Completed acquisition by JD Sports Fashion plc of Footasylum plc

Final report on the case remitted to the CMA by the Competition Appeal Tribunal

5 November 2021

Website: www.gov.uk/cma

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 Some numbers have been replaced by a range.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

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Overview of our findings

1. The Competition and Markets Authority (CMA) has found that the completed acquisition by JD Sports Fashion plc (JD Sports) of Footasylum plc (Footasylum) (together, the Parties) has resulted, or may be expected to result, in a substantial lessening of competition (SLC) in the retail supply of sports-inspired casual footwear and in the retail supply of sports-inspired casual apparel sold both in stores and online in the UK.

Background to the Remittal

2. On 6 May 2020, the CMA announced its decision that the completed acquisition by JD Sports of Footasylum (the Merger) has resulted or may be expected to result, in an SLC.

3. On 17 June 2020, JD Sports submitted a Notice of Application (JD Sports' Application) to challenge certain of the CMA's findings in the Phase 2 report (the CMA's Phase 2 Final Report) to the Competition Appeal Tribunal (the Tribunal).

4. On 13 November 2020, the Tribunal issued its judgment (Judgment). The Judgment dismissed JD Sports' Application regarding several aspects of the CMA's competitive assessment and found that there was no error of law in the CMA's overarching analytical approach. However, the Tribunal upheld JD Sports' Application as regards the CMA's assessment of the possible effect of Coronavirus (COVID-19) on Footasylum under the counterfactual, and on the impact of Coronavirus (COVID-19) on the likely post-merger constraints from Nike's and adidas's own direct-to-consumer (DTC) retail offer.

3. The Tribunal quashed the CMA's Phase 2 Final Report insofar as its conclusions were based on the CMA's assessment of the likely effects of the Coronavirus (COVID-19) pandemic (i) on the relevant markets, (ii) on the Parties and/or the Merged Entity, and (iii) on the competitive constraints likely to apply to the Parties and/or the Merged Entity. The Tribunal further remarked that '*we consider that the assessment of these effects is sufficiently material to the CMA's overall conclusions as to require further examination of the FR [Final Report] as a whole and we therefore remit the case to the CMA for reconsideration in the light of this judgment*'.

5. In December 2020 the CMA sought permission to appeal the Tribunal's judgment at the Court of Appeal. In March 2021 the Court of Appeal decided

not to grant leave for the CMA to appeal the judgment. Therefore, the CMA was required to investigate the Merger under remittal. We refer to our inquiry as 'the Remittal'.

The Merger Parties

6. JD Sports is an international retailer and the UK's largest retailer of sports-inspired casual footwear and apparel. It sells via stores and online. Its UK revenue in 2020/21 was £2.5 billion.

7. Footasylum is a retailer of sports-inspired casual footwear and apparel. It sells via stores and online.

Our assessment

How we have approached the Remittal

8. We have assessed whether the Merger has resulted or may be expected to result in an SLC arising from horizonal unilateral effects in:

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

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

9. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged entity to worsen its offering profitably or not improve that offering as much as it would otherwise have done across aspects of price, quality, range and service levels – collectively referred to as 'PQRS'. Horizontal unilateral effects are more likely when the merging parties are close competitors (ie their products are close substitutes).

10. Since the CMA's Phase 2 Final Report, the Coronavirus (COVID-19) pandemic has resulted in several national and local lockdowns in the UK as well as further restrictions that have affected how people shop, work and travel. For example, there have been times when shopping in-store was prohibited and times when shopping in-store was allowed but subjected to social distancing rules. Where they are able to, many UK workers have been working from home which has affected their shopping habits.

11. These factors have of course affected the retailers and consumers in our Remittal inquiry. For example, although we have seen growth in online

shopping for sports-inspired casual footwear and apparel, that growth has not only come from JD Sports, Footasylum and Foot Locker (who were the main retailers in the CMA's Phase 2 Final Report) but also from Nike and adidas and some online only retailers. In the Remittal we have assessed the impact of the Coronavirus (COVID-19) pandemic to date on competition and taken into account the most recent evidence on other relevant factors impacting on competitive dynamics. We have considered whether the changes we have seen since the CMA's Phase 2 Final Report are enduring changes that are likely to affect competition in the future.

How competition operates in these markets

12. We have found that retailers compete on a wide range or parameters across a number of different aspects of PQRS. However, retailers do not have complete discretion over their PQRS offer to their customers. There are parameters of competition that Nike and adidas, the two most important suppliers, influence and, in some instances, actively monitor in order to ensure that their products are displayed, marketed and sold in the type of retail environment (whether in-store or online) that they consider benefits them. For example, these suppliers determine which retailers receive certain product ranges and the volumes that they receive. Suppliers set recommended retail prices (RRPs) which are generally followed by retailers. We have also found other aspects of PQRS that are influenced by suppliers.

13. However, we have also found that retailers are able to compete on aspects of PQRS that are not directly influenced by suppliers or retailers flex their offerings above suppliers' standards. Suppliers do not monitor and engage in all aspects of retail competition, and in some cases have little (if any) incentive to constrain relative deterioration in the retail offer. We have found that price competition takes place on discounts, delivery charges and product prices during sales, for example. Retailers may, in addition, compete on other factors that are important to consumers such as store locations and sizes, staffing levels, the mix of brands and own labels they offer, service levels of online shopping including website and app functionalities, speed of delivery and product returns policies. Although suppliers monitor some of these factors in order to evaluate which retailers give consumers the best shopping experience (eg service levels of online shopping) we have found that the suppliers' constraint on retailers is not so significant as to prevent a worsening of aspects of PQRS. We therefore think that there are a range of aspects of PQRS that could be worsened in the event of the Merger leading to an SLC.

14. We have found that suppliers allocate products to retailers via their selective distribution policies which places retailers into categories that determines for

each retailer its range and volume of products and the timing of supply. We have found that JD Sports is a valued retailer in the eyes of suppliers. Footasylum is able to access product ranges and volumes that enable it to compete effectively. We have taken these distribution policies into account in our assessment.

The counterfactual – would Footasylum compete without the Merger?

15. We have compared competition with the Merger against the competitive situation that we think would likely exist in the absence of the Merger. This situation, referred to as the ‘counterfactual’, is the benchmark against which we have assessed the competitive effects of the Merger.

16. The Parties have submitted that Footasylum like other retailers is vulnerable to progressive disintermediation: Nike’s and adidas’s clearly stated policies are to reduce the number of retailers. These brands are important suppliers to Footasylum and their products are an important part of the close competition between Footasylum and JD Sports. We have therefore sought evidence on this from Nike and adidas.

17. We have subjected the evidence supplied by the brands to close scrutiny. The large bulk of this evidence is confidential. We used our statutory information-gathering powers on multiple occasions to require production of a significant amount of information and have held a formal hearing with Nike and adidas. We have considered the evidence on whether Footasylum may continue to be supplied by Nike and/or adidas (whether in a reduced format or having its supply stopped).

18. We have considered evidence on the range and volume of products that Footasylum has received each quarter from 2019, examining annual changes and quarter-on-quarter comparisons. We have looked at the evidence regarding supply disruptions resulting from short-term production or supply issues and the evidence on longer term supply to Footasylum. We have also examined Nike and adidas internal documents about its supply to UK retailers including Footasylum (and JD Sports) which have been probative.

19. Having considered the evidence submitted by the Parties and by Nike and adidas we are satisfied on the basis of the facts available that the most likely scenario that would have occurred absent the Merger is that Footasylum would have continued to receive products by Nike and adidas so that it could compete (in a similar way as it does today) in our counterfactual. Similarly, JD Sports would have exerted the same degree of competitive constraint as it does today.

Competition between the Parties

Footwear and apparel

20. Competition between retailers drives good outcomes for shoppers (in terms of better deals, quality, service, range and other continuous improvements). It is therefore necessary to understand how each of the merging businesses competes against the other and how they compete against other retailers. If two closely competing retailers merge, each will be under less competitive pressure which means they will not work as hard to offer good deals to their customers or make improvements to their businesses as they otherwise would have done.

21. In our assessment, we have taken into account the nature of competition. In the retail of sports-inspired casual footwear and apparel, competition between retailers varies depending on an array of factors that include the products that they are able to stock, the customer groups that they are able to attract, the marketing they undertake, the in-store and online shopping experience that they offer and their branding and reputation.

22. We have therefore considered whether JD Sports competes closely with Footasylum and vice versa, and which other retailers are close competitors to them. Firms are close competitors if their customers view them as alternatives to each other – ie customers would be willing to switch between the two firms, and, as a result, the two firms compete to win and retain customers by offering a better product and service.

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

24. The Parties are both large, national, multi-brand retailers of sports-inspired casual footwear. They each serve a large number of customers and have national reach both through their stores and their online deliveries. There is a high degree of geographic overlap of the Parties' physical stores. The Parties both target a similar demographic – 16-24-year-old males, although the focus on males is more pronounced for Footasylum.

25. To target this customer base, JD Sports and Footasylum stock a similar range of branded sports-inspired casual footwear and apparel, although we have found some differences. For example, Footasylum has a low overlap with JD Sports on adidas footwear products and the Parties' product overlap is lower on apparel than footwear. JD Sports consistently stocks a high proportion of the Nike and adidas footwear and apparel products (ie the two most popular brands) that Footasylum sells.

26. We carried out a survey of online customers of the Parties in May 2021 (Remittal Online Survey). This survey found that for both footwear and apparel, JD Sports was by far and away the closest alternative for Footasylum's online customers. Over 40% of Footasylum customers for footwear and half of Footasylum customers for apparel said they would go to JD Sports in the event that they could not shop at Footasylum. These figures were substantially higher than for any other retailer.

27. The Remittal Online Survey results showed a much lower proportion of JD Sports customers considered Footasylum to be their best alternative. Only 9% of JD Sports' online footwear customers said they would go to Footasylum and 8% of its online apparel customers said they would go to Footasylum if they could no longer shop at JD Sports.

28. These survey results indicate that Footasylum has weakened relative to JD Sports since the CMA's Phase 2 Report. More JD Sports customers now consider Nike, Foot Locker and adidas as their alternatives than they do Footasylum. Previously Footasylum was the second-best alternative after Nike. Whilst in-store diversion between the Parties may still be higher than online diversion, we consider these changes in online diversion to be informative and consistent with other evidence on market developments.

29. Using the Remittal Online Survey results, we estimated the strength of the incentive to worsen some aspects of PQRS at the national level for both Parties using 'Gross Upward Pricing Pressure Indices' (GUPPIs), which is commonly used in the CMA's merger investigations. The online GUPPI results are very high for Footasylum in both the footwear and apparel markets, which suggests the Merged Entity would have a very strong incentive to worsen some aspects of PQRS at Footasylum, but considerably lower for JD Sports (indicating a weaker incentive to worsen PQRS at JD Sports).

30. Although for practical reasons relating to COVID-19 we did not carry out a survey of in-store shoppers during the Remittal, the CMA had carried out such a survey in its Phase 2 investigation (Phase 2 Exit Survey) and found a very high proportion of Footasylum's customers said that they would shop at JD Sports if they could no longer shop at Footasylum. Indeed the proportions of respondents from that survey were so high that we believe the proportion of Footasylum customers today who would select JD Sports as their best alternative to Footasylum would still be sizeable even after taking into account that the proportion may have decreased in view of market developments. Any reasonable adjustment to the diversion would still see Footasylum customers diverting to JD Sports ahead of any other rival. This is because the physical proximity of many Footasylum stores to JD Sports stores has not changed, neither the Parties nor their rivals have been opening or closing large

numbers of stores and the fact that they both sell similar products aimed at similar customers. Based on the evidence from the Phase 2 Exit Survey, we expect that in-store and combined in-store and online GUPPIs would be higher than the online ones, although they may be lower than at Phase 2 due to market developments.

31. The Parties agreed that any reasonable adjustment to the Phase 2 Exit Survey results would still yield large diversions from Footasylum to JD Sports and a high GUPPI. However, the Parties argued that GUPPI analysis is a static analysis and we ought to take account of relevant market developments such as the shift to online shopping, the growth of Nike's and adidas's DTC sales and possible changes to Footasylum's product allocations. We took these factors into account in our findings.

32. We also found that the Parties' internal documents imply that they view each other as competitors.

33. We therefore consider that the evidence shows a consistent picture that JD Sports is an especially close competitor and strong competitive constraint on Footasylum in the retail supply of sports-inspired casual footwear in-store and online in the UK, and in the retail supply of sports-inspired casual apparel in-store and online in the UK. It is by far the closest competitor to Footasylum. The Merged Entity will have a strong incentive to worsen Footasylum's offering.

34. However, the evidence does not indicate that Footasylum is a strong competitive constraint on JD Sports in either footwear or apparel.

Competition with rivals

Footwear

35. We have used a range of evidence to assess what competition the Parties face from rivals in the relevant markets. The evidence we have used includes survey evidence in which customers identified which retailer they consider to be their best alternative retailer, the degree of product overlap with the Parties, the sales performance of the retailer since the CMA's Phase 2 Final Report, Nike's and adidas's product allocation category for the retailer, the extent to which Parties monitor particular rivals in their internal documents, and views of third parties.

36. We also looked at evidence relating to the retailer's future performance, whether through a supplier's product allocation category (eg a Strategic

Partner to Nike or adidas), the retailer’s own growth forecasts or recent changes to the business or investment.

37. We have found that Nike, adidas and Foot Locker exert a competitive constraint on both Parties in footwear. We consider that the other retailers are weak competitive constraints on the Parties.

38. The evidence indicates that Nike’s DTC sales channels have grown strongly over the past year and are expected to grow further in footwear. In our Remittal Online Survey, online customers of Footasylum and JD Sports responded that Nike is a popular alternative for online footwear shoppers. Indeed, for Footasylum’s customers Nike was ranked second only to JD Sports as their best alternative to Footasylum. The other evidence that we looked at, including the CMA’s Phase 2 Exit Survey of in-store shoppers, Parties’ internal documents and other retailers’ views, also indicates that Nike exerts a competitive constraint on both Parties in footwear. In terms of constraints for online consumers, Nike is a stronger constraint on JD Sports than Footasylum is, but is a much weaker constraint on Footasylum than JD Sports is. Put another way, the evidence indicates that JD Sports imposes a very significant constraint on Footasylum and that, while Nike also imposes some constraint on Footasylum, it is considerably less than the constraint from JD Sports. We consider that Nike is likely to become a stronger constraint to both Parties in the future as a result of growth in its DTC offering.

39. adidas too has seen its sales through its DTC channels grow strongly over the past year. We consider that adidas exerts some competitive constraint on both Parties in footwear although less than Nike. In terms of constraints for online consumers, adidas is a more important constraint on JD Sports than it is on Footasylum and it is a much weaker constraint on Footasylum than JD Sports is. adidas is likely to become a stronger constraint to both in the future, particularly in the online segment, as a result of growth in its DTC offering.

40. In regard to Foot Locker, the evidence that we looked at, including survey results, evidence on product overlaps with the Parties, evidence from suppliers on allocation of products to retailers, the Parties’ internal documents, and market shares indicates that Foot Locker exerts a competitive constraint on both Parties in footwear. However, Foot Locker poses a weaker constraint on Footasylum than JD Sports does.

41. We have found that numerous other retailers offer sports-inspired casual footwear but taken in the round the evidence indicates that these other retailers, individually and collectively, impose only a weak competitive constraint on the Parties.

42. Taking the current constraints in aggregate, we have found they pose a much smaller constraint on Footasylum than JD Sports does. Given how closely JD Sports competes with Footasylum, and the size of the gap to the next closest competitor, we do not consider the current aggregate horizontal constraints to be sufficient to offset the incentive to deteriorate PQRS at Footasylum as indicated by the GUPPI and other evidence.

43. We have looked at the evidence from suppliers on their future product allocation strategies (this evidence is also relevant to our consideration of apparel). We expect some retailers will become stronger (Nike DTC and adidas DTC) and Foot Locker will maintain its position. However, we do not expect future growth of these rivals will be sufficient to counter the loss of competition from the Merger.

44. We have found that the aggregate constraints from rival retailers, combined with the constraints that suppliers impart on the retailers (in terms of how retailers can flex PQRS or in product allocation), would not be sufficient to offset the substantial loss of constraint from JD Sports on Footasylum in the retail supply of sports-inspired casual footwear. Specifically, the SLC that we have found is driven by the competitive constraint that JD Sports imparts on Footasylum. Therefore, the Merger is more likely than not to give rise to an incentive to deteriorate PQRS at Footasylum post-Merger even taking into account the constraints that suppliers impart on retailers.

Apparel

45. We have used the same types of evidence in assessing competitors in apparel as we did in footwear.

46. In apparel we note that Nike and adidas account for a much smaller proportion of Footasylum's sales than they do in footwear (owing to Footasylum's strong own brand offering and the inclusion of other brands such as North Face and Under Armour).

47. We consider that Nike exerts a competitive constraint on JD Sports for online customers for apparel but is a much weaker constraint on Footasylum than JD Sports' constraint. This is particularly pronounced given the lower importance of Nike products for Footasylum's apparel sales. Our Remittal Online Survey showed that Nike was second only to JD Sports when customers were asked where they would shop for apparel if Footasylum was not available. The evidence also shows that Nike's constraint is likely to be less important for in-store customers given its more limited store presence and its lower diversions for in-stores customers from the CMA's Phase 2 Exit Survey. While Nike's

constraint is likely to grow stronger in the future it is considerably weaker than the constraint JD Sports places on Footasylum.

