



FOOTASYLUM 

**JD SPORTS / FOOTASYLUM
PARTIES' RESPONSE TO THE CMA'S PROVISIONAL REPORT
ON THE REMITTAL**

**SUBMITTED ON BEHALF OF JD SPORTS FASHION PLC
& FOOTASYLUM LIMITED**

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PART I – Introduction and Executive Summary

1. Introduction: the unprecedented context of the CMA's provisional report

- (1) Following the quashing of the original Phase 2 Final Report (the “**Final Report**” or “**FR**”) and remittal by the Competition Appeal Tribunal (the “**Tribunal**”) the CMA's Provisional Report (“**PR**”) has reconsidered the impact of the COVID-19 pandemic on its assessment of the competitive impact of the acquisition by JD Sports of Footasylum (together, the “**Parties**”) (the “**Merger**”); in particular, the CMA was to reassess the pandemic's impact on Nike and adidas's Direct to Consumer (“**DTC**”) strategies as competitive constraints on the Parties.¹
- (2) Throughout the remittal, the Parties put forward a substantial body of evidence, much of it public and not in dispute, that the pandemic had caused a step change acceleration in pre-COVID marketplace forces which could be summarised as the “3Ds”: a structural shift to Digital; this empowered Nike's and adidas' confidence in aggressive DTC acceleration; consequently, there would be corresponding Disintermediation of retailers soon surplus to the brands' requirements.² This is how Nike's CEO, John Donahoe, put it to investors yesterday:

*“Today, we're in a stronger position relative to our competition than we were prior to the pandemic. Why? Because the changes happening in the market work in our favor. Consumers shift to digital that might have taken, five years, will now only take two. That plays to NIKE's advantage. And our consumer-direct acceleration [DTC] strategy is capitalizing on this marketplace transformation. We know that when we get to the other side of this, we'll be in an even stronger shape. We'll be more agile, more direct, and more digital”.*³

- (3) In response to this and extensive other evidence gathered by the CMA, the PR represents a significant change in conclusion from the Final Report:
- **No SLC centred on JD Sports.** Due to the impact of the pandemic on competitive dynamics, the CMA no longer considers that an SLC arises in respect of JD Sports, which represents the large majority (c. 87%) of the Parties' combined sales in the relevant markets;⁴
 - **Residual Footasylum-only SLC.** SLC findings tend to be two-dimensional across both merging Parties (as close competitors on a reciprocal basis). Despite the pandemic, the CMA still considers that a residual “asymmetric” or one-dimensional SLC arises that is limited to (i) a subset of competitive parameters and (ii) at Footasylum alone, with a market share of [0-5]%.

¹ PR paragraphs 4-7.

² See Parties' Opening Submission of Remittal, 30 April 2021 and Supplementary SLC submission of 28 May 2021.

³ John Donahoe, Nike President and CEO, Nike Fiscal 2022 First Quarter Results, 23 September 2021, Transcript, p. 2.

⁴ [X] [X]

(4) The PR thereby represents two firsts for UK merger control under the modern Enterprise Act regime in force since 2003:

- **First change from SLC to no SLC.** With respect to the JD Sports analysis, this is the first time ever that an SLC finding on a Phase 2 remittal has changed from SLC to no SLC. In dropping this SLC, the PR notes that “*market developments since ... have resulted in Footasylum becoming a weaker constraint and other competitors becoming stronger constraints on JD Sports*” (paragraph 58). For example, between the two Reports, in footwear, JD Sports online customer diversion to Footasylum fell by 46% (7pp) while diversion to DTC rose by 35% (9pp); in apparel, diversion to Footasylum went down by 39% (5pp) while diversion to DTC went up by 43% (10pp).⁵ These inverse trends are related: the CMA explains that the “*reduction in diversion [to Footasylum] is explained by an increase in the diversion to Nike and adidas DTC*” in footwear (paragraph 11.14) and “*to Nike, adidas and ASOS*” for apparel (paragraph 11.114).
- **First prohibition based on an asymmetric SLC.** In respect of the SLC centred on Footasylum alone, this is the first time in UK Phase 2 merger control history that a merger will (provisionally) be blocked (or unwound) based on such a one-dimensional SLC.

2. The SLC incentive – to profit from worsening Footasylum – is allegedly stable over [0-5]% of a retail fashion market still undergoing major competitive change

(5) The 2010 Merger Assessment Guidelines (“**MAGs**”) used by the CMA for this case do not mention the possibility of an asymmetric SLC, though there are a small number of examples of asymmetric constraint findings in past cases.⁶

(6) However, as noted, it is novel for this to have a decisive (fatal) impact on a transaction, in circumstances where the asymmetric SLC finding is, in context, so extraordinary. The merged entity’s alleged stable and durable SLC incentive to worsen the experience for customers at Footasylum, and thus make it less competitive vs. rivals, has the following contextual features:

(a) The SLC is extraordinarily leveraged – said to apply only to a subset of competitive parameters and only at a player with a [0-5]% market share

The SLC test applies “*in a market or markets in the UK*” but the Footasylum SLC is confined to its own market share – in the [0-5]% range – and not even the merged entity as a whole (JD Sports’ share in footwear is [X], and [X] in apparel). With 95%+ of the relevant market *unaffected*, this relative sliver of an SLC impact is itself limited in the PR to those competitive parameters *not* subject to supplier discipline – in other words, the SLC bites on only some aspects of a retail offer that itself

⁵ These are aggregate results for Nike, adidas and other brands (Puma, The North Face, Under Armour) DTC; the same trend is true for the #1 DTC brand, Nike (up 29% (4pp) in apparel, up 27% (5pp) in footwear) and #2 adidas (up 35% (3pp) in footwear, up 15% (1pp) in apparel) in isolation. Comparing the survey results used in the Final Report (May 2020) and the PR (September 2021); see Parties’ Response to CMA Working Papers, pp. 10-11, 16-17.

⁶ The principle is mentioned in the new MAGs (2020): see paragraph 4.11 and there is one footnote reference, note 82, giving the example of a large supermarket constrains a convenience store but not the other way around. Whilst the Parties proposed that the new MAGs be applied to the present case, the CMA declined.

accounts for [0-5]% market.⁷ The CMA does not allege any SLC or adverse effects market-wide or with respect to any other party (which would also not make sense, given the CMA finds there is no JD Sports incentive to make its own JD Sports-branded offer less competitive). There is no precedent for an SLC in this context.

Moreover, because under the MAGs an SLC must be a “*significant effect on rivalry over time*”⁸ the question is not (simply) one of materiality at a snapshot moment in time (e.g. over some parameters within a [0-5]% market share immediately post-merger), and cannot be divorced from durability: in other words, the SLC theory should be based on a *persistent* incentive to make Footasylum *less* attractive to consumers, relative to the competition, by *worsening* its offer -- notwithstanding the reactions of customers, rivals and suppliers – to amount to a durable SLC.

In this case, the following four considerations highlight the static and unfinished nature of the SLC analysis.

(b) The supposedly durable SLC centres on a player whose competitive constraint on JD Sports went from ‘strong’ (2020) to ‘moderate, at best’ (2021)

The asymmetric SLC is said to persist over time in a market that is highly dynamic, reflected in the change from SLC to no SLC with respect to JD Sports in less than 18 months (i.e., comfortably within the time horizon of the original SLC finding that was quashed). In particular, the SLC relates to a weakened competitor that has in sixteen months:

- gone from being a “*strong competitor*” or “*closest*” or “*close*” substitute, a “*strong alternative*” and a “*strong constraint*”⁹ to JD Sports – so strong, in fact, that the removal of its constraint was a substantial lessening of competition on JD Sports;
- to being a constraint on JD Sports that is “*only moderate, at best*” in footwear (paragraph 47 PR) and “*only moderate, at best*” in apparel (paragraph 54 PR).

(c) The stability of the SLC incentive glosses over the dynamic cumulative impact of Nike/adidas DTC acceleration in tandem with multiple other rivals

The narrow and attenuated nature of the SLC finding is further underlined when the Nike/adidas DTC constraint is fully accounted for, as explained in detail in the Parties’ submissions throughout the remittal and not repeated in full again.

For present purposes, it suffices to note that the “*other competitors becoming stronger*”¹⁰ growth in constraint by Nike and adidas DTC is a core reason why the CMA reversed its position on SLC with respect to JD Sports, the larger player.

⁷ For both footwear and apparel. As explained at Part II section 5 below, the Parties consider that the CMA’s identification of the subset of allegedly affects parameters is unclear and in any event wrong.

⁸ MAGs, paragraph 4.1.3. See also MAGs (2020) at 2.2, 2.12.

⁹ References at FR paragraphs 21, 39, 8.216, 8.229, 9.167, 9.208.

¹⁰ Paragraph 58 PR.

And yet the SLC finding depends, incoherently, on the constraint by Nike and adidas (not just individually but together with every other third party) being much lesser only in respect of the much smaller player, who apparently remains insulated from these competitive forces.

This is in spite of the fact that, in addition to all the public industry facts in the marketplace, comparing the CMA online survey evidence in the FR versus the PR, the survey diversion from Footasylum to Nike/adidas DTC has grown markedly (by 50% from 12% to 18% in footwear, and by 100% from 6% (at most)¹¹ to 12% in apparel).

(d) A well-founded SLC in a dynamic market cannot predominantly be based on one consumer survey question

At the same time, there remains a clear difference in the May 2021 online survey results between the relative size of diversion between the Parties: the Footasylum to JD Sports diversion is “*very high*” (40-50%) and the reverse is not true (9%).

But does this (unusually) asymmetric result provide the foundation for an (unusual) asymmetric SLC? It does not. Survey diversion ratios are zero-sum percentages that must add up to 100: if JD Sports scores 40-50% that leaves a balance of 50-60% in total for all other rivals, split between them, so their individual score will be materially lower than that of JD Sports. But proper SLC analysis of the strength of competitive constraints is not zero-sum. It is illogical to say: JD Sports is *strong* (inferred from a *high* diversion score) *therefore* all others must be *weak* (inferred from a *lower* score) -- now and in the future. This is clearly wrong:

- Survey diversions derive from one question, being the spontaneous mention by consumers of their “next-best” alternative to where they just shopped (e.g. Footasylum);
- It is always possible that consumers consider they have *one* next-best alternative (when allowed to name only *one*) but many *other* attractive choices too;
- In this case, while Footasylum shoppers mainly buy Nike or adidas products (as high as ~~25~~ of sales in footwear); by way of survey design, no consumers (including as the large fraction who mentioned JD Sports) were asked whether they thought they had other strong alternatives, such as buying Nike/adidas directly from Nike/adidas DTC, or from others.¹²

Consequently, the May 2021 Footasylum survey results are not very informative (let alone decisive) of whether consumers think they have multiple strong options beyond Footasylum or not, nor specifically whether the constraint on Footasylum from Nike/adidas DTC is strong or weak in absolute terms. Nor, as with all

¹¹ Table 9.6 in the Final Report only shows diversion ratios from Footasylum to other retailers for which the level of diversion exceeds 2%. The table includes Nike (4%) but not adidas, thus total diversion to Nike and adidas is at most 6%.

¹² The Parties had proposed that the survey include a question along these lines to improve the evidence base.

“snapshot” evidence applicable to a fixed point in time, would the consumer responses (as at May 2021) capture marketplace changes past that date.

As a result, the survey data do not greatly inform let alone decide the question of whether Nike and adidas are currently strong and growing future rivals. Nor do they indicate that Footasylum is (uniquely) immune from the DTC threat, and nor can they explain the difference between no SLC at JD Sports and an SLC at Footasylum.

Other evidence must speak to that issue (of which there is an abundance, and which points away from SLC).

The CMA appears to agree with the cautions on survey diversions. These are one input into its GUPPI model, which the CMA uses to identify “*prima facie concerns*” (8.31) but is “*static*” (paragraph 8.31), being based on “*current incentives ... and does not take into account future changes*” (8.39) and in any event “*just one piece of evidence*” (8.39). It is therefore common ground that the SLC analysis itself, based on “*all the evidence in the round*” (8.32(a)) on the balance of probabilities, cannot collapse into this one indicator, with its inherent limitations, and render all other evidence so subordinate as to be redundant.

(e) The SLC centres on a player whose competitiveness, scale and [redacted] risk depends on its growing DTC rivals as critical suppliers – Nike and adidas

The Footasylum SLC also has the context of other extremely unusual market facts:

- Footasylum depends [redacted];
- Nike and adidas are simultaneously the most dynamic and aggressive competitive threat to JD Sports and the entire wholesale channel, leveraging structural advantages of their membership programmes (discounts, early-release and exclusive offers only on DTC);¹³ [redacted];¹⁴
- Footasylum sits as a small player within the wholesale channel. It does not follow from the fact that JD Sports is easily the most commonly-cited spontaneous alternative to Footasylum (in the survey) that [redacted] from the strength of the DTC threat, when the [redacted] of its overall sales depend on these same DTC rivals.

