constraints do not apply to the pricing of own brand products. Among the Parties, these own-brand products comprise a significant minority of the Parties' sales ([✂]% of JD Sports' apparel sales and [✂]% of Footasylum's apparel sales). Suppliers therefore have no direct influence over the retail pricing of these products, although there may be some indirect influence where own-brand products compete with those of suppliers.

9.46 We consider that suppliers may not be concerned about, or may not react adversely to, a reduction in price competition post-Merger (for example a reduction in discounting, or less competition over other pricing elements such as the minimum spend thresholds for free delivery).[530] Suppliers may not have an incentive to drive retail price competition where it undermines consumers' perceptions of their branded products. For example, suppliers take great care to establish their products as 'status' products and enforce this through their selective distribution arrangements which control access to their

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[528] As set out in our analysis of the Parties' historical discounting behaviour, a sizeable proportion of the Parties' sales in 2018 had been discounted. See paragraph 9.79.
[529] In this context, we note that the European Commission has recognised that, in certain circumstances, there may be legitimate reasons (including the efficient operation of a selective distribution arrangement) why a supplier may seek to have some form of control over retail pricing. See *European Commission Vertical Guidelines*.
[530] See for example the evidence provided by Nike and adidas on monitoring – paragraph 8.90.

products. Discounting of branded products may in certain instances undermine this to some extent.[531]

9.47 As noted above, notwithstanding suppliers' use of selective distribution arrangements and RRP, we observed that there is discounting in this market (eg JD Sports engaged in clearance and non-clearance discounting of [✂]% and [✂]% of apparel revenues respectively which is similar to its level of discounting in footwear). There could be less discounting post-Merger as a result of any loss of competition between the Parties.[532] It is also unlikely that suppliers would react negatively to a reduction in discounting post-Merger (for the reason given in paragraph 9.46). On that basis, we disagree with the Parties' submission (see chapter 8, paragraph 8.47) that the stance of suppliers would result in the Merger being unlikely to have a material impact on price competition.

Range

9.48 In terms of range, and as discussed in paragraphs 9.25 - 9.28, we consider that a supplier's selective distribution arrangements and its segmentation decisions typically have a direct impact on a given retailer's product access and, in turn, provide a constraint on its retail offering in terms of product range. Retailers however can and often do offer less than the full range available to them in their stores due to limitations in store size, although they typically offer a fuller range online.

9.49 Similar to footwear, Nike and adidas are the two biggest suppliers of apparel in this market and represent a [✂] proportion of the Parties' sales ([✂]% of JD Sports' apparel revenue and [✂]% of Footasylum's apparel revenue). However, as noted in paragraphs 9.18 and 9.20, Nike and adidas have a smaller share of the apparel market than in footwear. Retailers stock a larger range of brands for apparel compared to footwear,[533] and retailers' own-brand apparel products also account for a significant minority of their sales in this market.

9.50 Consistent with the above, which shows that suppliers of branded products are less influential in apparel than in footwear, there is limited evidence that suppliers may influence retailers' incentives to flex their range of other

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[531] We recognise that discounting in some instances, such as for end-of-range products, may support suppliers' efforts to establish newer products as 'status' products.
[532] Regarding clearance discounting, we consider that it is driven by a range of factors including product lifecycle/seasonal changes. However, we also consider that competition influences clearance discounting, because where seasonal changes in products apply equally to all retailers, multiple retailers may engage in clearance discounting and compete with each other. As such, we consider that the Merged Entity could reduce such discounting post-Merger as a result of any loss of competition between the Parties.
[533] Our analysis of the Parties' brand level data found that each stocked more than 100 different apparel brands.

suppliers' brands and products (see paragraphs 8.70 - 8.73). We have also not seen any evidence of suppliers taking action in response to retailers flexing their range of other supplier's brands or products.

9.51 As set out in paragraphs 8.74-8.76 in relation to product access, suppliers vary in the level of restrictions they impose on retailers through their selective distribution arrangements and these restrictions arise from suppliers' own strategic decisions. Nike's and adidas's policies are more restrictive in apparel than those of smaller brands in terms of product access. For example, we have seen evidence of retailers seeking access to certain Nike and adidas apparel products but being denied them,[534] whereas this is not the case for suppliers of smaller brands. However, unlike in footwear, suppliers typically do not restrict the volumes of apparel products available to retailers, if those retailers have access to them.[535] This was supported by evidence from [✂] who told us that [✂].

Quality and service

9.52 Quality and service are often related, and some aspects of a retailer's offering could be placed in either category. In general, for the purpose of our assessment in this case we consider quality to capture aspects of the retail presentation of the products (such as store environment, website design) and service to capture aspects related to the customer journey and the process of purchase (eg staff knowledge and availability, queuing times and payment terms).

9.53 Suppliers impose some explicit restrictions affecting the consumer experience offered by retailers in relation to quality and service levels (both in-store and online) through their standard terms and conditions. For example, [✂].

9.54 Where restrictions on quality and service are imposed under suppliers' standard terms and conditions, suppliers establish a minimum contractual standard, beyond which retailers can, at least in principle, flex their offering. In setting such 'floors', suppliers enable retailers to differentiate aspects of their QRS offering above this floor, while still ensuring that their minimum standards are met. In the following section on how retailers compete (see paragraphs 9.72-9.88) we have considered evidence on the extent to which retailers flex their PQRS offerings.

9.55 We have seen evidence that some quality and service requirements for retailers' in-store and online offerings are set out in granular detail by

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[534] For example, [✂].
[535] JD Sports told us that for smaller suppliers the allocation arrangements for apparel [✂] than footwear.

suppliers (see paragraphs 8.80 and 8.81). Many of these requirements capture aspects related to a store or website as a whole and therefore apply equally to footwear and apparel, whereas others apply to specific products (ie some of the [✂] requirements) .

9.56 As for footwear (see paragraph 8.80), while such granular requirements exist, we found that they typically apply only to certain aspects of a retailer's offering rather than its full offering (see paragraphs 8.79, 8.80), do not capture situations where improvements might occur more slowly (see paragraph 8.81) and leave scope for retailers to compete above these minimum levels (see paragraphs 8.83 and 8.84), which is sometimes encouraged by suppliers (see paragraphs 8.85 - 8.87). Given suppliers' incentives to encourage competition on important aspects of quality and service, in accordance with their use of selective distribution arrangements, we recognise that they may react negatively to a reduction in such competition in some cases. There are however limitations on suppliers' ability and incentives to react in this way, as set out in the next section.

9.57 We also found that other requirements on quality and service are specified in broader terms, which introduces a degree of subjectivity (eg [✂]). The use of broad terms can also be considered as giving retailers some leeway to differentiate their offer; we have seen evidence of this in practice and consider this to be indicative of retail competition on quality and service (see paragraph 8.83).

Suppliers' monitoring of retailers and potential response to deterioration

9.58 As explained for footwear, suppliers conduct both general monitoring of retailers' behaviour[536] and more comprehensive (typically less frequent) audits of their retail offerings.[537] Suppliers can use the information gathered as a basis to give retailers either mandatory instructions or non-binding recommendations. This supplier behaviour can directly or indirectly influence retailers' choices over their PQRS offering.

9.59 We recognise that such monitoring might impact on a retailer's ability and/or incentives to deteriorate PQRS. However, as explained for footwear, we note that:

[536] We note that JD Sports submitted examples of correspondence with Nike and adidas which show those suppliers [✂], as referred to in paragraph 8.50.
[537] [✂].

(a) suppliers typically monitor and audit retailers' compliance with the minimum requirements for quality and service included in their standard terms and conditions (see paragraph 88.9(a));

(b) suppliers may not be able to detect all deteriorations, particularly if the deterioration involves a lack of improvement relative to what otherwise would have been achieved (see paragraph 8.89(b)); and

(c) suppliers may monitor retailers infrequently such that there are periods of time during which a change in a retailer's standards may occur unobserved (see paragraph 8.89(c)).

9.60 Evidence from suppliers on the scope of their monitoring and audit activities shows that they do not seek to monitor all aspects of retailers' PQRS offerings in apparel, as in footwear, for example they do not monitor, or monitor to a lesser extent than for their own branded products, the display of retailers' own-brand or other suppliers' branded products. Given this and factors (a)-(c) we consider that suppliers' monitoring is such that they are likely to have some but not full visibility over some aspects of retailers' offerings.

9.61 Suppliers are likely to benefit from competition between retailers on quality and service, and hence have an incentive to encourage such competition. We have seen evidence that suppliers monitor retailers and use this to benchmark retailers against each other to incentivise them to improve their offerings. For example, there is evidence that suppliers compare and monitor retailers' store quality, app capabilities, payment and checkout, customer services, delivery, and the quality of marketing campaigns across retailers. We note that the Merger reduces the extent to which suppliers can rely on such benchmarking to improve the Parties' offerings as they can no longer benchmark JD Sports and Footasylum operating as independent competitors against each other post-Merger.

9.62 We also considered how suppliers may respond to any observed deteriorations in retailers' offerings and the potential consequences of this for retailers:[538]

(a) suppliers may have little (if any) incentive to respond to some deteriorations (see paragraph 8.92(a));

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[538] We also recognise that in making any decision suppliers will be conscious of their wider strategies and the implications for both their DTC channels and their wholesale relationships with retailers. For suppliers with active DTC channels, the consequences of adversely affecting wholesale partners may be less if their DTC channel is one of the beneficiaries, however, we consider that their wholesale channel as a whole is [✂]. See also the market developments section (paragraphs 9.257-9.268)) where we consider further developments in suppliers' DTC channels over the foreseeable future.

(b) merging retailers may still have an incentive to deteriorate their offerings despite there being some likelihood that customers and/or suppliers would respond (see paragraph 8.92(b)); and

(c) there is very limited evidence of Nike and adidas having taken action to respond to a retailer for a deterioration in quality and/or service (see paragraph 8.92(c)).

9.63 Taking into consideration the evidence set out in a)-c), we consider that suppliers have some impact on aspects of retailers' PQRS through monitoring and benchmarking. However, suppliers have little incentive to respond to some deteriorations post-Merger and suppliers would be unlikely to identify all instances of any deterioration. Further, we have seen limited evidence of suppliers responding to deteriorations of retailers' PQRS.

Conclusion on the impact of suppliers on retail competition

9.64 Suppliers play an important role in the sports-inspired casual apparel market, although to a lesser extent than for footwear. Their overall strategies take account of both their DTC channel and their wholesale supply ([✂]). They use selective distribution arrangements and segmentation policies to control the level of product access granted to retailers.

9.65 The control and influence suppliers exert is less significant in apparel than in footwear. This lesser constraint stems from the following:

(a) a greater proportion of apparel sales comes from a wider range of suppliers of branded products, such that there is less dependence on any individual supplier (including less dependence on Nike and adidas) in apparel than in footwear (see paragraph 9.18);

(b) as well as accounting for a greater proportion of sales, other suppliers are generally less restrictive than Nike and adidas in terms of product access (see paragraph 9.30);

(c) [✂] less restrictive with regard to volume allocations in apparel than in footwear (see paragraph 9.27). Typically, once a retailer is given access to branded apparel it does not face restrictions on the volume of that product; and

(d) retailers in this market (including the Parties) also design, stock and price their own-brands and therefore do not face the same constraints from suppliers (eg in relation to pricing) on these products (see paragraph 9.20).

9.66 Given suppliers' role in this market however, we considered their impact on retailers' ability and incentives to flex PQRS. We found that:

(a) suppliers exert some influence over retailers' pricing, for example by providing the RRP for branded products, although while retailers generally adopt RRPs, they do discount prices and flex other elements of pricing, such as delivery costs, which could be deteriorated post-Merger. We note that retailers do not face the same constraints in relation to their own-brand products, which comprise a significant minority of the market;

(b) suppliers can control retailers' range through the products and volumes that they can access (though suppliers are less restrictive on volume access in apparel than in footwear) and can implement this primarily through their segmentation policies. In the short term and in relation to specific orders, the use of, or threatened use of, suppliers' cancellation provisions may create a degree of uncertainty for retailers as regards product access;

(c) suppliers exert some influence on retailers' quality and service offerings. While suppliers place restrictions on retailers' offerings in this regard through minimum contractual standards, retailers can and do flex their offerings above those standards (as shown by the variation in their offerings, see also the following section on how retailers compete, paragraphs 9.72-9.88). On some aspects of retailers' offerings, suppliers impose and ensure compliance with granular standards [✂], but these do not encompass all aspects of retailers' offerings. However, we have seen evidence that suppliers may also encourage retailers to compete with each other beyond minimum requirements; and

(d) suppliers undertake engagement, feedback, monitoring and benchmarking of retailers on some but not all aspects of PQRS, which can directly or indirectly influence retailers' choices over their PQRS offering. We note that post-Merger, suppliers' ability to benchmark would be hindered by the loss of one independently owned retail comparator.

9.67 We therefore consider that suppliers play an important role in shaping retail competition in this market.[539] In particular, we consider that Nike and adidas impose the most restrictions and have the greatest influence, given their importance for retailers in this market, though we note that this is less than in

[539] We note that the Parties submitted that this includes playing a role in determining JD Sports' long term strategy/investment decisions. (The Parties, Response to Provisional Findings, chapter 4), which is evidence there might be some influence on strategy but we consider this is only relevant to the extent that it ultimately influences PQRS.

footwear. Other suppliers also have some influence, but this is considerably less than that of Nike and adidas.

9.68 We note that supplier restrictions and requirements arise primarily from suppliers' own strategic decisions. Further, their incentives as to how they allocate products are derived from an overall view taking account of both their wholesale and DTC channels. We also found that the constraint suppliers exert on retailers has limits (eg they do not monitor all aspects of a retailer's offering) and, as such, retailers have the ability and incentive to flex important aspects of their offering in relation to PQRS.

9.69 We consider that suppliers can, and to some extent do, act as a constraint on retailers' ability and/or incentive to deteriorate their offering. On that basis we found that suppliers exert some constraint on the Merged Entity's ability and/or incentive to deteriorate PQRS. However, taking account of the evidence set out in this section in the round, we found that on balance this constraint is not so significant to sufficiently discipline the Merged Entity's ability and/or incentive to deteriorate its offering post-Merger. In particular this is for the following reasons:

(a) retailers' (including the Parties') sales in this market are dispersed across a number of suppliers of branded products. As a result, retailers are less dependent on individual suppliers for sales revenue meaning that suppliers are less influential in this market than in footwear; in particular, Nike and adidas account for a smaller proportion of retailers' (including the Parties') sales in apparel than in footwear and therefore are less influential in this market;

(b) the Parties each have own-brand apparel propositions which comprise a significant minority of the Parties' sales and do not face the same constraints from suppliers on these products;

(c) retailers can and do compete on various aspects of PQRS as is evidenced by variations in their offerings including levels of discounting, delivery charges and times, customer service and innovation;

(d) there are limits to suppliers' ability to detect a deterioration of retailers' offerings, for example less and slower rates of innovation or other improvements and we note the Merger reduces the ability to benchmark; and

(e) suppliers have no incentive to discipline retailers where any deterioration of a retailer's offering does not harm supplier interests or where such deterioration may benefit suppliers, for example less discounting.

9.70 As set out in paragraph 9.41, given this, we also considered whether the extent of the constraint we found is sufficient, when taken in aggregate with other constraints on the Merged Entity, to prevent the Merged Entity from deteriorating its retail offering post-Merger (see the overview of current constraints section, paragraphs 9.199-9.227). The aggregate constraint is evaluated directly in some of the evidence, eg diversion ratios, but more generally we considered the aggregate constraint by recognising that it is appropriate to consider the effect of all of the retailers and suppliers together as a combined constraint on the Parties.

9.71 We assess how retailers compete on important parameters of competition in the next section.

How retailers compete

9.72 We found that suppliers affect some aspects of retailers' offering but that this is of less significance in apparel than in footwear. In this section we have considered in further detail how retailers compete in this market and the different aspects of the Parties' PQRS offering which could be flexed post-Merger to the detriment of consumers.

Parties' views

9.73 As set out in chapter 8, JD Sports submitted that the footwear and apparel markets were each subject to intense market-wide rivalry, and that it faced dynamic and disruptive competition from a wide range of other retailers.

9.74 JD Sports also submitted that there were a number of reasons why it had no incentive to worsen PQRS. These reasons included the aggregate competitive pressures of horizontal and vertical constraints from suppliers of branded products, intense competition from rivals across the spectrum of products they offered and its view that Footasylum under the counterfactual was not a material constraint on JD Sports.

9.75 The Parties submitted that the CMA did not find evidence that the Parties were materially influencing and/or responding to each other on the parameters in relation to which the CMA considered the Parties could worsen their consumer offer post-Merger (or indeed any other parameter) at the national level.[540] Moreover, JD Sports submitted that JD Sports sets many of its QRS parameters at a group level (including its UK and international

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[540] The Parties, Response to Provisional Findings, paragraphs 42, 290 and 314.

businesses) and that therefore, an analysis of incentive which was rooted in a single fascia (or two fasciae) in the UK did not correctly capture the investment decisions that the JD Sports group makes, for example in respect of technological improvements.[541]

9.76 With regard to pricing, the Parties submitted that there was insufficient evidence to show that competition between them pre-Merger had any material effect on price or in any event that the loss of such competition would not be replaced dynamically by other retailers.

9.77 The Parties also submitted that the CMA failed to consider whether the extent of costs saved from a worsening of non-price parameters would be sufficiently profitable to justify an SLC finding (which it must be for the incentive to degrade to exist), taking into account the likelihood of adverse responses by the suppliers of branded products to a deterioration of the retail offer which could be expected to be a strong disciplining factor on all aspects of the Parties' quality and service offering.[542]

Third parties' views

9.78 Overall, third parties who offered a view on both the footwear and apparel markets submitted that these markets were competitive and that retailers competed on different areas of PQRS (see paragraph 8.107 b) and c) for details).

Our assessment

9.79 We considered whether the Parties are able to, and do, compete on PQRS and therefore whether the Merged Entity could flex aspects of its offering post-Merger to the detriment of consumers. We would expect an SLC to occur if the Merged Entity worsened its PQRS offering or did not improve its offering as much or as quickly as it otherwise may have done absent the Merger.

9.80 We consider that many of the parameters of competition that the Parties compete on are broadly the same for apparel as they are for footwear (such as minimum spend thresholds on their online delivery services, the pricing of other delivery elements, discounting, store opening times, refurbishment plans, in-store queuing times, pay-later options, marketing activity and innovation), and therefore our assessment on the parameters of competition for footwear (set out in paragraphs 8.108 - 8.119) largely also applies to apparel. Regarding pricing of branded products for example, in apparel as in

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[541] The Parties, Response to Provisional Findings, paragraph 315..
[542] The Parties, Response to Provisional Findings, paragraph 316.

footwear, there is evidence that, while retailers' pricing typically follows RRP, discounting does occur which is evidence of competition between retailers. Taking the Parties' pricing as an example:

(a) the value (ie the difference in realised sales value against the sales value if sold at full price) of JD Sports' apparel clearance discounts amounted to £[✂] ([✂]% of its apparel revenue);

(b) the value of JD Sports' apparel non-clearance discounts amounted to £[✂] ([✂]% of its apparel revenue);

(c) the value of Footasylum's total (footwear and apparel) clearance discounts were £[✂] ([✂]% of revenues); and

(d) and the value of Footasylum's total (footwear and apparel) promotional discounts (temporary reductions in price) amounted to £[✂] ([✂]% of revenues).

9.81 Two further elements which are specific to apparel are the range and mix of brands that are stocked by retailers and the importance of own-brand products. First, the range of brands that is stocked by retailers is much broader in apparel than in footwear (although the range within brands may be smaller), which means there is even greater competition between retailers over the selection of brands to stock.[543] Nike and adidas remain important in apparel with a larger share of the market than other brands, however, as discussed in paragraph 9.14, their combined share is smaller in apparel than in footwear. Therefore, Nike and adidas are less important in the sports-inspired casual apparel market than in the footwear market.

9.82 Second, own-brand products are a significant part of the sports-inspired casual apparel market. Own-brand is a way in which retailers can differentiate themselves and another parameter on which they compete. For example, [✂] (Footasylum's own-brand) was the [✂] apparel brand for Footasylum in 2018. As noted in paragraph 9.18, the Parties both offer a number of their own-brand sports-inspired apparel products and in the case of Footasylum these brands represent a significant minority portion (approximately [✂]% in 2018) of its sales. JD Sports also identified the importance of own-brands as part of its rationale for the Merger, [✂] (see chapter 5).

9.83 Unlike branded products where retailers typically use suppliers' RRP as a starting point, retailers do not face the same constraints when pricing own-

[543] For example, one internal document from Footasylum stated that '[✂]'. Another document from Footasylum stated: '[✂]'.

brand products. We note that retailers typically have regard to other price points in the market, including those of branded products, when pricing own-brand apparel. JD Sports submitted that it prices its own-brand products by reference to the [✂].

Conclusion on how retailers compete

9.84 As for footwear,[544] we found that there is evidence that the Parties compete head-to-head, as well as with other competitors, on various different PQRS aspects in a bid to attract consumers and generate sales. Evidence of the Parties' market monitoring across footwear and apparel, indicates that there is retail level competition across all aspects of PQRS in apparel. There is some influence and restrictions from suppliers, though we note that this is less than in footwear, and therefore there is to some extent greater freedom to flex PQRS in apparel than footwear.

9.85 Retail competition in this market manifests in many different ways and these aspects are important to consumers (see paragraphs 9.145-9.148). There are significant aspects of retailers' offerings over which the Parties and other retailers compete, eg the price and development of own-brands, range and mix of suppliers' branded apparel products, level of discounts, customer service, loyalty schemes, future innovation, delivery speed and website functionality.

9.86 While we accept that some of the Parties' competitive parameters are influenced by factors other than competitive constraints (eg vertical constraints from suppliers, stocking decisions, sales performance, etc) and that JD Sports operates in areas where Footasylum is not present (within or outside the UK),[545] the evidence assessed above suggests that the Merged Entity could change some aspects of its offering in the UK in response to changes in competitive pressure post-Merger.

9.87 In chapter 8 (paragraphs 8.108-8.115), we considered the Parties' submissions on the flexing of competitive parameters covering both footwear and apparel. Our response to these points do not differ between footwear and apparel.

9.88 In subsequent sections we have looked at a range of evidence relating to the closeness of competition and the constraints from other retailers, to

[544] See paragraphs 8.116-8.119.
[545] We note that the same argument does not apply to Footasylum.

understand the aggregate competitive constraint on the Merged Entity in apparel.

Market shares

9.89 We looked at market shares as an indicator of the presence that different retailers have in the relevant markets. However as explained in chapter 7 and the introduction to chapter 8 (see paragraphs 8.6-8.7), delineating markets in this type of differentiated sector can be somewhat artificial which can make calculating market shares difficult. Therefore, in line with our Guidance,[546] we focussed our assessment on closeness of competition primarily using a range of other evidence, which we set out in subsequent sections.

Parties' views

9.90 As set out in chapter 8, JD Sports submitted that, while market shares were not 'determinative' of unilateral effects, their quantification still mattered since it helped 'identify the structural change arising from the Merger and the national scale and identity of existing competitors'.

9.91 JD Sports submitted that the Merger had a modest effect on retail market concentration,[547] noting that [✂]% of Footasylum's apparel sales were 'sports-heritage branded', and that Footasylum's market share represented 'a small increment not at all consistent with being a particularly close national competitor to JD Sports'.[548,549] The Parties submitted that therefore the inclusion of Footasylum's own-brands, which were not sports-inspired, inflated Footasylum's market share.[550] The Parties further submitted that this was relevant because 'the smaller the change of national market structure, and the more significant existing competitors, the most [sic] easily any lost constraint (even a relatively 'close' one) would be addressed, in aggregate, by the brands' influence over the retail market and/or replaced by expansion, entry or repositioning of rivals'.

9.92 The Parties made a number of submissions relating to market shares in their response to our Provisional Findings. These are detailed in chapter 8 (paragraphs 8.121-8.128).

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[546] CMA Guidance, paragraph 5.49.
[547] The Parties, Response to Provisional Findings, paragraph 54f.
[548] JD Sports, Response to Issues Statement, paragraph 7(a).
[549] [✂].
[550] The Parties, Response to Provisional Findings, paragraph 79.

Our assessment

9.93 We consider that the Parties are both large[551] national multi-brand retailers of sports-inspired casual apparel.[552] We estimated that JD Sports is the largest retailer in this market with a share of [20-40]% ([✂]).[553,554] Footasylum is smaller, with a share of [0-5%] ([✂]).[555] There are also a number of other retailers which have a presence in this market. Sports Direct has a share between [0-40%] ([✂]), and Primark[556] has a share of [10-20%] ([✂]), depending on how their revenues are categorised, but no other retailer has a share above 10%. This wide variation in market shares estimates shows the difficulty in accurately estimating these in a differentiated market such as this. Further information on the different share estimates of retailers and their limitations is set out in Appendix G.

9.94 The Parties submitted that the share increment, and subsequently any loss of constraint, was low and therefore any loss in constraint was easily addressed (see paragraph 9.91). We examined market shares primarily in order to identify which other retailers supply goods within the relevant markets. However, we consider that these market shares only give a basic indication of the Parties' presence in terms of the current structure of the market and do not fully capture the closeness of competition between retailers in

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[551] As noted in chapter 8, we describe Footasylum as large in view of the fact that it serves a large number of customers, has national reach, employs thousands of employees and has turnover in the hundreds of millions of pounds.
[552] We note that as set out in chapter 7 (see paragraph 7.78), we have not exhaustively defined the precise products or suppliers that fall within the 'sports-inspired casual apparel' category and we use the term loosely and non-determinatively. We also note that we have relied more on what customers told us in our surveys, regarding which apparel products are treated as substitutes (see section on surveys and GUPPIs, paragraphs 9.154-9.158 and 9.166).
[553] Our approach to calculating market shares used two methodologies, each including or excluding different products. Ranges for retailers' shares under each of these methodologies are set out in Appendix G, however, for presentational purposes we have combined the two ranges for each retailer in this paragraph. The main driver of differences between the two methodologies was the extent to which Sports Direct's apparel revenues are classified as sports-inspired casual apparel (and therefore included in the relevant market) or other apparel segments (and therefore not included). This is explained in more detail in Appendix G. We consider that further work to narrow down the precise market share is not necessary given the limited use to which we have put this market share evidence.
[554] JD Sports is the largest retailer when the mid-point of our retailer's range is used as the estimate for that retailer. In calculating JD Sports' apparel market share we used JD Sports' own estimates of its sports-inspired casual apparel revenues.
[555] In calculating Footasylum's apparel market share we took its total apparel revenues and excluded categories we considered clearly outside the market ie bags, denim, denim/fashion pants, swimwear, underwear. The range given for JD Sports' and Footasylum's market shares reflects different estimates for competitors' revenues in the relevant market, particularly the extent to which Sports Direct's activities are ascribed to sports-inspired casual footwear (and therefore included in the relevant market) or other footwear segments (and therefore not included). This is explained in more detail in Appendix G. We consider that further work to narrow down the precise market share is not necessary given the limited use to which we have put this market share evidence.
[556] Primark has a relatively large market share. However, we consider that its apparel offering is significantly different from that of the Parties, as shown by the responses to our surveys and lack of other evidence that it competes with the Parties, hence it did not feature in detail in our assessment.

differentiated markets, such as this one.[557] We note that even if there is a small share increment, competition can still be substantially lessened by a merger (for example if the merging parties are close competitors) when all the available evidence is considered in the round.

9.95 Further, as discussed in chapter 8, we note that there were also practical limitations to calculating all of the retailers' market shares in this case, as submitted by the Parties and as explained in Appendix G. This means there are significant uncertainties around the share calculations.[558] This is a further reason why we have made limited use of the market share evidence in our assessment. We consider that other evidence is more informative for our assessment of this Merger, including internal documentary evidence, econometric evidence and the survey evidence which can better capture the significance of pricing incentives, than concentration measures based off market shares. Therefore, we did not consider it necessary to seek to address these limitations.[559]

Retailers' offerings

9.96 One way for us to identify relevant potential competitors is to assess the similarities and differences between retailers' offerings. This provides an indication of their likely strength and closeness.

Parties' views

9.97 JD Sports submitted that the Parties had a 'significantly differentiated customer offer.'[560] It submitted that Footasylum's apparel offering was more skewed towards own-brand or Bedroom Brands (which were 'urban' or 'streetwear'-inspired), whereas a large proportion of JD Sports' offering was branded (and sports-inspired).[561,562] JD Sports also submitted that it had 'a very limited own label apparel offering, which is primarily focused on "basic"

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[557] Our view is that more information on closeness of competition and the significance for pricing incentives is captured in the GUPPI, than other potential measures, such as concentration measures. See: Sainsbury's/Asda, Final Report, paragraph 8.247b.
[558] This is particularly the case for Frasers Group, which is why we use a range of other evidence to assess its constraint and do not consider that because it has a large market share under methodology 1 (as referred to by the Parties, see paragraph 8.126) this undermined the conclusion from that other evidence.
[559] In regard to the Parties' submission of its own market shares calculations, we note that these used the CMA's market shares as calculated in the Provisional Findings as a starting point and as such do not consider that a 'reconciliation' with our approach is required.
[560] JD Sports, Response to Issues Statement, paragraph 6.
[561] JD Sports, Response to Issues Statement, paragraph 6a and 6b.
[562] JD Sports, Response to Issues Statement, paragraph 7a.

ranges offered under its McKenzie brand'[563] and that Footasylum's own-label products were highly differentiated from JD Sports.

9.98 JD Sports submitted that the Parties were therefore not particularly strong competitors to each other on own-brand apparel given the different nature of their offerings, and as own-brand apparel made up [✂]% of JD Sports' apparel sales, compared to [✂]% of own-brand apparel and Bedroom Brands for Footasylum.[564] JD Sports told us that it priced its own-brand products by reference to the [✂]. JD Sports submitted that it did not have regard [✂] when making pricing decisions for its own-brand products.

9.99 JD Sports highlighted that a number of 'fast fashion' retailers [✂].[565] It stated that Footasylum's closest competitors were fast fashion retailers such as River Island, Topshop/Topman, H&M and Zara, and not retailers of global sports-heritage brands, such as JD Sports.[566] The Parties submitted that the purpose of highlighting that they each had different apparel ranges was not to imply that only identical products competed. On the contrary, non-identical products were a source of competition. The Parties submitted that for example 'all own-label fast fashion label products of Zara, Next, Topshop, River Island, H&M etc were by definition non-overlapping with the Parties, but were a significant constraint on Footasylum especially with its sweet spot of own-label/Bedroom Brand apparel'.

9.100 The Parties submitted estimates of the degree of overlap[567] between their apparel offerings and noted that these showed their differentiation. The Parties further submitted that, within the overlapping product set, the brand mix was different.

9.101 The Parties submitted that the CMA's focus on Nike and adidas in its product overlap analysis failed to capture the actual products overlap and therefore did not capture the rivalry the Parties faced when selling brands other than Nike or adidas. The Parties submitted that this was particularly relevant for Footasylum given that [✂]% of its apparel sales were Nike or adidas products.

9.102 As with footwear (see paragraph 8.134), JD Sports also submitted that a national analysis overstated the degree of overlap at the individual store level.

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[563] JD Sports, Response to Issues Statement, paragraph 227.
[564] JD Sports, Response to Issues Statement, paragraph 100.
[565] JD Sports, Response to Issues Statement, paragraph 74.
[566] JD Sports, Response to Issues Statement, paragraph 35.
[567] The estimated sales-weighted overlap is [✂]% from JD Sports' perspective, and [✂]% from Footasylum's perspective.

9.103 The Parties made a number of submissions relating to retailers' offerings in their response to our Provisional Findings. These are detailed in chapter 8 (paragraphs 8.134-8.137).

Our assessment

9.104 As discussed in chapters 2 and 7 there is a range of retailers in this market and below we have considered their propositions and how similar they are, for example in terms of their products, geographic coverage, and consumer base. We also considered rankings of closeness between retailers as submitted by retailers themselves.

9.105 As part of this we examined supplier/product overlap and retailers' shares of branded products which provide some indication on the offerings of retailers and subsequently, their potential competitive constraints. We note that products do not have to be identical to be substitutes[568] and that consumer behaviour and stated preferences as evidenced in our surveys provide evidence of the degree of substitutability of the Parties' offerings.

9.106 We consider that the more similar other retailers' offerings are to those of the Parties, the stronger their constraint is likely to be. For example, a retailer is likely to be a stronger constraint on the Parties the more similar it is to the Parties across the following factors: its overlap across the Parties' distribution channels;[569] its access to and volumes of relevant branded products; how appealing its retail fascia is to the Parties' customers; and how appealing its in-store and online shopping experience is to the Parties' customers. As noted in paragraph 9.105 this does not mean that products need to be identical to be substitutes and this applies to own-brand apparel products as well as branded apparel.

The Parties

9.107 The Parties both have an in-store and an online offering. There is a high degree of geographic overlap between the Parties' physical stores; all Footasylum stores overlap with at least one JD Sports store.[570] Both of their online offerings are important channels for their respective businesses (representing [✂]% of JD Sports' revenue and [✂]% of Footasylum's revenue - see paragraph 7.95). While a lower proportion of its revenue, JD Sports has a significant online presence. For example, our online survey

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[568] The Parties also acknowledged this. They submitted that [✂].
[569] Through a presence in both distribution channels (in-store and online) and/or greater geographic overlap with the Parties in-store.
[570] Where overlap is defined as being present within a 20-min drivetime. See CMA, Phase 1 decision, paragraphs 140-142.

results suggest that of the Footasylum customers who had looked online somewhere other than Footasylum's own website before purchasing in-store at Footasylum, 70% had looked JD Sports' website.

9.108 The Parties both target a similar demographic - 16-24 year old consumers with a focus on males, although the focus on males is more pronounced for Footasylum.[571] JD Sports submitted that more than half of its customers were [✂], although we note that the majority of the apparel they sell is [✂] apparel, although they both also sell [✂] and [✂] apparel, with the latter making up a minority of its apparel sales.[572]

9.109 Both Parties stock a range of branded apparel as well as some own-brand apparel (as shown in Table 9.1). Relative to footwear, their sales are spread over a much wider set of brands. For Footasylum, [✂]% of its sports-inspired casual apparel sales fell outside of its top 10 brands.