48. In addition, adidas and the online only retailer, ASOS, both exert some constraint on JD Sports and Footasylum, although not to the same extent as Nike. For online shoppers specifically, where both of these retailers are stronger, they are stronger constraints on JD Sports than Footasylum is but are much weaker constraints on Footasylum than JD Sports. All three competitors are stronger constraints on the Parties for online customers than in-store customers. We also expect that the constraint from adidas and ASOS may increase slightly in the future (although, in the case of ASOS, not to the extent of Nike given its starting position is much weaker and has a different consumer focus).

49. Other retailers, such as Sports Direct and Foot Locker provide a smaller constraint in apparel, and we have not identified any other retailer who is likely to act as a strong competitive constraint on the Merged Entity.

50. Taking these constraints in aggregate, we found that the aggregate constraint on Footasylum relative to JD Sports to be only moderate at best. To give an example, our Remittal Online Survey of Footasylum shoppers of apparel showed small minorities of shoppers listed Nike (9%), ASOS (6%) and Foot Locker (5%) as close substitutes to Footasylum but this is set in the context of 50% of respondents listing JD Sports as their best alternative.

51. We have found that the aggregate constraints from rival retailers, combined with the constraints that suppliers impart on the retailers (in terms of how retailers can flex PQRS or in product allocation), would not be sufficient to offset the very substantial loss of constraint from JD Sports on Footasylum in the retail supply of sports-inspired casual apparel. The SLC that we have found is driven by the competitive constraint that JD Sports imparts on Footasylum. Therefore, the Merger is more likely than not to give rise to an incentive to deteriorate PQRS at Footasylum post-Merger.

Entry or expansion

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

Conclusion

53. This Merger would bring together two close competitors which would lead to worse outcomes for Footasylum's shoppers. On the basis of a significant amount of evidence, we have concluded that the Merger has resulted or may be expected to result in a substantial lessening of competition in:

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

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

54. The SLC that we have found in our Remittal differs from the CMA's Phase 2 Final Report in that whilst there is a loss of constraint from Footasylum on JD as a result of the Merger, the SLC is based primarily on the removal of the constraint imposed by JD Sports on Footasylum. This reflects our findings on market developments since the CMA's Phase 2 Final Report which have resulted in Footasylum becoming a weaker constraint and other competitors becoming stronger constraints on JD Sports. However, these market developments have not weakened Footasylum to such an extent that the merger does not result in an SLC in the market.

55. We have decided that the sale of the entirety of Footasylum to a purchaser approved by the CMA is an effective and proportionate remedy.

Findings

1. The remittal

1.1 On 1 October 2019, in exercise of its duty under section 22(1) of the Enterprise Act 2002 (the Act), the Competition and Markets Authority (CMA) referred the completed acquisition by JD Sports Fashion Plc (JD Sports) of Footasylum Plc[1] (Footasylum) (the Merger) for further investigation and report by a group of independent panel members. On 6 May 2020, the CMA announced its decision that the Merger would result in a substantial lessening of competition (SLC) in the markets for sports-inspired casual footwear and apparel sold both in stores and online (the CMA's Phase 2 Final Report).[2] The CMA required JD Sports to divest Footasylum in its entirety in order to remedy this SLC.[3]

1.2 On 17 June 2020[4], JD Sports filed an application to the Competition Appeal Tribunal (the Tribunal) for review under section 120 of the Act of the CMA's Phase 2 Final Report. The Tribunal issued its Judgment on 13 November 2020.[5] The Tribunal quashed the CMA's Phase 2 Final Report insofar as its conclusions were based on the CMA's assessment of the likely effects of the COVID-19 pandemic on (i) the relevant markets, (ii) the merging parties and/or the merged entity, and (iii) the competitive constraints likely to apply to the merging parties and/or the merged entity. The Tribunal decided that the case should be remitted to the CMA for reconsideration in the light of its Judgment. The CMA's applications for leave to appeal the Tribunal's Judgment were not granted[6] and the CMA has therefore proceeded with its reconsideration of the Merger (the Remittal).[7]

1.3 Whilst the Tribunal decided to remit the Merger to the CMA on the specific grounds that it failed to seek further evidence on the impact of COVID-19 in

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[1] JD Sports' offer for Footasylum was declared wholly unconditional on 12 April 2019. Consequently, Footasylum was delisted from the Alternative Investment Market on the London Stock Exchange and on 19 September 2019, Footasylum Plc became Footasylum Limited. References to Footasylum in this Report should be interpreted to mean both Footasylum Plc (in the period prior to 20 September 2019) and Footasylum Limited (in the period since 20 September 2019).

[2] Completed merger on the acquisition of Footasylum plc by JD Sports Fashion plc, Final Report, 6 May 2020.

[3] Final undertakings were accepted by the CMA on 13 July 2020. The Final Undertakings were subsequently released on 19 May 2021 and at the same time a new Interim Order was made (the Interim Order).

[4] On 2 June 2020 the Tribunal made an order extending time for JD Sports to file a notice of application by reason of the exceptional circumstances arising from the COVID-19 pandemic.

[5] JD Sports Fashion plc v Competition and Markets Authority [2020] CAT 24.

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

[7] On 26 March 2021, a group of independent panel members was appointed to further investigate and report on the Merger (the Remittal Group).

certain areas, it otherwise found in favour of the CMA and approved its approach to the analysis of the substantive issues. Furthermore, various aspects of the CMA's findings in the CMA's Phase 2 Final Report were not challenged before the Tribunal including the fact that the Merger has resulted in the creation of a relevant merger situation. In addition, JD Sports did not challenge the CMA's conclusions on the appropriate market definition, the finding that JD Sports and Footasylum are close competitors in the markets defined or the appropriate remedy.[8]

1.4 As the Merger has been remitted for reconsideration in light of the Tribunal's Judgment, we must consider the statutory questions afresh. However, as explained further below, in answering these questions we will take account of the evidence in the Phase 2 inquiry (insofar as it remains relevant) and the Judgment of the Tribunal. Therefore, in this Remittal, in exercise of our duty under section 35(1) of the Act, we must decide:

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

(b) if so, whether the creation of that situation has resulted, or may be expected to result, in an SLC within any market or markets in the United Kingdom for goods and services.

1.5 This document, together with its appendices constitutes the Remittal Group's findings published and notified to JD Sports and Footasylum in line with the CMA's rules of procedure. Further information can be found on the case page.[9]

2. The Parties, the Merger and the rationale

2.1 This chapter sets out the background to the completed acquisition by Footasylum of JD Sports (together referred to as the Parties), including details of the Parties and the transaction.

2.2 The matters covered in this chapter were not part of the challenge before the Tribunal and we have not received any further evidence on these matters during the Remittal. Therefore, no material changes have been made to the information from the CMA's Phase 2 Final Report.

[8] Judgment, paragraph 4.
[9] JD Sports Fashion plc / Footasylum plc merger inquiry webpage

The Parties

JD Sports

2.3 JD Sports is an international multi-brand multi-channel retailer of sportswear, sports-inspired casual wear, fashion wear and outdoor wear, operating through both stores and online. It focuses on both footwear and apparel. It is listed on the London Stock Exchange. Pentland Group (Pentland[10]), a privately-owned global group with wholesale and retail businesses supplying branded apparel and footwear products, owns a little over half (approximately 52%) of JD Sports.

2.4 JD Sports' global revenue was £6.2 billion for 2020/2021, of which £2.5 billion was in the UK. It is the UK's largest retailer of sports-inspired casual footwear and apparel.

Footasylum

2.5 Footasylum was formed in 2005 and is a retailer of fashionwear and sports-inspired casualwear mainly in the UK, operating both stores and online. Its shares were listed on the Alternative Investment Market (AIM) in November 2017. Footasylum's total revenue was £232 million for 2020/2021, with the UK accounting for almost all (95%) of the turnover.[11]

The Merger

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

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

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[10] As defined in the Interim Order dated 19 May 2021, as varied by the Variation Order of 13 October 2021.
[11] Footasylum Limited statutory accounts for the financial year ending 1 February 2020 and 30 January 2021 show that revenue increased from £227 million in 2018/19 to £249 million in 2019/20, and decreased to £232 million in 2020/21, which coincided with the COVID-19 pandemic, in-store revenue decreased by 38% while online revenue increased by 48%. Underlying earnings before interest, tax, depreciation and amortisation (EBITDA) increased from £2.3 million in 2018/19 to £25.5 million in 2019/20, and to £29.3 million in 2020/21.
[12] On 12 April 2019, JD Sports announced that it had received acceptances representing around [✂]% of the Footasylum shares and declared that, as a result, the offer for the remaining shares had become unconditional and it had reached the threshold required to commence the compulsory acquisition process for the remaining shares.

The rationale for the Merger

JD Sports

2.8 JD Sports told us that the [✂].[13]

2.9 JD Sports also told us that the Merger presented it with an opportunity to:[14]

(a) [✂];

(b) [✂]; and

(c) [✂].

2.10 JD Sports stated that its intention had been to maintain a separate operational management structure within Footasylum and that it would also:[15]

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

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

Footasylum

2.11 Footasylum told us that due to its [✂], the acquisition by JD Sports would secure its stores and online presence.[16]

2.12 Footasylum also told us that:[17]

(a) [✂];[18]

(b) [✂];

(c) [✂]; and

(d) [✂].

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13 [✂]
14 [✂]
15 Public offer document, page 17.
16 [✂]
17 [✂]
18 [✂]

3. Jurisdiction

Introduction

3.1 In the exercise of our duty under section 35(1) of the Act, we are required to decide whether a relevant merger situation has been created. In accordance with section 23(9) of the Act, the question as to whether a relevant merger situation has been created shall be determined as at the time which is immediately before the time when the reference under section 22 of the Act has been, or is to be, made. In this case, the reference under section 22 of the Act was made on 1 October 2019.[19]

3.2 The CMA's conclusions on this question in the CMA's Phase 2 Final Report were not challenged before the Tribunal and we have not received any further evidence in relation to the matters covered in this chapter during the Remittal. Therefore, the conclusions in the CMA's Phase 2 Final Report still apply and no material changes have been made to the equivalent chapter in the CMA's Phase 2 Final Report.

3.3 A relevant merger situation is created if:

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

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

Enterprises

3.4 The Act defines an 'enterprise' as 'the activities or part of the activities of a business'.[20]

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

[19] As noted in paragraph 1.1 above.
[20] A 'business' is defined as including 'a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge'. Sections 129(1) and (3) of the Act.

Ceasing to be distinct

3.6 The Act provides that two enterprises 'cease to be distinct' if they are brought under common ownership or common control.[21]

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

3.8 The enterprises must have ceased to be distinct either not more than four months before the date on which the reference was made or, where the merger took place without having been made public and without the CMA being informed of it, four months from the time that material facts are made public or the time the CMA is told of material facts, whichever is earlier.[22] The four month period may be extended under section 25 of the Act.

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

Turnover and share of supply tests

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

3.11 The turnover of JD Sports in the financial year ending 2 February 2019 was £2.14 billion in the UK. The turnover of Footasylum for the financial year ending in 2019 was £227.4 million in the UK.[23]

3.12 We are therefore satisfied that the value of the annual UK turnover of Footasylum exceeds £70 million and that the turnover test is met.

3.13 As the turnover test is met, we are not required to consider whether the share of supply test is also met.

[21] Section 26 of the Act.
[22] Section 24 of the Act.
[23] According to paragraph 4.60 of the Guidance on the CMA's jurisdiction and procedure: "the turnover test applies to the turnover of the acquired enterprise that was generated in relation to customers *within the UK the business year preceding the date of completion of the merger*" (emphasis added). As the Merger completed on 12 April 2019, the Parties' turnover for the financial year ending 2 February 2019 is the relevant turnover for the purposes of the turnover test. However, for completeness we note that the turnover of JD Sports in the financial year ending 1 February 2020 was £2.60 billion in the UK. The turnover of Footasylum for the financial year ending 1 February 2020 was £[✂] million in the UK.

Conclusion on relevant merger situation

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

4. Our approach to the Remittal

Introduction

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

Application to the Tribunal

4.2 JD Sports outlined three grounds in its application to challenge the CMA's Phase 2 Final Report before the Tribunal by way of judicial review:

4.3 Ground 1: The CMA erred in law and/or acted irrationally in:

(a) applying its Merger Assessment Guidelines in determining whether any lessening of competition caused by the Merger was "substantial" and;

(b) assessing the aggregate constraints on the merged entity posed by suppliers and retail rivals, currently and in the future;

4.4 Ground 2: The CMA erred in law and/or acted irrationally in:

(a) excluding from the counterfactual the effect of COVID-19 on Footasylum; and

(b) its assessment of the effect of COVID-19 on Footasylum.

4.5 Ground 3: The CMA erred in law and/or acted irrationally and/or failed to provide adequate reasoning regarding:

(a) Frasers Group Plc's elevation strategy;

(b) the constraint posed by suppliers on the merged entity; and

(c) the constraint on the merged entity posed by Nike's and adidas's own direct to consumer (DTC) retail offer.

The Judgment

4.6 The Tribunal dismissed JD Sports' application under Ground 1 and upheld the CMA's overarching analytical approach to determining whether the Merger gave rise to an SLC.[24] JD Sports had argued that the CMA needed to establish that the Merger had or would lead to an adverse effect on consumers and this required a 'parameter by parameter' analysis of the impact of the Merger on competition. JD Sports claimed that the CMA should have examined each parameter of competition and demonstrated that there was a link between the reduction of rivalry relevant to a specific parameter as a result of the Merger and an adverse effect for consumers. JD Sports argued that it could not be assumed from the CMA's analysis at an overall level that the Merged Entity would have the ability profitably to deteriorate its offering on any individual parameter, let alone a key competitive variable where a loss of competition would adversely affect market outcomes for consumers.

4.7 The CMA's approach in the CMA's Phase 2 Final Report was to rely on an overall assessment of incentives to deteriorate price, quality, range and service (PQRS) and to consider the likelihood of an adverse effect on consumers as part of the overall SLC assessment. In essence, the CMA:

(a) first, considered how retailers compete in the relevant markets and the extent of the constraint from suppliers;

(b) it then found there were aspects of PQRS on which the Parties competed and which the Merged Entity would be able to deteriorate to the detriment of consumers;

(c) in those circumstances, any substantial lessening in the competitive constraints faced by the Parties would create the incentive to deteriorate any of these aspects of PQRS; and

(d) the subsequent analysis showed that the Merger would remove a direct and significant constraint on each of the Parties and the remaining post-Merger constraints would not be sufficient.

4.8 The Tribunal found that the CMA had followed its guidelines[25] and had taken an orthodox approach to the analysis which was within its wide margin of appreciation. There was no reason in law to impose the 'parameter-by-parameter' analysis of PQRS required by JD Sports. The Tribunal stated that 'the requirements of rationality do not require the CMA to adopt a particular

[24] Judgment, paragraph 97.
[25] Merger Assessment Guidelines, September 2010 (CC2 Revised, OFT 1254).

analytical technique'.[26] The Tribunal went on to confirm that, other than in relation to certain matters covered under Grounds 2 and 3(3) of JD Sports' application, there was 'more than sufficient evidence' on which the CMA could reasonably rely in order to come to the conclusions that it did on the question of SLC and that there was 'abundant evidence' to show that the CMA did not err in law by adopting the methodological approach it did.[27] Similarly, in relation to Ground 1(ii), the Tribunal stated that the CMA had 'very substantial evidence' on which to base a reasonable decision relating to the aggregate effects of the competitive constraints posed by suppliers and retail rivals and provided 'substantial reasons' for its assessment.[28]

4.9 The Tribunal also dismissed JD Sports' application under Grounds 3(i) and (ii). In the CMA's Phase 2 Final Report, the CMA stated that it could not conclude with sufficient certainty that Frasers Group's elevation strategy will significantly change the strength of the competitive constraint on the Merged Entity from Sports Direct in the market for the retail supply of sports-inspired casual footwear in the foreseeable future.[29] The Tribunal found that it was reasonable for the CMA to have reached this conclusion on Frasers Group's elevation on the basis of the inquiries it made. The Tribunal referred to a 'significant body of evidence' on this topic and found that the 'extensive evidence that the CMA had gathered on the actual and anticipated effect of that strategy had probative value'. The CMA could therefore reasonably reach the conclusion set out in the CMA's Phase 2 Final Report.[30]

4.10 Similarly in relation to Ground 3(ii), the Tribunal considered that the CMA's investigation of the constraints exerted by suppliers was more than sufficient to form the basis for a decision that was not irrational.[31] The Tribunal carefully assessed the CMA's approach and concluded that the scope and nature of the evidence gathered by the CMA, and the nature of its assessment, did not disclose any error of law.[32]

4.11 However, the Tribunal upheld JD Sports' application under Grounds 2 and 3(iii), which were related to the CMA's assessment of the impact of COVID-19 on the matters under consideration in the CMA's Phase 2 Final Report. Ground 2 concerned the CMA's assessment of the impact of COVID-19 on Footasylum. JD Sports claimed that the CMA had acted irrationally in not seeking more information on this topic, particularly from the principal suppliers

[26] Judgment, paragraphs 96-97.
[27] Judgment, paragraph 101.
[28] Judgment, paragraph 111.
[29] Final Report, paragraph 8.395.
[30] Judgment, paragraph 206.
[31] Judgment, paragraph 216.
[32] Judgment, paragraph 226.

and Footasylum's primary lender. The Tribunal held that the CMA was entitled to consider the likely effects of COVID-19 as part of its competitive assessment rather than the counterfactual. However, it concluded that the CMA had acted irrationally in that it came to conclusions as to the likely effects of the COVID-19 pandemic, that were of material importance to its overall decision, without having the necessary evidence from which it could properly draw those conclusions.[33] The Tribunal considered that the CMA should have made further inquiries of suppliers and of Footasylum's primary lender, even at a late stage in its investigation, in order to be able to conclude as to whether there was robust evidence that could affect its conclusions.