(f) The SLC is said to endure in a market with a ‘digitally native’ 16 to 24-year-old target demographic and whose balance is structurally shifting towards online

¹³ See the Parties’ Initial Submission, 30 April 2021, paragraph 29-30 (adidas) and paragraphs 42, 63-65 (Nike) and [redacted] at paragraph 6.55 of the PR.

¹⁴ While individual DTC stores may be mono-brand, the merged entity would be disciplined against SLC in the multichannel *market* by the fact that, together, Nike and adidas DTC present a *multi*-brand digital shopping offer that accounts [redacted]. Nike/adidas DTC choice is reinforced, in aggregate, with the multi-brand offer of Foot Locker, ASOS and numerous others that [redacted].

Already in the Final Report, the CMA found that the fast-growing digital channel constrains stores (and vice versa) as part of a single multi-channel market. Meanwhile, the pandemic has ushered in a structural shift in favour of an “*acceleration of online shopping*” (see PR paragraphs 42-43) and it remains the case that digital (re)search rates for purchases are high, while switching costs between .com sites (or between Google search results) are negligible. Accordingly, no supplier (such as the merged entity) can rely on “sticky” (predictable, bankable) switching patterns between rivals (see the dramatic changes in the JD Sports diversion patterns for DTC and Footasylum, respectively, above), not least by the target demographic.

The result of the above considerations is that the SLC is profoundly contrived. It rests on incomplete reasoning and static assumptions at odds with any dynamic reading of what has happened in the last 18 months (the same period in which the JD Sports SLC has fallen away).

Moreover, the PR does not go beyond its narrow Footasylum-centric analysis (particularly of the snapshot of Footasylum survey data) to address any of the issues raised by proceeding down the asymmetric SLC route (see further Section 4).¹⁵

3. In reaching the wrong conclusion, the PR makes a series of discrete errors and omissions

(7) Aside from the issues above, the PR reaches its conclusion about the constraints operating on Footasylum by a number of errors and omissions, examples of which include:

- Some “hot” footwear franchises are more important than others for the brand perception with consumers of that retailer with the target demographic, and yet the PR does not assess [X] of key franchises;
- The CMA misapprehends the significance of Footasylum's [X];
- The CMA finds that the [X] is unlikely, so it does not include it in the counterfactual; the PR promises but then appears not to factor it into the competitive assessment, even though [X] does not need to be “more likely than not” to have a disciplining effect on incentives;

(8) The PR also misses fundamental dynamics of the conditions of supply. By implementing DTC and disintermediation¹⁶ of less relevant wholesale channel partners, the brands are looking for retail partners with relevance to consumers (consumer momentum) and that reach consumers not (currently) reached by DTC. That means retail partners that are gaining customers, not losing them. The PR fails to acknowledge that a necessary condition of its theory of harm of worsening Footasylum's retail offer (and competitiveness) is that it causes customer defection and reducing sales.

¹⁵ The inadequacy of reasoning is consistent with the fact that the asymmetric SLC scenario as such was never raised as part of Q&A at the Site Visit, the Main Party Hearing, or included in terms in the remittal Working Papers. So, before settling on this conclusion in the PR, the CMA never had the benefit of meaningfully stress-testing the robustness of its reasoning with questions to and engagement with the Parties.

¹⁶ For the avoidance of doubt, the term disintermediation is used by the Parties (and has been used in previous submissions) to refer also to progressive disintermediation i.e. reductions in supply that fall short of termination. [X]

(9) This is the opposite of what secures product allocations with brands. And this holds true whether the parameters which are worsened by the merged entity at Footasylum are ones that the brands directly track or notice or care about (most variables) or ones that they do not (residual variables). This supplier constraint is one that the merged entity would ignore at the peril of Footasylum's allocation levels going forward and (as simply a matter of time: when not if) of supply at all. In this respect, the PR cannot see the wood for the trees.

(10) Nor does the PR factor in that Footasylum [REDACTED].

4. The CMA does not engage with the applicable Merger Guidelines in addressing the extreme context of the proposed Footasylum-only SLC

(11) Finally, the CMA should have considered, beyond the evidence on the change of constraints on Footasylum, a broader set of factors informative about the presence of an SLC in the market arising specifically from asymmetry, specifically with reference to the MAGs it has applied to the case:

- **An asymmetric SLC despite no material reduction in consumer choice.** The MAGs provide that “Unilateral effects are more likely where customers have little choice of alternative supplier, for example because of the level of ‘switching costs’ or network effects” (paragraph 5.4.5, 5.4.12). There are no switching costs online, and network effects are irrelevant here. As to the materiality of any reduction in consumer choice, the MAGs also note that “in relation to the number of firms, previous OFT [Phase 1 CMA] decisions in mergers involving retailers suggest that [it] has not usually been concerned about mergers that reduce the number of firms in the market from five to four (or above)”; paragraph 5.3.5.
- Applying the guidance from the MAGs, on the CMA's market share data, even (unjustifiably) counting only rivals the same size or larger than Footasylum as a choice for consumers, the merger is a “6 to 5” on a worst-case basis:
 - In apparel, in addition to the two Parties, there are 7 third party competitors to Footasylum that are the same size ([REDACTED]) or larger ([REDACTED]), in addition to Nike and adidas) in market share than Footasylum.
 - In footwear, in addition to the two Parties, there are 4 third party rivals larger than Footasylum: Nike is [REDACTED] times the size of Footasylum online and almost [REDACTED] times larger in multichannel overall ([REDACTED]); adidas is [REDACTED] [REDACTED] Footasylum online and [REDACTED] larger overall ([REDACTED]); while Foot Locker and Office are also both larger.¹⁷

While an asymmetric SLC with a player with a small market share could reduce choice in a concentrated market with few choices to begin with (e.g. four choices reducing to three or less, as per the MAGs¹⁸), this is implausible here.

¹⁷ Meanwhile, in addition to the four larger players, several are close behind: [REDACTED]

¹⁸ MAGs, paragraph 5.3.5.

- **An SLC centred on a player that is not a ‘significant competitive force’.** The MAGs provide that: “*Unilateral effects resulting from the merger are more likely where the merger eliminates a significant competitive force in the market. For example, the merger may involve a recent entrant or a firm which was expected to grow into a significant competitive force or otherwise to provide a significant competitive threat to other firms in the market (eg by virtue of having a novel business model or a reputation for aggressive price cutting).*”¹⁹ This is not the case here. The CMA’s conclusions are that Footasylum is a “*moderate, at best*” constraint on JD Sports (and by implication, on other competitors too given that, unlike JD Sports, they were not perceived by the CMA to be close competitors to Footasylum).
- **An SLC despite leaving over 95% of the market – and a large competitor set of third-party rivals – unaffected.** The MAGs note that reactive price increases by rivals in response to an attempt by the merged firm to raise prices can make a price rise more likely to occur.²⁰ However, that has not been alleged in the PR; on the contrary, the CMA has found that JD Sports has no merger incentive to raise prices (and the same must apply to the multiple third party rivals outlined above, where the CMA has alleged no effect).

(12) It is a further major failing of the PR that it has assessed the Footasylum SLC in isolation and not considered the specific implications of asymmetry for that finding.

5. Conclusion and summary of submission structure

(13) The above factors, when properly taken into account, make the asymmetric SLC finding not only unlikely, on balance, but wholly unrealistic: the SLC incentive is supposed to be a real-world commercial one that makes economic sense to a market participant so that it is actually acted upon in a market.

(14) But the SLC makes no strategic commercial sense to JD Sports. Were it to attempt to act on a notional incentive to worsen Footasylum for an extended period (over the next two years, 2022-23), it would fully expect the following:

- the reaction of customers – who would leave Footasylum, but without JD Sports having any comfort that 40-50% of them would switch to JD Sports (e.g. along the May 2021 survey proportions), not least because
- the reaction of rivals -- DTC and wholesale, who have no incentive to worsen their own offer, and instead have the incentive to expand and capture unhappy Footasylum customers who decide to switch; and, moreover
- the reaction of suppliers -- Nike and adidas, who will not reward Footasylum as a retailer that continues to lose unhappy customers – the opposite of the requisite momentum and consumer relevance – with the key input of their desirable products necessary for a retailer to stay a competitor.

¹⁹ MAGs, paragraph 5.4.5.

²⁰ MAGs, paragraph 5.4.11.

- (15) JD Sports knows its market and its consumers well. It also knows full well that the SLC incentive that has been provisionally found would be self-defeating and unprofitable on any durable basis as the discipline of the above market forces would inevitably be triggered.
- (16) It would also be entirely contrary to the deal rationale to profitably make Footasylum a better version of itself, not a worse one.
- (17) The remainder of this submission in Part II considers in turn the CMA's assessment of (i) wholesale disintermediation; (ii) the Footasylum counterfactual; (iii) the constraint from DTC; (iv) the constraint from other horizontal rivals; (v) the supplier constraint; and (vii) the resulting issues with the SLC assessment.

PART II – Substantive issues by topic

1 The assessment of disintermediation within the wholesale channel

1.1 Introduction

- (18) Nike's and adidas's plans with respect to the disintermediation of the wholesale channel are critical to the assessment of [X], whether assessed as part of the counterfactual analysis or as part of the competitive assessment.
- (19) At a high level, the PR finds that *"evidence from the suppliers indicates that in general they see a continued role for wholesale as a complementary channel to DTC in future"* (paragraph 7.203). This is not in dispute, at least in the short term. The key questions for the purposes of the competition analysis in this case, however, are (a) the extent to which the wholesale channel is likely to grow, remain flat, or decline (bearing in mind the key suppliers' public statements on this topic); and (b) the extent to which [X] position as a wholesale partner of the brands is likely to be impacted.²¹ As set out below, the CMA has made errors in respect of both of these questions.

1.2 Evidence cited is at odds with public statements and internally inconsistent

- (20) As noted above, an important question for consideration is the suppliers' general strategies (including their public statements) with respect to the wholesale channel, and the extent to which this channel is likely to grow or decline.
- (21) Paragraph 7.206 notes that Nike stated that it *"expects the wholesale sales of its UK retail partners to continue to grow overall"*. This statement appears to be at odds, however, with Nike's public statements that it expects wholesale channel revenues will remain *"flat"* until FY25.²² Inflation means a decline in real terms.
- (22) It is clear from its public statements (and, it appears, is accepted by the CMA) that Nike has *"shifted from a legacy wholesale distribution model"* with plans to *"consolidate the marketplace"* by working closely with large strategic retailers and local neighbourhood partners.²³ This has been consistently reiterated in Nike's Earnings calls.
- (23) In Nike's Q1 21 Earnings call, Matthew Friend (Nike's Executive Vice President and Chief Financial Officer) stated *"I would also want to highlight that the strategy and the focus on shifting the marketplace, exiting undifferentiated wholesale distribution and focusing on our direct business and our strategic partners... then we work with fewer strategic partners who see the world the same way we see the world..."*²⁴
- (24) In the Q2 21 Earnings Call, Matthew Friend added that *"Looking forward over the next two years, we will more aggressively accelerate change with larger undifferentiated accounts as we and our strategic partners together reprofile the shape of the marketplace and recapture short term demand dislocation..."*²⁵

²¹ As noted above, for the avoidance of doubt, the term disintermediation is used by the Parties (and has been used in previous submissions) to refer also to progressive disintermediation i.e. reductions in supply that fall short of termination. For the competitive assessment it is not necessary for Footasylum [X] for there to be an impact on its competitive position.

²² See Annex 761, page 15 and Berenberg analysis provided with email from Tom Clare to the CMA, dated 29 June 2021.

²³ See Annex 761, page 8.

²⁴ See Nike's Q1 21 Earnings Call Transcript, page 10.

²⁵ See Nike's Q2 21 Earnings Call Transcript, page 6.