Table 9.1: Brands' share of the Parties' sports-inspired casual apparel revenues (2018)

JD Sports				*Footasylum*		
1	[✂]	[✂]		*1*	[✂]	[✂]
2	[✂]	[✂]		2	[✂]	[✂]
3	[✂]	[✂]		3	[✂]	[✂]
4	[✂]	[✂]		4	[✂]	[✂]
5	[✂]	[✂]		5	[✂]	[✂]
6	[✂]	[✂]		6	[✂]	[✂]
7	[✂]	[✂]		7	[✂]	[✂]
8	[✂]	[✂]		8	[✂]	[✂]
9	[✂]	[✂]		9	[✂]	[✂]
10	[✂]	[✂]		10	[✂]	[✂]
	[✂]	[✂]			[✂]	[✂]
Total		100%		Total		100%

Source: CMA analysis of Parties' data.

9.110 Both Parties have a substantially lower reliance on Nike and adidas in apparel than they do in footwear. As set out in Table 9.1, for JD Sports, [✂]% of its total apparel sales came from Nike and [✂]% from adidas. For Footasylum, [✂]% of its total apparel sales came from Nike and [✂]% from adidas.[573]

9.111 Although Nike and adidas are less important in apparel than in footwear, we nonetheless compared the Parties' offerings of Nike and adidas apparel products (see Table 9.2 and Table 9.3, and Appendix G for more detail).[574]

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[571] JD Sports, Response to Issues Statement, paragraph 6 and 14.
[572] JD Sports' 2018 apparel sales were split, [✂]% men's apparel, [✂]% junior/infant apparel, [✂]% women's apparel (this excludes replica textiles). Footasylum's 2018 apparel sales were split, [✂]% men's apparel, [✂]% junior/infant apparel, [✂]% women's apparel.
[573] We also examined the sales-weighted brand cross-over at phase 1 and found a cross-over of [✂]% from JD Sports' perspective and [✂]% from Footasylum's perspective. See CMA, Phase 1 Decision, Table 2.
[574] In our analysis we treated each colourway (but not size) of a separate apparel item as a distinct product. We also examined a more aggregated product level (treating different colourways as the same product) and found similar results.

Table 9.2: Number of Nike apparel products sold by the Parties that were also sold by other retailers (6 months to June 2019)

Retailer	Number of products	Proportion of products
JD Sports	[✂]	
Retailer 1	[✂]	49%
Retailer 2	[✂]	31%
Retailer 3	[✂]	23%
Retailer 4	[✂]	20%
Retailer 5	[✂]	18%
Retailer 6	[✂]	17%
Retailer 7	[✂]	16%
Retailer 8	[✂]	15%
Retailer 9	[✂]	15%
Retailer 10	[✂]	14%

Retailer	Number of products	Proportion of products
Footasylum	[✂]	
Retailer 1	[✂]	59%
Retailer 2	[✂]	47%
Retailer 3	[✂]	41%
Retailer 4	[✂]	34%
Retailer 5	[✂]	31%
Retailer 6	[✂]	25%
Retailer 7	[✂]	25%
Retailer 8	[✂]	23%
Retailer 9	[✂]	20%
Retailer 10	[✂]	14%

Note: [✂]
Source: CMA analysis of data received from Nike and adidas.

Table 9.3: Number of adidas apparel products sold by the Parties that were also sold by other retailers (6 months to June 2019)

Retailer	Number of products	Proportion of products
JD Sports	[✂]	
Retailer 1	[✂]	38%
Retailer 2	[✂]	28%
Retailer 3	[✂]	17%
Retailer 4	[✂]	10%
Retailer 5	[✂]	8%
Retailer 6	[✂]	8%
Retailer 7	[✂]	5%
Retailer 8	[✂]	4%
Retailer 9	[✂]	2%

Retailer	Number of products	Proportion of products
Footasylum	[✂]	
Retailer 1	[✂]	49%
Retailer 2	[✂]	42%
Retailer 3	[✂]	36%
Retailer 4	[✂]	36%
Retailer 5	[✂]	8%
Retailer 6	[✂]	5%
Retailer 7	[✂]	4%
Retailer 8	[✂]	0%
Retailer 9	[✂]	0%

Source: CMA analysis of data received from Nike and adidas.

9.112 We found that [✂]% of [✂] Nike apparel products (not shown in Table 9.2) and [✂]% of its adidas products were available at [✂], while [✂]% of [✂] Nike products and [✂]% of its adidas products were available at [✂]. [✂] has the [✂] highest overlap (ie number of identical products available) with [✂] for Nike products and [✂] highest overlap for adidas products. We found that [✂] has the [✂] highest overlap with [✂] for Nike products and [✂] highest overlap for adidas products. We also found that a number of other retailers have the same or higher degree of product overlap of Nike and adidas products with [✂].

9.113 Of the Nike and adidas apparel products sold by JD Sports, [✂] was sold by other retailers. Of the smaller number of products sold by Footasylum, [✂] was sold by other retailers. While important to the Parties' apparel offerings, we recognise that examining the overlap of Nike and adidas products captures only part of the Parties' offerings in this market, given that they stock a wide range of branded and own-brand apparel products.

9.114 The Parties submitted that this type of analysis overstated the degree of overlap at a local store level. We recognise that could be the case for the in-store segment, although this does not apply to their online offerings, or where their online offerings are available in-store (eg through JD Sports' in-store kiosks); further, the scope for overstatement would apply to all retailers assessed.

9.115 We addressed further submissions from the Parties that relate to this analysis in chapter 8 (see paragraphs 8.148 and 8.149).

9.116 Overall, we found that the Parties have some similarities in their apparel offering, although there are some apparent differences when looking at branded product shares and product overlaps in isolation.

9.117 As mentioned in 9.104, we asked third parties to rank the Parties and other retailers in terms of their closeness of competition to each other.[575] We assessed their views on rankings by examining the average scores they gave in terms of closeness of competition. The average score out of 10 given by third parties in response to the question on closeness of competition between the Parties was 7.6 (Footasylum on JD Sports) and 7.6 (JD Sports on Footasylum) for the retail supply of sports-inspired casual apparel (see Table 9.4).[576] This demonstrates that third parties view JD Sports and Footasylum as close competitors.

Other retailers

9.118 We also considered the offerings of other prominent retailers of sports-inspired casual apparel. In subsequent sections we have assessed further evidence of the constraint they impose on the Parties.

9.119 Sports Direct is a major national retailer in the UK (and is part of the Frasers Group, which also owns USC among other fasciae).[577] It has a large number (approximately 500) of stores, with a high geographic overlap with the Parties

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[575] Closeness in this context was measured on a one (not close at all) to 10 (very close) scale
[576] CMA, Phase 1 Decision, paragraph 253 and CMA analysis of third party questionnaires during phase 1.
[577] The Parties submitted that Sports Direct has incorporated USC concessions into its elevated stores and website (under the name 'USC by Sports Direct') and customers can now browse and purchase USC's products directly from Sports Direct's website rather than having to visit a separate website as they did previously. They submitted that 'this change means that all Sports Direct and USC's products, including the latter's premium apparel offering, are now available in one location' and that the distinction between the two offerings is increasingly blurred and that they should be viewed as a single retailer in the CMA's assessment. We have taken account of both Sports Direct and USC (both owned by Frasers Group, formerly Sports Direct International) throughout our competitive assessment as well as the aggregate effect of all retailers, and suppliers. We have considered the role of combined Sports Direct and USC elevated stores in our assessment of market developments, see from paragraph 9.2368.322. We also note that some suppliers treat the two fasciae separately, including for the purposes of product access, see paragraph 8.362.

([✂]% with JD Sports and [✂]% with Footasylum) and operates online [✂] and it offers a wider range of sports apparel than that of the Parties. Its brand mix differs to that of the Parties and it focusses less on own-brand. We note that for Nike and adidas products it has a [✂] apparel overlap with the Parties (eg for Nike products a [✂]% overlap with JD Sports and [✂]% overlap with Footasylum) although this is relatively [✂] compared to other retailers. [✂],[578] [✂]. This indicates that, despite its size, there are some important differences in Sport Direct's offering in comparison with the Parties.

9.120 ASOS is an online-only retailer that has been growing (it started selling sports-inspired products in 2016).[579] It sells a broad range of products across the wider casual fashionwear sector, including sports-inspired casual apparel. It submitted that its target is both males and females [✂]. [✂]. Across both genders, it has a [✂] product overlap with JD Sports ([✂]%) and a [✂] overlap with Footasylum ([✂]%). Therefore, [✂], its overall sports-inspired casual apparel offering has some differences to that of the Parties.

9.121 There are various other online-only retailers. For example, Zalando sells a broad range of products, including sports-inspired casual apparel, and is active in a number of European markets.[580] Its marketing is principally aimed at 20 to 49 year olds, and the majority of its customers are females aged 25 to 55 (55% for apparel). It has a [✂] product overlap with both Parties for Nike and adidas products (eg for Nike products a [✂]% overlap with JD Sports and [✂]% overlap with Footasylum). This indicates [✂] it is focussed on a different consumer market and has a much smaller presence in the UK (as shown by its low estimated market share, see Appendix G).

9.122 Amazon also sells a broad range of products, including sports-inspired casual apparel, although we note it does not currently directly supply products from Nike or adidas.[581] It does not target a specific demographic. This indicates that its offering is relatively different from that of the Parties.

9.123 Suppliers including Nike and adidas have been growing their retail sales through their DTC channels. They both have online offerings that deliver to all parts of the UK. They both have a number of physical stores, a few of which are large flagship stores, but the majority of which are forms of factory or

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[578] [✂].
[579] [✂].
[580] Zalando is active in 15 European countries and is Europe's biggest online fashion retailer.
[581] [✂]. We also note that as reported (for example as reported by Bloomberg in November 2019), Nike announced that it's ending a pilot programme with Amazon launched in 2017, which attempted to stop counterfeit third party sellers by giving Amazon access to Nike products.

clearance stores which [✂].[582] The geographic overlap of these stores to the Parties' stores is also low.[583] Since these suppliers are also retailers themselves, they typically offer all of their own branded products online, and more than they make available to their retailer customers. However, as a mono-brand footwear and apparel proposition they do not offer other brands alongside these products. Overall, we consider that there are some similarities to the Parties' offerings but there are also some important differences.

9.124 In addition to its strong position in footwear, Foot Locker offers a range of apparel products (including by these suppliers of branded products: adidas; Nike; Jordan; Puma; Converse and Under Armour). However, apparel is a low proportion of its overall sales (around [✂]%). Foot Locker's product overlap with both Parties is [✂] (eg for Nike products, Foot Locker has a [✂]% overlap with JD Sports and [✂]% overlap with Footasylum). We have considered the extent to which it may be repositioning its apparel offering in as part of our consideration of market developments (see paragraphs 9.269-9.271).

9.125 A number of high street retailers, eg Primark, Next, River Island, Zara, and department stores eg John Lewis and Debenhams, also offer apparel products which may be substitutes for the products that the Parties sell.[584] We recognise that, as submitted by the Parties, some of their products may appear to be similar to some of the products offered by the Parties, and Footasylum in particular. Therefore we have further considered the constraint from these retailers through our assessment of other evidence, namely our surveys which show how consumers view them as alternatives, our entry-exit analysis which indicates actual consumer behaviour rather than stated preferences, and internal documents which provide informative evidence on the Parties' views on these retailers and each other. We also note that these retailers did not generally see their offerings as being similar to the Parties.

9.126 We asked third parties (covering both competitors and suppliers) to rank other retailers in terms of their closeness of competition to each of the Parties and to other retailers, as shown in Table 9.4.

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[582] Nike has 42 stores in the UK, of which only five are core or flagship stores, whereas the remaining 37 are Factory Outlet stores. Nike estimated that a Factory Outlet store would stock around [✂]-[✂]% of clearance products, whereas other non-outlet stores typically stock [✂]% of clearance products (Where clearance products are defined as products which have become permanently discounted below RRP). adidas has 26 stores, four of which are flagship stores, three are core stores, two brand centres and the rest are Factory Outlets.
[583] Based on a 20-minute drive-time catchment area, we calculated that [✂]% of Footasylum's stores overlap with a Nike store and [✂]% with an adidas store; [✂]% and [✂]% for JD Sports, respectively.
[584] [✂] said that females aged 25 and above accounted for 87% of its customers, of those who purchased sports-inspired apparel. [✂]and [✂] said they did not compete with any other sports inspired business). [✂] said that it was a fashion retailer not primarily focused on sports or performance apparel.

Table 9.4: Third parties' rankings of retailers' closeness to the Parties in apparel [585] [586]

Retailers	*Number of responses included in closeness average*	*Number of mentions included in closeness average*	*Closeness to:*	
			JD Sports	*Footasylum*
The Parties				
JD Sports	20	-	-	7.6
Footasylum	20	-	7.6	-
Third parties				
Sports Direct	-	10	5.9	5.2
ASOS	-	10	6.0	6.1
Foot Locker	-	6	8.8	8.8
Nike	-	4	7.8	7.0
adidas	-	4	8.3	6.8
Footpatrol	-	3	6.3	6.3
Amazon	-	3	6.3	5.3
Shop Direct	-	3	6.5	6.5

Notes:-
Rankings are on a scale of 1 to 10, with 10 being the closest and 1 being the least close.
Our third party questionnaires asked third parties directly to provide a ranking of the Parties' closeness to each other. The table reports the number of third parties that responded to this question and the average ranking of closeness to each other.
Our questionnaire, also asked third parties to provide rankings for other retailers, but the identities of these other retailers were unprompted. For these retailers, the table reports the number of mentions and the reported ranking of closeness to the Parties. The number of mentions is therefore relevant to which retailers third parties considered they should raise, however closeness of competition is a more direct measure of the significance of the mentioned retailers in terms of competition. Views do not include third parties' views of their own position relative to the Parties.
Only retailers mentioned by three or more third parties are included. Footpatrol is a JD Sports' fascia.

9.127 As shown in Table 9.4, third parties scored Foot Locker, Nike and adidas highly in terms of how closely they compete with the Parties. However, these three retailers were all mentioned by fewer third parties than Sports Direct and ASOS, which were mentioned the most times, though given lower scores than the Parties were. We therefore consider that third parties view the Parties as competing closely against each other with relatively few other close constraints (eg Foot Locker, Nike and adidas), but with some other constraints from retailers such as Sports Direct and ASOS.

Conclusion on retailers' offerings

9.128 Overall, we found that the Parties have some similarities in their apparel offering. They both have a wide range of brand products and product types available. Nike and adidas account for [✂] of JD Sports' apparel sales [✂] of Footasylum's sales. Both Parties' have own-brands, with these being particularly important for Footasylum.

9.129 The relevance of similarities in offering is difficult to assess by looking at branded product shares and product overlaps in isolation. Given this we

[585] These estimates differ from those given in the Phase 1 decision, paragraph 25, due to addition of further retailer rankings gathered at phase 2; CMA analysis of third-party questionnaires during phase 1 and phase 2.
[586] We note that, while our question asked third parties to provide rankings for closeness in the apparel market, for two of the retailers (Foot Locker and Footpatrol) reported by third parties, footwear is a greater proportion of their sales than apparel. This may be reflective of closeness or may have some bias from third parties' views over these retailers' closeness in footwear.

consider that the surveys of the Parties' customers, in particular, provide evidence on customers' view of the Parties' apparel offerings and their substitutability (see paragraphs 9.140-9.162).

9.130 There are also a number of other retailers whose offerings while they have some similarity to those of the Parties also have some differences, in particular Sports Direct, ASOS (who operates only online), and Nike and adidas (which only offer a single brand).

9.131 Third parties scored the Parties as competing closely against each other with relatively few other close constraints (eg Foot Locker, Nike and adidas), but with some other constraints from retailers such as Sports Direct and ASOS. We therefore consider that third parties view the Parties as competing closely against each other with relatively few other close constraints.

Internal documents

9.132 We analysed a large number of the Parties' internal documents, which, in our view, are highly informative evidence of how the Parties view the market and their competitors in the ordinary course of their business prior to the Merger.[587]

Parties' views

9.133 JD Sports submitted that while the Parties referenced each other in their internal documents, these documents simply reflected the respective Party's monitoring of market activities. It said that many of its documents discussed a wide range of competitors in addition to Footasylum. Further, it submitted that [✂].It also submitted that closeness of competition was not a simple function of the number of mentions in or across a given set of internal documents.

9.134 JD Sports further submitted that 'on a correct analysis of the Parties' internal documents, there is no basis for a finding that they are closer competitors to one another than they are to the host of other competitors mentioned in those documents.'[588] It also submitted that:

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[587] In our requests for internal documents from the Parties we generally defined internal documents as, 'Internal documents refer to documents in any form (including, but not necessarily limited to, reports, presentations, studies, internal analyses, analyst reports, industry/market reports or analysis, including customer research and pricing studies) which have been prepared by or for, or received by, any member of the board of directors (or equivalent body) or senior management or the shareholders' meeting of [either Party] (whether prepared internally or by external consultants).' The timeframes and precise definitions varied depending on each specific question, but generally covered the last two years.

[588] The Parties, Response to Provisional Findings, paragraph 281. Parties also stated that 'the PFs misrepresent a number of the documents cited, fail to acknowledge explanations made by the Parties in previous submissions

> the Parties remain of the strong view that the simple fact and degree of competitor monitoring of each other as reflected in the internal documents cited in the PFs does not sustain a finding of "closeness" of competition between them and is in any event clearly insufficient to support an SLC finding without evidence that the Parties are reacting to each other when they choose to set their national PQRS variables (as opposed to competitive pressure in aggregate, or other rivals).[589]

9.135 The Parties also submitted that we had: (i) not identified any document which evidences JD Sports responding to Footasylum in the implementation of its student discounts scheme, though we recognised that JD Sports' documents referred to ASOS as the 'dominant' retailer in relation to student discounts;[590] (ii) misrepresented a number of documents cited; (iii) failed to acknowledge explanations made by the Parties in previous submissions with respect to particular documents; and (iv) failed to take proper account of a number of documents submitted by the Parties which had not been referenced in the Provisional Findings.[591]

Our assessment

9.136 As explained in chapter 8, we found that references to competitor retailers in the Parties' internal documents do not usually distinguish between footwear and apparel, or in-store and online, but rather cover competing retailers in general. Therefore, we consider the internal documents discussed for footwear in chapter 8 to be largely of relevance to apparel as well (see the documents referenced in paragraphs 8.176 - 8.182). We considered the Parties' submissions as we assessed each type of internal document as set out in paragraphs 8.176 - 8.182.

Conclusion on internal documents

9.137 The detailed monitoring of each other in the Parties' internal documents is evidence supportive of a finding of closeness of competition between them. It is unlikely that the Parties would engage in detailed monitoring of retailers which they do not consider to be close competitors and which does not feed indirectly or directly into their commercial decisions. Indeed, there is some

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with respect to particular documents and fail to take proper account of a number of documents submitted by the Parties which have not been referenced in the PFs.' The Parties, Response to Provisional Findings, paragraph 282.

[589] The Parties, Response to Provisional Findings, paragraph 293.

[590] The Parties, Response to Provisional Findings, paragraph 308.

[591] The Parties, Response to Provisional Findings, paragraph 39, 282, 294.

evidence of it influencing their decisions directly (see paragraphs 8.184 - 8.187), although this is not extensively reported in these internal documents for any retailers.

9.138 In particular, on the basis of the evidence set out in detail in chapter 8 (paragraphs 8.169-8.187) we found that:[592]

(a) Footasylum's internal documents demonstrate that JD Sports is the competitor most closely monitored by Footasylum. These documents show that Footasylum also closely monitors Foot Locker, though not to the same extent as JD Sports. In relation to the latter, however, we recognise that the documents do not distinguish between apparel and footwear, and that Foot Locker is less relevant a competitor in apparel than in footwear given that its product offering is largely footwear focussed; and

(b) JD Sports' internal documents demonstrate that Footasylum is one of the competitors most closely monitored by JD Sports, alongside Foot Locker, ASOS, Nike and adidas.

9.139 The Parties' internal documents show a low degree of monitoring by the Parties of a range of other competitors,[593] showing that they are seen as more distant competitors. It is notable that Sports Direct, which is a large retailer in the industry, is monitored to a much lesser extent, especially by Footasylum. More generalist retailers, including department stores, are hardly mentioned at all.

Surveys

9.140 The way that retailers compete in this market and the extent of their constraint on each other is influenced by consumer preferences.

9.141 As explained in chapter 6, we undertook two large surveys of the Parties' customers to understand their views on how they purchase the Parties' products, and what alternatives they would consider if the retailer and/or channel that they shopped in was no longer available. We have not placed full evidential weight on the online survey results due to the low response rate (see paragraph 6.29). Further detail on the surveys and their methodology is set out in Appendix E.

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[592] As noted, we found that references to competitor retailers in internal documents do not usually distinguish footwear and apparel. We note some examples of documents considered in detail in chapter 8, which refer to both footwear and apparel, for example: [✂].
[593] These were [✂].

Parties' views

9.142 As set out in chapter 8 (paragraphs 8.193-8.916), the Parties made a number of submissions on the survey questions, design and robustness of the survey results, including on the phrasing of the diversion questions. These submissions are summarised in chapter 8 and set out in more detail in Appendix E, alongside our assessment of them.

Our assessment

9.143 The evidence from the store exit survey is highly informative of the constraint that the Parties place on each other and the constraint from other retailers, as this is derived from the views of the Parties' customers on which retailer is their next best alternative.

9.144 We first reviewed customers' reasons for shopping with the Parties to indicate what consumers value, then their search behaviour to indicate which retailers they look at before purchase (if any) and finally their stated next best alternatives (diversion) to indicate which retailers constrain each of the Parties.

Survey results for apparel customer shopping behaviour

9.145 Our surveys asked the Parties' customers why they had chosen to shop with the Parties.[594] We found that apparel customers reported a wide range of reasons for purchasing from the Parties, covering both price and non-price features of the Parties' offerings in both surveys.

9.146 Our store exit survey found that 19% of Footasylum's apparel customers and 10% of JD Sports' apparel customers mentioned 'good prices' as the main reason to shop there.[595] Our online survey suggests that price is the most important factor for just over half (56%) of Footasylum's apparel customers and over two-fifths (44%) of JD Sports' apparel customers when choosing to shop on either Party's website.[596]

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[594] In the case of the exit survey, respondents were not prompted in any way, while for the online survey respondents were presented with a comprehensive list.
[595] CMA analysis of DJS Store Exit survey. See: DJS Research, Exit survey for retail customers for a merger inquiry: JD Sports and Footasylum, January 2020
[596] DJS Research, Survey of online retail customers for a merger inquiry: JD Sports and Footasylum, January 2020.

9.147 Both in-store and online apparel customers also find quality and service to be of value. Indeed, more JD Sports in-store apparel customers stated that their main reason to shop at JD Sports is to do with quality rather than its prices.[597]

9.148 Product range is also important to the Parties' customers. When asked about the main reason that led them to buy at Footasylum, 39% of in-store apparel customers stated reasons associated with a good product range (eg good range of branded products, wide range of products, products that other stores do not have).[598] The percentage is similar for JD Sports' in-store customers (43%). For online customers, good product range is mentioned by around two-thirds of respondents as the main reason why they had shopped at either JD Sports (65%) or Footasylum (66%).[599]

9.149 Our store exit survey asked apparel customers what actions they had taken before visiting the JD Sports or Footasylum store where they made their purchase. A sizeable minority of apparel customers had looked at another physical store (14% of JD Sports' customers and 32% of Footasylum's customers) and a few (5% JD Sports; 10% Footasylum) had looked at other retailer websites. Of those customers that had looked elsewhere, this was most commonly the other Merging Party, followed by Sports Direct (in-store) and Foot Locker (online).[600]

9.150 Overall, the Parties' customers gave a range of price and non-price elements of the Parties' offering as the main reason why they shopped with the Parties. This is consistent with consumers valuing elements of QRS as well as price.

9.151 Just under a quarter of JD Sports' in-store apparel customers and just under half of Footasylum's in-store apparel customers had looked at the offering of other retailers before making their purchase decision and most commonly this comparison was made with the other Party.

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[597] CMA analysis of DJS Store Exit survey. See: DJS Research, Exit survey for retail customers for a merger inquiry: JD Sports and Footasylum, January 2020
[598] CMA analysis of DJS Store Exit survey. See: DJS Research, Exit survey for retail customers for a merger inquiry: JD Sports and Footasylum, January 2020
[599] DJS Research, Survey of online retail customers for a merger inquiry: JD Sports and Footasylum, January 2020.
[600] Of the Footasylum customers that had looked elsewhere 70% of those that had looked at other websites had looked at JD Sports and 28% at Foot Locker and 77% of those that had looked at other physical stores had looked at JD Sports and 19% at Foot Locker. Of the JD Sports customers that had looked elsewhere 40% of those that had looked at other websites had looked at Footasylum 28% of Foot Locker and 42% of those that had looked at other physical stores had looked at Footasylum and 23% at Foot Locker.

Survey results for apparel customer diversion behaviour[601]

9.152 Our store exit survey asked customers what they would do if all the stores of the Party that they had shopped at were closed. Similarly, our online survey asked customers what they would have done if the Party they had shopped at had stopped selling online.[602]

9.153 The responses to these questions give an indication of which other retailers customers view as alternatives to the Parties. Nationally representative diversion ratios to retailers receiving more than 2% of total diversion (across both channels) are shown in Table 9.5.[603]

Table 9.5: Apparel diversion ratios from JD Sports to Footasylum and third-parties (with no spend-weighting, excluding own-party diversion)

	%					
	JD Sports to Footasylum					
Retailer	In-store customers			Online customers		
	In-store to any channel	In-store to in-store	In-store to online	Online to any channel	Online to online	Online to in-store
Footasylum	17	13	4	13	9	4
Sports Direct	17	15	2	12	8	3
Nike	8	4	4	14	9	6
Foot Locker	8	6	2	5	2	3
adidas	7	4	3	9	7	2
DW Sports	4	3	1			
ASOS				10	10	
Amazon				7	7	
Next				2	2	
M and M				2	2	
Other third party	21	13	8	10	4	5
Not shop	16			15		
Total	100*	58	24	100*	60	23

Source: CMA calculations based on DJS surveys.

Note: The tables show diversion ratios from JD Sports to other retailers from the store exit survey and the online survey.
The tables only include parties for which the level of diversion exceeds 2%.
The 'Other third party' or 'Not shop' category includes a long tail of retailers with lower diversion ratios (for the column in question) including, as applicable, retailers such as: TK Maxx, Debenhams, House of Fraser and River Island.
If a retailer is included as a row in the table but a cell is empty this means that the diversion ratio was less than 2% for the column in question, in these columns the retailer may be present in the other third party figure.

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[601] Estimates of diversion reported in this section have been weighted to make them nationally representative of the Parties' entire store estate. This is different from the unweighted diversion tables in the DJS exit survey report (DJS Research, Exit survey for retail customers for a merger inquiry: JD Sports and Footasylum, January 2020).
[602] Those customers whose first choice would have been to divert to JD Sports' own online channel, were asked for their next best alternative after this and are instead reported under this next best alternative (this is what we refer to as excluding own-party diversion).
[603] We note that although our store exit survey was designed to provide national estimates of diversion, we have also examined some store level results. We looked at whether there was any apparent material difference in diversion between the Parties depending on the presence of other specific retailers. We found that diversion between the Parties in overlap areas where both Nike and adidas were present broadly exhibited the same pattern across stores as between other stores where only one or neither of them were present. Further, we assessed whether diversion was different in overlap areas where Sports Direct had an elevated store (Thurrock, Denton, Dudley and Leicester). Again, we found that the levels of diversion between the Parties in these areas appeared to be broadly in-line with at other stores.

The store exit survey, in particular, was designed primarily to estimate diversion between the two Parties; as such the level of sampling error is larger for third parties. The implication of this is that while the estimates for third parties are unbiased the margin of error is larger.
*Due to rounding the sum of diversion to each listed individual party, other third party and not shop is not equal to 100.

9.154 JD Sports' in-store customers are most likely to divert to Footasylum (17%) and Sports Direct (17%) to make their apparel purchases.[604] Other than Footasylum and Sports Direct, Nike, Foot Locker, adidas and D W Sports have diversion above 2%. About a fifth (21%) of customers would have gone to one of a number of other retailers and 16% would not have shopped at all. While the majority of diversion is to in-store, 24% would have diverted online. Diversion from in-store to online shows a similar pattern in terms of the retailers listed and the relative size of diversion to these retailers as for in-store to in-store diversion.

9.155 JD Sports' online customers are most likely to divert to Nike (14%). Other than Nike, Footasylum (13%), Sports Direct (12%) and ASOS (10%) are the most popular destinations. Other retailers with diversion above 2% are: Foot Locker; adidas; Amazon; Next; and M and M. One tenth (10%) of customers would have gone to a number of other retailers and 15% would not have shopped at all. While the majority of diversion is online, 23% would have diverted in-store. Diversion from online to in-store shows a similar pattern across retailers as for online to online diversion, the main difference being that those retailers that do not have an in-store presence are not included.

9.156 Table 9.6 shows the diversion ratios from Footasylum to other retailers for its apparel customers.

Table 9.6: Apparel diversion ratios from Footasylum to JD Sports and third-parties (with no spend-weighting, excluding own-party diversion)

	%					
Retailer	Footasylum to JD Sports					
	In-store customers			Online customers		
	In-store to any channel	In-store to in-store	In-store to online	Online to any channel	Online to online	Online to in-store
JD Sports	69	57	13	61	40	21
Foot Locker	3	2	1	5	3	2
ASOS				8	8	
Nike				4	2	1
Other third party	15	9	6	13	9	4
Not shop	13			10		
Total	100	68	20	100*	62	28

Source: CMA calculations based on DJS surveys.

Note: The tables show diversion ratios from Footasylum to other retailers from the store exit survey and the online survey. The tables only include parties for which the level of diversion exceeds 2%.

[604] Those customers whose first choice would have been to divert to JD Sports' own online channel, were asked for their next best alternative after this and are instead reported under this next best alternative (this is what we refer to as excluding own-party diversion).

The 'Other third party' or 'Not shop' category includes a long tail of retailers with lower diversion ratios (for the column in question) including, as applicable, retailers such as: TK Maxx, Debenhams, House of Fraser and River Island.
If a retailer is included as a row in the table but a cell is empty this means that the diversion ratio was less than 2% for the column in question, in these columns the retailer may be present in the other third party figure.
The in-store survey, in particular, was designed primarily to estimate diversion between the two Parties; as such the level of sampling error is larger for third parties. The implication of this is that while the estimates for third parties are unbiased the margin of error is larger.
*Due to rounding the sum of diversion to each listed individual party, other third party and not shop is not equal to 100.

9.157 Footasylum's in-store customers are by far most likely to divert to JD Sports (69%) to make their apparel purchases. Other than JD Sports, only Foot Locker has diversion above 2%; 15% of customers would have gone to one of a number of other retailers and 13% would not have shopped at all. While the majority of diversion is to in-store, 20% would have diverted online.

9.158 Footasylum's online customers are by far most likely to divert to JD Sports (61%). Only Foot Locker, ASOS and Nike also have diversion above 2%; 13% of customers would have gone to a number of other retailers and 10% would not have shopped at all. While the majority of diversion is online, 27% would have diverted in-store. Diversion from online to in-store shows a similar pattern across retailers as for online to online diversion, the main difference being that those retailers that do not have an in-store presence are not included.

Conclusion on apparel customer diversion

9.159 In both the exit survey and the online survey, substantially more Footasylum customers would divert to JD Sports than any other retailer. This shows that Footasylum's apparel customers view JD Sports as their closest substitute.

9.160 A sizeable proportion of JD Sports' in-store apparel customers stated that their next best alternatives are Footasylum or Sports Direct. For JD Sports' online apparel customers Nike, Footasylum and Sports Direct are seen as the next best alternatives with diversion ratios of 14%, 13% and 12% respectively. This shows that JD Sports' apparel customers view Footasylum as one of a small number of close substitutes.

9.161 Diversion to JD Sports for in-store Footasylum apparel customers was substantially higher (66 percentage points) than the next best alternative (Foot Locker), whereas diversion to Footasylum for in-store JD Sports apparel customers was the same as Sports Direct (17%) and nine percentage points higher than the next best alternatives of Nike and Foot Locker. A similar pattern emerges from the results of the online survey.

9.162 This evidence shows that their customers view the Parties as one of the closest substitutes to each other (along with Sports Direct for JD Sports' in-store customers and Nike for JD Sports' online customers) and therefore the

Parties exert a strong constraint on each other. The constraint that JD Sports imposes on Footasylum is larger than vice versa.

GUPPIs

9.163 As explained in chapter 6, the GUPPI is a commonly used metric designed to indicate the upward pricing incentive for merging parties post-merger.[605] The rationale underpinning the GUPPI is that it is less costly for the merged entity to deteriorate its offering post-merger (for either or both of the merging parties) as it will recoup the profit on recaptured sales from those customers that divert and purchase products from the other merging party. GUPPIs are calculated by combining diversion ratios and profit margin information (see Appendix F for more detail). The CMA has used GUPPIs in its assessment in a number of merger inquiries.[606] An illustrative example showing the logic underpinning the GUPPI and further discussion of the GUPPI has been provided in chapter 8 (see paragraph 8.218).

Parties' views

9.164 As set out in chapter 8, the Parties made a number of submissions regarding the use of GUPPIs. These submissions were not specific to apparel and have therefore been accounted for in the same way as described for footwear in chapter 8 – see paragraphs 8.221-8.225 (see also Appendix F).

Our assessment

9.165 Our GUPPI estimates for apparel are set out in Table 9.7. We tested the robustness of these GUPPI figures with respect to a range of factors, outlined in detail in Appendix F.[607]

Table 9.7: GUPPI estimates – apparel (%)

Market segment		%
	JD Sports *	Footasylum†
In-store	[4-7]	[19-27]
Online	[3-5]	[14-21]
Combined	[4-7]	[18-25]

Source: CMA calculations based on DJS surveys and CMA variable margin estimates. The ranges presented represents the CMA's ranging of the margin for the purposes of publication.

