

# Completed acquisition by JD Sports Fashion plc of Footasylum plc

Provisional report on the case remitted to the  
Competition and Markets Authority by the  
Competition Appeal Tribunal

3 September 2021

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## Glossary

# Summary

## Overview of our provisional findings

1. The Competition and Markets Authority (CMA) has provisionally found that the completed acquisition by JD Sports Fashion plc (JD Sports) of Footasylum plc (Footasylum) (together, the Parties) may be expected to result in a substantial lessening of competition (SLC) in the retail supply of sports-inspired casual footwear and apparel products sold both in stores and online.
2. We invite any interested parties to make representations to us on the findings in the provisional report by no later than **16 September 2021**. Parties should refer to the notice of provisional findings for details of how to do this.
3. Alongside these provisional findings, we have published a provisional decision on the remedy that would be effective and proportionate to address the SLC that we have provisionally found. We also invite interested parties to make representations on the provisional decision on remedies by **9 September 2021**.

## Background to the Remittal

4. On 6 May 2020, the CMA announced its decision that the completed acquisition by JD Sports of Footasylum (the 'Merger') has resulted or may be expected to result, in an SLC.
5. On 17 June 2020, JD Sports submitted a Notice of Application ('JD Sports' Application') to challenge certain of the CMA's findings in the Phase 2 report (the 'CMA's Phase 2 Final Report') to the Competition Appeal Tribunal ('the Tribunal').
6. On 13 November 2020, the Tribunal issued its judgment. The judgment dismissed JD Sports' Application regarding several aspects of the CMA's competitive assessment and found that there was no error of law in the CMA's overarching analytical approach. However, the Tribunal upheld the Application as regards the CMA's assessment of the possible effect of COVID-19 on Footasylum under the counterfactual, and on the impact of COVID-19 on the likely post-merger constraints from Nike's and adidas's own direct-to-consumer retail offer.
3. The Tribunal quashed the CMA's Phase 2 Final Report in so far as its conclusions were based on the CMA's assessment of the likely effects of the COVID-19 pandemic (i) on the relevant markets, (ii) on the Parties and/or the

Merged Entity, and (iii) on the competitive constraints likely to apply to the Parties and/or the Merged Entity. The Tribunal further remarked that ‘*we consider that the assessment of these effects is sufficiently material to the CMA’s overall conclusions as to require further examination of the FR [Final Report] as a whole and we therefore remit the case to the CMA for reconsideration in the light of this judgment.*’<sup>1</sup>

7. In December 2020 the CMA sought permission to appeal the Tribunal’s judgment at the Court of Appeal. In March 2021 the Court of Appeal decided not to grant leave for the CMA to appeal the judgment. Therefore, the CMA was required to investigate the Merger under remittal. We refer to our inquiry as ‘the Remittal’.

## **The Merger Parties**

8. JD Sports is an international retailer and the UK’s largest retailer of sports-inspired casual footwear and apparel. It sells via stores and online. Its UK revenue in 2019/20 was £2.6 billion.
9. Footasylum is a retailer of sports-inspired casual footwear and apparel. It sells via stores and online.

## **Our assessment**

### **How we have approached the remittal**

10. We are assessing whether the Merger has resulted or may be expected to result in an SLC arising from 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.
11. 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 across aspects of price, quality, range and service levels – collectively referred to as ‘PQRS’. Horizontal unilateral

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<sup>1</sup> [2020] CAT 24, *JD Sports Fashion plc v CMA*

effects are more likely when the merging parties are close competitors (ie their products are close substitutes).

12. Since the CMA's Phase 2 Final Report, the COVID-19 pandemic has resulted in several national and local lockdowns in the UK as well as further restrictions that have affected how people shop, work and travel. For example, there have been times when shopping in-store was prohibited and times when shopping in-store was allowed but subjected to social distancing rules. Where they are able to, many UK workers have been working from home which has affected their shopping habits.
13. These factors have of course affected the retailers and consumers in our Remittal inquiry. For example, although we have seen growth in online shopping for sports-inspired casual footwear and apparel, that growth has not only come from JD Sports, Footasylum and Foot Locker (who were the main retailers in the CMA's Phase 2 Final Report) but also from Nike and adidas and some pure online retailers. In the Remittal we have assessed the impact of the COVID-19 pandemic to date on competition and taken into account the most recent evidence on other relevant factors impacting on competitive dynamics. We have considered whether the changes we have seen since the CMA's Phase 2 Final Report are enduring changes that are likely to affect competition in the future.

## **How competition operates in these markets**

14. We have found that retailers compete on a wide range of parameters across a number of different aspects of PQRS. However, retailers do not have complete discretion over their PQRS offer to their customers. There are parameters of competition that Nike and adidas, the two most important suppliers, influence and, in some instances, actively monitor in order to ensure that their products are displayed, marketed and sold in the type of retail environment (whether in-store or online) that they consider benefits them. For example, these suppliers determine which retailers receive certain product ranges and the volumes that they receive. Suppliers set recommended retail prices (RRPs) which are generally followed by retailers. We have also found other aspects of PQRS that are influenced by suppliers.
15. However, we have also found that retailers are able to compete on aspects of PQRS that are either not directly influenced by suppliers or retailers flex their offerings above suppliers' standards. Suppliers do not monitor and engage in all aspects of retail competition, and in some cases have little (if any) incentive to constrain relative deterioration in the retail offer. For example, we have found that price competition takes place on discounts, delivery charges and product prices during sales. Retailers may, in addition, compete on other



factors that are important to consumers such as store locations, staffing levels, the mix of brands and own labels they offer, service levels of online shopping including website and app functionalities, speed of delivery and product returns policies. We therefore think that there are a range of aspects of PQRS that could be worsened in the event of the Merger leading to an SLC.

16. We have found that suppliers allocate products to retailers via their selective distribution policies which places retailers into categories that determines for each retailer its range and volume of products and the timing of supply. We have found that JD Sports is a valued retailer in the eyes of suppliers. Footasylum is able to access product ranges and volumes that enable it to compete effectively. We have taken these distribution policies into account in our assessment.

### **The counterfactual – would Footasylum compete without the Merger?**

17. We have compared competition with the Merger against the competitive situation that we think would likely exist in the absence of the merger. This situation, referred to as the ‘counterfactual’, is the benchmark against which we have assessed the competitive effects of the Merger.
18. The Parties have submitted that Footasylum like other retailers is vulnerable to progressive disintermediation: the brands’ clearly stated policies are to reduce the number of retailers. Nike is an important supplier to Footasylum and its products are an important part of the close competition between Footasylum and JD Sports. We have therefore sought evidence on this from Nike.
19. We have subjected the evidence supplied by Nike to close scrutiny. The large bulk of this evidence is confidential. We used our statutory information-gathering powers on multiple occasions to require production of a significant amount of information from Nike and have held a formal hearing with Nike. We have considered the evidence on whether Footasylum may continue to be supplied by Nike (whether in a reduced format or having its supply stopped).
20. We have considered evidence on the range and volume of products that Footasylum has received each quarter from 2019, examining annual changes and quarter-on-quarter comparisons. We have looked at the evidence regarding supply disruptions resulting from short-term production or supply issues and the evidence at longer term supply to Footasylum. We have also examined Nike internal documents about its supply to UK retailers including Footasylum (and JD Sports) which have been probative.

21. Having considered the evidence submitted by the Parties and by Nike we are satisfied on the basis of the facts available that the most likely scenario that would have occurred absent the Merger is that Footasylum would have continued to receive products by Nike so that it could compete (in a similar way it does today) in our counterfactual.
22. We consider that the most likely counterfactual is one in which Footasylum would have continued to compete effectively absent the Merger and that JD Sports would have exerted the same degree of competitive constraint as it did pre-Merger.

## **Competition between the Parties**

### ***Footwear and apparel***

23. 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. If two closely competing retailers merge, each will be under less competitive pressure which means they will not work as hard to offer good deals to their customers or make improvements to their businesses as they otherwise would have done.
24. In our assessment, we have taken into account the nature of competition. In the retail of sports-inspired casual footwear and apparel, competition between retailers varies depending on an array of factors that include the products that they are able to stock, the customer groups that they are able to attract, the marketing they undertake, the in-store and online shopping experience that they offer and their branding and reputation.
25. We have therefore considered 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.
26. In assessing this Merger, we looked at a wide range of evidence which we considered in the round to reach our decision.
27. The Parties are both large, national, multi-brand retailers of sports-inspired casual footwear. They each serve a large number of customers and have national reach both through their stores and their online deliveries. There is a

high degree of geographic overlap of the Parties' physical stores. 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.

28. We carried out survey of online customers of the Parties in May 2021. This survey found that for both footwear and apparel, JD Sports was by far and away the closest alternative for Footasylum's online customers. Over 40% of Footasylum customers for footwear and half of Footasylum customers for apparel said they would go to JD Sports in the event that they could not shop at Footasylum. These figures were substantially higher than for any other retailer.
29. Our survey results showed a much lower proportion of JD Sports customers considered Footasylum to be their best alternative. Only 9% of JD Sports' online footwear customers said they would go to Footasylum and 8% of its online apparel customers said they would go to Footasylum if they could no longer shop at JD Sports.
30. These survey results indicate that Footasylum has weakened relative to JD Sports since the CMA's Phase 2 Report. More JD Sports customers now consider Nike, Foot Locker and adidas as their alternatives than they do Footasylum. Previously Footasylum was the second-best alternative after Nike. Whilst in-store diversion between the Parties may still be higher than online diversion, we consider these changes in online diversion to be informative and consistent with other evidence on market developments.
31. Using these online survey results, we estimated the strength of the incentive to worsen some aspects of PQRS 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 online GUPPI results are very high for Footasylum in both the footwear and apparel markets, which suggests the Merged Entity would have a very strong incentive to worsen some aspects of PQRS at Footasylum, but considerably lower for JD Sports (indicating a weaker incentive to worsen PQRS at JD Sports).
32. Although we did not carry out a survey of in-store shoppers during the Remittal, the CMA had carried out such a survey in its Phase 2 investigation and found a very high proportion of Footasylum's customers said that they would shop at JD Sports if they could no longer shop at Footasylum. Indeed the proportions of respondents from that survey were so high that we believe the proportion of Footasylum customers today who would select JD Sports as their best alternative to Footasylum would still be sizeable even after taking into account that the proportion may have decreased in view of market developments. Any reasonable adjustment to the diversion would still see

Footasylum customers diverting to JD Sports ahead of any other rival. This is because the physical proximity of many Footasylum stores to JD Sports stores has not changed, neither the Parties nor their rivals have been opening or closing large numbers of stores and the fact that they both sell similar products aimed at similar customers. Based on the evidence from the Phase 2 exit survey, we expect that in-store and combined GUPPIs would be higher than the online ones, although they may be lower than at Phase 2 due to market developments.

33. The Parties agreed that any reasonable adjustment to the Phase 2 exit survey results would still yield large diversions from Footasylum to JD Sports and a high GUPPI. However, the Parties argued that GUPPI analysis is a static analysis and we ought to take account of relevant market developments such as the shift to online shopping, the growth of Nike's and adidas' direct-to-consumer (DTC) sales and possible changes to Footasylum's product allocations. We took these factors into account in our findings.
34. 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.
35. JD Sports and Footasylum stock a similar range of branded sports-inspired casual footwear and apparel, although we have found some differences. For example, Footasylum has a low overlap with JD Sports on adidas footwear products and the Parties' product overlap is lower on apparel than footwear. JD Sports consistently stocks a high proportion of the Nike and adidas footwear and apparel products that Footasylum sells (ie the two most popular brands).
36. We also found that the Parties' internal documents imply that they view each other as competitors.
37. We therefore consider that the evidence shows a consistent picture that JD Sports is an especially close competitor and strong competitive constraint on Footasylum in the retail supply of sports-inspired casual footwear in-store and online in the UK, and in the retail supply of sports-inspired casual apparel in-store and online in the UK. It is by far the closest competitor to Footasylum. The Merged Entity will have a strong incentive to worsen Footasylum's offering.
38. However, the evidence does not indicate that Footasylum is a strong competitive constraint on JD Sports in either footwear or apparel.

## Competition with rivals

### *Footwear*

39. We have used a range of evidence to assess what competition the Parties face from rivals in the relevant markets. The evidence we have used includes survey evidence in which customers identified which retailer they consider to be their best alternative retailer, the degree of product overlap with the Parties, the sales performance of the retailer since the CMA's Phase 2 Final Report, whether the retailer has the same or similar core customer base as JD Sports and/or Footasylum, Nike and adidas' product allocation category for the retailer, and views of third parties.
40. We also looked at evidence relating to the retailer's future performance, whether through a supplier's product allocation category (eg a Strategic Partner to Nike or adidas), the retailer's own growth forecasts or recent changes to the business or investment.
41. We have found that Nike, adidas and Foot Locker exert a competitive constraint on both Parties in footwear. We consider that the other retailers are weak competitive constraints on the Parties.
42. Nike's sales through its DTC channels have grown strongly since the CMA's Phase 2 Final Report, partly driven by the impact of COVID-19 and the acceleration of online shopping. In our survey, online customers of Footasylum and JD Sports responded that Nike is a popular alternative for online footwear shoppers. Indeed, for Footasylum's customers Nike was ranked second only to JD Sports as their best alternative to Footasylum. The other evidence that we looked at, including the Parties' internal documents and other retailers' views, also indicates that Nike is a strong competitor to the Parties.
43. adidas too has seen its sales through its DTC channels grow strongly since the CMA's Phase 2 Final Report. For online shoppers adidas is a slightly stronger constraint on JD Sports than it is on Footasylum but we consider that adidas is likely to grow stronger as a competitive constraint in the future.
44. The CMA found in its Phase 2 Final Report that Foot Locker was a close competitor to both Parties. In the Remittal we have found that customers of both Parties view Foot Locker as a good alternative. The other evidence that we looked at, including on product overlaps with the Parties, evidence from suppliers on allocation of products to retailers, the Parties' internal documents, market shares and the CMA's Phase 2 survey of in-store shoppers, also indicates that Foot Locker is a strong competitor to the Parties.

45. We have looked at the evidence from suppliers on their future product allocation strategies (this evidence is also relevant to our consideration of apparel). We consider some retailers will become stronger (Nike DTC and adidas DTC) and others will maintain their already strong position in the marketplace (JD Sports and Foot Locker). Our main concern is the loss of a competitive constraint on Footasylum (not JD Sports). This does not change our findings that Nike, adidas and Foot Locker exert a competitive constraint on both Parties in footwear.
46. We have provisionally found that the aggregate constraints from rival retailers would not be sufficient to offset the substantial loss of competition between the Parties in the retail supply of sports-inspired casual footwear. Specifically, the SLC that we have provisionally found is driven by the competitive constraint that JD Sports imparts on Footasylum. Therefore, the Merger is more likely than not to give rise to an incentive to deteriorate PQRS at Footasylum post-Merger even taking into account the constraints that suppliers impart on the retailers.
47. We have provisionally found the constraint by Footasylum on JD Sports to be only moderate, at best. In other words, Footasylum's customers would be disadvantaged by the reduction in choice following the Merger to a materially greater extent than JD Sports' customers.

### ***Apparel***

48. We have used the same types of evidence in assessing competitors in apparel as we did in footwear (paragraph 39).
49. In apparel we note that Nike and adidas account for a much smaller proportion of Footasylum's sales than they do in footwear (owing to Footasylum's strong own brand offering).
50. We consider that Nike exerts a competitive constraint on both Parties in apparel. Our survey of online shoppers showed that Nike was second only to JD Sports when customers were asked where they would shop for apparel if Footasylum was not available. While Nike's constraint is also likely to grow stronger in the future it is considerably weaker than the constraint JD Sports places on Footasylum.
51. In addition, adidas and the online only retailer, ASOS, both exert some constraint on JD Sports and Footasylum, although not to the same extent as Nike. For online shoppers specifically, where both of these retailers are likely to be stronger, they both provide a stronger constraint on JD Sports than

Footasylum does. We also expect that the constraint from adidas and ASOS may increase slightly in the future.

52. Other retailers, such as Sports Direct and Foot Locker provide a smaller constraint in apparel, and we have not identified any other retailer who is likely to act as a strong competitive constraint on the Merged Entity.
53. Taking these constraints in aggregate, we found that the aggregate constraint on Footasylum relative to JD Sports to be only moderate at best. To give an example, our survey of Footasylum online shoppers of apparel showed small minorities of shoppers listed Nike (9%), ASOS (6%) and Foot Locker (5%) as close substitutes to Footasylum but this is set in the context of 50% of respondents listing JD Sports as their best alternative.
54. We have found that the aggregate constraints from retailers, combined with the constraints that suppliers impart on the retailers (in terms of how retailers can flex PQRS or in product allocation), would not be sufficient to offset the very substantial loss of constraint from JD Sports on Footasylum. The SLC that we have provisionally found is driven by the competitive constraint that JD Sports imparts on Footasylum. Therefore, the Merger is more likely than not to give rise to an incentive to deteriorate PQRS at Footasylum post-Merger.
55. We have provisionally found that the constraint by Footasylum on JD Sports to be only moderate, at best. In other words, Footasylum's customers would be disadvantaged by the reduction in choice following the Merger to a materially greater extent than JD Sports' customers.

### ***Entry or expansion***

56. For both footwear and apparel we looked at whether entry or expansion would prevent an SLC from arising. We do not consider that entry and/or expansion would be timely, likely and sufficient to prevent the SLCs we have provisionally found.

### **Provisional conclusion**

57. This Merger would bring together two close competitors which would lead to worse outcomes for Footasylum's shoppers. On the basis of a significant amount of evidence, we have provisionally concluded that the Merger has resulted or may be expected to result in a substantial lessening of competition 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.
- 58. The SLC that we provisionally find in our Remittal differs from the Phase 2 Final Report in that it is based only on the removal of the constraint imposed by JD Sports on Footasylum and not the loss of constraint from Footasylum on JD Sports. This reflects our findings on market developments since our Phase 2 Final Report which have resulted in Footasylum becoming a weaker constraint and other competitors becoming stronger constraints on JD Sports. However, these market developments have not weakened Footasylum to such an extent that the merger does not result in an SLC in the market.



# Provisional findings

## 1. The remittal

- 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<sup>2</sup> (Footasylum) (the Merger) for further investigation and report by a group of independent panel members. On 6 May 2020, the CMA announced its decision that the Merger would result in a substantial lessening of competition (SLC) in the markets for sports-inspired casual footwear and apparel sold both in stores and online (the Phase 2 Final Report).<sup>3</sup> The CMA required JD Sports to divest Footasylum in its entirety in order to remedy this SLC.<sup>4</sup>
- 1.2 On 17 June 2020<sup>5</sup>, JD Sports filed an application to the Competition Appeal Tribunal (Tribunal) for review under section 120 of the Act of the CMA's Phase 2 Final Report. The Tribunal issued its judgment on 13 November 2020 (Judgment).<sup>6</sup> The Tribunal quashed the Phase 2 Final Report insofar as its conclusions were based on the CMA's assessment of the likely effects of the COVID-19 pandemic on (i) the relevant markets, (ii) the merging parties and/or the merged entity, and (iii) the competitive constraints likely to apply to the merging parties and/or the merged entity. The Tribunal decided that the case should be remitted to the CMA for reconsideration in the light of its judgment. The CMA's applications for leave to appeal the Tribunal's judgment were not granted<sup>7</sup> and the CMA has therefore proceeded with its reconsideration of the Merger (the Remittal).<sup>8</sup>

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<sup>2</sup> 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 Plc became Footasylum Limited. References to Footasylum in this Report should be interpreted to mean both Footasylum Plc (in the period prior to 20 September 2019) and Footasylum Limited (in the period since 20 September 2019).

<sup>3</sup> [Completed merger on the acquisition of Footasylum plc by JD Sports Fashion plc, Final Report, 6 May 2020](#).

<sup>4</sup> Final undertakings were accepted by the CMA on 13 July 2020. These final undertakings were subsequently released on 19 May 2021 and at the same time a new Interim Order was served on Pentland Group Holdings Limited, Pentland Group Limited, JD Sports Fashion Plc and Footasylum Limited (the Interim Order).

<sup>5</sup> On 2 June 2020 the Tribunal made an [order](#) extending time for JD Sports to file a notice of application by reason of the exceptional circumstances arising from the COVID-19 pandemic.

<sup>6</sup> [JD Sports Fashion plc v Competition and Markets Authority](#) [2020] CAT 24.

<sup>7</sup> On 1 December 2020, the CMA sought permission to appeal the Judgment. On 17 December 2020, following the Tribunal's decision to deny the CMA permission to appeal the Judgment, the CMA renewed its application at the Court of Appeal. On 4 March 2021, the CMA received the Court of Appeal's decision not to grant leave to appeal in this case.

<sup>8</sup> On 26 March 2021, a group of independent panel members was appointed to further investigate and report on the Merger (the Remittal Group).

- 1.3 Whilst the Tribunal decided to remit the Merger to the CMA on the specific grounds that it failed to seek further evidence on the impact of COVID-19 in certain areas, it otherwise found in favour of the CMA and approved its approach to the analysis of the substantive issues. Furthermore, various aspects of the CMA's findings in the Phase 2 Final Report were not challenged before the Tribunal including the fact that the Merger has resulted in the creation of a relevant merger situation. In addition, JD Sports did not challenge the CMA's conclusions on the appropriate market definition, the finding that JD Sports and Footasylum are close competitors in the markets defined or the appropriate remedy.<sup>9</sup>
- 1.4 As the Merger has been remitted for reconsideration in light of the Tribunal's judgment, we must consider the statutory questions afresh. However, as explained further below, in answering these questions we will take account of the evidence in the Phase 2 inquiry (insofar as it remains relevant) and the judgment of the Tribunal. Therefore, in this Remittal, in exercise of our duty under section 35(1) of the Act, we 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 an SLC within any market or markets in the United Kingdom for goods and services.
- 1.5 This document, together with its appendices constitutes the Remittal Group's provisional findings published and notified to JD Sports and Footasylum in line with the CMA's rules of procedure. Further information can be found on the case page.<sup>10</sup>

## **2. The Parties, the Merger and the rationale**

- 2.1 This chapter sets out the background to the completed acquisition by Footasylum of JD Sports (together referred to as the Parties), including details of the Parties and the transaction.
- 2.2 The matters covered in this chapter were not part of the challenge before the Tribunal and we have not received any further evidence on these matters during the Remittal. Therefore, no material changes have been made to the information from the Phase 2 Final Report.

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<sup>9</sup> Judgment, paragraph 4.

<sup>10</sup> [JD Sports Fashion plc / Footasylum plc merger inquiry webpage](#)

## The Parties

### *JD Sports*

- 2.3 JD Sports is an international multi-brand multi-channel retailer of sportswear, sports-inspired casual wear, fashion wear and outdoor wear, operating through both stores and online. It focuses on both footwear and apparel. It is listed on the London Stock Exchange. Pentland Group Limited<sup>11</sup> (Pentland), a privately-owned global group with wholesale and retail businesses supplying branded apparel and footwear products, owns a little over half (approximately 52%) of JD Sports.
- 2.4 JD Sports' global revenue was £6.1 billion for 2019/2020, of which £2.6 billion was in the UK. It is the UK's largest retailer of sports-inspired casual footwear and apparel.

### *Footasylum*

- 2.5 Footasylum was formed in 2005 and is a retailer of fashionwear and sports-inspired casualwear mainly in the UK, operating both stores and online. Its shares were listed on the Alternative Investment Market (AIM) in November 2017.
- 2.6 Footasylum's total revenue was £249 million for 2019/2020, with the UK accounting for almost all (96%) of the turnover.<sup>12</sup>

## The Merger

- 2.7 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.
- 2.8 On 12 April 2019, JD Sports completed the acquisition<sup>13</sup> 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

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<sup>11</sup> At the time of the reference, JD Sports was 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. On 1 December 2020, Pentland Group Limited, a company registered in Jersey, changed its name to Pentland Group Holdings Limited. References to Pentland means Pentland Group plc prior to 21 November 2019 and both Pentland Group Holdings Limited and Pentland Group Limited from 21 November 2019 onwards.

<sup>12</sup> Footasylum [Annual Report and Financial Statements FY ending 1 Feb 2020](#).

<sup>13</sup> On 12 April 2019, JD Sports announced that it had received acceptances representing around [X]% 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.

Sports acquired the remaining issued ordinary share capital of Footasylum as well as its associated assets and liabilities.

## The rationale for the Merger

### *JD Sports*

2.9 JD Sports told us that the [REDACTED].<sup>14</sup>

2.10 JD Sports also told us that the Merger presented it with an opportunity to:<sup>15</sup>

(a) [REDACTED];

(b) [REDACTED]; and

(c) [REDACTED].

2.11 JD Sports stated that its intention had been to maintain a separate operational management structure within Footasylum and that it would also:<sup>16</sup>

(a) maintain Footasylum's differentiated brand mix and product ranges in Footasylum's multi-channel proposition; and

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

### *Footasylum*

2.12 Footasylum told us that due to its [REDACTED], the acquisition by JD Sports would secure its stores and online presence.<sup>17</sup>

2.13 Footasylum also told us that:<sup>18</sup>

(a) [REDACTED]<sup>19</sup>[REDACTED];

(b) [REDACTED];

(c) [REDACTED]; and

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<sup>14</sup> [REDACTED].

<sup>15</sup> [REDACTED].

<sup>16</sup> [Public offer document](#), page 17.

<sup>17</sup> [REDACTED].

<sup>18</sup> [REDACTED].

<sup>19</sup> [REDACTED].

(d) [REDACTED].

### 3. Jurisdiction

#### Introduction

- 3.1 In the exercise of our duty under section 35(1) of the Act, we are required to decide whether a relevant merger situation has been created. In accordance with section 23(9) of the Act, the question as to whether a relevant merger situation has been created shall be determined as at the time which is immediately before the time when the reference under section 22 of the Act has been, or is to be, made. In this case, the reference under section 22 of the Act was made on 1 October 2019.<sup>20</sup>
- 3.2 The CMA's conclusions on this question in the Phase 2 Final Report were not challenged before the Tribunal and we have not received any further evidence in relation to the matters covered in this chapter during the Remittal. Therefore, the conclusions in the Phase 2 Final Report still apply and no material changes have been made to the equivalent chapter in the Phase 2 Final Report.
- 3.3 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.

#### **Enterprises**

- 3.4 The Act defines an 'enterprise' as 'the activities or part of the activities of a business'.<sup>21</sup>
- 3.5 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.

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<sup>20</sup> As noted in paragraph 1 above.

<sup>21</sup> 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.

### ***Ceasing to be distinct***

- 3.6 The Act provides that two enterprises ‘cease to be distinct’ if they are brought under common ownership or common control.<sup>22</sup>
- 3.7 As a result of the Merger, JD Sports acquired the entire issued ordinary share capital of Footasylum. Accordingly, we are satisfied that the businesses ceased to be distinct prior to the date on which the reference was made.
- 3.8 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.<sup>23</sup> The four month period may be extended under section 25 of the Act.
- 3.9 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 and share of supply tests***

- 3.10 The turnover test is satisfied where the UK turnover of the enterprise being acquired exceeds £70 million.
- 3.11 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.<sup>24</sup>
- 3.12 We are therefore satisfied that the value of the annual UK turnover of Footasylum exceeds £70 million and that the turnover test is met.
- 3.13 As the turnover test is met, we are not required to consider whether the share of supply test is also met.

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<sup>22</sup> Section 26 of the Act.

<sup>23</sup> Section 24 of the Act.

<sup>24</sup> According to paragraph 4.60 of the Guidance on the CMA’s jurisdiction and procedure: “the turnover test applies to the turnover of the acquired enterprise that was generated in relation to customers *within the UK the business year preceding the date of completion of the merger*” (emphasis added). As the Merger completed on 12 April 2019, the Parties’ turnover for the financial year ending 2 February 2019 is the relevant turnover for the purposes of the turnover test. However, for completeness we note that the turnover of JD Sports in the financial year ending 1 February 2020 was £2.60 billion in the UK. The turnover of Footasylum for the financial year ending 1 February 2020 was £[REDACTED] in the UK.

### ***Conclusion on relevant merger situation***

- 3.14 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.

## **4. Our approach to the Remittal**

### **Introduction**

- 4.1 In order to determine the specific areas of focus for the Remittal, we have examined the implications of the Tribunal's judgment on the Phase 2 Final Report.

### ***Application to the Tribunal***

- 4.2 JD Sports outlined three grounds in its application to challenge the CMA's Phase 2 Final Report before the Tribunal by way of judicial review:
- 4.3 Ground 1: The CMA erred in law and/or acted irrationally in:
- (a) applying its Merger Assessment Guidelines in determining whether any lessening of competition caused by the Merger was "substantial" and;
  - (b) assessing the aggregate constraints on the merged entity posed by suppliers and retail rivals, currently and in the future;
- 4.4 Ground 2: The CMA erred in law and/or acted irrationally in:
- (a) excluding from the counterfactual the effect of COVID-19 on Footasylum; and
  - (b) its assessment of the effect of COVID-19 on Footasylum.
- 4.5 Ground 3: The CMA erred in law and/or acted irrationally and/or failed to provide adequate reasoning regarding:
- (a) Frasers Group Plc's elevation strategy;
  - (b) the constraint posed by suppliers on the merged entity; and
  - (c) the constraint on the merged entity posed by Nike's and adidas' own direct to consumer (DTC) retail offer.

## ***The Judgment***

- 4.6 The Tribunal dismissed JD Sports' application under Ground 1 and upheld the CMA's overarching analytical approach to determining whether the Merger gave rise to an SLC.<sup>25</sup> JD Sports had argued that the CMA needed to establish that the Merger had or would lead to an adverse effect on consumers and this required a 'parameter by parameter' analysis of the impact of the Merger on competition. JD Sports claimed that the CMA should have examined each parameter of competition and demonstrated that there was a link between the reduction of rivalry relevant to a specific parameter as a result of the Merger and an adverse effect for consumers. JD Sports argued that it could not be assumed from the CMA's analysis at an overall level that the Merged Entity would have the ability profitably to deteriorate its offering on any individual parameter, let alone a key competitive variable where a loss of competition would adversely affect market outcomes for consumers.
- 4.7 The CMA's approach in the Phase 2 Final Report was to rely on an overall assessment of incentives to deteriorate price, quality, range and service (PQRS) and to consider the likelihood of an adverse effect on consumers as part of the overall SLC assessment. In essence, the CMA:
- (a) first, considered how retailers compete in the relevant markets and the extent of the constraint from suppliers;
  - (b) it then found there were aspects of PQRS on which the Parties competed and which the Merged Entity would be able to deteriorate to the detriment of consumers;
  - (c) in those circumstances, any substantial lessening in the competitive constraints faced by the Parties would create the incentive to deteriorate any of these aspects of PQRS; and
  - (d) the subsequent analysis showed that the Merger would remove a direct and significant constraint on each of the Parties and the remaining post-Merger constraints would not be sufficient.
- 4.8 The Tribunal found that the CMA had followed its guidelines<sup>26</sup> and had taken an orthodox approach to the analysis which was within its wide margin of appreciation. There was no reason in law to impose the 'parameter-by-parameter' analysis of PQRS required by JD Sports. The Tribunal stated that 'the requirements of rationality do not require the CMA to adopt a particular

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<sup>25</sup> Judgment, paragraph 97.

<sup>26</sup> Merger Assessment Guidelines, September 2010 (CC2 Revised, OFT 1254).



analytical technique'.<sup>27</sup> The Tribunal went on to confirm that, other than in relation to certain matters covered under Grounds 2 and 3(3) of JD Sports' application, there was 'more than sufficient evidence' on which the CMA could reasonably rely in order to come to the conclusions that it did on the question of SLC and that there was 'abundant evidence' to show that the CMA did not err in law by adopting the methodological approach it did.<sup>28</sup> Similarly, in relation to Ground 1(ii), the Tribunal stated that the CMA had 'very substantial evidence' on which to base a reasonable decision relating to the aggregate effects of the competitive constraints posed by suppliers and retail rivals and provided 'substantial reasons' for its assessment.<sup>29</sup>

- 4.9 The Tribunal also dismissed JD Sports' application under Grounds 3(i) and (ii). In the Phase 2 Final Report, the CMA stated that it could not 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.<sup>30</sup> The Tribunal found that it was reasonable for the CMA to have reached this conclusion on Frasers Group's elevation on the basis of the inquiries it made. The Tribunal referred to a 'significant body of evidence' on this topic and found that the 'extensive evidence that the CMA had gathered on the actual and anticipated effect of that strategy had probative value'. The CMA could therefore reasonably reach the conclusion set out in the Phase 2 Final Report.<sup>31</sup>
- 4.10 Similarly in relation to Ground 3(ii), the Tribunal considered that the CMA's investigation of the constraints exerted by suppliers was more than sufficient to form the basis for a decision that was not irrational.<sup>32</sup> The Tribunal carefully assessed the CMA's approach and concluded that the scope and nature of the evidence gathered by the CMA, and the nature of its assessment, did not disclose any error of law.<sup>33</sup>
- 4.11 However, the Tribunal upheld JD Sports' application under Grounds 2 and 3(iii), which were related to the CMA's assessment of the impact of COVID-19 on the matters under consideration in the CMA's Phase 2 Final Report. Ground 2 concerned the CMA's assessment of the impact of COVID-19 on Footasylum. JD Sports claimed that the CMA had acted irrationally in not seeking more information on this topic, particularly from the principal suppliers

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<sup>27</sup> Judgment, paragraphs 96-97.

<sup>28</sup> Judgment, paragraph 101.

<sup>29</sup> Judgment, paragraph 111.

<sup>30</sup> Final Report, paragraph 8.395.

<sup>31</sup> Judgment, paragraph 206.

<sup>32</sup> Judgment, paragraph 216.

<sup>33</sup> Judgment, paragraph 226.

and Footasylum's primary lender. The Tribunal held that the CMA was entitled to consider the likely effects of COVID-19 as part of its competitive assessment rather than the counterfactual. However, it concluded that the CMA had acted irrationally in that it came to conclusions as to the likely effects of the COVID-19 pandemic, that were of material importance to its overall decision, without having the necessary evidence from which it could properly draw those conclusions.<sup>34</sup> The Tribunal considered that the CMA should have made further inquiries of suppliers and of Footasylum's primary lender, even at a late stage in its investigation, in order to be able to conclude as to whether there was robust evidence that could affect its conclusions.

- 4.12 In relation to Ground 3(iii), the Tribunal similarly found that the CMA acted irrationally in deciding not to request further information from the suppliers on the impact of COVID-19 on the likely post-Merger constraints from their DTC channels.<sup>35</sup>
- 4.13 In view of these findings, the Tribunal quashed the Phase 2 Final Report in so far as its conclusions were based on the CMA's assessment of the likely effects of the COVID-19 pandemic on (i) the relevant markets, (ii) the Parties and/or the Merged Entity, and (iii) on the competitive constraints likely to apply to the Parties and/or the Merged Entity. The Tribunal considered that the assessment of these effects was sufficiently material to the CMA's overall conclusions as to require further examination of the Phase 2 Final Report 'as a whole'.<sup>36</sup> The case was therefore remitted to the CMA for reconsideration.

## **Implications for the SLC analysis**

- 4.14 As the CMA's conclusions on the existence of a relevant merger situation have not been affected by the Judgment such that we maintain the conclusion that a relevant merger situation has been created, the Remittal is focused on the second statutory question. This question asks whether the creation of that relevant merger situation has resulted or may be expected to result in an SLC in any market or markets for goods or services in the UK.<sup>37</sup>
- 4.15 The Tribunal found no basis for concluding that the CMA had erred in law in the relation to the analytical framework for the assessment of the substantial lessening of competition, the assessment of the aggregate effects of the competitive constraints, the Frasers Group's elevation strategy and the constraint posed by suppliers (except for where the latter related to the impact

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<sup>34</sup> Judgment, paragraph 186.

<sup>35</sup> Judgment, paragraph 242.

<sup>36</sup> Judgment, paragraph 248.

<sup>37</sup> Section 35(1) of the Act.

of COVID-19 on the direct-to-consumer offerings of those suppliers). We have therefore adopted the same methodological approach to these issues in the Remittal taking into account updated evidence where necessary.