(25) In its Q3 21 and Q4 21 Earnings calls Nike again stated that it intends to prioritise its relationships with its Strategic Retail Partners and “*compelling local, neighbourhood partners*” (together also referred to earlier as “*differentiated retail*”²⁶ more generally), and that it still intends to exit all other undifferentiated wholesale.²⁷

(26) Just yesterday, in its Q1 22 Earnings call Matthew Friend said, in response to a question about Nike’s strategy given ongoing supply issues resulting from the pandemic:

*“What I would tell you is that, we continue to see strong growth in our differentiated partners. And our differentiated partners, because of the fact that they are creating a better consumer experience and driving more demand, their mix of inventory on hand is about half where they would like for it to be right now, because of the strong demand that they’re driving. And to take it a step further, over the last three years, we’ve actually exited about 50% of our undifferentiated accounts, while we’ve been able to deliver strong double-digit growth. And so, we believe that we will continue down this strategy. And as John alluded to in his prepared remarks, we believe that the supply-related reductions will likely trigger an even greater acceleration in the transformation of the marketplace towards NIKE and our most important wholesale partners.”*²⁸

(27) As previously set out in the Parties’ submissions, consolidation within the wholesale channel means that, even if the overall channel sales are flat, they are being redistributed through disintermediation, whereby DTC and strategic partners benefit and less-favoured retailers lose out. These submissions have not been properly addressed in the PR.

(28) While the detail of adidas’ submissions remains redacted, paragraphs 7.204-6 indicate that adidas [REDACTED] and that it told the CMA that it will [REDACTED]. It is not clear, however, whether the [REDACTED] will extend beyond strategic partners. Similar to Nike, adidas’ public statements are very clear regarding its intentions to reduce the number of wholesale partners that it supplies.

(29) There is also a marked contrast in the approach taken in Chapter 7 of the PR, whereby the CMA relies on statements suggesting that the wholesale channel will grow, compared to the provisional finding in Chapter 12 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*”. This appears to accept that even existing retail partners are hampered in their expansion plans given the suppliers’ distribution policies and overall strategy to “*reduce the number of retail partners*”.

1.3 [REDACTED]: overview

(30) With respect to the [REDACTED] in particular, the PR concludes that:

i. [REDACTED];²⁹

ii. [REDACTED];³⁰

²⁶ See Nike’s Q3 21 Earnings Call Transcript, page 10.

²⁷ See Nike’s Q4 21 Earnings Call Transcript, page 7.

²⁸ See Nikes Q1 22 Earnings Call Transcript, page 13.

²⁹ PR, Table 2 and Table 10.

³⁰ PR, Figure 1.

iii. The data that [REDACTED];³¹ and

iv. This [REDACTED] has “*not significantly undermined Footasylum’s ability to compete*”³² and will not cause “*Footasylum to become a materially weaker competitor in the foreseeable future*”³³.

(31) The Parties consider that there are a number of flaws in the CMA’s assessment of [REDACTED], including: (i) incorrectly dismissing the distinction between [REDACTED] products [REDACTED]; (ii) incorrectly using [REDACTED]; and (iii) not considering the [REDACTED] for key franchises. The PR also fails to take proper account of the impact of [REDACTED]. These issues are discussed in the sections that follow, which also include a discussion of the latest [REDACTED].

(32) As a preliminary point, it is notable that the CMA [REDACTED]. The CMA states that its Remittal Online Survey (and “*the evidence*” more generally) was undertaken at a time [REDACTED], and therefore its results capture the Parties’ prospective position as close competitors.³⁴ This ignores the evidence above and is therefore incorrect.

(33) Footasylum has consistently distinguished between [REDACTED].³⁵ [REDACTED]³⁶

(34) Footasylum submitted evidence [REDACTED]³⁷ [REDACTED].

1.4 The CMA’s assessment incorrectly dismisses [REDACTED] products [REDACTED]

(35) First, in its analysis of [REDACTED], the CMA considers it appropriate not to distinguish between [REDACTED]. To support this, the CMA provides [REDACTED] as “*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 [REDACTED]*”³⁸ In doing so, the CMA [REDACTED].

(i) For instance, [REDACTED]³⁹[REDACTED]⁴⁰[REDACTED].⁴¹

(ii) The Parties also noted that [REDACTED] has not categorised products in this way [REDACTED].⁴² [REDACTED] does not explain why [REDACTED], [REDACTED], and why this difference does not impact the [REDACTED].

(iii) [REDACTED] clarifies that there is “*no difference in the likelihood of products not being delivered between the [REDACTED] categories*”. However, that only further begs the (unanswered) question of why any distinction is made. As a matter of plain English,

³¹ PR, paragraph 7.198 and Figure 1.

³² PR, paragraph 11.87.

³³ PR, paragraph 11.89.

³⁴ PR, paragraph 11.87.

³⁵ See for instance: the Parties’ Initial Submission, 30 April 2020, paragraphs 53-58.

³⁶ Footasylum’s response to RFI 1 dated 6 April 2021 paragraph 22.4

³⁷ Footasylum’s response to RFI 1 dated 6 April 2021 paragraph 22.5. See also paragraphs 22.16, 22.26, 22.33, 22.42, 22.47, 22.52, 22.56. See also Footasylum’s site visit presentation, 14 May 2021, slide 18.

³⁸ PR, paragraphs 7.209-7.211. At paragraph 7.211, the CMA states: “*We therefore consider that it is appropriate to not make a distinction between the two categories.*”

³⁹ Parties’ submission on allocations (‘JD Sports / Footasylum’s Allocations for Q1 2022’), 2 July 2021, Annex 757. [REDACTED]

⁴⁰ Parties’ submission on allocations (‘JD Sports / Footasylum’s Allocations for Q1 2022’), 2 July 2021, paragraph 8.

⁴¹ Parties’ submission on allocations (‘JD Sports / Footasylum’s Allocations for Q1 2022’), 2 July 2021, paragraphs 8-9.

⁴² Parties’ submission on allocations (‘JD Sports / Footasylum’s Allocations for Q1 2022’), 2 July 2021, paragraphs 8 and 10.

[REDACTED] just as unlikely means the opposite of likely. The CMA fails to explore the counter-intuitive notion that there is no reason or significance to [REDACTED] category that (as the evidence from JD Sports attests) is not in universal usage by [REDACTED] in the wholesale channel.

- (36) While the CMA might give weight to [REDACTED] when assessing the likelihood of Footasylum [REDACTED] volumes [REDACTED]. In other words, when assessing whether the Parties have an incentive to deteriorate Footasylum's offering post-merger, the fact that [REDACTED] implies a greater risk of [REDACTED] can act to constrain any deterioration in the first place.⁴³ This is discussed further in Section 5 below.

1.5 The CMA incorrectly uses [REDACTED]

- (37) It is useful to distinguish three relevant metrics when analysing allocations:

- i. The **initial allocation** set out by [REDACTED] – this is a fixed number.⁴⁴
- ii. The **expected allocation** which incorporates revisions to the initial allocation known in advance of delivery. This is a figure that is constantly updated with new information (increasingly so since the start of the pandemic), and is more often than not lower than the initial allocation
- iii. The **received volumes** [REDACTED].

- (38) For example, [REDACTED] (the spreadsheets with this data were sent to the CMA in the Allocations Paper package). [REDACTED].

- (39) Figure 1 in the PR is constructed from [REDACTED].

- (40) It is also clear from Figure 1 that [REDACTED].

- (41) Paragraph 7.220 of the PR notes that:

"[REDACTED]"

- (42) It is not clear from the CMA's drafting how it is comparing the allocations across the different years, but the only way in which the allocations [REDACTED]⁴⁵ [REDACTED]. For the reasons outlined above, this is the incorrect comparison. What [REDACTED], so the CMA [REDACTED].

- (43) Instead, the [REDACTED]. When viewed on the correct basis, it is clear that [REDACTED]. Furthermore, [REDACTED] (as the Parties set out below).

- (44) The Parties note that this error of incorrectly comparing [REDACTED] is pervasive throughout the CMA's assessment [REDACTED].

- (45) Both JD Sports and Footasylum have been recently been provided with [REDACTED].

⁴³ Parties' Response to Working Papers, 15 July 2021, paragraph 95(ii): [REDACTED] [REDACTED]

⁴⁴ Parties' submission on allocations, paragraph 4.

⁴⁵ PR, footnote 305.

Table 1 All: [REDACTED]

Total	[REDACTED]	[REDACTED]	[REDACTED]
JD Sports	[REDACTED]	[REDACTED]	[REDACTED]
Footasylum	[REDACTED]	[REDACTED]	[REDACTED]

Figures based on Annexes 765 (Footasylum) and 766 (JD Sports).

(46) As demonstrated in Table 1, [REDACTED]. However, [REDACTED], [REDACTED].

Table 2 All: [REDACTED]

Total	[REDACTED]	[REDACTED]	[REDACTED]
JD Sports	[REDACTED]	[REDACTED]	[REDACTED]
Footasylum	[REDACTED]	[REDACTED]	[REDACTED]

Figures based on Annexes 765 (Footasylum) and 766 (JD Sports).

(47) [REDACTED]. [REDACTED] – [REDACTED]

(48) The updated information represented in Tables 1 and 2 demonstrates that [REDACTED] [REDACTED] as well as Nike's public statements that, "as [it] manage[s] product supply in response to the pandemic", it is "reprioritizing product allocation to benefit our strategic partners [i.e. JD Sports] and NIKE Direct"⁴⁶ (and Nike's ongoing disintermediation strategy discussed previously, namely that DTC and strategic partners will receive priority to the detriment of non-strategic partners). This was again reiterated yesterday in Nike's Q1 2022 Earnings call, in which the CFO stated that "we believe that the supply-related reductions will likely trigger an even greater acceleration in the transformation of the marketplace towards NIKE and our most important wholesale partners".⁴⁷

(49) The latest figures [REDACTED] that [REDACTED]. These figures are directly comparable to the total [REDACTED] requested by the CMA in RFI 8 because they both reflect known [REDACTED].

(50) It is not correct to assume that [REDACTED] – as the PR already demonstrates – [REDACTED]. With the exception of [REDACTED], and there is no reason to think that this will change now.

(51) Paragraph 7.220 of the PR, which states "... [REDACTED], and we do not have sufficient evidence to [REDACTED] on Footasylum's allocations" is therefore incorrect .

(52) Overall, therefore, the evidence is clear (including the latest updates for [REDACTED] presented above) that [REDACTED]

(53) This is implicitly accepted in the PR. Paragraph 11.85 states [REDACTED]

(54) With respect to adidas, paragraph 11.85 of the PR also accepts that: "However, Footasylum is [REDACTED] As a result, when unexpected market-wide supply issues occur, [REDACTED]. Ultimately, this means that Footasylum (and other retailers [REDACTED])"

⁴⁶ See Nike's Q2 21 Earnings Call Transcript, page 6.

⁴⁷ See Nike's Q1 22 Earnings Call Transcript, page 13.

- (55) It is not clear why this finding has not properly flowed through to the CMA's competitive assessment and in particular the incentives of the merged entity durably to worsen Footasylum's competitiveness in light of the above.

1.6 The PR does not assess [X] of key franchises

- (56) The Parties' Allocations Submission assessed [X]. As far as the Parties can tell, the PR contains no assessment of [X] key franchises. The Parties consider this to be a crucial omission for two reasons:

- Not all franchises are created, or perceived by consumers to be, equal:** As the Parties explained in their Allocations Submission, certain franchises are more desirable than others.⁴⁸ [X] Therefore, looking at the [X] may mask the true picture of a [X].
- Allocations of key franchises are indicative of suppliers' views of a retailer:** All retailers, [X], want to obtain as many allocations of these key franchises as possible, but suppliers typically tend to limit volumes to retain exclusivity. [X].

- (57) [X]

Table 3 [X][X]

Nike Air Force 1	[X]	[X]	[X]
JD Sports	[X]	[X]	[X]
Footasylum	[X]	[X]	[X]

Figures based on Annexes 765 (Footasylum) and 766 (JD Sports).

Table 4 [X][X]

Nike Air Jordan 1	[X]	[X]	[X]
JD Sports	[X]	[X]	[X]
Footasylum	[X]	[X]	[X]

Figures based on Annexes 765 (Footasylum) and 766 (JD Sports).

- (58) As evidenced in Tables 3 and 4, [X]. [X]

1.7 The PR does not take proper account of the impact of [X] on [X]

- (59) Crucially, the CMA fails to take account of [X] (i.e., will [X] undermine [X] ability to compete prospectively).⁴⁹ To date, [X]⁵⁰[X]. Moreover, [X].⁵¹ [X]

⁴⁸ This was recognised by the CMA in assessing the competitive constraint exerted by Frasers Group during the Phase 2 inquiry, which focused on the extent to which Frasers was securing access to significant volumes of higher tier products.

⁴⁹ The CMA acknowledges this in the PR, paragraph 7.151 and 8.27(d), but the evidence does not flow through to its assessment of the impact of suppliers strategies on the future strength of Footasylum and other retailers.