[605] The same incentive applies to deterioration of QRS as to increasing prices.
[606] Examples of where GUPPIs were used include: Ladbrokes/Coral merger inquiry (2016), Cineworld/City Screen merger inquiry (2013) and Sainsbury's/Asda merger inquiry (2019).
[607] If we focussed on price or range marginal consumers, estimated diversion ratios allowing consumers to select other fasciae belonging to the Parties, using spend-weighted diversion ratios or the Parties' submitted variable margins, the impact on the estimated GUPPI would not be sufficient to change our overall conclusion.

* These GUPPIs are calculated on the basis of diversion from JD Sports to Footasylum and Footasylum's variable margins.
† These GUPPIs are calculated on the basis of diversion from Footasylum to JD Sports and JD Sports' variable margins.

Note: Combined estimates calculated on the basis of weighted in-store and online diversion (based on 2018 proportions of the Parties' in-store and online revenues) and the relevant margins.

9.166 We consider that the GUPPI figures are high, particularly for Footasylum but also for JD Sports.[608] In the in-store segment of the market we estimated GUPPIs of [19-27%] for Footasylum and [4-7%] for JD Sports. We did not place full evidential weight on the online GUPPIs or the combined GUPPIs as they have both been derived using the online survey results (see chapter 6) but note that, although lower than the GUPPIs in-store, they still indicate a strong incentive to increase prices (or to deteriorate other aspects of QRS) for both JD Sports and Footasylum. The asymmetry of the GUPPIs between Footasylum and JD Sports is consistent with other evidence we reviewed, including the Parties' internal documents.

Conclusion on GUPPIs

9.167 As noted in paragraph 9.162, the diversion ratios from the surveys show that the Parties are close alternatives for their customers (along with Sports Direct for JD Sports' in-store customers and Nike for JD Sports' online customers). We found that the Parties exert a strong constraint on each other in-store and online, and the constraint that JD Sports imposes on Footasylum is larger than vice versa. This means that if either of the Parties were to deteriorate their PQRS, a sizeable proportion of their customers would divert to the other Party. Post-Merger these customers would continue to purchase from the Merged Entity and so it would recoup the profits from these customers that might otherwise have been lost absent the Merger. When combined with estimates of the Parties' variable margins, this results in high in-store GUPPIs, particularly for Footasylum.

9.168 In the in-store segment of the market we estimated GUPPIs of [19-27%] for Footasylum and [4-7%] for JD Sports. GUPPI figures of this magnitude show a strong incentive for the Merged Entity to deteriorate its offering post-Merger for example through raising prices or deteriorating elements of QRS. The asymmetry of the GUPPIs is consistent with other evidence presented elsewhere in this chapter, for example the Parties' own internal documents. Although the online and combined GUPPIs are lower than the in-store GUPPIs, they still indicate a strong incentive on the Merged Entity to

[608] We have not set a specific GUPPI threshold above which a SLC would arise in our national level assessment of this Merger. A threshold is sometimes necessary in the context of using a decision rule to identify local SLCs, where there are too many local areas to assess individually but is not necessary in this case given our national assessment.

deteriorate PQRS for example through raising prices or deteriorating elements of QRS.

9.169 We considered the surveys and the GUPPIs as part of a wide range of evidence reviewed in our investigation and based our decision on all of this evidence in the round.

Entry-exit analysis

9.170 One way to assess the strength of the competitive constraint from a given retailer on the Parties is to assess the impact on the Parties of that retailer's stores opening or closing in the relevant catchment area — an 'entry-exit analysis'. The entry-exit analysis complements other evidence sources on the extent to which different retailers constrain each other, by providing information on consumers' actual behaviour rather than their stated behaviour. We note that this analysis is focussed on store-level data and, as such, is relevant to the in-store segment of the relevant markets.

9.171 We explained the details of our analysis in chapter 8 (see paragraphs 8.246-8.259) and further detail on our results, methodology and response to the Parties' submissions is set out in Appendix C, as well as in this section.

Parties' views

9.172 The Parties made a number of overarching and more detailed comments on the CMA's analysis (set out in paragraphs 8.235-8.244), in particular stating that it was retrospective and did not reflect:

(a) the prospective competitive landscape;

(b) the weakened position of Footasylum in the counterfactual; and

(c) the impact of Sports Direct's elevation strategy.

9.173 We have considered these points below and in detail in Appendix C.

Our assessment

9.174 We examined the impact of store openings and closures by different retailers on JD Sports' store performance as measured by revenue.

9.175 The impact on revenue provides an indication of the extent to which that retailer competes with JD Sports (see chapter 8, paragraph 8.247 and Appendix C for more detail).

9.176 As described in chapter 8, the analysis is retrospective and there is the potential for upward bias. However, we consider that entry-exit analysis remains informative of the relative constraint exerted by different retailers, particularly when the analysis is considered in the context of other evidence. The Parties made a number of submissions related to the entry-exit analysis which are set out in more detail in chapter 8 (paragraphs 8.235-8.244) and Appendix C along with our description as to how these submissions have been taken into account (eg see paragraphs 8.248-8.258). The implication of the upward bias is that evidential weight is only given to results that are negative and statistically significant.[609] This is because if a result is statistically insignificant or positive and significant this may be the result of the upward bias.

9.177 As explained in chapter 8, we analysed 'store entry' ie other retailers' opening of stores in areas where JD Sports is present regardless of whether the retailer has an existing store in the area, and we also analysed 'retailer entry' where the retailer does not have an existing store already in the area. The latter analysis is important as the impact of entry may be less if the retailer already has a store in an area, which may underestimate the closeness of competition between the two retailers.

9.178 The weekly data used in the analysis covers 2014 to 2020 and as noted in chapter 8, it was only possible to perform the analysis for JD Sports. The analysis estimates an average effect of entry or exit by different retailers across all JD Sports stores on apparel revenue across all time periods post-entry (or exit). We tested for robustness by first adjusting for store and time-specific factors and then additionally for region-specific factors that vary over time, as described in chapter 8 (paragraph 8.255).[610]

9.179 As described in chapter 8 (paragraph 8.256) to test the robustness of our findings we estimated models where we use a 10-minute drivetime to identify entry and exit events as opposed to our preferred approach of using a 20-minute drivetime. We also estimated models where we only use the last three years of data as opposed to our preferred approach of using all years of data in our sample.

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[609] The conventional cut-off for placing weight on estimated results is a significance threshold of 5%. We have considered statistical significance at the 5% level unless stated otherwise, see also Appendix C, paragraph 80.
[610] Data on Footasylum store locations was provided by Footasylum. Data on other retailer store locations was provided by JD Sports. Weekly revenue for each of the Parties' stores. To smooth out the random variation that exists from week-to-week, the data was aggregated to a four-weekly (monthly) and 12-weekly (quarterly) basis.

Results – impact of entry/exit on apparel revenue

Store entry/exit

9.180 When all available data is used, and an entry/exit event is defined using a 20-minute drivetime (our preferred specification), store entry by the following retailers is statistically significant in reducing the apparel revenue of JD Sports stores:

(a) Footasylum ([✂]% but only when region-time fixed effects are used);

(b) Nike ([✂]%); and

(c) USC[611] ([✂]% but only when region-time fixed effects are used).

9.181 When only the last three years of available data are used, and an entry/exit event is defined using a 20-minute drivetime, store entry by the following retailers is statistically significant in reducing the apparel revenue of JD Sports stores:

(a) Nike ([✂]%); and

(b) DW Sports ([✂]% but only when quarterly data is used, and region-time fixed effects are not used).

9.182 When a 20-minute definition of entry/exit events is used there is evidence that store entry/exit by Nike affects the revenue of JD Sports on average between September 2014 and February 2020. There is weak evidence[612] that store entry/exit by Footasylum and USC has an effect. There is evidence using only the last three years of data that store entry/exit by Nike has an effect and weak evidence that store entry/exit by DW Sports may have some effect.

9.183 The opening or closure of a Footasylum store within 20-minutes of a JD Sports store is estimated to reduce the apparel revenue of the JD Sports store by [✂]% on average between September 2014 and February 2020, but only when region-time fixed effects are included in the model. However, if attention is restricted to the three-year period February 2017 to February 2020 the estimated effect ceases to be statistically significant. It is not possible to distinguish whether the absence of an effect is driven by the loss of statistical

[611] For the purposes of the entry/exit analysis, USC refers to standalone USC stores. Sports Direct/USC includes any Sports Direct store, including those that are co-located with a USC store.
[612] If a result is statistically significant regardless of whether the data is monthly/quarterly or the region time fixed effects are included/excluded, it is given full evidential weight. If in at least one of these specifications a result is not statistically significant it is deemed weak evidence.

precision or a material change in the competitive constraint that Footasylum exerts on JD Sports in the supply of sports-inspired casual apparel.

9.184 When a 10-minute definition of entry/exit events is used there is evidence that store entry/exit by Schuh affects the apparel revenue of JD Sports on average between September 2014 and February 2020. There is weak evidence that store entry/exit by Nike has an effect using all available data. There is evidence using only the most recent data that store entry/exit by Nike has an effect. There is also weak evidence using only the last three years of data that store entry/exit by Sports Direct/USC[613] may have some effect.

9.185 The opening or closure of a Footasylum store within 10-minutes of a JD Sports is not found to have a statistically significant effect on the apparel revenue of the JD Sports store between September 2014 and February 2020, or when attention is restricted to the three-year period February 2017 to February 2020.

Retailer entry/exit

9.186 When all available data is used, and an entry/exit event is defined using a 20-minute drivetime, retailer entry by the following retailers is statistically significant in reducing the apparel revenue of JD Sports stores:

(a) Footasylum ([✂]%); and

(b) Foot Locker ([✂]%).

9.187 When only the last three years of available data are used, and an entry/exit event is defined using a 20-minute drivetime retailer entry by the following retailers is statistically significant in reducing the apparel revenue of JD Sports stores:

(a) Nike ([✂]% but only when region-time fixed effects are not used).

9.188 When a 20-minute definition of entry/exit events is used there is strong evidence that retailer entry/exit by Footasylum and Foot Locker affects the apparel revenue of JD Sports on average between September 2014 and February 2020. There is weak evidence using only the last three years of data that retailer entry/exit Nike may have some effect.

9.189 The opening or closure of the only Footasylum store within 20-minutes of a JD Sports store is estimated to reduce the apparel revenue of the JD Sports store by [✂]% on average between September 2014 and February 2020. However,

[613] Sports Direct/USC includes any Sports Direct store, including those that are co-located with a USC store.

if attention is restricted to the three-year period February 2017 to February 2020 the estimated effect ceases to be statistically significant. It is not possible to distinguish whether the absence of an effect is driven by the loss of statistical precision or a material change in the competitive constraint that Footasylum exerts on JD Sports in the supply of sports-inspired casual apparel.

9.190 When a 10-minute definition of entry/exit events is used there is strong evidence that retailer entry/exit by Footasylum affects the apparel revenue of JD Sports on average between September 2014 and February 2020. There is weak evidence that retailer entry/exit by Foot Locker and Nike has an effect when all data is used. There is evidence using only the most recent data that retailer entry/exit by Footasylum and Nike has an effect. There is weak evidence using only the last three years of data that retailer entry/exit by Office may have some effect.

9.191 The opening or closure of the only Footasylum store within 10-minutes of a JD Sports store is estimated to reduce the apparel revenue of the JD Sports store by [✂]% on average between September 2014 and February 2020. When attention is restricted to the three-year period February 2017 to February 2020 the estimated effect continues to be statistically significant and negative but the magnitude of the estimated effect falls slightly to [✂]%.

9.192 There is consistent evidence that retailer entry within 10-minutes or 20-minutes by Footasylum has an effect on the apparel revenue of JD Sports on average between September 2014 and February 2020. There is only weak evidence that store entry by Footasylum has any effect. We note that there is evidence that retailer entry within 10-minutes by Footasylum is found to have an effect on the apparel revenue of JD Sports on average between February 2017 and February 2020.

9.193 Our analysis is unable to shed light on the extent to which this constraint may have changed in the most recent years of data for retailer entry within 20-minutes of a JD Sports. The finding of no impact by Footasylum in the last three years of data is consistent with a reduction in the competitive constraint that it imposes on JD Sports. However it is not possible to distinguish between whether this lack of statistical significance is driven by the loss of statistical precision which occurs because we have less data or whether there has been a genuine change in the competitive constraint that Footasylum exerts on JD Sports in the supply of sports-inspired casual apparel. Further the potential for upward bias means that throughout this analysis we only place evidential weight on results that are negative and statistically significant.

Summary of results on impact of entry/exit on apparel revenue

9.194 Overall, the entry-exit results indicate that Footasylum is a competitive constraint on JD Sports when it comes to sports-inspired casual apparel. Retailer entry by Footasylum is found to affect JD Sports' apparel revenues.[614] Store entry by Nike and USC and retailer entry by Foot Locker is also found to reduce the revenue from apparel at the local JD Sports store in our preferred specification. In other specifications, there is evidence that DW Sports, Sports Direct/USC and Office may also have an effect. Given the potential for upward bias, any estimates which were not negative and statistically significant have been treated as being indicative of an absence of evidence for the impact of these retailers on the revenue of JD Sports, rather than evidence for the absence of a competitive constraint. It is not possible to rule out that other retailers may also exert a competitive constraint on JD Sports in the same market.

9.195 On the face of it, the results for Foot Locker and Office are counter-intuitive given that both of these retailers focus on footwear rather than apparel. In the case of Office, the estimated effect is not robust to reasonable model variation and so we placed limited weight on this result. For Foot Locker, there are possible explanations for such an impact, including that its footwear offering might lead to some consumers who buy both footwear and apparel visiting Foot Locker rather than JD Sports, although we note that the proportion of consumers who purchase both footwear and apparel in one trip is small (as found in our surveys - see Appendix E, paragraph 7b)ii). Further, while its range of apparel is not as wide as the Parties', many Foot Locker stores do stock apparel (albeit it is a small proportion of its overall offering).

9.196 The entry-exit results indicate that while there is a smaller proportion of apparel sold at Foot Locker stores, the apparel that is stocked is considered by consumers to be a substitute to the apparel available in JD Sports. This is consistent with the survey evidence whereby 8% of JD Sports in-store customers stated that they would divert to Foot Locker for the purchase of apparel (which is just under half of the proportion of JD Sports customers who said they would divert to Footasylum - 17%).

Conclusion on entry-exit analysis

9.197 Looking at the entry-exit analysis in the round, we found that retailer entry by Footasylum has a negative impact on JD Sports' apparel revenue. We note that store entry by Footasylum is also found to affect the apparel revenue at

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[614] Store entry by Footasylum is also found to have a statistically significant effect but only when region-time fixed effects are used in the model.

JD Sports but only when region-month fixed effects are included in the model. This indicates that Footasylum is a close competitor to JD Sports and exerts a constraint on JD Sports in this market. The evidence for the impact of Footasylum on apparel revenue is slightly less strong than that for footwear revenue, since only retailer entry is associated with a statistically significant decrease in apparel revenue for JD Sports.

9.198 We also note that entry by Foot Locker, Nike and USC were also found to have an impact on JD Sports' apparel revenue, indicating that they impose some constraint in this market. To a lesser extent there is also evidence that DW Sports and Sports Direct/USC may exert a competitive constraint on JD Sports in apparel.

Overview of current constraints

9.199 We reviewed a wide range of evidence on market shares, the nature of retailers' offerings and third parties' rankings of competitive closeness, internal documents, our surveys (covering diversion ratios and our GUPPI analysis) and our entry-exit analysis, in addition to the impact of suppliers, in assessing the current aggregate constraints on retail competition.

Parties' views

9.200 JD Sports submitted that the 'assessment [of apparel] is best split into three brand-based categories' (own-label and Bedroom Brands,[615] sports-heritage brands,[616] and other brands).[617] It said that the Parties could not be close competitors across all three of these categories to result in a likely unilateral effects SLC if they were not particularly close competitors in any of the three categories.[618] Further, it submitted that the Parties were differentiated and each faced an array of closer third party competitors in each category than in aggregate, which dwarfed the relatively marginal role they played against each other as competitors in apparel.

9.201 JD Sports submitted that the Parties faced a wide range of competitors with established and well known own-brand ranges, including other fashion retailers such as Next, River Island and Topshop/Topman and online-only retailers such as ASOS, Boohoo, Pretty Little Thing and Amazon, in addition

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[615] A term used by the Parties to describe emerging fashion brands that start life in their founders' bedrooms (ie are founded by individual entrepreneurs).
[616] [✂].
[617] JD Sports, Response to Issues Statement, paragraph 95.
[618] JD Sports, Response to Issues Statement, paragraph 96.

to selling branded products. It submitted that this strength of competition would not be impacted by the Merger.

Third parties' views

9.202 We received submissions from a number of third parties,[619] most of whom considered that the Parties competed closely in apparel and that there were few other close constraints on the Parties both currently and post-Merger.

Competition between the Parties

9.203 As discussed in chapter 8, at phase 1, we asked third parties to rank the Parties in terms of their closeness of competition to each other.[620] Overall, third parties indicated that the Parties competed closely against each other in apparel (see paragraphs 9.126-9.127 where we explore this further), although slightly less closely than for footwear.

9.204 Several retailers submitted that the Merger would decrease competition and increase the leverage that the Merged Entity would have over suppliers, and its access to branded products, although they did not typically differentiate between footwear and apparel.

Constraints from other retailers

9.205 We asked third party retailers to rank other retailers in terms of their closeness of competition in apparel to each of the Parties. Based on these rankings, Sports Direct and ASOS were most frequently mentioned as competitors.[621] In terms of closeness of competition, adidas, Nike and Foot Locker were mentioned as the closest to the Parties, at a level similar to the closeness between the Parties themselves (see paragraphs 9.126-9.127).[622]

9.206 A number of third party retailers separately submitted views as to whether or not they saw themselves as competitors to the Parties, for example:

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[619] We note that JD Sports submitted that 'As in all cases where there are complainants with commercial incentives to frustrate a deal there will be a question of how much weight should be given to their views about the effect of a merger (as opposed to other grievances) and a need to ensure their submissions are supported with evidence.' As in any inquiry, we have given due regard to a range of factors including: the incentives of the party giving that evidence; the extent to which the party had knowledge that was relevant to the statutory questions we are required to answer; and the extent to which the evidence was corroborated by other evidence available to us.
[620] Closeness in this context was measured on a one (not close at all) to 10 (very close) scale.
[621] CMA analysis of third party questionnaires during phase 1.
[622] We note that there may be some bias in the reported rankings by third parties as both footwear and apparel were considered in the same questionnaire, albeit each was considered separately.

(a) [✂] submitted that it was a fashion retailer not primarily focussed on sports or performance apparel, and that it did not see itself as directly competing with the Parties;

(b) [✂] submitted that it did not compete with the Parties;

(c) [✂] submitted that it did not view itself as a competitor of Footasylum or JD Sports, stating:

> We fundamentally believe [✂] not to compete directly with either of JD Sports, Foot Asylum [sic], or any other sports inspired business. We are a fashion retailer that offers casual clothing in addition to smarter products.

(d) [✂] submitted that it considered JD Sports to be a competitor, stating that it 'also sells direct to consumers in competition with JD Sports. Approximately, [✂]% of all [✂] lines sold directly are also sold by JD.' Regarding Footasylum, [✂]submitted it was 'Not really/theoretical competitor as Footasylum does not retail [✂] products in competition to [✂] own stores'.

Our assessment

9.207 The Parties are both large multi-brand retailers of sports-inspired casual apparel operating nationally through their stores and online channel, with each serving a large number of customers.

9.208 For JD Sports, while it is a larger retailer than Footasylum, overall we found its apparel offering has some similarities to Footasylum, internal documents demonstrate that JD Sports sees Footasylum as one of its close competitors, its apparel customers state that Footasylum is their next best alternative (along with Sports Direct for JD Sports' in-store customers and Nike for JD Sports' online customers), the opening of Footasylum stores affects nearby JD Sports store apparel revenues and third parties rank Footasylum highly as a close competitor to JD Sports in apparel.

9.209 For Footasylum, although it is a smaller retailer than JD Sports, overall we found its apparel offering has some similarities to JD Sports, internal documents demonstrate that Footasylum sees JD Sports as its closest competitor, its in-store and online apparel customers are by far most likely to divert to JD Sports and third parties rank JD Sports highly as a close competitor to Footasylum in apparel.

9.210 We found that, taken together and in the round, the evidence strongly demonstrates that the Parties are close competitors to each other in apparel

although JD Sports provides a stronger constraint on Footasylum than vice versa.

9.211 We considered the current aggregate constraints from other retailers on the Parties in this market, based on the same evidence.

9.212 The GUPPIs we calculated for JD Sports and Footasylum using the diversion ratios are high, particularly for Footasylum, and we note that the GUPPIs in apparel are higher than in footwear. This shows that the Merged Entity would have a strong incentive post-Merger to deteriorate PQRS (worsen or improve PQRS to a lesser extent or not as quickly as it would have done absent the Merger) post-Merger. The GUPPIs take into account the aggregate current constraint from all other retailers.

9.213 Our store exit survey shows that Sports Direct exerts a constraint on JD Sports that is comparable with Footasylum in apparel, but a much weaker constraint on Footasylum than JD Sports, despite it being a large national retailer. Sports Direct's apparel offering is different in some respects from that of the Parties. It has a [✂] apparel product overlap with the Parties for Nike and adidas products, is more focussed on sporting goods and currently has more of a value proposition than the Parties (although it has opened some elevated stores - we consider how any continued elevation might change its constraint in the next section, see paragraphs 9.236-9.256). There is a low degree of monitoring by the Parties of Sports Direct in their internal documents, and this is to a much lesser extent than of other competitors and each other. Taking this evidence in the round, we found that while Sports Direct exerts some constraint on JD Sports, this is less than that imposed by Footasylum and it is a far weaker constraint on Footasylum than JD Sports is in apparel.

9.214 Similarly, Nike's DTC apparel offering has some impact on the Parties. We found that it is monitored by both of the Parties in their internal documents. Our entry-exit analysis indicates that the entry of Nike stores has an impact on the apparel revenue of JD Sports stores. However, our store exit survey shows that while it exerts some constraint on JD Sports, it is a weak constraint on Footasylum. The online survey suggests Nike may be a closer competitor to JD Sports' online apparel customers than for in-store apparel customers, but that it is a weaker constraint on Footasylum. On this basis we found that Nike exerts some constraint on the Parties in apparel, but less than each does on the other.

9.215 Foot Locker is viewed by third parties as being a close competitor to the Parties in apparel and our entry-exit analysis also indicates that the entry of new Foot Locker stores has an impact on the apparel revenue of local JD

Sports stores. Internal documents also show that the Parties closely monitor Foot Locker, although these documents do not distinguish between footwear and apparel. However, Foot Locker has a much smaller proportion of apparel in its offering than it does footwear. Our store exit survey shows that Foot Locker exerts only some constraint on JD Sports in apparel, which is much less than Footasylum; and it exerts a weak constraint on Footasylum. These findings are consistent with those of our online survey. Taking this evidence in the round, we found that Foot Locker has some constraint on the Parties in apparel but not as strong as each does on the other.

9.216 The Parties also monitor ASOS (which is online-only) and third parties view ASOS as exerting some constraint on the Parties in apparel. Our online survey suggests it exerts some constraint on the Parties. However, our store exit survey shows that ASOS is a very weak constraint on both JD Sports and Footasylum. Therefore, overall we found that ASOS exerts some constraint on the Parties in apparel, but it is not as strong as that imposed by each Party on the other.

9.217 While numerous other retailers offer sports-inspired casual apparel, taken in the round, the same evidence indicates that their constraint on the Parties is only moderate at best.

9.218 We found that adidas's DTC apparel offering is a weaker constraint than Nike's DTC offering. It is monitored by both Parties in their internal documents. Our surveys show that it exerts some constraint on JD Sports but much less than Footasylum, and it is a much weaker constraint on Footasylum in apparel. We did not find evidence of a constraint from adidas in our entry/exit analysis.

9.219 Our store exit survey shows Amazon is a very weak constraint on the Parties in apparel. The online survey suggests it exerts some constraint on JD Sports but a very weak constraint on Footasylum. Few third parties mention Amazon as a constraint on the Parties in apparel. We recognise that [✂] (see paragraph 8.302). However, the evidence overall suggests that Amazon exerts a very weak constraint on the Parties in apparel.

9.220 There is a large number of other apparel retailers that sell sports-inspired or other types of casual apparel eg Next, Topshop/Topman, River Island, Primark, Zalando (which is online-only) but, with the exception of Next and Zalando, these retailers do not sell similar branded apparel products to either of the Parties and Next and Zalando only sell these online. The evidence from the surveys, internal documents and third party views indicate that these retailers are very weak constraints on the Parties in apparel. In support of this,

nearly all of the retailers listed here (bar one) consider themselves not to be competitors to either of the Parties.

9.221 In addition to the constraint from other retailers, we also assessed the constraint that suppliers exert on retailers in this market (including on the Parties). Much like footwear, suppliers play an important role in shaping retail competition in apparel. Suppliers, in particular Nike and adidas, exert some constraint on the Parties' ability and/or incentive to deteriorate their offering. However, this constraint is not so significant as to sufficiently discipline the Merged Entity's ability and/or incentive to deteriorate its offering post-Merger. Further, the strength of suppliers' constraint is less in apparel than in footwear. In apparel, a greater proportion of sales come from a wide range of suppliers of branded products, and there is less dependence on Nike and adidas which have a smaller share in the apparel market than in footwear, though remain important. Unlike footwear, retailers (including the Parties) also design, stock and price their own-brand apparel products and do not face the same constraints from suppliers on these products.

9.222 Overall, while we found that numerous other retailers offer sports-inspired casual apparel, taken in the round, the evidence indicates that only Sports Direct and Nike exert some constraint, but this is less than the Parties do on each other, with other retailers providing much less of a constraint. Taking these current constraints in aggregate, we found that the constraint on the Parties is only moderate at best (eg the aggregate diversion to other retailers was low) and would not be sufficient to prevent an SLC. While suppliers exert some constraint, in addition to retailers, as noted above this constraint has limitations and suppliers' constraint is weaker in apparel than in footwear. Taking the evidence in the round, and on balance, we found that the aggregate constraints[623] from retailers and suppliers would not be sufficient to prevent the Merged Entity from deteriorating PQRS post-Merger.

Impact of COVID-19

9.223 We also considered the impact of COVID-19 on our assessment, as far as possible, to see if it changes these findings. While the market is clearly being impacted by COVID-19, the impact on our assessment of the competitive effects of the Merger is less certain. There remains considerable uncertainty about the extent and duration of the impact of COVID-19.[624]

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[623] The aggregate constraint is evaluated directly in some of the evidence, eg diversion ratios, but more generally we have considered the aggregate constraint by recognising that it is appropriate to consider the effect of all of the retailers and suppliers considered as a combined constraint on the Parties.
[624] CMA, Merger Assessments during the Coronavirus (COVID-19) pandemic, paragraph 22.

9.224 We note the Parties' submissions as set out in chapter 8 (see paragraph 8.306) regarding the impact of COVID-19 and social distancing measures on Footasylum, and that this would particularly [✂]. We consider that it is likely that Footasylum, much like many other retailers, will be negatively impacted to an extent. We note that all retailers in this market are subject to the same change in market conditions and measures put in place by the government as a result of COVID-19, although it is difficult to predict the effect on different retailers and how each will respond to the circumstances. We also note that online sales are not being impacted to the same extent as in-store sales,[625] and that online sales make up a sizeable proportion of the Parties' sales.

9.225 Overall, it is not clear to what extent COVID-19 is affecting the relative constraints posed by different retailers and suppliers in the apparel market. We have not seen evidence to suggest that either of the Parties is being more negatively impacted by COVID-19 relative to each other or relative to other retailers in this market. Therefore, it is not clear that, as a result of COVID-19, either of the Parties would be in a much weaker competitive position to each other and to other retailers, or that other competitors would become significantly stronger. For example, in our view, it is likely that all retailers are [✂] given the current circumstances. Therefore, while recognising these uncertainties, we do not envisage that the impact of COVID-19 is likely to reduce materially the extent to which the Parties are close competitors, or to increase materially the current competitive constraints on the Parties in apparel. We consider the impact of COVID-19 on competitive constraints in the foreseeable future in terms of market developments, in the next section (paragraphs 9.276-9.279).

9.226 Therefore, based on our assessment of the aggregate constraints from retailers and suppliers, we found that the Merger would result in the removal of a direct and significant constraint on each of the Parties and that overall the remaining constraints post-Merger would not be sufficient to prevent an SLC.

9.227 We recognise that this is to some extent a dynamic market and therefore in addition to evidence illustrating current constraints on the Parties, it is also important to consider the impact of future market developments on the competitive constraints on the Merged Entity which we have considered below and in more detail in chapter 8 (see paragraphs 8.311-8.446).

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[625] See for example paragraph 7.43 and paragraph 8.3.

Market developments

9.228 Our Guidance states that changes to market conditions in the foreseeable future will often be assessed as part of our competitive assessment.[626] In chapter 8 we assessed whether there are any changes underway (including the impact of COVID-19)[627] or likely to happen in the foreseeable future (ie broadly within the next two years – see also paragraph 9.2) that may materially change the nature of the existing constraints on the Parties. We focussed our assessment on retailers already present in the market and considered any repositioning or significant expansion by them. We separately assessed new market entry, including entry from adjacent markets, when we considered countervailing factors (see chapter 11). The discussion of market developments in chapter 8 (see paragraphs 8.311-8.446) largely applies equally to apparel and footwear and is summarised below. We have expanded on any specific evidence related to apparel.

Parties' views

9.229 As set out in chapter 8, the Parties made a number of submissions that applied to both the footwear and apparel markets, which we have summarised here (set out in detail in paragraphs 8.313 - 8.316). The Parties submitted that:

(a) the sector in which they operated 'is subject to substantial disruptive expansion and repositioning by rivals' and cited a number of factors as evidence that 'many' rivals were disruptively expanding and repositioning themselves;

(b) they also faced the threat of 'potential brand-sponsored entry' and that suppliers 'can and do sponsor entry into the market when the incumbent retailers are under-performing'. (We consider potential supplier-sponsored entry as part of our assessment of countervailing factors in chapter 11); and

(c) this expansion and repositioning of other retailers would be 'large relative to the scale of Footasylum, meaning that the constraint from Footasylum on JD Sports would be replaced, several times over, by new constraints'.

9.230 The Parties further submitted that repositioning and expansion by Frasers Group points to no SLC.[628] They said that Frasers Group was aggressively

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[626] CMA Guidance, paragraph 4.3.2.
[627] Where submissions were made following the onset of COVID-19 in the UK this is indicated; otherwise we note that submissions referenced were received prior to COVID-19 arising.
[628] The Parties, Response to Provisional Findings, chapter 2, section II.

pursuing its elevation strategy, there is evidence of it having increasing access to the same premium sports-inspired casual apparel and footwear products, this access is having a significant impact on the Parties' store sales and that there is evidence that the store elevation strategy is supported by suppliers of branded products. The Parties further submitted that the view expressed in the Provisional Findings with respect to apparel was 'also not reflective of the current competitive reality, in which the combined SDI / USC offering includes a wide range of sports-inspired and fashion inspired premium brands, including Nike, Nicce, Lyle & Scott, Lacoste, Champion, Calvin Klein, Diesel and many others.'[629]

9.231 JD Sports submitted that Foot Locker was shifting toward a more active and aggressive store expansion programme which included stocking more apparel products in its larger 'power stores' which it considered Footlocker was opening more of in the UK.[630]

Third parties' views

9.232 As set out in chapter 8, third parties who commented on market developments - such as [✂] - highlighted suppliers' role in the footwear and apparel markets, which they submitted was changing in relation to suppliers' DTC offer (set out in detail in paragraph 8.317).

Our assessment

9.233 In this section, we assess whether significant changes in retailers' positioning or significant expansions of their offerings could lead to a material increase in the aggregate constraint faced by the Merged Entity post-Merger.

9.234 Since sports-inspired casual apparel is trend driven, retailers of such products may reposition themselves in terms of what they stock, the fascia under which they trade, the branding that they use, the branding of a given fascia, marketing and the consumers they target. If a given retailer were to change some or all of these elements of its offering, this could change the extent of the constraint that it exerts on the Merged Entity in the foreseeable future. Alternatively, a retailer may materially expand under its current proposition. These types of changes would not be captured by the retrospective or point-in-time nature of some of the evidence we have considered, such as our entry-exit analysis and the surveys (including the GUPPIs) respectively. However, some internal documents may capture the Parties' views about

[629] The Parties, Response to Provisional Findings, chapter 2, section II, paragraph 202.
[630] The Parties, Response to Provisional Findings, chapter 2, section IV, paragraph 242.

market developments, and we considered these in our assessment where appropriate.

9.235 We focussed our assessment of changes on retailers who are already present in the market repositioning or expanding their offer. In particular, we considered Frasers Group, DTC growth and multi-brand retailers' growth including Foot Locker and Amazon, among others. Our full assessment is set out in chapter 8 (paragraphs 8.311-8.456) and summarised here. We also set out in detail specific evidence related to apparel which is not covered in chapter 8.

Frasers Group

9.236 As explained in chapter 8 (paragraphs 8.321-8.324), Frasers Group has a number of fasciae including Sports Direct and USC. It has publicly outlined its intentions to continue to elevate and change the retail proposition of some of its fasciae (including Sports Direct) in the coming years,[631,632] to improve the quality of its stores and digital offer in order to elevate the consumer perception of the Sports Direct fascia, USC fascia and the wider Frasers Group. [✂]. In Frasers Group's half-year results for 2019, elevation was listed as a strategic priority.[633]

9.237 We considered whether this elevation strategy would mean that the Sports Direct fascia and the USC fascia or a combination of these would become a closer competitor to the Parties in the foreseeable future, while recognising that some parts of the elevation strategy have already been implemented. Our assessment of this strategy in chapter 8 (see paragraph 8.325 - 8.389) mostly applies to apparel as well, so we have not repeated this here. We have however set out our analysis of data on Frasers Group's access to branded apparel products and volumes.