4.12 In relation to Ground 3(iii), the Tribunal similarly found that the CMA acted irrationally in deciding not to request further information from the suppliers on the impact of COVID-19 on the likely post-Merger constraints from their DTC channels.[34]

4.13 In view of these findings, the Tribunal quashed the CMA's Phase 2 Final Report insofar as its conclusions were based on the CMA's assessment of the likely effects of the COVID-19 pandemic on (i) the relevant markets, (ii) the Parties and/or the Merged Entity, and (iii) on the competitive constraints likely to apply to the Parties and/or the Merged Entity. The Tribunal considered that the assessment of these effects was sufficiently material to the CMA's overall conclusions as to require further examination of the CMA's Phase 2 Final Report 'as a whole'.[35] The case was therefore remitted to the CMA for reconsideration.

Implications for the SLC analysis

4.14 As the CMA's conclusions on the existence of a relevant merger situation have not been affected by the Judgment such that we maintain the conclusion that a relevant merger situation has been created, the Remittal is focused on the second statutory question. This question asks whether the creation of that relevant merger situation has resulted or may be expected to result in an SLC in any market or markets for goods or services in the UK.[36]

4.15 The Tribunal found no basis for concluding that the CMA had erred in law in the relation to the analytical framework for the assessment of the substantial lessening of competition, the assessment of the aggregate effects of the competitive constraints, the Frasers Group's elevation strategy and the

[33] Judgment, paragraph 186.
[34] Judgment, paragraph 242.
[35] Judgment, paragraph 248.
[36] Section 35(1) of the Act.

constraint posed by suppliers (except for where the latter related to the impact of COVID-19 on the direct-to-consumer offerings of those suppliers). We have therefore adopted the same methodological approach to these issues in the Remittal taking into account updated evidence where necessary.

4.16 There was no challenge to the CMA's approach to market definition and we have not received any representations to suggest that we should now adopt a different market definition. For ease of reference we have set out the market definition that we have used in the following chapter.

4.17 Any relevant changes to market dynamics as a result of COVID-19 are captured in our competitive assessment.

4.18 The Judgment clearly states that the Remittal should assess the impact of the COVID-19 pandemic on the markets for sports-inspired casual footwear and sports-inspired casual apparel to inform the competitive assessment. Whilst the Judgment and full remittal of the case means that we have reconsidered many aspects of the CMA's Phase 2 Final Report (eg the strength of competitive constraints between JD Sports and Footasylum, the competitive constraints from other retailers, and suppliers), in light of the Tribunal's conclusions on the specific grounds in the Judgment, we have ensured the Remittal directly addresses the impact of COVID-19 on Footasylum (both in the counterfactual and the competitive assessment) and on suppliers' DTC strategies.

4.19 The key themes of the Remittal are therefore:

- the counterfactual, and evidence from Footasylum's lender as to the impact of COVID-19 on Footasylum's position in the counterfactual;
- the development of the markets and the competitive constraint exerted by the Parties and other retailers in light of the COVID-19 pandemic; and
- the strength of the constraint from suppliers' and in particular from their direct to consumer (DTC) retail offerings in light of the impact of COVID-19.[37]

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

4.20 Notwithstanding this, we have reconsidered the CMA's Phase 2 Final Report as a whole as required by the Tribunal including significant market developments since the CMA's Phase 2 Final Report.

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

Theories of harm

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

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

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

4.23 Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged entity to worsen its offering profitably or not improve that offering as much as it would otherwise have done (for example by increasing prices, and/or reducing quality, range and/or service levels – collectively referred to as PQRS).[38] Horizontal unilateral effects are more likely when the merging parties are close competitors (ie their products are close substitutes).

Coordinated effects

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

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

(a) it would be difficult for JD Sports, Nike and adidas (as a coordinating group) to reach and monitor terms of coordination over the pricing of and access to certain Nike and adidas sports-inspired casual footwear and apparel products;

(b) the characteristics of the relevant markets are not conducive to coordination being internally sustainable; and

[38] Merger Assessment Guidelines, from paragraphs 5.4.1.

(c) the Merger is not likely significantly to increase the ability of JD Sports, Nike and adidas to reach and monitor such coordination or its internal sustainability.[39]

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

4.27 We therefore do not consider coordination further.

Structure of our report

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

(a) First, we discuss the market definitions that we have employed;

(b) Second, we discuss the evidence on how retail competition operates in the relevant activities;

(c) Third, we set out the evidence relevant to both the retail supply of sports-inspired casual footwear and the retail supply of sports-inspired casual apparel markets;

(d) Fourth, we set out the evidence specific to the retail supply of sports-inspired casual footwear;

(e) Fifth, we set out the evidence specific to the retail supply of sports-inspired casual apparel;

(f) Sixth, we make our assessment of the counterfactual; and

[39] CMA (2020), Phase 2 Final Report, paragraph 10.31

(g) Lastly, we make our assessment on whether the Merger is likely to result in an SLC for the two markets separately.

Implications for the evidence gathering and assessment

Updating our evidence base

4.29 In the Remittal, we are reconsidering the question of whether there is an SLC as a whole, taking into account the changes in market conditions as a result of COVID-19 as well as other changes in market conditions. We have therefore updated the evidence base to gather information on market conditions in light of the impact of the COVID-19 pandemic and forecasts or projections as to future market developments. We have also updated the evidence base more generally to take into account other relevant factors such as changes in competitive dynamics (eg growth in supplier DTC sales) and changes in and future plans for product allocation from suppliers.[40]

4.30 During the Remittal, we have gathered evidence from JD Sports and Footasylum in the form of written submissions, quantitative data, internal documents and oral representations. We have also gathered evidence from a number of third parties (eg key suppliers such as Nike and adidas, competitors and other retailers) using our powers under section 109 of the Act where appropriate. We have held formal hearings with Nike and adidas and held calls with a number of other third parties.

Commissioning surveys

4.31 We considered whether we should conduct new surveys of the Parties' customers during the Remittal to update our evidence base. We decided to commission a new survey of JD Sports and Footasylum's online customers (paragraph 8.24).

4.32 We also considered whether we should conduct a new exit survey of in-store shoppers during the Remittal. Due to the timing of the Remittal, any survey would have had to be conducted in late April or May 2021, shortly after shops had reopened following an extended period of national lockdown and whilst they were still subject to certain government restrictions in terms of social distancing. We received views from the Parties[41] who submitted that it would not be appropriate to conduct an exit survey given the continuing impact of the COVID-related restrictions in terms of maximum headcounts in stores,

[40] Where we have relied on evidence from the CMA's Phase Final Report we have copied relevant extracts of that evidence into an appendix to our report.
[41] [✂]

one-way systems and other COVID-related measures (which could lead to queues outside stores and therefore cause problems whether interviews were conducted inside or outside of stores). It was submitted that these issues would be particularly difficult at smaller stores. JD Sports pointed to the latest COVID-19 guidance from the Market Research Society which stated that *"the fundamental principle underlying this guidance is that face-to-face data collection will only be undertaken when no other alternative methodology can be used".*[42] Ultimately, we decided not to commission a new exit survey due to the practical difficulties of running such a survey whilst social distancing practices were still in place and concerns that it would not be in line with the Market Research Society guidance.

How we have used our evidence

4.33 This new evidence together with the evidence we previously gathered means we have evidence covering three different time periods:

(a) Period 1: The period prior to publication of the CMA's Phase 2 Final Report (pre-May 2020). During this period, COVID-19 related restrictions required non-essential retail to close from 23 March 2020;

(b) Period 2: The period from publication of the CMA's Phase 2 Final Report up to (and including) the Remittal investigation. COVID-19 related restrictions were in place throughout this period to a greater or lesser extent with several periods of store closure and local and national lockdowns in place at different times; and

(c) Period 3: The outlook over the longer term, and in particular forecasts for the next two years. In the UK, COVID-19 restrictions are in the process of being lifted and whilst the effects of the pandemic will continue to have some impact on this evidence, we will focus on evidence of the structural impact on the market as a result of the Merger.

4.34 As Period 1 evidence was gathered during the CMA's phase 1 and phase 2 investigations, evidence gathering for the Remittal has been largely focused on Periods 2 and 3.

4.35 We have considered all of the evidence in the round in order to reach a conclusion on the SLC question. We have used evidence from Period 1 in this Remittal to the extent relevant, although we have updated this with evidence of the current and likely future market conditions (over the next two years). As

[42] MRS Post-Lockdown Covid-19 Guidance: Undertaking Safe Face-to-Face Data Collection, A Status Update Across the Four Nations and Guidance for England from 29th March 2021.

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

4.36 Whilst we are aware that there is still some uncertainty around the impact of COVID-19 on the markets under investigation, as set out in the CMA's guidance on Merger assessments during the COVID-19 pandemic (the COVID Mergers Guidance),[43] COVID-19 has not changed the standards by which we assess whether a merger is likely to give rise to an SLC.[44]

4.37 We consider that it is appropriate to focus on understanding what durable changes there may have been to the market conditions reported in the CMA's Phase 2 Final Report. As set out in our COVID-19 Mergers Guidance, '*A merger control investigation typically looks beyond the short-term and considers what lasting structural impacts a merger might have on the markets at issue. Even significant short-term industry-wide economic shocks may not be sufficient, in themselves, to override competition concerns that a permanent structural change in the market brought about by a merger could raise. The CMA needs to ensure its decisions are based on evidence and not speculation, and will carefully consider the available evidence in relation to the possible impacts of Coronavirus on competition in each case*.'[45]

4.38 For instance, while it is conceivable that the COVID-19 pandemic could lead to an increase in valid failing firm claims, the pandemic is not a reason to lower the standard for accepting such claims. While in some circumstances it may be necessary to factor the short-term impact of the pandemic into merger assessments, this will need to consider the impact on all firms in the market and competition agencies' assessments must remain rigorous and evidence-based. In particular, competition agencies cannot base assessments on speculation or unfounded claims as to the impact of the pandemic.

[43] Merger assessments during the Coronavirus (COVID-19) pandemic, 22 April 2020, CMA120 (COVID Mergers Guidance)
[44] COVID Mergers Guidance, paragraph 5.
[45] COVID Mergers Guidance, paragraph 22.

4.39 We recognise that, as regards the substance of the evidence we have received, imperfect information as to future developments is a feature of the type of the forward-looking assessment that is required in this case. As the Tribunal noted in its Judgment, all business forecasts and projections are based on uncertainty about future events.[46] The level of uncertainty inherent in any particular piece of evidence may affect the weight that can be attributed to it. Where this is relevant, we have made it clear in our competitive assessment. Ultimately, in order to answer the statutory questions set out in paragraph 1.4, we have assessed all the evidence in the round in order to reach a view on the SLC question including in light of the impact of COVID-19 on the markets for sports-inspired casual footwear and sports-inspired casual apparel.

5. Market definition

5.1 In the CMA's Phase 2 Final Report, the CMA defined the relevant markets for its assessment of the Merger. The full analysis of the phase 2 market definition is in Appendix J. The market definition exercise was based on considerations of demand-side substitution for footwear and apparel including demand-side substitution between different types of footwear and between different types of apparel. The CMA also considered relevant factors of supply-side substitution, for example, if a retailer of predominately sports-inspired casual apparel would be able to re-position itself as being also a retailer of sports-inspired casual footwear.

5.2 As stated in Chapter 4, we have not seen any evidence to make us alter the market definition that was used in the phase 2 inquiry. Nor have the Parties or any third party submitted to us any reasons why we should use a different market definition in the Remittal.

5.3 We are not aware of any evidence that the COVID-19 pandemic has changed how consumers view the substitutability of footwear and apparel and/or the substitutability of online and in-store shopping. Indeed, as regards online versus in-store shopping behaviour, the evidence indicates that consumers are more likely to shop across both channels which has further blurred not delineated the boundaries between online and in-store shopping. For example, the Remittal Online Survey (paragraph 7.116 found that relatively few shoppers expect to buy all or nearly all of their footwear or apparel solely online or solely in-store after the COVID-19 pandemic and the same survey found proportionately more shoppers bought all or nearly all of their footwear

[46] Judgment, paragraph 148.

or apparel solely online or solely in-store before the COVID-19 pandemic.[47] The Remittal Online Survey also found that around a quarter of both footwear and apparel shoppers responded that they would have shopped at a physical store in the event that their preferred online retailer had stopped selling online.[48]

5.4 Our view, which is the same as that in the CMA's Phase 2 Final Report, is that a sufficient proportion of consumers currently shop in both the in-store and online channels, or would be prepared to move between the two channels, in order for the two channels to be considered within the same product market. Nevertheless, we examined any material differences between the channels in the constraints on the Parties and the strength of constraint on the Parties of retailers who operate only or primarily in each channel, in our competitive assessment.

5.5 We have therefore used in the Remittal the same market definition as in the CMA's Phase 2 Final Report, which is:

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

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

5.6 In adopting these definitions of the relevant markets, we note that the Parties are active in a differentiated marketplace. This typically means that they face a spectrum of offerings that are close but imperfect substitutes. For example, retailers may have a wide range of products covering different types of footwear, from trainers to formal shoes. Moreover, among other factors retailers differ according to their branding, marketing, core customer base, the online and/or in-store shopping experience that they offer and, for stores, location. Delineating a relevant market on such a spectrum can be difficult and somewhat artificial. Therefore, the boundaries of the market do not determine the outcome of our competitive assessment.[49] We have focussed our assessment on the evidence on how closely the Parties and their rivals are likely to compete in the future.

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[47] DJS report: survey of online retail customers for a merger inquiry, figures 10 and 12
[48] DJS report: survey of online retail customers for a merger inquiry
[49] Merger Assessment Guidelines, paragraph 5.2.2

6. How retail competition operates

6.1 Before we examine the evidence regarding competition in the retail supply of sports-inspired casual footwear and apparel we examine the main drivers for retail competition in the relevant markets and what may have changed since the CMA's Phase 2 Final Report. We consider that the parameters of competition discussed in this chapter are relevant to both footwear and apparel.

6.2 Retailers compete to make sales to customers across a range of parameters that customers care about. Customers might care about prices, product range, availability of products in their size, ease of use of an online shopping website or app or the convenience of a store. However, some parameters of competition between retailers are influenced by suppliers. It is important that we understand the nature of competition and how the Merger may affect rivalry over time. Moreover, evidence on likely adverse effects that may arise as a consequence of an SLC typically forms an important part of our merger assessments.[50]

6.3 We have therefore considered the evidence on the parameters on which retailers compete by examining:

(a) the CMA's findings from the CMA's Phase 2 Final Report;

(b) other evidence on how retailers compete including the Parties' and suppliers' submissions in the Remittal; and

(c) how suppliers allocate products to retailers using selective distribution arrangements.

6.4 We have then considered the evidence on how suppliers influence and monitor.

6.5 Finally, we assess the evidence and present our conclusions.

How retailers compete

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

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[50] Sales-weighted, paragraph 8.5, paragraph 4.1.3

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

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

6.7 On price, the CMA found that retailers generally priced in line with RRP (recommended retail prices) provided by suppliers and that retailers also competed on discounts (ie prices).[51] For example, the CMA found that the Parties could choose whether to take part in cashback websites such as TopCashback and Quidco, which give discounts to consumers online. In addition, the Parties offered student discounts and could flex the level of the discounts.[52]

6.8 Further, in the online channel, the CMA found that the Parties and other retailers competed on prices for aspects such as minimum spends for their online delivery services and delivery charges.

6.9 The CMA also found that retailers competed on some non-price aspects of competition, for example:[53]

(a) store locations, opening times, in-store shopping experiences and refurbishments, store fittings, in-store staffing levels and queuing times, staff training and knowledge, and general store quality;

(b) marketing activity, on which they spent a large amount and is a key way they differentiate their offering to consumers;

(c) website functionality and ease of use;

(d) loyalty programmes; and

(e) the range of product brands offered.

6.10 The CMA found that retailer innovation improved retailers' services and offerings. Some examples of this included:[54]

(a) JD Sports' introduction of in-store kiosks, giving customers access to a wider range of products than is available in a given store;

(b) Improvements to website and app functionality and design;

[51] CMA (2020), Phase 2 Final Report, paragraph 8.109
[52] CMA (2020), Phase 2 Final Report, paragraph 8.110
[53] CMA (2020), Phase 2 Final Report, paragraphs 8.111
[54] CMA (2020), Phase 2 Final Report, paragraph 8.113

(c) Digital content displays in stores;

(d) More efficient product retrieval systems; and

(e) Different forms of marketing campaigns, such as partnerships with celebrities or social media influencers.