⁵⁰ Compass Lexecon's Supplementary Submission following Working Papers ("CL WP submission"), 15 July 2021, paragraph 2.20. [X]

⁵¹ Parties' submission on allocations ('JD Sports / Footasylum's Allocations for Q1 2022'), 2 July 2021, paragraphs 19-20 and 24. [X]

2 The counterfactual

2.1 The CMA's provisional conclusion fails to take proper account of [REDACTED]⁵² risk, whether in the counterfactual or competitive assessment

- (60) The CMA has provisionally concluded that *“the most likely counterfactual is broadly the pre-Merger conditions of competition, but which includes [REDACTED]. We consider this would be similar to the conditions of competition that exist today. That is, absent the Merger, Footasylum would have continued to exercise 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”*.⁵³
- (61) In essence, the CMA provisionally finds (paragraphs 10.37-10.40) that in the counterfactual [REDACTED], and will continue to exert a similar constraint on JD Sports to the constraint it exerts “today” (which is now “only moderate, at best” (paragraphs 47, 55) compared to the “strong” and “close” constraint that Footasylum was found to exert on JD Sports in the Final Report). This provisional finding is not made, as far as the Parties/their advisers can tell, on the basis of [REDACTED] but is made on the basis of [REDACTED] [REDACTED]. However, it is clear from Nike’s public statements that it does intend to reduce its retail partners, and disintermediation of some partners will therefore occur in the future. Since there are relatively few larger retailers (outside of Nike DTC itself and its strategic partners), the risk that [REDACTED]
- (62) The PR also recognises that [REDACTED] (paragraph 10.41). Ultimately, as noted above, the CMA concludes that this type of structural change is not sufficiently certain to form part of the counterfactual. The Parties consider that this assessment must be revisited in light of the errors highlighted in Section 1 above.
- (63) Furthermore, the Parties note the statement in paragraph 10.4 of the PR (reflecting the MAGs) that *“Where future events or 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”*. The same point is noted at footnote 371 [REDACTED]
- (64) However, it is clear that such analysis has not properly taken place within the assessment of competitive effects in this case. Paragraph 11.73 of the PR states that *“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... (b) Footasylum does not receive the premium products to compete with JD Sports because [REDACTED] weakening it significantly compared to JD Sports.”* But no mention is made in this section of the [REDACTED]
- (65) Similarly, paragraph 11.83 states *“As regards the evidence relating to Footasylum, we have assessed [REDACTED]. This section contains our assessment of the impact on Footasylum [REDACTED]”*. The Parties are not clear what the CMA is referring to when it states that “we [REDACTED]” as it does not ultimately do so.⁵⁴
- (66) The CMA’s competitive assessment should factor in not only the [REDACTED]. This very logic drives the CMA’s and in turn the Government’s proposal to lower the SLC threshold for Strategic Market Status firm mergers because a “realistic prospect” of a very harmful outcome (in an

⁵² [REDACTED].

⁵³ PR, paragraph 10.92.

⁵⁴ As noted at paragraph **Error! Reference source not found.** below, the CMA explicitly says that that “[REDACTED]” (PR paragraphs 11.92 and 11.164).

SMS merger) is one that the CMA believes should be acted upon by way of preventative measures, even if that risk, by definition, falls short of “likely” (in the guise of the “more likely than not” normal SLC threshold to intervene).

- (67) Similarly, a [REDACTED] does not need to be judged more likely than not to impact on incentives that would increase that risk. For an individual, being told that “it’s not very *likely* but you *might* ...” be held at gunpoint in this part of town at night is enough incentive to avoid that part of town at night. For corporations (such as the merged entity) the [REDACTED] is incentive to avoid taking steps that would increase the risk that it crystallises, because the cost of misjudging the risk is economically fatal to [REDACTED]. It is highly relevant to incentives as soon as the risk is not so trivial as to be treated, in effect, as zero risk.

2.2 The PR does not properly assess Footasylum’s financial position

- (68) In paragraph 10.60 of the PR, the CMA provisionally finds that “*Footasylum has continued to trade successfully*”. This provisional conclusion is reached in reliance on data about revenues, gross profits (including gross profit margin) and EBITDA (including EBITDA margin) (see Table 18 and paragraphs 10.53, 10.54, 10.59, 10.61, 10.63, 10.65). It supports the provisional finding at paragraph 10.92 that the counterfactual is conditions of competition that are similar to those “*that exist today*”.
- (69) The CMA does not discuss in its PR the value or limitations of the three parameters it focuses on and does not consider free cash flow, or explain why free cash flow is not an indicator of whether a business is “*trad[ing] successfully*”.
- (70) The limitations of the three parameters relied on by the CMA include the following:
- (i) revenue provides no information about whether the sales generate cash that is available to the business or the owners of the business (and ultimately it is the ability to generate cash that is the determinant of whether a business is trading successfully or not);
 - (ii) gross profit (and gross profit margin) provides no indication of the speed of inventory turn or whether the gross profit is sufficient to cover the costs of the business and capex, such that the business generates cash that is available to the business or the owners of the business;
 - (iii) EBITDA (and EBITDA margin) provides no indication of (in particular) the extent to which capex is required (whilst D&A are non-cash costs, the costs of capex are cash costs which are omitted from EBITDA); again, EBITDA does not identify whether the business generates cash that is available to the business or the owners of the business.
- (71) In summary, whilst the three parameters relied on by the CMA are commonly referred to as part of an overall assessment of whether a business is “*trad[ing] successfully*” they fail, both individually and together, to convey information [REDACTED]. [REDACTED].
- (72) [REDACTED].
- (i) [REDACTED]. [REDACTED]

(ii) [REDACTED].⁵⁵

(73) [REDACTED]⁵⁶[REDACTED].

(74) [REDACTED]⁵⁷[REDACTED].⁵⁸

(75) As previously submitted, the relevant frame of reference for the counterfactual (or competitive assessment) is Footasylum's competitive position, which is a separate issue from Footasylum's financial position.⁵⁹ In any event, it is not possible to draw conclusions on the basis of [REDACTED] alone. The CMA would need to assess whether [REDACTED].

2.3 The CMA must revisit its approach and assessment

(76) Given the above, the Parties consider that the CMA's provisional conclusion with respect to the counterfactual (or, as appropriate, its competitive assessment) must be reassessed.

(77) It is clear that, once the errors with respect to the CMA's analysis of wholesale disintermediation are corrected, [REDACTED]. It cannot therefore be maintained that Footasylum's competitive position "today" (which has degraded from a "strong" to "moderate at, best" constraint on JD Sports) will remain static given the dynamic trends that continue.

3 The constraint from DTC

3.1 The SLC test

(78) The Merger Assessment Guidelines 2010 ("MAGs") explain that

*Some mergers will lessen competition but not substantially so because sufficient post-merger competitive constraints will remain to ensure that rivalry continues to discipline the commercial behaviour of the merger firms. 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. Evidence on likely adverse effects will therefore play a key role in assessing mergers.*⁶⁰

(79) The CMA's SLC theory of harm is that JD Sports will have no incentive to make the JD Sports retail offer worse but will have a durable profit incentive to make the Footasylum retail offer less competitive, in effect because "... sufficient post-merger competitive constraints will [not] remain to ensure that rivalry continues to discipline the commercial behaviour" of Footasylum (as part of the JD Sports group). The PR argues that remaining retailer constraints, in aggregate, in tandem with supplier constraints, would "not be sufficient to offset the very substantial loss of constraint from JD Sports on Footasylum" (paragraph 54).

(80) In reconsidering the impact of the pandemic as instructed by the Tribunal, a critical flaw in the PR is its analysis, in light of the pandemic's changes, of whether DTC currently, and in

⁵⁵ On a "snapshot" basis (i.e. without looking at several periods of data), profit before tax is more informative than EBITDA (in particular because EBITDA leaves out of account both D&A and capex spend). [REDACTED]

⁵⁶ [REDACTED].

⁵⁷ The CMA notes in PR, paragraphs 10.55, 10.56 and 10.65 that Footasylum [REDACTED]

⁵⁸ The fact that Footasylum is not [REDACTED] (PR, paragraphs 10.57 and 10.65) is positive for Footasylum, [REDACTED].

⁵⁹ See, for example, the Parties' Response to the CMA Working Papers, footnote 83.

⁶⁰ MAGS, paragraph 4.1.3.

the future, would represent a sufficient constraint to discipline JD Sports against a “*more likely than not ... incentive to deteriorate PQRS at Footasylum post-Merger*” (paragraph 54) on a durable basis notwithstanding the likely reactions of customers, rivals, and suppliers.

(81) These flaws pertain to the evidence both on the constraints acting on Footasylum today and on the constraints on JD Sports (as operator of Footasylum post-Merger) going forward. In other words:

- the CMA’s static assessment of the competitive constraints as they operate in late 2021 is flawed; and
- its dynamic assessment of the evolution (or, on its account, the non-evolution) of these competitive constraints compounds these flaws.

(82) The following addresses the flaws in the DTC analysis on a stand-alone basis before considering the issue of DTC in conjunction with all other horizontal constraints.

3.2 The PR understates the current and future constraint from DTC and fails to recognise that actual and future competitive constraints from DTC will prevent an SLC

(83) The CMA has provisionally found that:

- (a) “*Nike DTC and to a lesser extent, adidas DTC*” “*offer some constraint on Footasylum*” (along with Foot Locker and ASOS)⁶¹ and “*some competitors may become stronger in the future*”,⁶² but
- (b) the current and future constraints posed by rivals (including Nike DTC and adidas DTC) will not be “*sufficient to counter the loss of competition between the Parties*”.⁶³

(84) JD Sports disagrees with the CMA’s assessment. In this section, JD Sports addresses the actual and prospective constraint posed by Nike DTC and adidas DTC. (Other horizontal constraints are addressed in Section 4 below.)

(a) Current and future constraint from DTC

(85) Nike DTC and adidas DTC are currently significant constraints. Whilst their market shares and current diversion ratios⁶⁴ are high⁶⁵ and growing, particularly for Nike, these data, when read alone, materially understate their competitive significance because of their dual role as retail competitor and supplier (and therefore controller of stock and desirable SKUs) to the wholesale channel in circumstances where [X].⁶⁶

(86) Nike DTC and adidas DTC will become much stronger constraints in the future, as evidenced by the guidance both companies have issued to their investors.⁶⁷

⁶¹ PR, paragraph 11.99.

⁶² PR, paragraph 11.100.

⁶³ PR, paragraph 11.100.

⁶⁴ From both JD Sports and Footasylum for both footwear and apparel.

⁶⁵ PR, paragraphs 8.45 and 9.26 (market shares) and Tables 5 and 13 under paragraphs 8.20 and 9.16 respectively (current diversion ratios).

⁶⁶ PR, Table 2 under paragraph 8.3 (footwear) and Table 10 under paragraph 9.3 (apparel).

⁶⁷ Nike and adidas have historically under-promised and over-delivered on the guidance they have issued to their investors.

- (a) In its FY to 31 May 2019, prior to the COVID-19 pandemic,⁶⁸ 31.5% of Nike's global sales were DTC.⁶⁹ Nike has announced to investors plans to increase that percentage to 60 by 2025.⁷⁰
- (b) In its FY calendar 2019, prior to the COVID-19 pandemic, 33% of adidas's global sales were DTC.⁷¹ Adidas has announced to investors plans to increase that percentage to 50 by 2025.⁷²

(b) Impact of the DTC constraint on the SLC analysis

- (87) This large growth in DTC should require extensive appraisal for its impact on the SLC analysis, through among other things increasing diversion to Nike and adidas and (where diversion is still from Footasylum to JD Sports), weakening the attachment of these consumers to JD Sports (i.e., where Nike and adidas are a third preference of current Footasylum consumers but just behind JD Sports), and giving the brands confidence to increase DTC targets further.
- (88) There is no survey evidence on the strength of preferences for adidas and Nike (other than identifying whether they are a current second preference)⁷³ and the effect of Nike's and adidas' large DTC growth -- and the degree to which they will (now or increasingly) be perceived to be strong alternatives to wholesale channel partners such as the Parties is therefore a matter for inference from the evidence as a whole.
- (89) At an early stage in the Remittal review the Parties made detailed submissions on the implications of the DTC constraint for the SLC analysis.⁷⁴
- (90) The Parties' Supplementary SLC paper (the "**CL SLC Paper**") identified six strategic considerations (in addition to the supplier constraint) arising from the market developments that are omitted from the GUPPI framework and that would operate *at a minimum* to counteract any apparent durable incentive based on GUPPIs for the Parties to worsen PQRS (even a large one, and after taking account of prospective changes in diversion ratios in light of market developments). As regards the Footasylum side, the relevant considerations were:
 - (i) Worsening PQRS as implied by GUPPI would be contrary to JD Sports' strategy of making itself (including Footasylum) relevant to the brands for as long as possible;
 - (ii) Worsening PQRS as implied by GUPPI would make Footasylum's remaining customers more vulnerable to DTC;
 - (iii) Any customers diverting to JD Sports would also be more vulnerable to DTC competition than when they were at Footasylum;

⁶⁸ JD Sports has used pre-COVID-19 data as the closures of shops during COVID-19 may have increased the share of supply accounted for by DTC. Comparing pre-COVID-19 data with 2025 predictions ensures a like-for-like comparison.