9.238 The Parties submitted that [✂] Sports Direct/USC [✂] stocked a wide range of branded apparel products including Nike, adidas, Under Armour, Nicce, Lyle & Scott etc. They drew particular attention to [✂] products being available and [✂] products, which is [✂]. They also highlighted that Sports Direct/USC stocked a number of brands (covering both footwear and apparel) that the Parties did not stock or could not gain access to (for example, [✂]). The Parties submitted that 'It is clear that SDI / USC's apparel offering [✂]

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[631] Frasers Group, Interim Results for the 26 weeks to 27 October 2019.
[632] Frasers Group possesses a number of fasciae within the retail of footwear and clothing. Within the Sports Direct segment of sports retail sits the Sports Direct and USC fasciae. Frasers Group also has fascia that fall into the premium lifestyle segment, namely, Flannels, Cruise and van Mildert.
[633] Frasers Group, Interim Results for the 26 weeks to 27 October 2019.

and that they offer a wider range of sports-inspired and fashion apparel due to the fact that their stores are typically larger so can stock more products and can also house two fasciae within the same building.'[634]

9.239 [✂].

9.240 In order to review whether Frasers Group's elevation strategy has resulted in improved product access, and particularly access to products that would allow it to compete closely with the Parties, we requested data from Nike and adidas on their wholesale supply of apparel products to Frasers Group and also from Frasers Group itself on its retail sales of [✂] different suppliers' branded apparel products. Below we do not discuss access to [✂] branded apparel products because, as highlighted in chapter 8 for footwear, [✂] submitted that as a result of the elevation strategy all Sports Direct stores now receive [✂] access, which is primarily sports goods rather than sports-inspired casual products. We note that this channel is different from that of the Parties and the evidence cited in chapter 8 (see paragraphs 8.350 and 8.352) indicates that [✂] does not intend for the Parties and Frasers Group to get access to the same products.[635] We also note that the Parties did not highlight any specific [✂] apparel products in their submissions on changes in Frasers Groups' product access, although they did submit that 'SDI/USC' sells [✂].

9.241 We analysed apparel data received from [✂]. This analysis was conducted at the product-level, ie not taking colourway or size into account.[636] We focused on the [✂] franchise that the Parties had highlighted Frasers Group had access to (among others). The Parties listed this franchise under the heading 'premium sport-inspired and fashion labels'.[637]

9.242 We identified [✂] products that JD Sports had received the highest volumes of from [✂] in 2019, by identifying product names containing the [✂]. Of these products, we found that Sports Direct had accessed [✂] by the end of 2019. However, in comparison to the Parties, the average monthly volume of these products supplied to Frasers Group was low. For instance, the average monthly volume of [✂] supplied in 2019 was [✂] for Sports Direct, compared with [✂] for JD Sports and [✂] accessed by Footasylum. Similarly, the

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[634] The Parties, Response to Provisional Findings, paragraph 213.
[635] We note that some elevated Frasers Group stores receive [✂]products, which provides higher tier product access to certain sports products (though not sports-inspired casual products).
[636] We acknowledge that access to appropriate sizes and the most desirable colourways is also a relevant aspect of understanding product access, but we examined first at a more aggregate level, since if changes in access at an aggregate level appear limited then this in itself implies a limited change in constraint.
[637] We note that [✂]. We note that the [✂] apparel products supplied to Frasers Group are available in both the [✂]. As stated at paragraph 9.105 we do not consider that access to identical products is necessarily needed for retailers to compete with each other and consumer preferences are a better indication of the substitutability of retailers' offerings.

average monthly volume of [✂] supplied in 2019 was [✂] for Sports Direct, compared with [✂] for JD Sports and [✂] for Footasylum. The [✂] product [✂] for which the average monthly volume in 2019 was [✂] for Sports Direct, compared with [✂] for JD Sports and [✂] accessed by Footasylum.[638]

9.243 We also analysed data on retail sales received from Frasers Group. Specifically, we requested data from Frasers Group on sales from suppliers of branded products the Parties described as 'premium sport-inspired and fashion labels'. We requested data for the most recent six-month period (September 2019 to February 2020) and found that Frasers Group had sold branded products from [✂] suppliers over this time period. However, we did not find evidence of a significant change in the volumes of these products in aggregate. As shown in Figure 9.1, [✂], but not clear evidence of a sustained upward trend.

Figure 9.1: Frasers Group monthly aggregate sales of selected apparel brands (units)

[✂]

Source: CMA analysis of data received from Frasers Group.

Note: products included are: [✂].

9.244 Looking at Fraser Group's sales of individual franchises of branded apparel products,[639] some products appeared to be on an [✂] (although we note with [✂] data points we would place limited weight on any trend) during the period September 2019 to February 2020, namely [✂] (see Figure 9.2) and [✂]. However, other branded products, namely [✂], appeared to be on [✂]. This evidence therefore shows mixed success in terms of Frasers Group's sales of branded higher-tier lifestyle apparel products.

9.245 For [✂] apparel products, overall Frasers Group's sales have nearly [✂] between September 2019 and February 2020, rising to around [✂] units per month across all of the [✂] apparel products analysed taken together (see Figure 9.2). However, the volumes of these product remain low relative to JD Sports, which sells approximately [✂] units per month across all of the [✂] apparel products together. Footasylum only had access to [✂] of these [✂] products and hence its average monthly volume ([✂]) is very low in comparison to both JD Sports and Sports Direct. We recognise Fraser

[638] We consider that this is evidence that Frasers Group has access to some identical products which JD Sports has access to. However, as stated at paragraph 9.105 we do not consider that access to identical products is necessarily needed for retailers to compete with each other and consumer preferences are a better indication of the substitutability of retailers' offerings. This evidence does show no clear change in Frasers Group's access to these products and hence our assessment of current constraints is unlikely to have been impacted by changes in these products.

[639] We note that retail sales of products is not an equivalent metric to product access. However, given we are here considering products that are best-sellers for the Parties, we consider it unlikely that Frasers Groups' access to volumes of these products is materially higher than its sales of these products.

Group's increased access to these [✂] apparel products over a six-month period, and that if Frasers Group's volume access were to continue to grow at the same rate, it would have reached the [✂] of products as JD Sports in the foreseeable future (ie within two years).

Figure 9.2: Frasers Group monthly sales of [✂] apparel products (units)

[✂]

Source: CMA analysis of data received from Frasers Group.

Note: products included are [✂].

9.246 We asked [✂] whether Frasers Group had gained access to additional apparel products in the [✂] (product channels accessible to JD Sports and Footasylum) since December 2019. [✂] submitted [✂]. However, [✂]. It submitted that [✂].

9.247 Finally, we note that the Parties' bestselling apparel products to which Frasers Group also has access [✂], which is consistent with submissions from [✂].[640] As set out in chapter 8, we note that the impact of Frasers Group's access to higher-tier sports-inspired casual products may arise across both its online and wider store estate and not just at elevated stores. Therefore, the impact of changes in product access might arise across more of Sports Direct's offering than just its current and planned elevated stores (see paragraph 8.361 and Table 8.8).

9.248 We recognise [✂] that by conducting analysis at the level of the suppliers of branded products rather than the individual product we may be comparing aggregate volumes that are not similar at the disaggregate level. Nevertheless, we consider that the analysis above does not demonstrate an aggregate material increase in Fraser Group's access to volumes of higher-tier branded apparel products that would allow it to compete with the Parties.

9.249 Overall, we found evidence of Frasers Group accessing some branded higher-tier sports-inspired casual apparel products that are best-sellers for the Parties, and evidence of these being sold across its sales channels. We found some evidence of an increase in [✂] apparel products over the most recent six-month period, but no evidence of an overall increase in sales of premium sports-inspired casual apparel brands. We consider that the latest evidence suggests that Frasers Group's volumes of these products remains low (including for [✂]) relative to the Parties.

[640] [✂] submitted [✂].

Conclusion on changes in Frasers Group's positioning

9.250 We considered evidence submitted to us by Frasers Group on the success of its elevation strategy, particularly in relation to its Sports Direct fascia and access to branded products from the key suppliers, Nike and adidas, both looking at its internal documents and data on sales. We also considered internal documents and data from the Parties considering Frasers Group's (particularly in relation to Sports Direct) elevation and its impact on them. Additionally, we examined data from the key suppliers to verify the extent of Sports Direct's product access and its similarity to that of the Parties.

9.251 As set out in paragraph 8.327, we have seen evidence which shows that elevation on the part of Sports Direct is ongoing [✂], we consider that its future commitment to elevation is subject to some risks, eg product lead-time, suppliers' support and the impact of COVID-19, albeit uncertain. We also consider that it may take time for consumers to change their view of the Sports Direct fascia and accordingly update their search habits

9.252 Regarding product access to higher-tier branded apparel products, we have seen some evidence that Frasers Group is accessing greater volumes of [✂] apparel products, but that these volumes are still limited compared to the Parties. It has enhanced its access to [✂] products but in the segment that can be considered sporting goods. It has access to other premium sports-inspired branded products, but there is no evidence that this access is new or that its volumes of these products are increasing materially.

9.253 Further, we consider that the evidence on the overall impact of Frasers Group's elevation strategy on the Parties is mixed (see paragraphs 8.376-8.396 and Appendix J). Overall, there appears to be a negative impact on JD Sports' stores in [✂] of the relevant cases but there is no clear impact in the remainder of cases. For Footasylum, we consider that the number of affected stores is too small to draw robust conclusions.

9.254 Based on the evidence from JD Sports' internal documents, we consider that JD Sports is unsure of the likely success of Frasers Group's elevation strategy but considers that if it was to be successful it would increase the strength of Sports Direct as a competitor.

9.255 We consider that the scope for Frasers Group's elevation strategy to significantly change the constraint that its Sports Direct and USC fascia exert on the Parties is more limited in apparel than in footwear. This is due to the fact that a greater proportion of apparel sales come from a wide range of suppliers of branded products other than Nike and adidas ([✂]). The effects on the strength of Sports Direct's constraint resulting from it getting improved

access to higher-tier Nike and adidas branded products would therefore be more limited in apparel, as their branded products make up a smaller proportion of the apparel market.

9.256 Frasers Group is a significant and successful player in the retail sector and the effects of its elevation strategy in the context of this Merger investigation has required careful consideration. However, overall, on the basis of the evidence currently available, we cannot conclude with sufficient certainty that Frasers Group's elevation strategy will significantly change the strength of the competitive constraint on the Merged Entity from Sports Direct in the market for the retail supply of sports-inspired casual apparel in the foreseeable future.

DTC

9.257 As discussed in chapter 2, suppliers (in particular Nike and adidas) offer their branded products to consumers through two channels - their wholesale offering to retailers and their own DTC retail offering.

9.258 Our analysis set out earlier in this chapter and in chapter 8 (including our review of internal documents, our surveys and our entry-exit analysis) has taken account of the constraint DTC currently has on the Parties in apparel.[641] However, we recognise that as the market develops, there is the potential for the competitive constraint exerted by the suppliers' DTC offering to increase.

9.259 The Parties submitted that 'the COVID-19 crisis will further strengthen the key brands such as Nike and adidas as they increasingly focus on their online offering and DTC strategies'.

9.260 Nike and adidas are the two most important suppliers in the sports-inspired casual apparel market, though significantly less so than in footwear, and we therefore focussed our assessment of DTC growth on these suppliers. Since the majority of the analysis of DTC applies equally to footwear and apparel, the discussion of DTC growth, where relevant to both footwear and apparel, is set out in chapter 8 (see paragraphs 8.400-8.430). In this section we consider evidence that is specific to apparel.

[641] Although we note that the entry-exit analysis does not capture the role of online constraints.

Recent growth

9.261 Nike's DTC apparel sales grew [✂]. The share of sales generated through its DTC channel [✂] of its total UK sales, see Table 9.8. [✂] adidas's DTC apparel sales in the UK [✂], see Table 9.9.[642]

Table 9.8: Nike's share of apparel revenues and annual growth rate by channel in the UK

	Share of revenues			Annual growth rate		
Calendar year	DTC in-store	DTC online	Wholesale	DTC in-store	DTC online	Wholesale
2015	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
2016	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
2017	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
2018	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]

Source: CMA analysis of Nike's data

Table 9.9: adidas's share of apparel revenues and annual growth rate by channel in the UK

	Share of revenues			Annual growth rate		
Calendar year	DTC in-store	DTC online	Wholesale	DTC in-store	DTC online	Wholesale
2015	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
2016	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
2017	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]
2018	[✂]	[✂]	[✂]	[✂]	[✂]	[✂]

Source: CMA analysis of adidas's data

9.262 We consider that the data shows that [✂] through which revenue is generated for both Nike and adidas in the sports-inspired casual apparel market. In support of this view, Nike told us that it:

> does not operate in isolation but works together with its retailers to continuously improve its offering to deliver a seamless brand and shopping experience throughout the market. It is therefore in Nike's express interest to have successful retailers, especially as they sell multiple brands and the vast majority of consumers will always compare offerings from different brands.

Future growth

9.263 As set out in chapter 8 (see paragraph 8.402), the key suppliers have made public statements about their future strategy and desire to grow their DTC offering, primarily online.[643] We asked about their future plans and collected

[642] CMA analysis of data provided by Nike and adidas.
[643] See for example: Nike website.

internal strategy documents in order to understand how their UK DTC sales are likely to evolve in the foreseeable future.

9.264 In chapter 8 (paragraphs 8.403-8.414), we reported Nike's and adidas's forecast for online and in-store DTC growth as well as their views on the potential impact of COVID-19 on these forecasts. In chapter 8, we also reviewed the forecasts of the DTC to wholesale ratio (paragraphs 8.415-8.426).

9.265 Both Nike and adidas forecast that their DTC channel will increase in size, [✂] their wholesale business [✂] (see paragraphs 8.415-8.417).

9.266 We also asked the key suppliers how they anticipated achieving their projected DTC growth. In response:

(a) in addition to the factors mentioned in paragraph 8.248, Nike [✂]; and

(b) adidas's [✂].

Conclusion on DTC growth

9.267 Nike's and adidas's DTC offer is currently present in both the in-store and online segments of the market.[644] We consider that it is likely that their DTC offer will continue to grow strongly in the UK, predominantly online. In particular, there is evidence as set out in Table 9.8 and Table 9.9 and paragraphs 8.415-8.417 which indicates that such growth is likely reflective of general growth in the market and that the ratio of DTC sales to wholesale sales will not change significantly in the foreseeable future. We consider that the initiatives which they are undertaking in order to achieve their projected DTC growth do not appear to amount to a substantial repositioning of their offering.

9.268 On that basis, our view is that over time the key suppliers' DTC offer may become more of a constraint. However, the evidence does not show with sufficient certainty that Nike's and adidas's DTC offer across their channels will become a significantly stronger constraint on the Merged Entity in the market for the retail supply of sports-inspired casual apparel in the foreseeable future.

[644] [✂]submitted that its DTC range is greater online.

Foot Locker

9.269 Foot Locker does not focus on apparel to the same extent as the Parties. It does sell some apparel, but this is a low share of its overall business (around [✂]%). Given the links between footwear and apparel, if Foot Locker was to reposition itself to increase its focus on apparel, it could potentially become a stronger constraint on the Parties.

9.270 We asked Foot Locker to confirm its future plans for expansion in the UK. [✂]. We also note that [✂] the stores which Foot Locker plans to open were identified as [✂]and Foot Locker submitted that it expected the proportions of footwear, apparel and other product types (eg accessories) [✂].

9.271 We consider that currently Foot Locker has some constraint on the Parties in apparel. We recognise that this constraint could be strengthened further (particularly given its current strong position in footwear) if it was to enhance its apparel proposition or if more larger stores were opened in future. However, we consider that the evidence does not show that there will be a significant change in the strength of its competitive constraint on the Merged Entity in the market for the retail supply of sports-inspired casual apparel in the foreseeable future.

Amazon

9.272 As set out in paragraph 9.219, we consider that Amazon currently exerts a very weak constraint on the Parties in apparel. As in footwear, in order to understand whether the constraint it poses may change in the foreseeable future, we asked Amazon about its plans in the UK sports-inspired casual apparel market (see paragraph 8.440).

9.273 We consider that since Amazon does not source products directly from Nike or adidas in the UK, and in our view there is uncertainty about whether it will in the future, the evidence does not show that there will be a significant change in the strength of its competitive constraint on the Merged Entity in the foreseeable future.

Other retailers

9.274 Some multi-brand retailers such as ASOS and Next have recently started selling sports-inspired casual products. Therefore, it is possible that they may grow, though we cannot say how significant such growth might be. [✂]:

[✂].

9.275 We recognise that in keeping with normal commercial pressures, some retailers are likely to be successful and others less successful. However, we have not seen evidence of [✂] from these retailers such that any of them would become a significantly stronger competitive constraint on the Merged Entity in the market for the retail supply of sports-inspired casual apparel in the foreseeable future.

Impact of COVID-19

9.276 As set out in chapter 8, we note the Parties' submissions that COVID-19 and social distancing measures will result in long term structural market changes as retailers and particularly the key suppliers through their DTC offerings, shift to online (see paragraph 8.444).

9.277 We agree that it is uncertain what the market will look like in the medium to long term. Therefore, while a greater shift to online could be a potential outcome, we cannot determine with sufficient certainty whether this is likely to be the enduring structure, once stores have reopened and other restrictions have been lifted. We also consider that the figures the Parties have submitted regarding Nike's and adidas's projected online sales growth are [✂] and therefore do not necessarily reflect a structural market change as the Parties submitted.

9.278 We also note that, in principle should there be a greater shift to online more permanently, while the constraint from some retailers might be strengthened as a result, it is possible that the strength of other retailers who currently exert a stronger in-store constraint, may be weakened. Therefore, we do not consider that we can be sufficiently certain that any such market changes, were they to arise, would increase materially the aggregate competitive constraints posed by retailers (including suppliers through their DTC offerings) in the round.

Conclusion on market developments

9.279 On balance, we have concluded that the Sports Direct fascia of Frasers Group imposes some constraint currently in apparel, and may, through its elevated stores, become a more direct competitor to the Parties to some extent within the next two years. The evidence on the overall impact of Frasers Group's elevation strategy on the Parties' stores is mixed. There is some evidence of it receiving access to some the apparel products that are among the Parties' best-selling apparel products, although its volumes of these are limited compared to the Parties and there is no evidence that this access is new or that its volumes of these products are increasing materially. Its future commitment to elevation is subject to some risks and it may take

time for consumers to change their view of the Sports Direct fascia. On the basis of the evidence currently available, we cannot conclude with sufficient certainty that it will become a significantly stronger constraint on the Merged Entity in the market for the supply of sports-inspired casual apparel in the foreseeable future.

9.280 The evidence shows that Nike and adidas are likely to continue to grow their DTC sales, primarily online. However, there is evidence which indicates that such growth is likely reflective of general growth in the market and that the ratio of DTC sales to wholesale sales will not change significantly in the foreseeable future. On that basis, our view is that over time Nike's and adidas's DTC offer may become more of a constraint. However, the evidence does not show with sufficient certainty that each of Nike's and adidas's DTC offering across their channels will become a significantly stronger constraint on the Merged Entity in the market for the supply of sports-inspired casual apparel in the foreseeable future.

9.281 We consider that Foot Locker currently imposes some constraint on the Parties in apparel. While this constraint could be strengthened (particularly given its current strong position in footwear) if it was to enhance its apparel proposition or if more larger stores were opened in future, we consider that the evidence does not show that there will be a significant change in the strength of its competitive constraint on the Merged Entity in the market for the supply of sports-inspired casual apparel in the foreseeable future.

9.282 For Amazon, its lack of direct access to products from the key suppliers means that the evidence does not show that there will be a significant change in the strength of its competitive constraint on the Merged Entity in the market for the supply of sports-inspired casual apparel in the foreseeable future.

9.283 We also did not find clear evidence of any particular other retailer repositioning or expanding its offering in a way which would materially change its constraint.

9.284 We also considered whether the aggregate effect of these market developments might be such as to constitute a material change in the market constraints on the Parties. Overall and on balance, the evidence does not show with sufficient certainty that the aggregate effects of the market developments examined above would amount to a materially stronger competitive constraint on the Merged Entity in the market for the supply of sports-inspired casual apparel in the foreseeable future.

9.285 We also considered the impact of COVID-19 on the likelihood of these market developments arising and materially increasing the constraints on the Merged

Entity. As set out in paragraphs 8.444-8.446 and 9.277-9.278, there is considerable uncertainty about the extent and duration of the impact of COVID-19. It is difficult to predict the effect on different retailers and how each will respond to the circumstances, and therefore how this might impact market developments in the foreseeable future. However, we do not envisage that COVID-19 would increase the likelihood of success of any retailer's future plans, which involve substantial investment. This includes the market developments examined in this section. Therefore, we do not consider that it would increase materially the constraints on the Merged Entity so as to reduce the likelihood of an SLC. As set out in chapter 8 (paragraph 8.444) we also note the Parties' submission that COVID-19 and social distancing measures will result in long term structural market changes with a greater shift to online. We do not consider that we can be sufficiently certain that any such market changes, were they to arise, would increase materially the aggregate competitive constraints posed by retailers in the round.

9.286 Overall and on balance, we found that, taken together, the evidence does not show with sufficient certainty that the aggregate effect of the market developments examined above, would amount to a materially stronger competitive constraint on the Merged Entity in the market for the supply of sports-inspired casual apparel in the foreseeable future.

Conclusion

9.287 In our competitive assessment, we considered the degree of competition between the Parties and other retailers, both now and in the foreseeable future, as well as the constraints from suppliers. We looked at a wide range of evidence which we then considered in the round to reach our conclusion as to whether the Merger has resulted or may be expected to result in an SLC in the market for the retail supply of sports-inspired casual apparel (in-store and online) in the UK.

9.288 We assessed the impact of suppliers on retail competition and the ways in which retailers in this market compete. We found that suppliers play an important role in the sports-inspired casual apparel market, particularly Nike and adidas. We found that there are various ways in which suppliers control and influence some aspects of retail competition. Suppliers exert some influence over retailers' pricing and can control retailers' range as they determine the products and volumes that retailers can access, which can also be used as a mechanism to exert influence over other aspects. Suppliers also exert some influence over quality and service aspects of retailers' offerings to some extent by including minimum contractual standards on quality and service as a precondition of product access. Suppliers also undertake

engagement, monitoring, benchmarking and provide feedback on some aspects of retailers' PQRS

9.289 Further, the control and influence that suppliers exert is less significant in apparel than in footwear. In particular, in apparel, a greater proportion of apparel sales come from a wide range of other suppliers of branded products and there is less dependence on Nike and adidas, which have a smaller share in the apparel market than in footwear, though remain important. Retailers (including the Parties) also design, stock and price their own-brands and do not face the same constraints from suppliers on these products.

9.290 We found that on balance while suppliers exert some constraint on retailers' PQRS, there remains significant scope for retail competition in this market which could be lost as a result of the Merger. In particular we found that:

(a) retailers compete head-to-head on various different PQRS aspects in a bid to attract consumers and generate sales (eg through discounting, delivery charges and times, own-brand pricing, brand mix, customer service and other innovations); and

(b) suppliers can leverage their influence (eg through benchmarking of retailers) to encourage retailers to compete above and beyond their minimum standards, and we note that the Merger reduces this ability to benchmark.

9.291 We also found that the constraint suppliers exert on retailers has limitations. In particular we found that:

(a) suppliers do not monitor all aspects of retailers' offerings;

(b) there are limits to suppliers' ability to detect a deterioration of retailers' offerings, for example less and slower rates of innovation or other improvements; and

(c) suppliers have no incentive to discipline retailers where any deterioration in a retailer's offering does not harm supplier interests or where such deterioration may benefit suppliers eg less discounting.

9.292 Overall, we found that, taking the evidence in the round and on balance, suppliers would not act as a sufficient constraint on the Merged Entity's ability and/or incentive to deteriorate its PQRS offering post-Merger.

9.293 We considered the competitive constraints between the Parties and other retailers. With respect to market shares, we found that the Parties are both large national multi-brand retailers of sports-inspired casual apparel. JD

Sports is the largest retailer in this market, Footasylum is smaller and a small number of other retailers have a significant presence, including in particular, Sports Direct and Primark (which does not sell branded apparel). However, we consider that market shares give only a basic indication of the Parties' presence in terms of the market structure and do not fully capture the closeness of competition between retailers in differentiated markets, such as this one. Further, there were also limitations in the data used to calculate market shares, which means there are significant uncertainties around these.

9.294 Our assessment of the Parties' offerings showed that the Parties have some similarities in their apparel offering, although there are some apparent differences. There is also a number of other retailers whose offerings have some similarity to those of the Parties, in particular Sports Direct, ASOS (which operates only online) and Nike and adidas (although these offer only a single brand). Third parties also ranked the Parties as competing closely with relatively few other close constraints. We further considered the constraint from these retailers through our assessment of other evidence, such as the Parties' internal documents and our surveys, which show how consumers view the Parties' apparel offerings and their substitutability.

9.295 We examined the Parties' internal documents, considering in particular the extent to which they monitor each other and other retailers, which is evidence supportive of a finding of closeness of competition. We found that:

(a) Footasylum's internal documents demonstrate that JD Sports is the competitor most closely monitored by Footasylum and that it also closely monitors Foot Locker. In relation to the latter, however, we recognise that the documents do not distinguish between apparel and footwear, and that Foot Locker is less relevant a competitor in apparel than in footwear given its product offering is largely footwear focussed; and

(b) JD Sports' internal documents demonstrate that Footasylum is one of the competitors most closely monitored by JD Sports, alongside Foot Locker, ASOS, Nike and adidas.

9.296 Their internal documents show a low degree of monitoring by the Parties of a range of other retailers, including Sports Direct.

9.297 Through our store exit and online surveys, we obtained information from the Parties' customers about their shopping behaviour and their next best alternatives to the Parties' stores and websites. We note that we have not placed full evidential weight on the online survey results due to the low response rates (see chapter 6).

9.298 In both the exit survey and the online survey, substantially more of Footasylum's customers would divert to JD Sports than to any other retailer, which shows that Footasylum's apparel customers view JD Sports as the closest substitute for Footasylum. JD Sports' in-store apparel customers are equally likely to divert to Footasylum and Sports Direct. For JD Sports' online apparel customers, Nike is seen by customers as the next best alternative with Footasylum and Sports Direct also seen as close substitutes.

9.299 We used the diversion ratios from our surveys to calculate GUPPIs and found these to be high, particularly for Footasylum but also for JD Sports (and higher in apparel than in footwear). The asymmetry of the GUPPIs is consistent with other evidence, for example the Parties' own internal documents. We consider that the in-store GUPPIs, for both JD Sports and Footasylum, demonstrate a strong incentive for the Merged Entity to deteriorate (worsen or improve relatively more slowly or to a lesser extent than in the absence of the Merger) PQRS across its sports-inspired casual apparel offerings post-Merger. Although the online and combined GUPPIs are lower than the in-store GUPPIs, they still indicate a strong incentive to deteriorate PQRS.

9.300 We analysed the impact of store openings and closures by Footasylum and other retailers on the revenues of JD Sports' stores and JD Sports' offering. This entry-exit analysis indicates that retailer entry by Footasylum has a negative impact on JD Sports store apparel revenues. We note that store entry by Footasylum is also found to affect the apparel revenue at JD Sports but only when region-month fixed effects are included in the model. This evidence indicates that Footasylum is a close competitor to JD Sports and exerts a constraint on JD Sports. Other retailers have some negative impact, but this varies when looking at different variations of the analysis.

9.301 Taken together and in the round, the evidence shows that the Parties are close competitors, with JD Sports providing a stronger constraint on Footasylum than vice versa. The same evidence shows that no other retailers currently exert a strong constraint on the Parties. Other retailers such as Sports Direct and Nike impose some constraint but none more so than either of the Parties.

9.302 Therefore while we found that numerous other retailers offer sports-inspired casual apparel, taken together and in the round, the evidence shows that their aggregate constraint on the Parties is only moderate at best (eg aggregate diversion to other retailers was low) and would not be sufficient to prevent an SLC. While suppliers also exert some constraint, in addition to retailers, as noted above this has limitations and their constraint is less in apparel than in footwear. Taking the evidence in the round, and on balance, we found that the

aggregate constraints[645] from retailers and suppliers would not be sufficient to prevent the Merged Entity from deteriorating PQRS post-Merger and to prevent an SLC.

9.303 We considered whether there is scope for the strength of the competitive constraints from other retailers on the Parties to increase, including in particular via the repositioning of Sports Direct, the growth of apparel sales at Foot Locker, the growth of Amazon and the growth of Nike's and adidas's DTC channels. We found that, on the basis of the evidence available, we cannot conclude (and with sufficient certainty regarding in particular Frasers Group's Sports Direct fascia and Nike's and adidas's DTC channels) that the repositioning or growth of any retailer will significantly change their competitive strength in the foreseeable future. Overall and on balance, we found that, taken together, the evidence does not show with sufficient certainty that the aggregate effect of such market developments would amount to a materially stronger competitive constraint on the Merged Entity in the market for the supply of sports-inspired casual apparel in the foreseeable future.

9.304 We considered the impact of COVID-19, the effects of which arose during the final stages of our investigation, including submissions from the Parties and third parties on this. We considered how COVID-19 might affect our competitive assessment (both now and in the foreseeable future) and in turn the extent to which it would affect any SLC finding.

9.305 It is clear that COVID-19 is having a significant impact on retailers in this market and on the economy, and we recognise that retailers are facing uncertain and challenging trading conditions. At the time of publishing this report, there is considerable uncertainty about the extent and duration of this impact in the medium to long term. It is difficult to predict the effect on different retailers and how each will respond to the circumstances, and therefore its impact on current competition and market developments in the foreseeable future.

9.306 While COVID-19 is clearly impacting the market, we have not seen evidence to suggest that either of the Parties is being more negatively impacted by COVID-19 relative to each other or relative to other retailers in this market. We also do not envisage that COVID-19 would increase the likelihood of success of any retailer's future plans, which involve substantial investment. Therefore, we do not consider that COVID-19 would reduce materially the

[645] The aggregate constraint is evaluated directly in some of the evidence, eg diversion ratios, but more generally we have considered the aggregate constraint by recognising that it is appropriate to consider the effect of all of the retailers and suppliers considered as a combined constraint on the Parties.

extent to which the Parties are close competitors, or increase materially the aggregate constraints posed by retailers on the Parties, now or in the foreseeable future, such that it would not be likely, on the balance of probabilities, that the Merger would or may be expected to result in an SLC.

9.307 Based on our assessment, we found that the Merger would result in the removal of a direct and significant constraint on each of the Parties and that overall the remaining constraints post-Merger (both now and in the foreseeable future) would not be sufficient to prevent an SLC.

9.308 On the basis of the evidence set out above, taken in the round, we concluded that the Merger has resulted or may be expected to result in an SLC in the market for the retail supply of sports-inspired casual apparel (in-store and online) in the UK.

9.309 We have considered whether there are any countervailing factors (such as entry or expansion by other retailers or efficiencies) which would be timely, likely and sufficient to prevent this SLC, in chapter 11.

10. Our assessment of coordinated effects

Introduction

10.1 During the course of our inquiry, we received submissions from some third parties raising concerns about coordination, to varying degrees of detail. Accordingly, we examined whether coordination is more likely as a result of the Merger. Our assessment is set out in this chapter.

10.2 Our Guidance sets out that the CMA will first analyse the characteristics of the market that could be conducive to coordination (ie alignment without any explicit agreement among the coordinating group). The CMA will then examine whether there is evidence that firms in the market were coordinating pre-merger and if so, whether the merger would make coordination more stable or effective. If there is no evidence of pre-merger coordination, the CMA will examine whether the merger makes it more likely that firms in the market will start to coordinate.[646] The Guidance sets out that all three of the following conditions must be satisfied for coordination to be possible:

(a) firms need to be able to reach and monitor the terms of coordination;

[646] CMA Guidance, paragraph 5.5.4.

(b) coordination needs to be internally sustainable among the coordinating group, ie firms find it in their individual interests to adhere to the coordinated outcome; and

(c) coordination needs to be externally sustainable, in that the coordination is not undermined by competition from outside the coordinating group.

10.3 We assessed whether the Merger might be expected to give rise to an SLC through coordinated effects, using this framework.

Parties' views

10.4 The Parties submitted that there was no evidence of concerns in relation to coordinated effects in the relevant markets. The Parties stated that a coordinated effects theory of harm was problematic for a number of reasons, including in particular that there was no:

(a) evidence of pre-existing coordination, including on the alignment of interests within the alleged coordinating group (ie JD Sports and the key suppliers);

(b) focal point identified for hypothetical coordination (in particular, due to the significant number of products allegedly covered and the significant amount of annual churn in the key suppliers' product ranges);

(c) prospect for coordination to be internally stable (given asymmetries in the positions of the alleged coordinating group) or externally stable (given the large proportion of the market supplied by retailers outside of the alleged coordinating group); or

(d) clear explanation as to what the Merger would change that would materially impact the prospects of the alleged coordination to emerge and be sustainable.

Third parties' views

10.5 As noted in paragraph 10.1, some third parties raised concerns about coordination. Broadly, these stated that there was currently coordination between JD Sports, Nike and adidas, that resulted in protecting JD Sports from retail competition, and that this coordination would be exacerbated as a result of the Merger.

10.6 [✂], one third party stated that Nike and adidas provided access to their higher-tier branded products to a very limited set of retailers, including JD Sports and Footasylum, which made the supply of those products susceptible

to coordination. It further stated that Nike and adidas provided JD Sports with preferential access to such products, without objective or transparent justification. This was cited as evidence of pre-existing coordination. [✂] third party identified through a pricing analysis that, in the context of sales of higher-tier Nike and adidas branded products, Footasylum competed on price more often than JD Sports. This was cited as evidence showing that the Merger would increase the external stability of coordination.

10.7 One third party in its response to the Provisional Findings submitted that the relevant markets were conducive to coordination as there was a clear focal point for coordination (namely, restricted products of which there were a limited number, with distinct characteristics) and transparency around product access. It submitted that there was evidence that such coordination would be externally sustainable, and that the Merger would improve the conditions for pre-existing coordination by lessening the complexity of market dynamics.