- 4.16 There was no challenge to the CMA's approach to market definition and we have not received any representations to suggest that we should now adopt a different market definition. For ease of reference we have set out the market definition that we have used in the following chapter.
- 4.17 Any relevant changes to market dynamics as a result of COVID are captured in our competitive assessment.
- 4.18 The Judgment clearly states that the Remittal should assess the impact of the COVID-19 pandemic on the markets for sports-inspired casual footwear and sports-inspired casual apparel to inform the competitive assessment. Whilst the Judgment and full remittal of the case means that we have reconsidered many aspects of the Phase 2 Final Report (eg the strength of competitive constraints between JD Sports and Footasylum, the competitive constraints from other retailers, and suppliers), in light of the Tribunal's conclusions on the specific grounds in the Judgment, we have ensured the Remittal directly addresses the impact of COVID-19 on Footasylum (both in the counterfactual and the competitive assessment) and on suppliers' DTC strategies.
- 4.19 The key themes of the Remittal are therefore:
- the counterfactual, and evidence from Footasylum's lender as to the impact of COVID-19 on Footasylum's position in the counterfactual;
  - the development of the markets and the competitive constraint exerted by the Parties and other retailers in light of the COVID-19 pandemic; and
  - the strength of the constraint from suppliers' and in particular from their direct to consumer (DTC) retail offerings in light of the impact of COVID-19.<sup>38</sup>
- 4.20 Notwithstanding this, we have reconsidered the CMA's Phase 2 Final Report as a whole as required by the Tribunal (paragraph 4.13) including significant market developments since the CMA's Phase 2 Final Report.

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<sup>38</sup> In March 2021 the CMA revised its Merger Assessment Guidelines. The previous guidelines dated from 2010. In line with the [CMA's published statement](#) regarding when the revised guidelines take effect, we are applying the 2010 [Merger Assessment Guidelines](#) in this Remittal, as the reference to Phase 2 was made prior to the date of publication of the revised guidelines. Likewise, in December 2020 the CMA updated its Guidance on the CMA's Jurisdiction and Procedure. In line with the [CMA's published statement](#) regarding when the updated guidance take effect, we are applying the previous (2014) [Guidance on the CMA's Jurisdiction and Procedure](#).

4.21 Below we set out in broad terms how we have approached this. We set out our theories of harm, we briefly discuss how we have structured our analysis and the report, and finally we discuss our evidence gathering during the Remittal.

### ***Theories of harm***

4.22 In the Remittal we have considered the following two theories of harm:

- (a) horizontal unilateral effects on the retail supply of sports-inspired casual footwear (in-store and online) in the UK; and
- (b) horizontal unilateral effects on the retail supply of sports-inspired casual apparel (in-store and online) in the UK.

4.23 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).<sup>39</sup> Horizontal unilateral effects are more likely when the merging parties are close competitors (ie their products are close substitutes).

### ***Coordinated effects***

4.24 In its challenge to the CMA's Phase 2 Final Report at the Tribunal JD Sports did not challenge the CMA's findings on coordinated effects.

4.25 In the Phase 2 Final Report the CMA found that:

- (a) it would be difficult for JD Sports, Nike and adidas (as a coordinating group) 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.<sup>40</sup>

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<sup>39</sup> [Merger Assessment Guidelines](#), from paragraphs 5.4.1.

<sup>40</sup> CMA (2020), [Phase 2 Final Report](#), paragraph 10.31

4.26 Consequently, the CMA's Phase 2 Final Report did not find that coordinated effects would be likely to arise as a result of the Merger. We have not seen evidence to indicate that the likely effects of the COVID-19 pandemic or any other factor have made coordination more likely since the time of the CMA's Phase 2 Final Report. Neither the Parties nor any third party have made representations to us that we should consider issues of coordination as a part of our inquiry.

4.27 We therefore do not consider coordination further.

### ***Structure of our provisional report***

4.28 We have assessed the two theories of harm (paragraph 4.22). Some of the evidence that we have considered is relevant to both the retail supply of sports-inspired casual footwear and of apparel. This is to be expected since some retailers (including the Parties) sell both footwear and apparel in-store and online and some of the same key suppliers are relevant to both categories. Other evidence that we have considered is specific to either the retail supply of sports-inspired casual footwear or to the retail supply of sports-inspired casual apparel. We have therefore structured our analysis in this report as follows:

- (a) First, we discuss the market definitions that we have employed;
- (b) Second, we discuss the evidence on how retail competition operates in the relevant activities;
- (c) Third, we set out the evidence relevant to both the retail supply of sports-inspired casual footwear and the retail supply of sports-inspired casual apparel markets;
- (d) Fourth, we set out the evidence specific to the retail supply of sports-inspired casual footwear;
- (e) Fifth, we set out the evidence specific to the retail supply of sports-inspired casual apparel;
- (f) Sixth, we make our assessment of the counterfactual; and
- (g) Lastly, we make our assessment on whether the Merger is likely to result in an SLC for the two markets separately.

## Implications for the evidence gathering and assessment

### *Updating our evidence base*

- 4.29 In the Remittal, we are reconsidering the question of whether there is an SLC as a whole, taking into account the changes in market conditions as a result of COVID-19 as well as other changes in market conditions. We have therefore updated the evidence base to gather information on market conditions in light of the impact of the COVID-19 pandemic and forecasts or projections as to future market developments. We have also updated the evidence base more generally to take into account other relevant factors such as changes in competitive dynamics from rivals (eg growth in supplier DTC sales) and changes and future plans in product allocation from suppliers.<sup>41</sup>
- 4.30 During the Remittal, we have gathered evidence from JD Sports and Footasylum in the form of written submissions, quantitative data, internal documents and oral representations. We have also gathered evidence from a number of third parties (eg key suppliers such as Nike and adidas, competitors and other retailers) using our powers under section 109 of the Act where appropriate. We have held formal hearings with Nike and adidas and held calls with a number of other third parties.

### *Commissioning surveys*

- 4.31 We also considered whether we should conduct new surveys of the Parties' customers during the Remittal to update our evidence base. We decided to commission a new survey of JD Sports and Footasylum's online customers (the Remittal Online Survey). This survey is described more fully in paragraph 8.13 (Chapter 8, Survey Evidence).
- 4.32 We also considered whether we should conduct a new exit survey of in-store shoppers during the Remittal. Due to the timing of the Remittal, any survey would have had to be conducted in late April or May, shortly after shops had reopened following an extended period of national lockdown and whilst they were still subject to certain government restrictions in terms of social distancing. We received views from the Parties<sup>42</sup> who submitted that it would not be appropriate to conduct an exit survey given the continuing impact of the COVID-related restrictions in terms of maximum headcounts in stores, one-way systems and other COVID-related measures (which could lead to queues outside stores and therefore cause problems whether interviews were

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<sup>41</sup> Where we have relied on evidence from the CMA's Phase Final Report we have copied relevant extracts of that evidence into an appendix to our provisional report.

<sup>42</sup> [REDACTED].

conducted inside or outside of stores). It was submitted that these issues would be particularly difficult at smaller stores. JD Sports pointed to the latest COVID-19 guidance from the Market Research Society which stated that *“the fundamental principle underlying this guidance is that face-to-face data collection will only be undertaken when no other alternative methodology can be used”*.<sup>43</sup> Ultimately, we decided not to commission a new exit survey due to the practical difficulties of running such a survey whilst social distancing practices were still in place and concerns that it would not be in line with the Market Research Society guidance.

### ***How we have used our evidence***

- 4.33 This new evidence together with the evidence we previously gathered means we have evidence covering three different time periods:
- (a) Period 1: The period prior to publication of the Phase 2 Final Report (pre-May 2020). During this period, COVID-19 related restrictions required non-essential retail to close from 23 March 2020;
  - (b) Period 2: The period from publication of the Phase 2 Final Report up to (and including) the Remittal investigation. COVID-19 related restrictions were in place throughout this period to a greater or lesser extent with several periods of store closure and local and national lockdowns in place at different times; and
  - (c) Period 3: The outlook over the longer term, and in particular forecasts for the next two years. In the UK, COVID-19 restrictions are in the process of being lifted and whilst the effects of the pandemic will continue to have some impact on this evidence, we will focus on evidence of the structural impact on the market as a result of the Merger.
- 4.34 As Period 1 evidence was gathered during the CMA’s phase 1 and phase 2 investigations, evidence gathering for the Remittal has been largely focused on Periods 2 and 3.
- 4.35 We are considering all of the evidence in the round in order to reach a conclusion on the SLC question. We continue to rely on evidence from Period 1 in this Remittal to the extent relevant, although we have updated this with evidence of the current and likely future market conditions (over the next two to three years) and will continue to update the evidence insofar as possible until our Final Report. We welcome any further evidence the Parties and third

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<sup>43</sup> [MRS Post-Lockdown Covid-19 Guidance: Undertaking Safe Face-to-Face Data Collection, A Status Update Across the Four Nations and Guidance for England from 29<sup>th</sup> March 2021.](#)

parties can provide on any aspect of our Provisional Report. As set out in Chapter 11 of this report the weight we are placing on evidence from Period 1 depends on what the evidence from Periods 2 and 3 indicates and the extent to which this new evidence confirms or contradicts evidence previously received. We have therefore carefully analysed and compared and contrasted evidence we received on Periods 2 and 3 with the prior situation to decide how much weight can be placed on it. For some specific types of evidence, for example internal documents, we have also taken into account the date on which a piece of evidence was produced and how this relates both to the CMA process and the development of the COVID-19 pandemic in order to decide on the weight that we can place on it.

- 4.36 Whilst we are aware that there is still some uncertainty around the impact of COVID-19 on the markets under investigation, as set out in the CMA's guidance on Merger assessments during the COVID-19 pandemic (the COVID Mergers Guidance),<sup>44</sup> COVID-19 has not changed the standards by which we assess whether a merger is likely to give rise to an SLC.<sup>45</sup>
- 4.37 We consider that it is appropriate to focus on understanding what durable changes there may have been to the market conditions reported in the CMA's Phase 2 Final Report. As set out in our COVID-19 Mergers Guidance, '*A merger control investigation typically looks beyond the short-term and considers what lasting structural impacts a merger might have on the markets at issue. Even significant short-term industry-wide economic shocks may not be sufficient, in themselves, to override competition concerns that a permanent structural change in the market brought about by a merger could raise. The CMA needs to ensure its decisions are based on evidence and not speculation, and will carefully consider the available evidence in relation to the possible impacts of Coronavirus on competition in each case.*'<sup>46</sup>
- 4.38 For instance, while it is conceivable that the COVID-19 pandemic could lead to an increase in valid failing firm claims, the pandemic is not a reason to lower the standard for accepting such claims. While in some circumstances it may be necessary to factor the short-term impact of the pandemic into merger assessments, this will need to consider the impact on all firms in the market and competition agencies' assessments must remain rigorous and evidence-based. In particular, competition agencies cannot base assessments on speculation or unfounded claims as to the impact of the pandemic.

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<sup>44</sup> [Merger assessments during the Coronavirus \(COVID-19\) pandemic, 22 April 2020, CMA120 \(Covid Mergers Guidance\)](#)

<sup>45</sup> COVID Mergers Guidance, paragraph 5.

<sup>46</sup> COVID Mergers Guidance, paragraph 22.



4.39 We recognise that, as regards the substance of the evidence we have received, imperfect information as to future developments is a feature of the type of the forward-looking assessment that is required in this case. As the Tribunal noted in its Judgment, all business forecasts and projections are based on uncertainty about future events.<sup>47</sup> The level of uncertainty inherent in any particular piece of evidence may affect the weight that can be attributed to it. Where this is relevant, we have made it clear in our competitive assessment. Ultimately, in order to answer the statutory questions set out in paragraph 1.4, we have assessed all the evidence in the round in order to reach a view on the SLC question including in light of the impact of COVID-19 on the markets for sports-inspired casual footwear and sports-inspired casual apparel.

## **5. Market definition**

- 5.1 In the CMA's Phase 2 Final Report, the CMA defined the relevant markets for its assessment of the Merger. The full analysis of the phase 2 market definition is in Appendix I. The market definition exercise was based on considerations of demand-side substitution for footwear and apparel including demand-side substitution between different types of footwear and between different types of apparel. The CMA also considered relevant factors of supply-side substitution, for example, if a retailer of predominately sports-inspired casual apparel would be able to re-position itself as being also a retailer of sports-inspired casual footwear.
- 5.2 As stated in Chapter 4, we have not seen any evidence to make us alter the market definition that was used in the phase 2 inquiry. Nor have the Parties or any third party submitted to us any reasons why we should use a different market definition in the Remittal.
- 5.3 We are not aware of any evidence that the COVID-19 pandemic has changed how consumers view the substitutability of footwear and apparel and/or the substitutability of online and in-store shopping. Indeed, in regard to online versus in-store shopping behaviour, the evidence indicates that consumers are more likely to shop across both channels which has further blurred not delineated the boundaries between online and in-store shopping. For example, our survey of online shoppers found that relatively few shoppers expect to buy all or nearly all of their footwear or apparel solely online or solely in-store after the COVID-19 pandemic and the same survey found proportionately more shoppers bought all or nearly all of their footwear or apparel solely online or solely in-store before the COVID-19 pandemic ('DJS

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<sup>47</sup> Judgment, paragraph 148.

report: survey of online retail customers for a merger inquiry'). Our survey of online shoppers also found that around a quarter of both footwear and apparel shoppers responded that they would have shopped at a physical store in the event that their preferred online retailer had stopped selling online ('DJS report: survey of online retail customers for a merger inquiry').

- 5.4 Our view, which is the same as that in the CMA's Phase 2 Final Report, 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. 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.
- 5.5 We have therefore used in the Remittal the same market definition as in the CMA's Phase 2 Final Report, which is:
- (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.
- 5.6 In adopting these definitions of the relevant markets, we note that the Parties are active in a differentiated marketplace. This typically means that they face a spectrum of offerings 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. Moreover, among other factors retailers differ according to their branding, marketing, core customer base, the online and/or in-store shopping experience that they offer and, for stores, location. Delineating a relevant market on such a spectrum can be difficult and somewhat artificial. Therefore, the boundaries of the market do not determine the outcome of our competitive assessment.<sup>48</sup> We have considered in our assessment the evidence on how closely the Parties and their rivals are likely to compete in the future.

## **6. How retail competition operates**

- 6.1 Before we examine the evidence regarding competition in the retail supply of sports-inspired footwear and apparel we examine the main drivers for retail competition in the relevant markets and what may have changed since the

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<sup>48</sup> [Merger Assessment Guidelines](#), paragraph 5.2.2

CMA's Phase 2 Final Report. We consider that the parameters of competition discussed in this chapter are relevant to both footwear and apparel.

- 6.2 Retailers compete to make sales to customers across a range of parameters that customers care about. Customers might care about prices, product range, availability of products in their size, ease of use of an online shopping website or app or the convenience of a store. However, some parameters of competition between retailers are influenced by suppliers. It is important that we understand the nature of competition and how the Merger may affect rivalry over time. Moreover, evidence on likely adverse effects that may arise as a consequence of an SLC typically forms an important part of our merger assessments<sup>49</sup>
- 6.3 We have therefore considered the evidence on the parameters on which retailers compete by examining:
- (a) the CMA's findings from its Phase 2 Final Report;
  - (b) the supply of key products from suppliers via allocation categories;
  - (c) the Parties' and suppliers' submissions in the Remittal on the parameters of competition between retailers; and
  - (d) other evidence including our survey results.
- 6.4 We have then considered the evidence on how suppliers influence some of the parameters on which retailers compete by examining:
- (a) the CMA's findings from its Phase 2 Final Report;
  - (b) the evidence that we have received from the Parties during the Remittal; and
  - (c) the evidence that we have received from suppliers during the Remittal.
- 6.5 Finally, we assess the evidence and present our conclusions.

## **How retailers compete**

- 6.6 In its Phase 2 Final Report, the CMA considered whether the Parties competed on PQRS and whether the Merged Entity could profitably worsen aspects of its PQRS offering to the detriment of consumers. Below we

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<sup>49</sup> [Merger Assessment Guidelines](#), paragraph 4.1.3

summarise the CMA's findings from its Phase 2 investigation. Appendix I contains the full extract from the Phase 2 Final Report.

### ***Summary of the CMA's Phase 2 Final Report on how retailers compete***

- 6.7 On price, the CMA found that retailers generally priced in line with RRP (recommended retail prices) provided by suppliers and that retailers undertook discounting. The CMA found that retailers competed on discounts (ie prices).<sup>50</sup> For example, the CMA found that the Parties could choose whether to take part in cashback websites such as TopCashback and Quidco, which give discounts to consumers online. In addition, the Parties offered student discounts and could flex the level of the discounts.<sup>51</sup>
- 6.8 Further, in the online channel, the CMA found that the Parties and other retailers further competed on prices for aspects such as minimum spends for their online delivery services and delivery charges.
- 6.9 The CMA also found that retailers competed on some non-price aspects of competition, for example:<sup>52</sup>
- (a) store locations, opening times, in-store shopping experiences and refurbishments, store fittings, in-store staffing levels and queuing times, staff training and knowledge, and general store quality;
  - (b) marketing activity, on which they spent a large amount and is a key way they differentiate their offering to consumers;
  - (c) website functionality and ease of use;
  - (d) loyalty programmes; and
  - (e) the range of product brands offered.
- 6.10 The CMA found that retailer innovation improved retailers' services and offerings. Some examples of this included:<sup>53</sup>
- (a) JD Sports' introduction of in-store kiosks, giving customers access to a wider range of products than is available in a given store;
  - (b) Improvements to website and app functionality and design;

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<sup>50</sup> CMA (2020), [Phase 2 Final Report](#), paragraph 8.109

<sup>51</sup> CMA (2020), [Phase 2 Final Report](#), paragraph 8.110

<sup>52</sup> CMA (2020), [Phase 2 Final Report](#), paragraphs 8.111

<sup>53</sup> CMA (2020), [Phase 2 Final Report](#), paragraph 8.113

- (c) Digital content displays in stores;
- (d) More efficient product retrieval systems; and
- (e) Different forms of marketing campaigns, such as partnerships with celebrities or social media influencers.

- 6.11 The CMA considered whether the Merged Entity was likely to be incentivised to close some or all Footasylum fascia stores to the detriment of consumers. The CMA estimated that closing all Footasylum stores would likely be profitable for the Merged Entity.<sup>54</sup> The CMA also found that closing only some stores would also be profitable, especially if the least profitable Footasylum stores were to be closed. The CMA was careful to note that it interpreted these results with caution given it did not have detailed information on the cost of closing stores or the costs of capturing sales.
- 6.12 Overall, the CMA found that there was evidence that the Parties competed head-to-head, as well as with other competitors, on various aspects of PQRS.<sup>55</sup>
- 6.13 Finally, we note that the CMA found that suppliers have some control or influence over some aspects of PQRS. These are discussed further in paragraphs 6.34 to 6.57, but first we discuss the suppliers' primary role with respect to retailers which is the supply of products for retail since that is the main leverage over retailers that some suppliers hold.

### ***Other evidence on how retailers compete***

- 6.14 During the Remittal we have received other evidence on parameters of competition.
- 6.15 For example, in our survey of online shoppers, respondents said that they chose to shop with JD Sports or Footasylum because of:
- (a) good prices or special offers;
  - (b) the availability of the product;
  - (c) product range;
  - (d) fast/reliable/flexible delivery;

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<sup>54</sup> CMA (2020), [Phase 2 Final Report](#), paragraph 8.115

<sup>55</sup> CMA (2020), [Phase 2 Final Report](#), paragraph 8.116

- (e) ease of use of the website;
- (f) reputation of the brand;
- (g) reasonable delivery charges;
- (h) 'pay later' options; and
- (i) availability of vouchers and discounts.<sup>56</sup>

6.16 Respondents told us that the main reasons why they chose JD Sports or Footasylum ahead of other retailers were (in decreasing order) price, range, quality and service.

6.17 Although this is not direct evidence of retailers competing, it does indicate the factors that consumers consider important and we expect that retailers would compete on these factors in order to win sales. Moreover, this evidence is consistent with the findings in the CMA's Phase 2 Final Report.

6.18 We note that suppliers are able to influence some (eg the range that is available at a retailer), but not all of these factors, and this is discussed further below in the subsection 'suppliers' setting and monitoring of KPIs'.

6.19 During the Remittal the Parties submitted that:

- (a) free delivery offers are a variable on which retailers attract consumers given consumers are price-sensitive to delivery charge levels and types (free, standard, next-day);

- (b) JD Sports has recently reviewed [REDACTED]; and

- (c) [REDACTED].<sup>57</sup>

6.20 We consider that this indicates that JD Sports competes on some price factors. Indeed, JD Sports spoke to us about competition for online shoppers in the hearing. It said:

[REDACTED]

6.21 Also in respect to online shopping, we have seen internal documents from JD Sports that [REDACTED]. For example, [REDACTED].<sup>58</sup> This indicates a broad range of parameters for online shopping alone on which retailers compete.

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<sup>56</sup> DJS Report figures 6-9

<sup>57</sup> [REDACTED].

<sup>58</sup> [REDACTED].

6.22 In respect to the in-store shopping experience, JD Sports told us:

[REDACTED]

6.23 Finally, we consider that retailers compete on innovation and branding. For example, JD Sports has told us that [REDACTED].<sup>59</sup> In the CMA's phase 2 investigation JD Sports submitted 'we consider that successfully building own-brands is not a skill that is unique to Footasylum and has been done by other retailers in this market. JD Sports could gain this expertise without having to acquire Footasylum'.<sup>60</sup> Further, [REDACTED]. This too indicates that one possible parameter of competition is to develop and maintain a range of own brand products (which may help differentiate a retailer from other retailers).

### ***The supply of products to retailers via selective distribution arrangements***

6.24 The main suppliers of sports-inspired casual footwear and apparel wholesale their products to retailers using some form of selective distribution arrangement. This grants them a degree of control over where, how and how many of their products are sold and marketed. Suppliers decide which retailers sell their products and can control the specific products and volumes provided to each retailer. Allocation of products is typically done through segmentation policies, with different categories of retailer having access to different product ranges (eg sport or lifestyle/fashion-focussed range of footwear and clothing). In some cases, suppliers will have tiers of retailers within a category.

6.25 There are also some products – known as restricted products – where suppliers put constraints on the number of products available to retailers, prioritising some channels (eg their DTC offerings or priority retailers) over others.<sup>61</sup>

6.26 For some new or exclusive products there might be greater restrictions on which retailers can access a product and when they can access it. That is, retailers who are of the highest strategic importance may receive a popular product on its launch ahead of lower priority retailers or may be granted exclusive access to a new product.

6.27 In addition to these allocation decisions, the supply of products to retailers may also be impacted by short-term supply issues. Examples include the recent blockage of the Suez Canal or restrictions in supply resulting from

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<sup>59</sup> CMA's Phase 2 Final Report, paragraph 3.24

<sup>60</sup> CMA's Phase 2 Final Report Appendix I paragraph 49

<sup>61</sup> Throughout the Provisional Report when we discuss product allocation categories and suppliers' selective distribution arrangements, we are primarily referring to restricted products.

short-term production disruptions. When these arise, suppliers need to decide how to allocate the available products between the different retailers.

- 6.28 Therefore, we consider that retailers are capacity constrained since the volume of products that they receive from product suppliers is limited, in particular as regards the most high-demand products. Consequently, retailers can face demand for some products that greatly exceeds the volume that they can fulfil. In our inquiry we have heard from various retailers telling us that their product allocations are insufficient to meet the demand from their customers.<sup>62</sup>
- 6.29 Moreover, retailers might be unable to get any access to the range of product that they want and/or not get access to the products when they want them (eg some retailers will receive new products sooner than others). This is because the suppliers' selective distribution arrangements determine which product allocations each retailer receives according to the retailer category that the supplier places them in (and, in some cases, the specific tier within a category). For example, all main suppliers that we have spoken to consider JD Sports to be of high strategic importance and therefore sitting within the highest priority product allocation category/tier. We have taken the strategic importance of retailers into account in our competitive assessment.
- 6.30 We have found that there have been recent changes to the supplier allocation strategies, and changes in supply and demand patterns, which have reduced the supply of products which are available to [X] and some other retailers. Changes in the product allocation categories of the main suppliers are a part of their broader allocation strategies in which they are seeking to sell a greater proportion of products through their own DTC channels, supply to fewer retailers and/or allocate the largest volumes and best products to a relatively small number of select retailers (such as JD Sports). The main suppliers are looking for retailers who can offer (among other attributes) scale, easy access to large numbers of customers and/or specific customer groups, a unique or premium shopping experience for the customer and promotion of their products.
- 6.31 These supply arrangements impact on competition between retailers, particularly in relation to the products that might be the most popular, the most fashionable or in some sense a premium product. Higher tier products that are more attractive to customers are likely to have more impact on the competitive position of a retailer.

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<sup>62</sup> For example: [X].



- 6.32 Importantly for our analysis, the supply arrangements are not static but are changing and, with them, the potential for the competitive dynamic between some retailers to change. Indeed, the Parties have highlighted their concerns about possible [REDACTED].<sup>63</sup>
- 6.33 We have therefore considered current and likely future supply arrangements very carefully in our analysis (Chapters 10 and 11).

### ***Suppliers' setting and monitoring of KPIs***

- 6.34 Supply arrangements between suppliers and retailers typically include requirements for retailers to observe minimum standards of quality and service, 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 or in-line with the perception of a particular product (eg as being a high-end, premium or luxury product). This approach helps suppliers to shape consumer perceptions and preferences across a range of their products.
- 6.35 A standard feature of supply arrangements is that the supplier agrees to supply only those retailers which meet certain specified criteria (eg financial and quality requirements) and only supply a certain volume of its product to these retailers. These selective distribution arrangements are incorporated into the supplier's standard terms and conditions and individual trade terms with retailers.

### ***Findings of the CMA's Phase 2 Final Report***

- 6.36 In the CMA's Phase 2 Final Report it assessed in detail the possible impact suppliers have on retailers' offerings as a result of their supply relationship with retailers. In particular, the CMA considered whether suppliers could prevent retailers from deteriorating aspects of PQRS.<sup>64</sup> Full details of the assessment made at Phase 2 are available in an extract from the Phase 2 Final report as Annex I.
- 6.37 The Parties submitted in the CMA Phase 2 inquiry that the key suppliers, [REDACTED]. JD Sports submitted that Nike and adidas [REDACTED]; and unilaterally controlled who was able to participate (and to what extent)' in the market. The Parties submitted that the relevant question was whether post-Merger, retailers would have the incentive to significantly and permanently degrade their offer, taking

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<sup>63</sup> [REDACTED].

<sup>64</sup> 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.

account of the ability and incentives of suppliers to react to any such degradation.

- 6.38 The CMA considered 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.
- 6.39 Paragraphs 6.40 to 6.44 are an extract from the CMA's Phase 2 Final Report.<sup>65</sup>

*Extract from the CMA's Phase 2 Final Report<sup>66</sup>*

- 6.40 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 (which remains their largest channel). They use selective distribution arrangements and segmentation policies to control the access and volumes of their products that are available to retailers.
- 6.41 Given suppliers' importance in this market, we [the CMA] considered their impact on retailers' ability and incentives to flex PQRS. We [the CMA] found that:
- (a) suppliers exert some influence over retailers' pricing, for example by providing the RRP for products, although while retailers generally adopt RRP, 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 offerings). 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 [the CMA]

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<sup>65</sup> Paragraphs 8.94 to 8.98 of the CMA's Phase 2 Final Report

<sup>66</sup> Cross-references to the Phase 2 Final Report within this excerpt have been removed.

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 [the CMA] note that post-Merger, suppliers' ability to benchmark would be hindered by the loss of one independently owned retail comparator.

6.42 We [the CMA] therefore consider that suppliers play an important role in shaping retail competition in this market.<sup>67</sup> In particular, we [the CMA] 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.

6.43 However, we [the CMA] 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 [the CMA] 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.

6.44 We [the CMA] 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 [the CMA] 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;
- (b) there are limits to suppliers' ability to detect a deterioration of retailers' offerings, for example less and slower rates of innovation or other

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<sup>67</sup> 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.

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.

*Parties' submissions in the Remittal*

- 6.45 As part of the Remittal we received updated evidence from the Parties and from the key suppliers on the setting and monitoring of KPIs and influencing aspects of PQRS.
- 6.46 The Parties submitted during the Remittal that [REDACTED] since the CMA's Phase 2 Final Report. For example, JD Sports has given examples of [REDACTED]. JD Sports also provided [REDACTED].
- 6.47 The Parties stated that Nike [REDACTED].<sup>68</sup> In relation to Footasylum, the Parties have stated that [REDACTED].<sup>69</sup>
- 6.48 The Parties have told us that this monitoring and auditing by the suppliers is affecting their operational decisions. JD Sports submitted that [REDACTED].<sup>70</sup> JD Sports also highlights [REDACTED].<sup>71</sup> JD Sports also highlighted [REDACTED].<sup>72</sup>
- 6.49 In the Main Party Hearing, [REDACTED].<sup>73</sup>
- 6.50 In response to working papers, JD Sports submitted that, [REDACTED].<sup>74</sup> JD Sports also submitted that [REDACTED]. Among other things [REDACTED]<sup>75</sup> [REDACTED]<sup>76</sup> [REDACTED], JD Sports submitted that [REDACTED].<sup>77</sup>
- 6.51 In relation to the impact of increased monitoring on Footasylum, the Parties have stated that: [REDACTED]. The Parties stated that [REDACTED].<sup>78</sup> The Parties also stated that in 2021, [REDACTED]. Footasylum considers that [REDACTED].<sup>79</sup>

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<sup>68</sup> [REDACTED].

<sup>69</sup> [REDACTED].

<sup>70</sup> [REDACTED].

<sup>71</sup> [REDACTED].

<sup>72</sup> [REDACTED].

<sup>73</sup> JD Sports Main Party Hearing 8 July 2021

<sup>74</sup> [REDACTED].

<sup>75</sup> [REDACTED].

<sup>76</sup> [REDACTED].

<sup>77</sup> [REDACTED].

<sup>78</sup> [REDACTED].

<sup>79</sup> [REDACTED].

6.52 In addition, the Parties have stated that [REDACTED]. The Parties have stated that [REDACTED].<sup>80</sup>

### *Submissions from suppliers in the Remittal*

6.53 We also requested updated evidence from the key suppliers on the extent to which they monitor retailers' compliance with their selective distribution policies.

6.54 Nike stated that it has not changed the way it monitors its retail partners since the start of the COVID-19 pandemic,<sup>81</sup> with "no systematic change in either (i) the information requested from retail partners during the last 18 months to confirm compliance with its distribution policies; or (ii) in the consequences of non-compliance with these policies".<sup>82</sup> Nike submitted that the individuals responsible for the retailer relationships do not recall any instances since December 2019 of Nike restricting product access to a retailer active in the UK – or considering doing so – due to their store or website having degraded in terms of quality or service. Nike added that there may have been (relative) degradation in terms of quality, but that any such issues are generally addressed directly and immediately during site visits.<sup>83</sup>

6.55 Nike [REDACTED].<sup>84</sup> [REDACTED].

6.56 adidas stated that it had [REDACTED]. It stated that for online offerings [REDACTED]. Since 2020 adidas stated that [REDACTED].<sup>85</sup> adidas submitted that since December 2019 it has [REDACTED].<sup>86</sup>

6.57 We welcome any further evidence from the Parties or third parties on how monitoring and benchmarking of retailers by suppliers limits the extent to which retailers can deteriorate their PQRS offerings.

### **Our assessment of how retail competition operates**

6.58 We have not received any evidence in the Remittal to suggest there are aspects of PQRS on which the Parties and their rivals no longer compete. We consider that the analysis set out in the CMA's Phase 2 Final Report on aspects of PQRS on which competition takes place is still relevant and that this together with the further evidence we have collected shows that the

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<sup>80</sup> [REDACTED].

<sup>81</sup> [REDACTED].

<sup>82</sup> [REDACTED].

<sup>83</sup> [REDACTED].

<sup>84</sup> [REDACTED].

<sup>85</sup> [REDACTED].

<sup>86</sup> [REDACTED].

Parties compete head-to-head, as well as with other competitors, on various different aspects of PQRS in a bid to attract consumers and generate sales.

- 6.59 We have also considered afresh the role of suppliers in constraining the ability and/or incentive of retailers to worsen aspects of PQRS. We have done this by considering the importance of the supply of key products, the suppliers' use of product allocation categories, and the role of suppliers in monitoring some aspects of retail PQRS and in setting retail KPIs.
- 6.60 In line with the CMA's Phase 2 Final Report we consider that the evidence indicates that there are parameters of competition that suppliers do influence and, in some instances, actively monitor. We consider that there is some evidence from the Parties that there has been some increase in the level of monitoring from suppliers since the time of the CMA's Phase 2 Final Report. For example, we have seen evidence that [REDACTED]. This is an example of [REDACTED].
- 6.61 We have heard from Footasylum that it has [REDACTED].
- 6.62 The main suppliers supply only those retailers which meet certain specified criteria (eg financial and quality requirements (paragraph 6.35)). Suppliers set retailer KPIs in their supply agreements (eg paragraph 6.48). Nike and adidas are able to monitor some aspects of these financial and quality requirements via [REDACTED] (paragraph 6.37). Footasylum told us during the Remittal that [REDACTED] (paragraph 6.51).
- 6.63 The increase in this kind of monitoring (or at least the perception of an increase since we note that Nike has stated that it has not recently changed its overall approach to monitoring, see paragraph 6.54 ) [REDACTED], may reduce the incentive for retailers to deteriorate their offerings on some aspects of PQRS.
- 6.64 We have seen little evidence of suppliers 'punishing', retaliating or restricting product allocations to retailers who have missed their targets set by suppliers. We note that the lack of availability of this evidence may in part be due to the fact that the threat of supplier retaliation is itself sufficient to constrain retailer behaviour on the relevant parameters or that there are other ways to address problems. As Nike put it to us, 'issues are generally addressed directly and immediately during site visits' (paragraph 6.54).
- 6.65 Overall, we consider that suppliers do seek to influence retailers' offerings and, in practical terms, in some instances set retailer outcomes or standards on some parameters of competition. The parameters that we consider suppliers have the most influence over are the range and volume of products that a retailer receives within a supplier's brand, broad levels of quality regarding the consumer's shopping experience (and the process of purchase) and the promotion and marketing of the supplier's products.

- 6.66 However, we also consider that there are parameters of retail competition that suppliers seek to influence but they cannot determine. For example, selling products at RRP – set by the supplier, not the retailer – is commonplace. But we have also found that retailers compete on a range of prices including discounts, delivery charges and product prices during sales.
- 6.67 The evidence shows that some retailers are concerned about how a deterioration in some aspects of PQRS may impact their relationship with their key suppliers, particularly in the context of constrained allocations. But there are other aspects of PQRS that they can flex without harming their relationship with suppliers.
- 6.68 We have further found that retailers compete on a range of parameters that suppliers do not seek to influence directly (or may find it difficult to monitor) or that retailers flex their PQRS offers to a level exceeding the suppliers' requirements (eg paragraphs 6.7 to 6.13, 6.19 to 6.23, 6.44). Examples include:
- (a) store openings and closures;
  - (b) the size and location of stores;
  - (c) staffing levels;
  - (d) the range of other brands stocked by retailers (and the product range within those brands);
  - (e) the range, quality, style and pricing of own brand products;
  - (f) in-store kiosks;
  - (g) service levels of online shopping such as speed of delivery, free delivery spend thresholds, returns policies, ease of use and functionalities of websites and apps, payment options, packaging options and gift card options; and
  - (h) product retrieval systems.
- 6.69 We consider that these parameters in paragraph 6.68 are significant. They are important to consumers and can be (and are) varied and improved according to the strength of competition that retailers face. Therefore, we consider that there are important parameters of competition that might be deteriorated as a result of an SLC following a merger and which suppliers may have little (if any) incentive or ability to influence. As a consequence, we consider that suppliers may have little incentive to respond to some

deteriorations of PQRS by a retailer (eg reduction in student discounts or loyalty schemes).

## **Provisional conclusion on how retail competition operates**

- 6.70 We have found that retailers compete on a wide range of parameters across a number of different aspects of PQRS.
- 6.71 There are parameters of competition that suppliers do influence and, in some instances, actively monitor. We consider that the targets and expectations that the main suppliers set for retailers, and their monitoring and auditing of retailer performance against those, has increased since the CMA's Phase 2 Final Report, although we note that not all suppliers agree.
- 6.72 The parameters that we consider suppliers have the most influence over are the range and volume of products that a retailer receives within a supplier's brand, broad levels of quality regarding the consumer's shopping experience and the promotion and marketing of the supplier's products. These are significant parameters and therefore the suppliers' effect on retail competition is material. Notwithstanding this, we consider that the suppliers' constraint is not so significant as to sufficiently discipline the Merged Entity's ability and/or incentive to deteriorate its offering post-Merger. For example, despite the prevalence of RRP, we have found that retailers do compete on price.
- 6.73 In addition, we have found that there are significant parameters of competition that are important to consumers that suppliers do not influence or determine.
- 6.74 For example, retailers compete across a range of pricing aspects such as discounting and, for online shopping customers, free delivery thresholds and delivery charges. Footasylum has a considerable range of own brand apparel on which it competes across price and non-price attributes.
- 6.75 Retailers can also compete on a broad range of non-price parameters, some of which are listed in paragraph 6.68.
- 6.76 The evidence we have received in the Remittal inquiry indicates the following aspects of our Phase 2 assessment remain relevant: suppliers do not seek to monitor all aspects of retailers' PQRS offerings; 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; and suppliers may monitor retailers infrequently such that there are periods of time during which a change in a retailer's standards may occur unobserved.