⁶⁹ See Note 16 on p. 148 of Nike's 2019 Annual Report. The figure is calculated as $100 * (12,306m / 39,117m)$. In FY to 31 May 2020, this figure increased to 34.7% (see Note 16 on p. 88 of Nike's 2020 Form 10K), but this period included the initial phases of the COVID-19 pandemic.

⁷⁰ See Nike's Q4 21 Earnings Call Transcript.

⁷¹ See adidas Annual Report, 2020, p. 80 (giving prior year data).

⁷² See the adidas Slide Pack, slides 153, 156, 170 and 177 and the accompanying press release "Adidas presents growth strategy 'Own the Game' until 2025", 10 March 2021 (available at <https://www.adidas-group.com/en/media/news-archive/press-releases/2021/adidas-presents-growth-strategy-own-the-game-until-2025/>).

⁷³ JD Sports suggested that the CMA include questions in its survey to identify third preferences.

⁷⁴ The CL SLC Paper, 28 May 2021, paragraphs 1.25-1.30 and 4.27-4.52.

- (iv) Acting on the GUPPI incentive necessarily involves increasing the sales made by third party rival retailers (whether DTC or other retailers);
 - (v) Relative diversion ratio from Footasylum to JD Sports compared to the brands overstates the competitive significance of JD Sports.⁷⁵
- (91) For the reasons explained in detail in the CL SLC paper, and which are not repeated here, DTC growth is a centrally important factor driving and reinforcing *all* of these strategic considerations, both directly by increasing horizontal constraints on the Parties (factors (ii)-(v) above) and indirectly by strengthening supplier constraints (factors (i) and (iv) above).
- (92) As the case developed the Parties went on to highlight additional evidence that had become available, including from the CMA's survey and from the main suppliers, which further bolstered these strategic considerations and made it even more important for them to be taken into account in the SLC analysis.⁷⁶
- (93) However, the CMA's assessment of these critical incentives that are left out of the GUPPI analysis – and which in this case are more important than the incentives that it does capture and explain why the Parties would have an incentive to maintain PQRS or even improve it – is cursory (at best) and wrong.⁷⁷
- (94) As regards the factors that concern horizontal competition from DTC growth (those impinging on supplier constraints are addressed in Section 5, below), the CMA's cursory assessment means that it is not possible to interrogate which aspects of and why the CMA considers them to "*speculative*" and their effects "*ambiguous*", and thus why they have been ignored.
- (95) Unfortunately, the Parties must now speculate on the CMA's reasons.
- (96) For example, does the CMA dispute that Footasylum customers that divert to JD Sports in response to a deterioration of PQRS by Footasylum's will be less attracted to the Parties' offerings, and thus have relatively stronger preferences for alternatives including DTC, alongside Foot Locker and other third party retailers? This is illogical since customers that divert to JD Sports (their second preference) following a deterioration in PQRS at Footasylum (their first preference) or that remain at Footasylum (with its deteriorated PQRS) must necessarily have reduced consumer surplus from their purchases and be less attracted to the Parties' offerings: Footasylum customers that stick with Footasylum are stuck with receiving a less competitive offer, while Footasylum customers that switch to JD Sports were prompted by the worsened offer to drop their first preference and switch to an option that was *not* their first choice.
- (97) Or does the CMA dispute that these alternatives are likely (increasingly) to include the main suppliers' DTC offerings? That would be contrary to (i) the public statements from these suppliers on their DTC growth targets⁷⁸, (ii) evidence from the CMA's online survey showing increasing stated diversion to DTC relative to the previous online survey⁷⁹, (iii) the CMA's

⁷⁵ The sixth factor ("Lower value of customers to JD Sports after hypothetical diversion to Footasylum due to greater risk of losing allocations") does not apply on the Footasylum side.

⁷⁶ See, for example, CL WP Submission, paragraphs 2.24-2.31.

⁷⁷ The CMA's assessment of the Parties' submissions on these points is set out in a single paragraph in the PR (paragraph 8.33).

⁷⁸ See paragraph 65, above.

⁷⁹ For Footasylum online customers, total diversion to Nike has increased from 9% to 13%, and to adidas from 3% to 5%, between the CMA's Phase 2 and remittal online surveys. Final Report, Table 8.6 and PR, Table 5.

findings in the PR that suppliers are seeking to sell a greater proportion of their products directly⁸⁰, (iv) [REDACTED]⁸¹ and (v) the [REDACTED]

- (98) Or, relatedly, does the CMA dispute that acting on the GUPPI incentive would involve increasing the sales made by rival retailers (whether DTC or other retailers) with the consequences for DTC growth and allocations? That would be contrary to the CMA's survey results showing that they would be recipients of the majority of diverted sales from Footasylum.⁸²
- (99) In addition, it is not clear on what grounds the CMA considers the effect of these factors on the Parties' incentives to maintain or improve the Footasylum offering to be ambiguous. To the extent that it relates to the Parties' acknowledgment of the potentially ambiguous effect that market developments could have on diversion ratios in the next few years⁸³, then the CMA has misunderstood the point. This was a point about inputs into the GUPPIs, whereas the fundamental point about the strategic considerations above is that they are omitted from the GUPPI and would unambiguously work against any incentive to deteriorate PQRS implied by the GUPPI.
- (100) As set out in the Parties' submissions, a proper assessment of the strategic considerations arising from DTC growth on the Parties' incentives to deteriorate PQRS is essential to a meaningful interpretation of the incentives implied by GUPPI, both in respect of the above factors and the implications that DTC growth has for [REDACTED](see Section 5, below).
- (101) By failing to address these factors the CMA's assessment of the implications of DTC growth for the SLC analysis is substantially incomplete, and accordingly, the CMA is wrong provisionally to conclude that current and future constraints posed by rivals (including Nike DTC and adidas DTC) will not be "*sufficient to counter the loss of competition between the Parties*".

3.3 The period for review should be longer than two years

- (102) At paragraph 10.8 the CMA changes its position from the Working Papers and states that it uses a period of "*around two years*" for review, for reasons given at paragraph 10.7 of the PR.
- (103) JD Sports submits that the CMA should use a longer period because Nike and adidas have published guidance to their investors about the proportions of their sales that will be DTC in 2025 and have therefore demonstrated an ability to forecast on this aspect of competition over a period that is longer than two years. The reasoning in paragraph 10.7 of the PR does not support the conclusion that is drawn:
- (a) Paragraph 10.7 states that the supplier forecasts "*do not address the question about conditions of competition between the Parties in the absence of the Merger.*" However, the prospective growth in DTC is an important component of the conditions

⁸⁰ PR, paragraph 6.30: "*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).*"

⁸¹ See, for example, the CL WP Submission, paragraph 2.29.

⁸² Competitors other than JD Sports account for 49/92=53% of Footasylum customers that would divert (8% would not make a purchase). PR, Table 5.

⁸³ The CL SLC paper, footnote 42: "*Exactly how market developments change diversion ratios is hard fully to predict since future diversion ratios depend on changes in first and second preferences and the diversion ratios will most likely change during periods of transition.*"

of competition between the Parties in the absence of the Merger and should not be excluded on the grounds that other aspects of the counterfactual cannot be identified with the requisite level of confidence. Indeed, the Merger Assessment Guidelines⁸⁴ (“**MAGs**”) emphasise that the counterfactual will incorporate “*those aspects of scenarios that appear likely on the basis of the facts available to it and the extent of its ability to foresee future developments*”.⁸⁵ The growth of DTC in the period to 2025 is both “*likely*” and “*foreseeable*” and should therefore be incorporated into the counterfactual. The fact that other “*aspects*” cannot be foreseen either at all or for the period to 2025 implies that they should be excluded from the counterfactual, not that a two year period should be used.

- (b) Paragraph 10.7 states that the suppliers’ “*detailed internal forecasts are often for far shorter periods*”. Again, this does not preclude the CMA from finding a counterfactual in which DTC grows significantly to 2025 in line with Nike’s and adidas’s predictions. The CMA does not typically describe the counterfactual with a level of granularity observed in “*detailed internal forecasts*”. Nor does it have any obligation to. Nor has it sought to in the present case. Indeed, the MAGs specifically guide against the incorporation of “*spurious claims to accurate prediction or foresight*”.⁸⁶ Nike and adidas are confident in their ability to forecast the growth of DTC to 2025 and are far better placed than the CMA to make those forecasts. Their forecasts can therefore confidently be incorporated into a counterfactual running to 2025 without being “*spurious*”.
- (c) Paragraph 10.7 states that “*we have not received sufficiently certain plans for product allocations or termination decisions years in advance*”. Again, this does not preclude the CMA from finding a counterfactual in which DTC grows significantly in line with Nike’s and adidas’s predictions. JD Sports repeats its submissions from sub-point (b) above.
- (c) Finally, paragraph 10.7 states that “*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*”. The fact that retailers have the power to change parameters of competition (e.g. prices, opening hours) does not in any way detract from the robustness of the predictions made by Nike and adidas about the future growth of their DTC operations to 2025. It is wrong for the CMA to use a two-year period for the counterfactual when there is clear evidence from the parties who are by far the best placed to provide it (namely Nike and adidas) about an important “*aspect*” of how competition will develop that is robust to 2025.

(104) Drawing together the four points, the CMA has provisionally chosen not to use a period longer than two years on the grounds that it lacks detailed information about “*aspects*” of the period beyond two years other than DTC growth, when it has no need for that detail of information in order to identify a counterfactual incorporating as a critical aspect that DTC will grow significantly to 2025 at least in line with Nike’s and adidas’s guidance to their investors.

(105) Indeed, the CMA’s provisional reasoning proves too much. The four reasons it gives would indicate that a counterfactual period far shorter than two years was appropriate. The CMA

⁸⁴ OFT 1254/CC2.

⁸⁵ MAGs, paragraph 4.3.6.

⁸⁶ MAGs, paragraph 4.3.6.

(understandably) cannot forecast product allocations for Q3 and Q4 2021 (PR, paragraph 7.219), let alone for two years. Nor can it sensibly extend out to two years the “*detailed internal forecasts*” made by Nike and adidas or make sensible predictions about which parameters of competition will be changed by which retailers over the next two years or when the retailers will make those changes. The fact that the reasoning is not apt to justify the two year period that the CMA has used indicates that it is not fit for the purpose of limiting that period to two years.

4 Aggregate horizontal constraints from all third party rivals

- (106) The CMA compounds its errors in relation to Nike and adidas DTC with respect to a variety of other horizontal competitors, individually and in aggregate.
- (107) The MAGs note that unilateral effects in a differentiated market are “*more likely where the merger eliminates a significant competitive force in the market or where customers have little choice of alternative suppliers*” (paragraph 5.4.12). The CMA provides no evidence that Footasylum is a significant competitive force: on the contrary it concludes the opposite that it is a weak constraint (on JD Sports). The CMA provides no reasoning or evidence to support an argument that consumers have little choice of supplier.
- (108) With respect to the set of vibrant and substantial array of choices that consumers will have post-merger, the competitive constraints from wholesale channel rivals are incremental to the DTC constraint and operate in aggregate alongside it. In order to rule out an SLC, it is not necessary that any individual competitor, on its own, constitute the sufficiency of the constraint that deters JD Sports from worsening the Footasylum offer.
- (109) The relevant question for the SLC analysis is: is it likely that the aggregate of the constraints of (i) DTC and (ii) other retail rivals and (iii) the supplier constraint from Nike and adidas is not “*sufficient to ensure that rivalry continues to discipline the commercial behaviour*” of JD Sports to keep Footasylum’s retail offer competitive, rather than an incentive to worsen it on a durable basis (MAGs, paragraph 4.1.3).
- (110) It is common ground that various rivals show significant survey diversion ratios from Footasylum that are considerably lower than the diversion results to JD Sports. However, the CMA’s SLC assessment argues that it has not collapsed into a simple measurement of relative diversion ratios from surveys (and consequent GUPPIs) and instead “*base[s] its assessment of all the evidence in the round, of which GUPPI estimates are just one part*” (PR paragraph 8.32).
- (111) The issue, therefore, is whether all other evidence can support the notion that all other rivals, even collectively, are not a sufficient alternative to JD Sports for Footasylum customers to prevent an SLC. The CMA’s reasoning does not stack up to support this premise at the aggregate level. The same is true with respect to certain individual rivals, of which the following focuses on Foot Locker and ASOS, although necessarily the aggregate third part constraint can only be incremental to (and therefore stronger than) the collective “four-way” constraint of Nike DTC plus adidas DTC plus Foot Locker plus ASOS; it cannot be weaker.
- (112) **Foot Locker**
- (113) For example, the CMA fails to explain how Foot Locker – which it positively has found in the Phase 2 inquiry and in the Remittal PR to be a close, strong competitor to Footasylum – would not, in and of itself, [3<].
- (114) With respect to Foot Locker, the CMA says:

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. (paragraph 44, emphasis added).