10.8 We considered further points of detail submitted to us as part of our assessment of coordinated effects, which we set out below.

Our assessment

Possible forms of coordination

10.9 In conducting our assessment, we first considered what form any potential coordination might take. It was appropriate to conduct our assessment of the potential for coordinated effects with a specific hypothetical form of coordination in mind. Based on our assessment of the characteristics of the relevant markets, and the evidence set out in paragraph 10.12, we considered the following possible mechanism for coordination:

(a) the coordinating group would include JD Sports, the largest retailer of branded sports-inspired casual products in the UK, and Nike and adidas, the largest two suppliers of such products.[647] Nike and adidas could influence and control the retail supply of their products by providing RRPs for their products and using selective distribution arrangements to allocate products to retailers;

(b) the most likely focusses of coordination would be the price of and access to certain higher-tier branded products, which Nike and adidas make available to only a limited number of retailers within their selective distribution arrangements, including JD Sports. We considered price and

[647] See Appendix G for further details.

access to such products to be the most likely focus of coordination due to the level of transparency of these two components in the relevant markets; and

(c) the terms of coordination would be most likely to emerge over time through repeated interaction in the markets. The coordinating group would collectively monitor retail behaviour, including prices. Nike and adidas would grant JD Sports preferential access to their products and in return JD Sports would limit its discounting for Nike and adidas products (ie from RRPs) and restrict its stock and sale of other suppliers' products. The coordinating group would be incentivised to maintain such coordination due to the resulting higher profits, in light of each member's ability to respond to deviations. In response to deviation by JD Sports, Nike and/or adidas could make changes to product access (increasing supply of higher-tier products to other retailers) while in response to deviation by the suppliers, JD Sports could make changes by discounting below RRP or increasing its stock and sale of other suppliers' products. This coordination mechanism would result in less competition and reduced choice for consumers (in terms of reduced access to Nike's and adidas's products in other retailers) and a price for Nike and adidas products above the level absent coordination.

10.10 A third party submitted that [✂] Footasylum should also be considered as part of the pre-existing coordinating group, on the basis that they had preferential access to largely the same or similar restricted products as JD Sports. We have considered this as part of our assessment on pre-existing coordination, below.

Pre-existing coordination

10.11 Pre-existing coordination is not required for a merger to lead to coordinated effects. However, generally speaking, a merger in a market already showing coordinated outcomes would be likely to make coordination more sustainable or more effective, unless the structure and scale of the merged entity were so different from those of the merging parties pre-merger that the incentive to coordinate would be removed.[648]

10.12 To assess whether there was evidence of pre-existing coordination, we considered the following:

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[648] CMA Guidance, paragraph 5.5.8.

(a) internal documents from JD Sports, Nike and adidas (including emails), pricing analysis and supplier market shares. We obtained such documents partly through information requests designed specifically to identify potential evidence of coordination.[649] From our review of internal documents, we did not identify any specific evidence indicating that there is pre-existing coordination, although we recognise that such written documentation does not necessarily capture all relevant communication between the relevant parties;

(b) from our pricing analysis, we found that retailers generally price in line with RRP, which is provided by suppliers, and that pricing in the relevant markets is relatively transparent. We did not find any evidence which suggests that Nike and/or adidas rely on information from JD Sports (or any other retailer [✂] Footasylum) to monitor retail behaviour; and

(c) from our review of supplier market shares, we did not find evidence of an alignment of interests to reach or sustain coordination, since the shares of Nike and adidas at JD Sports (and more generally in the market) have not been stable over the last 10 years. In particular, [✂].[650]

10.13 On the basis of the above we do not consider that there is sufficient evidence to find that pre-existing coordination is likely to be occurring in the hypothetical form set out in paragraph 10.9, nor do we consider that there is sufficient evidence that [✂] Footasylum would be part of any pre-existing coordinating group.

10.14 A third party submitted that the lack of price competition between [✂], Footasylum and JD Sports at a national level can only be explained by the existence of coordination. We disagree with this submission, based on the following:

(a) we carried out a pricing analysis of products in the relevant markets.[651] This pricing analysis demonstrates that there is some variation in pricing between JD Sports, Footasylum, [✂] and other retailers and therefore that there is some price competition; and

(b) we consider that any similarity in pricing by retailers in the relevant markets may be explained by other factors, including that some products

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[649] For example, we posed specific questions to Nike and adidas to determine whether they had engaged in correspondence with JD Sports in relation to the segmentation of other retailers or the recategorisation of certain products since January 2018. We collected information on JD Sports' product and brand level sales over time.
[650] See, for example Appendix G for Nike's and adidas's market shares.
[651] We used data from Google Shopping to compare price dispersion across retailers in the market.

have significant market-wide manufacturer-imposed volume limitations which reduces the likelihood of discounting (see also chapter 8).

Conduciveness to coordination

10.15 We considered to what extent the characteristics of the relevant markets are conducive to the hypothetical form of coordination set out in paragraph 10.9. This section considers the pre-Merger situation, with the change resulting from the Merger considered in the following section (see paragraph 10.26).

Condition one: ability to reach and monitor the terms of coordination

10.16 For coordination to emerge, the coordinating group needs to be able to reach a common view on the scope of such coordination. This does not need to involve a precise outcome but needs to be sufficiently clear to enable and incentivise the coordinating group's behaviour to be aligned. To sustain coordination, they will also need to be able to observe each other's behaviour sufficiently to ensure that deviation from the coordinated outcome can be detected. If deviation goes undetected then there will be no incentive to sustain a non-competitive outcome.

10.17 In assessing whether JD Sports, Nike and adidas would be able to reach and monitor the terms of coordination, we took into account the following factors:

(a) **complexity of identifying a focal point**. Nike and adidas supply thousands of products with multiple small variations within the relevant markets, which have different RRPs. Due to the fact that they sell differentiated products across a wide spectrum, ranging from value products through to premium products, it seems likely to be relatively difficult for Nike and adidas to identify sufficiently 'like for like' products (including within their higher-tier branded products) for the purpose of coordination. In addition, Nike's and adidas's product ranges change on a seasonal basis to a material extent, meaning that the terms of coordination would need to be revisited relatively frequently.

A third party submitted that the CMA had failed to identify a focal point for coordination because it had not sufficiently focussed its assessment on restricted products. We recognise that it would be easier for Nike and adidas to identify a focal point in relation to a narrower set of products such as restricted products. However, it is our view that the relative difficulty faced by Nike and adidas in identifying sufficiently 'like for like' products for the purpose of coordination would still apply to narrower sets of products, including restricted products, and therefore there would still

be some difficulties identifying a clear focal point for coordination in the relevant markets;

(b) **lack of incentives to reach coordination**. As noted in paragraph 10.12(c), the market shares of Nike and adidas have been relatively volatile over the last 10 years. More recently, [✂]. Following that development, [✂] (see Appendix G) and our analysis of Nike's and adidas's share of JD Sports' sales shows [✂]. The current [✂] lessens the likelihood that Nike and adidas have sufficiently aligned incentives to reach a coordinated outcome;[652] and

(c) **relative lack of transparency around product access**. There is some lack of transparency around Nike's and adidas's product access decisions. Retailers do not have complete information about the product access (particularly in terms of volumes) that Nike and adidas provide to other retailers (though they are able to discern this to some degree through market monitoring).[653] We note that by contrast there is more transparency within the relevant markets on price.

A third party submitted that there was no lack of transparency around product access for restricted products. It submitted that, for example, JD Sports clearly marketed its access to certain such products as being 'exclusive to JD Sports'. We recognise that there may be a higher degree of transparency for such restricted or higher-tier branded products that are sold exclusively by a particular retailer,[654] including JD Sports. However, the CMA considers that it remains the case for restricted products and more so for other non-exclusive higher-tier branded products that retailers will not be aware of the precise volumes made available to other retailers. On this basis, we consider that there is a lack of transparency that would hamper coordination in the relevant markets.

10.18 On the basis of the above, we found that it would be difficult for the coordinating group (as contemplated in paragraph 10.9) to reach and monitor the terms of coordination over pricing of and access to relevant products. We therefore consider it is unlikely that condition one is met.

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[652] CMA Guidance, paragraph 5.5.16.
[653] For example, as submitted by some third parties in hearings with the CMA; summaries of hearings are available on the inquiry webpage.
[654] We note that Nike and adidas typically retain the ability to sell products made available on an exclusive basis through their DTC channels.

Condition two: internal sustainability

10.19 Coordination will be sustainable only where the additional profit from coordination is sufficiently high, and there is an effective mechanism to respond to deviation (making the profit from deviation sufficiently low to make it unattractive).[655] If coordination is not sufficiently profitable, or the response of others to deviation is not sufficiently swift and costly to the firm deviating, the short term benefits of deviating (ie having a more competitive offering) may outweigh the costs of punishment (ie the loss of the gains from coordination).

10.20 We consider that the most likely response to deviation from Nike and/or adidas would be to make changes in product access (increasing supply of higher-tier branded products to other retailers) while JD Sports could make changes by discounting below RRP or increasing its stock and sale of other suppliers' branded products.

10.21 In assessing whether the characteristics of the relevant markets are conducive to coordination (in particular, in the form set out in paragraph 10.9) being internally sustainable, we took into account the following factor:

(a) **lack of incentives to sustain coordination**. As noted in paragraph 10.17(b), Nike's and adidas's market shares in the relevant markets have been relatively volatile, [✂]. This volatility does not suggest that they have reached some form of coordinated outcome. This, along with the [✂] highlighted in 10.17(b), indicates that these suppliers are unlikely to have sufficiently aligned incentives to sustain coordination.

10.22 On the basis of the above, we consider that the characteristics of the relevant markets do not appear to be conducive to coordination being internally sustainable in the form described in paragraph 10.9.

10.23 As noted in paragraph 10.10, a third party submitted that Footasylum [✂] should be considered as part of the pre-existing coordinating group and that more recently Footasylum opted for a pricing strategy involving greater levels of discounting, and as such it was a 'maverick'. Therefore, it submitted, Footasylum's removal as an independent competitor as a result of the Merger would lessen the amount of price competition in the relevant markets and improve the internal sustainability of coordination.

10.24 As set out in paragraphs 10.12 - 10.14, we do not consider that Footasylum formed part of any pre-existing coordinating group. We also consider that

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[655] CMA Guidance, paragraph 5.5.15.

Footasylum is not a maverick with regard to its levels of discounting (eg see paragraph 8.109). However, we accept that the Merger would improve the internal sustainability of coordination to some extent if Footasylum was part of a pre-existing coordinating group and then ceased to be distinct from JD Sports. However, we consider that the basis (as set out in paragraph 10.21) on which we found that the characteristics of the relevant markets are not conducive to coordination being internally sustainable would still apply.

Condition three: external sustainability

10.25 All three of the conditions must be satisfied for us to conclude that coordination would be more likely than not post-Merger.[656] Given our findings on the first and second conditions, we did not consider it necessary to assess whether any coordination would be externally sustainable.

Evidence of Merger effect

10.26 We considered whether the first and second conditions of coordination, namely, the ability to reach and monitor coordination and internal sustainability, would likely be satisfied following the Merger.

10.27 We found that the Merger is not likely significantly to strengthen the ability to reach and monitor coordination (in particular in the form set out in paragraph 10.9) or the internal sustainability of such coordination in the relevant markets, on the basis of:

(a) there not being any fewer members of the hypothetical coordinating group as a result of the Merger;

(b) there not being any fewer products covered by the hypothetical scope of coordination as a result of the Merger;

(c) the Merger not having any material impact on the ability to monitor retail behaviour because the level of transparency and complexity in the relevant markets around price and product access would not be changed by the Merger; and

(d) the Merger not having any material impact on Nike's and adidas's market positions or, in turn, on their ability or incentive to reach and sustain a coordinated outcome.

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[656] CMA Guidance, paragraph 5.5.9.

10.28 Given this, we did not need to conclude as to the external sustainability of any potential coordination in these markets following the Merger.

10.29 A third party submitted that there would be a Merger-specific effect on coordination due to the removal of Footasylum, which would mean for example that Footasylum, as an independent competitor, would no longer be part of the coordinating group and the complexity of the market dynamics would be lessened without Footasylum's deviation from RRP. For the reasons set out above, we do not consider that this would be the case and therefore do not consider that there is evidence of a Merger effect on coordination in the relevant markets.

10.30 Notwithstanding our findings on coordination, we considered the role of suppliers, including Nike and adidas, and their impact in shaping retail competition within the relevant markets as part of our competitive assessment set out in chapters 8 and 9.

Conclusion

10.31 We found that:

(a) it would be difficult for JD Sports, Nike and adidas to reach and monitor terms of coordination over the pricing of and access to certain Nike and adidas sports-inspired casual footwear and apparel products;

(b) the characteristics of the relevant markets are not conducive to coordination being internally sustainable; and

(c) the Merger is not likely significantly to increase the ability of JD Sports, Nike and adidas to reach and monitor such coordination or its internal sustainability.

10.32 On that basis, we concluded that the Merger is not likely, on a balance of probabilities, to result in an SLC on the basis of coordinated effects in the relevant markets.

11. Countervailing factors

Introduction

11.1 We considered whether there are countervailing factors which may prevent the SLCs we found from arising, as set out in this chapter. Specifically, we considered the effect of entry and expansion and efficiencies. In considering entry and expansion, we looked at whether competition in the relevant

market(s) may be affected as new firms enter and expand to compete against the Merged Entity and whether such changes may prevent any SLCs we found. We also considered whether any efficiencies arising specifically from the Merger may also enhance rivalry such that the Merger does not give rise to any SLCs.

Entry and expansion

11.2 As set out in our Guidance, the CMA considers whether the entry and expansion of new firms would offset the initial effect of a merger on competition to such an extent that no SLC would arise. We have considered whether such entry and expansion would be likely to prevent the SLCs we have found in footwear and apparel. In assessing this, we considered whether entry and/or expansion would be timely, likely and sufficient.[657]

11.3 In chapters 8 and 9, we considered whether the expansion and change in the proposition of existing competitors in the relevant markets such as Foot Locker and Frasers Group would increase their competitive constraint on the Merged Entity to offset any effects of the Merger.

11.4 This section focuses on the extent to which market entry and expansion by retailers currently outside of the relevant markets may be a countervailing factor. We note that the submissions from the Parties and third parties, in particular in relation to any future plans for new market entry or expansion, pre-date COVID-19. As discussed in chapters 8 and 9, COVID-19 is having a significant impact on all retailers in the relevant markets and on the economy and there remains considerable uncertainty about the extent and duration of the impact of COVID-19. It is difficult to predict the effect on different retailers and how each might respond to the circumstances, and therefore how it might impact repositioning or entry plans within two years. However, we do not envisage that COVID-19 would increase the likelihood or success of any retailer's future plans, which involve substantial investment.

11.5 We focussed this assessment at the national level and on the combined in-store and online market, referring separately to the in-store or online segment of the market where appropriate to do so. For the purpose of our assessment and based on the evidence we have seen, we consider that there are no

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[657] In assessing whether entry or expansion might prevent an SLC, the CMA will consider whether it would be timely, likely and sufficient. This assessment involves a consideration of any barriers to entry or expansion that may exist, alongside other factors that affect firms' incentives or ability to enter or expand in a market. The CMA would normally consider entry or expansion that has a significant impact on competition within two years to be timely. In this case, we found no compelling reason to consider a shorter or longer period than two years. For further details, see CMA Guidance, paragraphs 5.8.1 to 5.8.4.

material differences in the barriers to entry or expansion between footwear and apparel, and therefore we have not assessed these separately.

11.6 We first considered the extent to which there are barriers to entry and expansion,[658] before examining the possible sources of future entry and expansion.

Potential barriers to entry and expansion

11.7 We consider that in order for entry or expansion in the relevant markets to be a strong national competitive constraint, a competitor (after its entry or expansion) would need to:

(a) have access to the relevant branded products in both sports-inspired casual footwear and apparel, which is sufficient in scope to exert a competitive constraint on the Merged Entity – given, for example, the importance of access to branded products as a competitive parameter in these markets (see chapters 8 and 9);

(b) be a national multi-channel retailer, similar in size and scope to Footasylum, eg in terms of its national in-store footprint and online business, which could replace the loss of Footasylum as a competitive constraint at a national level as a result of the Merger; and

(c) offer a retail fascia brand and in-store and online shopping experience that appeals to the Merged Entity's target consumers and meets the requirements set by suppliers – given, for example: (i) the importance of a retailer's brand and market position because of the younger target consumers in the relevant markets (eg based on the Parties' and third parties' evidence in Appendix H); and (ii) the importance of competition in the relevant markets on different aspects of a competitor's QRS offering, including, but not limited to, a competitor's marketing activity, store fittings, improvements to website functionality, marketing campaigns or partnerships with influencers (see chapters 8 and 9).

11.8 We therefore considered the following possible barriers to entry into and expansion in the relevant markets:

(a) support from suppliers and access to their branded products;

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[658] Barriers to entry and expansion are specific features of a market that give incumbent businesses advantages over potential competitors. Where such barriers are low, the merged entity is more likely to be constrained by entry; conversely, this is less likely where barriers are high. See CMA Guidance, paragraph 5.8.4.

(b) the costs and timescales to establish a national in-store footprint;

(c) the costs and timescales to establish a national online business; and

(d) retailer branding and market positioning.

(a) Support from suppliers and access to their branded products

Parties' and third parties' views

11.9 The Parties told us that support from the key suppliers – Nike and adidas – was critical to the success of any entry or expansion into the relevant markets. JD Sports told us that such support was 'pivotal' to the success of sports-inspired casual footwear retailers (and to a lesser extent for sports-inspired casual apparel retailers), not only for incumbents but also for new entrants [✂]. It added that if the 'brands' were satisfied with the performance of their 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. JD Sports also told us that for a new store opening to be a success, it must stock sufficient range from Nike and adidas, and [✂].

11.10 We set out the evidence from third parties on this issue in Appendix H. Based on this evidence:

(a) third parties echoed the Parties' views on the importance of access to suppliers' branded products when competing in the relevant markets and highlighted in particular the restrictions they faced in accessing the higher-tier branded products of Nike and adidas both in terms of range and volumes (see paragraph 3 of Appendix H);

(b) some third parties told us that JD Sports was perceived to have a particularly strong incumbency advantage in relation to access to branded products compared with other competitors (see paragraph 4 of Appendix H); and

(c) while JD Sports told us that support from Nike and adidas and access to products was less of an issue for apparel than for footwear, we note that some third party retailers cited similar restrictions in accessing certain of their apparel products (albeit these appeared less frequent than for footwear) (see paragraph 5 of Appendix H).

Our assessment

11.11 We have considered the above submissions, and, as set out in chapters 8 and 9, recognise the importance of Nike and adidas in shaping the relevant markets and the impact of their segmentation policies on retailers' access to the type and quantity of their products. We consider that in the context of new entry and expansion, receiving support from suppliers represents a significant barrier to entry and expansion, especially in relation to gaining access to higher-tier branded products (both in terms of franchise and volume allocation) from Nike and adidas. This applies both to in-store and online retailers and in relation to footwear and, to a lesser extent, apparel.

11.12 We consider that the extent to which such access represents a barrier for a new entrant depends on whether that entrant may already have the support of the key suppliers and access to some of their products.

11.13 We also note that access to the key suppliers' branded products can vary between existing competitors in the relevant markets. Therefore, it is not only a potential barrier to expansion for market entrants but also for other competitors.

11.14 Based on our assessment of the submissions and evidence from the Parties and third parties, we conclude that support from suppliers, particularly Nike and adidas, and access to their branded products, poses a barrier to entry and expansion in the relevant markets. This applies both to in-store and online and in relation to footwear and, to a lesser extent, apparel.

(b) Costs and timescales to establish a national in-store footprint

Parties' and third parties' views

11.15 The Parties told us that it was not necessary to have a national in-store footprint to compete in the relevant markets, citing the success of smaller competitors. However, we note that some third parties cited the competitive advantages of operating with a national in-store footprint (see paragraphs 7 to 10 of Appendix H).

11.16 JD Sports told us that it considered that it was possible to achieve a 'regional or national presence' in the UK (from little or no presence) substantially comparable to that of Footasylum's 70 stores in around [✂] to [✂] years. It told us that normally, the strategy would be to start [✂] and add stores in a few key urban areas before opening in [✂].JD Sports also told us that the costs of establishing the necessary infrastructure (eg distribution assets, UK

office space and technology infrastructure) were [✂], and that 'off-the-shelf' IT solutions were an option for an entirely new entrant.

11.17 The Parties and third parties provided a wide range of costs for opening a new store (ranging from £0.2 million up to £3 million in store fit-out and opening costs), and timescales (as quickly as two months and up to one year) (see paragraph 11 of Appendix H).

11.18 In relation to the availability of varied retail space, the Parties told us that there was no shortage of retail space on high streets and in shopping centres across the UK, a view which was supported by third parties.

Our assessment

11.19 Given the national SLCs we found and the loss of Footasylum as a competitive constraint at a national level as a result of the Merger, we consider that a new entrant would need, among other things, to have a national in-store footprint broadly similar to that of Footasylum (ie around 70 stores).

11.20 We looked at the evidence for the costs and timescales of opening a single store. As we would expect given the wide range of sizes and specifications of a store, the evidence from the Parties and third parties provided a wide range of costs and timescales (see paragraph 11.17). Based on the lowest cost estimate presented to us for opening a new store of £0.2 million, we would expect the costs of establishing a national in-store footprint of 70 stores to be at least £14 million. This figure could be substantially higher depending on the quality of any store fit-out (eg [✂] told us that the minimum fit-out cost for each new [✂] store was around £[✂] – see also paragraph 11 of Appendix H). Further, we note that in addition to the costs of opening new stores, a new entrant would also need to invest in: *(a)* the necessary infrastructure (eg back office and distribution) and staff to support a national operation; and *(b)* the costs of any marketing and advertising expenditure in relation to building the retailer's brand and reputation to establish a new national presence in the market and to be a 'desirable' retailer that could appeal to both the target consumer base and suppliers (see also paragraphs 11.31 to 11.39 where we consider the establishment of a retailer's brand and market positioning as a potential barrier to entry and expansion).

11.21 We also considered the pace of expansion by the Parties and other retailers in general, which may be informative of whether entry or expansion in the relevant markets may be timely post-Merger:

(a) with regard to the pace of the Parties' own past expansion, we note that since opening its first store in 2007, it took Footasylum just over a decade to establish around 70 stores in the relevant markets, including opening around 26 stores in the last three years. In JD Sports' case, it took 15 years after opening its first store in 1981, to operate a total of 56 stores by 1996,[659] and its expansion over the last five years has involved the opening of 36 net new stores; and

(b) with regard to the pace of past expansion achieved by other non-sports - inspired casualwear specialist retailers, it took 18 years for Deichmann to grow to 102 stores in the UK and 20 years for Decathlon to grow to 44 stores, and since [✂] acquired [✂] in 2017, it has doubled the number of its stores to around [✂].

11.22 The evidence on the pace of past expansion shows that achieving a national in-store footprint for a new entrant of comparable size to Footasylum would take considerable time, and well above the two years we generally consider for timely entry and expansion.

11.23 The extent to which the establishment of an in-store national footprint is a barrier would vary to some extent depending on the circumstances of the retailer, for example:

(a) the total investment may be less of a barrier for a well-funded and large multinational operator – however, it is our view that achieving a national in-store footprint for any new entrant, regardless of its size or financial capability, could not be achieved within two years and therefore cannot be considered to be timely; and

(b) this barrier may not apply to a retailer in an adjacent market with an existing national in-store footprint. However there are other barriers that we discuss in this chapter, which may apply, eg in relation to securing access to the relevant branded products of the key suppliers and any necessary repositioning of the retailer's existing brand. We have considered whether entry from a retailer in an adjacent market may be timely, likely and sufficient when we consider the different possible sources of market entry later in this chapter.

11.24 Based on the above, we conclude that achieving a national in-store footprint for a new entrant of comparable size to Footasylum would take considerable time, and well above the two years we would normally consider to be timely. This is also supported by the evidence from past entry and expansion, which

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[659] JD Sports' website, as visited on 7 February 2020.

shows that most existing large retailers became established over many years. We also conclude that while the initial set-up costs to establish the required infrastructure may be relatively small for small scale entry, these costs can be more significant when scaled up for a national operation (including not only the costs of opening new stores (to the quality required to access the relevant branded products of the key suppliers), but also establishing the necessary infrastructure and a new national brand. While we note that for some large potential entrants with access to sufficient funding, these upfront costs to establish a national in-store footprint alone may not be an insurmountable barrier, we consider that in any case, the establishment of a national in-store footprint would not be timely.

(c) Costs and timescales to establish a national online business

Parties' and third parties' views

11.25 JD Sports told us that, for a given retailer, the barriers to entering or expanding in the online market for the retail supply of sports-inspired casualwear were [✂], provided that that retailer was supported by the 'brands'. Beyond that 'threshold issue', JD Sports estimated that the costs of setting up a website was [✂] and that it could be set up relatively [✂].

11.26 Footasylum also told us that it was 'straightforward' for online retailers to expand their existing presence and broaden their ranges and appeal to consumers. It cited Amazon, ASOS, Zalando and Boohoo as examples of 'sophisticated and well-resourced online retailers' that stocked broad ranges of sports-inspired casual apparel and footwear, including branded products from the key suppliers, Nike and adidas. It added that all of these retailers had 'significantly' expanded and had done so quite rapidly over the last five years.

11.27 One third party ([✂]) told us that there were numerous barriers to being an effective new national competitor in the market for sports-inspired casual footwear and apparel. [✂] told us that in particular, the sector had become very crowded in terms of the number of retailers, making it harder to create the type of business and infrastructure, and to have the marketing investment, to be able to create a differentiated retail offering. [✂] also identified product access as a barrier to entry and told us that this would be a barrier for both the online and 'brick and mortar' markets.

11.28 In relation to barriers to expansion, there was a broad consensus that there were very few barriers to expanding online. Even the main constraint of warehousing capacity was not considered by third parties to be a material concern (a further description of third parties' views is set out in paragraph 14 of Appendix H).

Our assessment

11.29 The evidence we have considered indicates that the initial set-up costs for setting up an online business and the costs of scaling up the business are significantly lower in comparison to establishing a national in-store footprint. This is also supported by the instances of market entry involving online-only retailers into the relevant markets. However, we note that there are other barriers that can undermine the sufficiency of such online entry or expansion, for example in relation to access to the relevant branded products (considered above) and retailer brand and positioning, which are considered in more detail below.

11.30 We therefore conclude that the costs and timescales to establish a national online business in the relevant markets do not on their own represent a significant barrier to entry or expansion.

(d) Retailer brand and positioning

Parties' and third parties' views

11.31 Both the Parties and third parties recognised the importance of a retailer's brand and positioning when competing in the relevant markets (eg recognition, credibility and authenticity of the retailer as a brand as well as the quality of its stores), in particular to appeal not only to the young target consumer base, but also to suppliers in accessing their most desirable branded products (see paragraphs 15 to 19 of Appendix H).

Our assessment

11.32 In relation to demand-side factors as a potential barrier, we have used the term 'retailer brand and positioning' to capture a broad range of factors that may contribute to the perceived 'quality' and 'desirability' of the retailer and its offer.[660]

11.33 We note the evidence from the Parties and third parties, which indicates the importance of a retailer's brand and market position (see also paragraphs 16 to 17 of Appendix H), for example:

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[660] This may capture for example: a retailer's brand (including its fascia); reputation in the market; and perception of the retailer by the key suppliers and the Parties' target consumers (which may be shaped by advertising and marketing), as well as any other contributory factor, such as the importance of the physical presentation of its stores, and the quality of the in-store and/or online consumer experience.

(a) [✂],[661] [✂];

(b) [✂];

(c) [✂] told us that 'recognition, credibility and authenticity of the retailer as a brand within this sector' was 'critical - in particular to the younger demographic to which JD and Footasylum orientate their marketing and product proposition'; and

(d) [✂] told us that 'most' consumers shopped with friends and visited the 'retailers that they think are cool'. It also told us that 'vendors have a tiered distribution approach and provide the coolest products to the coolest retailers first'.

11.34 While the Parties told us that the availability of social media provided a less costly means for marketing and raising consumer awareness, we also note that digital marketing expenditure accounts for a substantial proportion of Footasylum's advertising and marketing expenditure. For example, Footasylum estimated [✂]. Of this £[✂], we note that the vast majority ([✂]) relates to digital marketing (eg paid searches and social media) (see paragraph 18 of Appendix H).

11.35 Based on the above evidence taken in the round, we consider that establishing a national brand and market position that would appeal both to the relevant target consumers and the key suppliers, are important aspects for the success of any new market entry, not only in terms of attracting consumers, but also in terms of getting access to the desirable branded products of the key suppliers. However, in our view, there are inherent risks and uncertainties in relation to whether a new entrant would be able to establish its own brand and market position successfully to compete effectively in the relevant markets, and whether this could be achieved within two years. We therefore conclude that establishing a retailer's brand and market position that would appeal to both the target consumers and align with the requirements of the key suppliers, would represent a barrier to new entry and subsequently, rapid, large scale expansion.

11.36 For an existing retailer in an adjacent market, we would expect there to be barriers in terms of shifting its existing brand proposition and consumer perception – the extent to which these barriers apply would depend on the individual circumstances of the retailer. In some cases, a repositioning or rebranding may be considered undesirable by the retailer, if, for example, by targeting a younger consumer audience, this resulted in alienating the

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[661] [✂].

retailer's existing and established core consumer base. We have considered later in this section whether we would expect entry by retailers in adjacent markets to be likely, timely and sufficient.

11.37 We therefore conclude that retailer brand and positioning represent a barrier to entry and expansion, although the extent of this barrier will depend on the retailer's individual circumstances for reasons given in paragraph 11.36.

Conclusion on potential barriers to entry and expansion

11.38 Based on our assessment, we conclude that the following constitute barriers to entry and expansion in the relevant markets:

(a) securing support from the key suppliers and access to their branded products and volumes comparable to those offered by Footasylum;

(b) achieving a national in-store footprint in a timely manner; and

(c) achieving national brand recognition that appeals to the young target consumer base (as well as meeting the requirements of the key suppliers to gain access to their branded products).

11.39 We consider that the barriers to entry or expansion set out in paragraph 11.38 would have the effect of making it very difficult for entry or expansion to be timely, likely and sufficient. However, the significance and extent of this is likely to vary depending on the relevant retailer's individual circumstances and the extent to which it is already established either in this, or an adjacent, market.

Possible sources of entry and expansion

11.40 We have considered below the various possible sources of entry and expansion and whether the barriers discussed above would likely be overcome in each case.

11.41 We examined whether Nike or adidas have any plans to sponsor new entry or expansion into the UK, as well as the entry or expansion plans of overseas and UK retailers. We also considered the Parties' arguments in relation to the threat of potential entry. We set these out in turn below.

(a) Sponsored entry or expansion

Parties' views

11.42 JD Sports told us that the key suppliers could lead or sponsor new entry or expansion and that there was no reason to think that Nike and adidas would not be equally as willing to sponsor other retailers (eg as they had done for [✂]) to enter into the UK market if they considered that the standards of current incumbents had slipped.

Our assessment

11.43 We note that [✂],[662].

11.44 Given the role of the key suppliers in shaping the relevant markets, we consider it is possible for the key suppliers to support new entry or expansion into these markets. However, there are material uncertainties whether such entry or expansion would be timely or likely.

11.45 In this regard, [✂]. We also note that there have been a number of instances where requests by retailers planning to sell [✂] products in the UK for the first time were not granted by [✂]. We have also not seen any evidence [✂] sponsor new entry of any significant scale into the relevant markets.

11.46 Based on the evidence above, we conclude that supplier-sponsored entry is possible and has the potential to be sufficient if such support, in particular from each of Nike and adidas, is properly targeted to enable the entrant to compete in the relevant markets, eg in terms of sufficient access to the relevant branded products. However, we consider that such entry would not be timely, given the relatively long timescales to establish a national in-store footprint. In the absence of concrete plans for new entry, we also conclude that potential entry sponsored by either of the key suppliers is not sufficiently certain and therefore, would not be timely or likely.

(b) Entry by overseas retailers

Parties' views

11.47 JD Sports told us that it [✂] into the UK to come from an [✂] and that this could '[✂]', given their [✂]. It added that it was aware that [✂] was looking to enter the UK market and that it also expected an established European

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[662] [✂].

retailer (such as [✂])) to enter the UK. JD Sports also told us that these [✂] operators faced [✂]and that it was '[✂]', before they entered the UK market. It added that the 'brands' would not stop their expansion plans given that in the short term, the 'brands' were looking to [✂].

Our assessment

11.48 While we recognise that it may be possible for a multinational retailer to gain the necessary support and sufficient access to the key suppliers' branded products, we do not consider that such entry of a multi-channel retailer on a national scale would be timely based on the pace of past and current store expansions by retailers in the UK. Moreover, as we set out below, we have not seen any other evidence that indicates that significant entry by a multinational operator would be timely or likely.

11.49 We note that [✂] been in early discussions with [✂] retailer which also sells online ([✂]):

(a) [✂].

11.50 We note that discussions between [✂] remain at a very early stage and there is material uncertainty in relation to: *(a)* the likelihood or timing of such entry (if it materialises); *(b)* in the absence of any agreement, the products it may eventually be allocated ([✂]) and whether such product allocation would be sufficient for it to compete effectively with the Merged Entity; and *(c)* whether, having entered, it could establish a national in-store footprint in a timely manner. We note that [✂] currently sells online and [✂].

11.51 In relation to [✂] overseas retailers, [✂] told us that while its [✂] business was expanding in Europe and the US, it had no plans at this stage for [✂] to enter the UK. It also told us that the Merger could have a 'major impact' on its [✂] business, and that if [✂] did enter the UK market, it would be 'much harder' facing a 'combined' JD Sports/Footasylum business because their 'common suppliers' would 'try to distinguish channels and therefore supply selectively'.

11.52 Based on the above, and in the absence of any evidence of planned entry by other overseas retailers and the long timescales we would expect for an entrant to achieve a national in-store footprint, we conclude that entry by overseas retailers into the relevant markets would not be timely or likely.