## 7. Evidence relevant to footwear and apparel

### Introduction

- 7.1 This chapter sets out the evidence relevant to both the retail supply of sports-inspired casual footwear and the retail supply of sports-inspired casual apparel markets. That is, relevant evidence that cannot be separated by footwear and apparel or is not appropriate to separate.
- 7.2 We have considered the competitive effects of the Merger by considering the evidence from Periods 1 and 2 on current competition between the Parties and their rivals. We have also considered evidence from Period 3 on future developments and whether in light of those developments conditions of current competition are likely to provide a good indication of competition in the near future. As such we first set out the evidence on current competition between the Parties. The evidence relevant to this is:
- (a) the main changes in retail offerings of the Parties and their rivals since the CMA's Phase 2 Final Report;
  - (b) the retail performance of the main suppliers via their DTC channels;
  - (c) changes in suppliers' product allocation strategies;
  - (d) the Parties' internal documents;
  - (e) views of third parties.
- 7.3 We follow this discussion by setting out the evidence on how that competition between the Parties might change in the foreseeable future. In particular, we discuss:
- (a) the evidence regarding the impact of COVID-19 and the future of retail competition;
  - (b) the evidence on future growth of suppliers' DTC sales; and
  - (c) future changes in suppliers' product allocation strategies.

## Evidence of current competition

### *Introduction*

- 7.4 This section sets out the evidence from Periods 1 and 2 (paragraphs 4.33(a) and 4.33(b)) which is relevant to both footwear and apparel on the extent to which the Parties currently compete.

### *Retailers' offerings*

- 7.5 In this section we assess the Parties' and third parties' respective retail offerings to judge similarities and differences of these across retailers. Given the differentiated nature of retailing sports-inspired casual footwear and apparel, we expect firms to be closer competitors where their offerings are similar on the most important parameters of competition.
- 7.6 The Parties submitted that traditional retailers with the capability to invest significantly in their digital and physical offerings (e.g. Foot Locker and Next) have [REDACTED].<sup>87</sup>
- 7.7 It is the Parties' view that the culmination of these changes is that [REDACTED].<sup>88</sup>
- 7.8 For each of the Parties and their relevant competitors in turn, we first summarise findings on their retail offering from the CMA's Phase 2 Final Report, and where retailers told us during the Remittal that there have been significant changes since then, we summarise these. This will help ascertain whether there has been a significant change in the competitive positioning of the Parties and their competitors since the previous inquiry.
- 7.9 In the following section we cover various aspects of the retail offering, including but not limited to areas such as the quality of the website and digital channel, the store environment, marketing and advertising, pricing, discounts, and offers, as well as the products they sell. Note that we do not present all of the relevant evidence on retailers' offerings here, such as product or brand overlaps, as these are discussed in Chapters 8 and 9.

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<sup>87</sup> [REDACTED].

<sup>88</sup> [REDACTED].

## *The CMA's Phase 2 Final Report*

7.10 In the CMA's Phase 2 Final Report the CMA found the following on the Parties' retail offerings in the sports-inspired casual footwear and apparel markets:<sup>89</sup>

- Overall, the Parties have a similar retail offering, particularly in footwear.
- There is a high degree of geographic overlap of the Parties' physical stores.
- The Parties both have an in-store and online offering. Both of their online offerings are important channels for their respective businesses.
- Both Parties target a similar demographic, 16-24 year old males, although the focus on males is more pronounced for Footasylum.
- Both stock a similar range of branded footwear products, with a large proportion of this being Nike, and to a lesser extent, adidas. In apparel, relative to footwear, their sales are spread over a wider set of brands, including the Parties' own-brands, which are particularly important for Footasylum.

## *The Parties*

- *JD Sports*

7.11 JD Sports submitted in the Remittal that it had [REDACTED].<sup>90</sup>

7.12 JD Sports has invested around £19 million in software development during the last financial year [REDACTED].<sup>91</sup> [REDACTED]:<sup>92</sup>

(a) [REDACTED];

(b) [REDACTED];

(c) [REDACTED].

7.13 JD Sports also said it [REDACTED].<sup>93</sup> [REDACTED].

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<sup>89</sup> See CMA (2020), [Phase 2 Final Report](#), paragraphs 8.133 to 8.164 for further detail.

<sup>90</sup> [REDACTED].

<sup>91</sup> [REDACTED].

<sup>92</sup> [REDACTED].

<sup>93</sup> [REDACTED].

7.14 JD Sports submitted in the Remittal that [REDACTED].<sup>94</sup>

- *Footasylum*

7.15 Footasylum submitted in the Remittal that there have been [REDACTED].<sup>95</sup>

7.16 Footasylum submitted that it has made some material changes to its website and app since October 2019:<sup>96</sup>

- (a) New footasylum.com homepage;
- (b) New “Tracksuit Builder” function to its website in February 2020, allowing customers to easily locate and purchase the other items that are shown with the product they are viewing;
- (c) New algorithmic product recommendation service;
- (d) Free UK returns;
- (e) New ‘buy now, pay later’ options;
- (f) Personalised homepages for customers in Liverpool and Ireland;
- (g) Order tracking;
- (h) An unlimited free premium delivery subscription service for an annual fee of £9.99;
- (i) Reduced international delivery options due to Brexit impacts; and
- (j) New Outlet category to its main website where customers can browse some items with large reductions of up to 70% off.

7.17 Footasylum submitted in the Remittal that there have been [REDACTED] are made since October 2019.<sup>97</sup>

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<sup>94</sup> [REDACTED]

<sup>95</sup> Note that in its Oral Rep sessions, Footasylum also mentioned it had invested in elevating some key city-centre stores, including [REDACTED].

<sup>96</sup> [REDACTED]

<sup>97</sup> [REDACTED]

## *Suppliers' DTC offerings*

- *Nike*

7.18 Nike sells its products directly to consumers predominately through its digital channels but it also has physical stores, including flagship stores, but the majority are forms of factory or clearance stores. The geographic overlap of these stores with the Parties is low. Nike does not sell products of other brands alongside its own products.<sup>98</sup>

7.19 Nike submitted in the Remittal that Nike Direct's sales have grown since the previous inquiry. It has told us that the recent improvements it has sought to make include:<sup>99</sup>

- (a) Faster delivery to customers;
- (b) Improved size and fit online tools;
- (c) Creating apparel purchasing journeys and assets;
- (d) Additional payment and delivery options;
- (e) Targeted communications and member benefits;
- (f) Improved cross-sell and outfitting tools;
- (g) Increased repeat purchase;
- (h) Driving daily engagement in Nike's apps with more personalised content.

Converse, which is owned by Nike, said that its online business has continued to perform strongly, as consumers move (albeit through necessity) towards online and digital shopping experiences;<sup>100</sup>

- *adidas*

7.20 adidas, like Nike, does not sell products of other brands alongside its own products. It submitted in the Remittal that it plans to continue to invest into its e-com and retail infrastructures, [REDACTED].<sup>101</sup>

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<sup>98</sup> CMA (2020), [Phase 2 Final Report](#), paragraph 8.159

<sup>99</sup> [REDACTED]

<sup>100</sup> [REDACTED].

<sup>101</sup> [REDACTED].

- *Other suppliers' DTC channels*

- 7.21 Puma has six stores in the UK and an online presence. In this Remittal, Puma submitted that there has been no significant change in its strategy.<sup>102</sup>
- 7.22 The North Face has 28 stores and an online presence. The North Face submitted that it has not changed its overall strategy on how it will bring its products to market through DTC channels, and only made changes to respond to the COVID-19 pandemic.<sup>103</sup>
- 7.23 [REDACTED] said that its strategy has not changed, and only sells on a limited wholesale basis in the UK.<sup>104</sup>
- 7.24 Asics told us that its strategy has not changed since the CMA's Phase 2 Final Report, however, it has tried to adapt to the situation.<sup>105</sup>
- 7.25 New Balance closed all its DTC stores at the start of the COVID-19 pandemic and has given more focus to its online business to ensure customers could access the brand in all its width.<sup>106, 107</sup>
- 7.26 Vans has not changed its overall DTC strategy, however, due to lockdown restrictions and store closures, focused on driving consumer engagement by introducing multi-channel capabilities and pushing online consumer demand from store inventory.<sup>108</sup>
- 7.27 [REDACTED].<sup>109</sup>

#### *Multi-channel retailers*

- *Foot Locker*

- 7.28 Foot Locker is a large global retailer of sports-inspired casual footwear. It has a comparable store estate to Footasylum in the UK and an online channel. It is predominantly focussed on footwear and has access to some of the higher-tier branded sports-inspired casual footwear products. It has a relatively high

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<sup>102</sup> [REDACTED].

<sup>103</sup> [REDACTED].

<sup>104</sup> [REDACTED].

<sup>105</sup> [REDACTED].

<sup>106</sup> [REDACTED].

<sup>107</sup> Note, New Balance said there have been no major changes in strategy for its wholesale channel since March 2020.

<sup>108</sup> [REDACTED].

<sup>109</sup> [REDACTED].

geographic overlap with both Parties, and targets the same demographic. This suggests it has a similar offering to the Parties.<sup>110</sup>

- 7.29 Foot Locker submitted in the Remittal that its general retail proposition in relation to other retailers has not significantly changed in the UK. It noticed a shift to online sales, and believes it may have lost some market share to UK competitors who have a strong online presence, although it could not substantiate this.<sup>111</sup>

- *Sports Direct (part of Frasers Group)*

- 7.30 Sports Direct is a major retailer in the UK. It has a large number of stores with a high geographic overlap with the Parties and operates online. In the CMA's Phase 2 inquiry it submitted that most of its products may be classified as sporting goods rather than sports-inspired casual footwear and that its current offering could be characterised as more of a value proposition in the lifestyle segment than either of the Parties. It does not target a specific demographic. This indicates that despite its size, there are some important differences between Sports Direct's offering and the Parties.<sup>112</sup>

- 7.31 In the Remittal, Frasers Group submitted that the shift in consumer demand from premium sporting goods to premium lifestyle products as a result of Covid-19 lockdown measures has further strengthened and entrenched the position of the most desirable brands' preferred multi-brand retailers for premium lifestyle products, for example JD Sports, Footasylum, and Foot Locker.<sup>113</sup> Frasers Group submitted that it [REDACTED].

- 7.32 Frasers Group has submitted that Sports Direct's fascia in-store elevation plans [REDACTED].

- *Schuh, Office, and [REDACTED]*

- 7.33 Schuh, Office, and [REDACTED] are all multi-brand retailers with in-store and online channels that focus on footwear, including both sports-inspired casual and more general types of footwear.
- 7.34 Schuh targets the 16-24 year old market. Office targets predominantly female consumers. Schuh did not submit detail on changes to its retail offering. However, it noted that the switch from physical to digital sales could make store occupancy costs more challenging and give an advantage to larger

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<sup>110</sup> CMA (2020), [Phase 2 Final Report](#), paragraph 8.153

<sup>111</sup> [REDACTED].

<sup>112</sup> CMA (2020), [Phase 2 Final Report](#), paragraph 8.154

<sup>113</sup> [REDACTED].

businesses that can secure better rent deals.<sup>114</sup> Schuh has a relatively high geographic overlap with the Parties.

7.35 [X].<sup>115</sup> Office has a relatively high geographic overlap with the Parties.

7.36 [X] targets a wider demographic, females and males aged between 16 and 45 years. [X] has a lower geographic overlap with the Parties.<sup>116</sup> [X] submitted that it has been severely weakened by the COVID-19 pandemic, which caused it to liquidate its bricks and mortar company and start a new company. It continued to trade online and has since re-opened its stores. It has had to discount stock online intended for its offline business, meaning it has increased turnover but at considerably reduced margins. [X] believes it has been weakened by COVID-19 more than JD Sports, because of the acceleration of Nike and adidas DTC and reductions in the range provided to wholesale partners (other than JD Sports) by these brands.<sup>117</sup>

- *Other multi-channel retailers*

7.37 There are a number of other multi-channel retailers<sup>118</sup> who we consider have different offerings from the Parties (see Appendix C for further details).

*Online only retailers*

- *ASOS*

7.38 ASOS submitted that its sales have grown since the COVID-19 pandemic [X].<sup>119, 120</sup>

- *Zalando*

7.39 Zalando submitted that the shift in consumer shopping habits from offline to online has strengthened its business. However, despite this, [X].<sup>121</sup>

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<sup>114</sup> [X].

<sup>115</sup> [X].

<sup>116</sup> CMA (2020), [Phase 2 Final Report](#), paragraph 8.155

<sup>117</sup> [X]. [X].

<sup>118</sup> Deichmann, Decathlon, John Lewis, Clarks and H&M.

<sup>119</sup> ASOS told the CMA during its third party call that it has noticed a strong growth in casualwear as people have been spending more time at home in recent times. ASOS said it had to quickly adapt its marketing and product focus to align with this shift.

<sup>120</sup> [X].

<sup>121</sup> [X].



- *Amazon*

7.40 Amazon submitted that it has remained focussed on offering customers a large selection of products at competitive prices and with convenient delivery.<sup>122</sup> Amazon submitted that it is constantly working to improve customer experience and expand its product offerings, including its selection of footwear and apparel in the UK.<sup>123, 124</sup>

7.41 Appendix C discusses a number of other online only retailers.<sup>125</sup>

### ***Supplier DTC performance***

7.42 The previous section set out the evidence on rivals' retail offerings and the main changes that they have made since the CMA's Phase 2 Final Report. Since one of the main developments that has occurred since then is the increased sales through Nike's and adidas' DTC channels, this section analyses these in greater detail. Although there are some differences between footwear and apparel for supplier DTC channels, including different sales targets and their overall effect on competition in the respective markets, in the main we view DTC channels being relevant to both footwear and apparel. This is because the investments needed to make their DTC channels grow benefit both footwear and apparel. Further, the incentives on whether a supplier should sell via a retailer or sell via its DTC channels is likely to be similar across product types and, in any case, are linked.

7.43 The period since October 2019 has seen an increase in sales (both in absolute terms and in proportional terms) via Nike's and adidas' DTC channels. This is at least in part due to the general move towards online, which has accelerated a pre-existing trend during the period that stores have been closed due to the COVID-19 pandemic. We believe also that Nike's and adidas' supply arrangements with retailers will reflect whether suppliers believe it is more profitable for them to sell via DTC or via retailers. We have heard from several retailers who have said that suppliers do not supply them with the volumes of products since the suppliers prefer to sell those additional volumes through their own DTC channels.

7.44 We have also seen evidence of the growing importance of data in these markets spurred by the digitalisation trend. [X].

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<sup>122</sup> [X].

<sup>123</sup> [X].

<sup>124</sup> [X].

<sup>125</sup> Very, M and M Direct and Farfetch.

7.45 Nike and adidas have also stated their commitment to prioritising DTC, and to increasing the proportion of DTC sales globally (which will be explored in more detail below, from paragraph 7.186 on future competition).

#### *Parties' views*

7.46 The Parties have emphasised the increased [REDACTED]. The Parties have highlighted the recently increased targets from both brands on increasing DTC – i.e. Nike's 60% DTC by 2025 target and adidas's 50% DTC by 2025 target (set out at paragraphs 7.50 and 7.51).<sup>126</sup> These strategies are part of Nike's global move from its 'Consumer Direct Offense' strategy to a 'Consumer Direct Acceleration' strategy<sup>127</sup> and adidas's global move from its 'Creating the New' to its 'Own the Game' Strategy.<sup>128</sup>

7.47 The Parties noted results published by Nike and adidas. Nike increased DTC sales by 6.5 percentage points during the COVID-19 pandemic, growing DTC from 31.5% of global sales prior to the COVID-19 pandemic, to around 38% in Q2/Q3 of the FY to end May 2021. adidas' DTC sales increased by 8 percentage points during the COVID-19 pandemic, growing DTC from 33% of global sales in 2019, to 41% in 2020<sup>129</sup> – estimated as having accelerated global DTC by two to three years.<sup>130</sup>

7.48 The Parties have highlighted the incentives that Nike and adidas have associated with an increase to DTC which include: earning higher gross margins; building direct connections with customers (including through use of data) and improving their understanding of customer behaviour via advanced analytics, both of which reduce a range of costs and make repeat customers more likely.<sup>131</sup> The Parties have also highlighted Strategic DTC investments, for example Nike has invested heavily in its digital offering, spending over US\$1 billion globally on data and analytics capabilities in 2019, including through acquisitions (e.g. Virgin Mega in 2016, Zodiac and Vertex in 2018, Celect in 2019 and Datalogue in 2021) [REDACTED]<sup>132, 133</sup> and adidas's purchase of the Runtastic app in 2015, and plans to invest a further €1 billion globally in "digital transformation" by 2025.<sup>134</sup>

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<sup>126</sup> [REDACTED].

<sup>127</sup> Nike's new 'digitally empowered' phase its strategy, announced June 2020

<sup>128</sup> Adidas's new 'Own the Game' five year Strategy, announced March 2021

<sup>129</sup> [Parties Initial Submission](#), 30 April 2021, paragraph 7a-7b

<sup>130</sup> [Parties Initial Submission](#), 30 April 2021, paragraph 28, with reference to Harm Ohlmeyer, adidas CFO statement 6 August 2020, in adidas Q2FY20 earnings call.

<sup>131</sup> [Parties Initial Submission](#), 30 April 2021, p3-4

<sup>132</sup> [Parties Initial Submission](#), 30 April 2021, paragraph 67

<sup>133</sup> [Parties Initial Submission](#), 30 April 2021, p29

<sup>134</sup> [Parties Initial Submission](#), 30 April 2021, p33

7.49 The Parties have told us that “DTC has structural competitive advantages that wholesale rivals cannot replicate” and that “it is now a given that JD Sports and others in wholesale (that compete with DTC [REDACTED]) increasingly be competitively constrained, as the brands deliver on rapid DTC expansion targets while wholesale stays “flat” in nominal terms (per Nike).”<sup>135</sup> We also explore in more detail the Parties’ submissions on the future strategies of Nike and adidas (paragraphs 7.185 to 7.191).

### *Evidence from suppliers*

7.50 Nike has stated that one of its focuses during the COVID-19 pandemic has been to continue growing its digital DTC offering, as part of a longer-term global strategy. Overall Nike announced a headline target of 60% of its sales to be achieved via its DTC channels in FY25.<sup>136</sup> Nike confirmed that it currently forecasts an increase in the proportion of its total UK footwear sales accounted for by DTC’s sales from [REDACTED] in Nike’s fiscal year 21 to [REDACTED] in Nike’s fiscal year 24. For apparel, the respective current forecast for the proportion of total UK apparel sales accounted for by DTC sales for Nike’s fiscal year 24 is [REDACTED], increasing from [REDACTED] in Nike’s fiscal year 21.<sup>137</sup> Nike does not have a specific strategy for the UK.<sup>138</sup> Nike has highlighted the generally strong digital growth across the market.<sup>139</sup>

7.51 adidas’s Own the Game strategy includes aiming for 50% DTC globally by 2025, from 40% in 2020.<sup>140</sup> However, adidas noted that [REDACTED]<sup>141 142</sup> adidas has also stated [REDACTED].<sup>143</sup>

### **Supplier product allocation strategies**

7.52 As discussed in detail in Chapter 6, the suppliers in the relevant markets play an important role in controlling the allocations of products that retailers receive, and these allocations differ between different types of retailers, and in some cases between different tiers. Chapter 6 discussed the general importance of suppliers’ selective distribution policies on retail competition. This section presents the evidence on how those policies currently affect competition between the Parties and their rivals, particularly in light of recent

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<sup>135</sup> [REDACTED].

<sup>136</sup> Berenberg Consumer Discretionary email bulletin, 25/06/2021

<sup>137</sup> In general Nike has informed us that it is not typically forecasting [REDACTED], however they do have these longer range ‘targets’.

<sup>138</sup> [REDACTED].

<sup>139</sup> [REDACTED].

<sup>140</sup> Adidas aims for DTC to be 50% of sales by 2025 | Retail Dive

<sup>141</sup> [REDACTED].

<sup>142</sup> [REDACTED].

<sup>143</sup> [REDACTED].

changes in supplier strategies, and how the impacts of the COVID-19 pandemic have led to some increasing impacts on retailers and the Parties. A further section, from paragraph 7.193, presents the evidence on what we know about any upcoming changes to those policies so that we can assess whether retail competition is likely to be altered as a result. Suppliers' selective distribution strategies impact on both footwear and apparel. The greatest restrictions are generally on high demand footwear products, including increased restrictions due to supply disruptions during the COVID-19 pandemic. However, there have been supply disruptions which have led to increased restrictions on specific apparel product lines.

### *Parties' views*

- 7.53 The Parties have explained that the changes [REDACTED], and the Parties invite us to consider this as evidence that Footasylum is a [REDACTED] now than it was at the time of the CMA's Phase 2 Final Report. Footasylum stated that it [REDACTED]<sup>144</sup> [REDACTED] (which will be detailed below). Footasylum also said that [REDACTED].<sup>145</sup> Footasylum stated that these changes included impacts on [REDACTED].<sup>146</sup> Footasylum also provided evidence of [REDACTED], and two examples [REDACTED].<sup>147</sup>
- 7.54 Footasylum stated that in some cases where [REDACTED], where any unallocated stock or stock that has become available is sold. However, Footasylum has also stated that [REDACTED]<sup>148</sup> and that product purchased through [REDACTED].<sup>149</sup>
- 7.55 Footasylum did not describe any particular [REDACTED]. However, it did [REDACTED]. Half of its store network [REDACTED] and the remainder [REDACTED]. However, Footasylum has been [REDACTED].<sup>150</sup>
- 7.56 JD Sports stated it [REDACTED] analogous [REDACTED] or comparable [REDACTED] to those experienced by Footasylum,<sup>151</sup> [REDACTED].<sup>152</sup> [REDACTED].<sup>153</sup>
- 7.57 The Parties have also highlighted retailers with close relationships to Nike and adidas, the 'key Strategic Partners', which have seen a significant increase in

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<sup>144</sup> We note that Nike has explained that orders placed on a futures basis are subject to 'confirmation' as a standard part of the order process, and that it is typically the case that such orders are 'not confirmed' rather than 'cancelled'. [REDACTED]

<sup>145</sup> [REDACTED].

<sup>146</sup> [REDACTED].

<sup>147</sup> [REDACTED].

<sup>148</sup> [REDACTED]..

<sup>149</sup> [REDACTED].

<sup>150</sup> [REDACTED].

<sup>151</sup> [REDACTED].

<sup>152</sup> [REDACTED].

<sup>153</sup> [REDACTED].

online sales and are making substantial investments in their digital capabilities.

7.58 [X], Footasylum stated that it [X]<sup>154</sup>

### *Third party retailer views*

7.59 We asked other retailers questions related to supply issues (e.g. delays, cancellations or lower than expected volumes of products) that were specific to the retailer and the supplier, and impacted the retailer directly, rather than impacts (such as COVID-19) which were felt across the market. The retailer responses fell broadly into three categories:

- (a) Giving no information or detailing only impacts which would have impacted the whole market - [X], [X], [X] and [X]
- (b) Detailing impacts which are specific to the suppliers restricting supply, but that the restrictions had not increased compared to the period prior to October 2019 – [X] provided details of restricted access to products from Nike and adidas, but stated that the retail sales value impacts were similar to the period prior to October 2019. [X] stated that there were no supply issues which were specific to the retailer, and there was a stable relationship in relation to sporting goods. However, [X] highlighted [X].
- (c) Increased supply issues due to changes in the approach from suppliers – [X] stated that it has experienced increased supply issues in the past 18 months. [X]. [X] stated that they have been weakened because the brands “value controlling the market in their category, and were already cutting back on their wholesale partners’ range options, and indeed on their wholesale partners.”

### *Evidence from suppliers on product allocation*

#### *Nike*

7.60 We consider the evidence from Nike indicates that there are two key elements to Nike’s approach to allocation:

- (a) First, determining the *range* of products that a retailer has access to (which Nike refers to as the overall *assortment* of core products).

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<sup>154</sup> Footasylum main party hearing.

- (i) Footasylum remains within Nike's [REDACTED] category and consequently [REDACTED].
  - (ii) Under Nike's new MPU internal organisational structure, launched in April 2021, Footasylum sits within Nike's [REDACTED] MPU. Under the MPU structure (i) where in the MPU structure a partner sits will determine [REDACTED]; and (ii) each MPU will be mapped to a [REDACTED]. In other words, Nike has moved from [REDACTED]. Nike has stated that it "expects that this will result in [REDACTED]." <sup>155</sup>
  - (iii) Most [REDACTED] Partners (for example, each of JD Sports, Foot Locker, and the Deichmann Group) [REDACTED] <sup>156</sup> and also have dedicated merchandising teams.
  - (iv) Other retailers are categorised into groups to "match consumer expectations to the specific profile of each retailer". <sup>157</sup> Footasylum sits within the [REDACTED] MPU <sup>158</sup>, which Nike states captures [REDACTED]. <sup>159</sup>
- (b) Second, allocating *volumes* for a limited range of products for which there is high demand and supply constraints in a particular assortment and/or selling season
- (i) Nike has stated that there is a 'small number' of high demand products where restrictions are placed on the volumes that a retailer can purchase. These products change, depending on for example supply and demand, including unexpected supply disruptions. <sup>160</sup>
  - (ii) [REDACTED] <sup>161</sup>

7.61 The Parties have provided evidence of [REDACTED] which Footasylum has experienced, including impacting some of their top selling lines, [REDACTED]. Nike have provided details on these particular lines of the [REDACTED], relating them to the COVID-19 pandemic or other disruptions, as well as changes in demand patterns. [REDACTED].

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<sup>155</sup> [REDACTED]. Nike has noted that [REDACTED].

<sup>156</sup> Note that Zalando is also [REDACTED], due to its importance in the EMEA market, [REDACTED].

<sup>157</sup> [REDACTED].

<sup>158</sup> We do not have information on all the parties in the [REDACTED] MPU, but it also includes Office

<sup>159</sup> [REDACTED].

<sup>160</sup> [REDACTED].

<sup>161</sup> [REDACTED].

7.62 As regards how these restrictions for Footasylum compare to those experienced by other retailers, Nike stated that Footasylum's [REDACTED] in the last year, [REDACTED].<sup>162</sup> Nike stated that [REDACTED].

7.63 Nike has provided data for its supply of certain key footwear lines for four retailers. [REDACTED] which are [REDACTED] compared to overall reductions for [REDACTED].<sup>163</sup>

7.64 Evidence from Nike also indicates that overall it currently views its supply relationship with Footasylum [REDACTED]:

(a) It has stated that: '[REDACTED] has [REDACTED].'<sup>164</sup>

(b) [REDACTED].<sup>165</sup>

(c) [REDACTED].<sup>166</sup>

#### *adidas*

7.65 The Parties have not expressed significant concerns about recent changes in adidas' product allocations made available to Footasylum.

7.66 Adidas' segmentation broadly contains [REDACTED]<sup>167</sup> [REDACTED]<sup>168</sup> [REDACTED]<sup>169</sup>.

7.67 In addition to the above, adidas has informed us that it plans to introduce a new concept of Alliance Partners: "key wholesale retailers with the existing and/or potential size and scale to distribute products across multiple territories and marketplaces". [REDACTED].<sup>170</sup> Adidas has clarified that [REDACTED].<sup>171</sup>

7.68 In addition, from [REDACTED].<sup>172</sup>

#### *Data from Footasylum on product allocation*

7.69 Footasylum have provided quarterly data [REDACTED] to the latest available data and including upcoming forecasts.<sup>173</sup> This data captures Footasylum's initial expected allocations as well as the volumes of products ultimately received from [REDACTED]. This data shows that since early 2020, Footasylum has experienced

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<sup>162</sup> [REDACTED].

<sup>163</sup> [REDACTED].

<sup>164</sup> [REDACTED].

<sup>165</sup> [REDACTED].

<sup>166</sup> [REDACTED].

<sup>167</sup> [REDACTED].

<sup>168</sup> [REDACTED].

<sup>169</sup> [REDACTED].

<sup>170</sup> [REDACTED].

<sup>171</sup> [REDACTED].

<sup>172</sup> [REDACTED].

<sup>173</sup> [REDACTED].

[REDACTED] in the number of footwear products that it has received [REDACTED].<sup>174</sup> These [REDACTED] (paragraph 7.53). These [REDACTED] (paragraph 7.60). Please see further details and data below (from paragraph 7.217).

- 7.70 For apparel, there are [REDACTED] few [REDACTED].<sup>175</sup> We note that Footasylum has stated that during the COVID-19 pandemic it has [REDACTED],<sup>176</sup> but has not provided data evidencing this position.

### ***The Parties' internal documents***

- 7.71 We have analysed a large number of the Parties' internal documents, which in our view, are informative evidence of how the Parties view the market and their competitors in the ordinary course of business and, in particular, during the COVID-19 pandemic.

#### ***Our treatment of internal document evidence***

- 7.72 In the Remittal, and where we are able to, we have been cognisant of the purpose of each document, the timeframe over which it was produced and/or relates to, and its audience. We have also considered its context, including whether it is part of a series of documents or standalone. For example, the fact that a competitor's name appears in a document is less informative than the context in which it appears including the detail and nature of the commentary regarding that competitor. It may be appropriate to consider references to certain competitors less probative where the analysis of these competitors is more cursory or substantively different to others in the document.
- 7.73 We have generally placed greater weight on documents prepared to inform decision making by senior management as these are likely to be most reflective of the Parties' strategic thinking. However, that is not to say that we have disregarded all other documents. We have generally placed some weight on these documents, especially where these documents are consistent with other evidence that we have.
- 7.74 We have not relied on the Parties' internal documents as standalone confirmation of any one of our findings or even individual pieces of analysis. Instead, we have looked at all the evidence in the round and used the internal

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<sup>174</sup> We requested data on the latest available planned allocations. In the case of future periods this was important to ensure that the latest position is reflected, as discussed further below. However, in relation to past periods we do not have data on whether there may have been different iterations of the allocations plans, which [REDACTED].

<sup>175</sup> [REDACTED].

<sup>176</sup> [REDACTED].



documents to corroborate or to contradict other evidence or to otherwise inform us of the context in which other evidence should be interpreted.

- 7.75 Although we consider this approach to be important in its own right, we consider it to be especially important in the context of the timing of the Merger. JD Sports made a public offer for Footasylum in March 2019 and the Merger completed in April 2019. The CMA generally adopts a cautious approach in interpreting internal documents prepared after a merger is contemplated and subjected to an ongoing merger investigation. However, we recognise that not all internal documents submitted since the Merger will have been prepared with the CMA's review in mind, and the extent to which the CMA review was a consideration may vary significantly between the documents. For this reason, we have not disregarded any of the internal documents on the basis that they were prepared after the Merger, but have taken into account the timing and the context in which they were prepared.

#### *Internal document evidence*

- 7.76 Our assessment of the Parties' internal documents is in Appendix H.
- 7.77 From that assessment, we consider that it is clear from the Parties' internal documents that they [X] monitor each other as competitors, although the documents suggest that Footasylum monitors JD Sports [X] than JD Sports monitors Footasylum. This has been consistently borne out in the Parties' internal documents assessed for the CMA's Phase 2 Final Report and the Remittal.
- 7.78 In the case of JD Sports, Footasylum is one of several competitors that is monitored closely by JD Sports. Other competitors monitored closely include [X] are often monitored alongside a range of other competitors. Although Footasylum appears [X] in JD Sports' internal documents, it is not always included in lists of competitors. In addition, a number of recent internal documents, including senior management presentations, discuss [X].
- 7.79 The findings from our document review in the Remittal are broadly consistent in this regard to the documentary evidence in the CMA's Phase 2 Final Report although the documents in the Remittal contain a broader set of comparator retailers and discuss more frequently the increasing threat of the brands' DTC growth and other COVID-19 driven factors.
- 7.80 In the case of Footasylum, JD Sports is its most closely monitored competitor. Other competitors, such as [X] are also monitored but with less frequency and consistency than JD Sports. This is broadly consistent across the document review in the CMA's Phase 2 Final Report and the Remittal.

7.81 Finally, both Parties' internal documents generally support the Parties' arguments that since the COVID-19 pandemic there has been a growth in digital sales including from the main brands' DTC channels which have become an increasingly stronger competitive threat.

### ***Third party views***

#### *Third party retailers' views on closeness*

7.82 In this section we cover retailers' views on the closeness of competition between the parties and other competitors in the markets for footwear and apparel.

7.83 We asked third party retailers to list up to 10 retailers which they consider to be the closest competitors to each of JD Sports and Footasylum, for the footwear and apparel markets, respectively, and indicate the listed retailers' closeness to each of the Parties out of 10 (where 10 means very close competitor). There are limitations to this analysis as we are asking competitors to tell us about the constraints on the Parties. Closer competitors to the Parties should have a more informed view on this question. In addition, we have received significantly fewer responses than in the previous inquiry.<sup>177</sup>

7.84 Generally, where third party retailers included one Party in the other Party's list, the Parties were scored as close competitors to each other in both footwear and apparel. Other retailers that were also often scored as close competitors to the Parties were Foot Locker, Nike DTC, adidas DTC and Sports Direct.

#### *Multi-channel retailers*

- *Foot Locker*

7.85 Foot Locker said that, in general, it did not consider each of JD Sports and Footasylum to have become stronger or weaker competitors in the UK market since March 2020. When scoring the Parties and their competitors on closeness of competition out of 10, it considered the Parties' to be each others' closest competitors (scoring both Parties a score of 9 in respect of closeness to each other) and gave itself a score of 7 against both Parties. It

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<sup>177</sup> In the CMA's Phase 2 Final Report it received a total of 21 responses with quantitative scores over Phase 1 and 2. In this remittal so far, we have received 10 responses which included quantitative scores on closeness. Further, as reflected in this section, the format of the retailers' responses varied (for example, some respondents did not provide scores).

also gave Size? (a JD Sports brand) and Sports Direct a score of 7 against both Parties.<sup>178</sup>

- *Frasers Group*

7.86 Frasers Group does not consider itself a competitor of JD Sports. It said that (in order) Footasylum, Foot Locker, Nike DTC and adidas DTC have been the only meaningful competitors in terms of strength of product offering to JD Sports. With respect to Footasylum, Frasers Group listed (in order) JD Sports, Foot Locker, Nike DTC, and adidas DTC as its closest competitors.<sup>179</sup>

- *Schuh*

7.87 In footwear, Schuh views JD Sports' closest competitors to be Footasylum and Foot Locker, giving them both scores of [X]. It also gave Nike DTC and adidas DTC [X] scores of [X] for JD Sports. For Footasylum in the footwear market, Schuh listed Foot Locker as its closest competitor with a score of [X], and also gave Size? a [X] score of [X].[X]. The next closest competitor for both Parties in footwear was Sports Direct, for which Schuh gave a score of [X] to both Parties.<sup>180</sup>

7.88 In apparel, Schuh views adidas and Nike DTC to be JD Sports' closest competitors, giving them both scores of [X], whereas for Footasylum it views Foot Locker to be the closest competitor, with a score of [X]. The next closest competitor for both Parties in apparel was Sports Direct, for which Schuh gave a score of [X] to both Parties.<sup>181</sup>

- [X]

7.89 [X].<sup>182</sup>,

- [X]

7.90 [X].<sup>183</sup>

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<sup>178</sup> [X].

<sup>179</sup> [X].

<sup>180</sup> [X].

<sup>181</sup> [X].

<sup>182</sup> [X].

<sup>183</sup> [X].

- *Clarks*

7.91 In footwear, [REDACTED].

- *H&M*

7.92 H&M regards [REDACTED].<sup>184</sup>

- [REDACTED]

7.93 [REDACTED] said it views Foot Locker and Offspring to be the closest competitor to both Parties in the footwear market, giving both a score of 5 against both Parties.<sup>185</sup>

- *Deichmann*

7.94 Deichmann views Foot Locker to be the closest competitor to both Parties.<sup>186</sup>

#### *Online-only retailers*

- *Very*

7.95 [REDACTED].<sup>187</sup>

- *ASOS*

7.96 [REDACTED].<sup>188</sup>

- *Zalando*

7.97 In footwear, Zalando views the Parties as [REDACTED] competitors to each other, giving a score of [REDACTED] to Footasylum for its closeness to JD Sports and a score of [REDACTED] to JD Sports for its closeness to Footasylum. Zalando also views Foot Locker as a [REDACTED] competitor, giving it a score of [REDACTED] for both Parties. In apparel, Zalando views the Parties as [REDACTED] competitors, giving a score of [REDACTED] to Footasylum for its closeness to JD Sports and a score of [REDACTED] to JD Sports for its closeness to Footasylum.<sup>189</sup>

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<sup>184</sup> [REDACTED].