(115) In other words, the CMA in the Remittal PR positively affirms its findings from the Phase 2 Report. Based on all the evidence (as referred to above), it finds that Foot Locker in footwear is “a close competitor and exerts a strong competitive constraint on both Parties” (paragraph 11.46) i.e. also on Footasylum, and without qualification by sales channel (store or online).

(116) However, the CMA then makes different observations by channel.

- (i) Despite finding Foot Locker is a close competitor and strong constraint on Footasylum in the relevant multi-channel footwear market, the CMA goes on to say that “*in terms of constraints for online consumers, Foot Locker is ... a much weaker constraint on Footasylum than is JD Sports*” (paragraph 11.46).
- (ii) Conversely, the PR notes that “*the Phase 2 Final Report identified Foot Locker as being a particularly close competitor for in-store shoppers and we have seen no evidence to show that this is likely to have changed*” (paragraph 11.42)

(117) There are at least three problems with these bifurcated conclusions by channel.

- (iii) First, and most simply, the diversion from Footasylum online shoppers to Foot Locker (all channels) was 8% for footwear in the May 2021 online survey, compared to a 7% footwear diversion from Footasylum in-store shoppers to Foot Locker (all channels) in the October 2019 store survey. The online result is slightly *higher*.⁸⁷⁸⁸ The survey results can in no way be employed to support the notion that Foot Locker is a weaker constraint for Footasylum online customers than store customers.
- (iv) More importantly, the CMA is at pains to point out that its assessment of constraints is not based entirely on the GUPPI (and by implication the GUPPI's constituent parts of survey diversion results and margin data) but that the “*assessment is based on all the evidence in the round*” (paragraph 8.32(a)), which is reflected in paragraph 44 cited above, and includes the CMA's Phase 2 store survey results but is not limited to them. Indeed, the CMA correctly in the Phase 2 Final Report found that Foot Locker was a “*particularly close competitor for in-store shoppers*”, which is a valid conclusion when based on all evidence in the round (it cannot possibly be

⁸⁷ The Footasylum online diversion to Foot Locker for footwear was also higher than in-store diversion when comparing the CMA's Phase 2 online survey (9%) to the Phase 2 exit survey (7%).

⁸⁸ The Footasylum Remittal survey online footwear result for Foot Locker is also a substantially *larger* fraction of the JD Sports result than was the equivalent Foot Locker vs. JD Sports store survey result. The relevant comparison is: Foot Locker (8%) relative to JD Sports (43%) for the Footasylum Remittal online survey and Foot Locker (7%) relative to JD (68%) in the store survey. The online comparison is a higher ratio (8:43 is around 1:5) than the store comparison (almost 1:10).

inferred from a 7% in-store survey diversion result alone, as the CMA appears to have done for online (at 8%) at paragraph 11.46).

- (v) In any event, the CMA's entire treatment of analysing survey results presupposes that there are "online" consumers as a distinct set from "store" consumers. But all the evidence is that this distinction is overstated: too many customers shop both channels and switch between them, not least post-pandemic. The CMA repeats its finding from the Phase 2 Report that the store channel constrains the online channel and vice versa such that they are part of the same relevant market in which the SLC is supposed to arise (paragraph 5.4). A "closeness of competition" assessment is supposed to be a richer analysis of differentiation within a market, but this also means that "closeness" cannot be assessed in isolation for one channel (even if the survey customers are in one channel only). On the evidence and the CMA's own Phase 2 and Remittal conclusions, it means that rivalry from Foot Locker is a "close, strong" *multi-channel* constraint, i.e., the combination of its stores and online constrain Footasylum's online offering. It cannot rationally be the case that a multi-channel constraint is "close and strong" across both channels and yet weak in one channel (online).

- (118) Moreover, in terms of the impact of the pandemic looking forward, Foot Locker's status as a named key "strategic" partner of both brands (with its recent results as "*nothing short of exemplary*"⁸⁹) means that it is poised to remain [REDACTED], despite the brands' DTC strategy, given that other retailers ([REDACTED]) that are neither global strategic or "neighbourhood" accounts will be disintermediated. As noted in the PR, the CMA [REDACTED] (paragraph 11.77).
- (119) With respect to apparel, Foot Locker individually is [REDACTED] than in footwear. That aside, the Parties' case is not that Foot Locker alone resolves SLC concerns in apparel; it is that the aggregate level of third-party constraint facing Footasylum in apparel is not materially different from the strong aggregate level of third party constraint in footwear, even if the composition and relative strengths of individual players within the competitor set varies. In both markets, the aggregate third party constraint is sufficient to [REDACTED].

4.2 ASOS

- (120) In the same vein as the above, the CMA also fails properly to consider the [REDACTED] ([REDACTED]).
- (121) For the smaller of the two Parties, Footasylum, the CMA concludes that ASOS represents "*a relatively limited constraint*" on Footasylum for both footwear and apparel (paragraphs 11.65 and 11.139) and that, overall, while "*ASOS may also become a slightly stronger constraint on both parties*", its constraint will not "*materially increase*" (paragraph 11.162), is inconsistent with the evidence of the [REDACTED] between the Parties and ASOS. This is at odds with multiple pieces of evidence that corroborate each other.
- (122) The CMA finds that "*market developments since ... have resulted in Footasylum becoming a weaker constraint and other competitors becoming stronger constraints on JD Sports*" (paragraph 58). The CMA also finds that the "*reduction in diversion [to Footasylum] is explained by an increase in diversion to Nike and adidas DTC and ASOS*" for apparel

⁸⁹ See the Parties Working Papers Response, paragraph 62 (ii).

(paragraph 11.114), which puts ASOS in the category of retailers that the CMA finds have “become stronger constraints” on JD Sports.

(123) Nor does the evidence suggest the odd conclusion that ASOS has become a stronger constraint on JD Sports, the much larger of the Parties, but not so for Footasylum, the much smaller of the Parties. For example:

- The CMA’s Remittal online survey at Footasylum found its online shoppers consider ASOS to be Footasylum’s third closest competitor for apparel (Table 13) and Footasylum’s fourth closest competitor for footwear (Table 5).⁹⁰
- The CMA also concludes that “[X]” and that “retailers mentioned ASOS as a competitor to the Parties” (paragraph 11.64).

(124) The above evidence is consistent with ASOS’ expansion in sales.

(125) ASOS submitted to the CMA that “its sales have grown since the COVID-19 pandemic” (paragraph 7.38). As highlighted in the Parties’ Working Paper response, ASOS’ sales growth has also continued despite physical non-essential retail re-opening on 12 April 2021. Indeed, ASOS reported in July that “despite the re-opening of physical stores early in the period” – “revenue growth in the period was strong”.⁹¹ ASOS also flagged that its “active customer base increased by 1.2m to 26.1m since HY21”. Nick Beighton, ASOS’ CEO, commented at the time that “we believe that the structure of the global e-commerce fashion market has changed forever, which will drive an increase in online fashion sales over the long term.” This view is supported by ASOS’s Interim Results for the six months to 28 February 2021, in which ASOS reported “Exceptional UK performance with 39% sales growth”⁹² and a 19% total sales increase in financial year 2020.⁹³

(126) In the PR it is also noted that “ASOS said that 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. [X]” (paragraph 7.136).

(127) None of the above evidence is consistent with the [X].

5 The supplier constraint

(128) The CMA finds that retailers compete on a wide range of parameters, and that there are some parameters that suppliers (in particular Nike and adidas) influence or actively monitor.⁹⁴ The CMA recognises the constraint from suppliers is material (through the range and volume of products they supply).⁹⁵ However, the CMA considered that retailers are still able to compete on aspects of PQRS that are not monitored or in which suppliers have no interest.⁹⁶ The CMA concludes that “there are a range of aspects of PQRS that could be

⁹⁰ JD Sports’ online customers consider ASOS to be JD Sports’ second closest competitor (only after Nike) for apparel (Table 13) and JD Sports’ sixth closest competitor for footwear (Table 5).

⁹¹ See <<https://www.investigate.co.uk/asos-plc--asc-rns/asos-trading-statement/202107150700032895F/>>.

⁹² See Annex 156, page 1.

⁹³ See Annex 161, page 6.

⁹⁴ PR, paragraphs 14, 6.60, 6.65, and 6.71.

⁹⁵ PR, paragraph 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” (emphasis added).

⁹⁶ PR, paragraphs 6.18, 6.67, 6.68, 6.76, and 8.30.

worsened in the event of the Merger leading to an SLC”⁹⁷ and “it is this competition that could be reduced”⁹⁸ (emphasis added).

- (129) The CMA’s findings have not materially changed since its Phase 2 Final Report,⁹⁹ other than in acknowledging there has been an increase in the level of supplier monitoring and target-setting for retailers which may reduce the incentive for retailers to deteriorate their offerings.¹⁰⁰ Ultimately, the CMA does not consider this sufficient to discipline the Parties post-merger including in combination with other constraints.
- (130) The CMA has made a number of errors in its assessment of the supplier constraint.

5.1 Irrelevant and inconsistent conditions to identify parameters the Parties can deteriorate post-merger

- (131) The CMA sets out 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*” (emphasis added).¹⁰¹ This sets out two (individually sufficient) conditions for the CMA to consider a parameter of retail competition¹⁰² as one the Parties would be able to deteriorate post-merger without harming the supplier relationship:¹⁰³
- (i) suppliers are not monitoring or not able to detect a deterioration, or
 - (ii) suppliers are not interested in punishing a deterioration.
- (132) However, in its assessment of which parameters meet those conditions, the CMA appears to apply another condition based on whether suppliers are able to “*determine*” the parameter directly: “*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.*”¹⁰⁴ The CMA considers this lack of supplier ability to directly determine the retail parameter an individually sufficient condition to identify aspects of PQRS that can be deteriorated. This is an irrelevant condition and contradicts the two conditions the CMA outlines for its assessment.
- (133) Suppliers do not need to be able to directly control and set aspects of retailers’ PQRS in order to effectively constrain a deterioration. For instance, the CMA acknowledges that “*the use of, or threatened use of, suppliers’ cancellation provisions may create a degree of uncertainty for retailers as regards product access*”,¹⁰⁵ and “[t]he evidence shows that some retailers are concerned about how a deterioration in some aspects of PQRS may impact

⁹⁷ PR, paragraph 15. Confusingly, the CMA also describes that the “*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*” (PR paragraphs 11.95 and 11.167), which does not follow from its distinction between parameters that can and cannot be deteriorated post-merger.

⁹⁸ PR, paragraph 8.30.

⁹⁹ PR, paragraphs 6.12, 6.17, 6.42-6.44, 6.58, 6.60, and 6.76.

¹⁰⁰ PR, paragraphs 6.60, 6.63 and 6.71.

¹⁰¹ PR, paragraph 8.30.

¹⁰² For completeness, the Parties note that the parameter must also be a parameter of competition as between the Parties pre-merger. However, this section focuses on the conditions relevant to the supplier constraint.

¹⁰³ PR, paragraph 6.44(b) and (c) sets out these conditions as found in Phase 2, and paragraph 6.58 considers the Phase 2 analysis remains relevant for the Remittal (see also 6.69 and 6.76).

¹⁰⁴ PR, paragraph 6.66. See also paragraph 6.72 and 6.74.

¹⁰⁵ PR, paragraph 6.41(b).

their relationship with their key suppliers, particularly in the context of constrained allocations” (emphasis added).¹⁰⁶

- (134) The relevant question is ultimately whether, overall, a worsening of parameters of competition by the Parties could lead to a supplier reaction that would be likely to disincentivise the worsening in the first place (including in combination with other constraints).