(c) Entry and expansion by UK retailers

Parties' views

11.53 Footasylum cited a number of examples of market entry over the last five years, including (among others) Realbuzz (entry in 2016, currently 13 UK stores), The Sports Edit (entry in 2015, online with one London store) and Gymshark (entry in 2012, online). JD Sports told us that in addition to the entry and expansion of traditional multi-brand retailers (such as Foot Locker, Sports Direct and Next) a number of established, non-athleisure retailers had begun to offer sports-inspired casualwear lines over the last five years, eg ASOS, H&M, Primark, Uniqlo and Topshop.

Our assessment

11.54 There have been a number of entry events over the last five years, however these have been on a relatively small scale, with entry limited primarily into the online channel with a very limited in-store footprint. We have not seen any evidence of material entry in the last five years, which we would consider to be significant or sufficient.

11.55 We considered expansion by existing competitors in the relevant markets separately in chapters 8 and 9. Appendix H also sets out the details of the expansion plans of these competitors in the relevant markets. We already considered in chapters 8 and 9 whether the expansion and change in the proposition of existing competitors such as Frasers Group and Foot Locker would increase their competitive constraint on the Merged Entity. Further, we note from the evidence in Appendix H that none of the online-only retailers or competitors we approached told us that it had plans to enter into in-store supply and open any physical stores over the next two years (see paragraph 22 of Appendix H). We have also seen no evidence of any plans for material new entry into online supply in the relevant markets, eg with regard to product range similar to those offered by the Parties or with regard to achieving online sales similar to those of Footasylum's online business (of around [✂]) (see paragraph 23 of Appendix H).

11.56 We note that UK retailers (including both those in the relevant markets and in adjacent UK markets) have been active both in terms of new store openings and closures. Over a two-year timeframe, the highest number of net store openings by an individual retailer was 20 (by [✂]) followed by [✂] with

four.[663] While this may indicate that it is possible for retailers to expand in adjacent markets, as we concluded in paragraph 11.24, we consider that substantial expansion to the extent required to establish a national in-store footprint would not be timely.

11.57 In relation to whether national retailers in adjacent markets, eg fashion-led or generalist retailers, have plans to enter the relevant markets, we note that none of the retailers we approached had specific or concrete plans to enter or significantly expand their offering into sports-inspired casualwear, although we note that some retailers (such as [✂]) plan to continue to open new stores. [664] In relation to the specific plans of two retailers ([✂] and [✂]):

(a) [✂] told us that there was an opportunity for it to stock apparel products from a 'new sports-inspired casualwear brand' ([✂]) from Autumn 2020 and that negotiations with this supplier were ongoing. However, [✂] told us that subject to these negotiations, these products would only be available online and in a handful of [✂] stores from autumn 2020 in addition to its 'existing sports-inspired casualwear offering'. [✂] also told us that it did not expect the 'on-boarding' of this new supplier to have a 'significant impact' on its revenue figures for 2020; and

(b) in relation to [✂] as a potential entrant, we note that its plans are relatively limited in scope. It told us that it was currently running a 'very small trial' in five stores to see how well it could sell adidas products in a 'small part' of its stores. [✂] told us that if this worked, it would 'probably roll this out' to a 'small number of stores' ([✂]) for Q1 of 2020, a period where it believed 'activewear sales should be at their strongest'. It added that outside of this, it did not sell sports brands in its stores and had no plans to do so. We do not expect this to represent a significant shift of [✂] product offering that would closely align with that of the Parties.

11.58 We also consider that if a retailer in an adjacent market did decide to enter, such a repositioning may not be timely. For example, [✂] told us that for a retailer with access to the key suppliers and an existing national store footprint, it would take at least 18 months to appropriately stock its stores with new products and then a longer period to change consumer perceptions about where these products would be available and about the store fascia.

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[663] CMA analysis of data provided by JD Sports and Footasylum, the competitor data was provided by JD Sports. Data covered the period from 1 September 2017 to 1 October 2019. Store opening/closure data included the retailer's 'Kids' fascia.
[664] [✂] told us that it was a 'fashion retailer' offering casual clothing in addition to 'smarter products' and that only a 'small proportion' of its offering at any time could be regarded as sports-inspired. It also told us that it did not stock third-party 'sports brands'. It told us that it did not compete with the Parties or any other sports-inspired business.

While such a decision to reposition a retailer's offering may be feasible, in our view, there would be significant barriers to doing so. These barriers include challenges, risks and costs arising from repositioning the retailer's brand and positioning to appeal not only to the Merged Entity's target consumers, but also to suppliers such as Nike and adidas, which would be necessary to enable the retailer to gain their support in accessing their branded products and volumes.

11.59 Based on the above, and in the absence of any specific or concrete plans to enter or significantly expand their offering into sports-inspired casualwear, we conclude that entry or expansion by UK retailers outside of the relevant markets would not be timely, likely or sufficient. In any case, even if a retailer in an adjacent market did decide to enter, we consider that securing sufficient access to the relevant branded products and/or repositioning the retailer's brand and market positioning, could pose substantial barriers to entry, as well as give rise to material risks and uncertainties in relation to its success, nor do we consider that such entry would be timely.

(d) Threat of entry

Parties' views

11.60 JD Sports told us that notwithstanding its view that there was already sufficient evidence of entry or expansion, the Parties were constrained by the potential threat of entry by an international retailer sponsored by the 'brands'. It added that such a constraint was explicitly recognised in the CMA's Guidance, which stated that 'a constraint from potential entry may rise even though there may be no expectation on the part of the [CMA] that entry would actually occur'.

11.61 JD Sports also told us that regardless of whether the CMA had been able to obtain evidence that indicated that entry was timely, likely or sufficient, the CMA should take into account the extent to which the potential threat of entry would act as a constraint. It added that if JD Sports were hypothetically to attempt to exercise any market power to the detriment of consumers, the 'brands' would have both the ability and incentive to neutralise that, and that it was 'unrealistic to assume the brands would not do so, as otherwise they would simply cede value transfer from themselves to retailers'.

Our assessment

11.62 Our Guidance considers the circumstances where the threat of entry alone might deter the merged entity from exploiting any market power resulting from the merger to be rare.[665]

11.63 We consider that in this case, given the relatively long timescales to establish a national in-store footprint, we would not expect such entry on a national scale to be timely.

11.64 In relation to the threat of suppliers of branded products constraining and responding to a deterioration in the Parties' offering post-Merger, we have considered this as part of our competitive assessment (see chapters 8 and 9).

Conclusion on possible sources of entry or expansion

11.65 Based on our assessment of the possible sources of entry and expansion from outside of the relevant markets, whether sponsored by suppliers, overseas retailers or other UK retailers, we conclude that we would not expect such entry or expansion to be timely, likely or sufficient. We have not seen evidence of any concrete plans by online-only retailers or retailers in adjacent markets looking to enter into in-store supply in the relevant markets.

Conclusion on entry and expansion

11.66 Drawing on our assessment in the round, we conclude that in order for entry or expansion in the relevant markets to be sufficient and an effective competitive constraint on the Merged Entity, a competitor (after its entry or expansion) would need to:

(a) have access to the key suppliers' relevant branded products in both sports-inspired casual footwear and apparel, which is sufficient in scope to exert a competitive constraint on the Merged Entity;

(b) be a national multi-channel retailer, similar in size and scope to Footasylum, eg in terms of its national in-store footprint and online business; and

(c) offer a retail fascia brand and in-store and online shopping experience that appeals to the Merged Entity's target consumers and meets the requirements set by the key suppliers.

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[665] CMA Guidance, paragraph 5.8.2.

11.67 We conclude that this would neither be timely nor likely given that:

(a) based on past entry and expansion in-store and the rate at which the Parties and other entrants have grown their store footprint, we do not consider it likely that a national footprint of stores could be established in a timely manner. We consider that the timescales and the costs involved to achieve a national footprint (as well as the necessary supporting infrastructure and staff), together with the timescales and costs involved in establishing national brand recognition, would make it difficult for new entry to be timely or likely;[666]

(b) given that we found that over the past five years, no material national in-store entry has taken place, we consider that material de novo entry into the relevant markets is also unlikely;

(c) while it is possible for a large existing non-UK retailer to enter, we have not seen evidence that this would be timely given the long timescales to establish a national store footprint and build UK retailer brand recognition with consumers; and

(d) expansion from UK retailers operating in adjacent markets, such as other fashion retailers, would not be timely, likely and sufficient, given the time it would take and challenges they would face in either building a new brand or substantially repositioning themselves, particularly given their very different and broader consumer base. This would also depend on the extent to which they were able to access suppliers' branded products.

11.68 In our view, the costs of setting up and expanding an online business are relatively low and retailers in the relevant markets have plans to continue to expand their online businesses. We found that it is easier to enter and expand as an online-only retailer, as ASOS and some other retailers have done. However, access to branded products and building a nationally recognised proposition remain significant barriers. Given the evidence we have seen, we do not consider that online entry and expansion would be timely, likely, or sufficient to outweigh the SLCs we have identified.

11.69 Based on our assessment above and in the light of the available evidence, we conclude that entry and/or expansion would not be timely, likely and sufficient to prevent the SLCs we found.

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[666] However, we note that for some large potential entrants with access to sufficient funding, these upfront costs may not be an insurmountable barrier.

Efficiencies

11.70 We also considered whether there are any efficiencies arising from the Merger which could be considered a potential countervailing factor to the SLCs we found. The details of our assessment, including our consideration of the Parties' response to our Provisional Findings on efficiencies, are set out in Appendix I and summarised in this section.

11.71 As set out in our Guidance, in order for any claimed efficiencies to be found to be rivalry-enhancing, the evidence must lead the CMA to expect that the following cumulative criteria would be met: timely, likely, sufficient, merger-specific and incentivise the merging parties to improve their consumer offer in the relevant markets.[667]

Parties' views

11.72 The Parties submitted that the following synergies were likely to arise as a result of the Merger (further details are set out in Appendix I):

(a) JD Sports submitted that the Merger would: [✂]; and

(b) Footasylum told us that the Merger would: [✂].

Our assessment

11.73 We considered whether each of the efficiencies submitted by the Parties would meet the cumulative criteria set out in paragraph 11.71.

11.74 Based on this assessment, we consider that the proposed efficiencies would be timely (ie within two years) and likely to occur.

11.75 However, based on the evidence we have seen, we do not consider that the efficiencies submitted by the Parties are specific to the Merger. For example, in relation to whether the Merger would [✂], as set out in our counterfactual assessment in chapter 5, we consider it likely that Footasylum would have stabilised its financial position absent the Merger. We also consider that the proposed efficiencies [✂] could be achieved through other means such as outsourcing or employing specialists and trading with Footasylum's wholesale channel. In addition, while the Parties quantified the fixed cost-savings they expected from the Merger, the Parties have not provided evidence that these would be passed onto consumers in terms of a reduction in prices or an

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[667] CMA Guidance, paragraph 5.7.4.

improvement in quality of services (ie store refurbishments). In any case, we do not in general give as much weight to savings in fixed costs given such savings may often represent private gains to businesses and are less important in short-run price formation.[668]

11.76 We have seen limited evidence that the Parties' proposed efficiencies are rivalry-enhancing in terms of PQRS. JD Sports submitted that in the relevant markets, [✂] and [✂]. Therefore, we do not consider that any price efficiencies would be reflected in cost reductions for consumers. The other synergies are limited in their improvement to consumers and would not contribute to an overall increase in rivalry in the market.

11.77 Therefore, we conclude that these efficiencies are unlikely to be sufficient to prevent the SLCs we found in the relevant markets.

Conclusion on efficiencies

11.78 Based on this assessment, we consider that the proposed efficiencies would be timely (ie within two years) and likely to occur. However, based on the evidence we have seen, we do not consider that these efficiencies are Merger-specific or rivalry-enhancing. Therefore, we conclude that these efficiencies are unlikely to be sufficient to prevent the SLCs we found in the relevant markets.

Conclusion on countervailing factors

11.79 Based on our assessment set out in this chapter, we concluded that there are no countervailing factors to the SLCs we found in the relevant markets.

12. Conclusions

12.1 As a result of our assessment, we concluded that the Merger has resulted in the creation of a relevant merger situation.

12.2 We also concluded that the creation of that situation has resulted, or may be expected to result, in an SLC in:

(a) the retail supply of sports-inspired casual footwear in-store and online in the UK; and

[668] CMA Guidance, paragraph 5.7.9.

(b) the retail supply of sports-inspired casual apparel in-store and online in the UK.

12.3 We concluded that there is no SLC on the basis of coordinated effects in the relevant markets.

13. Remedies

Introduction

13.1 This chapter sets out our assessment of, and final decision on, the appropriate remedy to the SLCs and resulting adverse effects we found.

13.2 As noted throughout this report, we recognise that all retailers are currently facing uncertain and difficult trading conditions due to COVID-19. This is having a significant impact on retailers and on the economy, and there remains considerable uncertainty about the extent and duration of this impact. We recognise that COVID-19 could also have a significant impact on remedies in a number of different ways and therefore, as far as possible, we have considered this in our remedy assessment.

13.3 The design of our remedy and its implementation process has sufficient flexibility to enable us to take into account the impact of COVID-19 (based on what we currently know or the factors we are able to predict). Further we have given careful consideration to the ongoing flexibility we have under the Act allowing remedies to be reassessed in light of material changes in circumstances or other special reasons (see sections 41(3),[669] 41A(2),[670] and see also section 92(2)[671] of the Act), to ensure we can continue to respond to any relevant developments which are, at this point in time, difficult to anticipate.

13.4 We explored various ways in which our remedy and its implementation process can provide the necessary flexibility to respond and adapt to developments as they arise, while at the same time, not undermining the effectiveness of our final remedy in addressing the SLCs we found. Our

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[669] Under section 41(3) of the Act, the action the CMA takes in implementing remedies must be consistent with the decisions in the final report, unless there has been a material change of circumstances since the preparation of the report or the CMA otherwise has a special reason for deciding differently.
[670] Under section 41A of the Act, the CMA is subject to a statutory deadline of 12 weeks following its final report to accept final undertaking or to make a final order. This period may be extended once by up to six weeks if the CMA considers there are special reasons for doing so.
[671] Under section 92 of the Act, the CMA has an ongoing responsibility for the monitoring and enforcement of the final undertakings or final order. From time to time, the CMA must consider whether, by reason of any change in circumstances, the final undertakings are no longer appropriate and should be released, varied or superseded or the final order is no longer appropriate and should be varied or revoked.

consideration of this flexibility is set out in further detail at appropriate points throughout this chapter, in particular when we consider the design of the remedy and its implementation process.

13.5 In reaching our final decision on the appropriate remedy, we also considered the evidence we gathered from the Parties and third parties, including: *(a)* their responses to our public consultation on our notice of possible remedies[672] (Remedies Notice); *(b)* our response hearings with each of the Parties and various third parties;[673] and *(c)* the Parties' response to our Remedies Working Paper (RWP), which set out our provisional decision that a full divestiture of Footasylum would be the only effective and proportionate remedy.

13.6 This chapter sets out:

(a) the CMA's framework for assessing remedies (see paragraphs 13.7-13.11);

(b) the nature of the SLCs we found and their resulting adverse effects (see paragraphs 13.12-13.13);

(c) an overview of possible remedy options (see paragraphs 13.14 to 13.20);

(d) our assessment of the effectiveness of a full divestiture remedy (see paragraphs 13.21-13.161);

(e) our conclusions on effective remedies (see paragraph 13.162);

(f) our assessment of any relevant customer benefits (RCBs) (see paragraphs 13.163-13.202);

(g) our assessment of the proportionality of the effective remedy (see paragraphs 13.203-13.224);

(h) giving effect to our final remedy (see paragraphs 13.225-13.227); and

(i) our final decision on the appropriate remedy (see paragraph 13.228).

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[672] Our Remedies Notice was published on the CMA website on 11 February 2020.
[673] We received written responses to our Remedies Notice from: *(a)* JD Sports (25 February 2020); *(b)* [✂] (25 February 2020); and *(c)* [✂] (3 March 2020). We also held separate response hearings with each of the Parties on 2 March 2020 and with the following third parties: ([✂]). We also received written responses to our requests for information from [✂]. [✂] declined our invitation for a response hearing and confirmed that having viewed our Remedies Notice, it had no further evidence to provide.

CMA framework for assessing remedies

13.7 Where the CMA finds an SLC, it must decide what, if any, action should be taken to remedy, mitigate or prevent that SLC or any adverse effect resulting from the SLC.[674]

13.8 The Act requires that when considering possible remedial actions, the CMA shall 'in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it'.[675]

13.9 To fulfil this requirement, the CMA will seek remedies that are effective in addressing the SLC and any resulting adverse effects.[676] The effectiveness of a remedy is assessed by reference to its: *(a)* impact on the SLC and its resulting adverse effects; *(b)* duration and timing – remedies need to be capable of timely implementation and address the SLC effectively throughout its expected duration; *(c)* practicality in terms of its implementation and any subsequent monitoring; and *(d)* risk profile, relating in particular to the risk that the remedy will not achieve its intended effect.[677]

13.10 The CMA will then select the least costly and intrusive remedy that it considers to be effective. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. The CMA may also have regard, in accordance with the Act, to the effect of any remedial action on any RCBs arising from the merger.[678]

13.11 Our guidance on remedies states that in 'unusual situations', it is possible that all feasible remedies will only be partially effective in remedying an SLC. In such cases, the CMA will select the most effective remedy or package of remedies that is available, provided that the costs of this remedy are not disproportionate in relation to the SLC (ie if an effective remedy might be expected to incur costs that are disproportionate to the scale of the SLC and its adverse effects).[679]

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[674] Section 35(3) of the Act.
[675] Section 35(4) of the Act.
[676] In *Ecolab Inc. v CMA* [2020] CAT 12, the Tribunal held that the duty to find as comprehensive a solution as is reasonable and practicable is correctly encapsulated in the concept of an 'effective remedy' (see paragraphs 74-75).
[677] CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 3.5.
[678] CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 3.4.
[679] CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 3.12.

Nature of the SLCs and resulting adverse effects

13.12 In chapter 12, we concluded that the Merger has resulted, or may be expected to result, in an SLC at a national level as a result of horizontal unilateral effects in: *(a)* the retail supply of sports-inspired casual footwear (in-store and online) in the UK; and *(b)* the retail supply of sports-inspired casual apparel (in-store and online) in the UK (see chapters 8 and 9 for our respective assessments of these markets).

13.13 We found that these SLCs have resulted, or may be expected to result, in adverse effects, for example in the form of less discounting, a reduced range and/or not improving quality or service as much as would otherwise have been the case absent the Merger.[680]

Overview of remedy options considered

13.14 Remedies are typically classified as either structural or behavioural.[681] In merger inquiries, the CMA generally prefers structural remedies over behavioural remedies because:[682]

(a) structural remedies are more likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;

(b) behavioural remedies are less likely to have an effective impact on the SLC and its resulting adverse effects, and are more likely to create significant costly distortions in market outcomes; and

(c) structural remedies rarely require monitoring and enforcement once implemented.

13.15 In our Remedies Notice, we indicated our initial view that a full divestiture of Footasylum by JD Sports appeared likely to be the only effective and proportionate remedy, and that we had not been able to identify a smaller

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[680] See chapters 8 and 9.
[681] Structural remedies, such as divestiture, are generally one-off measures that seek to restore or maintain the competitive structure of the market by addressing the market participants and/or their shares of the market. Behavioural remedies are normally ongoing measures that are designed to regulate or constrain the behaviour of the merging parties with the aim of restoring or maintaining the level of competition that would have been present absent the merger.
[682] CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 3.46.

divestiture package that could form the basis of an effective and proportionate structural remedy.[683,684]

13.16 We also indicated in our Remedies Notice that any behavioural remedy was very unlikely to be effective. This reflected our initial view that there would be significant risks and obstacles to designing an effective behavioural remedy that could comprehensively address our (at the time provisional) national SLCs and resulting adverse effects, in particular given the broad scope of the adverse effects we had provisionally identified and the need for extensive and ongoing monitoring.[685]

13.17 In our public consultation on our Remedies Notice, we invited views on the effectiveness of a remedy requiring the full divestiture of Footasylum and on its design, as well as whether there were any other practicable remedy options we should be considering.[686]

13.18 The Parties told us that other than a remedy involving the full divestiture of Footasylum, there were no other remedy options (including a structural remedy involving a smaller or differently configured divestiture package) which would be effective. In their response to the RWP, the Parties maintained their view that a remedy was not required but that if, on the basis of the Provisional Findings, the CMA were to maintain its position, then a full divestiture of Footasylum would be the only available remedy. The Parties did not submit an alternative remedy proposal in their response to the RWP.

13.19 Similarly, no third party told us that we should be considering an alternative remedy to a full divestiture of Footasylum, and none of the Parties and third parties told us that we should be pursuing a behavioural remedy option.

13.20 On this basis, other than a structural remedy involving a full divestiture of Footasylum, we did not consider any other remedy option and consequently, in this chapter, we consider the effectiveness and proportionality of a full divestiture of Footasylum.

Effectiveness of full divestiture of Footasylum

13.21 In this section, we set out:

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[683] Remedies Notice, paragraphs 12-13.
[684] We also indicated in our Remedies Notice that while a divestiture of JD Sports instead of Footasylum could be another potentially effective remedy, we did not propose to consider this remedy option further as this was likely to be a less proportionate remedy given that Footasylum was the acquired business and the smaller and less profitable of the two. Source: Remedies Notice, footnote 9.
[685] Remedies Notice, paragraph 14.
[686] Remedies Notice, paragraph 15.

(a) a brief description of a remedy involving a full divestiture of Footasylum;

(b) the general views of the Parties and third parties on its overall effectiveness;

(c) our assessment of the remedy's effectiveness (including our consideration of its design); and

(d) our conclusions on the effectiveness of a full divestiture remedy.

Remedy description

13.22 Under a full divestiture remedy, JD Sports would be required to divest the whole of the Footasylum business to a suitable purchaser within a timeframe specified by the CMA. This would be equivalent to having prohibited the Merger, as if it had not completed.

13.23 Since completion of the Merger and for the entire duration of our investigation, the interim measures we put in place have ensured the separation of the legal entity comprising the whole of the Footasylum business from the wider JD Sports/Pentland group of companies, and prevented further integration of the Footasylum business with the rest of the JD Sports business and the Pentland business.[687,688]

13.24 Therefore, a full divestiture remedy would involve the sale of all of JD Sports' shareholding in Footasylum.[689]

Parties' and third parties' views on overall remedy effectiveness

13.25 The Parties told us (without prejudice to their views that there were no SLCs resulting from the Merger) that only a full divestiture of Footasylum would address the SLCs we had found. However, the Parties told us that this would be a disproportionate course of action, particularly in the 'current unprecedented climate given the COVID-19 crisis', that would 'deprive' customers of the benefits arising from the Merger.

13.26 The Parties told us that even if SLCs were found, it remained open to the CMA to decide, exceptionally, not to take any remedial action if a reasonable and practicable solution was 'effectively unavailable given the exceptional

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[687] Further details of our interim measures are provided in paragraph 13.122.
[688] References to Pentland means Pentland Group plc prior to 21 November 2019 and Pentland Group Limited from 21 November 2019 onwards. On 11 December 2019, Pentland sold a 2.47% stake in JD Sports and, as a result, Pentland now owns 55.0% of JD Sports.
[689] The divestiture package would therefore comprise Footasylum Limited, and all of its subsidiaries (Drome Limited, Footasylum Brands Limited and Projects NYC Limited).

market conditions', which comprised: *(a)* Footasylum 'already struggling' in the counterfactual; coupled with *(b)* 'no obvious stable retail future' for store sales of non-essential items nor, when coupled with 'likely' high unemployment rates, or lower disposable income for such items when stores are permitted to re-open.

13.27 The Parties submitted that if the CMA did decide to proceed with a divestiture remedy, then JD Sports should be provided with sufficient time to implement a divestiture remedy, namely that the commencement of the initial divestiture period should be conditional on the stabilisation of the retail sector and financial markets.

13.28 In relation to third parties' views on the overall effectiveness of a full divestiture remedy, [✂] told us that only a full divestiture of Footasylum would represent an effective remedy (the details of their views are provided in paragraph 2 of Appendix K).

Our assessment of the effectiveness of full divestiture of Footasylum

13.29 Overall, we would expect that a full divestiture remedy, if designed to address the practical risks normally associated with any divestiture remedy (see paragraph 13.32), would re-establish JD Sports and Footasylum as two independent competitors in the relevant markets and thereby enable competition which would have existed between the Parties in the absence of the Merger, to take place. It would address all of our concerns at source by reversing the Merger which has given rise to the SLCs, and therefore represent a comprehensive solution to all aspects of each SLC.

13.30 In addressing these practical risks, we considered in the design of our remedy (including its implementation process) the impact of COVID-19 where relevant (and to the extent possible) and considered the Parties' submissions on this. In particular, we considered the extent to which the considerable uncertainty arising from COVID-19 increases the composition, purchaser and asset risks associated with a divestiture remedy, and whether the remedy can be designed such that these risks can be appropriately mitigated, for example by ensuring that the remedy and its implementation process are sufficiently flexible to respond to any relevant developments given the uncertainties.

13.31 The remainder of this section therefore focusses on the design of a remedy requiring the full divestiture of Footasylum (including its implementation process), which is integral to our assessment of its effectiveness in addressing the SLCs we found.

Divestiture remedy design considerations

13.32 There are broadly three categories of risk that could impair the effectiveness of any divestiture remedy:[690]

(a) composition risk arises if the scope of the divestiture package is too narrowly constrained or not appropriately configured to attract a suitable purchaser, or does not allow a purchaser to operate as an effective competitor;

(b) purchaser risk arises if a divestiture is made to a weak or otherwise inappropriate purchaser or if a suitable purchaser is not available; and

(c) asset risk arises if the competitive capability of the divestiture package deteriorates before completion of the divestiture.

13.33 An effective divestiture remedy should give us confidence that these practical risks can be properly mitigated in its design, including in the face of considerable uncertainty arising from COVID-19. We therefore consider the following remedy design issues:

(a) the appropriate scope of the divestiture package;

(b) the identification and availability of suitable purchasers; and

(c) ensuring an effective remedy implementation process, ie the divestiture process and maintaining the competitive capability of the divestiture package.

13.34 We consider each of these in turn below, where we set out the views of the Parties and third parties on each aspect of the remedy design, before setting out our views and conclusions.

(a) Scope of the divestiture package

13.35 In considering the appropriate scope for a divestiture package, we will aim to ensure that it: *(a)* addresses the SLCs and any resulting adverse effects; *(b)* is attractive to potential purchasers; and *(c)* enables the eventual purchaser to operate the divested business as an effective competitor.

[690] CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 5.3.

- *Parties' and third parties' views on the scope of the divestiture package*

13.36 As mentioned in paragraphs 13.25 and 13.28, the Parties and all of the third parties we heard from told us that a full divestiture remedy would be the only effective remedy to the SLCs we had found.

13.37 In addition, the Parties and third parties explained why a smaller divestiture package would not be an effective remedy.

13.38 In relation to why a partial divestiture of Footasylum would not be effective, JD Sports told us that given the 'national problem' identified by the CMA, this would require a 'national solution', and that since the SLCs applied to both online and in-store supply and to both footwear and apparel, there would be 'no smaller parameter' that could address those concerns. JD Sports also told us that given the relatively small size of Footasylum's business, there would also not be much scope for a 'scalpel approach' to determine a smaller divestiture package. Similarly, Footasylum told us that a partial divestiture of the Footasylum business [✂].

13.39 In their response to the RWP (and without prejudice to their views that there were no SLCs and therefore no remedy would be required), the Parties did not make any further representations on the scope of the divestiture package or disagree with our provisional view that the divestiture package should comprise the whole of the Footasylum business.

13.40 Third parties told us that a partial divestiture of Footasylum would not result in an effective remedy and added that the Footasylum brand should be considered an essential component of any divestiture package. The details of these third parties' views are provided in paragraph 3 of Appendix K.

13.41 The Parties did not consider that we should pursue a 'mix-and-match' approach, involving for example, permitting JD Sports to substitute a JD Sports store for a Footasylum store within the divestiture package. In this regard, JD Sports told us that it would 'not be prepared to dispose of any of its own stores', and ruled out a possible mix-and-match approach, [✂]. Similarly, Footasylum told us that, [✂].

13.42 Third parties also submitted that we should not pursue a 'mix-and-match' approach, with [✂] citing differences between the Parties and between their stores, as well as the costs of realigning stores, as reasons (see also paragraph 4 of Appendix K for the details of their views).

- *Our assessment of the scope of the divestiture package*

13.43 In defining the scope of a divestiture package that will satisfactorily address an SLC, the CMA will normally seek to identify the smallest viable, standalone business that can compete successfully on an ongoing basis.[691]

13.44 In this case, we would expect that in order for the divested business to be an effective national competitive constraint in the relevant markets, it would:[692]

(a) have access to the relevant branded products in both sports-inspired casual footwear and apparel which is sufficient in scope to exert a competitive constraint in the relevant markets;

(b) be a national multi-channel retailer with a national in-store footprint and online business (similar in scope and scale to that of Footasylum); and

(c) offer a retail fascia brand and an in-store and online retail experience and proposition (similar to that of Footasylum) that appeal to the Parties' target consumers and meet the requirements set by suppliers.

13.45 We consider that Footasylum, divested in its entirety, would meet all of the above requirements and represent an effective national competitive constraint, and as mentioned in paragraph 13.29, we would expect a full divestiture of Footasylum (if carefully designed and implemented) would comprehensively address each SLC and resulting adverse effects we found.

13.46 A remedy requiring the full divestiture of Footasylum would also mitigate the risk of any key Footasylum assets, which are necessary for it to compete effectively in the relevant markets, being omitted from the final divestiture package (and, as a result, JD Sports retaining any key Footasylum assets), and ensure that the remedy comprehensively addresses the SLCs and resulting adverse effects we found.

13.47 In the absence of any evidence that a partial divestiture package could form the basis of an effective divestiture remedy in the circumstances of this case, and in light of the evidence from the Parties and third parties that a partial divestiture would fail to address the SLCs and could also have the unintended consequences of significantly undermining the divested Footasylum business, we have not considered a partial divestiture package further. In particular, we would be concerned if a break-up of the Footasylum business resulted in undermining the divested Footasylum business's financial viability and

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[691] CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 5.7.
[692] See chapter 11.

consequently its ability to invest into its business and to access branded products from suppliers.

13.48 We also note the absence of any evidence to support a 'mix-and-match' approach, as well as the Parties' lack of appetite for doing so. Given this, together with the CMA's general preference for avoiding 'mix-and-match' divestitures,[693] we did not consider a 'mix-and-match' approach further.

13.49 We therefore consider that requiring the divestiture package to comprise the whole of the Footasylum business would appropriately mitigate any composition risks. We do not consider that COVID-19 impacts our consideration of the question of whether Footasylum should be divested in its entirety or whether a partial divestiture or mix-and-match approach could be effective. In this regard, we considered and set out our reasons why only a full divestiture of Footasylum would ensure that the divested business can be an effective national competitive constraint and address the SLCs we found.

13.50 During our remedy implementation process, we will seek to ensure that the competitive capability of the Footasylum business is appropriately preserved to ensure that our remedy effectively addresses the SLCs we found, ie such that once divested, the Footasylum business will be an effective national competitive constraint in the relevant markets. We explain later in this section when we consider the design of an effective remedy implementation process, how the preservation of the competitive capability of the divestiture package should be interpreted in the context of the challenges and uncertainties facing all retailers as a result of COVID-19 (see from paragraph 13.84).

13.51 Having considered the evidence and found that a partial or differently configured divestiture package would undermine the effectiveness of a divestiture remedy, we consider that a full divestiture of Footasylum would be effective in addressing the SLCs we found (whether separately in relation to footwear and apparel, or when viewed in combination).

- *Conclusion on the appropriate scope of the divestiture package*

13.52 Based on the above, we conclude that the divestiture package should comprise the whole of the Footasylum business and that a partial divestiture of Footasylum would substantially increase (to an unacceptable level) the risk

[693] The CMA will normally prefer avoiding a 'mix-and-match' approach given that a mixture of assets from both merger parties may create additional composition risks such that the divestiture package will not function effectively (Source: CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 5.16).

of a divestiture remedy being ineffective. We also conclude that we should not pursue a 'mix-and-match' approach.

(b) Identification and availability of suitable purchasers

13.53 We considered the risks that Footasylum may be sold to a weak or otherwise inappropriate purchaser or that a suitable purchaser may not be available. These risks, if not properly addressed, could undermine the effectiveness of any divestiture remedy.

13.54 We normally mitigate the risks of an acquisition by an unsuitable purchaser by satisfying ourselves that a potential purchaser:[694]

(a) is independent of the merging parties (in this case, both JD Sports and Pentland);

(b) has the necessary capability to compete in the relevant markets;

(c) is committed to competing in the relevant markets; and

(d) will not create further competition concerns.

13.55 In this regard, under a divestiture remedy, the eventual purchaser and final transaction documents would normally be subject to CMA approval.

- *Parties' and third parties' views on purchaser suitability and availability*

13.56 In general terms, there was a broad consensus from the Parties and third parties on the need for a suitable purchaser to meet our normal purchaser suitability criteria (see paragraph 13.54).

13.57 The Parties told us in their response to the RWP that they agreed with the CMA's provisional view that the CMA's standard purchaser approval criteria would be sufficient to address any concerns regarding purchaser suitability. In this regard, JD Sports told us that it was 'fully cognisant' of the CMA's requirement for a potential purchaser to meet the CMA's 'standard purchaser-specific approval criteria'.[695]

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[694] CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 5.21.
[695] JD Sports told us that the CMA's 'standard purchaser approval criteria' set out in its remedies guidance already required that a purchaser had 'access to appropriate financial resources, expertise and assets to enable the divested business to be an effective competitor in the market'. Source: JD Sports, Remedies Notice response (25 February 2020), paragraph 11.