<sup>185</sup> [REDACTED].

<sup>186</sup> [REDACTED].

<sup>187</sup> [REDACTED].

<sup>188</sup> [REDACTED].

<sup>189</sup> [REDACTED].

## *Investment banking analysts' and market research reports*

- 7.98 We have reviewed third party analyst and other market reports submitted by the Parties in order to assess to what extent they provide evidence of recent market developments which may be relevant for our analysis. In general, the documents are focused on larger, listed companies (eg JD Sports, Frasers Group, Nike, adidas) and there is limited discussion of smaller non-listed companies (eg Footasylum, Office).
- 7.99 We would note that many of the documents discuss a wider market than the market definition we have adopted (in terms of both geography and product) and are therefore of limited direct relevance for our SLC analysis. However, we have taken these reports into account as evidence of themes and market developments that are relevant to our analysis more broadly. The main points from our review are listed below.
- (a) The analyst reports support the view that the shift to the online channel has been accelerated by COVID-19.
  - (b) Several analyst reports discuss how the shift to online has benefited certain online only retailers.
  - (c) A number of reports comment on the importance of retailers having a strong omnichannel offering, particularly following the pandemic.
  - (d) The analyst reports are generally positive about JD Sports' online performance, and its online offering is compared favourably to its peers several times.
  - (e) Several analyst reports consider the online performance of other multichannel retailers, such as Sports Direct. The reports are more mixed about the performance of Sports Direct.
  - (f) Generally, the analyst reports do not discuss specific smaller and non-listed multichannel retailers (eg Footasylum, Office etc.). However, a Redburn report from November 2020<sup>190</sup> acknowledges the difficulty for smaller brands to commit to "major, capital-intensive projects", and the McKinsey report on sporting goods comments that "small-to-medium sized players with limited funds are probably in danger, given the requirement for investment in areas such as omnichannel and store upgrades".

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<sup>190</sup> [REDACTED].

- (g) The expansion of the brands' DTC strategies and their acceleration as a result of COVID-19 are well-supported by the third-party analyst reports.
- (h) Several reports note that, although the brands' DTC channel is growing, this will not remove the need for brands to have retail partners.<sup>191</sup>
- (i) Several reports acknowledge that the growth of the brands' DTC offerings presents a risk to retailers, although several reports note that JD Sports will likely continue to grow within the framework of a concentration of the fragmented wholesale channel as a result of DTC growth.
- (j) The analyst reports generally support the view that the brands' DTC strategies carry the risk of disintermediation but note that a select few differentiated/Strategic Partners ([§]) are unlikely to lose out from disintermediation, but smaller/undifferentiated retailers will suffer (although Footasylum is not specifically mentioned in this context).

## Evidence on future competition

### *Introduction*

- 7.100 We have considered future developments in the relevant markets and whether in light of those developments conditions of current competition are likely to provide a good indication of competition in the near future. This section therefore presents the evidence on future developments.
- 7.101 We start by presenting evidence on the impact of the COVID-19 pandemic. This section contains evidence on general consumer behaviour and, in particular, in-store shopping following the various COVID-19 related lockdowns. It also presents evidence on retailers' views on the impact of COVID-19 and their plans and future strategies.
- 7.102 Given their increasing importance to competition, we then look at the future plans of suppliers for their DTC channels.
- 7.103 Finally, we set out the evidence on any upcoming changes to the main suppliers' product allocation arrangements.

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<sup>191</sup> [§].

## ***The impact of COVID-19 and implications for future competition***

- 7.104 The COVID-19 pandemic had a significant impact on retail, not least through various lockdowns that resulted in the closure of non-essential shops (which include footwear and clothing stores).
- 7.105 Given the impact of the COVID-19 pandemic generally and its effects on UK retail more specifically, we have also sought to understand how this impacted both consumers and retailers in sports-inspired casual footwear and apparel. Given also both JD Sports and Footasylum had significant store estates we gathered evidence on the impact of COVID-19 on the relative importance of in-store and online sales to understand how important in-store sales were likely to be in the foreseeable future.
- 7.106 This section considers evidence on consumer behaviour in relation to shopping during the pandemic and how this might change as the pandemic eases; an analysis of the impact of COVID-19 on the revenues of the Parties, other retailers and suppliers; and third parties' views on the impact of COVID-19 and their plans in relation to their store estate, and finally the future strategies of retailers.

### ***Parties' views***

- 7.107 The Parties submitted that COVID-19 has contributed to a significant increase in the Parties' and their competitors' digital sales.<sup>192</sup> In particular they note that Nike has told investors that the "shift to digital is here to stay" and that adidas's CEO recently explained that COVID-19 has led to a "2 to 3 year step forward" in digital sales.<sup>193</sup>
- 7.108 The Parties submitted that the acceleration of digital shopping will favour brand DTC and digitally native retailers, translating into increased competitive constraints on the merged firm (and other wholesale channel retailers) due to increased price transparency, ease of consumer comparison and switching, and growth in DTC.<sup>194</sup>
- 7.109 In addition to the acceleration of DTC, the Parties told us that the COVID-19 pandemic has strengthened and improved the relative position of online only retailers (e.g. [X]).<sup>195</sup>

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<sup>192</sup> [X].

<sup>193</sup> [X].

<sup>194</sup> [X].

<sup>195</sup> [X]..

- 7.110 The Parties submitted that their recent trading data shows a shift to digital shopping. In particular:
- 7.111 From week ending 26<sup>th</sup> June to 10<sup>th</sup> July 2021, JD Sports' online sales [REDACTED] compared to the same period in 2019. Conversely, JD Sports' footfall during this period is [REDACTED] in 2019, while in-store sales were [REDACTED].<sup>196</sup>
- 7.112 [REDACTED] between 20<sup>th</sup> June and 10<sup>th</sup> July 2021, compared with an average [REDACTED] in the same three weeks in 2019. While [REDACTED] than the same period in 2019.<sup>197</sup>
- 7.113 JD Sports also submitted that its expectation is that in-store sales will [REDACTED] as Covid 19 restrictions are relaxed and events and travel attractions divert discretionary spending.<sup>198</sup>
- 7.114 In addition, the Parties submitted that retailer exits from the high street make in-store retail less appealing generally.<sup>199</sup>
- 7.115 Footasylum submitted that during the [REDACTED]. Therefore, even if some customers return to stores, [REDACTED].<sup>200</sup>

#### *Survey evidence on consumer behaviour*

- 7.116 This section describes evidence on how the pandemic has affected consumer shopping behaviour and retailer offerings.
- 7.117 As part of the evidence gathering for the Remittal we commissioned a survey of the Parties' online customers (the Remittal Online Survey) which is more fully described at paragraph 8.13 (Chapter 8, Survey Evidence). In this section we use results from the Remittal Online Survey and from two Mintel reports and an ONS survey to look at the impact of the pandemic on customer behaviour in relation to non-essential retail and in particular attitudes towards shopping for footwear and apparel. The ONS and Mintel research is described in Appendix E.
- 7.118 The Parties submitted that our survey results are not based on the products that are part of the market definition. The Parties submitted that questions in the survey related to 'footwear' and 'clothing' rather than sports-inspired footwear or apparel, and therefore the results cover categories of products with fundamentally different characteristics than sports-inspired products<sup>201</sup>

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<sup>196</sup> [REDACTED].

<sup>197</sup> [REDACTED].

<sup>198</sup> [REDACTED].

<sup>199</sup> [REDACTED].

<sup>200</sup> [REDACTED].

<sup>201</sup> [REDACTED].



and that the CMA's treatment of the survey evidence is not consistent with the treatment of analyst reports which cover a wider market (which the CMA said were therefore of limited direct relevance), and therefore we should not put full weight on the Remittal Online Survey to draw inferences about consumer shopping behaviour pre and post-pandemic.

7.119 We decided that the questions about the balance of spending in-store and online would need to be sufficiently wide for there to be enough potential purchases for a respondent to make a sensible response. Clothing and/or footwear seem appropriate because they share many of the same features with the more narrowly defined reference market. This is one piece of evidence that corroborates findings in other evidence, such as the ONS and Mintel research, third party views and analyst reports, and as such we believe it has probative value.

7.120 Table 1 is based on our Remittal Online Survey. It shows the proportion of customers who use different retail channels pre- and post-pandemic.

**Table 1: Proportion of customers using different retail channels, pre- and post-pandemic**

	JD Sports customers				Footasylum customers				%
	Footwear		Apparel		Footwear		Apparel		
	Pre-Covid	Post-Covid	Pre-Covid	Post-Covid	Pre-Covid	Post-Covid	Pre-Covid	Post-Covid	
Online	46	44	46	45	50	49	45		43
Equal	26	38	27	36	23	34	27		43
In-store	29	18	27	19	28	18	27		14

Source: CMA analysis of the CMA Remittal Survey of Online Customers.

Questions asked were as follows.

Q05. Now we would like you to think back to before the COVID-19 pandemic and think about your spending on [...] at that time.

Q05B. Once the COVID-19 pandemic is over, what do you think your preference for shopping for [...] will be?

For both questions, respondents were given the following options and were asked only to tick one of them. "Don't Knows" are excluded.

I bought/think I will buy all/nearly all online

I bought/think I will buy most online

I bought/think I will buy about the same online and in physical stores

I bought/think I will buy most in physical stores

I bought/think I will buy all/nearly all in physical stores

Don't know/Not sure

7.121 Table 1 shows that after the pandemic the proportion of customers using online shopping for all/most of their purchases is broadly the same as before the pandemic (between 40 and 50%). This is not the case for the proportion of customers using stores for all/most of their purchases and for those buying about the same online and in stores: the former falls from about 25 to 30% to about 15 to 20% while the latter rises from about 25% to about 35% or higher. This suggests that while online shopping will become more important, store shopping will still be important. In particular, the greatest increase is likely to be in customers using a mix of online and in-store, rather than purely one or the other.

- 7.122 The Parties submitted that most of the evidence from ONS and Mintel is current and/or historic rather than prospective, and where it is prospective, it generally suggests that consumers will continue shopping online for non-grocery goods post-pandemic. The Parties also submitted that these sources of information are not specific to sports inspired footwear or apparel.<sup>202</sup>
- 7.123 We agree with the Parties that we should only place limited weight on this evidence given it covers a broader market and much of it is historic. However, the research from Mintel and ONS generally corroborates other evidence, including from the Remittal Online Survey, and the evidence contained in the following section. Overall the ONS and Mintel evidence show that there was a large shift to online purchasing during the pandemic, and that some of this increase in online shopping will persist, however it also suggests a significant proportion of customers will go back to shopping in-store, as concerns around the pandemic decrease.

#### *Analysis of the impact of COVID-19 on revenues*

- 7.124 To assess the impact of COVID-19 and related restrictions on retailers' in-store and online revenues we used pre-pandemic data (up to and including February 2020) to predict monthly revenues during the pandemic and compared this with data on actual revenues to infer the impact of COVID-19.
- 7.125 The analysis was based on monthly revenue data for sports-inspired casual footwear and apparel products for the period January 2015 to March 2021. Data was provided by the Parties, ASOS, Foot Locker<sup>203</sup>, Next, Schuh, Sports Direct, Zalando, Adidas and Nike.<sup>204</sup> Appendix F sets out further details including the methodology used, the limitations of the approach and the results.
- 7.126 We first assessed in-store revenues. As expected, over the pandemic period (March 2020 to March 2021), COVID-19 had an adverse impact on in-store actual revenues. However, when compared with expected sales had the COVID-19 pandemic not happened, [X] performed proportionately better than [X] for both footwear and apparel, and [X] for footwear. Its performance was similar to [X] for footwear and apparel, and worse than [X] for both footwear and apparel. [X] performance was better than [X] for both footwear and apparel, and [X] for footwear. Its performance was equivalent to that of

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<sup>202</sup> [X].

<sup>203</sup> [X].

<sup>204</sup> Adidas and Nike were included as they are the two key suppliers in the market, whilst ASOS, Foot Locker, Next, Schuh, Sports Direct and Zalando were retailers that were able to provide revenues for sport-inspired casual fashion products over the relevant time period.

[X] for apparel and worse for footwear, and worse than [X] and [X] for both apparel and footwear.

7.127 We also compared actual in-store revenues for July and August 2020 with both predicted in-store revenues for July and August 2020, and actual in-store revenues for July and August 2019 to assess the performance of stores during a period in which stores were open for the entire period, and both restrictions and COVID-19 levels were relatively lower.<sup>205</sup>

7.128 Compared with both expected revenues and relative to 2019 revenues, [X] performed better than [X], [X] and [X] for both footwear and apparel, better than [X] for footwear and [X] for apparel. Its performance was similar to that of [X] for both footwear and apparel, worse than [X] for both footwear and apparel, and worse than [X] for footwear. Compared with both expected revenues and relative to 2019 revenues, [X] performed better than [X] for footwear and better than [X] for apparel. Its performance was similar to that of [X] and [X] for footwear, and worse than [X] for both footwear and apparel, and [X] for apparel.

7.129 The evidence suggests that COVID-19, and the various associated lockdowns had a [X] and other retailers. It also shows that for in-store sales some retailers performed even better than would have been expected during periods when restrictions were more limited, while others performed worse than would be expected.

7.130 In addition to assessing the impact of COVID-19 on in-store revenues, we have assessed the impact on online revenues.<sup>206</sup> As expected, over the pandemic period (March 2020 to March 2021), COVID-19 had a positive impact on online actual revenues.

7.131 Relative to expected sales absent the pandemic, [X] performed better than [X] for footwear and apparel, and [X] for footwear; better than [X] for footwear but worse for apparel. For both footwear and apparel, [X] performed better than [X] but worse than [X].

#### *Retailer's views on the impact of COVID-19*

7.132 The primary issues that retailers highlighted with respect to the impact of COVID-19 were changes related to the closure of stores, and the move to

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<sup>205</sup> July and August 2020 were selected, as a short-term 'boom' may have taken place in June after the reopening of non-essential shops on June 15th, and restrictions were increasingly put in place from September onwards prior to the second lockdown taking effect on 31st October.

<sup>206</sup> As with in-store sales we modelled the pre-pandemic revenues from January 2015 to February 2020, to create predicted revenues for March 2020 to March 2021 and compared this with actual sales for this period.

online sales. These effects are discussed in greater detail below. Retailers also highlighted the dislocation in supply chains, both in production and transport, which have led to reduced access to some products.

- 7.133 Particularly at the start of the pandemic, the very high uncertainty and the process of adapting to the new environment, led to retailers cancelling orders and being very cautious. Retailers with a focus on in-store retail and a weak online presence have faced the most challenges during the pandemic, and there have been few companies in this sector which closed entirely. However, even retailers which were strong online or solely online faced challenges adapting to the new environment, and shifting supply and demand patterns. Amazon for example highlighted how vigorously other retailers competed, delivering compelling new online services.<sup>207</sup>
- 7.134 ASOS submitted that it has had to adapt to significant operational change, disruption across its supply chain, a dramatic shift in consumer demand, and an uncertain and fast changing landscape. ASOS said it saw strong growth in casualwear and other lockdown relevant products. [REDACTED].<sup>208</sup>
- 7.135 ASOS said that to meet these challenges, it built greater diversity into its product mix and its sports footwear and apparel sales have grown during the pandemic period as consumer behaviour altered and moved towards these categories.<sup>209</sup>
- 7.136 ASOS said although it expects a portion of consumer demand to move back to stores as restrictions ease, it also expects online penetration to remain structurally higher than pre-COVID-19 levels. [REDACTED].<sup>210</sup>
- 7.137 Foot Locker told us that COVID-19 had led to a huge rise in demand for online shopping, as people were now accustomed to shopping online. Online would become an alternative way for customers to purchase products. However, it said that the re-opening of stores had shown that customers still loved to go and visit a store. It noted that the re-opening of stores was just beginning, so it, and others, were not yet comfortable that the market had stabilised, but it appeared clear that offering a combination of 'bricks and clicks' [bricks and mortar stores and online] would be essential going forward.<sup>211</sup>
- 7.138 Zalando told us that COVID-19 has helped shift consumer shopping online which has benefitted it although it has not [REDACTED].

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<sup>207</sup> [REDACTED].

<sup>208</sup> [REDACTED].

<sup>209</sup> [REDACTED].

<sup>210</sup> [REDACTED].

<sup>211</sup> [REDACTED].

7.139 It also said that in the coming years, it expected three main trends that may affect Zalando's retail proposition and more specifically the retail Footwear and Apparel markets:

(a) Continued shift from offline to online, which may make Zalando stronger compared with brick and mortar retailers.

(b) [REDACTED].

(c) [REDACTED].<sup>212</sup>

7.140 [REDACTED].<sup>213</sup>

7.141 Sports Direct was also not able to off-set the losses of store closures, despite an approximate [REDACTED] growth in online sales, and in its January 2021 Board Minutes, said [REDACTED]<sup>214</sup> and in Feb 2021 noted [REDACTED].<sup>215</sup>

7.142 Amazon said one of the key developments that COVID-19 has accelerated, is the trend towards omni-channel offerings (ie online and bricks-and-mortar offerings). It said this manifests itself in strong growth of established bricks and mortar retailers, who are growing the digitized aspects of its business models in a number of ways. Amazon expects these trends, and the intense competition for consumers, to continue through and beyond the COVID-19 pandemic.<sup>216</sup>

#### *Retailer stores during Covid*

7.143 [REDACTED] opened all stores they were able to at points at which government rules allowed them to.<sup>217 218</sup> All other retailers stated that they opened all stores when they were able to, in line with government guidelines, with only minor exceptions.<sup>219</sup>

#### *Plans for growth or decline of store estate*

7.144 This section considers the plans of the Parties and other retailers in terms of their in-store presence going forward. This is important for understanding both how important retailers think an in-store offer is to their overall business, but

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<sup>212</sup> [REDACTED].

<sup>213</sup> [REDACTED].

<sup>214</sup> [REDACTED].

<sup>215</sup> [REDACTED].

<sup>216</sup> [REDACTED].

<sup>217</sup> [REDACTED].

<sup>218</sup> [REDACTED].

<sup>219</sup> [REDACTED].

also whether and how we might expect the relative competitive strength of their in-store offers to change in the future.

7.145 We asked the Parties and other retailers what their plans were in terms of growing or reducing their store estate.

#### *JD Sports*

7.146 [REDACTED].

7.147 [REDACTED].

7.148 [REDACTED].<sup>220 221</sup>

#### *Footasylum*

7.149 Footasylum had 70 stores at the start of 2020, but closed 2 stores during 2020. Footasylum opened one new store in April 2021,<sup>222</sup> and [REDACTED].<sup>223</sup> During 2021 thus far, it has [REDACTED] stores.

7.150 Overall Footasylum's store estate [REDACTED] since the start of 2020. There are [REDACTED].<sup>224</sup>[REDACTED].<sup>225</sup> Going forward, Footasylum submitted that its 'expectation is that [REDACTED]<sup>226</sup> [REDACTED].

7.151 Footasylum submitted that its recent store closures were a result of a combination [REDACTED].<sup>227</sup>

#### *Third party retailers*

7.152 Among other retailers there is a trend towards closing stores. Foot Locker stated that [REDACTED].<sup>228, 229</sup>

7.153 Office told us they plan to shrink its real estate and only keep key locations.<sup>230</sup> The Parties provided more detail on the numbers of Office stores closed (19

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<sup>220</sup> [REDACTED].

<sup>221</sup> [REDACTED].

<sup>222</sup> [REDACTED].

<sup>223</sup> [REDACTED].

<sup>224</sup> [REDACTED].

<sup>225</sup> [REDACTED].

<sup>226</sup> [REDACTED].

<sup>227</sup> [REDACTED].

<sup>228</sup> [REDACTED].

<sup>229</sup> [REDACTED].

<sup>230</sup> [REDACTED].

since June 2020) and planned for closure (30 between 2022 and 2024) based on group annual accounts.<sup>231</sup>

7.154 Schuh has closed 5 stores permanently during lockdown, and stated that even prior to the pandemic stores were becoming uneconomic due to the increased proportion of online sales. They stated that “the only leverage we have is either when the lease comes to an end or we can exercise a break. Whenever we have one of the events in the future, once we can understand what post-Covid trading looks like, we will assess every location on the merits of a new rent deal to see whether we can make it financially viable to continue. Failing that we would look to exit stores and reduce stores numbers overall. We believe we might have some very limited options for expansion in certain areas, but we suspect that it’s very likely net store count will reduce regardless of any new openings.”<sup>232</sup>

7.155 Next stated that “Last year 80 leases expired; we closed 18 branches and renegotiated rents in 62 stores, achieving an average reduction in rent of - 58%”.<sup>233</sup>

7.156 [X]<sup>234</sup>

7.157 Sports Direct has taken a different approach to other retailers, focussing on its in-store offer, and continuing with its store elevation strategy: stating [X]<sup>235</sup> Sports Direct has plans to increase its number of elevated stores [X].<sup>236</sup> [X]. Sports Direct however did note that while [X].<sup>237</sup>

7.158 Primark has also stated that it “remains committed to opening new stores”, [X].<sup>238</sup>

7.159 [X] and [X] have stated that they do not yet know their plans for store openings/closings.<sup>239</sup>

### *Future strategies*

7.160 In this section we consider the future strategies of the merging Parties and other retailers. We have assessed evidence from the internal documents of

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<sup>231</sup> [X].

<sup>232</sup> [X].

<sup>233</sup> [X].

<sup>234</sup> [X].

<sup>235</sup> [X].

<sup>236</sup> [X].

<sup>237</sup> [X].

<sup>238</sup> [X].

<sup>239</sup> [X].

the merging Parties, responses to our retailer RFIs, as well as analyst reports held by the merging Parties.

### *JD Sports*

7.161 [REDACTED].<sup>240</sup>

7.162 [REDACTED]:

(a) [REDACTED]<sup>241</sup>

(b) [REDACTED]<sup>242</sup>

(c) [REDACTED]<sup>243</sup>

7.163 [REDACTED]:

(a) [REDACTED]<sup>244</sup>

(b) [REDACTED].<sup>245</sup>

7.164 [REDACTED]<sup>246</sup>

7.165 [REDACTED]<sup>247</sup> [REDACTED]<sup>248</sup>

### *Footasylum*

7.166 Footasylum's future strategies are focussed on a continuing shift to online channels. However, this is not to say that Footasylum views in-store shopping as unimportant in the future – Footasylum's internal documents discuss it being an 'omni channel' retailer across online and in-store. [REDACTED]<sup>249</sup> [REDACTED].

7.167 [REDACTED].

7.168 [REDACTED]<sup>250</sup> [REDACTED].

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<sup>240</sup> [REDACTED].

<sup>241</sup> [REDACTED].

<sup>242</sup> [REDACTED].

<sup>243</sup> [REDACTED].

<sup>244</sup> [REDACTED].

<sup>245</sup> [REDACTED].

<sup>246</sup> [REDACTED].

<sup>247</sup> [REDACTED].

<sup>248</sup> [REDACTED].

<sup>249</sup> [REDACTED].

<sup>250</sup> [REDACTED].



7.169 [REDACTED].<sup>251</sup> [REDACTED]:

- (a) [REDACTED];
- (b) [REDACTED]; and
- (c) [REDACTED].

7.170 [REDACTED].<sup>252</sup>

7.171 [REDACTED].<sup>253</sup> [REDACTED]<sup>254</sup> [REDACTED]

7.172 [REDACTED].<sup>255</sup> [REDACTED].<sup>256</sup>

#### *Retailers' future strategies*

- *Multi-channel retailers*

7.173 The multi-channel retailers have emphasised the growth of online through the pandemic, and the work that the retailers have done to adapt to increased selling online. Some highlighted the scale of the increase (John Lewis, for example stated that “trends that might in normal times have taken five years to transpire have happened in five months<sup>257</sup>). Most emphasised the likelihood that online will continue to be stronger in the future although without being able to confirm the degree to which this will remain the case (or at least noted considerable uncertainty about the degree to which this will remain the case) ([REDACTED],<sup>258</sup> [REDACTED],<sup>259</sup> [REDACTED]<sup>260</sup>, [REDACTED]<sup>261</sup>).

7.174 Foot Locker told us that its strategy on footwear was: [REDACTED]. [REDACTED], [REDACTED]. It noted that apparel is a small part of its mix [REDACTED].<sup>262</sup>

7.175 Next stated that “our instinct is that retention rates for customers acquired in 2020 are likely to be similar to those gained in more normal times, though we recognise that might be optimistic. One thing appears to be certain, the longer

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<sup>251</sup> [REDACTED].

<sup>252</sup> [REDACTED].

<sup>253</sup> [REDACTED].

<sup>254</sup> [REDACTED].

<sup>255</sup> [REDACTED].

<sup>256</sup> [REDACTED].

<sup>257</sup> [REDACTED].

<sup>258</sup> [REDACTED].

<sup>259</sup> [REDACTED].

<sup>260</sup> [REDACTED].

<sup>261</sup> [REDACTED].

<sup>262</sup> [REDACTED].

the pandemic encourages online shopping, the more likely it is that customers will keep shopping that way.”<sup>263</sup>

7.176 Next already had an established online presence, including selling third party brands on its own website and licencing its operations to third party brands. Next stated that “Retail stores were, and will remain, at a fundamental and irreversible disadvantage to online competition. This is not being driven by price or even home delivery, but by the scale of the choice websites can offer relative to any physical store ... items can be made available online with minimal stock investment.”<sup>264</sup>

7.177 Other retailers emphasised their comparatively weak position. Office stated that “the biggest shift and concern has been the invasion by online retailers buying up high street household names but losing the stores. Whilst bricks and mortar retailers have had to struggle to compete, the pandemic played into online retailers hands”.<sup>265</sup>

7.178 Most retailers have highlighted their ongoing emphasis on growing their strength online. John Lewis plans to increase investment in digital capabilities “to [redacted] current levels”.<sup>266</sup> Next have “accelerated capital investment in both warehousing and systems and ... expect to make good progress on both fronts in the year ahead.”<sup>267</sup>

7.179 Conversely, Sports Direct, as highlighted above continue to emphasise its in-store presence and elevation. While it has announced that it will invest (over time) £100 million in its online elevation, they see this as secondary to store elevation: stating that [redacted].<sup>268</sup> Primark do not currently sell online, and [redacted].<sup>269</sup>

- *Online-only retailers*

7.180 A number of online-only retailers ([redacted]) highlighted that the shift to online through the COVID-19 pandemic had benefited them compared to other retailers. With one noting the benefits of the consumer becoming “more confident purchasing online”,<sup>270</sup> and another that “e-commerce has been attracting new customer segments”.<sup>271</sup>

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<sup>263</sup> [redacted].

<sup>264</sup> [redacted].

<sup>265</sup> [redacted].

<sup>266</sup> [redacted].

<sup>267</sup> [redacted].

<sup>268</sup> [redacted].

<sup>269</sup> [redacted].

<sup>270</sup> [redacted].

<sup>271</sup> [redacted].

7.181 Some retailers noted impacts which had increased competition in online retail. Zalando noted the “increased importance of [REDACTED].<sup>272</sup> [REDACTED],<sup>273</sup> and Farfetch said that COVID-19 has accelerated the convergence between physical and online retail within luxury fashion, with physical retailers investing in and growing its online offerings (and developing increasingly digital in-store experiences), while e-commerce retailers and digital-native brands are launching or developing physical retail offerings.<sup>274</sup>

7.182 [REDACTED]<sup>275</sup>[REDACTED].<sup>276</sup>

7.183 [REDACTED]<sup>277</sup>

7.184 Amazon said many retailers significantly ramped up their online offerings in response to the lockdown. It said there has been and remains intense competition during the pandemic, and it has been striking how quickly many retailers have delivered new compelling services.<sup>278</sup> Amazon highlighted the acceleration of a trend towards omni-channel offerings (i.e. online and brick-and-mortar offerings), with “established retailers ... growing the digitized aspects of their business models in a number of ways”<sup>279</sup>, including consumers who are buying online and collecting in a physical store.

7.185 Amazon said it is constantly working to expand its product offerings, including its selection of footwear in the UK, and improving the experiences of selling partners and customers on Amazon’s stores.<sup>280</sup> [REDACTED].

### ***Suppliers’ plans for DTC***

7.186 Nike and adidas have publicly announced targets to significantly increase their proportion of DTC sales, and therefore to reduce the proportion of sales made through their wholesale channel (ie their retail partners).<sup>281</sup> Growth in DTC sales of the magnitude set by these large suppliers may materially affect retailers’ sales of Nike and adidas products. We therefore present the evidence on this below.

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<sup>272</sup> [REDACTED].

<sup>273</sup> [REDACTED].

<sup>274</sup> [REDACTED].

<sup>275</sup> [REDACTED].

<sup>276</sup> [REDACTED].

<sup>277</sup> [REDACTED].

<sup>278</sup> [REDACTED].

<sup>279</sup> [REDACTED].

<sup>280</sup> [REDACTED].

<sup>281</sup> Paragraphs 7.50 and 7.51

## *Parties' Views*

7.187 The Parties have highlighted the impact of the recent increases in supplier DTC, and the anticipated increasing impact, given the suppliers' targets to increase the proportion of sales through DTC in the market. The Parties have referred to a number of public announcements in which Nike and adidas have emphasised their strategy to continue the increase in DTC (see Appendix B).

7.188 The Parties submit that the increase in DTC will necessarily [REDACTED], for example, stating that: "[REDACTED]." <sup>282</sup>

7.189 The Parties have also pointed to the consequential impact of the strategy to increase DTC on the wholesale strategy of the suppliers, stating that there has been "a rise in progressive disintermediation made public by the brands where, linked to their confidence in the growing DTC share of access to consumers, Nike and adidas cut out the "middleman" by dropping, or allocating less stock to, those less important third party retailers who do not offer the brands sufficient incremental value to reach new customers. At a time when, as DTC's share progressively expands, the wholesale channel's share of total sales progressively declines." <sup>283</sup> The risk of [REDACTED] is discussed in Chapter 10.

7.190 JD Sports has also highlighted [REDACTED]. <sup>284</sup> JD Sports further stated that "[REDACTED]" <sup>285</sup>

## *Evidence from Suppliers*

7.191 Nike has confirmed that its strategy in the UK will be as a part of its EMEA-wide strategy, and currently forecasts the proportion of its total UK footwear sales accounted for by DTC sales to increase from [REDACTED]% in Nike's fiscal year 21 to [REDACTED]% in Nike's fiscal year 24 (with the respective proportion for apparel currently forecast to increase from [REDACTED]% to [REDACTED]% over the same period). <sup>286</sup> Nike stated that it sees most growth of DTC as coming from "growing the pie", stating that this applies similarly both in the UK and in EMEA. <sup>287</sup>

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<sup>282</sup> [REDACTED].

<sup>283</sup> [REDACTED].

<sup>284</sup> [REDACTED].

<sup>285</sup> [REDACTED].

<sup>286</sup> [REDACTED]. In general Nike has informed us that they are not forecasting [REDACTED], however they do have these longer range 'targets'

<sup>287</sup> [REDACTED].

7.192 adidas is aiming for 50% DTC globally by 2025, [REDACTED],<sup>288</sup> [REDACTED].<sup>289</sup> adidas also highlighted its expectation that [REDACTED].<sup>290</sup>

### ***Upcoming changes to supplier product allocation strategies***

7.193 As discussed in detail in Chapter 6, the suppliers in the relevant markets play an important role in controlling the allocations of products that retailers receive, and these allocations differ between different categories of retailer, and in some cases between different tiers of retailer within a category (see paragraph 6.24). Chapter 6 discussed the general importance of suppliers' selective distribution policies on retail competition. In addition, paragraphs 7.52 to 7.68 presented the evidence on how those policies currently affect competition between the Parties and their rivals. This section presents the evidence on what we know about any upcoming changes to those policies so that we can assess whether retail competition is likely to be altered as a result.

### ***Parties' views***

7.194 As detailed above, the Parties have expressed concerns that the increase in DTC sales and an anticipated increased tightening of selective distribution arrangements from the key brands, [REDACTED].

7.195 The Parties suggest that [REDACTED].<sup>291</sup>

7.196 JD Sports has [REDACTED]. JD Sports has [REDACTED].<sup>292</sup>

7.197 Footasylum stated that its [REDACTED] allocations for Q4 2021 [REDACTED] compared to the same period in 2020, and that it has been informed of [REDACTED] for Q4 2021. Footasylum stated that these changes included reductions in supply of some key footwear lines that are particularly important to attract customers to stores.<sup>293</sup>

7.198 The Parties provided analysis of Footasylum's [REDACTED] initial forecast product allocations for Q1 and Q2 2022. The Parties have interpreted certain products labelled as [REDACTED], and therefore have assessed that Footasylum's forecast allocations [REDACTED] (see further details from [REDACTED] in paragraph 7.210). The Parties subsequently provided updated information from [REDACTED] which set out an

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<sup>288</sup> [REDACTED].

<sup>289</sup> [REDACTED].

<sup>290</sup> [REDACTED].

<sup>291</sup> [REDACTED].

<sup>292</sup> [REDACTED].

<sup>293</sup> [REDACTED].

estimation by [REDACTED] across all products (including apparel, footwear and accessories), with limited further information on how this would [REDACTED].<sup>294</sup>

7.199 Footasylum's internal documents show that between January 2021 and May 2021 Footasylum's budget revenue for FY2021/22 changed from £[REDACTED] to £[REDACTED] ([REDACTED]), with EBITDA [REDACTED].<sup>295</sup> The change in Footasylum's forecast revenue, which at average [REDACTED] percent margin, comprise [REDACTED].<sup>296</sup> We consider that the [REDACTED] appears to be only a minor adjustment, at [REDACTED]% of total budget forecast revenues.

7.200 JD Sports has also [REDACTED].

#### *Evidence from third party retailers*

7.201 As discussed above, some third-party retailers have expressed concerns about the role of suppliers in restricting allocations. In addition to concerns about current changes in its allocations, [REDACTED]."<sup>297</sup>

7.202 Sports Direct has referenced [REDACTED] public statements, and expressed concerns that in the future [REDACTED].<sup>298</sup> Sports Direct highlighted its elevation strategy as its only way to [REDACTED].

#### *Evidence from Suppliers*

7.203 Evidence from the suppliers indicates that in general they see a continued role for wholesale as a complementary channel to DTC in future:

7.204 adidas has stated that: '[REDACTED]'.

7.205 Nike has noted that: 'Nike intends to continue to rely on third-party retail partners' acknowledging that they 'provide the complementary multi-brand experience preferred by many consumers'.

7.206 [REDACTED]. Nike stated that it "expects the wholesale sales of its UK retail partners to continue to grow overall."<sup>299</sup> Adidas stated that "[REDACTED]".<sup>300</sup>

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<sup>294</sup> [REDACTED]. See further analysis on the [REDACTED] in paragraph 7.217

<sup>295</sup> [REDACTED].

<sup>296</sup> Footasylum provided us with cost figures of the change in forecast revenues. We have calculated the sales value using margin estimate of [REDACTED]. The figure [REDACTED] for various other changes is calculated as a balancing figure, which is the [REDACTED]. Source: [REDACTED]

<sup>297</sup> [REDACTED].

<sup>298</sup> [REDACTED].

<sup>299</sup> [REDACTED].

<sup>300</sup> [REDACTED].

- 7.207 However, evidence from Nike and adidas indicates that their wholesale supply strategies will continue to be focussed on [REDACTED].
- 7.208 Consistent with the above, adidas's current forecasts indicate that between 2019 and 2025, [REDACTED].
- 7.209 In relation to Footasylum's initial forecast product allocations from [REDACTED] for January – March 2022 (Q1 2022), the Parties have [REDACTED].
- 7.210 [REDACTED] has however clarified that this new terminology refers to the remainder of product styles with a given assortment that are not subject to the longstanding practice of 'allocating' finite quantities of stock for some high demand products, and that there was no difference in the likelihood of products not being delivered between the 'unallocated' and 'allocated' categories.
- 7.211 We therefore consider that it is appropriate to not make a distinction between the two categories. We also note the subsequent changes in these allocations, detailed in paragraph 7.198.
- 7.212 Taking into account [REDACTED]'s clarification, we consider that the overall change in Footasylum's initial allocations across all [REDACTED] footwear products for Q1 2022 compared to their initial allocations in Q1 2021 is [REDACTED] the overall change experienced by JD Sports in relation to its equivalent allocations between the same periods (Footasylum had a [REDACTED] whereas JD Sports had a [REDACTED]). When the allocations are separated by range, we see that Footasylum's [REDACTED] in Men's allocations ([REDACTED]) are [REDACTED] JD Sports' reductions for these products ([REDACTED]), and both Parties had [REDACTED] allocations in Junior/kids/infants products ([REDACTED] for JD Sports and [REDACTED] for Footasylum), though we note that Footasylum's allocation had a [REDACTED] than JD Sports'. In Women's products however, JD Sports' allocation [REDACTED] ([REDACTED]) while Footasylum's allocation was [REDACTED] ([REDACTED]). We note that Men's products are Footasylum's target demographic, and Women's products make [REDACTED] of Footasylum's [REDACTED] footwear products. We consider that these [REDACTED] (see paragraphs 7.60 to 7.64).
- 7.213 There have been subsequent changes to Nike's planned allocations for this period, due to supply issues that Nike is currently experiencing. These changes are in keeping with [REDACTED]. Data supplied by Footasylum provides further evidence on Q4 2022 allocations (paragraphs 7.216 to 7.218).
- 7.214 Restrictions in allocations can also impact specific high demand products, or where there are short-term supply shocks. As set out further in paragraphs 7.218 to 7.219, Nike has explained that many of the specific instances of reductions in product allocations identified by Footasylum over the last 12-18 months have been due to supply disruptions, which have impacted Footasylum and other retailers [REDACTED].