6.11 The CMA considered whether the Merged Entity was likely to be incentivised to close some or all Footasylum fascia stores to the detriment of consumers. The CMA estimated that closing all Footasylum stores would likely be profitable for the Merged Entity.[55] The CMA also found that closing only some stores would also be profitable, especially if the least profitable Footasylum stores were to be closed. The CMA was careful to note that it interpreted these results with caution given it did not have detailed information on the cost of closing stores or the costs of capturing sales.

6.12 Overall, the CMA found that there was evidence that the Parties competed head-to-head, as well as with other competitors, on various aspects of PQRS.[56]

6.13 Finally, we note that the CMA found that suppliers have some influence over some aspects of PQRS. These are discussed further in paragraphs 6.34 to 6.58.

Other evidence on how retailers compete

6.14 During the Remittal we have received other evidence on parameters of competition.

6.15 For example, in the Remittal Online Survey, respondents said that they chose to shop with JD Sports or Footasylum because of:

(a) good prices or special offers;

(b) the availability of the product;

(c) product range;

(d) fast/reliable/flexible delivery;

(e) ease of use of the website;

[55] CMA (2020), Phase 2 Final Report, paragraph 8.115
[56] CMA (2020), Phase 2 Final Report, paragraph 8.116

(f) reputation of the brand;

(g) reasonable delivery charges;

(h) ‘pay later’ options; and

(i) availability of vouchers and discounts.[57]

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

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

6.18 We note that suppliers are able to influence some (eg the range that is available at a retailer), but not all of these factors, and this is discussed further below in the subsection ‘suppliers’ setting and monitoring of KPIs’ (from paragraph 6.34).

6.19 During the Remittal the Parties submitted that:

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

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

(c) [✂].[58]

6.20 We consider that this indicates that, despite the prevalence of pricing at RRP, the Parties compete on some price factors. Indeed, JD Sports spoke to us about competition for online shoppers in the hearing. It said:

> [✂]

6.21 Also in respect of online shopping, we have seen internal documents from JD Sports that [✂]. For example, [✂].[59] This indicates a broad range of parameters for online shopping alone on which retailers compete.

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[57] DJS Report figures 6-9
[58] [✂]
[59] [✂].

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

> [✂].

6.23 Finally, we consider that retailers compete on innovation and branding. For example, JD Sports has told us that [✂].[60] In the CMA's phase 2 investigation JD Sports submitted 'we consider that successfully building own-brands is not a skill that is unique to Footasylum and has been done by other retailers in this market. JD Sports could gain this expertise without having to acquire Footasylum'.[61] Further, [✂]. This too indicates that one possible parameter of competition is to develop and maintain a range of own brand products (which may help differentiate a retailer from other retailers).

The supply of products to retailers via selective distribution arrangements

6.24 The main suppliers of sports-inspired casual footwear and apparel wholesale their products to retailers using some form of selective distribution arrangement. This grants them a degree of control over where, how and how many of their products are sold and marketed. Suppliers decide which retailers sell their products and can control the specific products and volumes provided to each retailer. Allocation of products is typically done through segmentation policies, with different categories of retailer having access to different product ranges (eg sport or lifestyle/fashion-focussed range of footwear and clothing). In some cases, suppliers will have tiers of retailers within a category – these are discussed further in Chapter 7. [✂].

6.25 There are also some products – known as restricted products – where suppliers put constraints on the number of products available to retailers, prioritising some channels (eg their DTC offerings or priority retailers) over others.[62] These are mostly footwear products although there are some apparel products that are restricted.

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

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

[60] CMA's Phase 2 Final Report, paragraph 3.24
[61] CMA's Phase 2 Final Report Appendix I paragraph 49
[62] Throughout this report when we discuss product allocation categories and suppliers' selective distribution arrangements, we are primarily referring to restricted products.

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

6.28 Therefore, we consider that retailers are capacity constrained to some extent since the volume of products that they receive from product suppliers is limited, in particular as regards the most high-demand products. [✂]. Consequently, retailers can face demand for some products that greatly exceeds the volume that they can fulfil. In the Remittal we have heard from various retailers telling us that their product allocations are insufficient to meet the demand from their customers.[63] Notwithstanding this, product allocations are adjusted which allows retailers to grow (JD Sports, for example, [✂] – Tables 7, 8, 15 and 16).

6.29 Retailers might be unable to get any access to the range of products that they want and/or not get access to the products when they want them (eg some retailers will receive new products sooner than others). This is because the suppliers' selective distribution arrangements determine which product allocations each retailer receives according to the retailer category that the supplier places them in (and, in some cases, the specific tier within a category). For example, all main suppliers that we have spoken to consider JD Sports to be of high strategic importance and therefore within the highest priority product allocation category/tier. We have taken the strategic importance of retailers into account in our competitive assessment.

6.30 We have found that suppliers are making market-wide adjustments to their approaches to the allocation of products in line with their stated overall objectives of selling a greater proportion of products through their own DTC channels and supplying fewer retailers. The main suppliers are looking for retailers who can offer (among other attributes) scale, access to large numbers of customers and/or specific customer groups, a unique or premium shopping experience for the customer and promotion of their products.

6.31 These supply arrangements impact on competition between retailers, particularly in relation to the products that might be the most popular, the most fashionable or in some sense a premium product. Greater access to higher tier products that are more attractive to customers is one of the ways in which retailers compete.

6.32 Importantly for our analysis, the supply arrangements are not static but are changing and, with them, the potential for the competitive dynamic between

[63] For example: [✂]

some retailers to change. Indeed, the Parties have highlighted their concerns about possible [✂].[64]

6.33 We have therefore considered current and likely future supply arrangements very carefully in our analysis.

Suppliers' setting and monitoring of KPIs

6.34 Supply arrangements between suppliers and retailers typically include requirements for retailers to observe minimum standards of quality and service, whether in-store or online. The ultimate purpose of such arrangements is to ensure that products are marketed in a manner consistent with the supplier's brand image or in-line with the perception of a particular product (eg as being a high-end, premium or luxury product). This approach helps suppliers to shape consumer perceptions and preferences across a range of their products.

6.35 A standard feature of supply arrangements is that the supplier agrees to supply only those retailers which meet certain specified criteria (eg financial and quality requirements) and will only supply a certain volume of its product to these retailers. These selective distribution arrangements are incorporated into the supplier's standard terms and conditions and individual trade terms with retailers.

Findings of the CMA's Phase 2 Final Report

6.36 The CMA's Phase 2 Final Report assessed in detail the possible impact suppliers have on retailers' offerings as a result of their supply relationship with retailers. In particular, the CMA considered whether suppliers could prevent retailers from deteriorating aspects of PQRS.[65] Full details of the assessment made at Phase 2 are available in an extract from the CMA's Phase 2 Final report as Annex I.

6.37 The Parties submitted in the CMA Phase 2 inquiry that the key suppliers, [✂]. JD Sports submitted that Nike and adidas [✂]; and unilaterally controlled who was able to participate (and to what extent)' in the market. The Parties submitted that the relevant question was whether, post-Merger, retailers would have the incentive to significantly and permanently degrade their offer,

[64] [✂]
[65] For the purpose of this assessment, we use the term 'deterioration' to cover both any worsening in absolute terms and/or any lack of improvement that might have happened faster or to a greater extent, absent the Merger.

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

6.38 The CMA's Phase 2 Final Report found that there is a spectrum of constraints that suppliers may possibly exert on retailers' offerings and the level of such constraint may depend on the precise element of PQRS under consideration.

6.39 The CMA's Phase 2 Final Report considered that the main suppliers have a similar impact across the sports-inspired casual footwear and apparel markets. The key distinction between those markets is that apparel sales are dispersed across more suppliers of branded products than in footwear and the Parties also stock more apparel brands than footwear brands. The lower concentration of supplier brand sales in apparel means that individual brands are less influential in apparel than in footwear since retailers are less dependent on each individual supplier for sales revenue.[66] Nike and adidas are the two largest suppliers of branded products in the market but they accounted for a smaller proportion of sales in apparel than in footwear. The proportion of the Parties' sales in footwear and apparel accounted for by the main brands is discussed in Chapters 8 and 9 respectively.

6.40 Paragraphs 6.41 to 6.45 are an extract from the CMA's Phase 2 Final Report.[67]

Extract from the CMA's Phase 2 Final Report[68]

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

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

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

(b) suppliers can control retailers' range through the products and volumes that they can access and can implement this primarily through their

[66] Paragraphs 9.17 and 9.18 of the CMA's Phase 2 Final Report.
[67] Paragraphs 8.94 to 8.98 of the CMA's Phase 2 Final Report
[68] Cross-references to the CMA's Phase 2 Final Report within this excerpt have been removed.

segmentation policies. In the short term and in relation to specific orders, the use of, or threatened use of, suppliers' cancellation provisions may create a degree of uncertainty for retailers as regards product access;

(c) suppliers exert some influence on retailers' quality and service offerings. While suppliers place restrictions on retailers' offerings in this regard through minimum contractual standards, retailers can and do flex their offerings above those standards (as shown by the variation in their offerings). On some aspects of retailers' offerings, suppliers impose and ensure compliance with granular standards [✄], but these do not encompass all aspects of retailers' offerings. However, we have seen evidence that suppliers may also encourage retailers to compete with each other beyond minimum requirements; and

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

6.43 We therefore consider that suppliers play an important role in shaping retail competition in this market.[69] In particular, we consider that Nike and adidas impose the most restrictions and have the greatest influence, given their importance for retailers in this market. Other suppliers also have some influence, but this is considerably less than that of Nike and adidas.

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

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

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

ability and/or incentive to deteriorate its offering post-Merger. In particular this is for the following reasons:

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

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

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

Parties' submissions in the Remittal

6.46 As part of the Remittal we received updated evidence from the Parties and from the key suppliers on the setting and monitoring of KPIs and influencing aspects of PQRS.

6.47 The Parties submitted that we should consider whether a worsening of a parameter of competition by a retailer (and in particular, by the Parties after the Merger) could lead to a [✂] that would be likely to disincentivise the worsening in the first place (including in combination with other constraints).[70]

6.48 The Parties submitted during the Remittal that [✂] since the CMA's Phase 2 Final Report. For example, JD Sports has given examples of [✂]. JD Sports also provided [✂].

6.49 The Parties stated that Nike [✂].[71] In relation to Footasylum, the Parties have stated that [✂].[72]

6.50 The Parties have told us that this monitoring and auditing by the suppliers is affecting their operational decisions. JD Sports submitted that [✂].[73] JD Sports also highlights [✂].[74] JD Sports also highlighted [✂][75]

[70] Parties' Response to the CMA's Provisional Report (24 September 2021)
[71] [✂].
[72] [✂].
[73] [✂].
[74] [✂].
[75] [✂].

6.51 In the Main Party Hearing, [✂].”[76]

6.52 In response to working papers, JD Sports submitted that, [✂].[77] JD Sports also submitted that [✂]. Among other things ([✂][78] [✂][79] [✂].[80]

6.53 In relation to the impact of increased monitoring on Footasylum, the Parties have stated that: [✂]. The Parties stated that [✂].[81] The Parties also stated that in 2021, [✂]. “Footasylum considers that [✂].[82]

6.54 In addition, the Parties have stated that [✂]. The Parties have stated that [✂][83]

Submissions from suppliers in the Remittal

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

6.56 Nike stated that it has not changed the way it monitors its retail partners since the start of the COVID-19 pandemic,[84] with “no systematic change in either (i) the information requested from retail partners during the last 18 months to confirm compliance with its distribution policies; or (ii) in the consequences of non-compliance with these policies”.[85] Nike submitted that the individuals responsible for the retailer relationships do not recall any instances since December 2019 of Nike restricting product access to a retailer active in the UK – or considering doing so – due to their store or website having degraded in terms of quality or service. Nike added that there may have been (relative) degradation in terms of quality, but that any such issues are generally addressed directly and immediately during site visits.[86]

6.57 [✂][87] [✂].[88]

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[76] [✂].
[77] [✂].
[78] [✂].
[79] [✂].
[80] [✂].
[81] [✂].
[82] [✂].
[83] [✂].
[84] [✂].
[85] [✂].
[86] [✂].
[87] [✂] has clarified that any changes to its policy are “unlikely to be announced before towards the end of this calendar year).” [✂].
[88] [✂].

6.58 adidas stated that it had [✂]. It stated that for online [✂]. Since 2020 adidas stated that [✂].[89] adidas submitted that since December 2019 it has [✂].[90]

Our assessment of how retail competition operates

6.59 We have not received any evidence in the Remittal to suggest there are aspects of PQRS on which the Parties and their rivals no longer compete. We consider that the analysis set out in the CMA's Phase 2 Final Report on aspects of PQRS on which competition takes place is still relevant and that this together with the further evidence we have collected shows that the Parties compete head-to-head, as well as with other competitors, on various different aspects of PQRS in a bid to attract consumers and generate sales.

6.60 We have also considered afresh the role of suppliers in constraining the ability and/or incentive of retailers to worsen aspects of PQRS. We have done this by considering the importance of the supply of key products, the suppliers' use of product allocation categories, and the role of suppliers in monitoring some aspects of retail PQRS and in setting retail KPIs.

6.61 In line with the CMA's Phase 2 Final Report we have found that the evidence indicates that there are parameters of competition that suppliers do influence and, in some instances, actively monitor. We consider that there is some evidence from the Parties that there has been some increase in the level of monitoring from suppliers since the time of the CMA's Phase 2 Final Report. For example, we have seen evidence that [✂] (paragraph 6.48). This is an example of [✂].

6.62 We have heard from Footasylum that it has [✂]

6.63 The main suppliers supply only those retailers which meet certain specified criteria (eg financial and quality requirements (paragraph 6.35)). Suppliers set retailer KPIs in their supply agreements (eg paragraph 6.50). Nike and adidas are able to monitor some aspects of these financial and quality requirements via [✂] (paragraph 6.37). Footasylum told us during the Remittal that [✂] (paragraph 6.53).

6.64 The increase in this kind of monitoring (or at least the perception of an increase since we note that Nike has stated that it has not recently changed its overall approach to monitoring, paragraph 6.56) [✂], may reduce the

[89] [✂].
[90] [✂].

incentive for the Parties to deteriorate their offerings on some aspects of PQRS post-Merger.

6.65 We have seen little evidence of suppliers 'punishing', retaliating or restricting product allocations to retailers who have missed their targets set by suppliers. We note that the lack of availability of this evidence may in part be due to the fact that the threat of supplier retaliation is itself sufficient to constrain retailer behaviour on the relevant parameters or that there are other ways to address problems. As Nike put it to us, 'issues are generally addressed directly and immediately during site visits' (paragraph 6.56).

6.66 Overall, we consider that suppliers do seek to influence retailers' offerings and, in practical terms, in some instances set retailer outcomes or standards on some parameters of competition. The parameters that we consider suppliers have the most influence over are the range and volume of products that a retailer receives within a supplier's brand, broad levels of quality regarding the consumer's shopping experience (and the process of purchase) and the promotion and marketing of the supplier's products.

6.67 In that context, we note that Nike has stated that it imposes volume allocations on a 'small number' of high demand products, with these restrictions mainly applicable to footwear product lines (paragraphs 7.54). The evidence does not indicate that adidas imposes restrictions on retailers' allocations for specific products but rather it is based on tiers and segmentations (paragraphs 7.62 to 7.64).

6.68 However, we also consider that there are parameters of retail competition that suppliers influence but in relation to which retailers retain some discretion to deviate from the suppliers' preference. 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 different aspects of overall pricing including discounts, delivery charges and product prices during sales. For example:

(a) The CMA's Phase 2 Final Report found that the Parties competed on student discounts and monitored other retailers with respect to discounts.[91]

[91] CMA's Phase 2 Final Report, paragraph 8.185

(b) The Parties' internal documents monitor discounts and promotions and sales of rivals. For example, [✂].[92] This is one of a [✂] that frequently monitor these parameters.

(c) The Parties' internal documents monitor delivery charges (and other aspects of delivery) across rivals. For example, [✂].[93]

6.69 To take pricing through discounts and sales as an example, the Parties internal documents show that the levels of discounts and promotions change. For example, [✂] show that in October 2019 [✂]. A year later, in October 2020, [✂]. In March 2021, [✂]. In addition, the Parties' submission on internal documents said that 'Footasylum [✂]. The fact that Footasylum [✂] demonstrates the importance of [✂] to the Footasylum business'.[94] Despite levels of discounts and promotions going up and down (and sales and promotions being introduced for defined periods), we have not seen any evidence showing how suppliers reacted to these changes.

6.70 The evidence shows that some retailers (including the Parties, paragraph 6.47) are concerned about how a deterioration in some aspects of PQRS may impact their relationship with their key suppliers, particularly in the context of constrained allocations. But there are other aspects of PQRS that they can flex without harming their relationship with suppliers.