13.58 We set out below the views of the Parties and third parties where the evidence we received was mixed, namely in relation to:

(a) whether a purchaser needs pre-existing relationships with the key suppliers (Nike and adidas);

(b) potential purchasers that may raise further competition concerns; and

(c) the likely availability of a suitable purchaser.

- *Views on the need for a purchaser to have pre-existing relationships with key suppliers*

13.59 We received mixed views in relation to whether a purchaser needs to have pre-existing relationships with the key suppliers (in addition to Footasylum's existing relationships).

13.60 One third party ([✂]) told us that it was 'fundamental' for the purchaser itself to have some existing contacts with Nike and adidas and, preferably, a trading history with the key suppliers (either in the lifestyle or the sporting goods sector or both), to ensure that Footasylum continued to have 'adequate access' to supplies of Nike's and adidas's 'must-have' products. It told us that while Footasylum had its own relationships with the key suppliers, the key suppliers were currently reducing the number of retailer 'accounts' they supplied, and therefore the purchaser should 'ideally' have its own relationships with Nike and adidas in order to 'maximise' Footasylum's chances of ensuring continuity of supply of the key suppliers' products going forward (see also paragraph 5 of Appendix K).

13.61 The Parties and other third parties ([✂]) provided a different view that ensuring ongoing access to the key suppliers' products depended on Footasylum's own performance and relationships with the key suppliers, rather than the purchaser needing to have its own relationships with the key suppliers:

(a) JD Sports told us that Nike and adidas would be focussed on the quality of Footasylum's 'ongoing execution' to enable it to continue to gain access to their products and that it anticipated continuity in Footasylum's access to the key suppliers' products. It told us that given that the key suppliers would have their own distribution arrangements and relationships directly with the Footasylum 'entity', it was 'irrelevant' whether a potential purchaser had its own separate relationship with the suppliers. [✂];

(b) [✂]; and

(c) the evidence from third parties ([✂]) also indicated that ensuring Footasylum's ongoing access to the key suppliers' products depended on Footasylum's ability to meet the key suppliers' ongoing standards and requirements, rather than the purchaser needing to have its own relationships with the key suppliers. The details of this evidence from third parties are provided in paragraph 6 of Appendix K.

- *Views on potential purchasers raising further competition concerns*

13.62 At its response hearing, JD Sports told us that it accepted that there would be a 'minority' of potential purchasers who would not be suitable on the grounds that they would create a 'realistic prospect of further competition or regulatory concerns'.[696] [✂]:

(a) [✂];

(b) [✂]:

(i) [✂];

(ii) [✂];

(iii) [✂]; and

(iv) [✂].

13.63 Notwithstanding the above, JD Sports told us that the CMA should focus on whether a suitable purchaser met its normal purchaser approval criteria rather than on the purchaser's identity,[697] and that at this stage, no purchaser should be ruled out.[698]

13.64 Footasylum told us at its response hearing that:

(a) [✂]; and

(b) [✂].

13.65 In their response to the RWP, the Parties reiterated their views expressed in their respective response hearings that [✂] meet the CMA's standard purchaser approval criteria. The Parties added that, in the context of COVID-

[696] JD Sports, Remedies Notice response (25 February 2020), paragraph 3(c).
[697] JD Sports, Remedies Notice response (25 February 2020), paragraph 15.
[698] JD Sports, Remedies Notice response (25 February 2020), paragraph 11.

19 and the UK government's instructions for non-essential retailers to close their stores:

[✂].

13.66 The details of the views of third parties on purchasers who might raise further competition concerns are provided in paragraphs 8 and 9 of Appendix K, where concerns were raised by some in relation to an acquisition of Footasylum by Foot Locker and/or Frasers Group.

- *Views on the likely availability of a suitable purchaser*

13.67 At their respective response hearings and in JD Sports' response to our Remedies Notice, the Parties told us that the risk of not finding a suitable purchaser was very low. JD Sports told us that there was 'likely to be a number of viable purchasers' who would satisfy the CMA's normal criteria,[699] [✂]. Similarly, [✂].

13.68 In their subsequent response to the RWP, the Parties told us that while they agreed with the CMA's provisional view that in 'ordinary circumstances', the risk that a suitable purchaser was not available was low, the effects of COVID-19 since their response hearings had resulted in 'unprecedented economic impact and uncertainty exceeding that of the financial crisis in 2008'. The Parties added that this had already had a 'significant negative impact' on both Parties and on financial markets and mergers and acquisitions (M&A) activity and appetite more generally.

13.69 The Parties told us that in a letter (dated 30 March 2020) to JD Sports' CFO, [✂].The Parties told us that once retail and financial markets returned to 'relative stability', JD Sports remained 'confident' that it would be able to achieve a sale [✂].

13.70 We note that third parties' views on the likely availability of a suitable purchaser (the details of which are set out in paragraph 10 of Appendix K), did not take into account the effects of COVID-19 as they were provided prior to the point that its effects could be taken into account. In our view, this third party evidence is still informative and relevant to our assessment of the potential attractiveness of the Footasylum business to a purchaser, provided that its competitive capability was appropriately preserved.

13.71 In that context, we note the submissions from some third parties which indicated that Footasylum could be an attractive business for certain

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[699] JD Sports, Remedies Notice response (25 February 2020), paragraph 12.

purchasers. For example, [✂] told us that Footasylum was a recognised 'brand' in the UK, which offered a 'retail environment' which appealed to a particular customer segment, and was operating in a growing market segment. [✂]told us that it considered Footasylum would be an 'attractive' business if it had access to some of the key suppliers' [✂] and had the support of the key suppliers to open new stores.

13.72 However, and noting that third parties may have differing agendas as regards a sale of Footasylum, the evidence from third parties on the availability of a suitable purchaser was mixed. For example, [✂] told us that it might be difficult to find an 'international competitor' given the limited number of 'international competitors' and that it was only aware of a few private equity-owned retailers. [✂] told us that it did not see an 'obvious alternative buyer' for Footasylum in the UK. [✂] explained that based on its 'experience within the UK sporting goods retail market', there was a 'limited number of retailers' which were 'acquisitive in nature', and that of those which were acquisitive, [✂]. However, [✂] told us that it did not consider that it would take too long to find a suitable purchaser. [✂] told us that in light of the current COVID-19 'crisis' and, in particular, the CMA's guidance on the implications of COVID-19 for merger control, the CMA should have 'no concerns or doubts regarding the existence of a suitable purchaser for Footasylum', as it would be [✂] purchaser of the business.

- *Our assessment of purchaser suitability and availability*

13.73 In relation to the attributes of a suitable purchaser of the Footasylum business, we consider that the application of our usual criteria for purchaser suitability (see paragraph 13.54) would enable us to identify a suitable purchaser who would address all aspects of the Parties' and third parties' key concerns, and note the broad consensus from the Parties and third parties for a suitable purchaser to be independent, have the appropriate capabilities and commitment and to not raise further competition concerns.

13.74 We considered whether it would be necessary for a purchaser to have pre-existing relationships with key footwear and apparel suppliers. We note that prior to the Merger, Footasylum was able to ensure the ongoing supply of the key suppliers' branded products through its own relationships with them, and this situation has continued throughout our investigation.[700] We would see no reason to expect this situation to change following the implementation of a divestiture remedy, provided that the new owner supported Footasylum in

[700] We also concluded in chapter 5 that we would expect this situation would have continued in the absence of the Merger.

continuing to meet the key suppliers' expectations, eg with Footasylum continuing to invest in its business in terms of marketing and advertising, as well as its in-store and online offerings.

13.75 We consider that a purchaser who meets our purchaser suitability criteria would also be likely to meet the requirements of the key suppliers such that under the ownership of a suitable purchaser, Footasylum would be able to continue having access to the key suppliers' branded products. We consider that this view is corroborated by the evidence we received from the Parties themselves, as well as from third parties, [✂], on the importance of Footasylum's ability to continue to meet Nike's and adidas's respective standards and requirements to ensure ongoing access to their branded products (rather than be dependent on a purchaser's pre-existing relationships with the key suppliers).

13.76 We therefore consider that it would not be necessary to require a purchaser to have its own and pre-existing relationship with the key suppliers, but that we should assess the suitability of a potential purchaser on its individual merits and on a case-by-case basis.

13.77 In relation to the purchaser not raising further competition concerns, while we note in particular the mixed views of [✂] third parties in relation to the suitability of Frasers Group and Foot Locker as potential purchasers and whether this could raise further competition concerns, we did not consider it necessary to depart from our usual practice and rule out any purchaser at this stage. We have therefore reserved judgement at this stage on the suitability of any particular purchaser and consider that, in line with our usual practice, it would be for JD Sports to determine which potential purchasers it would submit for the CMA's approval as a suitable purchaser. The CMA at that point would conduct its own assessment, based on the evidence presented to it, of the suitability of any potential purchaser shortlisted by JD Sports.

13.78 In relation to the likely availability of a suitable purchaser, we note the Parties' views that COVID-19 had already had a 'significant negative impact' on both Parties and on financial markets and M&A activity and appetite more generally.

13.79 Separate from the question of when a suitable purchaser may emerge in the current climate where M&A activity has been significantly and negatively impacted, which we consider later when we turn to the appropriate timescales JD Sports should be provided to complete a divestiture, we consider that Footasylum fundamentally remains an attractive business which is capable of being sold to a potential purchaser. In this regard, we note that Footasylum

has for its last financial year (2019/20) been a [✂],[701] before COVID-19 started to have a significant and negative impact on Footasylum (as well as on many other UK retailers, including JD Sports). In addition, given Footasylum's access to the range and volumes of the key suppliers' branded products and the strength of Footasylum's brand and retail offering, among other factors (including its national multi-channel offering),[702] we consider that, based on the evidence we have seen to date, these factors (which enable Footasylum to compete effectively in the relevant markets) would be attractive to potential purchasers. We also note that prior to COVID-19, JD Sports [✂] and note the Parties' views that once retail and financial markets returned to 'relative stability', JD Sports remained 'confident' that it would be able to achieve a sale of the Footasylum business [✂] (see also paragraph 13.90).

13.80 As such, we would expect that, provided that the asset risk (ie the risk that Footasylum's competitive capability deteriorates) is appropriately mitigated during any divestiture process (see also paragraph 13.126), the Footasylum business will remain an attractive business capable of being sold to a suitable purchaser. We also consider that JD Sports should be given sufficient time to find a suitable purchaser, in particular in the context of the uncertainties arising from COVID-19, and this issue is considered in detail when we turn to what the appropriate timescale should be for JD Sports to complete a divestiture of Footasylum later in this section (see paragraph 13.86 onward).

13.81 Finally, and notwithstanding our view that we do not consider the risk of not finding a suitable purchaser to be material, we would note that our guidance on remedies states that substantial uncertainty as to whether a suitable purchaser will emerge will generally not be sufficient for the CMA to conclude that any form of divestiture remedy is not feasible. In this regard, the CMA has found that it is normally possible to implement divestiture remedies (eg a sale of a business to a suitable purchaser approved by the CMA), despite such uncertainties, given the flexibility in the disposal price.[703]

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[701] Based on Footasylum's February 2020 monthly management accounts, Footasylum's last 12 months rolling EBITDA [✂].
[702] In chapter 5, we recognise that overall, while Footasylum had been in a weaker financial position around the time of the Merger which might have had some impact on its competitiveness in the short term, it was likely that it would have recovered from this position. We concluded in chapter 5, that, on the balance of the evidence taken in the round, the most likely counterfactual was one in which Footasylum would have continued to compete effectively absent the Merger.
[703] CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 3.51.

- *Conclusion on purchaser suitability and availability*

13.82 Under a divestiture remedy, in order to ensure that the remedy achieves its intended effects in this case in both footwear and apparel, we conclude that:

(a) we would wish to satisfy ourselves that a potential purchaser meets our normal purchaser suitability criteria (see paragraph 13.54);

(b) it would not be necessary at this stage to rule out any potential purchaser – the CMA will assess the suitability of any potential purchaser on its individual merits, and against our normal purchaser suitability criteria; and

(c) notwithstanding the current impact of COVID-19, the risk that no suitable purchaser will emerge is not material, provided that: (i) Footasylum's ability to compete effectively in both the relevant markets is preserved during any divestiture process (see also paragraph 13.126 onward); and (ii) JD Sports is given an appropriate timescale to complete the divestiture (see also paragraph 13.86 onward). We consider both (i) and (ii) in further detail later in this section.

13.83 Under a full divestiture remedy, and in line with our normal practice, the eventual purchaser and final transaction documents would be subject to CMA approval.

(c) Ensuring an effective divestiture process and maintaining the competitive capability of the divestiture package

13.84 An effective divestiture process will safeguard the competitive potential of the divestiture package before disposal and enable a suitable purchaser to be secured in an acceptable timescale, as well as allowing prospective purchasers to make an appropriately informed acquisition decision.[704]

13.85 The circumstances of this case raise the following issues for consideration in relation to the divestiture process, which we consider in turn below:

(a) the appropriate timescale for divestiture to take place;

(b) the need for measures to preserve the divestiture package during the divestiture process to mitigate any risks that the competitive capability of Footasylum might deteriorate before completion of divestiture; and

(c) whether, and under what circumstances, there is a need to appoint an external and independent trustee to complete a divestiture (Divestiture

[704] CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 3.51.

Trustee) to mitigate the risk that the divestiture does not complete within the agreed timescales.

- *Timescales to complete a divestiture*

13.86 We considered what might be an appropriate timescale for JD Sports to implement a full divestiture remedy (the Initial Divestiture Period). This would normally run from the acceptance of final undertakings or the making of a final order (for which the statute provides a period of up to 12 weeks after the final report)[705] until legal completion of an effective divestiture (ie a sale to a purchaser approved by the CMA).

  - *Views on the timescales to complete a divestiture*

13.87 The Parties told us in their response to the RWP that it was 'essential' for JD Sports to be given an 'appropriate timescale to complete the divestiture', bearing in mind the 'current exceptional circumstances', and welcomed the CMA's observation in the RWP to keep its provisional view on a [✂] Initial Divestiture Period under review in light of the impact of COVID-19.

13.88 The Parties told us that in a letter (dated 30 March 2020) to JD Sports' CFO, [✂].

13.89 The Parties told us that the 'most appropriate course of action' would therefore be for the commencement of the [✂] Initial Divestiture Period to be conditional upon:

(a) stabilisation of the retail sector, ie that: (i) the Parties and other retailers would be permitted to reopen their stores without 'restrictions for a sufficient period of time' to enable purchasers to see a recent and 'meaningful' continuous store trading history record (of at least [✂]); and (ii) there being no indication from the UK government to suggest that there was a reasonable risk that restrictions would be re-imposed; and

(b) stabilisation of the financial markets, which would enable JD Sports to engage with a larger number of potential purchasers and run an 'effective' sale process.[706]

13.90 The Parties told us that after the CMA's final report and pending the commencement of the Initial Divestiture Period, JD Sports was prepared to

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[705] This may be extended once by up to six weeks (section 41A(2) of the Act) if the CMA considers there are special reasons for doing so, see also: CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 4.
[706] The Parties told us that this could be measured by, for example: [✂].

progress preliminary steps, eg the preparation of an information memorandum. The Parties added that once the retail and financial markets returned to 'relative stability', JD Sports remained 'confident' that it would be able to achieve a sale within [✂].

13.91 In a further submission following the Parties' response to the RWP, JD Sports told us that even when markets first 'stabilise', there would be 'significant uncertainty' as to the availability of an 'appropriate purchaser' given companies would have less appetite to engage in M&A (as the 'current crisis' would reduce all companies' cash reserves and would make them more wary about taking on additional leverage in case there were further lock downs). It added that this issue was 'exacerbated' due to the market in which the Parties operated where retailers were expected not only to operate their businesses, but to continually make investments to secure ongoing access to Nike and adidas products. JD Sports submitted that in these circumstances, 'the CMA must be alive to the real possibility that ordering a divestment, even with an extension to the timetable for doing so, would produce a worse outcome for consumers than the transaction, given that in these exceptional circumstances an appropriate purchaser meeting the CMA's criteria may not emerge'.

13.92 In their response to our RWP, the Parties told us that an approach which did not take account of the 'current, exceptional circumstances', but which required JD Sports to commence a sale process without at least [✂] of 'continuous and meaningful' store trading would:

(a) oblige JD Sports to commence a sale process at a time when 'very little' buyer interest could reasonably be expected;

(b) result in time running against JD Sports while it was unable to make any 'practical progress'; and

(c) exacerbate the risk of a sale taking place at a 'fire sale price' (whereby JD Sports at the time of the Merger could not have reasonably contemplated the risk that it would not have a 'trading record' for Footasylum or that the M&A markets would be 'effectively closed').

13.93 The Parties told us that a 'fire sale at the time of a pandemic' would not be 'conducive' to the CMA's remedy objectives, which were not to be 'punitive of the acquirer' but to restore competition by finding a purchaser who 'genuinely' met all of the CMA's purchaser approval criteria and whose ownership of Footasylum would be in the 'medium to long-term best interests' of Footasylum, and in turn, consumers. The Parties added that a purchaser who acquired Footasylum at a 'very low price' would not be 'properly incentivised

to reinstate effective competition', since its shareholders would judge the acquisition to be successful even if Footasylum achieved 'only low sales and profits'.

13.94 The Parties submitted that, if the CMA decided to take an alternative approach and require commencement of the Initial Divestiture Period from the date of any final undertakings or order, and instead grant extensions to the Initial Divestiture Period (eg if markets had not re-opened or not sufficiently opened to encourage bidders to come forward), this risked:

(a) a lack of clarity for bidders at the outset of the sales process in relation to the duration of the sales process;

(b) a lack of incentive for bidders to expend resources; and

(c) putting the CMA in an 'untenable position' of making predictions about the likely timing and trajectory of an unprecedented crisis, which could not reasonably be done.

13.95 We note that third parties' views on the appropriate timescales to complete a divestiture (the details of this third party evidence are provided in paragraph 11 of Appendix K), did not take into account the effects of COVID-19 as they were provided prior to this. With this in mind, we note the following views, in particular on ensuring that the duration of the Initial Divestiture Period had regard to the preservation of the Footasylum business:

(a) [✂] told us that six months seemed a 'sensible' timescale for requiring JD Sports to complete a sale, although it considered that there were arguments for a shorter period (eg three months) given the potential for damage to Footasylum's competitive capability and the CMA's ability to grant an extension of any Initial Divestiture Period if necessary; and

(b) [✂] told us that it was not in a position to provide a view on the exact timescale within which JD Sports should complete a sale of Footasylum, but that the CMA's standard six-month period seemed reasonable. It told us that the CMA should seek to ensure that the Initial Divestiture Period had regard to ensuring that there would be no deterioration in the Footasylum business and that Footasylum continued to compete appropriately.

- *Our assessment of the timescales to complete a divestiture*

13.96 In considering the appropriate Initial Divestiture Period, our guidance on remedies states that we 'will seek to balance factors which favour a shorter duration, such as minimising asset risk and giving rapid effect to the remedy,

with factors that favour a longer duration, such as canvassing a sufficient selection of potential suitable purchasers and facilitating adequate due diligence'. Our guidance on remedies also states that the Initial Divestiture Period will normally not exceed six months.[707]

13.97 As noted above, we have recognised the considerable uncertainty about the extent and duration of the impact of COVID-19. As such, we have given careful consideration to the asset risks and purchaser risks described in paragraph 13.96.

13.98 In circumstances such as these, where a general lack of appetite for mergers and acquisitions could have an adverse impact on the availability of a suitable purchaser for the Footasylum business, we consider that an Initial Divestiture Period longer than our normal six-month period would be reasonable and appropriate, provided that the asset risks are acceptable.

13.99 In this case, we consider at this stage that an Initial Divestiture Period of [✂] from the date of any final undertakings or order would be appropriate and that we will keep this under review if evidence emerges that JD Sports would not be able to sell Footasylum to a suitable purchaser within this timescale as a result of COVID-19. In this regard, we note that the CMA has discretionary powers to grant extensions to the Initial Divestiture Period where this is necessary to achieve an effective divestiture.

13.100 As mentioned, the CMA will keep under review the need for any extensions to the Initial Divestiture Period and will continue to engage with the Parties and the Monitoring Trustee on this matter. In considering whether to grant an extension, among the factors the CMA will take into account are the requirements of potential purchasers, including whether potential purchasers have indicated that they would require a longer period to assess the acquisition or to undertake adequate due diligence.

13.101 The Act provides up to 12 weeks from the date of this report for the CMA to accept final undertakings or to make a final order. Together with the Initial Divestiture Period, this would provide JD Sports with up to [✂] to sell Footasylum. At this stage, we consider that this looks to be a reasonable timeframe for any full divesture in this case, taking into consideration the effects of COVID-19 at the time of publishing this final report, but we note that the remedy implementation process provides sufficient flexibility to extend the timetable if needed.

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[707] CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 5.41.

13.102 We note the Parties' submission that the commencement of the Initial Divestiture Period should be conditional on the stabilisation of both the retail sector and financial markets. The Parties had suggested a number of measures by which this might be measured [✂].

13.103 In response to the Parties' suggestion above, we consider that the longer Initial Divestiture Period we have determined, combined with the CMA's ability to extend this period if necessary, provides sufficient flexibility to observe and adapt to any future developments affecting the successful conclusion of an effective divestiture. This includes the requirement of potential purchasers to consider the transaction and undertake adequate due diligence, for example the need for Footasylum's stores to reopen and the availability of Footasylum's latest in-store trading results, and in the context of the timing of the stabilisation of the retail sector and the financial markets. In relation to the Parties' suggestion that Footasylum should have a recent and 'meaningful' continuous store trading history record of at least [✂], we note that the CMA will take this into account when considering the need for any extension to the Initial Divestiture Period.

13.104 We consider that stabilisation of the retail sector or the financial markets is likely to take place over a period of time rather than be a single event. Therefore we do not consider it appropriate for us to define at the outset what may constitute a suitable stabilisation of the retail sector or the financial markets. We note the possibility that a suitable purchaser may emerge before the Parties' proposed definitions of stabilisation of the retail sector and financial markets would have been met. We therefore consider it more appropriate to provide flexibility by way of further extensions to the Initial Divestiture Period than to define at the outset tests or thresholds to measure a stabilisation of the retail sector and financial markets. Such tests or thresholds could do no more than mark a moment in time which may or may not materially affect JD Sports' actual ability to sell the Footasylum business or the possibility of a suitable purchaser emerging. In this regard, in light of the SLCs and resulting adverse effects we found, we consider that we should aim for completion of the divestiture in as timely a manner as possible in the relevant circumstances applicable at the time.

13.105 We note the Parties' submission that a purchaser willing to acquire Footasylum while the effects of the COVID-19 pandemic are ongoing and which acquired Footasylum at a 'very low price' would not be properly incentivised to reinstate effective competition (see paragraph 13.93). We consider that our assessment of each potential purchaser on a case-by-case basis and against our normal purchaser suitability criteria, which include a purchaser's commitment to the relevant markets and capability to run the Footasylum business as an effective competitor, would provide a sufficient

safeguard to ensure that a sale to an unsuitable purchaser (regardless of the eventual purchase price) is not approved.

13.106 We consider that the longer Initial Divestiture Period we have allowed should be balanced against the additional asset risk that may arise, and this is considered further when we turn to whether there is a need for measures to preserve the divestiture package during the divestiture process (see paragraph 13.115 onward).

13.107 To ensure that our remedy provides the necessary flexibility to enable an effective divestiture process in the current climate, the CMA will keep under review the need for any further flexibility both before any final undertakings or order and during the remedy implementation period.

13.108 We also consider that in order to monitor the timely implementation of our remedy, we would encourage JD Sports to undertake early market-testing with potential purchasers and based on these early discussions, engage with the CMA to develop a high-level timetable setting out the key steps and milestones for the divestiture process.

13.109 Finally, in the unlikely event that there may be no interested and suitable purchaser for Footasylum, even in circumstances where a Divestiture Trustee has been appointed,[708] the CMA has an ongoing responsibility for the monitoring and enforcement of any final undertakings or final order in respect of this remedy,[709] and it is open to the CMA to consider whether, by reason of a change in circumstances, the final undertakings or order are no longer appropriate and should be varied or released/terminated.

- *Conclusion on the timescales to complete a divestiture*

13.110 Based on the above, we conclude that the Initial Divestiture Period should be [✂] from the date of any final undertakings or final order. However, we will keep under review the need for extensions to the Initial Divestiture Period and will continue to engage with the Parties and the Monitoring Trustee on this matter. As mentioned in paragraph 13.108, JD Sports should engage with the CMA to develop a high-level timetable setting out the key steps and milestones for the divestiture process. Should it be necessary for the CMA to

[708] For example, in Somerfield/Morrison (2005), the Competition Commission (CC) found an SLC in 12 local markets, with divestiture of a store in each local market required to remedy the SLC. Somerfield was released from the final undertakings for one store on the basis of a change of circumstances; and Somerfield was released from the obligation to sell the final two stores on the basis that there was no likely purchaser, despite having made extensive marketing efforts to do so by the Divestiture Trustee.
[709] Section 92 of the Act.

grant an extension to the Initial Divestiture Period, the CMA will approve the relevant consequential amendments to any initial approved timetable.

13.111 In considering whether to grant an extension, one of the factors the CMA will consider will be the potential purchasers' requirement to have sufficient time in the circumstances to consider the transaction or to undertake adequate due diligence, for example the availability of Footasylum's [✂] in-store trading results as required.

13.112 The CMA will also seek to ensure that an extension does not pose an unacceptable asset risk (see paragraph 13.115 onward).

13.113 In line with the CMA's normal practice,[710] the details of the Initial Divestiture Period (and any extensions the CMA may grant to it during any divestiture process) will not be published on the CMA website.

13.114 The CMA will keep under review the need for any further flexibility to allow remedies to be reassessed in light of material changes of circumstances or other special reasons, and to extend the deadline, under sections 41(3) and 41A of the Act both before the acceptance of any final undertakings or the making of a final order and during the remedy implementation period.

- *Measures to preserve the divestiture package*

13.115 We consider the risks that the competitive capability of Footasylum would deteriorate before completion of divestiture, and whether the functions of the Monitoring Trustee should be expanded to oversee the divestiture process (eg to monitor JD Sports' progress against any approved timetable during the divestiture process) and to ensure that the Footasylum business to be divested is maintained and properly supported during the course of the process.[711]

  - *Views on the need for measures to preserve the divestiture package*

13.116 At their respective response hearings, the Parties told us that the risk of Footasylum's competitive capability eroding during the divestiture process was low:

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[710] The Initial Divestiture Period may be excised from the final report if it is considered that disclosure to third parties may undermine the divestiture process. Source: CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 5.40.
[711] Remedies Notice, paragraph 24(b).

(a) JD Sports told us that it did not consider there to be a risk of any deterioration in Footasylum's competitive capability during the divestiture process, given [✂]; and

(b) Footasylum told us that it did not consider there to be a risk of its competitive capability eroding during the divestiture process [✂].

13.117 In their subsequent response to the RWP, the Parties told us that both JD Sports and Footasylum were currently under 'extreme financial and commercial pressure given the COVID-19 pandemic', and that both Parties had closed all of their stores (as mandated by the UK government) with 'no trading' taking place in stores:

(a) the Parties told us that JD Sports' share price had fallen by over 60% since 31 January 2020 from over £8 to as low as around £3 and that JD Sports expected its in-store sales to be [✂] from 30 March 2020 and 'going forward for the foreseeable future'.[712] The Parties added that based on JD Sports' 'central forecast' for the current financial year, JD Sports' Group revenues [✂]. The Parties told us that this was based on JD Sports' 'central forecast' assumptions that [✂]; and

(b) the Parties told us that [✂].[713]

13.118 Specifically in relation to Footasylum, the Parties told us that [✂].

13.119 The Parties also told us in their response to the RWP that it was 'unclear at what speed normal trading' would return to the high street, since 'consumer discretionary spend ([✂])' might 'take years to recover' and sales that transferred to online might 'never return' in-store. The Parties also told us that it was unclear what impact COVID-19 might have on [✂].[714]

13.120 In relation to whether the scope of the Monitoring Trustee should be expanded during any divestiture process, prior to their response to the RWP, the Parties told us that this would not be necessary.[715,716] However, in their response to the RWP, the Parties told us that if the CMA was minded to commence the Initial Divestiture Period conditional upon the stabilisation of

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[712] For the week ending 28 March 2020 (compared to the equivalent week last year), JD Sports told us that its UK in-store sales were [✂] its UK online sales were [✂], resulting in a like-for-like [✂] in weekly sales of [✂].
[713] The Parties told us that Footasylum's EBITDA in the month of December 2019 [✂].
[714] We considered the Parties' submissions on the changes to the competitive environment as a result of COVID-19 (for example: that consumer discretionary spend may take years to recover; or that in-store sales that transferred to online may never return; or [✂]), as part of our competitive assessment, set out in chapters 8 and 9.
[715] JD Sports told us at its response hearing that there was no reason to expand the functions of the Monitoring Trustee to oversee the divestiture process given that [✂]. Source: JD Sports, Remedies Notice response (25 February 2020), paragraph 3(e).
[716] Footasylum [✂].

both the retail sector and financial markets, then they would consider the extension of the Monitoring Trustee's mandate in these circumstances to be appropriate. The Parties' noted that the risks which the CMA's interim measures normally sought to address were 'significantly reduced' given that both Parties' stores were closed and would remain closed for the 'foreseeable future'.

13.121 There was a broad consensus from third parties on the importance of actively preserving the Footasylum business during any divestiture process, given: the impact of any uncertainty arising from a prolonged divestiture process ([✂]); the importance of maintaining 'consumer goodwill' and 'top of mind' awareness with consumers in this market, which required 'active management and significant expenditure' ([✂]); or the risk of departures of Footasylum staff in 'key positions' who understood the market ([✂]). [✂] told us that an independent trustee should be put in place to oversee and ensure that the divestiture process runs smoothly. The detailed views of third parties on the potential asset risks during any divestiture process are provided in paragraph 12 of Appendix K.

- *Our assessment of the need for measures to preserve the divestiture package*

13.122 We currently have in place interim measures, which have remained in force since the CMA's phase 1 investigation. The CMA imposed interim measures on 17 May 2019 for the purpose of preserving each of the Parties' businesses as a potential divestiture package by maintaining their respective independent competitive capabilities and preventing any further integration between the Parties. A Monitoring Trustee was appointed at the start of the CMA's phase 2 investigation to monitor the Parties' compliance with these interim measures, including ensuring that there was no deterioration of the Footasylum business.[717]

13.123 At the time of writing, JD Sports, Footasylum and Pentland have each taken actions to respond to, and mitigate the impact of, the effects of COVID-19 on their respective businesses as far as possible. Where these have required the CMA's prior approval under our interim measures, these have been granted, subject to the appropriate safeguards being put in place. In particular, in relation to Footasylum (and immediately prior to the UK government's

[717] Our interim measures comprised an Initial Enforcement Order, which came into force on 17 May 2019, during the CMA's phase 1 investigation, which was subsequently replaced by an Interim Order (which came into force on 26 November 2019) during the phase 2 investigation.

requirement on 23 March 2020 for all retail stores selling non-essential goods to close for an initial period of three weeks), [✂].[718] [✂].

13.124 We consider that the relevant provisions of our Interim Order cover the concerns cited by a number of third parties, including the obligation on the Parties to maintain the viability and competitive capability of the Footasylum business, and to incentivise key staff to remain within the business.[719]

13.125 We therefore consider that the relevant provisions of the Interim Order should be carried over into any final undertakings or order under a divestiture remedy and should remain in force for the duration of the divestiture process until completion. We will also amend some of these obligations (where appropriate) to focus primarily on the independent operation and preservation of the divestiture package (ie the Footasylum business) rather than the preservation of the JD Sports or Pentland businesses. We also consider that the existing Monitoring Trustee's appointment should continue (see also paragraph 13.127 on the potential expansion of the Monitoring Trustee's role during the divestiture process).

13.126 In the context of preserving the Footasylum business for the duration of any divestiture process and in the wider context of the uncertainties arising from COVID-19 and its impact on Footasylum, we recognise the need to take an informed approach to interpreting the Parties' obligation to maintain the viability and competitive capability of the Footasylum business, and in turn, to our assessment of asset risk. This does not mean that Footasylum should be shielded from the effects of COVID-19 on the Footasylum business (even if this were possible), but rather that Footasylum's business would be preserved to the extent appropriate and possible in the circumstances applicable at the time. For example, at the time of writing, following the UK government's requirements relating to physical store openings and social distancing, all non-essential retailers' physical stores have been closed, including the Parties' stores. At the same time, and for the purpose of preserving its business as a potential divestiture package, Footasylum was required under our interim measures to [✂]. We will continue to interpret the Parties' obligations under any equivalent measures during the divestiture process in light of the relevant circumstances and developments applicable at the time.[720] This could mean, for example, that the CMA may consider whether it

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[718] [✂].
[719] Interim Order, paragraphs 5(b) and 5(k).
[720] We also refer to our recently published guidance on merger assessments during the COVID-19 pandemic, which notes that derogations 'can be, and have been, granted rapidly where merging parties demonstrate that such steps are necessary to ensure the viability of their businesses, and appropriate safeguards are put in place to protect the CMA's ability to take appropriate action to protect UK consumers as part of the merger review

is necessary for there to be certain store closures by Footasylum where there is evidence they are not financially viable.

13.127 We also considered the scope of the Monitoring Trustee's role. We consider that any failure by the Parties to comply with their divestiture obligations under any final undertakings or order could have a significantly negative impact on the timely completion of any divestiture remedy within the Initial Divestiture Period (subject to any extensions granted by the CMA). Depending on the nature of any such non-compliance, this could also have a bearing on what (if any) CMA intervention might be required. Bearing in mind the current circumstances, we therefore consider that an important procedural safeguard is to expand the Monitoring Trustee's role to monitor the Parties' compliance with their broader obligations under any final undertakings or order, and not only the Parties' compliance with those provisions carried over from the Interim Order, which focus primarily on the maintenance and preservation of the Footasylum business.