7.215 As regards Footasylum in particular:

- (a) Nike has not indicated it has any current plans to [REDACTED].
- (b) adidas has not identified any [REDACTED].

7.216 Overall, the evidence from Nike indicates that revenue from sales to Footasylum has [REDACTED] since 2019. Nike has also forecast [REDACTED] Footasylum's revenue for Nike fiscal year 22.<sup>301</sup>

7.217 adidas too has forecast that [REDACTED].

#### *Data from Footasylum on [REDACTED] product allocations*

7.218 As discussed from paragraph 7.69, Footasylum has provided data on expected and received allocations of footwear products from [REDACTED] in the period since Q1 2019 through to the latest forecasts. In order to assist our interpretation of that data we obtained further data from Footasylum, which we set out below (see Figure 1, with the total footwear allocations from Q1 2019 to the latest forecast for Q1 2022). We present from paragraph 7.60 and 7.203 wider evidence from [REDACTED] of its treatment of Footasylum's allocations and the allocations of other retailers in the same category.

7.219 The Parties have highlighted the [REDACTED] in the planned allocations for Q4 2021 (compared to planned allocations in Q4 2020). However, we would note that the footwear [REDACTED].<sup>302</sup> We are aware that there have [REDACTED]<sup>303</sup> and that [REDACTED]. It is difficult to predict to what degree the footwear received by Footasylum for Q3 and Q4 2021 will be [REDACTED]. However, we would note that the footwear received from [REDACTED].<sup>304</sup> We do not have sufficient evidence on future periods to assess whether Footasylum's allocations and performance will be better/worse or broadly equivalent to the same periods the previous year.

7.220 Footasylum have also provided the latest data available from [REDACTED]<sup>305</sup>. [REDACTED] and we do not have sufficient evidence to [REDACTED] on Footasylum's allocations.

**Figure 1: [REDACTED]<sup>306</sup>**

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<sup>301</sup> [REDACTED]. Note that these are sales of [REDACTED] products to each retailer, combining footwear and apparel.

<sup>302</sup> [REDACTED].

<sup>303</sup> [REDACTED].

<sup>304</sup> The parties have brought to our attention [REDACTED]. We note [REDACTED].

<sup>305</sup> [REDACTED]. ([REDACTED]).

<sup>306</sup> The data provided here is for Total Units of footwear. We also assessed the value at cost price, and separate product categories for Men's Women's and Kid's. The broad trends remain the same for all the analysis.



## **8. Evidence relevant to footwear**

### **Introduction**

- 8.1 Chapter 7 set out the evidence that is applicable to competition in both the retail supply of sports-inspired casual footwear and apparel (and which it is difficult to attribute to footwear only or apparel only). This chapter sets out the remaining evidence relevant to competition in the retail supply of sports-inspired casual footwear.
- 8.2 This chapter sets out the evidence relevant to how closely the Parties compete and how closely they and rival retailers compete. We present the evidence on:
- (a) The importance of different brands in the Parties' sales of footwear;
  - (b) The proportion and rankings of each retailer's overlap with JD Sports and Footasylum with respect to Nike and adidas footwear products;
  - (c) The diversion ratios calculated from our survey of online shoppers (ie the proportion of other retailers selected by the Parties' customers as their best alternative);
  - (d) The GUPPI metrics that we have estimated;
  - (e) Market shares; and
  - (f) Sales forecasts for the Parties.

### **Importance of the brands**

- 8.3 Table 2 shows the suppliers' share of the Parties' sports-inspired casual footwear revenue for 2020.

**Table 2: Suppliers' share of the Parties' sports-inspired casual footwear revenues (2020)**

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

Source: CMA analysis of the Parties' data.

8.4 Table 2 shows that ✂ accounts for ✂ of JD Sports' and Footasylum's revenue. ✂ is ✂ sold by each of the two Parties.

## Product overlaps

8.5 We assessed the extent to which Nike and adidas footwear products sold by each Party are also sold by other retailers to show the Parties ✂ their competitors overlap in terms of footwear products offered. We used Nike and adidas footwear products as these are the two largest suppliers of sports-inspired casual footwear to the Parties. The data used for this analysis was supplied by Nike and adidas and is for the six months to March 2021. The overlaps are expressed in two ways: as a proportion of their value (sales-weighted)<sup>307</sup>, and as a proportion of the number of products sold.<sup>308 309</sup>

8.6 Table 3 shows the results for Nike's products.

**Table 3: Proportion of Nike footwear products sold by the Parties that were also sold by other retailers (six months to March 2021)**

<sup>307</sup> For example if JD Sports sold 300 Nike products with a value of £39,000 and JD Sports and Footasylum sold the same 150 Nike products, with a value of £18,000 for JD Sports, the overlap would be 46% (18,000/39,000).

<sup>308</sup> For example, if JD Sports sold 300 Nike products and JD Sports and Footasylum sold the same 150 Nike products, the overlap would be 50% (150/300).

<sup>309</sup> Whether expressed as a sales-weighted proportion or simply as a proportion of the number of products sold, this attempts to understand whether the Parties and other retailers sell the same range of Nike and adidas products. However, this does not measure whether different retailers sell the same proportions of different items; for instance, if a retailer sells (or has in stock) just a single unit of an item, it would still count as an overlap.

Retailer	Proportion of JD sales	Proportion of JD products	Retailer	Proportion of FA sales	Proportion of FA products
JD Sports			Footasylum		
✂			✂		
✂	71%	66%	✂	92%	87%
✂	58%	43%	✂	87%	76%
✂	54%	29%	✂	81%	64%
✂	41%	28%	✂	53%	40%
✂	39%	32%	✂	50%	43%
✂	32%	25%	✂	44%	32%

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

Note: \* refers to the total number of products sold by the Parties.

8.7 For the Nike footwear products sold by JD Sports, the sales-weighted overlaps, which factor in the popularity of products, are ✂ than the raw product overlaps. Table 3 shows that ✂ has the highest sales-weighted product overlap with JD Sports, followed by ✂. Footasylum has the ✂ overlap with JD Sports, selling ✂ of JD's products on a sales-weighted basis. The ranking is a little different in terms of the raw product overlap with ✂ and ✂ retaining the top two positions but Footasylum having the ✂ overlap.

8.8 For the Nike footwear products sold by Footasylum, the sales-weighted overlaps, which factor in the popularity of products, are ✂ than the raw product overlaps. JD Sports has ✂ product overlap followed by ✂ and ✂, using both methodologies. JD Sports' overlap with Footasylum is ✂, with JD Sports selling ✂ of Nike footwear products that are sold by Footasylum, using either methodology.

8.9 Table 4 shows the results for adidas' products.

**Table 4: Proportion of adidas footwear products sold by the Parties that were also sold by other retailers (six months to March 2021)**

Retailer	Proportion of JD sales	Proportion of JD products	Retailer	Proportion of FA sales	Proportion of FA products
JD Sports			Footasylum		
✂			✂		
✂	22%	27%	✂	72%	48%
✂	19%	23%	✂	67%	59%
✂	19%	24%	✂	67%	42%
✂	16%	14%	✂	62%	33%
✂	14%	10%	✂	48%	20%
✂	13%	9%	✂	45%	32%

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

Note: \* refers to the total number of products sold by the Parties.

8.10 For the adidas footwear products sold by JD Sports, Table 4 shows that, on a sales-weighted basis, ✂ has the highest product overlap with JD Sports, followed by ✂. Footasylum has the ✂ overlap with JD Sports on a sales

weighted basis. Footasylum's overlap of adidas footwear products with JD Sports is 30% in percentage terms, using either methodology.

- 8.11 For the adidas products sold by Footasylum, Table 4 shows that, on a sales-weighted basis, 30% has the highest product overlap, followed by 20% and 10%. JD Sports has 30% product overlap with Footasylum on a raw product count basis. Using either methodology, JD Sports' overlap with Footasylum is 30% than Footasylum's overlap with JD Sports, in both percentage terms and ranking.
- 8.12 Appendix C shows further detail including the comments from the Parties and our responses.

## Survey Evidence

- 8.13 As part of the evidence gathering for the Remittal we commissioned a survey of the Parties' online customers (the Remittal Online Survey). The survey, conducted by DJS Research Ltd<sup>310</sup> was based on a list of contact details of customers who had placed orders with either party that were dispatched between 18 April and 1 May 2021. This was after most non-essential shops in the UK had re-opened following a period of lockdown. Fieldwork for the survey took place between 10 May and 23 May 2021 and 691 and 634 survey responses were received from JD Sports and Footasylum customers respectively, representing response rates of 7.0% among JD customers and 6.4% among Footasylum customers.<sup>311</sup> We regard the survey as providing robust evidence for the Remittal.<sup>312</sup>
- 8.14 A survey of the Parties' online customers had been conducted during the Phase 2 inquiry (the Phase 2 Online Survey). We note that due to the response rates in that survey being lower than the 5% minimum threshold we did not give full weight to the results in our Phase 2 Final Report and we have not relied on these results in the Remittal, although we do refer to some of the diversion ratios from that survey for comparison purposes below.
- 8.15 As explained in Chapter 4, we decided not to commission a new survey in the Parties' stores during the Remittal given the continuing impact of COVID-19 restrictions. We regard the exit survey of in-store shoppers, conducted in

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<sup>310</sup> See 'Survey of online retail customers for a merger inquiry: JD Sports and Footasylum', DJS Research, June 2021 for a full account of the survey methodology and main findings.

<sup>311</sup> All these figures relate to the half of the sample that were incentivised with a £5 online voucher. Response rates for the non-incentivised half of the sample very low and responses from this sample have not been used in any of the analyses.

<sup>312</sup> This means that we are not applying the same caveats and caution about applying evidential weight as were applied to the survey of online customers conducted for the Phase 2 Inquiry for which the response rates were much lower.

November 2019 as part of the Phase 2 Inquiry<sup>313</sup> (the Phase 2 Exit Survey), to be a high quality survey for which the results remain relevant to the Remittal. Many stores have been shut for much of the period since the exit survey was conducted due to the COVID-19 pandemic restrictions, none of the main competitors to the Parties have exited the market and there have been no significant new entrants. We therefore consider there to have been no significant structural changes in the in-store part of the market since the time of the survey that would render the results of the survey uninformative for our purposes. We do, however, recognise that there have been changes in the online segment and these may have an impact on, for example, the propensity of in-store shoppers to divert to different online alternatives as their next best alternative. We have therefore included, in the Appendix on GUPPIs, some sensitivity analyses around our estimates which consider some of these changes.

### ***Parties' views on the survey***

8.16 The Parties made, among others, the following points in their submissions on our proposed surveys:<sup>314</sup>

- (a) A survey in the re-opening period for non-essential shops would risk conflating any changes since the time of the 2019 surveys with 'opening bubble' effects and any inferences about non-transitory or lasting 'change' since 2019 would be unreliable.
- (b) Secondly, in so far as the CMA's proposed surveys are 'static' (i.e. ask about the current or last purchase when it took place) they necessarily do not capture evidence about the prospective situation over the next several years when, for example, according to Nike and adidas the market will be going through very substantial change.
- (c) It is important to capture the specific items purchased, including brand and model, for each survey respondent and, in case more than one item is purchased to allow for different responses per item;
- (d) It is important to ask about the strength of second preferences as part of the diversion suite of questions.
- (e) The questions about the balance of spending in-store and online before and after the COVID-19 pandemic should be more narrowly focussed on

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<sup>313</sup> 'Exit survey retail of retail customers for a merger inquiry', DJS Research, January 2020

<sup>314</sup> [REDACTED].

a range of products closer to the reference for the merger case, rather than the broader categories of clothing and footwear.

8.17 Responding in turn to each of these comments:

- (a) We agree that the context for the Remittal survey of online customers is unusual and needs to be taken into account when interpreting results. Hence, for example, our sensitivity analysis of GUPPI estimates<sup>315</sup>. However, an analysis of changes between the Phase 2 Online Survey and the Remittal Online survey has evidential value and the results appears to be consistent with other sources. For example, the rise in diversion to Nike and adidas is consistent with the growth of their online DTC sales.
- (b) We agree that the online survey reflects the state of the market at the time the survey was undertaken and does not reflect future developments. Future developments are taken into account elsewhere in our assessment, much of which is forward looking.
- (c) We decided that it would add too much complexity to the survey to attempt to capture the specific items purchased by respondents and/or to verify them against information provided by the Parties.
- (d) We considered that the structure of the diversion suite of questions was already complex and potentially challenging for respondents to understand and answer and we therefore decided to focus questions on establishing the next best alternative.
- (e) We decided that the questions about the balance of spending in-store and online would need to be sufficiently wide for there to be enough potential purchases for a respondent to make a sensible response. Clothing and/or footwear seem appropriate because they share many of the same features with the more narrowly defined reference market.

## **Diversion ratios**

8.18 Diversion ratios<sup>316</sup> show the percentage of shoppers who would go to a specific different retailer if their first choice was unavailable. We have measured diversion directly from the Remittal Online Survey which shows that 9% of online footwear customers from JD Sports would divert to Footasylum (Table 5). This has nearly halved since the Phase 2 Online Survey from which

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<sup>315</sup> See Appendix G.

<sup>316</sup> All diversion ratios are not spend weighted, do not allow own party diversion and are based on the full sample (ie are not restricted to, for example, price marginal customers).

diversion was estimated to be 16%. From our Phase 2 Exit Survey we estimated that 21% of JD Sports' in-store footwear customers would have diverted to Footasylum; 4% to its online offering and 17% to its stores (Table 6).

- 8.19 Our Remittal Online Survey showed that 43% of Footasylum's online footwear customers would divert to JD Sports (Table 5), down from 46% in our Phase 2 Online Survey. From our Phase 2 Exit Survey we estimated that 68% of Footasylum's in-store footwear customers would divert to JD Sports; 11% online and 57% to JD Sports stores (Table 6).
- 8.20 Table 5 shows that for 69% of Footasylum's online shoppers', the next best alternative is another online retailer, with 23% diverting to an in-store option. JD Sports is by far the closest competitor in both channels, receiving 43% of overall diversion, with Nike the next closest at 13% and Foot Locker at 8%.
- 8.21 Among JD Sports online customers, 70% gave an online retailer as their next best alternative while 21% diverted in-store. Nike was the strongest competitor receiving 23% of diversion, nearly all of which was online, with adidas and Foot Locker both receiving 11% of diversion and Footasylum receiving 9% (Table 5).

**Table 5: Footwear diversion ratios of online customers to the merger party and third parties**

	JD Sports customers			Footasylum customers			%
	To a store	To online	Total	To a store	To online	Total	
Footasylum	4	5	9				
JD Sports				12	31	43	
Nike	2	22	23	4	9	13	
Adidas	3	8	11	1	4	5	
Foot Locker	4	7	11	1	7	8	
Sports Direct	3	5	8	1	2	3	
ASOS		6	6		6	6	
Schuh	1	5	5	1	2	3	
Amazon		4	4		3	3	
Flannels	2	1	2				
M and M Direct		2	2				
Other	3	5	9	3	4	7	
Total	21	70	91	23	69	92	

Source: CMA Remittal Survey of Online Customers

Note: No spend-weighting was applied. Own-party diversion was excluded. Nine percent of JD Sports customers and eight percent of Footasylum customers would not make a purchase.

**Table 6: Footwear diversion ratios of store customers to the merger party and third parties**

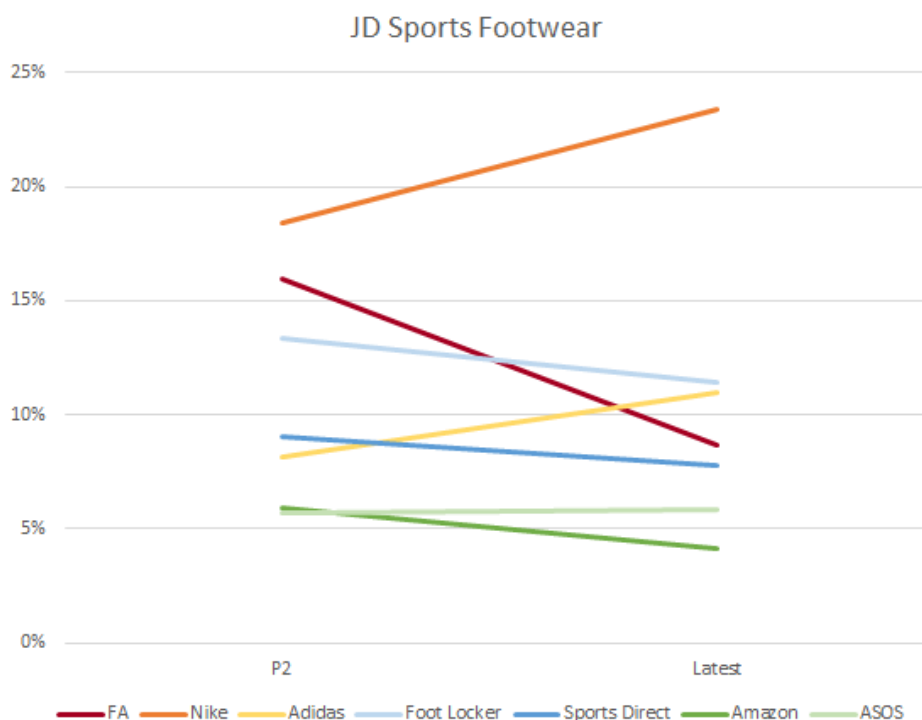
	JD Sports customers			Footasylum customers			%
	To a store	To online	Total	To a store	To online	Total	
Footasylum	17	4	21				
JD Sports				57	11	68	
Foot Locker	12	4	16	4	2	7	
Sports Direct	9	1	10	2		2	
Nike	4	3	7	1	1	2	
Schuh	5	1	6	3		3	
adidas	4	2	6	1		1	
DW Sports	3	1	4				
Other	9	7	16	3	2	5	
Total	64	22	86	71	18	88	

Source: CMA Phase 2 exit survey

Note: No spend-weighting was applied. Own-party diversion was excluded. Fourteen percent of JD Sports customers and 12% of Footasylum customers would not make a purchase

8.22 Figure 2 shows the changes in diversion ratios for JD Sports between the Remittal Online Survey and the Phase 2 Online Survey. It shows the fall in the share of diversion to Footasylum and the corresponding rise in diversion to Nike and adidas. While in the Phase 2 Online Survey Footasylum was the second closest competitor, not far behind Nike, in the Remittal Online Survey Footasylum was the fourth closest competitor with Nike clearly the strongest competitor.

**Figure 2: Change in online JD Sports customer diversion: footwear**

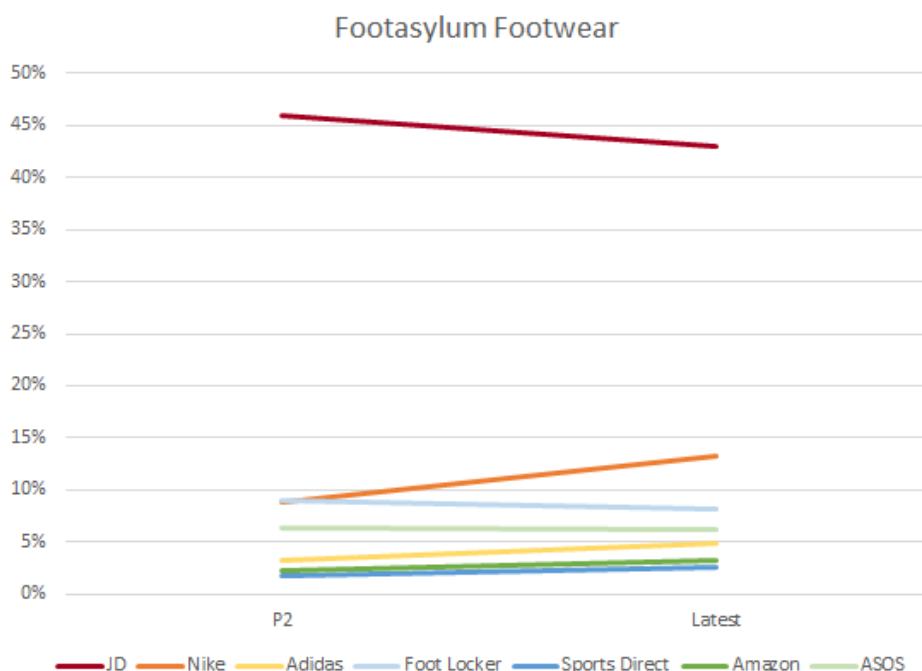


Source: CMA Phase 2 Online Survey and CMA Remittal Survey of Online Customers

8.23 Figure 3 shows the equivalent comparison for Footasylum customers. While it shows that diversion to both Nike and adidas have risen between the two surveys, JD Sports is still by far the closest competitor.



**Figure 3: Change in online Footasylum customer diversion: footwear**



Source: CMA Phase 2 Online Survey and CMA Remittal Survey of Online Customers

[OBJ] Source: CMA Phase 2 Online Survey and CMA Remittal Survey of Online Customers

## GUPPIs

8.24 We have calculated Gross Upward Pricing Pressure Indices (GUPPIs) for each of the Parties. The GUPPI provides an estimate, based on current market conditions, of the incentive that the Merged Entity faces to worsen PQRS. The GUPPI is calculated by combining diversion ratios and variable profit margins. In this case we do not use the GUPPI as a decision rule, rather the GUPPI is one piece of evidence in our decision making.

### *Parties' submissions*

8.25 The Parties in their submission on GUPPIs<sup>317</sup> set out their own GUPPI analysis.<sup>318</sup>

8.26 The Parties made a number of submissions related to the GUPPI being a static assessment and that diversion ratios are likely to change over the next

<sup>317</sup> [OBJ]

<sup>318</sup> See Appendix G for a discussion of the GUPPI analysis.

few years as a result of changes to the market (including due to the growth of DTC, disintermediation and the growth of digital).<sup>319</sup>

8.27 They also made the following points in relation to the level of the GUPPI:

- (a) The threshold of concern for GUPPIs should not be set as low as it was in groceries in *Sainsbury's/Asda* due to differences in the type of market.
- (b) The CMA has recognised the need to account for uncertainty in previous cases, for example in *Sainsbury's/Asda* where the CMA allowed for 0.5% to account for uncertainty in convenience grocery.
- (c) If Footasylum were [X], the GUPPI would be zero at that point.
- (d) Footasylum is X, and so the GUPPI must be assumed materially to overstate the incentives on JD Sports.

8.28 The Parties submitted a list of six strategic considerations which they believe would restrain JD Sports from acting on any quantified GUPPI.<sup>320</sup> These points were presented in relation to whether JD Sports would worsen its offer, but the Parties submitted most of these would also be applicable to whether Footasylum would worsen its offer:<sup>321,322</sup>

- (a) Worsening PQRS as implied by GUPPI would be X;
- (b) Worsening PQRS as implied by GUPPI would make X;
- (c) X;
- (d) X of customers to JD Sports after hypothetical diversion to Footasylum due to X;
- (e) Relative diversion ratio from JD Sports to Footasylum X;
- (f) Acting on the GUPPI incentive necessarily involves increasing the sales made by retailers (whether DTC or other retailers).

8.29 Finally, the Parties submitted that “the most acute issue on the Footasylum side is X. That constraint is X. Were JD Sports to worsen the offer of

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<sup>319</sup> Parties' Supplementary SLC paper from 28<sup>th</sup> May, paragraph 4.3 and 4.9 to 4.26.

<sup>320</sup> [X].

<sup>321</sup> Parties' Supplementary SLC paper from 28<sup>th</sup> May, paragraph 4.50

<sup>322</sup> [X].

Footasylum it would presumably carry [REDACTED].<sup>323</sup> The parties submit that the GUPPI framework does not account for this.<sup>324</sup>

- 8.30 Whilst we note that the Parties also made points regarding GUPPIs not accounting for the threat of reduced allocations and the loss of relevance to the brands in the CMA's Phase 2 Final Report,<sup>325</sup> we have considered the extent to which the evidence has changed. We considered in earlier sections the role of suppliers and how the Parties compete (Chapter 6). In particular we found that there are aspects of PQRS which retailers compete on and are not monitored or of interest to suppliers, and it is this competition that could be reduced, as indicated by the incentives implied by the GUPPI estimates.
- 8.31 We also recognise that GUPPI estimates are reflections of the Parties' positions now and do not capture the dynamics of 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 evidence on future competition. We consider for Footasylum in particular, that given the size of the GUPPI estimates based on current competition, the change needed in future competition would need to be of a large magnitude to reduce incentives to a level which does not raise prima facie concerns. We do not think that this is likely.
- 8.32 In relation to the specific points about the level of any GUPPI raised in paragraphs 8.26 to 8.30:
- (a) Our assessment is based on all the evidence in the round, of which GUPPI estimates are just one part. While each case is assessed on its own merits, we have not set GUPPI thresholds and the need for any adjustment to a threshold for uncertainty therefore does not arise.
  - (b) We consider the most likely counterfactual to be one in which Footasylum is [REDACTED]<sup>326</sup> and therefore one in which Footasylum continues to compete effectively.
  - (c) We agree with the Parties that capacity constraints can have an impact on the Merging Parties' ability to act on changed incentives arising from the Merger. The extent to which these constraints might arise is addressed in our assessment of [REDACTED]. We note here, however, that the potential for

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<sup>323</sup> Parties' Supplementary SLC paper from 28<sup>th</sup> May, paragraph 4.46

<sup>324</sup> [REDACTED].

<sup>325</sup> This was also the Parties first strategic consideration.

<sup>326</sup> See Chapter 10

these constraints is predominantly asymmetrical as JD Sports will not be materially supply-constrained.

- 8.33 In relation to the Parties' remaining strategic considerations (paragraph 8.29), many of these are related to the GUPPIs being static and in particular that customers are more vulnerable to switching to DTC, or other retailers in the future. As noted above, we consider future competition in our assessment, and while many of these effects are plausible to some extent, they remain speculative and we consider the impact to be ambiguous. In particular there is little concrete evidence of these potential effects or their magnitude and the Parties have not developed these points fully in terms of the effect on the Merged Entity's incentives to deteriorate PQRS at Footasylum.

### ***GUPPI estimates***

- 8.34 We used diversion ratios estimated from the results of our Remittal Online Survey and variable margins based on data from the Parties during the Remittal to estimate GUPPIs for each Parties' online offering.<sup>327</sup> We estimate the GUPPI for JD Sports online offering to be 3%, while the GUPPI for Footasylum's online offering to be far higher, at 15%.
- 8.35 We also used the diversion ratios estimated from the Phase 2 Exit Survey with the variable margins based on data from the Parties during the Remittal to estimate GUPPIs for each of the Parties' in-store offerings. We estimate the GUPPI for JD Sports in-store offering to be 3%, while the GUPPI for Footasylum's online offering to be far higher, at 15%. However, we consider these in-store estimates to be the upper limit of a range of possible estimates, as we describe below.
- 8.36 We then weighted the online and in-store GUPPIs together, using recent proportions of total sales occurring online and in-store, to estimate combined GUPPIs.<sup>328</sup> This gave us a 'base' calculation which we regard as the upper limit of a range of possible estimates because we considered it likely that due to market developments since the Phase 2 Exit Survey, the in-store diversion ratios would have changed. We applied a sensitivity analysis to reflect those market developments, namely the growth of DTC online since November 2019, the possible strengthening of online offerings for in-store customers and the possibility that Footasylum may have weakened as an in-store alternative among JD Sports customers. In order to consider a range of sensitivities we applied some fairly extreme assumptions at the lower end (eg assuming a

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<sup>327</sup> The GUPPI calculation and methodology is explained in Appendix G.

<sup>328</sup> See Appendix G for a full account of the GUPPI calculations.

very significant increase in diversion to DTC and a significant decrease in diversion to Footasylum). The range of estimates cover a wide range of possibilities and as such, while we do not rely on specific GUPPI numbers, the range gives us a broad sense of the Parties' potential incentives.

- 8.37 Within the framework of the sensitivity analysis described above (and in more detail in Appendix G), we estimate a combined GUPPI in the range of 3% to 5% for JD Sports.
- 8.38 For Footasylum, using the online GUPPI, and in-store GUPPI based directly on the Phase 2 Exit Survey diversion, gives a 'base' combined GUPPI of 3%. We have not conducted a sensitivity analysis around this estimate, but note that even if we were to take the online GUPPI alone as a lower variant of the range of estimates for the combined GUPPI (which would be extreme) it would still generate a GUPPI of 3%.
- 8.39 Overall, we therefore consider GUPPIs to provide useful and robust evidence on the Parties' current incentives to degrade PQRS. However, we are not using the GUPPI as a decision rule and we recognise that it does not take account of changes in future competition. The GUPPI is just one piece of evidence which will be considered in the round with the other evidence.

## Market shares

- 8.40 In this section, we show the market shares of suppliers in the sports-inspired casual footwear market.
- 8.41 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.
- 8.42 Due to the differentiated nature of this market, we looked at market shares as an indicator of the presence that different retailers have in the relevant markets.
- 8.43 For the purposes of the Remittal, we asked retailers to provide their UK revenue data covering the sports-inspired casual footwear market. Using this data from retailers, we calculated shares of supply in the relevant markets for the latest full calendar year of data available (2020).

- 8.44 There are limitations with these market shares including: there is not a clear boundary between products inside and outside the market; and it is unlikely that all market participants hold data in categories that precisely match the sports-inspired casual footwear market definition that we have adopted.
- 8.45 Across all distribution channels in the UK, JD Sports is the largest retailer of sports-inspired casual footwear, with a [20-30]% share. The next largest competitors are Nike ([10-20]%), Office ([5-10]%), adidas ([5-10]%), and Foot Locker ([5-10]%). Footasylum is the sixth largest, and significantly smaller than JD Sports, with a [0-5]% share across all channels. JD Sports is the largest retailer of sports-inspired casual footwear in both the in-store and online channels, but particularly large in the in-store channel, with a [40-50]% share. The Parties' combined in-store share ([50-60]%) is higher than its combined online share ([20-30]%). Finally, the Parties' combined share across all channels is [30-40]%. Appendix C shows further details on the shares including the Parties' comments and our responses to their comments.

## Sales forecasts

- 8.46 This section assesses the Parties' sales forecasts. Sales forecasts are useful in understanding how the Parties expect to perform in the future, which provides some information on whether they expect to be stronger or weaker competitors in the future. We do however, place some caution in interpreting the forecasts, given they are firms expectations of the future and are not necessarily comparable across retailers.

### JD Sports

- 8.47 [REDACTED]<sup>329</sup>, [REDACTED]<sup>330</sup>.

**Table 7: JD Sports UK forecasts for footwear sales (by volume)**

	1,000 units					
	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
In-store	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Online	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Total volume	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Source: [REDACTED]

Note: [REDACTED]

<sup>329</sup> [REDACTED].

<sup>330</sup> [REDACTED].

8.48 [REDACTED].<sup>331</sup> [REDACTED]

8.49 [REDACTED]

8.50 [REDACTED]

**Table 8: JD Sports UK forecasts for footwear sales (by value)**

						£m
	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
In-store	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Online	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Total value	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Source: [REDACTED]

Note: [REDACTED]

8.51 [REDACTED].

### *Footasylum*

8.52 [REDACTED].<sup>332</sup>

8.53 [REDACTED].<sup>333</sup>

8.54 [REDACTED].<sup>334</sup>

8.55 [REDACTED].<sup>335</sup>

## **9. Evidence relevant to apparel**

### **Introduction**

9.1 Chapter 7 set out the evidence that is applicable to competition in both the retail supply of sports-inspired casual footwear and apparel (and which it is difficult to attribute to footwear only or apparel only). This chapter sets out the

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<sup>331</sup> [REDACTED].

<sup>332</sup> [REDACTED].

<sup>333</sup> Given stores were closed for much of 2020, and stores only opened in April in 2021, we consider this the most meaningful comparison of how Footasylum expects its near-future sales to perform in comparison to pre-Covid performance.

<sup>334</sup> [REDACTED].

<sup>335</sup> [REDACTED].

remaining evidence relevant to competition in the retail supply of sports-inspired casual apparel.

9.2 This chapter sets out the evidence relevant to how closely the Parties compete and how closely they and rival retailers compete. We present the evidence on:

- (a) the importance of different brands in the Parties' sales of apparel;
- (b) the proportion and rankings of each retailer's overlap with JD Sports and Footasylum with respect to Nike and adidas apparel products;
- (c) the diversion ratios calculated from our survey of online shoppers (ie the proportion of other retailers selected by the Parties' customers as they best alternative);
- (d) the GUPPI metrics that we have estimated;
- (e) market shares; and
- (f) sales forecasts for the Parties.

## Importance of the brands

9.3 Table 10 shows the suppliers' share of the Parties' sports-inspired casual apparel revenue for 2020.

**Table 10: Suppliers' share of the Parties' sports-inspired casual apparel revenues (2020)**

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

Source: CMA analysis of Parties' data.

9.4 Table 10 shows that [X] and [X] are [X]. [X] is still the [X] brand for JD Sports and Footasylum but the proportion of [X] products in apparel is [X] than in footwear. [X] is still the [X] brand for JD Sports but the difference



between [X] and [X] is [X] in apparel than in footwear. [X] is [X] brand for Footasylum, this position is held by [X]. [X] is [X] brand for Footasylum but [X] between the [X] and that [X] in the top 10 positions, with the exception of [X]. [X].

## Product overlaps

9.5 For the reasons given in paragraph 8.5, we assessed the extent to which Nike and adidas apparel products sold by each Party are also sold by other retailers to show the Parties and their competitors overlap in terms of apparel products offered. However, it should be noted that this is less important for apparel compared with footwear given the greater diversity of sales for each brand and the greater reliance on own brand revenue in apparel, particularly for Footasylum. The methodology is described in paragraphs 71 to 74 of Appendix C.

9.6 Table 11 shows the results for Nike's apparel products.

**Table 11:** Proportion of Nike apparel products sold by the Parties that were also sold by other retailers (six months to March 2021)

Retailer	Proportion of JD sales	Proportion of JD products	Retailer	Proportion of FA sales	Proportion of FA products
JD Sports			Footasylum		
X			X		
X	59%	64%	X	87%	79%
X	48%	38%	X	73%	63%
X	44%	31%	X	69%	58%
X	40%	33%	X	62%	52%
X	33%	16%	X	60%	49%
X	32%	29%	X	59%	40%

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

Note: \* refers to the total number of products sold by the Parties.

9.7 For the Nike apparel products sold by JD Sports, Table 11 shows that, on a sales-weighted basis, X has the highest product overlap with JD Sports, followed by X and X. Footasylum has the X overlap with JD Sports, selling X of JD Sports' products on a sales-weighted basis.

9.8 For the Nike apparel products sold by Footasylum, Table 11 shows that, on a sales-weighted basis, X has the highest product overlap followed by X. JD Sports' overlap with Footasylum's products is X than Footasylum's overlap with JD Sports' products.

9.9 Table 12 shows the results for adidas' apparel products.

**Table 12:** Proportion of adidas apparel products sold by the Parties that were also sold by other retailers (six months to March 2021)

Retailer	Proportion of JD sales	Proportion of JD products	Retailer	Proportion of FA sales	Proportion of FA products
JD Sports			Footasylum		
✂ *			✂ *		
✂	11%	27%	✂	71%	54%
✂	10%	28%	✂	63%	53%
✂	8%	29%	✂	58%	49%
✂	5%	11%	✂	52%	36%
✂	4%	15%	✂	26%	17%
✂	4%	6%	✂	19%	7%

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

Note: \* refers to the total number of products sold by the Parties.

- 9.10 For the adidas apparel products sold by JD Sports, Table 12 shows that, on a sales-weighted basis, ✂ has the highest product overlap with JD Sports, followed by ✂ and ✂. Footasylum has the ✂ overlap with JD Sports on a sales weighted basis, and this is ✂, using either methodology.
- 9.11 For the adidas apparel products sold by Footasylum, Table 12 shows that, on a sales-weighted basis, ✂ has the highest product overlap followed ✂ and ✂. JD Sports has the ✂ overlap, selling ✂ of Footasylum's adidas apparel products on a sales-weighted basis.
- 9.12 Appendix C shows further detail including the comments from the Parties and our responses.