5.2 Hard to follow which parameters give concern

- (135) As part of its assessment of supplier constraints, the CMA invites the Parties to provide further evidence of supplier monitoring and benchmarking which might limit the incentives to deteriorate these parameters.¹⁰⁷

- (136) However, aside from the fact that [redacted]¹⁰⁸ (which the CMA has not fully reflected and in the Parties’ view is sufficient to show that the supplier constraint would discipline any PQRS deterioration post-merger, see section 5.3 below), it is extremely hard to understand which parameters are of concern to the CMA, and therefore what evidence may be available to address the concerns.

- (i) The CMA finds that *“retailers compete on a range of prices including discounts, delivery charges and product prices during sales.”*¹⁰⁹ For the reasons set out above, the CMA fails to assess properly whether suppliers would react to a deterioration in these parameters e.g., by restricting product supply.
- (ii) In any case, the CMA continues to find *“there are other aspects of PQRS that they can flex without harming their relationship with suppliers.”*¹¹⁰ The only elaboration appears to be PR paragraph 6.68 containing a list of non-price parameters which the CMA finds *“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”*. This list is non-exhaustive, such that even if the Parties provided sufficient evidence of a supplier constraint for these parameters, there may be other parameters of concern that remain which the Parties have no opportunity to address. Paragraph 6.69 then goes on to consider only these parameters as significant and does not make the same claim about other parameters not listed.
- (iii) The CMA concludes that *“suppliers may have little incentive to respond to some deteriorations of PQRS by a retailer (eg reduction in student discounts or loyalty schemes).”*¹¹¹ Again, the reference to “some” deteriorations of PQRS is vague and fails to consider a durable and substantial degradation. In respect of the two examples provided: as noted above, the CMA does not evidence that retailers can reduce student discounts without harming the supplier relationship; and [redacted].¹¹²
- (iv) PR paragraph 6.76 reiterates reasons why suppliers may have no ability or incentive to constrain some deteriorations in retailers’ PQRS. No parameters are listed in relation to these concerns.

¹⁰⁶ PR, paragraph 6.67.

¹⁰⁷ PR, paragraph 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.”*

¹⁰⁸ See for instance the Parties Response to Working Papers (15 July 2021), paragraphs 64-68, 72-81, 95, and 98-106.

¹⁰⁹ PR, paragraph 6.66.

¹¹⁰ PR, paragraph 6.67.

¹¹¹ PR, paragraph 6.69.

¹¹² PR, paragraph 6.47.

5.3 Ignores critical evidence of the Parties

- (137) The CMA's assessment of the supplier constraint acting on the Parties fails to account for relevant evidence.
- (138) First, the CMA's PR entirely omits and fails to address at all [REDACTED].¹¹³ This problem is particularly and increasingly acute in the context of [REDACTED]. The result being that Footasylum is [REDACTED]. This is a crucial aspect of the supplier constraint acting on the Parties, [REDACTED], which the CMA has overlooked.
- (i) If Footasylum were to worsen its offer in a manner consistent with an SLC, that would necessarily involve a loss of customers and sales. [REDACTED].¹¹⁴ The CMA recorded the Parties' statement that "[REDACTED]",¹¹⁵ but ultimately does not take account of the implications of this in its assessment. The CMA's characterisation of there being certain aspects of PQRS which retailers can deteriorate without discipline from suppliers ("*and it is this competition that could be reduced*"¹¹⁶), is therefore wrong.
 - (ii) As noted in paragraph (133) above, the CMA appears to recognise that "[t]he 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",¹¹⁷ but errs in finding that this applies to only "some aspects of PQRS" and that therefore there are "other aspects" that can be deteriorated.
 - (iii) During the Main Party Hearings, [REDACTED], which the CMA has failed to engage with. [REDACTED] (emphasis added).¹¹⁸
 - (iv) Elsewhere, the CMA recognises that suppliers care about loss of customers: "*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*" (emphasis added).¹¹⁹ The CMA failed to account for the implications of these dynamics in its assessment of the supplier constraint. [REDACTED]. In light of this, any incentive to deteriorate Footasylum's offering post-merger would be significantly reduced (if not removed).
- (139) Secondly, [REDACTED]¹²⁰ However, the CMA does not go on to assess the *implications* of this evidence on supplier constraints at all. In particular, [REDACTED] It is all the more surprising that the

¹¹³ The Parties' Response to Working Papers, 15 July 2021, paragraphs 80-81 and 86-87. The original text refers to a deterioration by JD Sports, but the Parties noted that the majority of evidence of competitive constraints on JD Sports also apply to Footasylum (paragraph 90).

¹¹⁴ The Parties' Response to Working Papers, 15 July 2021, paragraph 81.

¹¹⁵ PR, paragraph 6.52 (quoting from Parties' Response to Working Papers, 15 July 2021, paragraph 95(vi)).

¹¹⁶ PR, paragraph 8.30.

¹¹⁷ PR, paragraph 6.67.

¹¹⁸ JD Sports Main Party Hearing transcript, 8 July 2021, pages 69-70.

¹¹⁹ PR, paragraphs 6.30.

¹²⁰ PR, paragraph 6.51 quoting the Parties' Response to Working Papers, 15 July 2021, paragraph 95(iii).

CMA does not even assess the point when a Panel member had clearly grasped its significance during the Footasylum hearing: [REDACTED].¹²¹

(140) Thirdly, there is evidence directly contradicting the set of parameters identified by the CMA at paragraph 6.68 as ones which are not monitored or of interest to suppliers.

(i) **Store openings/closures, size and location of stores.** Store openings and closures, and size and locations of stores are directly observable and of obvious interest to suppliers. [REDACTED]¹²²[REDACTED].¹²³ Therefore, it is clear that suppliers monitor and have an interest in the Parties' store estates.

(ii) **Service levels of online shopping.** In the Parties' Response to Working Papers, [REDACTED]¹²⁴[REDACTED]¹²⁵[REDACTED]¹²⁶[REDACTED].

(iii) **Staffing levels, in-store kiosk, product retrieval systems.** [REDACTED].¹²⁷

(141) Even if the CMA were entitled to presume the Parties could deteriorate certain aspects of PQRS not monitored or of interest to suppliers, this would seem inappropriate in the face of specific contradictory evidence that does pertain to a given parameter. For instance, the Parties submitted in Phase 2 that ASOS is considered the leader in student discounts,¹²⁸ and this is relevant to assessing whether deterioration of student discounts by the Parties is likely post-merger.

5.4 Implications for the materiality of parameters of competition that can be deteriorated

(142) The CMA claims that the "*parameters of competition that...suppliers do not influence or determine*" are "*significant*" and "*important to consumers*", providing the example of aspects of pricing like discounting.¹²⁹

(143) However, for the reasons set out above:

(i) It is difficult for the Parties to address this since it is not clear what those parameters are (see paragraphs **Error! Reference source not found.** and **Error! Reference source not found.**-(140) above); and

(ii) The CMA's entire assessment that there are some parameters that the Parties can deteriorate without discipline from suppliers is wrong (see paragraph **Error! Reference source not found.** above).

5.5 Fundamentally incomplete and incorrect assessment of the implications of supplier constraints for incentives to deteriorate Footasylum offering

(144) The CMA recognises "*the Parties submitted that "the most acute issue on the Footasylum side is [REDACTED]. That constraint is [REDACTED]. Were JD Sports to worsen the offer of Footasylum it*

¹²¹ Footasylum Main Party Hearing transcript, 6 July 2021.

¹²² CMA Phase 2 Final Report, paragraph 8.51 referencing: (i) Compass Lexecon, Supplier constraints submission in response to the PR, paragraph 6.3; (ii) the Parties' Response to the PR, page 74.

¹²³ PR, paragraph 7.55: [REDACTED]

¹²⁴ The Parties' Response to Working Papers, 15 July 2021, paragraph 95(b).

¹²⁵ The Parties' Response to Working Papers, 15 July 2021, paragraph 95(b) and figure on page 37.

¹²⁶ The Parties' Response to Working Papers, 15 July 2021, figure on page 38.

¹²⁷ PR, paragraphs 6.37 and 6.54

¹²⁸ Phase 2 Final Report, paragraph 8.156: "*ASOS is particularly strong in the student segment, and we note that the Parties submitted ASOS started to offer student discounts in 2011 before either Party, Schuh, Office, adidas or Nike.*" See also paragraph 9.135: [REDACTED]

¹²⁹ PR, paragraph 6.73.

would presumably carry [REDACTED]" The parties submit that the GUPPI framework does not account for this."¹³⁰

- (145) The CMA attempts to address this submission by reference to (i) its assessment of supplier constraints¹³¹ and (ii) its assessment of the evidence on future competition, based on which it found *"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."*¹³²
- (146) However, that assessment is fundamentally incomplete and incorrect for the following reasons.
- (147) First, the CMA's assessment of supplier constraints is subject to all of the problems mentioned above. [REDACTED]. This point in isolation is sufficient to show that the CMA's entire framework is flawed, and that supplier constraints (at a minimum) significantly mitigate the incentive to deteriorate PQRS at Footasylum.
- (148) Secondly, the CMA only conducts an assessment of *current* supplier constraints on the Parties. It does not assess at all how supplier constraints may change (and in particular, strengthen) prospectively, including, critically, in response to a deterioration of the Parties' offerings. The Parties have made multiple and various submissions on this point, which the CMA has failed properly to engage with.
- (i) The Parties submitted early in the Remittal process that the market developments of increasing DTC and rationalisation of the wholesale channel would increase the supplier constraint because it *"gives the brands more options for substituting away from any one wholesale partner, thus places each wholesale partner at more risk."*¹³³ The Parties later submitted that: [REDACTED] (emphasis added).¹³⁴ The CMA has not properly assessed the critical issue of *the connection* between: (a) a hypothetical deterioration by Footasylum of the competitive parameters to which the provisional SLC finding applies, and (b) the implications of that deterioration for [REDACTED]
- (ii) Moreover, the Parties' submitted that any [REDACTED] to Footasylum above the counterfactual level must be taken into account in the CMA's SLC analysis, because they *"operate as a threat for Footasylum...if Footasylum worsened PQRS, [REDACTED], thus acting as a material constraint."*¹³⁵ The CMA has not done this despite recognising in its counterfactual assessment that "[REDACTED]" (emphasis added).¹³⁶

¹³⁰ PR, paragraph 8.29.

¹³¹ PR, paragraph 8.30: *"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."*

¹³² PR, paragraph 8.31.

¹³³ The CL SLC Paper, 28 May 2021, paragraph 7.4.

¹³⁴ The Parties' Response to Working Papers, 15 July 2021, paragraph 102(v).

¹³⁵ The CL SLC Paper, 28 May 2021, paragraph 2.24: *"Finally, we note that if [REDACTED] are only factored into the counterfactual to a certain degree – e.g., because above a certain level they are considered to be possible but not likely – then the [REDACTED] above the counterfactual level would remain relevant in the SLC analysis as they operate as a threat for Footasylum. I.e., if Footasylum worsened PQRS, it could lead to [REDACTED], thus acting as a material constraint. Therefore, to the extent that some future [REDACTED] is not all reflected in the counterfactual, it should be taken account as a relevant constraint in the SLC analysis"*.

¹³⁶ PR, paragraph 10.41.

- (iii) In fact, the CMA even explicitly states [REDACTED]" (emphasis added).¹³⁷ This is simply incorrect on the facts and defies common sense. Footasylum has made multiple submissions on how it [REDACTED].¹³⁸ JD Sports, a retailer in a much stronger position than Footasylum, has also made submissions on how [REDACTED].¹³⁹ Even if there were a lack of evidence, this has not prevented the CMA from drawing similar inferences about the supplier constraint elsewhere.¹⁴⁰ In particular, the [REDACTED] – especially if competition for product supply has always been intense and Footasylum has always had to perform its best. [REDACTED]
 - (iv) The CMA entirely ignores the Parties' submissions that prospective market developments are likely to mean that *inter alia*: (a) the loss of benchmarking as a result of the merger will not be material given JD Sports and Footasylum will be increasingly less comparable and would have more obvious comparators; and (b) progressive disintermediation would result in greater ability to monitor the remaining retailers, and makes wholesale partners compete harder for supply "*even if detection is imperfect*".¹⁴¹
- (149) Lastly, in relation to supplier constraints, it is not correct for the CMA to state that "*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.*" [REDACTED]. The Parties have previously submitted that, in the context of [REDACTED], "*the GUPPI is uninformative because it measures marginal incentives and does not address step changes that would be implied by a significant loss of allocations.*"¹⁴²
- (150) Accordingly, the CMA has not properly taken account of the evidence submitted, and therefore it is wrong provisionally to conclude that supplier constraints are not sufficient to reduce the incentives implied by Footasylum's GUPPI.

6 Footasylum SLC analysis

- (151) For all of the reasons set out in the preceding sections above, there are serious errors in the CMA's substantive assessment in the key areas of wholesale disintermediation, the Footasylum counterfactual, the constraint from DTC, the constraint from other horizontal rivals, the supplier constraint.