6.71 We have further found that retailers compete on a range of parameters that suppliers do not seek to influence directly (or may find it difficult to monitor) and that retailers flex their PQRS offers to a level above the suppliers' minimum requirements (paragraphs 6.7 to 6.13; 6.19 to 6.23; 6.45; 6.76; and Appendix J). Examples include:

(a) store openings and closures;

(b) the size and location of stores including opening times;

(c) staffing levels;

(d) the range of other brands stocked by retailers (and the product range within those brands);

(e) the range, quality, style and pricing of own brand products;

(f) in-store kiosks;

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[92] [✂].
[93] [✂].
[94] [✂].

(g) service levels of online shopping such as speed of delivery, free delivery spend thresholds, returns policies, ease of use and functionalities of websites and apps, payment options, packaging options and gift card options; and

(h) product retrieval systems.

6.72 For example, the CMA's Phase 2 Final Report found that [✂].[95] It also found that retailers compete above the minimum requirements set by [✂].[96] We consider that [✂] submissions in the Remittal as regards the changes in its approach to monitoring since Phase 2 (paragraphs 6.55 to 6.58) indicate that the above findings remain relevant. A further finding of the CMA's Phase 2 Final Report which remains relevant in the Remittal is that JD Sports and Footasylum compete above the minimum requirements [✂] for returns.

6.73 In addition to the above, we note that [✂] evaluate the Parties' delivery options and estimated delivery times.[97] However, the evidence we have seen indicates that the factors that the Parties use to benchmark themselves against other retailers on those aspects are at least in some cases either more granular or broader than the elements that are assessed by [✂]. Indeed, the evidence indicates that retailers do compete on delivery options and delivery times.[98] JD Sports submitted that it has recently reviewed the [✂] provided by other retailers.[99] JD Sports' internal documents show [✂][100] We have considered this to be evidence of how retailers compete to improve their offers to go over and above what is required by suppliers.

6.74 Similarly, a Footasylum internal document [✂].[101]

6.75 Separately, a Footasylum minute of a senior management meeting discusses how [✂]. This proposition is based on feedback from customers and explores [✂] and a [✂] (including, for example [✂]). It also suggests a number of retailers that Footasylum could benchmark itself against.[102] This suggests that retailers are able to compete on a range of parameters including innovative ways to improve a customer offer and retain custom.

6.76 We consider that the parameters in paragraph 6.71 are significant. They are important to consumers and can be (and are) varied and improved according

[95] Appendix J, Footnote 164.
[96] Appendix J, paragraph 2.61.
[97] [✂]
[98] [✂].
[99] [✂].
[100] [✂].
[101] [✂]
[102] [✂].

to the strength of competition that retailers face. The evidence from the Parties does not show suppliers retaliating against retailers who flex these parameters of competition or that Footasylum has considered the risk of retaliation before closing stores. For example, in relation to store closures, throughout the Remittal Footasylum has sought (and received) derogations from the Interim Order to close some stores but has not provided evidence of retaliation from suppliers.

6.77 Therefore, we consider that there are important parameters of competition that could be deteriorated following the Merger and in relation to which suppliers may have little (if any) incentive or ability to influence (including via retaliation). We consider that suppliers may have little incentive to respond to some deteriorations of PQRS by a retailer because such deteriorations would not be contrary to the suppliers' interests (eg reduction in student discounts or loyalty schemes). We note that the Tribunal endorsed the CMA's conclusion on this point in its Judgment and the evidence we have gathered in the remittal does not suggest the position has changed.[103]

6.78 The Parties have argued that even if they could worsen some aspects of Footasylum's PQRS as a result of the Merger it would make Footasylum less attractive in the eyes of suppliers. This would mean Footasylum would lose sales and therefore some of its retrospective discounts from suppliers.[104] In addition, we have noted Footasylum's submissions that it [✂] against (paragraph 6.53). The Parties have also argued that some parameters of competition are transparent (eg pricing and discounts) and if they are not competitive on these parameters consumers would switch to other retailers. We consider this is a point about the competitive dynamic constraining the retail offer, rather than one concerning influence or retaliation by suppliers. We assess the competitive dynamic in our competitive assessment (Chapter 11).

6.79 However, with respect to the other points we note:

(a) after the Merger, Footasylum would be a part of JD Sports which we consider will reduce the likelihood that suppliers will view Footasylum as being less attractive in the event of some deterioration of PQRS. This is because JD Sports is [✂] (paragraph 6.24) [✂].[105] The Parties themselves submitted to us that JD Sports' ownership of Footasylum will significantly reduce the risk of [✂] because JD Sports is [✂].[106] This

[103] [2020] CAT 24, JD Sports Fashion plc v CMA, paragraphs 216, 225 and 226.
[104] Parties' response to the CMA's Provisional Report, paragraph 137 and [✂].
[105] We further note that, in any case, [✂].
[106] [✂].

strongly suggests that, after the Merger, Footasylum, as a part of the JD Sports group, will be attractive to suppliers;

(b) our theory of harm is predicated on the Footasylum business worsening some aspect(s) of PQRS that would make the sales it retains more profitable and for the existing JD Sports brand to receive a sufficient proportion of customers who do decide to switch retailers to make the Merged Entity overall more profitable. We do not consider that the parties' submissions demonstrate why worsening some aspects of Footasylum's PQRS would not be in the Merged Entity's commercial interest taking into account the increased sales at JD Sports;

(c) the evidence we have received does not show how the Merged Entity would be prevented from worsening aspects of PQRS which are over and above the minimum requirements of the suppliers, irrespective of how aware Footasylum is of how it is being assessed. For example, in one Footasylum internal document in which [✂].[107] Where Footasylum currently offers a standard over and above the standard below which suppliers would seek to intervene, we consider there is scope for the Merged Entity to deteriorate aspects of Footasylum's PQRS offering.

Conclusion on how retail competition operates

6.80 We have considered whether there are aspects of the Parties' PQRS offer that they compete on and whether any of these could be worsened after the Merger. When we consider a worse PQRS offer after the Merger we mean worse than would have been the case absent the Merger with a reduced incentive for one or both of the Parties to improve its offering as a result of less competition.[108] This may not be the same thing as a deterioration from the situation today.

6.81 We have found that retailers compete on a wide range or parameters across a number of different aspects of PQRS which consumers value.

6.82 The evidence we have received in the Remittal inquiry indicates the following aspects of our Phase 2 assessment remain relevant: suppliers do not seek to monitor all aspects of retailers' PQRS offerings; suppliers may find it difficult in some cases to detect a deterioration of retailers' offerings, particularly if the deterioration involves a lack of improvement relative to what otherwise would have been achieved; and suppliers may monitor retailers infrequently such

[107] [✂]
[108] Merger Assessment Guidelines, paragraph 4.2.1 says that the theories of harm we use describe '… expected harm to consumers as compared with the situation likely to arise without the merger'.

that there are periods of time during which a change in a retailer's standards may occur unobserved.

6.83 There are parameters of competition that suppliers influence and, in some instances, actively monitor. We consider that the targets and expectations that the main suppliers set for retailers, and their monitoring and auditing of retailer performance against those, has increased since the CMA's Phase 2 Final Report. However, we note that the changes leading to such an increase are not comprehensive in scope but rather focussed on certain areas (such as digital) and do not, in the suppliers' view, represent a significant change in approach. While there is evidence that those suppliers may evolve their approach to these matters in future it is uncertain whether or not this will lead to any significant change in their influence over retailers' PQRS.

6.84 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. For the Parties, this influence is felt more strongly in footwear than apparel, reflecting the fact that the main suppliers represent a much greater proportion of the Parties' sales in footwear than apparel (paragraph 6.39). These are significant parameters and therefore the suppliers' effect on retail competition is material. Notwithstanding this, we consider that the suppliers' constraint is not so significant as to sufficiently discipline (through product allocation punishments or other mechanisms) the Merged Entity's ability and/or incentive to deteriorate its PQRS offering post-Merger compared to what it would have been absent the Merger. For example, despite the prevalence of RRP, we have found that retailers do compete on pricing through discounts and sales.

6.85 In addition, we have found that there are significant parameters of competition that are important to consumers that suppliers do not influence or in relation to which retailers retain some discretion. We note this includes parameters in relation to which suppliers may not be harmed by or may even benefit from a deterioration by retailers, for example less discounting.

6.86 For example, retailers compete across a range of pricing aspects such as discounting and, for online shopping customers, free delivery thresholds and delivery charges. Footasylum has a considerable range of own brand apparel on which it competes across price and non-price attributes and which are not subject to supplier influence.

6.87 Retailers can also compete on a broad range of non-price parameters, some of which are listed in paragraph 6.71.

7. Evidence relevant to footwear and apparel

Introduction

7.1 This chapter sets out the evidence relevant to both the retail supply of sports-inspired casual footwear and the retail supply of sports-inspired casual apparel markets. That is, relevant evidence that cannot be separated by footwear and apparel or is not appropriate to separate.

7.2 We have considered the competitive effects of the Merger by considering the evidence from Periods 1 and 2 on current competition between the Parties and their rivals. We have also considered evidence from Period 3 on future developments and whether, in light of those developments, conditions of current competition are likely to provide a good indication of competition in the foreseeable future. As such we first set out the evidence on current competition between the Parties. During the Remittal, the Parties have consistently submitted to us that the most important dynamics in the two markets are the growth of online sales, the growth of sales from Nike’s and adidas’s own DTC channels and [✂]. These dynamics have been an important part of our analysis. In this light, the relevant evidence we have examined to assess current competition is:

(a) the main changes in retail offerings of the Parties and their rivals since the CMA’s Phase 2 Final Report;

(b) the retail performance of the main suppliers via their DTC channels;

(c) changes in suppliers’ product allocation strategies;

(d) the Parties’ internal documents;

(e) views of third parties.

7.3 We follow this discussion by setting out the evidence on how that competition between the Parties might change in the foreseeable future. In particular, we discuss:

(a) the evidence regarding the impact of COVID-19 and the future of retail competition;

(b) the evidence on future growth of suppliers’ DTC sales; and

(c) future changes in suppliers’ product allocation strategies.

Evidence of current competition

Introduction to current competition

7.4 This section sets out the evidence from Periods 1 and 2 (see paragraphs 4.33(a) and 4.33(b) for a description of these periods) on the extent to which the Parties currently compete in the markets for both footwear and apparel. A fuller discussion of third party retailer offerings is in Appendix C.

Current retailer offerings

7.5 We assessed the Parties' and third party rivals' respective retail offerings to judge similarities and differences across these retailers by considering what had changed since the CMA's Phase 2 Final Report (see Appendix C for more detail). Given the differentiated nature of the relevant markets, we expect firms to compete closely where offerings are similar on the most important parameters of competition.

Parties' retail offerings

7.6 In the CMA's Phase 2 Final Report the CMA found the following relevant characteristics of the Parties' retail offerings in the sports-inspired casual footwear and apparel markets:

- The Parties had a very similar offering in footwear.[109]
- The Parties had some similarities in their apparel offering.[110]
- Both stocked a similar range of differently branded footwear products, with a large proportion of this being Nike and adidas. In apparel, their sales were spread over a wider set of brands than was the case in footwear, including the Parties' own-brands, which were particularly important for Footasylum.
- There was a high degree of geographic overlap of the Parties' stores.
- The Parties both had in-store and online sales and both channels were important for their respective businesses.
- Both Parties targeted a similar demographic; 16-24 year old males, although the focus on males was more pronounced for Footasylum.

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[109] CMA's Phase 2 Final Report, paragraph 8.163
[110] CMA's Phase 2 Final Report, paragraph 9.128

7.7 We asked the Parties about any material changes that they have made to their business since the CMA's Phase 2 Report. We assessed their submissions and concluded that there have not been any changes of a magnitude that would lead us not to place weight on the findings of the CMA's Phase 2 Final Report.

7.8 In the Remittal JD Sports submitted that:

(a) [✂].[111]

(b) [✂] (see Appendix C for more detail).[112]

(c) [✂].[113]

7.9 In the Remittal Footasylum submitted that:

(a) [✂].[114]

(b) There has been a [✂] to its online channel since its website continued to trade when its stores were required to close as a result of COVID-19 restrictions.

(c) It has made some material improvements to its website and app since October 2019, including a new homepage, tracksuit builder, product recommendation algorithm, finance options, order tracking, premium delivery subscription service, and free returns, among others (see Appendix C for more detail).[115]

(d) There have been [✂] are made since October 2019.[116]

Suppliers' retail offerings

7.10 The two largest suppliers in both footwear and apparel are Nike and adidas.

7.11 The CMA's Phase 2 Final Report found that suppliers including Nike and adidas have been growing their DTC channels. They both have online offerings and deliver to all parts of the UK. They have a number of physical stores, including a few large flagship stores, but the majority are forms of factory stores [✂]. The geographic overlap of these stores with the Parties is

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[111] [✂].
[112] [✂].
[113] [✂].
[114] [✂].
[115] [✂].
[116] [✂].

low. Nike and adidas are mono-brand footwear suppliers and they do not offer other brands alongside their own products.[117]

7.12 Nike submitted in the Remittal that its DTC sales have grown since the previous inquiry and that it has sought to make a number of recent improvements to its DTC offering (see the assessment of supplier DTC performance from paragraph 7.30 and Appendix C for more detail).[118]

7.13 adidas submitted in the Remittal that it plans to continue to invest in its e-commerce and retail infrastructures, [✂] (see the assessment of supplier DTC performance from paragraph 7.30 and Appendix C for more detail).[119]

7.14 We looked at the retail offerings of other suppliers including Puma, The North Face, Asics, Converse, New Balance, Vans, Under Armour, and Fila USA. All of these suppliers have a limited store presence in addition to their website offering (except for [✂]) which only sells on a wholesale basis in the UK). These suppliers have not made significant changes to their overall strategy, other than the necessary shift to online that resulted from store closures due to COVID-19 (see Appendix C for more detail).

Multi-channel retailers' offerings

7.15 We have looked at multi-channel, multi-brand retailers with in-store and online channels. The main retailers are Foot Locker, Sports Direct (Frasers Group), Schuh, Office, and Sole Trader.[120] Retailers with a smaller presence in one or both of the relevant markets include John Lewis, Clarks, H&M, Deichmann, Next and Primark. There is some variation in the position of some retailers between sports-inspired casual footwear and sports-inspired casual apparel. We have taken into account evidence specific to footwear and, separately, apparel.

7.16 We have found that these retailers' general retail offerings have not changed significantly, other than the impacts of COVID-19 lockdown measures experienced by all retailers.

7.17 Foot Locker submitted during the Remittal that its general retail proposition in relation to other retailers has not significantly changed in the UK market as a

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117 CMA (2020), CMA's Phase 2 Final Report, paragraph 8.159

118 [✂].

119 [✂].

120 Other retailers were Deichmann, Decathlon, John Lewis, Clarks and H&M.

result of COVID-19. It noticed a shift from offline to online sales as a result of store closures during lockdowns[✂].[121]

7.18 Frasers Group said it believes that the shift in consumer demand from premium sporting goods to premium lifestyle products has [✂].[122] Frasers Group submitted that it [✂].

7.19 Frasers Group has submitted that its in-store elevation plans for its Sports Direct fascia [✂].

7.20 Schuh, Office, and [✂] are all multi-brand retailers that focus on footwear, including both sports-inspired casual and more general types of footwear. None of these three retailers [✂] [123] [✂]. Specifically, [✂].[124] Schuh noted that the switch from physical to digital sales could make store occupancy costs more challenging and give an advantage to larger businesses that can secure better rent deals.[125]

Online only retailers' offerings

7.21 The online only retailers we have considered in our Remittal are ASOS, Zalando, Very Amazon, M and M Direct, and Farfetch. As with other retailers, some are important in our assessment of both footwear and apparel but we have also taken into account evidence specific to footwear and, separately, apparel.

7.22 ASOS submitted that its sales have grown since the COVID-19 [✂].[126]

7.23 Zalando submitted that COVID-19 has led to a shift from offline to online, which has made (pure) e-commerce players like Zalando stronger versus brick and mortar retailers. However, Zalando said despite this shift, [✂].[127]

7.24 Amazon submitted that it is constantly working to expand its product offerings, including its selection of footwear and apparel in the UK, and improving the experiences of selling partners and customers on Amazon's stores.[128, 129]

7.25 Very, M and M Direct, and [✂] each [✂] (see Appendix C for more detail).

121 [✂].
122 [✂].
123 [✂].
124 [✂].
125 [✂].
126 [✂].
127 [✂].
128 [✂].
129 [✂].

Parties' views

7.26 The Parties submitted that since the CMA's Phase 2 Final Report the COVID-19 pandemic has strengthened the position of online only retailers and traditional retailers with the capability to invest significantly in their online and in-store offerings (eg [✂]) have [✂].[130]

7.27 It is the Parties' view that the culmination of these changes is that [✂].[131]

7.28 In addition, in response to our Provisional Report, the Parties highlighted [✂] expansion in sales, and in particular, that its global customer base increased by 1.2m to 26.1m since HY21 and that 'despite the re-opening of physical stores early in the period – revenue growth in the period was strong'.[132]

7.29 Following the publication of the Provisional Report, we contacted a number of key retailers, and each confirmed that there had been no significant changes to their retail proposition in the UK since their earlier responses.