## Diversion ratios

- 9.13 As for footwear, we used the Remittal Online Survey to calculate diversion ratios<sup>336</sup> for customers of JD Sports and Footasylum in apparel. The Remittal Online survey shows that 8% of JD Sports apparel customers would divert to Footasylum as their best alternative (Table 13), down from 13% in the Phase 2 Online Survey. Our Phase 2 Exit Survey of in-store customers showed diversion to Footasylum of 17%; 4% to its online offering and 13% to its stores (Table 14).
- 9.14 Among Footasylum's online apparel customers our Remittal Online Survey showed that 50% would divert to JD Sports, down from 61% in our Phase 2 Online Survey. 69% of Footasylum's in-store apparel customers diverted to JD Sports in our Phase 2 Exit Survey; 13% online and 57% to JD Sports stores.
- 9.15 Table 13 shows that 68% of Footasylum's online shoppers' next best alternative is another online retailer while 22% diverted in-store. JD Sports is

<sup>336</sup> All diversion ratios are not spend weighted, do not allow own party diversion and are based on the full sample (ie are not restricted to, for example, price marginal customers)

by far the closest competitor in both channels, receiving half of overall diversion with Nike the next closest competitor at 9% and ASOS next at 6%.

- 9.16 Among JD Sports online customers, 65% cited an online competitor as their best alternative while 23% diverted in-store. Nike was the strongest competitor, receiving 19% of diverted sales, followed by ASOS at 12%, Adidas at 10%, Sports Direct at 9% and Footasylum at 8%.

**Table 13: Apparel diversion ratios of online customers to the merger party and third parties**

	<i>JD Sports customers</i>			<i>Footasylum customers</i>			%
	<i>To a store</i>	<i>To online</i>	<i>Total</i>	<i>To a store</i>	<i>To online</i>	<i>Total</i>	
Footasylum	2	6	8				
JD Sports				13	37	50	
Nike	5	14	19	2	8	9	
ASOS		12	12		6	6	
Adidas	2	8	10		2	3	
Sports Direct	3	6	9	2	1	4	
Next	1	5	6		2	2	
Amazon		4	4				
Foot Locker	1	2	3	1	4	5	
The North Face	1	2	3		2	2	
Flannels	1	1	2	2	1	3	
Boohoo					2	2	
Other	6	5	11	2	3	5	
Total	23	65	88	22	68	90	

Source: CMA Remittal Survey of Online Customers

Note: No spend-weighting was applied. Own-party diversion was excluded. Twelve percent of JD Sports customers and 10% of Footasylum customers would not make a purchase

**Table 14: Apparel diversion ratios of store customers to the merger party and third parties**

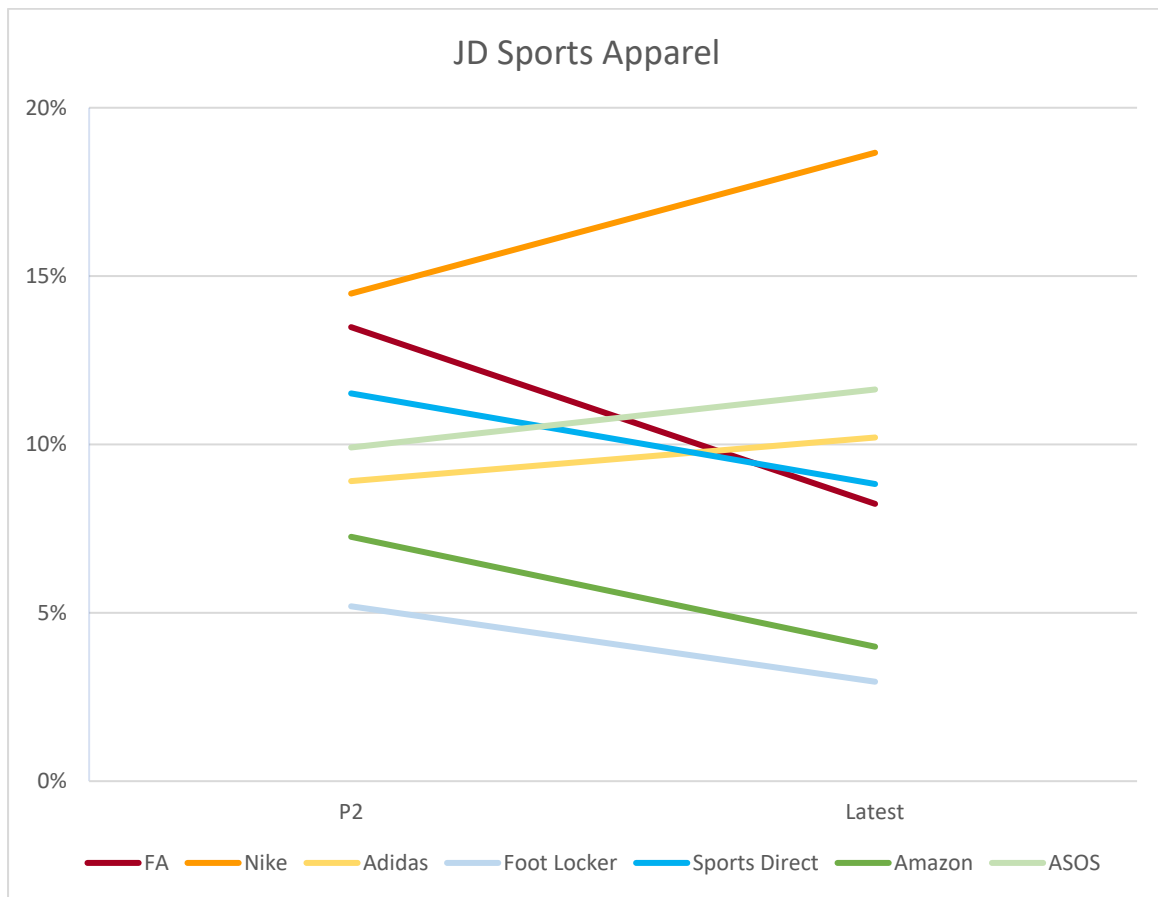
	<i>JD Sports customers</i>			<i>Footasylum customers</i>			%
	<i>To a store</i>	<i>To online</i>	<i>Total</i>	<i>To a store</i>	<i>To online</i>	<i>Total</i>	
Footasylum	13	4	17				
JD Sports				57	13	69	
Sports Direct	15	2	17	1		2	
Foot Locker	6	2	8	2	1	3	
Nike	4	4	8		1	2	
adidas	4	3	7	1	1	1	
DW Sports	3	1	4				
Other	9	6	15	4	2	6	
Total	59	24	84	68	20	87	

Source: CMA Phase 2 exit survey

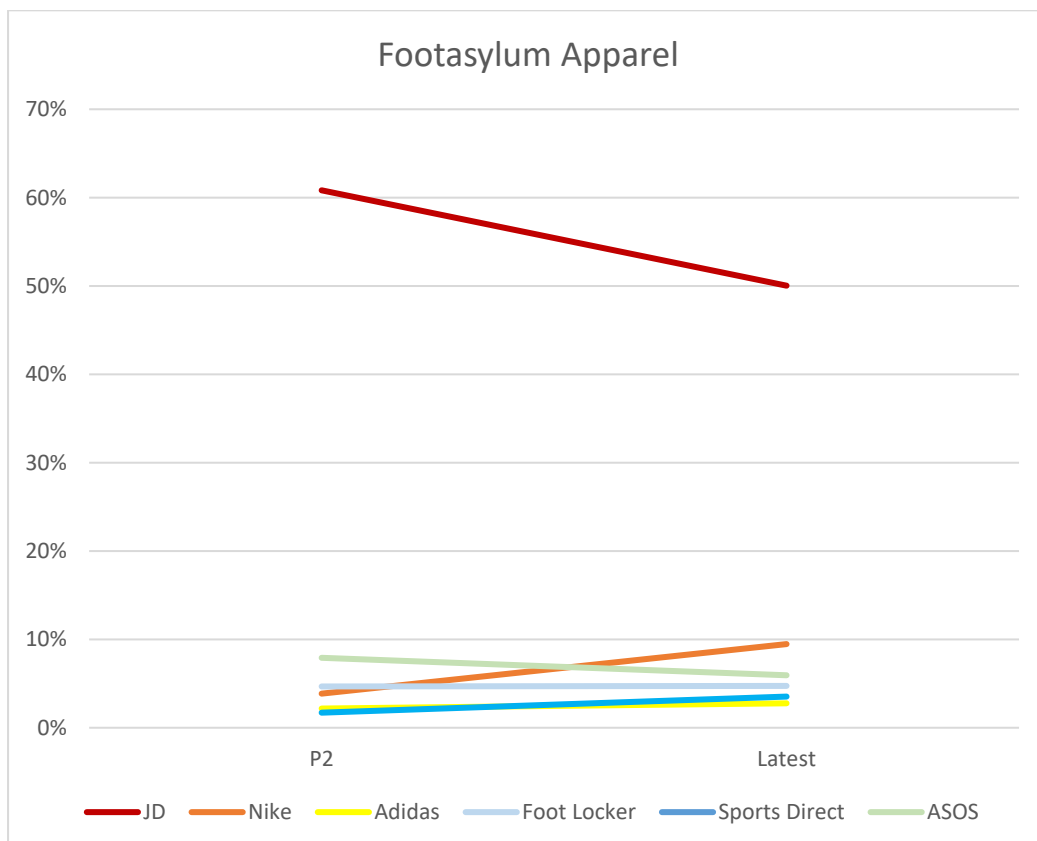
Note: No spend-weighting was applied. Own-party diversion was excluded. Sixteen percent of JD Sports customers and 13% of Footasylum customers would not make a purchase.

- 9.17 Figure 4 shows the changes in diversion ratios for JD Sports between the Phase 2 Online Survey and the Remittal Online survey. Diversion to Foot Locker, Amazon and, particularly, Footasylum has fallen whereas diversion to Nike, ASOS and Adidas has increased. The equivalent for Footasylum's online customers shows again, the extent to which JD Sports is the strongest alternative, even after a decrease in its share of diversion. Among other competitors, Nike's share has grown to become the second strongest competitor, albeit a long way below JD Sports.

**Figure 4: Change in JD Sports online customer diversion: apparel**



**Figure 5: Change in Footasylum online customer diversion: apparel**



## GUPPIs

- 9.18 We have calculated Gross Upward Pricing Pressure Indices (GUPPIs) for each of the Parties for apparel. The GUPPI provides an estimate, based on current market conditions, of the incentive that the Merged Entity faces to worsen PQRS. As described in relation to footwear, the GUPPI is calculated by combining diversion ratios and variable profit margins. In this case we do not use the GUPPI as a decision rule, rather the GUPPI is one piece of evidence in our decision making.
- 9.19 We used diversion ratios estimated from the results of our Remittal Online Survey and variable margins based on data from the Parties during the Remittal to calculate GUPPIs for each Parties' online offering.<sup>337</sup> We estimate the GUPPI for JD Sports online offering for apparel to be [X]%, while the apparel GUPPI for Footasylum's online offering to be far higher, at [X]%.
- 9.20 We also used the diversion ratios estimated from the Phase 2 Exit Survey with the variable margins based on data from the Parties during the Remittal to estimate GUPPIs for each of the Parties' in-store offerings. We estimate the GUPPI for JD Sports in-store offering for apparel to be [X]%, while the apparel GUPPI for Footasylum's online offering to be far higher, at [X]%. As described in relation to footwear in paragraph 8.37, we consider these in-store estimates to be the upper limit of a range of possible estimates.
- 9.21 We also weighted the online and in-store GUPPIs together, using recent proportions of total sales occurring online and in-store, to estimate combined GUPPIs. As we did for footwear, we applied a sensitivity analysis to reflect market developments. In order to consider a range of sensitivities we applied some fairly extreme assumptions at the lower end (eg assuming a very significant increase in diversion to DTC and a significant decrease in diversion to Footasylum). The range of estimates cover a wide range of possibilities and as such, while we do not rely on specific GUPPI numbers, the range gives us a broad sense of the Parties' potential incentives.
- 9.22 Within the framework of the sensitivity analysis (as described in paragraph 8.36 and more detail in Appendix G), we estimate a combined apparel GUPPI in the range of X % to X% for JD Sports.
- 9.23 For Footasylum, using the online GUPPI, and in-store GUPPI based directly on the Phase 2 Exit Survey diversion, gives a 'base' combined apparel GUPPI of X%. We have not conducted a sensitivity analysis around this estimate, but note that even if we were to take the online GUPPI alone as a lower

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<sup>337</sup> The GUPPI calculation and methodology is explained in Appendix G.

variant of the range of estimates for the combined GUPPI (which would be extreme) it would still generate a GUPPI of 30%.

## Market shares

- 9.24 In this section, we show the market shares of suppliers in the sports-inspired casual apparel market.
- 9.25 For the reasons given in paragraphs 8.42 and 8.43 we looked at market shares as an indicator of the presence that different retailers have in the relevant markets.
- 9.26 Across all distribution channels in the UK, JD Sports is the largest retailer of sports-inspired casual apparel, with a 30-40% share. The next largest competitors are Primark (10-20%), Nike (5-10%), M and M Direct (5-10%), and adidas (5-10%). Footasylum is the sixth largest, and significantly smaller than JD Sports, with a 0-5% share across all channels. JD Sports is the largest retailer of sports-inspired casual apparel in both the in-store and online channels, but particularly large in the in-store channel, with a 40-50% share. The Parties' combined in-store share (40-50%) is higher than its combined online share (30-40%). Finally, the Parties' combined share across all channels is 40-50%. Appendix C shows further details on the shares including the Parties' comments and our responses to their comments.

## Sales forecasts

- 9.27 This section assesses the Parties' sales forecasts in relation to apparel. Sales forecasts are useful in understanding how the Parties expect to perform in the future, which provides some information on whether they expect to be stronger or weaker competitors in the future. We do however, place some caution in interpreting the forecasts, given they are firms expectations of the future and are not necessarily comparable across retailers

### *JD Sports*

9.28 [redacted]

Table 15: [redacted]

[redacted]					
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

[REDACTED]

9.29 [REDACTED]

9.30 [REDACTED]

9.31 [REDACTED]

**Table 16:** [REDACTED]

						[REDACTED]
	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

[REDACTED]

9.32 [REDACTED]

**Table 17:** [REDACTED]

[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

[REDACTED]

### Footasylum

9.33 [REDACTED].<sup>338</sup>

9.34 [REDACTED].<sup>339</sup>

<sup>338</sup> [REDACTED].

<sup>339</sup> Given stores were closed for much of 2020, and stores only opened in April in 2021, we consider this the most meaningful comparison of how Footasylum expects its near-future sales to perform in comparison to pre-Covid performance.

9.35 [REDACTED].<sup>340</sup>

9.36 [REDACTED].<sup>341</sup>

## 10. Counterfactual

### Introduction

- 10.1 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.<sup>342</sup>
- 10.2 The counterfactual is not about benchmarking market dynamics at a specific point in time. Events which occur after the completion of a deal but before the completion of the CMA’s review of the merger and which are not a result of the merger can be incorporated into the counterfactual.<sup>343</sup> At the same time, events which occur during the CMA’s review and which are attributable to the Merger, should not form part of the CMA’s counterfactual.
- 10.3 Therefore, we consider that Footasylum’s trading performance since the Merger (and during the COVID-19 pandemic) can provide some insight into what would have occurred absent the Merger. For example, we understand that [REDACTED]. Footasylum has also made a series of improvements to its online and mobile app offer over the past year or so.
- 10.4 We seek to avoid importing into the assessment of the appropriate counterfactual any spurious claims to accurate prediction or foresight. Given that the counterfactual incorporates only those elements of scenarios that are foreseeable (ie that events or circumstances and their consequences can be predicted with some confidence), it will not in general be necessary to make finely balanced judgements about what is and what is not included in the counterfactual.<sup>344</sup> In reaching a view on the appropriate counterfactual, we must determine what future developments we foresee arising absent the merger based on the evidence available to us. Where future events or

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<sup>340</sup> [REDACTED].

<sup>341</sup> [REDACTED].

<sup>342</sup> [Merger Assessment Guidelines](#), paragraph 4.3.1

<sup>343</sup> See, in this regard, *British Sky Broadcasting Group plc v Competition Commission (CC)* (Cases 1095/4/8/08 and 1096/4/8/08) [2008] CAT 25, paragraph 138. See also, for example, [Ryanair Holdings plc/Aer Lingus Group plc](#), paragraph 7.10

<sup>344</sup> [Merger Assessment Guidelines](#), paragraphs 4.3.2 and 4.3.6



circumstances are not certain or foreseeable enough to include in the counterfactual, the analysis of such events can take place in the assessment of competitive effects.<sup>345</sup>

- 10.5 The time period over which the CMA considers the effects of a merger is determined by the nature of the markets in question and the time period over which events and their consequences are foreseeable.<sup>346</sup>
- 10.6 In this case, the Parties have submitted that in reviewing the time period over which the effects of the Merger are considered, the CMA should take into account the fact that suppliers and analysts are forecasting to 2025 or 2026,<sup>347</sup> and therefore, the CMA is able to gather sufficient evidence to make forecasts extending beyond two years. The Parties considered it important to do this in order to avoid overlooking some of the significant dynamic changes that are in progress. In addition, the Parties consider that the near-term may be harder to forecast given the unpredictability of the COVID-19 pandemic.<sup>348</sup>
- 10.7 Our view is that the evidence we have received during the Remittal is not sufficiently definitive to make projections about the period as far ahead as 2025 or 2026 as the Parties have suggested. The counterfactual is about conditions of competition that the Merger can be assessed against. The evidence that the Parties have submitted in the previous paragraph – suppliers and analysts forecasts – do not address the question about conditions of competition between the Parties in the absence of the Merger (although we do use Parties’ DTC growth forecasts and analysts’ reports in our assessment of the Merger). Whilst suppliers, who have considerable influence over retail competition, may set broad global targets several years into the future, their detailed internal forecasts are often for far shorter periods (eg up to the end of the current financial year) reflecting a degree of uncertainty around whether they will achieve their longer term targets.<sup>349</sup> This means that we have not received sufficiently certain plans for product allocations or [X] to justify a longer foreseeable period. Moreover, retailers are able to change parameters of competition over a relatively short period of time and we cannot foresee how retail competition will develop several years in advance.
- 10.8 Therefore, we have assessed the Merger over a period of around two years into the future (from the time of our assessment), but where appropriate and

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<sup>345</sup> [Merger Assessment Guidelines](#), paragraph 4.3.2

<sup>346</sup> [Merger Assessment Guidelines](#), paragraph 4.3.2

<sup>347</sup> The Parties highlight adidas’ public statements forecasting growth in DTC to 2025 and RBC Capital Markets forecast of Nike’s CAGR EPS out to FY26.

<sup>348</sup> [Parties’ Initial Submission](#), 30 April 2021, footnote 32.

<sup>349</sup> [X].

where supported by evidence we have considered the impact of developments further in the future.

10.9 In considering the counterfactual, we have focussed on the position of Footasylum since the Parties have made submissions to us on this but not on JD Sports' position in the counterfactual. We are also conscious that the financial position of Footasylum and other evidence relevant to how the COVID-19 pandemic may have affected Footasylum's position in the counterfactual were relevant to JD Sports' Application to the Tribunal. The Tribunal held that the CMA was entitled to consider the likely effects of COVID-19 as part of its competitive assessment rather than the counterfactual but that the CMA should have made further inquiries of suppliers and of Footasylum's primary lender, even at a late stage in its investigation, in order to be able to conclude as to whether there was robust evidence that could affect its conclusions. We have done this in the Remittal.

10.10 The chapter assesses:

- (a) Footasylum's likely future access to sports-inspired casual footwear and apparel from its main suppliers (Nike and adidas) and
- (b) Footasylum's financial performance and budget forecasts including financial support available during the COVID-19 pandemic.

## **Parties' submissions**

10.11 The Parties submitted that the most likely scenario for the counterfactual is that Footasylum will be a [redacted] competitor of JD Sports [redacted].<sup>350</sup> Further, the Parties submitted that the strategy of Nike and other brands of implementing [redacted] in the relevant markets over the next few years. The Parties submitted that this concerns Footasylum's market position and is a separate issue from Footasylum's financial position although any deterioration of its financial position may exacerbate these issues.<sup>351</sup> Finally, the Parties submitted that if [redacted] allocations are only factored into the counterfactual to a certain degree, eg because above a certain level they are considered to be possible but not likely, then the further [redacted] allocations above the counterfactual level remains relevant in the SLC analysis as it would operate as a threat for Footasylum.<sup>352</sup>

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<sup>350</sup> Parties' Supplementary SLC paper, 28 May 2021, paragraph 2.1.

<sup>351</sup> Parties' Supplementary SLC paper, 28 May, paragraph 2.23.

<sup>352</sup> Parties' Supplementary SLC paper, 28 May, paragraph 2.24.

10.12 The Parties submitted that [REDACTED] of Footasylum by Nike should form part of the counterfactual, whether the time frame is 2-3 years or longer. The Parties told us that the longer the time frame that is used, [REDACTED].<sup>353</sup>

## **Footasylum's future access to products**

10.13 The Parties have told us during the Remittal that absent the Merger Footasylum would be [REDACTED] it would be [REDACTED].

10.14 We have considered the evidence of Footasylum being a weaker competitor in the counterfactual [REDACTED]. We assess the evidence relating to each of these scenarios separately below.

10.15 Nike and adidas have told us that they continue to treat Footasylum independently from JD Sports under their distribution policies and in terms of product allocation.<sup>354</sup> On that basis, we consider that evidence relating to the period post-completion is relevant to the assessment of the counterfactual.

10.16 We have also taken into account evidence relating to Nike and adidas' plans [REDACTED] respective distribution policies and product allocations in the future.

[REDACTED]

10.17 The evidence that we have clearly shows [REDACTED]. We have considered whether the counterfactual [REDACTED]. This is because, in the event of [REDACTED], Footasylum would be a substantially weaker competitor to JD Sports given the importance [REDACTED] and the importance more generally of footwear to Footasylum's ability to compete effectively with JD Sports. JD Sports itself is [REDACTED] Nike has categorised JD Sports as [REDACTED], which generally is Nike's [REDACTED].

10.18 As discussed below, there is considerable uncertainty surrounding whether Nike [REDACTED]. However, the presence of uncertainty about the future does not in itself lead us to default to a particular position (eg the pre-Merger situation). Instead, we will consider the evidence in the round, including not only evidence of Nike's stated intentions but also evidence of its incentives and strategic objectives, to establish the most likely counterfactual scenario. The counterfactual incorporates only those scenarios that are foreseeable – ie that events or circumstances and their consequences can be predicted with some

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<sup>353</sup> [REDACTED].

<sup>354</sup> [REDACTED].

confidence.<sup>355</sup> It is not generally necessary for the counterfactual assessment to take detailed decisions on future competitive conditions.

10.19 Given the importance of this issue, we have used our formal information gathering powers to collect evidence from Nike on this question, including responses to our questionnaires and requests for internal documents. In particular, we have obtained evidence from Nike concerning its future plans for retailer partnerships in the UK and the status of its decision-making in this context, on which we have placed significant weight, and the factors that may drive that decision-making.<sup>356</sup> We have also held a formal hearing with Nike.

### *The Parties' submissions*

10.20 One of the Parties' main arguments to us in their submissions is that Footasylum is [REDACTED] as a part of Nike's strategy [REDACTED]. The Parties have submitted that the key suppliers are favouring brands with global coverage and a presence in key cities, are reducing costs by cutting the number of accounts they have to manage, and are extending their control over the remaining retailers. The Parties have stated that: "For the first time, Nike (and similarly adidas) in public 2021 statements has been unusually blunt about the strategic shake-out post-pandemic: "divesting" less valuable retail partners, while the criteria to be of "differentiated" value to them are at both extremes: "large strategic", plus "neighbourhood". [REDACTED]."<sup>357</sup> The Parties referenced Nike public statements on "large strategic retailers" and "local neighbourhood partners", and stated that "The takeaway from these two statements is that Nike will not support retailers that do not fall into either of these two categories."<sup>358</sup>

10.21 The Parties also highlighted [REDACTED] to [REDACTED], and statements by Nike to Footasylum that [REDACTED].

10.22 The Parties summarised that "considering Nike's evidence in the round, it is evident that the uncertainty is mainly about [REDACTED]."<sup>359</sup>

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<sup>355</sup> [Merger Assessment Guidelines](#), paragraph 4.3.6

<sup>356</sup> We sent 4 formal notices for information to Nike and a we held a formal hearing with Nike on 21 May 2021.

<sup>357</sup> [REDACTED].

<sup>358</sup> [REDACTED].

<sup>359</sup> [REDACTED].

## *Nike's submissions*

### *Nike's future plans [REDACTED]*

10.23 We consider that evidence from Nike shows that Nike is [REDACTED].<sup>360</sup> [REDACTED].

10.24 Nike has told us [REDACTED]<sup>361</sup> [REDACTED]<sup>362</sup> [REDACTED].<sup>363</sup>

10.25 [REDACTED].

### *Nike's options*

10.26 Nike's internal documents indicate that Nike [REDACTED]<sup>364</sup> [REDACTED].<sup>365</sup> [REDACTED].

10.27 Our analysis of internal Nike documents describing [REDACTED].

10.28 There is evidence that Nike is currently taking steps to implement the initial steps [REDACTED]. However, the steps already underway [REDACTED]. Indeed, Nike has stated that its business relationship with Footasylum [REDACTED] (see paragraph 7.64).

10.29 Taking account of the above, we do not consider that the fact that Nike has [REDACTED] Further, Nike has noted that it 'is not currently in a position to predict with any degree of certainty [REDACTED].'

10.30 As a means to probe the extent of that uncertainty we have also reviewed internal Nike strategy documents which contain further details of [REDACTED].

[REDACTED]

10.31 We have asked Nike a considerable number of questions concerning [REDACTED]. Nike has told us that [REDACTED] will depend on a range of factors [REDACTED] (paragraph 6.55).

10.32 We have not seen evidence showing that Nike [REDACTED].

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<sup>360</sup> [REDACTED].

<sup>361</sup> [REDACTED].

<sup>362</sup> [REDACTED].

<sup>363</sup> [REDACTED].

<sup>364</sup> [REDACTED].

<sup>365</sup> [REDACTED].

10.33 [REDACTED]. Notwithstanding this, Nike has also told us that [REDACTED].<sup>366</sup> Nike also told us that it considered that the unresolved nature of the merger with JD Sports (ie continued CMA review and the challenge at the Tribunal) has likely [REDACTED].<sup>367</sup>

10.34 Nike's internal documents show that [REDACTED].<sup>368</sup> [REDACTED].<sup>369</sup>

10.35 [REDACTED].

10.36 [REDACTED].

### *Our assessment*

10.37 In order to provisionally conclude that in the counterfactual [REDACTED], we would need to be satisfied on the basis of the evidence and facts available that this is the most likely scenario absent the Merger.<sup>370</sup>

10.38 Taken together, we consider the key factors arising out of the evidence [REDACTED] are the following:

(a) [REDACTED].

(b) [REDACTED].

(c) [REDACTED];

(d) [REDACTED]; and

(e) [REDACTED].

10.39 Whilst we have considered all these factors in the round, [REDACTED].

10.40 On that basis, we consider that the evidence we have received thus far [REDACTED], meaning that in the counterfactual Nike would have continued to supply Footasylum.

10.41 We have however taken into account that [REDACTED].<sup>371</sup> [REDACTED].

10.42 We next consider the evidence that in the counterfactual Footasylum would have [REDACTED] from Nike and adidas.

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<sup>366</sup> [REDACTED].

<sup>367</sup> [REDACTED].

<sup>368</sup> Other retailers [REDACTED].

<sup>369</sup> We also note [REDACTED].

<sup>370</sup> [Merger Assessment Guidelines](#), paragraph 4.3.6.

<sup>371</sup> The CMA may still consider the effects of the merger in the context of an event or circumstance occurring even if that event or circumstance is not sufficiently certain to include in the counterfactual ([Merger Assessment Guidelines](#), paragraph 4.3.2)

### ***Footasylum's product allocations by Nike and adidas***

- 10.43 We have considered whether the counterfactual should include a [REDACTED] from Nike and/or adidas ([REDACTED]).
- 10.44 We have evidence that the main suppliers, Nike and adidas, [REDACTED]. We note that some of these changes have already happened and are therefore likely to have also occurred in the counterfactual.
- 10.45 Taken together, we consider the key factors arising out of the evidence on changes to Footasylum's product allocations are the following:
- (a) Footasylum remains within Nike's [REDACTED] category and consequently [REDACTED] (paragraph 7.60). [REDACTED] affected by market-wide or short-term supply shortages (paragraph 7.212). However, the evidence does not indicate that [REDACTED].
  - (b) adidas has made [REDACTED]. adidas's current forecasts to [REDACTED] indicate that [REDACTED].
- 10.46 We consider that since the completion of the Merger, Nike and adidas have treated Footasylum as if it were an independent entity from JD Sports. Neither supplier has consolidated its supply to JD Sports and Footasylum combined and Footasylum has experienced supply [REDACTED] that JD Sports has not (or at least not to the same extent). Although suppliers may have some incentive to treat Footasylum differently than they would have done had Footasylum been independent of JD Sports, on balance we consider that Footasylum's experience of receiving products from Nike and adidas (paragraphs 7.60 to 7.70) provides at least some insight into what would have been the case absent the Merger.<sup>372</sup> On that basis, we consider that the evidence we have received indicates that, absent the Merger, Footasylum's product allocations from Nike and adidas would have been [REDACTED]. [REDACTED]. [REDACTED]. We will consider the impact of product allocations in the competitive assessment in further detail.
- 10.47 In regard to JD Sports' position in the counterfactual we note that since the CMA's Phase 2 Final Report, JD Sports' has remained a strong competitor. It has [REDACTED], in-store and online (paragraphs 7.127 to 7.131). Moreover, in the foreseeable future JD Sports' will remain as [REDACTED] and [REDACTED] to adidas.

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<sup>372</sup> The Parties have been effectively held separate by a series of interim measures and undertakings since May 2019. Such measures would have prevented them from negotiating with suppliers as a single entity and receiving a single, consolidated supply of products.

10.48 The Parties have not submitted to us any reasons why JD Sports' position in the counterfactual has changed since the CMA's Phase 2 Final Report.

10.49 The evidence indicates that for JD Sports its competitive constraint in the counterfactual is the pre-Merger conditions of competition.

## Footasylum's financial performance access to credit

10.50 As part of our assessment of the appropriate counterfactual, we considered the likely impact of COVID-19 on Footasylum in the counterfactual, and whether we consider it likely that, absent the Merger, the primary lender would have continued to support Footasylum to enable it to continue to compete in the relevant markets.

10.51 As a part of our consideration of Footasylum's overall financial position we have also considered Footasylum's financial performance and budget forecasts.

## Recent financial performance and budget

10.52 We have considered the financial health of Footasylum since it is relevant in considering Footasylum's strength as a competitor absent the Merger. Table 18 shows Footasylum's financial performance from 2018/19 to 2020/21, and its latest budget reforecast for 2021/22.

**Table 18: Footasylum historic financial performance from 2018/19 to 2020/21 and reforecast for 2021/22**

<b>£'m</b>	<b>2018/19</b>	<b>2019/20</b>	<b>2020/21</b>		<b>2021/22</b>
	<b>Actual</b>	<b>Actual</b>	<b>Actual</b>		<b>Reforecast (RF1)</b>
- In-store	[X]	[X]	[X]		[X]
- Online	[X]	[X]	[X]		[X]
- Wholesale	[X]	[X]	[X]		[X]
	[X]	[X]	[X]		[X]
<b>Total revenue</b>	[X]	[X]	[X]		[X]
<b>Gross Profit</b>	[X]	[X]	[X]		[X]
<b>EBITDA</b>	[X]	[X]	[X]		[X]
	[X]	[X]	[X]		[X]
<b>GP Margin (%)</b>	[X]	[X]	[X]		[X]
<b>EBITDA (%)</b>	[X]	[X]	[X]		[X]
	[X]	[X]	[X]		[X]
Capital expenditure	[X]	[X]	[X]		[X]
Marketing	[X]	[X]	[X]		[X]
<i>Marketing spend as percentage of revenue</i>	[X]	[X]	[X]		[X]

Source: Annex 2059 – FY22 RF1 (final)- Updated 060521.pptx,



<sup>i</sup> 2018/19 and 2019/20 figures are from Footasylum response to section 109 dated 23 December 2019, question 10, [Annex 3 – FY20\\_budget\\_board\\_pack-Final, slide 3](#).

<sup>ii</sup> 2020/21 capital expenditure are from Footasylum response to section 109 dated 6 April 2021, question 3, paragraph 3.10.1.

Notes:

(i) Footasylum's financial year runs from March to February.

(ii) 2021/22 budget includes 1 new store.

(iii) The rolling forecast include reduced allocations.

- 10.53 Table 18 shows that Footasylum's revenues were [REDACTED] by the COVID-19 pandemic, but its reforecast for the current year (2021/22) [REDACTED] (2019/20). Footasylum's overall total revenue [REDACTED]. Within the overall decline in revenue from 2019/20 to 2020/21, which coincided with the COVID-19 pandemic, in-store revenue [REDACTED] while online revenue [REDACTED]. Footasylum's management reforecast for 2021/22 shows that total revenue is expected to [REDACTED].
- 10.54 In relation to Footasylum's profitability, between 2018/19 and 2020/21, Footasylum's gross profit margin [REDACTED], and EBITDA margin from [REDACTED]. Footasylum's 2021/22 reforecast shows that [REDACTED]
- 10.55 Footasylum told us that it usually set its marketing budget at around [REDACTED].<sup>373</sup> Footasylum's marketing spend as a percentage of revenue [REDACTED], and its 2021/22 reforecast shows that its marketing spend will [REDACTED].
- 10.56 Footasylum's capital expenditure for 2020/21 shows that the actual capital expenditure for 2020/21 was [REDACTED]<sup>374</sup> compared to its pre-COVID-19 pandemic budget for 2020/21, and it has [REDACTED] its capital expenditure during the COVID-19 pandemic. Further, Footasylum's capital expenditure in its 2021/22 reforecast is set at around [REDACTED].
- 10.57 Footasylum's reforecast for 2021/22 show that it will [REDACTED] (see Figure 1, Appendix D Footasylum's Financial Position).<sup>375</sup>

### ***Our assessment of Footasylum's financial performance and budget forecast***

- 10.58 We considered the financial position of Footasylum and how the COVID-19 pandemic may have affected Footasylum's position in the counterfactual (ie absent the Merger). We note that while the CMA's interim measures have prevented further integration between the Parties and therefore maintained the separate operation of the Parties' respective businesses, we are mindful that Footasylum's performance may have been affected by the uncertainty and disruption associated with the Merger and ongoing investigation. We therefore consider post-Merger events and performance, but only to the

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<sup>373</sup> [REDACTED].

<sup>374</sup> Footasylum's capital expenditure for 2020/21 (before the COVID-19 pandemic) was set at [REDACTED], and Footasylum's actual spend for the year was [REDACTED].

<sup>375</sup> [REDACTED].

extent that they provide some insight into the competitive situation absent the Merger.

- 10.59 In considering the evidence set out above, we are mindful that Footasylum's actions in response to the COVID-19 pandemic may limit the comparability of 2020/21 EBITDA with prior periods. For example, due to the impact of rent-free periods and staff furlough. As such, we note that it may be more informative to make prior period comparisons at revenue and gross profit margin levels. Notwithstanding this, we consider that the profitability analysis is sufficiently robust for us to consider Footasylum to be a profitable entity.
- 10.60 Footasylum's financial performance from 2018/19 to 2020/21 showed that since the Merger completed in early 2019, Footasylum has continued to trade successfully.
- 10.61 We note that although Footasylum's overall revenue [X] in 2020/21 during the COVID-19 pandemic, compared to the previous year, the [X], while its gross profit and EBITDA margins [X] during this time. Therefore, in our view, while the COVID-19 pandemic did have a [X], Footasylum's financial performance, mainly in terms of the performance of its online business and [X] in its gross margins, indicate the underlying resilience of Footasylum during the COVID-19 pandemic.
- 10.62 On balance, we consider that we should place some, but not full, weight on this evidence given that we consider that Footasylum's post-Merger trading performance is a relevant indicator of what may have happened absent the Merger.