¹³⁷ PR, paragraphs 11.92 and 11.164.

¹³⁸ See for instance: (i) Footasylum's site visit slides, 14 May 2021, slide 14: "[REDACTED]"; (ii) Footasylum Main Party Hearing transcript, 6 July 2021, pages 38-39: "[REDACTED]"; and (iii) Parties' Response to Working Papers, 15 July 2021, paragraphs 95, 102-106.

¹³⁹ JD Sports Main Party Hearing transcript, 8 July 2021, page 40-42: "[REDACTED]" Parties' Response to Working Papers, 15 July 2021, paragraph 83 and footnote 128 quoting [REDACTED].

¹⁴⁰ PR, paragraph 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.*"

¹⁴¹ See The CL SLC Paper, 28 May 2021, paragraph 7.5 for the full list of points.

¹⁴² The CL SLC Paper, 28 May 2021, paragraph 4.47. See also paragraph 4.49: "*Simply put, even a high GUPPI with supplier reaction could be consistent with a lack of incentive to worsen PQRS. That is because the supplier reaction can largely destroy the incentive which the GUPPI purports to identify. Since progressive disintermediation has intensified since the Final Report (and is anticipated to intensify further in the foreseeable future), it would be inappropriate (even if it was reliable in other respects) to give the GUPPIs the same interpretation as in the Final Report. On the contrary, a much greater risk of disintermediation should fundamentally change the interpretation of the GUPPI.*"

- (152) Those points are not repeated here but all affect the CMA's analysis of the Footasylum SLC and combine to make that analysis fundamentally flawed. The Parties submit that nothing short of a complete reworking of the Footasylum SLC analysis in the Final Report is required to address these errors, and that the consequence of that reworking should be a finding that JD Sports would not have the incentive post-merger to deteriorate Footasylum's offering.
- (153) In what follows, the Parties make only a small number of incremental points on the Footasylum SLC analysis to those set out above.

6.1 Incomplete assessment of strategic considerations impinging on incentives to deteriorate Footasylum offering

- (154) In Sections 3 and 5 above, the Parties have set out their views on the substantial inadequacy of the CMA's assessment of the Parties' submissions on the strategic reasons for why, contrary to any static incentives implied by the GUPPI (even after taking account of prospective changes in diversion ratios in light of market developments), it would not make economic or commercial sense for the merged entity to worsen PQRS post-merger, and, on the contrary, why JD Sports would have a strong incentive to keep improving PQRS after the merger, including at Footasylum.
- (155) Those points are not repeated here, save to note the following:
- (156) The CMA's treatment of the six strategic considerations set out in paragraph 8.29 of the PR is cursory to such an extent that the CMA has even made an error in identifying which reasons the Parties said applied to Footasylum and which to JD Sports.¹⁴³ This superficial treatment is despite the Parties' making detailed submissions on these factors early on in the Remittal review, and subsequent submissions identifying additional evidence – including from the CMA's survey – further bolstering these factors and their significance for the SLC assessment, and yet the CMA has, without providing more reasoning than in a handful of paragraphs, failed to properly address them.
- (157) It is also not clear on what basis the CMA contends that *“there is little concrete evidence of these potential effects or their magnitude”* and that *“the Parties have not developed these points fully in terms of the effect on the Merged Entity's incentives to deteriorate PQRS at Footasylum”*. As set out in Sections 3 and 5 above, the CL SLC Paper explained for each strategic consideration in detail the underlying commercial and economic logic for why, in light of the relevant market context and dynamics, it would work against or entirely remove any incentive implied by the GUPPI for the merged entity to worsen PQRS at Footasylum, and the Parties have identified substantial evidence (including from the main suppliers themselves, the CMA's survey, and also now in the CMA's findings in the PR) strengthening the importance of these omitted incentives for the SLC assessment. As noted above, JD Sports also suggested that the CMA include questions in its survey to identify third preferences, but that suggestion was not accepted.
- (158) Finally, on the CMA's contention that *“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”*, the Parties consider that the CMA's reference to *“prima facie”* concerns - in combination with its cursory treatment of factors that would take the analysis beyond the prima facie - reveals that it has applied the wrong standard to the assessment of the GUPPI evidence required in a Phase 2 merger review. For all of the reasons set out

¹⁴³ PR, footnote 321 says all but the third point when it should refer to the fourth point.

in the submissions referred to above, the incentive implied by the GUPPI must be interpreted taking full account of relevant market context and dynamics in the round, to understand whether the GUPPI provides a meaningful indicator in the first place.

6.2 The CMA's assessment of capacity constraints is internally inconsistent and has implications for the interpretation of the Footasylum GUPPI

- (159) In their response to working papers, the Parties explained the relevance of capacity constraints for the interpretation of GUPPIs.¹⁴⁴
- (160) The Parties also provided evidence that capacity constraints are binding on both Footasylum and JD Sports.¹⁴⁵
- (161) The CMA accepts the Parties' submissions on the relevance of capacity constraints for the SLC assessment: *"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."*¹⁴⁶
- (162) However, the CMA goes on to find that: *"The extent to which these constraints might arise is addressed in our assessment of the evidence on disintermediation. We note here, however, that the potential for these constraints is predominantly asymmetrical as JD Sports will not be materially supply-constrained."*¹⁴⁷ (emphasis added)
- (163) However, the CMA's finding that JD Sports will not be materially supply-constrained is inconsistent with its findings on capacity constraints elsewhere in the PR: *"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."*¹⁴⁸ (emphasis added)
- (164) Given the Parties' submissions that capacity constraints do apply to JD Sports, the CMA either acknowledges this (correctly) in the quote above, or to the extent this quote was not intended to apply to JD Sports then that is wrong in view of the Parties' submissions.
- (163) This inconsistency is relevant for the assessment of the incentive to deteriorate the offer at Footasylum for the same reason that capacity constraints for Footasylum would reduce or remove the incentive to deteriorate the offer at JD Sports, i.e., because it reduces or eliminates the ability to recapture sales diverted in response to a deterioration and thus to deteriorate the offer in the first place.

6.3 Peculiar issues raised by the asymmetric SLC applied in this context

- (164) As set out in the introduction, before reaching a provisional finding of an asymmetric SLC, the CMA should have considered, beyond the evidence on the change of constraints on

¹⁴⁴ The CL WP Submission, paragraph 2.21: *"The presence of capacity constraints can transform the interpretation of GUPPIs. As explained in a March 2021 paper by FTC economists Daniel Greenfield and Jeremy Sandford, the presence of capacity constraints at the destination firm can reduce the GUPPI at the origin firm to zero or at least to a materially lower level than if ignoring capacity constraints."*

¹⁴⁵ See, for example, The CL WP Submission, paragraph 2.20 (Footasylum) and 2.36 (JD Sports).

¹⁴⁶ PR, paragraph 8.32(c).

¹⁴⁷ PR, paragraph 8.32(c), emphasis added.

¹⁴⁸ PR, paragraph 6.28. If the CMA's assessment of capacity constraints on JD Sports is a matter of degree, the CMA has not explained how it has factored JD Sports' evidence on the capacity constraints that it faces into that assessment.

Footasylum, a broader set of factors informative about the presence of an SLC in the market arising specifically from asymmetry.

- (165) However, the PR did not consider any factors specifically in relation to reaching an asymmetric finding. For reasons previously set out in the Parties' Phase 2 Pre-Hearing Key Points Submission,¹⁴⁹ the CMA should have considered the following factors (and others in the introduction) in that specific context:

(i) **No reduction in consumer choice.** The MAGs provide that "*unilateral effects are more likely where customers have little choice of alternative supplier, for example because of the level of 'switching costs' or network effects*" (paragraph 5.4.5, 5.4.12). There are no switching costs online, and network effects are irrelevant. As to the materiality of any reduction in consumer choice, the MAGs also note that "*in relation to the number of firms, previous OFT [CMA Phase 1] decisions in mergers involving retailers suggest that the OFT has not usually been concerned about mergers that reduce the number of firms in the market from five to four (or above)*"; paragraph 5.3.5. On the CMA's market share data:

- a. In apparel, there are 7 third party competitors to Footasylum that are the same size ([X]) or larger ([X]), in addition to Nike and adidas) in market share than Footasylum. The CMA finds in apparel that Nike, adidas and ASOS are all [X] ([X]) [X] (paragraphs 11.128, 11.132, 11.138). Even ignoring entirely any rival that is smaller (which is unfounded), the merger is, at worst, an "8 to 7" in terms of reduction in competitive choice.
- b. In footwear, there are 4 third party rivals larger than Footasylum: Nike is [X] times the size of Footasylum online and almost [X] times larger in multichannel overall ([X]); adidas is over [X] the size of Footasylum online and [X] larger overall ([X]); while Foot Locker and Office are also both larger.¹⁵⁰ The CMA finds in footwear that Nike, adidas, Foot Locker and ASOS are all [X] ([X]) [X] (paragraphs 11.31, 11.37, 11.45, 11.64). Even by ignoring entirely those with a lower share (which would be unfounded), the merger is, at worst, a "6 to 5" in terms of competitive choices.

While an asymmetric SLC with a player with a small market share could reduce choice in a concentrated market with few choices to begin with (e.g. four choices reducing to three or less, as per the MAGs¹⁵¹), this is not the case here.

(ii) **The fact that Footasylum is not a "significant competitive force".** As set out in the MAGs: "*Unilateral effects resulting from the merger are more likely where the merger eliminates a significant competitive force in the market. For example, the merger may involve a recent entrant or a firm which was expected to grow into a significant competitive force or otherwise to provide a significant competitive threat to other firms*

¹⁴⁹ JD Sports/Footasylum Pre-Hearing Key Points Submission, 10 December 2019, paragraphs 47-57.

¹⁵⁰ Meanwhile, in addition to the four larger players, several are close behind: [X].

¹⁵¹ The MAGs note that "*in relation to the number of firms, previous OFT decisions in mergers involving retailers suggest that the OFT has not usually been concerned about mergers that reduce the number of firms in the market from five to four (or above)*"; paragraph 5.3.5.

in the market (eg by virtue of having a novel business model or a reputation for aggressive price cutting).¹⁵² This is not the case here. The CMA's conclusions are that Footasylum is a "moderate, at best" constraint on JD Sports.

- (iii) **The fact that any loss of constraint on Footasylum would not lead other players (including JD Sports) to worsen PQRS.** The MAGs note that reactive price increases by rivals in response to an attempt by the merged firm to raise prices can make a price rise more likely to occur.¹⁵³ However, that has not been shown to be the case here, and the CMA has found that JD Sports has no post-merger incentive to raise prices (and the same must apply to third parties, where the CMA has alleged no effect).

- (iv) **[X] relatively [X].**

- (v) **The closeness of JD Sports as a substitute to Footasylum.** At paragraph 74, the Parties argue against SLC by pointing out that customers that switch from their preferred retailer (Footasylum), and say they would switch to JD Sports, are switching to second-best, and those that remain at Footasylum are also worse off with a deteriorated offer. However, in settling for *second-best*, or remaining with a deteriorated offer, this makes them more susceptible competition from expanding DTC and other alternatives.

In the alternative, if the CMA is minded to reject this and consider that this susceptibility to dynamic competition is low, because the Parties are extraordinarily or even uniquely close substitutes, this would suggest that there would limited loss of utility for any consumers switching from Footasylum to JD Sports. This in turn suggests no material adverse effects for switching customers, and yet the MAGs paras. 4.1.3 provide that "A merger that gives rise to an [asymmetric] SLC will be expected to lead to an adverse effect for customers. Evidence on likely adverse effects will therefore play a key role in assessing mergers" (emphasis added).

(166) Given the key role of adverse effects, the CMA therefore must explain:

- if its case is that the adverse effects arise for switching Footasylum customers are *material* (because switching to JD Sports as second choice is materially less attractive to them than their first choice was), how this consumer welfare loss does *not* make such customers more vulnerable to competitive offers from the merged entity's rivals or,
- if the closeness of JD Sports to Footasylum suggests that there would be *limited* loss of utility for any consumers switching from Footasylum to JD Sports, how that can support the asymmetric SLC -- when adverse effects per MAGs 4.1.3. are inherent to an expectation of an SLC.

(167) It is a major failing of the PR that the CMA has assessed the Footasylum SLC in isolation and not considered the specific implications of asymmetry for that finding.

¹⁵² CMA Merger Assessment Guidelines (2010 version), paragraph 5.4.5.

¹⁵³ CMA Merger Assessment Guidelines (2010 version), paragraph 5.4.11.