Supplier DTC performance

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

7.31 The period since October 2019 has seen an increase in sales (both in absolute terms and in proportional terms) via Nike's and adidas's DTC channels. This is at least in part due to the general move online, which was a pre-existing trend that accelerated during the period that stores were closed due to the COVID-19 pandemic. We believe also that Nike's and adidas's supply arrangements with retailers will reflect whether suppliers believe it is more profitable for them to sell via DTC or via retailers (paragraph 6.30). We

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130 [✂].
131 [✂].
132 [✂].

have heard from several retailers who have said that suppliers do not supply them with the volumes of products they request since the suppliers prioritise their own DTC channels.

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

7.33 Nike and adidas have also stated their commitment to prioritising DTC, and to increasing the proportion of DTC sales globally (which will be explored in more detail below, from paragraph 7.182 on suppliers plans for DTC).

Parties' views on supplier DTC performance

7.34 The Parties have emphasised the increased [✂]. The Parties have highlighted the recently increased targets from Nike and adidas for their DTC sales (set out at paragraphs 7.187 and 7.188).[133] These strategies are part of Nike's global move from its 'Consumer Direct Offense' strategy to a 'Consumer Direct Acceleration' strategy[134] and adidas's global move from its 'Creating the New' to its 'Own the Game' Strategy.[135]

7.35 The Parties also noted results published by Nike and adidas. Nike increased DTC sales by 6.5 percentage points during the COVID-19 pandemic, growing DTC from 31.5% of global sales prior to the COVID-19 pandemic, to around 38% in Q2/Q3 of the FY to end May 2021.[136] adidas's DTC sales increased by 8 percentage points during the COVID-19 pandemic, growing DTC from 33% of global sales in 2019, to 41% in 2020[137] – estimated as having accelerated forecast growth in global DTC by two to three years.[138]

7.36 The Parties have highlighted the incentives for Nike and adidas which are associated with an increase to DTC including: earning higher gross margins; building direct connections with customers (including through use of data) and improving their understanding of customer behaviour via advanced analytics, both of which reduce a range of costs and make repeat custom more likely.[139] The Parties have also highlighted strategic DTC investments, for example Nike has invested heavily in its digital offering, spending over US$1 billion globally on data and analytics capabilities in 2019, including through acquisitions (e.g. Virgin Mega in 2016, Zodiac and Vertex in 2018, Celect in

133 [✂]
134 [✂].
135 [✂].
136 Parties' Initial Submission, 30 April 2021, paragraph 7a.
137 Parties Initial Submission, 30 April 2021, paragraph 7b
138 Parties Initial Submission, 30 April 2021, paragraph 28, [✂]
139 Parties Initial Submission, 30 April 2021, p3-4

2019 and Datalogue in 2021) [✂][140], [141] and adidas's purchase of the Runtastic app in 2015, and plans to invest a further €1 billion globally in "digital transformation" by 2025.[142]

7.37 The Parties have told us that "DTC has structural competitive advantages that wholesale rivals cannot replicate" and that "it is now a given that JD Sports and others in wholesale (that compete with DTC [✂] increasingly be competitively constrained, as the brands deliver on rapid DTC expansion targets while wholesale stays "flat" in nominal terms (per Nike)."[143]

7.38 We explore in more detail the Parties' submissions on the future strategies of Nike and adidas in our section on suppliers' plans for DTC (paragraphs 7.182 to 7.188).

Evidence from suppliers on DTC

7.39 Nike has stated that one of its focuses during the COVID-19 pandemic has been to continue growing its digital DTC offering, as part of a longer-term global strategy to substantially increase the proportion of sales of Nike products going through its DTC channels (paragraph 7.187). Nike does not have a specific strategy for the UK.[144] Nike has highlighted the generally strong digital growth across the market.[145]

7.40 Similarly, adidas's growth in DTC sales is a part of its longer term strategy. Its 'Own the Game' strategy includes aiming for 50% DTC globally by 2025, up from 40% in 2020 (paragraph 7.188).[146, 147] [✂].[148] adidas has also stated "[✂]."[149]

Supplier product allocation strategies

7.41 As discussed in detail in Chapter 6, the suppliers in the relevant markets play an important role in controlling the allocations of products that retailers receive, and these allocations differ between different types of retailer, and in some cases between different tiers of retailer within a category. Nike and adidas are [✂] suppliers of footwear to the Parties (Table 2), Nike is the [✂] third party supplier of apparel to the Parties (Table 10) and adidas too is an

[140] Parties Initial Submission, 30 April 2021, paragraph 67
[141] Parties Initial Submission, 30 April 2021, p29
[142] Parties Initial Submission, 30 April 2021, p33
[143] [✂].
[144] [✂].
[145] [✂].
[146] [✂].
[147] [✂]
[148] [✂].
[149] [✂].

important supplier of apparel. The Parties have focused on these suppliers in their submissions. Therefore, our discussion of product allocation strategies also focusses on these two suppliers.

7.42 Chapter 6 discussed the general importance of suppliers' selective distribution policies for retail competition in the relevant markets. This section presents the evidence on how those policies currently affect competition between the Parties and their rivals, particularly in light of recent changes in supplier strategies, and how the impacts of the COVID-19 pandemic have led to some increasing impacts on retailers and the Parties.

7.43 A further section, from paragraph 7.189, presents the evidence on what we know about any upcoming changes to those policies so that we can assess whether retail competition is likely to be altered as a result. Suppliers' selective distribution strategies impact on both footwear and apparel. The greatest restrictions on product access are generally on high demand footwear products, including increased restrictions due to supply disruptions during the COVID-19 pandemic (for further detail see paragraphs 8.13 to 8.23). However, there have also been some instances of supply disruptions which have led to increased restrictions on specific apparel product lines (for further detail see paragraphs 9.13 and 9.14).

Parties' views on product allocation

7.44 The Parties have explained that certain changes [✂], and the Parties invited us to consider this as evidence that Footasylum is a [✂] now than it was at the time of the CMA's Phase 2 Final Report. Footasylum stated that it [✂].[150] [✂] [151] [✂].[152] Footasylum stated that these changes included impacts on [✂].[153] Footasylum also provided evidence of [✂], and two examples [✂].[154]

7.45 Footasylum stated that in some cases where [✂] where any stock that has become available (as a result of cancellations by retailers or Nike having excess inventory) is sold. [✂]. However, Footasylum has also stated that [✂].[155] It has also stated that the products available on Nike.net were not a

[150] We note that Footasylum has [✂].. As part of the Monitoring Trustee's reporting functions to the CMA, the Monitoring Trustee informed us of a call between it and Footasylum in October 2021. Footasylum told the Monitoring Trustee [✂].[✂].
[151] We note that Nike has explained that orders placed on a futures basis are subject to 'confirmation' as a standard part of the order process, and that it is typically the case that such orders are 'not confirmed' rather than 'cancelled'. [✂].
[152] Submission p44-45-46 and p23, Parties' opening submission of Remittal.
[153] [✂].
[154] [✂].
[155] [✂] [✂].and Parties Supplementary SLC analysis 28 May 2021, p11. [✂].

perfect substitute for [✂] in either range or type of product, and [✂] in relation to product purchased through [✂].[156] [✂] ([✂]).”[157]

7.46 Footasylum did not describe any particular [✂]. However, it did [✂]. Half of its store network [✂] and the remainder [✂]. However, Footasylum has been [✂].[158]

7.47 JD Sports stated it [✂] analogous [✂] or comparable [✂] to those experienced by Footasylum,[159] [✂].[160] [✂].[161]

7.48 The Parties have also highlighted that retailers with close relationships to Nike and adidas, the ‘key Strategic Partners’, have seen a significant increase in online sales and are making substantial investments in their digital capabilities.

7.49 In relation to the key suppliers’ allocations to Sports Direct, Footasylum [✂]. Footasylum stated that it does not [✂].[162]

Third party retailer views on product allocation

7.50 We asked other retailers questions related to supply issues (eg delays, cancellations or lower than expected volumes of products), including issues that were specific to the retailer and the supplier, and impacted the retailer directly, rather than impacts (such as COVID-19) which were felt across the market (for further detail see Appendix B).

7.51 One retailer told us about suppliers restricting supply but noting that the restrictions had not increased compared to the period prior to October 2019. [✂] stated that there were no supply issues which were specific to the retailer, and there was a stable relationship in relation to sporting goods. However, [✂] highlighted [✂].

7.52 Other retailers told us about increased supply issues. [✂] stated that it has experienced increased supply issues in the past 18 months. [✂].[163] [✂] stated that they have been weakened because the brands “value controlling

[156] [✂].To give a sense of the impact of this difference in discounts, Footasylum have informed us that normal intake margin from [✂] for different categories of products. For repurchases through [✂]. [✂].
[157] [✂] Footasylum has provided data on its purchases through Nike.net (which Footasylum has used to mitigate reductions in received volumes). While there is volatility in this data, it shows a trend that [✂]. This [✂] trend, combined with the information from Nike on its plans for Nike.net, indicates that Footasylum will continue to be able to purchase products from Nike.net in future.
[158] Submission p21-22.
[159] [✂].
[160] [✂].
[161] [✂].
[162] [✂].
[163] [✂].

the market in their category, and were already cutting back on their wholesale partners' range options, and indeed on their wholesale partners." [✂] stated that for the mid-long term it anticipates that the brands will increasingly concentrate supply via DTC".[164] [✂] stated in September 2021 that Nike had changed the way that it is segmented in the market, removing the distinction between adults and kids ranges (where [✂] is a market leader). [✂] stated that this is under review, but at least for early 2022 for kids products it will not receive some products and will receive reduced volumes of other higher tier products, and will also lose the limited access it had to some ladies products.[165]

Evidence from suppliers on product allocation

Nike

7.53 We consider the evidence from Nike indicates that there are two key elements to Nike's approach to allocation.[166]

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

(i) In April 2021, Nike launched a new marketplace unit (MPU) internal organisational structure. Under the MPU structure, where in the MPU structure a partner sits will determine [✂]. Each MPU is mapped to a [✂]. In its reorganisation of the assortment of core products, Nike has moved from [✂]. Nike has stated that it "expects that this will result in [✂]." [167]

(ii) [✂]. Most [✂] (others include Foot Locker and the Deichmann Group) [✂][168] and also have dedicated merchandising teams.

(iii) Footasylum is within a different MPU to JD Sports, which is Nike's [✂] MPU. Consequently, it [✂]. Nike has stated that this MPU captures [✂].[169]

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164 [✂]
165 [✂]
166 Nike confirmed that it had made no significant change to this approach since its initial submissions on this matter in April and June 2021 in its response to Q1(b) of the CMA's section 109 noticed dated 16 September 2021.
167 [✂]..
168 Note that Zalando is also [✂], due to its importance in the EMEA market, [✂].
169 [✂].

(iv) Other retailers are categorised into groups to “match consumer expectations to the specific profile of each retailer”.[170] Sports Direct, for example, sits within [✂].

(b) Second, Nike allocates *volumes* for a limited range of products for which there is high demand and supply constraints in a particular assortment and/or selling season:

(i) Nike has told us that there is a ‘small number’ of high demand products where restrictions are placed on the volumes that a retailer can purchase. These are classified as ‘allocated’ products. Which products are restricted change depending on, for example, supply and demand conditions, including unexpected supply disruptions.[171] The Nike products which are not subject to such allocations and therefore retailers can in principle choose the quantities that they purchase, are classified as ‘unallocated’ products.[172]

(ii) [✂] [✂].[173] [✂].

7.54 The Parties have provided evidence of [✂] which Footasylum has experienced, including impacting some of their [✂], [✂]. The Parties have in effect said that as a result of [✂] Footasylum is a [✂] than it was at the time of the CMA’s Phase 2 Final Report and that these issues provide some indication that Footasylum will [✂]. Nike has provided details on the [✂] relating to these particular product lines. Nike has said that the issues related to the COVID-19 pandemic and other disruptions, as well as changes in demand patterns. [✂].

7.55 As regards how these restrictions for Footasylum compare to those experienced by other retailers, Nike stated that Footasylum’s [✂] in the last year, “[✂]”[174] Nike stated that “[✂]”.

7.56 Nike has provided data for its supply of footwear to retailers between Q4 2019 and Q3 2022. [✂][175][✂], which are Strategic Partners, compared to overall reductions for [✂][✂].[176]

7.57 Evidence from Nike also indicates that it currently views its supply relationship with Footasylum [✂]. Nike told us:

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170 [✂].
171 [✂].
172 Ie there are in principle no limitations on the volume that a Nike retailer partner can order. [✂].
173 [✂].
174 [✂].
175 [✂].
176 See Appendix C, paragraph 72 for a description of this data.

(a) [✂] [✂][177]

(b) [✂].[178]

(c) [✂].[179]

7.58 Nike has told us that it is [✂]. This is [✂] with the Parties' submissions as regards suppliers' approach to allocations. Nike has further stated that when such [✂].

7.59 In light of the Parties' submissions that Footasylum has [✂] (see paragraph 7.44), we have probed certain data relating to overall allocations as a means to test whether Footasylum [✂]. In particular, we have analysed the volumes of footwear products Footasylum received from Nike and compared those with the equivalent volumes received by [✂], the retailers that will in [✂][180, 181]

(a) [✂][182]

(b) [✂].[183] [✂].

7.60 As shown in Figure 1, [✂]. In terms of the broad trends arising out of this data, we consider that this shows that [✂]. We have not sought to reach a more precise interpretation of this data for the reasons set out above and in paragraph 7.209. Overall, we consider the trends identified above are consistent with Nike's statement (Paragraph 7.55) that [✂], and we do not find support in this data for the position that Footasylum [✂], or that its supply relationship [✂]. As noted above, we do however find that the data confirms that Footasylum's allocations have been [✂].

Figure 1: Nike allocations (by value of footwear received) for Footasylum, [✂] and [✂]

[✂]

Source: CMA analysis of Nike data[184]

177 [✂].
178 [✂].
179 [✂].
180 [✂].
181 We note that [✂] [✂].
182 [✂].
183 [✂].
184 [✂].

adidas

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

7.62 adidas's segmentation broadly contains [✂]: [✂][✂][✂][✂], [✂] [✂][✂] [✂][✂].[185] [✂] [✂].[186] [✂].[187]

7.63 In addition to the above, adidas has informed us that it plans to introduce a new concept of Alliance Partners: "key wholesale retailers with the existing and/or potential size and scale to distribute products across multiple territories and marketplaces". [✂].[188] adidas has clarified that [✂].[189]

7.64 In addition, from [✂].[190]

7.65 adidas [✂].[191]

The Parties' internal documents

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

Our treatment of internal document evidence

7.67 In the Remittal, and where we are able to, we have been cognisant of the purpose of each document, the timeframe over which it was produced and/or relates to, and its audience. We have also considered its context, including whether it is part of a series of documents or standalone. For example, the fact that a competitor's name appears in a document is less informative than the context in which it appears including the detail and nature of the commentary regarding that competitor. It may be appropriate to consider references to certain competitors less probative where the analysis of these competitors is more cursory or substantively different to others in the document.

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185 [✂].
186 [✂].
187 [✂]. Other retailers listed as strategic include Footlocker, Sports Direct, ASOS, Zalando and Office.
188 [✂].
189 [✂].
190 [✂].
191 [✂].

7.68 We have generally placed greater weight on documents prepared to inform decision making by senior management as these are likely to be most reflective of the Parties' strategic thinking. However, that is not to say that we have disregarded all other documents. We have generally placed some weight on these documents, especially where these documents are corroborated by other evidence that we have.

7.69 We have not relied on the Parties' internal documents as standalone confirmation of any one of our findings or even of individual pieces of analysis. Instead, we have looked at all the evidence in the round and used the internal documents to corroborate or to contradict other evidence or to otherwise inform us of the context in which other evidence should be interpreted.

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

Internal document evidence

7.71 Our assessment of the Parties' internal documents is in Appendix I.

7.72 From that assessment, we consider that it is clear from the Parties' internal documents that they [✂] monitor each other as competitors, although the documents suggest that Footasylum monitors JD Sports [✂] than JD Sports monitors Footasylum. This has been consistently borne out in the Parties' internal documents assessed for the CMA's Phase 2 Final Report and the Remittal.

7.73 In the case of JD Sports, Footasylum is one of several competitors that is monitored closely by JD Sports. Other competitors monitored closely include [✂] are often monitored alongside a range of other competitors. Although Footasylum appears [✂] in JD Sports' internal documents, it is not always included in lists of competitors. In addition, a number of recent internal documents, including senior management presentations, [✂].

7.74 The findings from our document review in the Remittal are broadly consistent in this regard to the documentary evidence in the CMA's Phase 2 Final Report although the documents in the Remittal contain a broader set of comparator retailers and discuss more frequently the increasing threat of the brands' DTC growth and other COVID-19 driven factors.

7.75 In the case of Footasylum, JD Sports is its most closely monitored competitor. Other competitors, such as [✂] are also monitored but with less frequency and consistency than JD Sports. This is broadly consistent across the document review in the CMA's Phase 2 Final Report and the Remittal.