#### *Footasylum's reforecasts*

- 10.63 Footasylum's financial budget reforecasts for 2021/22, which showed that the total revenues will [X] to 2019/20 levels (before the COVID-19 pandemic).
- 10.64 Footasylum reforecasts showed that it will [X] its marketing spend as [X] of its revenue, and the capital expenditure will be only £[X] than 2019/20 (before the COVID-19 pandemic). Therefore, during the COVID-19 pandemic, Footasylum has [X].
- 10.65 Based on the above, Footasylum's budget reforecast for 2021/22 shows that: (a) Footasylum is forecasting revenue to [X], which is [X] with pre-COVID-19 pandemic levels (2019/20); (b) gross margin forecast [X]; and (c)

Footasylum will [REDACTED] (see paragraph 19, Appendix D Footasylum's Financial Position).<sup>376</sup>

### ***Footasylum's access to credit***

10.66 The Tribunal's judgment considered that the CMA should have made further inquiries of Footasylum's primary lender as part of the CMA's assessment of the counterfactual in the CMA's Phase 2 Final Report. In the course of the Remittal, we have gathered evidence from the primary lender, and this evidence is set out below.

### ***Evidence from Footasylum's primary lender***

10.67 The primary lender told us that its strategy was to support 'all of its clients' provided they remained a viable business with a range of measures (such as [REDACTED], and the UK Government's Coronavirus Business Interruption Loan schemes<sup>377</sup>) to mitigate any trading impact due to the COVID-19 pandemic. It also told us that [REDACTED].<sup>378</sup>

10.68 The primary lender told us that it was [REDACTED], and that Footasylum's [REDACTED].<sup>379</sup>

10.69 The primary lender's support to Footasylum continued throughout the COVID-19 pandemic. This is evidenced in a [REDACTED].<sup>380</sup>

10.70 The primary lender told us that it did not consider that Footasylum would be [REDACTED]. It told us that the suppliers of footwear continued through the pandemic and challenges were primarily related to operations such as running distribution centres in accordance with Government guidelines, and that [REDACTED].<sup>381</sup>

10.71 The primary lender also told us that its decision to [REDACTED]. The primary lender also told us that it took 'into consideration' the Interim Order and its provision that JD Sports would have to ensure that Footasylum remains as a going concern, but [REDACTED].<sup>382</sup>

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<sup>376</sup> [REDACTED].

<sup>377</sup> CBIL scheme which were available to business turnover of up to £45 million maximum. Therefore, Footasylum was ineligible.

<sup>378</sup> [REDACTED].

<sup>379</sup> [REDACTED].

<sup>380</sup> [REDACTED].

<sup>381</sup> [REDACTED].

<sup>382</sup> [REDACTED].

*Our assessment of Footasylum's access to credit*

10.72 We now consider the question of whether the primary lender would have [REDACTED]<sup>383</sup>, and then the question of whether the primary lender would have supported Footasylum during the COVID-19 pandemic to the present day, in the absence of the Merger.

*Primary lender's decision to [REDACTED]*

10.73 We note that Footasylum's [REDACTED].

10.74 [REDACTED] (see paragraph 18, Appendix D Footasylum's Financial Position).

10.75 While Footasylum's [REDACTED]), we note that this was hypothetical, and JD Sports' potential involvement only related to [REDACTED]. Therefore, this would have no bearing on the primary lender's decision either to [REDACTED] or to [REDACTED].

10.76 Footasylum's [REDACTED] for 2021/21 [REDACTED]<sup>384</sup> [REDACTED].

10.77 We also note that based on Footasylum's [REDACTED].

10.78 In relation to whether the primary lender would have supported Footasylum during the COVID-19 pandemic, we have considered the primary lender's views of Footasylum's business during the COVID-19 pandemic. In this regard, we note that the [REDACTED] (see paragraph 4, Appendix D Footasylum's Financial Position).

10.79 Although JD Sports was obliged to maintain Footasylum as a going concern under the Interim Order, Footasylum did not at any time receive any form of support from JD Sports, either in the form of any financial support; operationally; or in terms of stock, eg by way of JD Sports diverting some of its products to Footasylum.

10.80 We consider that the primary lender's strategy was to support its clients, and that for Footasylum, it would have continued to support Footasylum, irrespective of ownership given Footasylum's good financial performance (see paragraphs 10.67 and 10.68). Further, the primary lender considered that the Footasylum business would not be adversely affected compared to competitors (see paragraph 10.70). We also note that Footasylum has not received any financial support from JD Sports since the Merger. Therefore, it

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<sup>383</sup> [REDACTED].

<sup>384</sup> Footasylum had also managed its cashflow [REDACTED].

is our provisional view that Footasylum would have been able to [REDACTED], and that based on the forecast provided to the primary lender in [REDACTED].

- 10.81 We consider that, although JD Sports' obligation under the Interim Order (and later the Final Undertakings from 13 July 2020) to maintain Footasylum as a going concern may have provided some comfort to the primary lender, the primary lender was [REDACTED] and that absent the Merger, the primary lender would have continued to support Footasylum (noting that in any case, the primary lender had no legal recourse to JD Sports or Pentland under a potential event of default) (see paragraph 10.71).

[REDACTED]

- 10.82 We consider below the [REDACTED]<sup>385</sup> [REDACTED] and its reasons, and whether this would affect Footasylum's ability to compete effectively under the counterfactual.
- 10.83 We note that Footasylum's credit facility is a revolving credit facility, which by its nature is a 'fully-fluctuating' working capital facility (eg similar to a committed overdraft facility, and unlike term debt which is normally drawn down in full and then repaid over time). As such, drawdowns on the revolving credit facility by Footasylum are to fund its working capital in relation to the purchase of stock and are subsequently repaid.
- 10.84 Footasylum's drawdowns under its credit facility are determined by the stock level Footasylum plans to hold, which itself is a function of the time of year (eg due to the seasonality of trading where higher stock levels are needed for the Black Friday and Christmas trading periods) and product allocations by the key suppliers (Nike and adidas). Therefore, the [REDACTED].
- 10.85 Footasylum and the primary lender told us that the reduction was in line with [REDACTED] (see paragraphs 15 and 16, Appendix D Footasylum's Financial Position). We note that Footasylum's reforecast for its financial year 2021/22 and 2022/23 includes [REDACTED].

#### *Range of support available to Footasylum*

- 10.86 We note that Footasylum has been able to benefit from publicly funded schemes since 1 March 2020<sup>386</sup>, which supported Footasylum during the COVID-19 pandemic in the financial year 2020/21, and thereafter. We note that Footasylum's ability to access the publicly funded schemes was not

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<sup>385</sup> We note that in the amended credit facility agreement (dated February 2021), the Guarantors of the loan are [REDACTED].

<sup>386</sup> The total benefits received by Footasylum from publicly funded schemes [REDACTED].

contingent on JD Sports' ownership, and that these schemes were also available to other retailers.

10.87 In addition, Footasylum [REDACTED].<sup>387</sup> We note that other retailers, [REDACTED], had also negotiated rent-free and rent reduction for their store portfolio.

10.88 It is our provisional view that absent the Merger, Footasylum would have been able to access and receive a combination of financial support (eg from publicly funded schemes, landlords and the primary lender support, as discussed in the previous section), on the basis that the financial support Footasylum received was not contingent on JD Sports' ownership. We also note that at no time did Footasylum require any support or assistance from JD Sports or rely on JD Sports to access other forms of financial support to enable it to continue to [REDACTED].

*Provisional views on the primary lender's support during the COVID-19 pandemic and thereafter*

10.89 Based on the above, it is our provisional view that absent the Merger, the primary lender would likely have [REDACTED] and remained supportive thereafter (during the COVID-19 pandemic), eg by [REDACTED], given that:

- (a) the primary lender based its decision to [REDACTED];
- (b) Footasylum was [REDACTED];
- (c) Footasylum's stand-alone financial performance during 2020/21 [REDACTED];
- (d) evidence from the primary lender showed that its support would not have been different absent JD Sports' ownership; and
- (e) the primary lender [REDACTED]).

10.90 On the basis that the evidence provided by the primary lender [REDACTED] we did not consider it necessary to consider the question of an alternative purchaser of Footasylum absent the Merger.

10.91 Based on the above, we provisionally found that absent the Merger, it is likely that the primary lender would have supported Footasylum during the COVID-19 pandemic.

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<sup>387</sup> [REDACTED].

## **Provisional conclusion on the counterfactual**

10.92 Therefore, our provisional view is that, on the basis of the evidence set out above, the most likely counterfactual is broadly the pre-Merger conditions of competition but which includes [X]. We consider this would be similar to the conditions of competition that exist today. That is, absent the Merger, Footasylum would have continued to exert a similar competitive constraint on JD Sports to the constraint it exerts on JD Sports today and that JD Sports would have exerted the same degree of competitive constraint as it does today. As noted above, we will consider the impact of product allocations in further detail in the competitive assessment in further detail.

## **11. Our assessment of footwear and apparel**

### **Introduction**

11.1 This chapter provides our assessment of our two theories of harm:

- (a) horizontal unilateral effects in the retail supply of sports-inspired casual footwear (in-store and online) in the UK; and
- (b) horizontal unilateral effects in the retail supply of sports-inspired casual apparel (in-store and online) in the UK (paragraph 4.22).

11.2 We have set out the evidence that we are relying on in Chapters 7-9 and we have presented our assessment of the appropriate counterfactual in Chapter 10. We have presented our assessment of how retail competition operates in Chapter 6. This chapter discusses the parameters on which we have found retailers, including the Parties, compete (and can be varied according to conditions of competition). A worsening of one or more of these parameters of competition are the possible adverse effects that could arise from the Merger.

11.3 Our approach to the Remittal has been discussed in Chapter 4. We have used our formal information gathering powers to obtain evidence from the Parties and some third parties (particularly Nike and adidas). We have held calls with some third parties and formal hearings with Nike and adidas.

11.4 We have used some evidence from the CMA's Phase 2 Final Report and we have gathered fresh evidence during the Remittal. Although not an exhaustive list of the fresh evidence that we have gathered, we have obtained:

- (a) survey evidence of online shoppers of JD Sports and Footasylum;
- (b) recent internal documents from JD Sports and Footasylum;

- (c) questionnaire responses from third party retailers and suppliers;
- (d) internal documents from Nike and adidas;
- (e) sales growth targets from Nike and adidas and some third parties;
- (f) sales performance data from retailers relating to the period following the CMA's Phase 2 Final Report;
- (g) product allocation and overlap data for retailers from Nike and adidas; and
- (h) qualitative evidence from retailers on improvements that they have made since the CMA's Phase 2 Final Report.

## **Horizontal unilateral effects in footwear**

### ***Assessment of current competition***

- 11.5 In this section we assess whether the Merger removes an important competitor from the sports-inspired casual footwear market.
- 11.6 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.<sup>388</sup>
- 11.7 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 as they otherwise would have done.
- 11.8 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

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<sup>388</sup> [Merger Assessment Guidelines](#), September 2010, CC2 (revised), paragraphs 5.4.6-5.4.9.



constraints on the Parties from other retailers, in addition to the constraints from suppliers given their importance in this market.

*Our assessment of how closely the Parties compete*

11.9 To assess whether the Parties closely compete in the retail of sports-inspired casual apparel, below we examine the evidence relating to:

- (a) the degree of product overlap between the Parties for Nike and adidas products;
- (b) the extent to which JD Sports and Footasylum shoppers view the other Party as an alternative based on our Remittal Online Survey and the Phase 2 Exit Survey;
- (c) GUPPIs;
- (d) views of third parties; and
- (e) the Parties' internal documents.

11.10 Before we assess the specific evidence on footwear and apparel, we note that the Parties have some general characteristics as retailers that we consider make them likely to be close competitors. They 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 [REDACTED] million customers in 2019/20), have national reach (JD Sports has around 385 stores in the UK<sup>389</sup> and Footasylum has 65 stores; both have nationally operating online delivery services). There is a high degree of geographic overlap of the Parties' physical stores and since the CMA's Phase 2 Final Report there has been relatively little change in the Parties' store estates.<sup>390</sup> 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.<sup>391</sup> The evidence shows that JD Sports and Footasylum have a very similar sales profile in the footwear brands they sell, with similar revenue shares of the biggest two suppliers, Nike and adidas, and the same brands mainly featured in both Parties' top 10 lists (paragraphs 8.3 to 8.4).

11.11 Nike and adidas continue to [REDACTED]. Both suppliers prioritise [REDACTED] (in accordance with its status as a [REDACTED] for both suppliers). In terms of the specific Nike and

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<sup>389</sup> Plus a further 23 Size? And Footpatrol stores.

<sup>390</sup> Paragraphs 7.11 and 7.15

<sup>391</sup> [JD Sports, Response to Issues Statement, paragraphs 6 and 14.](#)

adidas products sold, we have found, through our product overlap analysis,<sup>392</sup> that JD Sports consistently stocks a high proportion of the specific products that Footasylum sells ([X])% of Nike footwear products and [X]% of adidas footwear products).<sup>393</sup> [X] Footasylum sells [X]% of the Nike footwear products that JD Sports sells ([X]), it sells [X]% of the adidas footwear products that JD Sports sells.<sup>394</sup> Regarding the overlap in Nike footwear, the proportion of JD Sports' products sold by Footasylum was [X] percentage points [X] but it was [X] percentage points [X].<sup>395</sup> For adidas' footwear products, Footasylum's proportion was [X] percentage points [X] the retailer with the highest proportion, [X].

11.12 We also collected evidence directly from customers, competitors and the Parties.

11.13 The Remittal Online Survey found that 43% of Footasylum footwear customers would shop at JD Sports if they could not shop at Footasylum, which was 3 percentage points lower than the Phase 2 Online Survey.<sup>396</sup> However, this was a substantially higher level of diversion than to any other retailer. Nike was the next highest alternative mentioned by 13% of respondents.

11.14 Diversion to Footasylum from JD Sports online customers was significantly lower at 9%, with Nike, Foot Locker and adidas all receiving more diversion than Footasylum. This represents a 7 percentage points reduction in diversion compared to the Phase 2 Online Survey. This reduction in diversion is explained by an increase in the diversion to Nike and adidas DTC.

11.15 In recent years, online sales accounted for a significant minority of both Parties' footwear business. Since March 2020 there have been a number of occasions where the Parties' stores have had to close due to government lockdowns, leading to a shift toward online sales. However, the evidence we collected suggests that the Parties and other multichannel retailers continue to see the importance of their in-store offer despite a steep increase in online sales. For instance, both Parties opened all stores they were able to when they were allowed to do so,<sup>397</sup> few stores have been permanently closed down by the Parties,<sup>398</sup> and in the 2 weeks to 3<sup>rd</sup> July 2021, [X]% of JD

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<sup>392</sup> See Appendix C for an explanation of this analysis.

<sup>393</sup> Sales-weighted, paragraph 8.7.

<sup>394</sup> Sales-weighted, paragraph 8.10.

<sup>395</sup> Although, as discussed in Appendix C, Zalando may not necessarily sell all these products in the UK, given its large European presence, but very small UK presence.

<sup>396</sup> The Phase 2 online survey did not reach the required response rate so its results need to be interpreted with caution.

<sup>397</sup> Paragraph 7.143

<sup>398</sup> Paragraphs 7.147 and 7.149

Sports sales were in-store sales.<sup>399</sup> In addition the Remittal Online Survey, the consumer behaviour data from ONS and Mintel and views from many retailers all pointed out the importance of presence across sales channels. In particular, the Remittal Online Survey suggested the greatest increase in consumers' channel preference is likely to be in customers using a mix of online and in-store, rather than purely one or the other,<sup>400</sup> and the ONS and Mintel evidence suggests that while some increase in online shopping will persist, a significant proportion of customers will go back to shopping in-store, as concerns around the pandemic decrease.<sup>401</sup> We therefore consider that in-store shopping currently does, and will continue to, play an important role in this market.

- 11.16 As noted in paragraph 4.32, we did not undertake a survey of in-store shoppers during the Remittal. However, we did undertake a robust survey of in-store shoppers during the Phase 2 inquiry and we found diversion between the Parties (in both directions) was significantly higher than in the Phase 2 Online Survey (68% from Footasylum to JD Sports and 21% from JD Sports to Footasylum).
- 11.17 We used the diversion ratios from our Remittal Online Survey and the Parties' variable margins to estimate GUPPIs - which give an indication of the strength of incentive to worsen certain elements of PQRS. The online footwear GUPPI for Footasylum is [X]%, which is high and indicates a strong incentive to worsen PQRS. In contrast the online footwear GUPPI for JD Sports is much lower at [X]%.
- 11.18 As we were unable to conduct a new in-store survey during the Remittal (paragraph 4.32) we considered whether we could use the diversion ratios from the Phase 2 Exit Survey to produce an updated in-store GUPPI and an updated combined GUPPI by making certain adjustments to the inputs for the GUPPI calculation to reflect market developments. The adjustments included using up-to-date margins, and recognising that there have been changes in the online segment and these may have an impact on, for example, the propensity of in-store shoppers to divert to different online alternatives as their best alternative.<sup>402</sup>

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<sup>399</sup> Table 17

<sup>400</sup> Paragraph 7.121 and 7.123.

<sup>401</sup> Appendix E.

<sup>402</sup> We do find there have been no significant structural changes to the market since the P2 inquiry survey given none of the main competitors have exited the market and there have been no significant new entrants or store expansion (albeit there have been some store closures). This is discussed in more detail in paragraph 8.36 and Appendix G.

- 11.19 For Footasylum, we considered that there is no credible scenario where in-store diversion to JD Sports would be lower than online diversion to JD Sports. Based on the evidence from the Phase 2 Exit Survey we consider that in-store diversion from Footasylum to JD Sports would likely be higher than online diversion, given there are fewer significant competitors with a national instore offering, there is a high degree of geographic overlap of the Parties' stores and in-store customers have a lower likelihood of choosing an online retailer than online customers. Therefore, we believe the online GUPPI of [X]% represents the absolute lower boundary of the possible value for the in-store or combined GUPPI. These indicate very strong incentives for the Merged Entity to worsen PQRS at Footasylum post-merger.
- 11.20 For JD Sports we also considered that in-store diversion between the Parties would be slightly higher than their online diversion based on the Phase 2 Exit Survey. We broadly estimated an in-store and combined GUPPI of 1 to 2 percentage points higher than the online GUPPI – in the region of [X] to [X]%, with the low end of this estimate being based on relatively extreme assumptions regarding changes in in-store consumer preferences. This suggests a considerably lower incentive for the Merged Entity to worsen PQRS at JD Sports than at Footasylum.
- 11.21 Almost all competitors responding to our questionnaires told us that the Parties compete closely, with the majority finding the Parties the closest competitor to each other, often along with Foot Locker and Nike DTC.
- 11.22 We also found that the Parties regularly monitor each other as well as a range of other retailers in their day to day business documents. [X].
- 11.23 The Parties' combined market shares in footwear are [X] [30-40]%, with JD Sports ([X] [20-30]%) substantially larger than Footasylum ([X] [0-5]%) (see Chapter 8 market shares). The Parties' combined in-store share ([X] [50-60]%) is higher than its combined online share ([X] [20-30]%). Due to the differentiated nature of this market, we looked at market shares as an indicator of the presence that different retailers have in the relevant markets, but do not consider them to be very informative as to how closely the different competitors in the market compete.
- 11.24 Overall, the evidence from our Remittal Online Survey, the Phase 2 Exit Survey, the large Footasylum GUPPIs, the Parties' internal documents and the evidence on the similarity of their general offerings and of the Nike and adidas footwear products in particular, are all consistent with JD Sports being by far the closest competitor to Footasylum.

11.25 The evidence indicates that Footasylum has weakened as a competitor relative to JD Sports since the Phase 2 inquiry and does not exert a significant competitive constraint on it. Diversion to Footasylum for JD Sports customers has nearly halved based on the Remittal Online Survey (whereas it has increased significantly for Nike and to a lesser extent for adidas). More JD Sports customers now consider Nike, Foot Locker and adidas as their alternatives than they do Footasylum. Previously Footasylum was the second-best alternative after Nike. Whilst in-store diversion between the Parties may still be higher than online diversion, we consider these changes in online diversion to be informative and consistent with other evidence on market developments. Footasylum is just one of a number of retailers that JD Sports monitors in its internal documents, some of whom have a higher proportion of overlapping Nike and adidas products with JD Sports than Footasylum.

### *Competitive constraints from rivals*

11.26 We have considered the extent to which other retailers, in isolation, or collectively, present a competitive constraint that would offset the loss of competition between the Parties (which results primarily from removing the constraint that JD Sports exerts on Footasylum). As such we have considered how closely other retailers compete with the Parties currently.

11.27 When considering the competitive constraints that the Merged Entity might face, where available and appropriate, we have assessed the strength of rivals using the following evidence:

- (a) The proportion of the Parties' customers who identified the third party as their best alternative in our Remittal Online Survey and the Phase 2 Exit Survey;
- (b) The overall magnitude of UK sales by the third party relative to JD Sports and Footasylum;
- (c) The proportion and ranking of the product overlap with the Parties;<sup>403</sup>
- (d) The sales performance of the retailer since the CMA's Phase 2 Final Report;
- (e) Whether the retailer has the same or similar core customer base as JD Sports and/or Footasylum;

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<sup>403</sup> We have used product overlaps on a sales-weighted basis.

- (f) Nike and adidas' product allocation category for the retailer. This includes the type of products that the retailer is being supplied (ie lifestyle, general sports or fashion-specialist).
- (g) Views of third parties; and
- (h) Indications of the retailer's future performance, whether through a supplier's product allocation category (eg a Strategic Partner to Nike or adidas), the retailer's own growth forecasts or recent changes to the business or investment.

### *Nike*

- 11.28 Nike is both a supplier of products to retailers and a retailer itself (via its stores and online sales channels). Unlike the Parties, it does not retail footwear of any brands other than its own.
- 11.29 The evidence indicates that Nike's DTC sales channels have grown strongly over the past year and are expected to grow further in footwear. In the year to March 2021, Nike's online footwear sales were [X]% higher than would be expected absent the pandemic.<sup>404</sup> In market share terms, its share of the retail of sports-inspired casual footwear across in-store and online channels has increased from [X]% in 2018 to [X]% in 2020. Nike's share may even be greater now given its growth in online footwear sales in the year to March 2021 was higher than [X].
- 11.30 In the Remittal Online Survey, Footasylum's online shoppers ranked Nike as second only to JD Sports when asked about alternatives to Footasylum for footwear and Nike was the most popular alternative for JD Sports' online footwear shoppers. However, the CMA's Phase 2 Exit Survey showed that diversion to Nike in-store was relatively low for both Parties at only 4% for JD in-store customers and 1% for Footasylum's in-store customers. This is consistent with the fact that Nike has fewer physical stores than the Parties and the majority of its stores are factory outlets, which [X].
- 11.31 Nike is [X] and the Parties have submitted that Nike [X]. Some retailers regard Nike as a competitor to the Parties.
- 11.32 We consider that Nike exerts a competitive constraint on both Parties in footwear. In terms of constraints for online consumers, Nike is a stronger constraint on JD Sports than Footasylum but is a much weaker constraint on Footasylum than JD Sports. We consider that the evidence also shows that

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<sup>404</sup> See Appendix F.

Nike's constraint is likely to be weaker for in-store consumers given its more limited store presence and its lower diversions for in-stores customers from the CMA's Phase 2 exit survey. We consider that Nike has become a stronger competitor since the CMA's Phase 2 Final Report and is likely to become a stronger constraint to both Parties in the future as a result of growth in its DTC offering (even if it does not meet its specific targets).

*adidas*

- 11.33 adidas is both a supplier of products to retailers and a retailer itself (via its stores and online sales channels). Unlike the Parties, it does not retail footwear of any brands other than its own.
- 11.34 Similar to Nike, adidas DTC sales performance has been strong over the past year. Its online sales growth in footwear in the year to March 2021 ([X])% higher than would be expected absent the pandemic)<sup>405</sup> has outstripped [X]. However, in market share terms its share from 2018 to 2020 was reasonably [X] and within the online segment its share [X].
- 11.35 In the Remittal Online Survey, adidas was ranked lower than Nike, Foot Locker and ASOS in terms of online shoppers' best alternative to Footasylum for footwear. For JD Sports' online shoppers of footwear, adidas' ranking was on a par with Foot Locker but was only around half that of Nike.
- 11.36 adidas has a relatively small store presence. Its share of supply of in-store sales is smaller than Footasylum and Nike (as well as Foot Locker, Office and Schuh). Our Phase 2 Exit Survey showed that diversion to adidas in-store was low and at similar levels to Nike for JD Sports' customers and was even lower for Footasylum's customers.
- 11.37 However, adidas is [X] and some retailers regard adidas as a competitor to the Parties.
- 11.38 We consider that adidas exerts some competitive constraint on both Parties in footwear although less than Nike. In terms of constraints for online consumers, adidas is a slightly stronger constraint on JD Sports than it is on Footasylum but is a much weaker constraint on Footasylum than is JD Sports. adidas is likely to become a stronger constraint to both in the future, particularly in the online segment, as a result of growth in its DTC offering (discussed further below).

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<sup>405</sup> See Appendix F.

## *Multichannel retailers*

- *Foot Locker*

- 11.39 Foot Locker is a multi-brand, multi-channel retailer of similar scale to Footasylum in the UK although it also has a global network.
- 11.40 The CMA found in its Phase 2 Final Report that Foot Locker was a close competitor to both Parties and imposed a strong constraint on the Parties in footwear.
- 11.41 We have found that Foot Locker has a large product overlap with respect to Nike footwear with both Footasylum ([X]%) and JD Sports ([X]%).<sup>406</sup> However, it does not have a high product overlap with either Party for adidas footwear.
- 11.42 The Remittal Online Survey indicated that Foot Locker was a good alternative for online shopping for JD Sports customers (second only to Nike, and ahead of Footasylum) and a slightly less popular option for Footasylum online shoppers but still third behind JD Sports and Nike. The CMA's Phase 2 Final Report identified Foot Locker as being a particularly close competitor to the Parties for in-store shoppers and we have seen no evidence to show that this is likely to have changed.<sup>407</sup>
- 11.43 Foot Locker has an online presence but it is not as strong as some other retailers' online offer and [X] (paragraph 7.29).
- 11.44 Further, evidence from Nike and adidas show that Foot Locker, like JD Sports, is and will remain in the highest strategic category [X]. This indicates that Foot Locker is likely to remain a strong competitor in the foreseeable future.
- 11.45 The Parties [X] [X]. Most retailers regard Foot Locker as a competitor to the Parties.
- 11.46 We consider that Foot Locker is a close competitor and exerts a strong competitive constraint on both Parties in footwear. In terms of constraints for online consumers, Foot Locker is a slightly stronger constraint on JD Sports than it is on Footasylum but is a much weaker constraint on Footasylum than is JD Sports.

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<sup>406</sup> Sales-weighted, paragraph 8.7.

<sup>407</sup> Foot Locker has told us that it has not made any significant changes since the CMA's Phase 2 Final report (paragraph 7.29)



- *Sports Direct*

11.47 Sports Direct is a large multi-channel retailer of sporting footwear and apparel. Sports Direct has very little product overlap with either Party given the different position it occupies in a differentiated marketplace.

11.48 Sports Direct is in the process of undergoing an elevation of its position in UK retail, focusing on an enhanced shopping experience and a greater selection of premium products. To date Sports Direct has not been successful in getting the same sports-inspired casual footwear products as JD Sports and Footasylum. [REDACTED] (paragraph 7.178). [REDACTED].

11.49 However, despite the differences in product focus some consumers view Sports Direct as being a credible alternative to both JD Sports and Footasylum. The Remittal Online Survey showed that 8% of JD Sports online shoppers thought Sports Direct would be their best alternative. However, we note that we are primarily concerned with the competitive constraints on Footasylum (paragraphs 11.25 and 11.26) and only 3% of Footasylum online shoppers thought Sports Direct would be their best alternative. This is consistent with Footasylum's own statement to us that given Sports Direct are [REDACTED]<sup>408</sup>

11.50 The Parties' internal documents demonstrate [REDACTED]. Some retailers named Sports Direct as a competitor to the Parties.

11.51 We therefore consider that given its different product focus Sports Direct is not a close competitor to either of the Parties and exerts only a limited constraint on the Parties in footwear.

- *Other multichannel retailers*

11.52 We have considered the evidence regarding the competitive constraint of Office, Schuh and [REDACTED].

11.53 Office is larger than Footasylum in both in-store and online sales of footwear. Its stores have a high geographic overlap with both Parties. Office sells [REDACTED]% of JD Sport's Nike footwear products and [REDACTED]% of Footasylum's Nike footwear products, and [REDACTED]% of JD Sports' adidas footwear products and [REDACTED]% of Footasylum's adidas footwear products.<sup>409</sup>

11.54 Nike places Office [REDACTED] in relation to the determination of its core product assortment ([REDACTED]), which is also relevant for the purpose of allocation.

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<sup>408</sup> [REDACTED].

<sup>409</sup> Sales-weighted. Paragraphs 8.7 to 8.11.

However, Office's core customer base is different to either Footasylum's or JD Sports customer base given that it is predominantly female. In our Remittal Online Survey Office was only considered by 1% of either JD Sports or Footasylum customers as the next best alternative. In the Phase 2 Exit survey, fewer than 2% of instore customers of either JD Sports or Footasylum said they would divert to Office.

- 11.55 The CMA's Phase 2 Final Report found that Office had some similarities with the Parties but less so than some other retailers and less than the Parties to each other. [REDACTED] (paragraph 7.153).
- 11.56 We consider that the evidence indicates that Office imposes only a weak constraint on either Party.
- 11.57 Schuh's product overlaps with the Parties are [REDACTED]% and [REDACTED]% for JD Sports and Footasylum respectively on Nike footwear products and [REDACTED]% and [REDACTED]% for JD Sports and Footasylum respectively on adidas footwear products.<sup>410</sup> [REDACTED]. Although Schuh's scale in the UK is similar to Footasylum's, its market share has declined between 2018 and 2020. In our Remittal Online Survey 5% of JD Sports online shoppers and only 3% of Footasylum online shoppers responded in favour of Schuh being their best alternative to JD Sports and Footasylum respectively. Schuh received similar rates of diversion in-store in our Phase 2 Exit Survey. We have found that JD Sports and Footasylum [REDACTED] than each other and certain other retailers in their [REDACTED]. The evidence indicates that Schuh imposes a greater constraint on the Parties than Office but this is still relatively limited.
- 11.58 [REDACTED] (paragraph 7.36) [REDACTED]. We consider any constraint imposed by [REDACTED] on JD Sports or Footasylum to be very limited.

#### *Online only retailers*

- ASOS

- 11.59 ASOS is an online retailer. It has an overall market share of a similar size to Footasylum<sup>411</sup> but targets a different core customer base to Footasylum and JD Sports.
- 11.60 ASOS's product overlap with the Parties is [REDACTED]% of Footasylum's Nike footwear and [REDACTED]% of JD Sports' Nike footwear. For adidas footwear, it is [REDACTED]% of Footasylum's adidas footwear and [REDACTED]% of JD Sports' adidas

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<sup>410</sup> Sales-weighted. Paragraphs 8.7 to 8.11.

<sup>411</sup> See Appendix C, Table 11.

footwear.<sup>412</sup> Therefore, it has a [X] overlap with Footasylum's footwear products, [X] than some other retailers for both brands, and a [X] overlap with JD Sports' footwear products, especially [X] footwear.

11.61 That ASOS has [X] with the Parties than other retailers is consistent with the estimated diversions from the Remittal Online Survey. Only 6% of both Footasylum's and JD Sports' online shoppers considered ASOS to be a good substitute for Footasylum and JD Sports respectively.

11.62 In the Phase 2 Exit Survey, less than 2% of both JD Sports and Footasylum instore shoppers for footwear mentioned ASOS as their best alternative, which is consistent with the fact that it does not have any stores.

11.63 ASOS is one [X]. Nike also confirmed that [X]. The evidence indicates that ASOS will have a different focus from the Parties in terms of the products it will retail, consistent with its different core customer base. Therefore, ASOS is not as close a competitor to either of the Parties in footwear as they are to each other.

11.64 We note that both Footasylum and JD Sports [X] and that some retailers mentioned ASOS as a competitor to the Parties.

11.65 We consider that the evidence indicates that ASOS imposes only a relatively limited constraint on either Party for footwear.

- *Zalando, Very and Amazon*

11.66 Zalando is an online only retailer with a significant presence in Europe. Zalando is [X] to Nike in EMEA and an [X] to adidas. However, we have been told by Nike that [X].<sup>413</sup> It receives product allocations centrally for its entire European operations (ie it does not have a separate UK allocation). It has a [X] of product overlap with both Parties for Nike footwear (on a European wide basis) but for adidas footwear products the overlap is [X].

11.67 Very few online shoppers of the Parties identified Zalando as a substitute for JD Sports or Footasylum in the Remittal Online Survey. Like ASOS, it does not have stores in the UK and the CMA's Phase 2 investigation did not find that Zalando offered a good alternative for in-store shoppers. Zalando is not among the retailers [X].

11.68 Very has a [X] product overlap with Footasylum for adidas footwear and although it does not have [X] overlap with JD Sports on adidas footwear

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<sup>412</sup> Sales-weighted, paragraph 8.7 to 8.11.

<sup>413</sup> [X].

([X]%), it is nevertheless [X] retailer. However, it [X] overlap with either Party for Nike footwear.<sup>414</sup> We consider this to be a significant shortcoming in its ability to compete. Few online shoppers of the Parties identified Very as a substitute for JD Sports or Footasylum. Very has a small market share (smaller than Footasylum) and in the online segment its share has [X] since the CMA's Phase 2 Final Report from [X]% to [X]%.

11.69 Amazon does not have a [X] product overlap with either Party for Nike or adidas footwear products. Neither does [X]. Online shoppers of the Parties did not identify Amazon as a significant substitute for JD Sports (4% of its shoppers) or Footasylum (3% of its shoppers). The CMA's Phase 2 investigation did not find that Amazon offered a good alternative for in-store shoppers. Its market share is very low and it is [X].

11.70 We consider that the evidence indicates that Zalando, Very and Amazon are, at best, only weak constraints on either Party.

#### *Conclusion on third party constraints*

11.71 We consider that Nike, adidas and Foot Locker exert a competitive constraint on both Parties in footwear. In terms of constraints for online consumers, they are stronger constraints on JD Sports than Footasylum is but are much weaker constraints on Footasylum than JD Sports is. Foot Locker is a slightly stronger constraint on the Parties for in-store customers than online customers and the reverse is true for Nike and adidas (we also consider that Nike is a stronger constraint on both Parties than adidas). While we found that numerous other retailers offer sports-inspired casual footwear, taken in the round, the evidence indicates that other retailers impose only a weak competitive constraint on the Parties. Taking these current constraints in aggregate,<sup>415</sup> we found that while they represent a considerable constraint on JD Sports (particularly Nike and Foot Locker) they pose a much smaller constraint on Footasylum than JD Sports does. This is illustrated by the fact that more Footasylum customers considered JD Sports their best alternative than all other retailers combined. We do not consider the current aggregate horizontal constraints to be sufficient to offset the incentive to deteriorate PQRS at Footasylum indicated by the GUPPI and other evidence. In the next section we assess whether these constraints are likely to change in the future (whether individually or in aggregate) so as to impact on this assessment. We

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<sup>414</sup> Sales-weighted, paragraph 8.7 to 8.11.

<sup>415</sup> 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.

then later consider these constraints in the round together with the vertical supplier constraint before coming to an overall provisional conclusion.

### ***Assessment of future competition***

11.72 Our analysis of current competition shows that the Parties compete closely, with JD Sports being a much stronger constraint on Footasylum than Footasylum is on JD Sports. They also face competition from some third-party rivals, notably Nike, adidas and Foot Locker, and weaker competition from a number of other retailers. Next, we assess whether conditions of current competition are likely to be a good prediction of future competition.

11.73 The evidence received during the Remittal indicates that the most likely reasons as to why current competition would not be a good prediction of future competition is if:

- (a) rivals, especially Nike and adidas, continue to grow their DTC channels in direct competition to the Parties; and/or
- (b) Footasylum does not receive the premium products to compete with JD Sports because [§<] weakening it significantly compared to JD Sports.

### ***Future growth of rivals***

11.74 We have considered the current strength of rivals in our assessment above. We have found that a number of retailers plan to improve their online offer to enable them to continue to compete in the future. However, we did not receive evidence that any retailer had plans that would significantly change its overall offer to such an extent as to materially change the constraint they placed on the Parties.

11.75 The evidence indicates that Nike's DTC sales have become a stronger competitive threat to the Parties since the CMA's Phase 2 Final Report (paragraph 11.32). We have found that adidas imparts some competitive constraint on the Parties but this constraint is weaker than that imposed by JD Sports, Foot Locker and Nike on Footasylum. adidas is however a stronger constraint on JD Sports than Footasylum. Nike and adidas have ambitious growth targets for their DTC operations and even if they do not meet those specific targets we nonetheless expect them to continue to grow their DTC sales and become stronger competitors in the UK. We have seen internal documents from the suppliers forecasting their future sales which are then used in their strategic decision-making. The expectation of Nike and adidas' DTC capturing a greater proportion of footwear sales in the near future is shared by the Parties (paragraphs 7.187 to 7.190) and a number of third

parties. Indeed, the Parties' internal documents [REDACTED] discuss and monitor the suppliers' DTC sales. The suppliers are also in a position to engineer the allocation of products to retailers that best suits their plans to grow their own DTC sales.