13.128 As part of this expanded role, we would expect the Monitoring Trustee to:

(a) monitor JD Sports' progress in relation to the divestiture process against any approved timetable;

(b) report to the CMA on any developments that may have a material impact on JD Sports' ability to meet any milestones in its approved timetable;

(c) make recommendations to the CMA (if necessary) in order to ensure an efficient divestiture process (and its timely completion); and

(d) undertake any further investigation (as required) by the CMA in relation to the Parties' compliance with any final undertakings or order, as well as in relation to any extension to the Initial Divestiture Period (if necessary) (as mentioned in paragraph 13.111).

13.129 This expansion of the Monitoring Trustee's role would be in line with our general practice and with our published guidance on remedies. We would require the adjustment of the Monitoring Trustee's mandate to reflect these new functions.

13.130 Finally, we considered whether there was a need to appoint an independent interim manager with executive powers to manage the Footasylum business during the divestiture process (a Hold Separate Manager). On the basis of our

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process' (Source: CMA, Merger Assessments during the Coronavirus (COVID-19) pandemic). While this guidance applies in the context of interim measures during merger investigations, this can also apply in the context of measures preserving the divestiture package during any remedy implementation process.

current understanding that the existing Footasylum management team will remain in place during any divestiture process (subject to any changes made with the CMA's prior approval), we consider that it would not be necessary at this stage to appoint a Hold Separate Manager. However, we consider that this should be revisited if the current circumstances were to change materially.

- *Conclusion on the need for measures to preserve the divestiture package*

13.131 Based on the above, we conclude that the Parties' current obligations under our existing interim measures, as set out in the Interim Order, should be carried over into any final undertakings or order and remain in place until completion of the full divestiture remedy. We will continue to interpret the Parties' obligations under such measures within the context of the relevant circumstances and developments applicable at the time.

13.132 We also consider that the Monitoring Trustee's appointment should continue in order to monitor the Parties' compliance with these measures. The Monitoring Trustee's obligations (where appropriate) should be amended to focus primarily on the independent operation and preservation of the divestiture package (ie the Footasylum business) rather than the preservation of the JD Sports or Pentland businesses.

13.133 We also conclude that the scope of the Monitoring Trustee's engagement should be expanded to monitor the Parties' compliance with their broader obligations under any final undertakings or order in relation to a divestiture remedy and to ensure an efficient divestiture process.

13.134 We do not propose to appoint a Hold Separate Manager at this stage. However, this would be revisited if Footasylum's current circumstances were materially to change, eg if there were a risk that the existing Footasylum management team would not remain in place during any divestiture process (see also paragraph 13.130).

- *Appointment of a Divestiture Trustee*

13.135 We considered whether there is a need for the appointment of a Divestiture Trustee, either from the outset of the divestiture process or, more conventionally, should the CMA have concerns that JD Sports will not achieve an effective disposal within the Initial Divestiture Period. If appointed, a

Divestiture Trustee would normally be tasked with completing the divestiture to a potential purchaser approved by the CMA and at no minimum price.[721]

- *Views on the appointment of a Divestiture Trustee*

13.136 At its response hearing, JD Sports told us that it considered the appointment of a Divestiture Trustee as a 'back-stop' (ie the CMA's 'conventional approach') rather than at the outset, to be 'entirely reasonable'. It added that Footasylum remained 'intact' with a Monitoring Trustee in place and that there was no reason to go for an 'exceptional approach' in this case. It also told us that given JD Sports' expertise in running a divestiture process, it was unclear what a Divestiture Trustee could add.

13.137 One third party ([✂]) told us that it did not consider it necessary to appoint a Divestiture Trustee given that it considered that JD Sports would be incentivised to sell Footasylum quickly and move on to focus on its own business. Another third party ([✂]) told us that it did not consider that there was a need for a Divestiture Trustee to be appointed at the outset of any divestiture process. The details of these views are set out in paragraph 13 of Appendix K.

13.138 One third party ([✂]) told us that a Divestiture Trustee should be appointed at the outset and set out two main reasons: *(a)* to prevent JD Sports from 'subverting' the divestiture process; and *(b)* to ensure that Footasylum procured 'contractual assurances' from Nike and adidas in relation to supply of their 'must-have' branded products. The details of [✂] submission on each of these two reasons are provided in paragraphs 14 to 17 of Appendix K.

- *Our assessment of the need to appoint a Divestiture Trustee*

13.139 In paragraph 13.82(c), we conclude that the risk that a suitable purchaser is not available was not material, provided that: *(a)* Footasylum's ability to compete effectively in both the relevant markets is preserved, and the asset risk was appropriately mitigated during any divestiture process; and *(b)* JD Sports is given an appropriate timescale to complete the divestiture (ie the Initial Divestiture Period). As such, we do not consider it necessary to appoint a Divestiture Trustee at the outset to ensure a timely completion of the divestiture process.

13.140 In relation to the risk that JD Sports would only put forward potential purchasers which would not adequately meet our purchaser suitability criteria,

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[721] CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 5.43.

we consider that our purchaser approval process would mitigate the risk of an unsuitable purchaser acquiring Footasylum.

13.141 However, there remains a risk that the CMA may not approve any of the potential purchasers shortlisted by JD Sports during a divestiture process if no purchaser meets the CMA's purchaser suitability criteria. If this happened, it could have significant implications for the timely completion of this remedy. This would also be the case were JD Sports to fail to engage constructively with the divestiture process.

13.142 We consider that the possibility of CMA intervention by way of an appointment of a Divestiture Trustee, who would be mandated to complete a sale of Footasylum at no minimum price, would provide a sufficient incentive to JD Sports to engage constructively with the divestiture process and to ensure that the CMA's purchaser suitability criteria are considered when shortlisting potential purchasers for the CMA's approval.

13.143 We therefore consider that we should reserve our rights to appoint a Divestiture Trustee if JD Sports fails to, or is unlikely to, complete the divestiture within the Initial Divestiture Period (or as otherwise extended by the CMA), or if there is evidence that JD Sports is failing to engage constructively with the process.

13.144 Finally, in relation to whether a Divestiture Trustee should be appointed at the outset to ensure Footasylum obtains 'contractual assurances' from the key suppliers, we asked the key suppliers if they would be prepared to provide assurances (contractual or otherwise) to a prospective purchaser regarding the continuation of Footasylum's access to their branded products:[722]

(a) [✂] told us that it was 'not inclined' to provide assurances on the future relationship as it also did not provide such assurances to other retailers; and

(b) [✂] told us that it could not (at this stage) provide any assurances (contractual or otherwise) to a prospective purchaser and added that '[✂]' was always subject to its 'terms and conditions together with its segmentation criteria and distribution policy'.

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[722] We note that [✂] submitted that the 'divestiture trustee should also seek to guarantee that, post-divestment, Footasylum will have adequate access to the appropriate volume and range of 'must-have' Nike and adidas products. Given the significance of these 'must-have' products for competition, the divestiture trustee should seek to ensure that, as part of the divestiture process, Footasylum procures contractual assurances from Nike and adidas that the two brands will supply it with the appropriate volume and range of 'must-have' products in the long term'.

13.145 The details of their respective submissions are provided in paragraph 18 of Appendix K.

13.146 As mentioned in paragraph 13.74, we consider that a purchaser who meets our purchaser suitability criteria would also likely meet the requirements of the key suppliers such that under the ownership of a suitable purchaser, Footasylum would be able to continue having access to the key suppliers' branded products, without the need for assurances (contractual or otherwise) from the key suppliers. We also note the views of the key suppliers in paragraph 13.144 and that the CMA does not have the vires to make an order on a third party to enter into a contractual arrangements with Footasylum and/or JD Sports to continue to supply their branded products. Therefore, we consider that it would neither be necessary nor feasible to direct Footasylum to secure such assurances or to require JD Sports to negotiate such assurances on Footasylum's behalf with the key suppliers.

- *Conclusion on the need to appoint a Divestiture Trustee*

13.147 Based on the above, we currently do not see a need to require a Divestiture Trustee to be appointed the outset of the divestiture process. However, in order to ensure a timely completion of this remedy, we note that the CMA has a discretionary power to appoint a Divestiture Trustee later in the process and that the CMA may exercise its power to appoint a Divestiture Trustee as it deems appropriate. This may be for example where:

(a) JD Sports fails to complete the divestiture process within the Initial Divestiture Period (or as otherwise extended by the CMA); and/or

(b) the CMA reasonably believes that there is a risk that the divestiture process would be delayed or fail to complete within the Initial Divestiture Period (or as otherwise extended with the CMA's prior approval); and/or

(c) JD Sports is not engaging constructively with the divestiture process, eg if it does not comply with its obligations under any final undertakings or order.

13.148 We also conclude that, in line with the CMA's normal practice,[723] if appointed, a Divestiture Trustee should be tasked with completing the divestiture of Footasylum to a potential purchaser approved by the CMA and at no minimum price.

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[723] CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 5.43.

Conclusion on the effectiveness of a divestiture remedy

13.149 We conclude that a full divestiture remedy would address our competition concerns at source and thereby prevent any SLC and consequently any resulting adverse effects we identified. We found that a full divestiture of Footasylum would be effective in addressing our SLCs in apparel and footwear, either in combination or each individually. It therefore represents a comprehensive solution to every aspect of the SLCs we found.

13.150 We would expect a full divestiture remedy designed according to our specifications detailed above, to re-establish JD Sports and Footasylum as two independent competitors in the relevant markets and thereby enable competition which would have existed between the Parties in the absence of the Merger, to take place. Therefore, we would expect this remedy once implemented to have an immediate and comprehensive effect in addressing the SLCs and resulting adverse effects.

13.151 In relation to the practicality of implementing a full divestiture remedy, we consider that we are able to specify clearly the scope of the divestiture package (in particular given the limited integration of the Parties to date). In this regard, we also expect a full divestiture remedy to involve little risk of omitting any key assets that may be necessary to ensure Footasylum's standalone viability and competitive capability and therefore ensure Footasylum's ongoing ability to be an effective national competitive constraint in the relevant markets.

13.152 We also considered the practical issues relating to the potential composition, purchaser and asset risks normally associated with a divestiture remedy. We also considered the potential impact of COVID-19 on these practical issues (to the extent possible) given there remains considerable uncertainty about the extent and duration of its impact.

13.153 We acknowledge that COVID-19 is having a significant impact on all retailers and on the economy, and we have already seen negative effects of the UK government's requirement for the closure of non-essential stores and social distancing on Footasylum's business as well as on other UK retailers. We recognise there may also be a negative impact on M&A activity. However, it is difficult at this stage to predict all of the effects of COVID-19 or the period over which they will occur and how this might affect the divestiture process.

13.154 Given this uncertainty, we have built into the design of our final remedy, flexibility to ensure that our remedy can be responsive to any further relevant developments in relation to COVID-19.

13.155 Our chosen remedy has sufficient flexibility to respond to the risks brought about by COVID-19 without undermining the effectiveness of our remedy, for example:

(a) JD Sports will be provided with an Initial Divestiture Period of [✂] from the date of any final undertakings or final order, which is longer than our normal six-month period;

(b) our process will allow for further extensions to this period if necessary, for example, to accommodate potential purchasers' requirements to undertake adequate due diligence, to ensure that a suitable purchaser is found; and

(c) we will continue to take an informed and evidence-based approach to interpreting the Parties' obligation to preserve the viability and competitive capability of the Footasylum business until completion of the divestiture remedy, and take into account the relevant market conditions and other circumstances applicable at the time (including any ongoing restrictions preventing the reopening of Footasylum's stores and/or staff from returning to work).

13.156 The CMA will also keep under review the need for any further flexibility in relation to other areas of our remedies process, as enabled by section 41(3) of the Act (ie that the remedy must be consistent with the decisions in the final report unless there has been a material change of circumstances since the preparation of the report or the CMA has a special reason for acting differently).

13.157 We conclude that the design of a full divestiture remedy as we have specified in paragraphs 13.29 to 13.148, sufficiently addresses the potential composition, purchaser and asset risks associated with a divestiture remedy, and ensures that this remedy is sufficiently flexible to be responsive to any relevant developments and ongoing uncertainties resulting from COVID-19 during the remedy implementation and divestiture process.

13.158 We set out above our conclusions on the criteria for a suitable purchaser and the procedural safeguards which should be put in place to ensure an effective divestiture process. Notwithstanding the current uncertainty, we considered the likelihood of achieving a successful divestiture. We did not consider the risk of not finding a suitable purchaser to be material, provided that: *(a)* Footasylum's ability to compete effectively in the relevant markets is preserved, and the asset risk is appropriately mitigated during any divestiture process; and *(b)* JD Sports is given an appropriate timescale to complete the divestiture. We consider that our divestiture process as we have specified

above will enable JD Sports to find a suitable purchaser while managing the relevant purchaser and asset risks arising from a longer divestiture process.

13.159 Therefore we conclude that this remedy would be capable of effective implementation and require minimal ongoing monitoring after its full implementation. Throughout the remedies process we will continue to take into account any further relevant developments, including in particular those arising as a result of COVID-19. We will also continue to take an informed approach to preserving the Footasylum business, our interpretation of the Parties' obligation to maintain the viability and competitive capability of the Footasylum business, and our assessment of asset risk. We conclude that the remedy implementation process, as specified above, is sufficiently flexible to enable the CMA to respond to any relevant developments and uncertainties arising from COVID-19.

13.160 In relation to the risk profile of a full divestiture remedy, given that a full divestiture of Footasylum would address the SLCs and resulting adverse effects at source, we conclude that there is a high degree of certainty that this remedy would achieve its intended effect. We therefore consider that the risks in terms of the effectiveness of a full divestiture remedy are low.

13.161 In summary, we conclude that a full divestiture of Footasylum to a suitable purchaser would be effective in addressing each SLC we have found.

Conclusion on effective remedies

13.162 We concluded that a full divestiture of Footasylum represents the only effective remedy to the SLCs and resulting adverse effects we found.

Relevant customer benefits

13.163 When deciding on remedies, we may have regard to the effects of remedial action on any relevant customer benefits (RCBs). In this section, we consider whether there are any RCBs (within the meaning of the Act) that should be taken into account in our remedy assessment.

13.164 An effective remedy to our SLCs, such as in this case a full divestiture of Footasylum, might be considered disproportionate if it prevents customers from securing substantial benefits arising from the Merger, where these benefits outweigh the SLCs and any resulting adverse effects. Insofar as

these benefits constitute RCBs for the purposes of the Act,[724] the statutory framework allows us to take them into account[725] when we decide whether any remedy is appropriate.

13.165 RCBs that will be foregone due to the implementation of a particular remedy may be considered as costs of that remedy. The CMA may modify a remedy to ensure retention of an RCB or it may change its remedy selection. For instance, it may decide to implement an alternative effective remedy, or it may decide that no remedy is appropriate.[726]

13.166 We set out the legal framework that we will apply, as set out in the Act, to determine whether the benefits claimed by the Parties can be considered as constituting RCBs.

Legal framework for assessing RCBs

13.167 The burden of proof of whether RCBs arise from a merger is on the merging parties. Our guidance on remedies states that the merging parties 'will be expected to provide convincing evidence regarding the nature and scale of RCBs that they claim to result from the merger and to demonstrate that these fall within the Act's definition of such benefits'.[727]

13.168 The Act defines RCBs as a benefit to relevant customers in the form of lower prices, higher quality, or greater choice of goods or services in any market in the UK, or greater innovation in relation to those goods or services.[728] For these purposes, relevant customers are direct and indirect customers (including future customers) of the merging parties at any point in the chain of production and distribution – they are not limited to final customers.[729]

13.169 In addition, in the case of completed mergers, to be properly considered as an RCB under the statutory definition, the CMA must believe that:[730]

(a) the benefit has accrued as a result of the creation of the relevant merger situation concerned or may be expected to accrue within a reasonable period as a result of the creation of that situation; and

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[724] Section 30 of the Act.
[725] Section 35(5) of the Act.
[726] CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 3.16.
[727] CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 3.20.
[728] Section 30(1) of the Act.
[729] Section 30(4) of the Act. See also CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 3.18.
[730] Section 30(2) of the Act.

(b) the benefit was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.

13.170 When assessing the merging parties' evidence on the claimed benefits, the CMA must therefore ask itself whether each claimed benefit has or may be expected to accrue as a result of the merger (*(a)* above), and, whether that benefit was, or is, unlikely to accrue without the merger or a similar lessening of competition (*(b)* above). With regard to the latter, in practice the CMA will consider whether the merging parties' evidence is sufficient to demonstrate that the claimed benefit could not be achieved by plausible less anti-competitive alternatives to the merger.[731]

13.171 In previous cases where RCBs have been accepted, the type of evidence presented to the CMA included implementation plans which have been found more persuasive where detailed and advanced. The merging parties' incentives to implement and pass on the benefits post-merger, which are themselves affected by the extent to which post-merger competition has been reduced by the SLC, will also be relevant to the likelihood of RCBs being realised in practice.

Parties' and third parties' views on RCBs

13.172 JD Sports told us that a full divestiture remedy would deprive customers of the benefits that would arise from the Merger, which included, in its view, the following RCBs:[732]

(a) *RCB 1:* preserving and enhancing Footasylum's differentiated brand mix, product ranges and retail positioning, for the longer term benefit of the consumer experience (using JD Sports' brand relationships to enable Footasylum to access new brands, in addition to the continued development of own-label brands and Bedroom brands ensuring that it remained relevant to its fashion-inspired customers);

(b) *RCB 2:* stabilising Footasylum's financial position and ensuring the continued employment of its staff and supplier base;

(c) *RCB 3:* maintaining the footwear product range available in Footasylum stores (in particular desirable limited allocation lines), under the umbrella of JD Sports as a global strategic partner to Nike and adidas, relative to absent the Merger;

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[731] CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 3.24.
[732] JD Sports, Remedies Notice response (25 February 2020), paragraph 5.

(d) *RCB 4:* investment in the 'existing distinctive Footasylum labels' and the development of new own-label brands. JD Sports told us that with JD Sports' international reach, it expected to be able to offer Footasylum brands in a number of its stores outside the UK, which offered return on investment to develop these brands further within the UK. JD Sports also told us that it expected to be able to invest further in the identification and development of Bedroom or niche apparel brands, and, had a 'much larger UK store network and international operation' to roll out these brands more widely once they had 'achieved more general interest'; and

(e) *RCB 5:* improvements to the efficiency of Footasylum's operations by putting to work JD Sports' 'best of breed' back office, technology, logistics and infrastructure platform.

13.173 The further views of JD Sports on each of its claimed RCBs are provided below when we consider each in turn.

13.174 Footasylum told us [✂].

13.175 At its response hearing, in response to whether the five claimed RCBs could only come through JD Sports' ownership of Footasylum, or whether they could be achieved if Footasylum came under different ownership, JD Sports told us that 'some' of those benefits could be achieved if Footasylum came under different ownership, [✂].

13.176 In their response to the RWP, the Parties did not make a further submission on RCBs other than noting that a number of third parties had 'also highlighted the benefits arising from the Merger' in responding to the Provisional Findings.

13.177 [✂] told us that they could not identify any RCBs arising from the Merger:

(a) [✂] told us that it did not see any consumer benefits arising from the Merger and that the Merger would instead lead to higher prices and 'customer detriment'. In particular, it told us that Footasylum [✂] and did not need JD Sports to continue to do so; and

(b) [✂] told us that the Merger would result in reduced consumer choice, eg in terms of retailer offerings and retail experiences, and that it could not identify any customer benefits arising from the Merger. It added that while a larger business could benefit from lower buy-in prices from suppliers, given JD Sports' current size in the UK market, it did not consider in this case that its ownership of Footasylum would give it better buy-in prices from suppliers.

13.178 [✂] told us that it believed that there were 'natural synergies and efficiencies in servicing Footasylum' as part of JD Sports. It added that based on [✂], its experience was that JD Sports had 'always maintained or improved the standard of quality, range and service to the benefit of the consumer'. Another third party ([✂]) told us that it could not comment on whether there would be any relevant customer benefits arising from the Merger.

Our assessment of RCBs

13.179 We consider each of these claimed RCBs in turn below. We note that the Parties' claimed RCBs [✂].

RCB claim 1: preserving and enhancing Footasylum's differentiated brand mix, product ranges and retail positioning

13.180 In relation to the preservation and enhancement of Footasylum's brand mix, product ranges and retail positioning, JD Sports told us at its response hearing [✂].

13.181 We consider that the preservation and enhancement of Footasylum's brand mix will be timely and likely to occur [✂]. We also note that there may be an increase in the quality and range of products available at JD Sports, which consumers would previously not have had access to unless they shopped at Footasylum. However, we consider that JD Sports' ability to increase the quality and range of its products available at its stores is not dependent on its ownership of Footasylum or unique to this Merger. In any case, even if this RCB claim were to be accepted, it would be limited in scope because it is only of potential benefit to customers of JD Sports that would not also shop at Footasylum, which our survey results indicated would be a low proportion.[733]

13.182 The Parties have not provided evidence of why the preservation or enhancement of Footasylum's differentiated brand mix, product ranges and retail positioning could only be achieved under JD Sports' ownership, other than JD Sports' own views that it had developed the relevant 'expertise'. We have also not seen any evidence on why such benefits could not be achieved by Footasylum either on its own or under the ownership of another retailer:

(a) as stated in our conclusion on the counterfactual in chapter 5, we consider that Footasylum's financial position would have stabilised absent

[733] For example, we found that a sizeable proportion of JD Sports' in-store footwear customers would divert to Footasylum, and online Footasylum was a close substitute to JD Sports (after Nike). In apparel, JD Sports' in-store customers stated Footasylum as their next best alternative, and online customers put Footasylum second (after Nike). See chapters 8 and 9 for more details.

the Merger, and therefore, we consider that Footasylum would also have been able to continue enhancing its brand mix and product range – we also consider that absent the Merger, the rivalry between the Parties could also be a possible driver for the ongoing enhancement of Footasylum's brand mix, product ranges and retail positioning ([✂]); and

(b) in relation to whether such benefits could arise if Footasylum came under different ownership, we found no evidence to indicate that such expertise would be unique to JD Sports and that no other retailer would have developed the same, or similar, level of expertise. It is also unclear how the launch of Footasylum's own-branded products outside the UK would constitute a benefit in any market in the UK.

13.183 On this basis, we conclude that any potential benefit under RCB claim 1 does not qualify as an RCB for the purposes of the Act, as we do not believe that the claimed benefit is unlikely to accrue without the Merger or a similar lessening of competition.

RCB claim 2: stabilising Footasylum's financial position and continued employment of its staff and supplier base

13.184 At its response hearing, JD Sports told us [✂].

13.185 We consider that it would be likely that Footasylum's financial position would be stabilised as part of the wider JD Sports Group ([✂]). However, it is unclear how or why the stabilisation of Footasylum's financial position would lower prices or increase quality to consumers ([✂]).

13.186 We also do not consider that this benefit is Merger-specific:

(a) in our counterfactual assessment (chapter 5), we concluded that Footasylum would have stabilised its financial position absent the Merger; and

(b) we have seen no evidence to suggest that only JD Sports could have stabilised Footasylum's financial position, and why this could not also be achieved if Footasylum had come under different ownership.

13.187 On this basis, we conclude that any potential benefit under RCB claim 2 does not qualify as an RCB for the purposes of the Act, as we do not believe that the claimed benefit is unlikely to accrue without the Merger or a similar lessening of competition.

RCB claim 3: maintaining Footasylum's footwear product range (particularly 'top tier' limited allocation lines) from key suppliers

13.188 JD Sports told us at its response hearing that it [✂] could help maintain Footasylum's footwear product range from the key suppliers. [✂].

13.189 We consider that it will be timely and likely that JD Sports' claimed investments to refurbish Footasylum's stores would ensure that the stores met the 'retail quality standards required of the brands' to aid with retaining supply of products from the key suppliers.

13.190 However, [✂], in terms of allocation of the key suppliers' branded products, we considered, on the basis of the evidence available, that in the counterfactual:

(a) suppliers were unlikely to terminate the supply of their products to Footasylum (eg [✂] were not concerned about Footasylum's financial position); and

(b) Footasylum would not require any intervention to ensure the continuation of supply.

13.191 Therefore, we did not consider this claim to be Merger-specific. We conclude that any potential benefit under RCB claim 3 does not qualify as an RCB for the purposes of the Act, as we do not believe that the claimed benefit is unlikely to accrue without the Merger or a similar lessening of competition.

RCB claim 4: investment and development of Footasylum's own-label brands

13.192 At its response hearing, JD Sports told us [✂].

13.193 We consider that it will be timely and likely that proposed investment and development of Footasylum's own-brands will occur ([✂]).

13.194 In relation to the growth in Footasylum's wholesale business, it could occur absent the Merger through agreement with international distributors. Further, JD Sports could acquire products from Footasylum's own-brands through wholesale agreement with Footasylum ([✂]).

13.195 The Parties have not provided any evidence on why this was a Merger-specific RCB. We would expect that any owner of the Footasylum business would likely invest in its development and therefore, we consider that this benefit could also have been achieved if Footasylum was under different ownership. We note that at its response hearing, [✂].

13.196 We therefore conclude that any potential benefit under RCB claim 4 does not qualify as an RCB for the purposes of the Act, as we do not believe that the claimed benefit is unlikely to accrue without the Merger or a similar lessening of competition.

RCB claim 5: improvements in Footasylum's back-office, technology, logistic and infrastructure operations

13.197 At its response hearing, JD Sports told us that it was 'always innovating', eg in terms of digital communications (both in-store and online), [✂].

13.198 We consider that the operational improvement in Footasylum such as collection points, customer service, stock management, and payment possibilities would be timely and likely as JD Sports have existing technological framework and services, which is relatively easily transferred across to Footasylum ([✂]).

13.199 However, we consider that these benefits are not Merger-specific as they can be achieved through other means and do not require the integration of Footasylum's business into JD Sports operations.

13.200 Further, while the fixed cost savings would be timely and likely, they would not benefit consumers given that they were not to be re-invested into Footasylum's customer proposition ([✂]).

13.201 We conclude that any potential benefit under RCB claim 5 does not qualify as an RCB for the purposes of the Act, as we do not believe that the claimed benefit will benefit customers in the form of lower prices, higher quality, or greater choice of goods or services in any market in the UK, or greater innovation in relation to those goods or services.

Conclusion on RCBs

13.202 We considered whether the benefits of the Merger identified by the Parties properly constitute RCBs for the purposes of the Act. On the basis of the analysis set out above, we concluded that there are no RCBs arising from the Merger.

Proportionality assessment

13.203 In this section, we set out our assessment of, and conclusions on, the proportionality of our proposed remedy, ie the full divestiture of Footasylum.

Proportionality assessment framework

13.204 In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, that it considers will be effective. If the CMA is choosing between two remedies which it considers will be equally effective, it will select the remedy that imposes the least cost or that is least restrictive. In addition, the CMA will seek to ensure that no remedy is more onerous than necessary or disproportionate in relation to the SLC and its adverse effects.[734]

13.205 To fulfil this, we first consider whether there are any relevant costs associated with each effective remedy option. When considering relevant costs, the CMA's considerations may include (but are not limited to):[735]

(a) distortions in market outcomes;

(b) compliance and monitoring costs incurred by the Parties, third parties, or the CMA; and

(c) the loss of any RCBs that may arise from the Merger which are foregone as a result of the remedy.

13.206 However, our guidance on remedies states that 'for completed mergers, the CMA will not normally take account of costs or losses that will be incurred by the merging parties as a result of a divestiture remedy', as it is for the merging parties 'to assess whether there is a risk that a completed merger would be subject to an SLC finding, and the CMA would expect this risk to be reflected in the agreed acquisition price'.[736]

13.207 Having identified the least costly effective remedy, we then consider whether the least costly remedy is more onerous than necessary or would be disproportionate to the SLCs and resulting adverse effects. In doing so, we are required to compare the level of harm which is likely to arise from the SLCs with the relevant costs of the proposed remedy.[737]

13.208 Our guidance on remedies states that in 'exceptional circumstances', even the least costly but effective remedy might be expected to incur costs that are disproportionate to the scale of the SLC and its adverse effects (eg if the costs incurred by the remedy on third parties are likely to be greater than the

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[734] CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 3.6.
[735] CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 3.10.
[736] CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 3.9.
[737] CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 3.6.

likely scale of adverse effects). If these 'exceptional circumstances' were to arise, the CMA may not pursue the remedy in question.[738]

Parties' and third parties' views on proportionality

13.209 In their response to the RWP, the Parties told us that requiring a divestiture of Footasylum would be disproportionate, 'particularly in the current unprecedented climate given the COVID-19 crisis' and that it would deprive customers of the benefits arising from the Merger. At its response hearing, JD Sports told us that there were not any relevant costs that the CMA should consider.[739]

13.210 [✂] told us that the only costs of a full divestiture remedy it could think of, related to JD Sports' 'professional service costs' to sell the Footasylum business, but that these costs might not necessarily be a relevant cost.

13.211 Other than those submissions we considered as part of our assessment of RCBs and the views of [✂] above, we received no other views from third parties on the costs of a full divestiture remedy.

Our assessment of proportionality

13.212 The appropriate remedy and whether it is effective and proportionate will be determined by having regard to the particular circumstances of the case. We have identified one effective remedy – the full divestiture remedy. For the reasons set out in this chapter, we consider that in this case, this remedy is the only one that would be effective in achieving the legitimate aim of comprehensively remedying our two SLCs (separately and in combination) and the resulting adverse effects.

13.213 We also consider that the full divestiture remedy is no more onerous than is required to achieve that aim, and there is not a choice of equally effective remedies.

13.214 We also considered whether a full divestiture remedy would produce effects that are disproportionate to the aim pursued. To help us address this question, we considered whether there were any RCBs that would be lost as a result of pursuing a full divestiture remedy, which we would treat as a cost of the remedy. Our conclusion from that assessment was that there would be no RCBs that would be lost as a result of a full divestiture of Footasylum.

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[738] CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 3.11.
[739] JD Sports noted that the costs of the divestiture process should be considered. In line with the CMA's guidance on remedies, such costs are not considered in our remedies assessment.

13.215 We considered whether there were any other costs of a full divestiture remedy we should take into account. Other than the costs to JD Sports of selling the Footasylum business, we have not seen evidence of any costs arising from a full divestiture remedy.

13.216 We note that JD Sports' decision to complete the Merger unconditional on any competition clearance was taken at its own risk, and therefore, in line with our guidance on remedies, we have not considered costs to JD Sports associated with implementing a full divestiture of Footasylum in our proportionality assessment. While we accept that we will be implementing this remedy in unusual circumstances as a result of COVID-19, there is flexibility within our remedy implementation process should exceptional costs arise, and we have safeguards in place through our purchaser approval process to mitigate the risk of a sale to an unsuitable purchaser. We therefore do not consider that the current circumstances provide us with a sufficiently compelling reason to depart from our normal approach, such that we should take into account the costs to JD Sports of implementing a divestiture remedy in our proportionality assessment. Further, we consider that our remedy implementation process will provide JD Sports with a fair opportunity to test the market to get the most competitive offers for the business, and there is flexibility within the divestiture process should there be any significant market failure causing exceptional costs or losses to arise.

13.217 Based on the above, we have not found any relevant costs to third parties arising as a result of the full divestiture remedy.

13.218 We found that the Merger removes a direct and significant constraint on each of the Parties in these markets, resulting in substantially less competition on PQRS and a weaker incentive to improve as much as they would otherwise. The resulting adverse effects of the SLCs we identified, include for example: less discounting; a reduced range; and/or not improving quality or service as much as would otherwise have been the case absent the Merger.

13.219 We conclude that the harm arising from the SLCs (including its cumulative effect over time) is likely to be significant and have a widespread impact on customers at a national level in the UK and would persist and be sustained under the Merger situation.

13.220 In relation to the 'relevant costs' of a structural remedy, we have found that no RCBs are to be taken into account in the assessment of the proportionality of a full divestiture of Footasylum. The full divestiture remedy would also not raise costs for third parties and, as such, full divestiture would not produce adverse effects that are disproportionate to the aim of comprehensively remedying the SLCs and resulting adverse effects.

13.221 As far as possible, we have sought to take into account the impact of COVID-19 in designing the remedy and, having done so, we consider that a full divestiture of Footasylum remains a proportionate solution in the current circumstances.

Conclusion on proportionality

13.222 Having identified a full divestiture of Footasylum as the only effective remedy available, we considered its proportionality to the SLCs and resulting adverse effects we found.

13.223 We have found that a full divestiture remedy is the only effective action to achieve the legitimate aim of comprehensively remedying the SLCs and resulting adverse effects. We consider that a full divestiture remedy is no more onerous than is required to achieve this legitimate aim and that, based on our views that the Merger is likely to lead to significant and sustained adverse effects and that there are no relevant costs which we should take into account, we concluded that a full divestiture remedy would not produce adverse effects which are disproportionate to the aim pursued.

13.224 We therefore concluded that the full divestiture remedy is proportionate to the SLCs and resulting adverse effects. This conclusion applies separately to the SLCs found in footwear and apparel, as well as to both SLCs when viewed as a whole.

Giving effect to the final remedy

13.225 Having decided on our remedy, we now consider how to give effect to this remedy decision. The CMA has the choice of giving effect to any final remedy decision either by accepting final undertakings pursuant to section 82 of the Act if the Parties wish to offer them, or by making a final order under section 84 of the Act. Either the final undertakings or the final order must be made within 12 weeks of publication of our final report (or extended once by up to six weeks under exceptional circumstances),[740] including the period for any formal public consultation on the draft undertakings or order as specified in schedule 10 of the Act.

13.226 In line with our guidance on remedies, once this remedy has been fully implemented in line with the conclusions set out in this chapter, we decided that JD Sports should be prohibited from subsequently acquiring the assets or

[740] Section 41A(2) of the Act – where the CMA considers there are special reasons for the extension.

shares of Footasylum or acquiring any material influence over them. Our guidance on remedies states that the CMA will normally limit this prohibition to a period of 10 years.[741] We find no compelling reason to depart from the guidance in this case by seeking a shorter or longer prohibition period.

13.227 We will take into account any further developments in relation to COVID-19 throughout our implementation of our preferred remedy.

Final decision on remedies

13.228 We concluded that a full divestiture of Footasylum would be an effective and proportionate remedy to address the SLCs and resulting adverse effects we found.

[741] CMA, Merger remedies guidelines, CMA87 (13 December 2018), paragraph 5.10.