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

Third party views

Third party retailers' views on closeness

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

7.78 We asked third party retailers to list up to 10 retailers which they consider to be the closest competitors to each of JD Sports and Footasylum, for the footwear and apparel markets, respectively, and indicate the listed retailers' closeness to each of the Parties out of 10 (where 10 means very close competitor). There are limitations to this analysis as we are asking competitors to tell us about the constraints on the Parties. Closer competitors to the Parties should have a more informed view on this question. In addition, we have received significantly fewer responses than in the previous inquiry.[192]

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

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

7.80 Following the publication of the Provisional Report, we contacted a number of retailers that are significant in this market, and all but one confirmed that they did not consider that there had been a significant change in competition between retailers in the relevant markets, and in particular in the strength of JD Sports and Footasylum in those markets since their earlier responses. Some retailers noted changes from suppliers (which are discussed above), and [✄] stated that "JD Sports has further strengthened and entrenched its position in the industry as a preferred multi-brand retailer for premium lifestyle products from the most desirable brands".[193]

Multi-channel retailers

- *Foot Locker*

7.81 Foot Locker said that, in general, it did not consider each of JD Sports and Footasylum to have become stronger or weaker competitors in the UK market since March 2020. When scoring the Parties and their competitors on closeness of competition out of 10, it considered the Parties to be each other's closest competitors (scoring both Parties a score of 9 in respect of closeness to each other) and gave itself a score of 7 against both Parties. It also gave Size? (a JD Sports brand) and Sports Direct a score of 7 against both Parties.[194]

- *Frasers Group*

7.82 Frasers Group does not consider any of its fascia (including Sports Direct) compete closely with JD Sports. It said that (in order) Footasylum, Foot Locker, Nike DTC and adidas DTC have been the only meaningful competitors in terms of strength of product offering to JD Sports. With respect to Footasylum, Frasers Group listed (in order) JD Sports, Foot Locker, Nike DTC, and adidas DTC as its closest competitors.[195]

- *Schuh*

7.83 In footwear, Schuh views JD Sports' closest competitors to be Footasylum and Foot Locker, giving them both scores of [✄]. It also gave Nike DTC and adidas DTC [✄]scores of [✄] for JD Sports. For Footasylum in the footwear market, Schuh listed Foot Locker as its closest competitor with a score of [✄], and also gave Size? a [✄] score of [✄]. The next closest competitor for both

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[193] [✄].
[194] [✄].
[195] [✄].

Parties in footwear was Sports Direct, for which Schuh gave a score of [✂] to both Parties.[196]

7.84 In apparel, Schuh views adidas and Nike DTC to be JD Sports' closest competitors, giving them both scores of [✂], whereas for Footasylum it views Foot Locker to be the closest competitor, with a score of [✂]. The next closest competitor for both Parties in apparel was Sports Direct, for which Schuh gave a score of [✂]to both Parties.[197]

- *[✂]*

7.85 [✂].[198]

- *[✂]*

7.86 [✂].[199]

- *Clarks*

7.87 In footwear, [✂]. In apparel, [✂].

- *H&M*

7.88 H&M regards [✂].[200]

- *[✂]*

7.89 [✂] said it views Foot Locker and Offspring to be the closest competitor to both Parties in the footwear market, giving both a score of 5 against both Parties.[201]

- *Deichmann*

7.90 Deichmann views Foot Locker to be the closest competitor to both Parties.[202]

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196 [✂].
197 [✂].
198 [✂].
199 [✂].
200 [✂].
201 [✂].
202 [✂].

Online-only retailers

- *Very*

7.91 [✂].[203]

- *ASOS*

7.92 [✂].[204]

- *Zalando*

7.93 In footwear, Zalando views the Parties as [✂] competitors to each other, giving a score of [✂] to Footasylum for its closeness to JD Sports and a score of [✂] to JD Sports for its closeness to Footasylum. Zalando also views Foot Locker as a [✂] competitor, giving it a score of [✂] for both Parties. In apparel, Zalando views the Parties as [✂] competitors, giving a score of [✂] to Footasylum for its closeness to JD Sports and a score of [✂] to JD Sports for its closeness to Footasylum.[205]

Investment banking analysts' and market research reports

7.94 We have reviewed third party analyst and other market reports submitted by the Parties in order to assess to what extent they provide evidence of recent market developments which may be relevant for our analysis. In general, the documents are focused on larger, listed companies (eg JD Sports, Frasers Group, Nike, adidas) and there is limited discussion of smaller non-listed companies (eg Footasylum, Office).

7.95 We would note that many of the documents discuss a wider market than the market definition we have adopted (in terms of both geography and product) and are therefore of limited direct relevance for our SLC analysis. However, we have taken these reports into account as evidence of themes and market developments that are relevant to our analysis more broadly. The main points from our review are listed below.

(a) The analyst reports support the view that the shift to the online channel has been accelerated by COVID-19.

[203] [✂].
[204] [✂].
[205] [✂].

(b) Several analyst reports discuss how the shift to online has benefited certain online only retailers.

(c) A number of reports comment on the importance of retailers having a strong omnichannel offering, particularly following the pandemic.

(d) The analyst reports are generally positive about JD Sports' online performance, and its online offering is compared favourably to its peers several times.

(e) Several analyst reports consider the online performance of other multichannel retailers, such as Sports Direct. The reports are more mixed about the performance of Sports Direct.

(f) Generally, the analyst reports do not discuss specific smaller and non-listed multichannel retailers (eg Footasylum, Office etc.). However, a Redburn report from November 2020[206] acknowledges the difficulty for smaller brands to commit to "major, capital-intensive projects", and a McKinsey report on sporting goods comments that "small-to-medium sized players with limited funds are probably in danger, given the requirement for investment in areas such as omnichannel and store upgrades".[207]

(g) The expansion of the brands' DTC strategies and their acceleration as a result of COVID-19 are well-supported by the third-party analyst reports.

(h) Several reports note that, although the brands' DTC channel is growing, this will not remove the need for brands to have retail partners.[208]

(i) Several reports acknowledge that the growth of the brands' DTC offerings presents a risk to retailers, although several reports note that JD Sports will likely continue to grow within the framework of a concentration of the fragmented wholesale channel as a result of DTC growth.

(j) The analyst reports generally support the view that the brands' DTC strategies carry the risk of disintermediation but note that a select few differentiated/Strategic Partners [✂] are unlikely to lose out from disintermediation, but smaller/undifferentiated retailers will suffer [✂].

206 [✂].
207 [✂].
208 [✂].

Evidence on future competition

Introduction to future competition

7.96 We have considered future developments in the relevant markets and whether in light of those developments conditions of current competition are likely to provide a good indication of competition in the near future. This section therefore presents the evidence on future developments.

7.97 We start by presenting evidence on the impact of the COVID-19 pandemic. This section contains evidence on general consumer behaviour and, in particular, in-store shopping following the various COVID-19 related lockdowns. It also presents evidence on retailers' views on the impact of COVID-19 and their plans and future strategies.

7.98 Given their increasing importance to competition, we then look at the future plans of suppliers for their DTC channels.

7.99 Finally, we set out the evidence on any upcoming changes to the main suppliers' product allocation arrangements.

The impact of COVID-19 and implications for future competition

7.100 The COVID-19 pandemic had a significant impact on retail, not least through various lockdowns that resulted in the closure of non-essential shops (which include footwear and apparel stores).

7.101 Given the impact of the COVID-19 pandemic generally and its effects on UK retail more specifically, we have also sought to understand how this impacted both consumers and retailers in sports-inspired casual footwear and apparel. Given also both JD Sports and Footasylum had significant store estates we gathered evidence on the impact of COVID-19 on the relative importance of in-store and online sales to understand how important in-store sales were likely to be in the foreseeable future.

7.102 This section considers evidence on consumer behaviour in relation to shopping during the pandemic and how this might change as the pandemic eases; an analysis of the impact of COVID-19 on the revenues of the Parties, other retailers and suppliers; and third parties' views on the impact of COVID-19 and their plans in relation to their store estate, and finally the future strategies of retailers.

Parties' views

7.103 The Parties submitted that COVID-19 has contributed to a significant increase in the Parties' and their competitors' digital sales.[209] In particular they note that Nike has told investors that the "shift to digital is here to stay" and that adidas's CEO recently explained that COVID-19 has led to a "2 to 3 year step forward" in digital sales.[210]

7.104 The Parties submitted that the acceleration of digital shopping will favour brand DTC and digitally native retailers, translating into increased competitive constraints on the merged firm (and other wholesale channel retailers) due to increased price transparency, ease of consumer comparison and switching, and growth in DTC.[211]

7.105 In addition to the acceleration of DTC, the Parties told us that the COVID-19 pandemic has strengthened and improved the relative position of online only retailers (e.g.[✂]).[212]

7.106 The Parties submitted that their recent trading data shows a shift to digital shopping. In particular:

7.107 From week ending 26th June to 10th July 2021, JD Sports' online sales [✂] compared to the same period in 2019. Conversely, JD Sports' footfall during this period was [✂] in 2019, while in-store sales were [✂].[213,214]

7.108 [✂] between 20th June and 10th July 2021, compared with an average [✂] in the same three weeks in 2019. [✂] than the same period in 2019.[215]

7.109 JD Sports also submitted that its expectation is that in-store sales will [✂] as COVID-1-9 restrictions are relaxed and events and travel attractions divert discretionary spending.[216]

7.110 In addition, the Parties submitted that retailer exits from the high street make in-store retail less appealing generally.[217]

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[209] [✂].
[210] [✂].
[211] [✂].
[212] [✂].
[213] [✂].
[214] Furthermore, JD Sports estimated its in-store and online share of total revenues in the two weeks between 20th June 2021 and 3rd July 2021 [✂].
[215] [✂].
[216] [✂].
[217] [✂].

7.111 Footasylum submitted that during the [✂]. [✂]. Therefore, even if some customers return to stores, [✂].[218]

Survey evidence on consumer behaviour

7.112 This section describes evidence on how the pandemic has affected consumer shopping behaviour and retailer offerings.

7.113 As part of the evidence gathering for the Remittal we commissioned a survey of the Parties' online customers – the Remittal Online Survey (for further details, see paragraph 8.24). In this section we use results from the Remittal Online Survey and from two Mintel reports and an ONS survey to look at the impact of the pandemic on customer behaviour in relation to non-essential retail and in particular attitudes towards shopping for footwear and apparel. The ONS and Mintel research is described in Appendix E.

7.114 The Parties submitted that our Remittal Online Survey results are not based on the products that are part of the market definition. The Parties submitted that questions in the survey related to 'footwear' and 'clothing' rather than sports-inspired casual footwear or apparel, and therefore the results cover categories of products with fundamentally different characteristics than sports-inspired products[219] and that our treatment of the survey evidence is not consistent with the treatment of analyst reports which cover a wider market (which we said were therefore of limited direct relevance), and therefore we should not put full weight on the Remittal Online Survey to draw inferences about consumer shopping behaviour pre and post-pandemic.

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

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

[218] [✂].
[219] [✂].

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

%

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

Source: CMA analysis of the CMA Remittal Survey of Online Customers.
Questions asked were as follows.
Q05. Now we would like you to think back to before the *COVID*-19 pandemic and think about your spending on […] at that time.
Q05B. Once the *COVID*-19 pandemic is over, what do you think your preference for shopping for […] will be?
For both questions, respondents were given the following options and were asked only to tick one of them. "Don't Knows" are excluded.
I bought/think I will buy all/nearly all online
I bought/think I will buy most online
I bought/think I will buy about the same online and in physical stores
I bought/think I will buy most in physical stores
I bought/think I will buy all/nearly all in physical stores
Don't know/Not sure

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

7.118 The Parties submitted that most of the evidence from ONS and Mintel is current and/or historic rather than prospective, and where it is prospective, it generally suggests that consumers will continue shopping online for non-grocery goods post-pandemic. The Parties also submitted that these sources of information are not specific to sports inspired footwear or apparel.[220]

7.119 We agree with the Parties that we should place only limited weight on this evidence given it covers a broader market and much of it is historic. However, the research from Mintel and ONS generally corroborates other evidence, including from the Remittal Online Survey, and the evidence contained in the following section. Overall the ONS and Mintel evidence show that there was a large shift to online purchasing during the pandemic, and that some of this

[220] Response to WP, paragraph 16

increase in online shopping will persist, however it also suggests a significant proportion of customers will go back to shopping in-store, as concerns around the pandemic decrease (see paragraphs 8 to 10 of Appendix E).

Analysis of the impact of COVID-19 on revenues

7.120 To assess the impact of COVID-19 and related restrictions on retailers' in-store and online revenues we used pre-pandemic data (up to and including February 2020) to predict monthly revenues during the pandemic and compared this with data on actual revenues to infer the impact of COVID-19.

7.121 The analysis was based on monthly revenue data for sports-inspired casual footwear and apparel products for the period January 2015 to March 2021. Data was provided by the Parties, ASOS, Foot Locker[221], Next, Schuh, Sports Direct, Zalando, adidas and Nike.[222] Appendix F sets out further details including the methodology used, the limitations of the approach and the results.

7.122 We first assessed in-store revenues. As expected, over the pandemic period (March 2020 to March 2021), COVID-19 had an adverse impact on in-store actual revenues. However, when compared with expected sales had the COVID-19 pandemic not happened, [✂] performed proportionately better than [✂] for both footwear and apparel, and [✂] for footwear. Its performance was similar to [✂] for footwear and apparel, and worse than [✂] for both footwear and apparel. [✂] performance was better than [✂] for both footwear and apparel, and [✂] for footwear. Its performance was equivalent to that of [✂] for apparel and worse for footwear, and worse than [✂] and [✂] for both apparel and footwear.

7.123 We also compared actual in-store revenues for July and August 2020 with both predicted in-store revenues for July and August 2020, and actual in-store revenues for July and August 2019 to assess the performance of stores during a period in which stores were open for the entire period, and both restrictions and COVID-19 levels were relatively lower.[223]

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

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[221] [✂]
[222] adidas and Nike were included as they are the two key suppliers in the market, whilst ASOS, Foot Locker, Next, Schuh, Sports Direct and Zalando were retailers that were able to provide revenues for sport-inspired casual fashion products over the relevant time period.
[223] July and August 2020 were selected, as a short-term 'boom' may have taken place in June after the reopening of non-essential shops on June 15th, and restrictions were increasingly put in place from September onwards prior to the second lockdown taking effect on 31st October.

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

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

7.126 In addition to assessing the impact of COVID-19 on in-store revenues, we have assessed the impact on online revenues.[224] As expected, over the pandemic period (March 2020 to March 2021), COVID-19 had a positive impact on online actual revenues.

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

Retailer's views on the impact of COVID-19

7.128 The primary issues that retailers highlighted with respect to the impact of COVID-19 were changes related to the closure of stores, and the move to online sales. These effects are discussed in greater detail below. Retailers also highlighted the dislocation in supply chains, both in production and transport, which have led to reduced access to some products.

7.129 Particularly at the start of the pandemic, the very high uncertainty and the process of adapting to the new environment, led to retailers cancelling orders and being very cautious. Retailers with a focus on in-store retail and a weak online presence have faced the most challenges during the pandemic, and there have been a few companies in this sector which closed entirely. However, even retailers which were strong online or solely online faced challenges adapting to the new environment, and shifting supply and demand

[224] As with in-store sales we modelled the pre-pandemic revenues from January 2015 to February 2020, to create predicted revenues for March 2020 to March 2021 and compared this with actual sales for this period.

patterns. Amazon for example highlighted how vigorously other retailers competed, delivering compelling new online services.[225]

7.130 ASOS submitted that it has had to adapt to significant operational change, disruption across its supply chain, a dramatic shift in consumer demand, and an uncertain and fast changing landscape. ASOS said it saw strong growth in casualwear and other lockdown relevant products. [✂].[226]

7.131 ASOS said that to meet these challenges, it built greater diversity into its product mix and its sports footwear and apparel sales have grown during the pandemic period as consumer behaviour altered and moved towards these categories.[227]

7.132 ASOS said although it expects a portion of consumer demand to move back to stores as restrictions ease, it also expects online penetration to remain structurally higher than pre-COVID-19 levels. [✂], [✂]. [✂][✂] [✂]. [✂].[228]

7.133 Foot Locker told us that COVID-19 had led to a huge rise in demand for online shopping, as people were now accustomed to shopping online. Online would become an alternative way for customers to purchase products. However, it said that the re-opening of stores had shown that customers still loved to go and visit a store. It noted that the re-opening of stores was just beginning, so it, and others, were not yet comfortable that the market had stabilised, but it appeared clear that offering a combination of 'bricks and clicks' [bricks and mortar stores and online] would be essential going forward.[229]

7.134 Zalando told us that COVID-19 has helped shift consumer shopping online which has benefitted it although it has not [✂].

7.135 It also said that in the coming years, it expected three main trends that may affect Zalando's retail proposition and more specifically the retail markets for casual sports-inspired footwear and apparel:

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

(b) [✂]

(c) [✂].[230]

225 [✂]
226 [✂]
227 [✂]
228 [✂]
229 [✂]
230 [✂]

7.136 [✂].[231]

7.137 Sports Direct was also not able to off-set the losses of store closures, despite an approximate [✂] growth in online sales, and in its January 2021 Board Minutes, said [✂][232] and in Feb 2021 noted [✂].[233]

7.138 Amazon said one of the key developments that COVID-19 has accelerated, is the trend towards omni-channel offerings (ie online and bricks-and-mortar offerings). It said this manifests itself in strong growth of established bricks and mortar retailers, who are growing the digitized aspects of its business models in a number of ways. Amazon expects these trends, and the intense competition for consumers, to continue through and beyond the COVID-19 pandemic.[234]

Retailer stores during COVID-19

7.139 [✂] [✂] [✂] [✂] opened all stores they were able to at points at which government rules allowed them to.[235,236] All other retailers stated that they opened all stores when they were able to, in line with government guidelines, with only minor exceptions.[237]

Plans for growth or decline of store estate

7.140 This section considers the plans of the Parties and other retailers in terms of their in-store presence going forward. This is important for understanding both how important retailers think an in-store offer is to their overall business, but also whether and how we might expect the relative competitive strength of their in-store offers to change in the future.