- 11.76 We therefore expect both Nike and adidas to be strong competitors in the future (even they do not meet their own growth targets) and although we do not expect them to be as strong a competitor as JD Sports in the market generally (or as strong a constraint on Footasylum, for the reasons given in paragraph 11.71) we do expect them to be at least as strong, if not stronger, than Footasylum (although we note that we expect Nike to be stronger than adidas).
- 11.77 We also expect Foot Locker to remain more competitive than Footasylum, given its [REDACTED] (in particular [REDACTED]). We note that we do not expect it to become more competitive than JD Sports in the UK.
- 11.78 We also considered the change in the aggregate constraint on the Parties as a result of the future strengthening of competitors, particularly Nike and adidas. Overall, we find that the aggregate constraint on the Parties is likely to strengthen. However, we also believe it likely that JD Sports will continue to be the largest constraint on Footasylum by some margin and individually as much a constraint as all other retailers combined.

#### *Impact of suppliers' strategies on future strength of Footasylum and other retailers*

- 11.79 The Parties have consistently told us throughout the Remittal that, absent the Merger, Footasylum will be a [REDACTED] because it will be one of the retailers which Nike [REDACTED] in pursuit of Nike's wholesaler consolidation strategy. [REDACTED]. Further, the Parties have submitted that Footasylum can already be considered a [REDACTED] than at the time of the Phase 2 Final Report because [REDACTED] (relative to [REDACTED] and [REDACTED]).
- 11.80 We concluded in Chapter 10 above that the most likely scenario for the counterfactual [REDACTED]. This section assesses whether the evidence indicates that any retailer (including JD Sports) may be impacted materially by a future change in supplier strategy [REDACTED]. This evidence and assessment is applicable to both footwear and apparel.

#### *Changes in distribution policies and product allocation categories*

- 11.81 We have considered whether there is evidence that planned changes by the main suppliers to their distribution policies may result in changes to the product allocations received by the Parties or their competitors which could

materially increase (or decrease) their ability to compete in the foreseeable future. We consider the impact on other retailers first before considering the more detailed evidence relating to potential changes which may impact Footasylum.

- 11.82 We consider that the evidence set out in Chapter 7 indicates that in future the main suppliers will at least maintain JD Sports' product allocations in line with its [X]. We do not consider that the evidence available shows that any of the Parties' competitors will become a materially stronger competitor due to increased allocations resulting from a change in supplier segmentation.
- 11.83 As regards the evidence relating to Footasylum, we have assessed [X]. This section contains our assessment of the impact on Footasylum [X].
- 11.84 The evidence indicates that Footasylum's segmentation by Nike and adidas is [X] (see paragraph 11.11). Nor have we lost sight of both Nike's and adidas' submissions that have [X].
- 11.85 However, Footasylum is [X]. As a result, when unexpected market-wide supply issues occur, [X]. Ultimately, this means that Footasylum (and other retailers [X]) [X].
- 11.86 The CMA considers that while there is evidence that the supply issues [X].
- 11.87 [X]. However, the CMA considers that the evidence shows that to date these issues have not significantly undermined Footasylum's ability to compete. These issues also do not affect the constraint that JD Sports exerts on Footasylum. In particular, we consider that the results of the Remittal Online Survey, which was undertaken at a time when Footasylum had already been experiencing such supply issues for around a year, demonstrate this continued closeness of competition between the Parties. We also note that Footasylum's financial results indicate that it has continued to trade well despite such issues.
- 11.88 In relation to Nike's forward planning [X][X], [X].
- 11.89 [X] Therefore, this evidence does not lead us to expect Footasylum to become a materially weaker competitor in the foreseeable future.

[X]

- 11.90 In our counterfactual assessment in Chapter 10 we provisionally concluded that [X].

11.91 Footasylum's internal documents show that its senior management are [REDACTED] (which risk we have captured in our assessment set out in paragraphs 6.58 to 6.69).<sup>416</sup>

11.92 We do not have any evidence to indicate that [REDACTED].

### *Conclusion on future competition*

11.93 Overall compared with the situation now, we expect Nike DTC and to a lesser extent, adidas DTC to be stronger competitors to JD Sports and Footasylum going forward. We expect Foot Locker to maintain its position given its continued priority in allocations from the key suppliers. ASOS may become a stronger competitor but its starting position is much weaker and it has a different consumer focus than these other rivals and so even if it does grow its constraint is unlikely to be as strong as these other rivals.

### ***Provisional conclusion***

11.94 In our competitive assessment, we considered the degree of competition between the Parties and other retailers, both now and in the foreseeable future.

11.95 We have first looked at the ability of the Merged Entity to worsen aspects of PQRS. 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. However, we have found that this constraint is not so significant on its own as to sufficiently discipline the Merged Entity's ability and/or incentive to deteriorate its offering to customers (paragraphs 6.72 to 6.75). We have also considered the impact of this constraint in aggregate with the other competitive constraints.

11.96 We have found based on the evidence from our Remittal Online Survey, the Phase 2 Exit Survey, the large Footasylum GUPPIs, the Parties' internal documents and the evidence on the similarity of their general offerings and of the Nike and adidas footwear products in particular, that JD Sports is by far the closest competitor to Footasylum (paragraphs 11.10 to 11.25). We consider that it applies an especially strong constraint on Footasylum.

11.97 We have also found that Footasylum does not exert a significant competitive constraint on JD Sports.

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<sup>416</sup> [REDACTED].



- 11.98 We have considered the extent to which other retailers, in isolation, or collectively, present a competitive constraint that would offset the loss of competition between the Parties. As such we have considered how closely other retailers compete with the Parties currently.
- 11.99 We have found that Nike DTC and to a lesser extent, adidas DTC, Foot Locker and ASOS compete with and offer some constraint on Footasylum. Other retailers that we have assessed only offer a limited constraint (paragraphs 11.28 to 11.71).
- 11.100 Taking these constraints in aggregate, including that some competitors may become stronger in the future, we provisionally find the constraint on Footasylum from other retailers relative to JD Sports to be only moderate. To give an indication of the strength of the constraint of JD Sports on Footasylum, the aggregate diversion from Footasylum to all other retailers combined was less than the diversion to JD Sports (and the aggregate diversion to Nike DTC, adidas DTC, Foot Locker and ASOS is even smaller). We therefore do not consider that the constraints from other retailers, even in aggregate<sup>417</sup> and taking account foreseeable future growth, are sufficient to counter the loss of competition between the Parties.
- 11.101 We have also considered Footasylum's likely product allocations in the foreseeable future. [✂].
- 11.102 Taking the evidence in the round, we provisionally find that the aggregate constraints from retailers, combined with the constraints that suppliers impart on the retailers (in terms of how retailers can flex PQRS or in product allocation), would not be sufficient to offset the very substantial loss of competition from JD Sports on Footasylum in the retail supply of sports-inspired casual footwear. Therefore, the Merger is more likely than not to give rise to an incentive to deteriorate PQRS at Footasylum post-Merger.
- 11.103 Subject to any countervailing factors, we have found that the Merger gives rise to an SLC in the retail supply of sports-inspired casual footwear.<sup>418</sup>
- 11.104 The SLC that we provisionally find in our Remittal differs from the Phase 2 Final Report in that it is based only on the removal of the constraint imposed by JD Sports on Footasylum and not the loss of constraint from Footasylum

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<sup>417</sup> 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.

<sup>418</sup> A merger gives rise to an SLC when it has a significant effect on rivalry over time, and therefore on the competitive pressure on firms to improve their offer to customers or become more efficient or innovative. A merger that gives rise to an SLC will be expected to lead to an adverse effect for customers. [Merger Assessment Guidelines](#), paragraph 4.1.3

on JD Sports. This reflects our findings on market developments since our Phase 2 Final Report which have resulted in Footasylum becoming a weaker constraint and other competitors becoming stronger constraints on JD Sports. However, these market developments have not weakened Footasylum to such an extent that the merger does not result in an SLC in the market.

## **Horizontal unilateral effects in apparel**

### ***Introduction***

11.105 The previous section assessed whether, subject to countervailing factors, we consider that the Merger has resulted or may be expected to result in an SLC in the retail supply of sports-inspired casual footwear in the UK.

11.106 This section assesses whether, subject to countervailing measures, we consider that the Merger has resulted or may be expected to result in an SLC in the retail supply of sports-inspired casual apparel in the UK.

11.107 Some of the evidence and findings in relation to footwear is also pertinent to apparel. In our analysis below we have referred to the relevant analysis in our assessment of footwear if we are placing weight on it in our assessment of apparel.

### ***Assessment of current competition***

#### ***Our assessment of how closely the Parties compete***

11.108 As discussed in paragraph 11.7 in relation to footwear, we expect firms to be closer competitors where their offerings are similar on the most important parameters of competition. As noted in paragraph 11.10 we consider that the Parties have some general characteristics as retailers that we consider make them likely to be close competitors.

11.109 However, with respect to apparel not all of the Parties' characteristics are similar. [X], Footasylum has a large collection of own brand apparel that accounts for [X] of its apparel sales. JD Sports' own brand apparel accounts for only around [X]% of its apparel sales (paragraph 9.4 and Table 10). This proportion of own brand sales for Footasylum is [X] as its sales of apparel for Nike (its biggest selling branded apparel items).

11.110 To assess whether the Parties closely compete in the retail of sports-inspired casual apparel, below we examine the evidence relating to:

- (a) the degree of product overlap between the Parties for Nike and adidas products;
- (b) the extent to which JD Sports and Footasylum shoppers view the other Party as an alternative based on our Remittal Online Survey and the Phase 2 Exit Survey;
- (c) GUPPIs;
- (d) views of third parties; and
- (e) the Parties' internal documents.

11.111 In terms of the specific Nike and adidas apparel products sold, we have found, through our product overlap analysis, that JD Sports consistently stocks a high proportion of the specific products that Footasylum sells ([X]% of Nike apparel products and [X]% of adidas apparel products, which is the [X] overlap among retailers respectively).<sup>419</sup> In contrast, Footasylum sells a lower proportion of Nike and adidas apparel products that JD Sports sells ([X]% of the Nike apparel products and only [X]% of the adidas apparel products – [X] overlap respectively). However, we note that this analysis covers a far lower proportion of the Parties' apparel sales than it does footwear sales (ie Nike and adidas account for around 80-90% of footwear sales at the Parties but between 20-50% of apparel sales).

11.112 In our view, as with footwear, this evidence suggests the Parties have a particularly similar retail offering, focusing heavily on the same brands (albeit to a slightly lesser extent for apparel than for footwear). JD Sports specifically sells many of the same Nike and adidas apparel products that Footasylum sells (although Footasylum sells a far lower proportion of the Nike and adidas apparel products sold by JD Sports).

11.113 The Remittal Online Survey found that 50% of Footasylum apparel customers would shop at JD Sports if they could not shop at Footasylum. This was 11 percentage points lower than in the Phase 2 Online Survey but remains a very high rate of diversion and over five times higher than that of any other retailer.<sup>420</sup> Nike was the next highest with 9% of respondents citing it as their next best alternative.

11.114 Diversion to Footasylum from JD Sports online customers was significantly lower at 8%, with Nike, ASOS, adidas and Sports Direct all receiving more

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<sup>419</sup> Sales-weighted, paragraph 9.7 to 9.11.

<sup>420</sup> The Phase 2 online survey did not reach the required response rate so its results need to be interpreted with caution.

diversion than Footasylum.<sup>421</sup> This represents a 5 percentage points reduction in diversion to JD Sports compared to the Phase 2 Online Survey. This reduction in diversion is explained by an increase in the diversion to Nike, adidas and ASOS.

- 11.115 In the Phase 2 Exit Survey, diversion between the Parties (in both directions) was significantly higher than in either of the online surveys (69% from Footasylum to JD Sports and 17% from JD Sports to Footasylum).
- 11.116 We have used the diversion ratios from the Remittal Online Survey and the Parties' variable margins to estimate GUPPIs. The online apparel GUPPI for Footasylum is [X]%, which is high and indicates a strong incentive to worsen some aspects of PQRS. In contrast the online apparel GUPPI for JD Sports is much lower at [X]%.<sup>422</sup>
- 11.117 As described in Chapter 4 as we were unable to conduct an in-store survey during the Remittal, we considered whether we could use the diversion ratios from the Phase 2 Exit Survey to estimate a range of updated in-store GUPPIs and combined GUPPIs by making certain adjustments to reflect market developments (such as those described in relation to footwear in paragraphs 8.34 to 8.39).
- 11.118 For Footasylum, we consider there to be no credible scenario where in-store diversion to JD Sports would be lower than online diversion to JD Sports. In fact, based on the evidence from the Phase 2 Exit Survey, we consider that in-store diversion from Footasylum to JD Sports would likely be somewhat higher than online diversion. Therefore, we consider the online GUPPI of [X]% represents the absolute lower boundary of the possible value for the in-store or combined GUPPI. This indicates a very strong incentive for the Merged Entity to worsen PQRS at Footasylum.
- 11.119 For JD Sports we also considered that in-store diversion would be likely to be slightly higher than online diversion based on the Phase 2 Exit Survey. We broadly estimated an in-store and combined GUPPI of 1 to 2 percentage points higher than the online GUPPI – in the region of [X] to [X]%, and slightly higher than the footwear GUPPI with the low end of this estimate being based on relatively extreme assumptions about changes in in-store consumer preferences. This suggests a considerably lower incentive for the Merged Entity to worsen PQRS at JD Sports than at Footasylum post-Merger.

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<sup>421</sup> The 8% diversion to Footasylum is slightly lower than the 9% figure recorded for footwear (paragraph 11.14)

<sup>422</sup> See paragraph 9.19.

- 11.120 We also found that the Parties regularly monitor each other as well as a range of other retailers in their day to day business documents. [REDACTED].
- 11.121 The Parties' combined market shares in apparel are [REDACTED] [40-50]%, with JD Sports ([REDACTED] [30-40]%) substantially larger than Footasylum ([REDACTED] [0-5]%) (paragraph 9.26). The Parties' combined share for the in-store segment ([REDACTED] [40-50]%) is higher than their combined online share ([REDACTED] [30-40]%). Due to the differentiated nature of this market, we looked at market shares as an indicator of the presence that different retailers have in the relevant markets, but do not consider them very informative in describing how closely the different competitors in the market compete.
- 11.122 Overall, the evidence from our Remittal Online survey, the Phase 2 Exit Survey, the large Footasylum GUPPIs, the Parties' internal documents, and the evidence on the similarity of their general offerings are all consistent with JD Sports being by far the closest competitor to Footasylum.
- 11.123 The evidence indicates that Footasylum has weakened relative to JD Sports since the Phase 2 inquiry and does not exert a significant competitive constraint on it. Diversion to Footasylum for JD Sports customers has reduced from 13% to 8% on the Remittal Online Survey (whereas it has increased significantly for Nike and to a lesser extent for adidas and ASOS). More JD Sports customers now consider Nike, ASOS, adidas and Sports Direct as better alternatives than they do Footasylum. Whilst in-store diversion between the Parties may still be higher than online diversion, we consider these changes in online diversion to be informative and consistent with other evidence on market developments. Footasylum is just one of a number of retailers that JD Sports monitors in its internal documents, some of whom have a higher proportion of overlapping Nike and adidas products with JD Sports than Footasylum.

#### *Competitive constraints from rivals*

- 11.124 We have considered the extent to which other retailers, in isolation, or collectively, present a competitive constraint sufficient to offset the loss of competition between the Parties. As part of this assessment, we have considered how closely other retailers compete with the Parties currently.
- 11.125 We have adopted the same approach and framework to assessing competitive constraints from rivals in the sports-inspired casual apparel market as we did for footwear (paragraph 11.26).

## Nike

- 11.126 The evidence indicates that Nike's DTC sales channels are expected to grow further in apparel. In the year to March 2021, Nike's online apparel sales were [REDACTED] than would be expected absent COVID-19.<sup>423</sup> In market share terms, its share of the retail of sports-inspired casual apparel across in-store and online channels has [REDACTED] in 2020. Nike's share was higher than all other retailers bar [REDACTED].
- 11.127 In the Remittal Online Survey, Nike was second only to JD Sports in terms of diversion when customers were asked where they would shop for apparel if Footasylum was not available. It was a clear first choice (19% of shoppers) for customers of JD Sports if JD Sports was not available. In the Phase 2 Exit Survey, diversion to Nike for JD Sports in-store apparel customers was much lower at only 8% and diversion to Nike for Footasylum's in-store apparel customers was only 2%.<sup>424</sup>
- 11.128 As noted in relation to footwear, Nike is [REDACTED] and some retailers regard Nike as a competitor to the Parties.
- 11.129 Nike exerts a relatively strong competitive constraint on JD Sports for online customers for apparel. However, Nike's constraint is more limited on Footasylum and is much less significant than JD Sports' constraint on Footasylum. This is particularly pronounced for apparel given the lower importance of Nike products for Footasylum's apparel sales. The evidence also shows that Nike's constraint is likely to be less important for instore customers given its more limited store presence. Nike is likely to become a stronger constraint to both Parties in the future as a result of growth in its DTC offering (even if it does not meet its specific targets).

## adidas

- 11.130 Similar to Nike, adidas DTC sales performance has been strong throughout the COVID-19 pandemic. Its online sales growth in apparel in the year to March 2021 ([REDACTED]% higher than would be expected absent COVID-19) has outstripped [REDACTED].<sup>425</sup> In market share terms its share from 2018 to 2020 was reasonably [REDACTED] which implies its UK DTC sales are of a similar magnitude to Footasylum's. adidas has a relatively small store presence. Its share of the in-store segment is smaller than [REDACTED].

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<sup>423</sup> See Appendix F, Table 3.

<sup>424</sup> See Table 13 and Table 14.

<sup>425</sup> See Appendix F, Table 3.

- 11.131 In the Remittal Online Survey, adidas was ranked lower than Nike, ASOS Foot Locker and Sports Direct in terms of online shoppers' best alternative to Footasylum for apparel (at 3%). For JD Sports' online shoppers of apparel, adidas was ranked behind Nike and ASOS at 10%. In the Phase 2 Exit Survey, diversion to adidas was lower for in-store customers of both JD Sports and Footasylum at 7% and 1% respectively.<sup>426</sup>
- 11.132 As noted in relation to footwear, adidas is [X] and some retailers regard adidas as a competitor to the Parties.
- 11.133 We consider that adidas exerts some competitive constraint on JD Sports for online customers although less than Nike. adidas is a much weaker constraint on Footasylum and imposes a much more limited constraint than JD Sports on Footasylum. As with Nike, adidas' in-store constraint is more limited given its much smaller store estate. adidas is likely to become a stronger constraint on both Parties in the future as a result of growth in its DTC offering (even if it does not meet its specific targets) although we expect it would still exert a more limited constraint than Nike.

## ASOS

- 11.134 ASOS sells [X]% of Footasylum's Nike apparel products and [X]% of JD Sports' Nike apparel. For adidas apparel, ASOS sells [X]% of Footasylum's adidas apparel and [X]% of JD Sports' adidas apparel.<sup>427</sup> Therefore, it has a [X] overlap with Footasylum's apparel products, and a [X] overlap with JD Sports' apparel products. However, for both Footasylum and JD Sports it is always ranked between [X] and [X] in terms of retailers' product overlap.
- 11.135 This is reflected in the estimated diversions from the Remittal Online survey. 6% of Footasylum's and 12% of JD Sports' online shoppers considered ASOS to be a good substitute for Footasylum and JD Sports respectively.
- 11.136 In the Phase 2 Exit Survey, few JD Sports or Footasylum in-store shoppers noted ASOS as an alternative, which is consistent with the fact that it does not have any stores. Given [X]% of Footasylum sales<sup>428</sup> and [X]% of JD Sports apparel sales<sup>429</sup> take place in stores we consider that this greatly reduces ASOS' constraint.
- 11.137 ASOS is one [X]. However, it is classed as a 'fashion specialist' which is a different classification to the Parties who are more focused on 'lifestyle'

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<sup>426</sup> See Table 13 and Table 14.

<sup>427</sup> Sales-weighted, paragraph 9.7 to 9.11.

<sup>428</sup> [X].

<sup>429</sup> [X].

products (with some overlap). Therefore, in terms of the products that ASOS will retail the evidence does not indicate that ASOS will be an especially close competitor to either JD Sports or Footasylum.

11.138 We note that both Footasylum and JD Sports [REDACTED] and some retailers consider ASOS to be a competitor to the Parties.

11.139 We consider that the evidence indicates that ASOS imposes relatively limited constraint on Footasylum and a moderate constraint on JD Sports in apparel (which is slightly stronger than its position for footwear). The constraint exerted by ASOS is stronger for online customers which is consistent with ASOS' online-only model.

### *Sports Direct*

11.140 As described in relation to footwear in paragraph 11.47, Sports Direct has very little product overlap with either Party given its different focus on sporting goods. We have noted our provisional views on Sports Direct's elevation plans in paragraph 11.48 above.

11.141 However, despite the differences in product focus, some consumers view Sports Direct as being a credible alternative to both JD Sports and Footasylum, albeit a weak alternative. The Remittal Online Survey showed that 9% of JD Sports online shoppers thought Sports Direct would be their best alternative (ie a similar proportion to Footasylum) and 4% of Footasylum online shoppers thought Sports Direct would be their best alternative which is very similar to the diversion levels for footwear. Further, we note that in the CMA's Phase 2 Exit Survey, Sports Direct did not receive a material level of diversion from Footasylum shoppers (less than 2%) although 17% of JD Sports shoppers thought Sports Direct would be a good alternative. We also note that Footasylum told us that it does not consider Sports Direct to be a strong competitor to it.

11.142 We therefore consider that, given its different product focus and the evidence discussed above, Sports Direct is not a close competitor to either of the Parties and exerts only a limited constraint on the Parties (which is greater on JD Sports than Footasylum) in apparel.

### *Foot Locker*

11.143 Foot Locker is focused on footwear rather than apparel [REDACTED].

11.144 However, we have found that Foot locker has a [REDACTED] product overlap with respect to Nike apparel with both Footasylum ([REDACTED]%) and JD Sports ([REDACTED]%).



Foot Locker [X] product overlap with either Party for adidas apparel ([X]).<sup>430</sup>

11.145 The Remittal Online Survey showed that 3% and 5% of JD Sports and Footasylum apparel customers respectively gave Foot Locker as their best alternative. In the CMA's Phase 2 Exit Survey diversion to Foot Locker was slightly higher for JD Sports customers with 8% giving Foot Locker as their best alternative whereas diversion for Footasylum in-store shoppers was 3%. We have not seen any evidence indicating that Foot Locker would have increased its constraint for in-store apparel shoppers.

11.146 The Parties both [X] and some retailers regard Foot Locker as a competitor to the Parties.

11.147 We consider that Foot Locker exerts a competitive constraint on both Parties in apparel but this is relatively limited and is far less than the constraint it exerts in footwear.

#### *Next*

11.148 Next's product overlap rates with the Parties are similar to ASOS with Next selling [X]% of Footasylum's Nike apparel and [X]% of JD Sports' Nike apparel. For adidas apparel, it is [X]% of Footasylum's adidas apparel and [X]% of JD Sports' adidas apparel.<sup>431</sup> Next's market share is [X]. However, only 2% of Footasylum's and 6% of JD Sports' online shoppers considered Next to be a good substitute for Footasylum and JD Sports respectively. Next did not receive any meaningful diversion (less than 2%) from the CMA's Phase 2 Exit survey.

11.149 We consider that Next exerts a weak competitive constraint on both Parties in apparel.

#### *Other online only retailers*

- *Very, Amazon, Zalando*

11.150 The evidence referred to at paragraph 11.66 above regarding Zalando's product allocation status with the key suppliers applies equally to apparel. As regards Nike apparel products, Zalando has [X] with both JD Sports and

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<sup>430</sup> Sales-weighted, paragraph 9.7 to 9.11.

<sup>431</sup> Sales-weighted, paragraph 9.7 to 9.11.

Footasylum on a sales-weighted basis. However, there is [X] with both Parties for adidas products.

- 11.151 In the Remittal Online Survey, less than 1% of both JD Sports and Footasylum customers mentioned Zalando as their best alternative. Zalando also did not receive any material diversion in the Phase 2 Exit Survey as would be expected given its lack of stores.
- 11.152 Very has [X] product overlap with both JD Sports and Footasylum for adidas products on a sales-weighted basis and it has the [X] overlap with JD Sports for Nike products (although it is [X] for Footasylum with regard to Nike products).
- 11.153 However, in the Remittal Online Survey, less than 1% of JD Sports and Footasylum customers mentioned Very as their next best alternative. Nor did Very receive any material diversion in the Phase 2 Exit Survey.
- 11.154 Amazon does [X] overlap with either Party for Nike or adidas apparel products. In the Remittal Online Survey, 4% of JD Sports customers and less than 1% of Footasylum customers mentioned Amazon as their next best alternative for apparel products. Amazon did not capture any material diversion from either of the Parties in the Phase 2 Exit Survey.
- 11.155 We consider that the evidence indicates that despite the relatively high product overlaps in some areas, Zalando Very and Amazon are, at best, only weak constraints on either Party in apparel.

#### *Conclusion on third party constraints*

- 11.156 We consider that Nike, adidas and ASOS exert a competitive constraint on both Parties in apparel. In terms of constraints for online consumers, they are stronger constraints on JD Sports than Footasylum is but are much weaker constraints on Footasylum than JD Sports. All three competitors are stronger constraints on the Parties for online customers than in-store customers. We consider that Sports Direct and Foot locker also provide only a limited constraint on Footasylum and JD Sports in apparel, although this may be more material in-store. While we found that several other retailers offer sports-inspired casual apparel, taken in the round, the evidence indicates that other retailers impose only a limited competitive constraint on the Parties.

## ***Assessment of future competition***

- 11.157 Our analysis of current competition shows that the Parties compete closely in apparel, with JD Sports being a much stronger constraint on Footasylum than Footasylum is on JD Sports. They also face competition from some third-party rivals, notably Nike, adidas and ASOS, and weaker competition from a number of other retailers. We now consider whether conditions of current competition are likely to be a good prediction of future competition.
- 11.158 As with footwear, for apparel we consider that the most likely reasons as to why current competition would not be a good prediction of future competition is if:
- (a) rivals, especially Nike and adidas, continue to grow their DTC channels in direct competition to the Parties; and/or
  - (b) Footasylum [X].

### ***Future of growth of rivals***

- 11.159 We have considered the strength of rivals in our assessment above. As noted in relation to footwear, we did not receive evidence that any retailer had plans that would significantly change their overall offer to such an extent to materially change the constraint they placed on the Parties.
- 11.160 The evidence indicates that Nike's DTC sales have become a stronger competitive threat to the Parties since the CMA's Phase 2 Final Report (paragraph 11.127). We have found that adidas imparts some competitive constraint on the Parties (in particular only Nike and ASOS provide a stronger constraint on JD Sports, but it is currently weaker than JD Sports, Nike, ASOS, Foot Locker and Sports Direct on Footasylum). Both Nike and adidas have ambitious growth targets for their DTC operations and even if they do not meet those specific targets we nonetheless expect them to continue to grow their DTC sales and become stronger competitors in the UK.
- 11.161 We therefore expect both Nike and adidas to be strong competitors in the future. Although we do not expect them to be as strong as JD Sports (for the reasons given in paragraphs 11.129 and 11.133), we do expect them to remain a stronger constraint on JD Sports than Footasylum.
- 11.162 We expect ASOS may also become a slightly stronger constraint on both Parties, given it is [X] and by virtue of [X]. Sports Direct receives different products from Nike and adidas, and Foot Locker has a limited presence in

apparel. Therefore, while we believe their constraint is unlikely to diminish, we do not consider it will materially increase either.

*Impact of suppliers' strategies on future strength of Footasylum and other retailers*

11.163 In paragraphs 11.79 to 11.93 we assessed the evidence on the future strength of Footasylum, and in particular [REDACTED]. While this evidence and assessment is applicable to both footwear and apparel, we consider that [REDACTED] there [REDACTED] evidence on supply restrictions impacting apparel [REDACTED]. Nike makes up a far smaller proportion of Footasylum's apparel sales than Footwear sales.

11.164 In our counterfactual assessment [REDACTED].

*Conclusion on future competition*

11.165 Overall compared with the situation now, we expect Nike DTC and to a lesser extent, adidas DTC to be stronger competitors to JD Sports and Footasylum going forward. We expect ASOS may also become a stronger competitor but not to the extent of Nike (given its starting position is much weaker and has a different consumer focus than these other rivals).

***Provisional conclusion***

11.166 In our competitive assessment, we considered the degree of competition between the Parties and other retailers, both now and in the foreseeable future.

11.167 We have first looked at the ability of the Merged Entity to worsen aspects of PQRS. 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. We found that the control and influence that suppliers exert is less significant in apparel than in footwear, particularly given there is a wider range of other suppliers of branded products and the Parties design, stock and price own-brand products. Overall, we have found that this constraint from suppliers is not so significant on its own as to sufficiently discipline the Merged Entity's ability and/or incentive to deteriorate its offering to customers (paragraphs 6.72 to 6.75). However, we have considered this constraint in aggregate with the other competitive constraints.

11.168 We have found based on the evidence from our Remittal Online Survey, the Phase 2 Exit Survey, the large Footasylum GUPPIs, the Parties' internal documents and the evidence on the similarity of their general offerings and

of the Nike and adidas footwear products in particular, that JD Sports is by far the closest competitor to Footasylum (paragraphs 11.111 to 11.123). We consider that it applies an especially strong constraint on Footasylum.

11.169 We have also found that Footasylum does not exert a significant competitive constraint on JD Sports.

11.170 We have considered the extent to which other retailers, in isolation, or collectively, present a competitive constraint that would offset the loss of competition between the Parties. As such we have considered how closely other retailers compete with the Parties currently.

11.171 We have found that Nike DTC exerts a competitive constraint on both Parties as does adidas DTC and ASOS albeit to a lesser extent than Nike. Sports Direct and Foot Locker compete with and offer some constraint on Footasylum in apparel but are weaker than Nike DTC and ASOS. Other retailers that we have assessed only offer a limited constraint (paragraphs 11.126 to 11.156).

11.172 Taking these constraints in aggregate, including that some competitors may become stronger in the future, we provisionally find the constraint on Footasylum from other retailers relative to JD Sports to be only moderate. To give an indication of the strength of the constraint of JD Sports on Footasylum, the aggregate diversion from Footasylum to all other retailers combined was less than the diversion to JD Sports (and the aggregate diversion to Nike DTC, ASOS, adidas DTC, Foot Locker and Sports Direct is even smaller). We therefore do not consider that the constraints from other retailers, even in aggregate<sup>432</sup> and taking account foreseeable future growth, are sufficient to counter the loss of competition between the Parties.

11.173 We have also considered [REDACTED].

11.174 Taking the evidence in the round, we provisionally find that the aggregate constraints from retailers, combined with the constraints that suppliers impart on the retailers (in terms of how retailers can flex PQRS or in product allocation), would not be sufficient to offset the very substantial loss of constraint from JD Sports on Footasylum in the retail supply of sports-inspired casual apparel. Therefore, the Merger is more likely than not to give rise to an incentive to deteriorate PQRS at Footasylum post-Merger.

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<sup>432</sup> 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.

- 11.175 Subject to any countervailing factors, we have found that the Merger gives rise to an SLC in the retail supply of sports-inspired casual apparel.<sup>433</sup>
- 11.176 The SLC that we provisionally find in our Remittal differs from the Phase 2 Final Report in that it is based only on the removal of the constraint imposed by JD Sports on Footasylum and not the loss of constraint from Footasylum on JD Sports. This reflects our findings on market developments since our Phase 2 Final Report which have resulted in Footasylum becoming a weaker constraint and other competitors becoming stronger constraints on JD Sports. However, these market developments have not weakened Footasylum to such an extent that the merger does not result in an SLC in the market.

## 12. Countervailing factors

- 12.1 In this section, we consider whether there are countervailing factors which may prevent the SLCs we have provisionally found from arising. We have considered the likely direct responses to the Merger by rivals and potential rivals. If effective entry and/or expansion occurs as a result of the Merger and any consequent adverse effect, the effect of the Merger on competition may be mitigated.
- 12.2 We note that the CMA's conclusions on this question in the Phase 2 Final Report were not challenged before the Tribunal and we have not received any further evidence during the Remittal in relation to rivalry-enhancing efficiencies. Indeed, the Parties have not made any submissions on efficiencies during the Remittal and we have not considered efficiencies further.

### ***Entry or expansion***

#### *Parties' submissions*

- 12.3 During the Remittal, the Parties told us that support from Nike and adidas remained critical to a retailer's viability into the relevant markets, and that without support from the brands, it would be unprofitable and commercially irrational for a retailer to attempt to enter or expand into the relevant markets.<sup>434</sup> The Parties said that public statements from Nike and adidas

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<sup>433</sup> A merger gives rise to an SLC when it has a significant effect on rivalry over time, and therefore on the competitive pressure on firms to improve their offer to customers or become more efficient or innovative. A merger that gives rise to an SLC will be expected to lead to an adverse effect for customers. MAGs, OFT1254, para 4.1.3

<sup>434</sup> [REDACTED].

make clear that they intended to reduce the number of smaller retailers that stocked their products, and therefore, it followed that the brands were less likely to support entry and/or expansion by these same retailers either in-store or online.<sup>435</sup> Therefore, barriers to entry and/or expansion for retailers who were less valuable to the brands had significantly increased.<sup>436</sup>

- 12.4 The Parties also told us that the barriers to expansion for the brands themselves (Nike and adidas DTC) had significantly decreased, and that many customers had moved to shopping online and would continue to do so once the pandemic was over.<sup>437</sup>

### *Third parties' submissions*

- 12.5 [REDACTED].<sup>438</sup>

- 12.6 Frasers Group (which owns Sports Direct) told us that barriers to entry and expansion have become more pronounced as the most desirable brands have decided to focus on a small number of Strategic Partners and DTC offerings. It added that without access to restricted premium lifestyle products from Nike and adidas new entrants and existing entrants hoping to expand could not realistically compete.<sup>439</sup> Frasers Group added it did not expect Nike or adidas would support an entrant.<sup>440</sup>

- 12.7 Schuh told us that there would be more options for properties with closures/contraction and potentially lower rents with lesser demand (so barriers have decreased) on the high street.<sup>441</sup>

- 12.8 Zalando told us that as a result of the COVID-19 pandemic, barriers to entry had increased due to increased competitive pressure from 'larger players', as well as 'logistics challenges' brought on by COVID-19 and Brexit. It added that for physical retail, logistic barriers to entry were the same, but that the barriers to entry on securing retail locations might be lower. It explained that the price of commercial retail rent had declined due to store closures across key cities, making it more accessible to new entrants.<sup>442</sup>

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<sup>435</sup> [REDACTED].

<sup>436</sup> [REDACTED].

<sup>437</sup> [REDACTED].

<sup>438</sup> [REDACTED].

<sup>439</sup> [REDACTED].

<sup>440</sup> [REDACTED].

<sup>441</sup> [REDACTED].

<sup>442</sup> [REDACTED].

### *Our assessment of entry and expansion*

- 12.9 We consider that the evidence indicates that suppliers' plans to reduce the number of retail partners coupled with their selective distribution arrangements create a significant barrier to successful entry and expansion.
- 12.10 We have not seen evidence of any significant entry or expansion plans that we would expect to change materially the ability of a retailer outside the relevant markets to exert a significant and sufficient competitive constraint on the Merged Entity over the foreseeable future. The third party views reported above clearly show that retailers themselves consider barriers to entry and expansion to be high.
- 12.11 In this regard, the evidence we have received during the Remittal, suggests that successful entry or expansion in the relevant markets continues to depend highly on gaining access to the key products of the key suppliers, consistent with the CMA's Phase 2 Final Report, but that since then securing that access (or sufficient access) is widely expected to become more challenging.
- 12.12 We have found that the major suppliers, Nike and adidas, have [REDACTED]. In practice, this means that it is likely that both of these suppliers will [REDACTED] (paragraph 10.64).
- 12.13 We therefore do not consider that entry and/or expansion would be timely, likely and sufficient to prevent the SLC we have provisionally found in either the retail supply of sports-inspired casual footwear or in the retail supply of sports-inspired casual apparel.

## **13. Overall provisional conclusion**

- 13.1 We have provisionally concluded that the completed acquisition of JD Sports of Footasylum has resulted in the creation of a relevant merger situation.
- 13.2 We have provisionally concluded that the Merger 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
  - (b) the retail supply of sports-inspired casual apparel (in-store and online) in the UK.