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

JD Sports

7.142 [✂].

7.143 [✂].

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231 [✂]
232 [✂]
233 [✂]
234 [✂]
235 [✂]
236 [✂]
237 [✂]

7.144 [✀].[238, 239]

Footasylum

7.145 Footasylum had 70 stores at the start of 2020, but closed 2 stores during 2020. Footasylum opened one new store in April 2021,[240] and [✀].[241] During 2021 thus far, it has [✀] stores.

7.146 Overall Footasylum's store estate [✀] since the start of 2020. There [✀],[242] [✀].[243] Going forward, Footasylum submitted that its 'expectation is that [✀].'[244] [✀].

7.147 Footasylum submitted that its recent store closures were a result of a combination [✀].[245]

Third party retailers

7.148 Among other retailers there is a trend towards closing stores. Foot Locker stated that [✀].[246, 247]

7.149 Office told us it plans to shrink its real estate and only keep key locations.[248] The Parties provided more detail on the numbers of Office stores closed (19 since June 2020) and planned for closure (30 between 2022 and 2024) based on group annual accounts.[249]

7.150 Schuh has closed 5 stores permanently during lockdown, and stated that even prior to the pandemic stores were becoming uneconomic due to the increased proportion of online sales. It stated that "the only leverage we have is either when the lease comes to an end or we can exercise a break. Whenever we have one of the events in the future, once we can understand what post-COVID-19 trading looks like, we will assess every location on the merits of a new rent deal to see whether we can make it financially viable to continue. Failing that we would look to exit stores and reduce stores numbers overall. We believe we might have some very limited options for expansion in

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238 [✀]
239 [✀]
240 [✀]
241 [✀]
242 [✀]
243 [✀]
244 [✀]
245 [✀]
246 [✀]
247 [✀]
248 [✀]
249 [✀]

certain areas, but we suspect that it's very likely net store count will reduce regardless of any new openings."[250]

7.151 Next stated that "Last year 80 leases expired; we closed 18 branches and renegotiated rents in 62 stores, achieving an average reduction in rent of -58%".[251]

7.152 [✂].[252]

7.153 Sports Direct has taken a different approach to other retailers, focussing on its in-store offer, and continuing with its store elevation strategy: stating [✂][253] Sports Direct has plans to increase its number of elevated stores [✂].[254] [✂]. Sports Direct however did note that while [✂].[255]

7.154 Primark has also stated that it "remains committed to opening new stores", [✂].[256]

7.155 [✂] and [✂] have stated that they do not yet know their plans for any store openings/closings.[257]

7.156 [✂]. It said that to date it has opened a single-digit number of stores per year in the UK and will continue to do so.[258]

Future strategies

7.157 In this section we consider the future strategies of the merging Parties and other retailers. We have assessed evidence from the internal documents of the merging Parties, responses to our retailer RFIs, as well as analyst reports held by the merging Parties.

JD Sports

7.158 [✂].[259]

7.159 [✂]:

250 [✂]
251 [✂]
252 [✂]
253 [✂]
254 [✂]
255 [✂]
256 [✂]
257 [✂]
258 [✂]
259 [✂]

(a) [✄][260]

(b) [✄][261]

(c) [✄][262]

7.160 [✄]:

(a) [✄][263]

(b) [✄] [264]

7.161 [✄][265] [✄][266] [✄][267]

Footasylum

7.162 Footasylum's future strategies are focussed on a continuing shift to online channels. However, this is not to say that Footasylum views in-store shopping as unimportant in the future – Footasylum's internal documents discuss it being an 'omni channel' retailer across online and in-store. [✄],[268] [✄].

7.163 [✄].

7.164 [✄][269] [✄].

7.165 [✄].[270] [✄]:

(a) [✄];

(b) [✄]; and

(c) [✄].

7.166 [✄].[271]

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260 [✄]
261 [✄]
262 [✄]
263 [✄]
264 [✄]
265 [✄]
266 [✄]
267 [✄]
268 [✄]
269 [✄]
270 [✄]
271 [✄]

7.167 [✂].[272] [✂] [273] [✂]

7.168 [✂].[274] [✂].[275]

Retailers' future strategies

- *Multi-channel retailers*

7.169 The multi-channel retailers have emphasised the growth of online through the pandemic, and the work that the retailers have done to adapt to increased selling online. Some highlighted the scale of the increase (John Lewis, for example stated that "trends that might in normal times have taken five years to transpire have happened in five months[276]). Most emphasised the likelihood that online will continue to be stronger in the future although without being able to confirm the degree to which this will remain the case (or at least noted considerable uncertainty about the degree to which this will remain the case) ([✂],[277] [✂],[278] [✂][279], [✂][280]).

7.170 Foot Locker told us that its strategy on footwear was: [✂]. [✂], [✂]. It noted that apparel is a small part of its mix [✂].[281]

7.171 Next stated that "our instinct is that retention rates for customers acquired in 2020 are likely to be similar to those gained in more normal times, though we recognise that might be optimistic. One thing appears to be certain, the longer the pandemic encourages online shopping, the more likely it is that customers will keep shopping that way."[282]

7.172 Next already had an established online presence, including selling third party brands on its own website and licensing its operations to third party brands. Next stated that "Retail stores were, and will remain, at a fundamental and irreversible disadvantage to online competition. This is not being driven by price or even home delivery, but by the scale of the choice websites can offer relative to any physical store … items can be made available online with minimal stock investment."[283]

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272 [✂]
273 [✂]
274 [✂]
275 [✂]
276 [✂]
277 [✂]
278 [✂]
279 [✂]
280 [✂]
281 [✂]
282 [✂]
283 [✂]

7.173 Other retailers emphasised their comparatively weak position. Office stated that "the biggest shift and concern has been the invasion by online retailers buying up high street household names but losing the stores. Whilst bricks and mortar retailers have had to struggle to compete, the pandemic played into online retailers hands".[284]

7.174 Most retailers have highlighted their ongoing emphasis on growing their strength online. John Lewis plans to increase investment in digital capabilities "to [✂] current levels".[285] Next have "accelerated capital investment in both warehousing and systems and … expect to make good progress on both fronts in the year ahead."[286]

7.175 Conversely, Sports Direct, as highlighted above, continues to emphasise its in-store presence and elevation. While it has announced that it will invest (over time) £100 million in its online elevation, it sees this as secondary to store elevation: stating that "[✂]."[287] Primark do not currently sell online, and [✂].[288]

- *Online-only retailers*

7.176 A number of online-only retailers ([✂]) highlighted that the shift to online through the COVID-19 pandemic had benefited them compared to other retailers. With one noting the benefits of the consumer becoming "more confident purchasing online",[289] and another that "e-commerce has been attracting new customer segments".[290]

7.177 Some retailers noted impacts which had increased competition in online retail. Zalando noted the "increased importance of [✂].[291] [✂][292] and Farfetch said that COVID-19 has accelerated the convergence between physical and online retail within luxury fashion, with physical retailers investing in and growing its online offerings (and developing increasingly digital in-store experiences), while e-commerce retailers and digital-native brands are launching or developing physical retail offerings.[293]

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284 [✂]
285 [✂]
286 [✂]
287 [✂]
288 [✂]
289 [✂]
290 [✂]
291 [✂]
292 [✂]
293 [✂]

7.178 [✄].[294]

7.179 [✄].[295]

7.180 Amazon said many retailers significantly ramped up their online offerings in response to the lockdown. It said there has been and remains intense competition during the pandemic, and it has been striking how quickly many retailers have delivered new compelling services.[296] Amazon highlighted the acceleration of a trend towards omni-channel offerings (i.e. online and brick-and-mortar offerings), with "established retailers … growing the digitized aspects of their business models in a number of ways"[297], including consumers who are buying online and collecting in a physical store.

7.181 Amazon said it is constantly working to expand its product offerings, including its selection of footwear in the UK, and improving the experiences of selling partners and customers on Amazon's stores.[298] [✄].

Suppliers' plans for DTC

7.182 Nike and adidas have publicly announced targets to significantly increase their proportion of DTC sales in future, and therefore to reduce the proportion of sales made through their wholesale channel (ie their retail partners).[299] Growth in DTC sales of the magnitude set by these large suppliers may materially affect retailers' sales of Nike and adidas products. We therefore present the evidence on this below.

Parties' Views

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

7.184 The Parties submitted that the increase in DTC will necessarily [✄], for example, stating that: "[✄]."[300]

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294 [✄]
295 [✄]
296 [✄]
297 [✄]
298 [✄]
299 [✄]
300 [✄]

7.185 The Parties have also pointed to the consequential impact of the strategy to increase DTC on the wholesale strategy of the suppliers, stating that there has been "a rise in progressive disintermediation made public by the brands where, linked to their confidence in the growing DTC share of access to consumers, Nike and adidas cut out the "middleman" by dropping, or allocating less stock to, those less important third party retailers who do not offer the brands sufficient incremental value to reach new customers. At a time when, as DTC's share progressively expands, the wholesale channel's share of total sales progressively declines."[301] The risk [✂] by the brands is discussed in Chapter 10.

7.186 JD Sports has also [✂].[302] JD Sports further stated that "[✂]."[303]

Evidence from Suppliers

7.187 Nike has confirmed that its strategy in the UK will be as a part of its EMEA-wide strategy, and currently forecasts the proportion of its total UK footwear sales accounted for by DTC sales to increase from [✂] in Nike fiscal year 21 to [✂] in Nike fiscal year 24 (with the respective proportion for apparel currently forecast to increase from [✂] to [✂] over the same period).[304] Nike stated that it sees most growth of DTC as coming from "growing the pie'", stating that this applies similarly both in the UK and in EMEA.[305]

7.188 [✂],[306] [✂].[307] adidas also highlighted its expectation that [✂].[308] adidas noted that [✂]".[309]

Future product allocations

7.189 As discussed in detail in Chapter 6, the suppliers in the relevant markets play an important role in controlling the products made available to retailers, and these allocations differ between different categories of retailer, and in some cases between different tiers of retailer within a category (see paragraph 6.24). Chapter 6 discussed the general importance of suppliers' selective distribution policies on retail competition. In addition, paragraphs 7.41 to 7.65 presented the evidence on how those policies currently affect competition between the Parties and their rivals (footwear-specific information is set out in

[301] Initial Submission p2.
[302] Initial Submission p22
[303] [✂]
[304] [✂]
[305] [✂]
[306] [✂]
[307] [✂]
[308] [✂]
[309] [✂]

chapter 8 at paragraphs 8.13 to 8.23 and apparel-specific evidence is set out in chapter 9 at paragraphs 9.13 to 9.14). This section presents the evidence on what we know about any upcoming changes to those policies and certain data on Footasylum's potential future allocations which informs our assessment of whether retail competition is likely to be altered as a result.

Parties' views

7.190 As detailed above, the Parties have expressed concerns that the increase in DTC sales and an anticipated increased tightening of selective distribution arrangements from the key brands, will [✂].[310] From paragraph 7.210 below we look in detail at the data on Footasylum's future product allocations.

7.191 The Parties suggest that [✂].[311]

7.192 Footasylum's internal documents show that between January 2021 and September 2021 Footasylum's overall budgeted revenue for FY21/22 changed from £[✂] to £[✂].[312] We note that Footasylum's actual revenue from Nike apparel and footwear for Q1 2021/22 was [✂] and Q2 was higher [✂] compared to its budgets for those periods [✂] compared to its budgets for those periods. Overall, Footasylum's annual revenue from Nike apparel and footwear is expected to [✂] by only £[✂] to £[✂] from budget to the new reforecast for 2021/22.[313] Further, we also note that compared to two years ago (ie comparing 2019/20 actual with 2021/22 actuals for Q1 and Q2 and new reforecast budgets for Q3 and Q4) Footasylum's revenue from Nike apparel is expected to [✂], and Nike footwear is expected to [✂].

7.193 JD Sports has also [✂]. [✂].

Evidence from third party retailers

7.194 As discussed above, some third-party retailers have expressed concerns about the potential for suppliers to restrict allocations in future. In addition to concerns about current changes in its allocations, [✂][314]

7.195 Sports Direct has referenced [✂] public statements, and expressed concerns that in the future [✂][315] Sports Direct highlighted its elevation strategy as its only way to [✂].

[310] By contrast, JD Sports has [✂]. JD Sports has [✂]. [✂]
[311] [✂]
[312] [✂]
[313] [✂]
[314] [✂]
[315] [✂]

Evidence from Suppliers

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

(a) adidas has stated that: '[✂]'.

(b) Nike has noted that: 'Nike intends to continue to rely on third-party retail partners' acknowledging that they 'provide the complementary multi-brand experience preferred by many consumers'. In a public statement relating to Q4 FY21 (excerpts of which the Parties have highlighted as showing Nike's commitment to retailer consolidation), Nike stated 'Our goal isn't merely to take market share. Our goal is also to <u>grow the entire market</u>.'[316]

7.197 [✂]. Nike stated that it "expects the wholesale sales of its UK retail partners to continue to grow overall."[317] adidas stated that "[✂]".[318]

7.198 However, we consider that the evidence, including in particular Nike's and adidas's recent public statements, indicates that those suppliers are reducing the number of their wholesale partners and that their wholesale supply strategies will continue to be focussed on certain [✂] accounts.

7.199 Consistent with the above, adidas's current forecasts indicate that between 2019 and 2025, [✂][319] [✂]

7.200 Restrictions in allocations can also impact specific high demand products, or where there are short-term supply shocks. As set out further in paragraphs 7.214 to 7.220, Nike has explained that many of the specific instances of [✂] over the last 12-18 months have been [✂] and other retailers [✂].

7.201 As regards Footasylum in particular:

(a) Nike has no current plans to [✂].[320]

(b) adidas has not identified any [✂][✂][✂].

[316] [✂]
[317] [✂]
[318] [✂]
[319] [✂]
[320] Nike confirmed that there was no change to this position in [✂].

7.202 Overall, the evidence from Nike indicates that revenue from sales to Footasylum has [✂] since 2019. Nike has also forecast [✂] Footasylum's revenue for Nike FY22.[321]

7.203 adidas has also forecast that [✂].

7.204 Footasylum has [✂], where Footasylum has been able to [✂] (although at a [✂] discount).[322] Nike confirmed that, while availability on Nike.net is likely to fluctuate in general, including as a result of general supply issues such as those anticipated to impact [✂] (see paragraph 7.214), Nike "has no plans to reduce the availability of stock on Nike.net over the next 1-3 years. [✂]."[323]

Data on Footasylum product allocations from [✂]

7.205 Given the importance of Nike products to Footasylum's offering, we assessed in detail the evidence relating to the Parties' submissions that Footasylum has [✂]. The Parties have not made similar submissions in relation to Footasylum's supply of adidas products (see paragraph 7.46) which is consistent with the evidence from adidas which broadly shows that [✂].[324] We assess Footasylum's past received volumes of Nike footwear products from paragraph 8.13, while below we discuss Footasylum's future expected allocations of Nike footwear and apparel products.

General framework for analysing product allocations

7.206 The Parties have provided detailed information concerning the product allocations that Footasylum has received from Nike, in some cases comparing these across different time periods, and in some cases comparing these to the allocations received by JD Sports. Footasylum has also provided detailed data on its recent supply of Nike footwear and apparel.

7.207 As part of their response to the Provisional Report, the Parties submitted that the information and data they have provided on allocations should be assessed by reference to the following three key metrics:[325]

(a) The initial allocation. This is a fixed amount which Nike communicates to each of its retail partners approximately 6-9 months ahead of the relevant quarter. Nike provides an initial allocation for each product made available, including 'allocated' products (for which Nike determines a

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321 [✂]. Note that these are sales of [✂] products to each retailer, combining footwear and apparel.
322 [✂]
323 [✂]
324 [✂].
325 Parties response to the Provisional Report, paragraph 36.

specific volume made available to each retail partner) and 'non-allocated' products (for which retailers can request any amount of volume).[326] [✂].

(b) The expected allocation. This is an amount which captures any revisions to the initial allocation communicated to the retailer in advance of delivery (if no such revisions are made, the expected allocation is equal to the initial allocation). The expected allocation can change at any point between notification of the initial allocation and delivery (ie when received volumes crystallise).

(c) The received volumes. This is a fixed amount equivalent to the volume of product actually received by the retailer for sale in a specific quarter.

7.208 The Parties further submitted that, [✂].

7.209 In response to the framework we emphasise the following points, including some limitations applicable to those metrics:

(a) Received volumes are a crucial metric in determining the competitive position of Footasylum (and other retailers) as these are ultimately what is available to consumers and shape the retail offering. We therefore consider comparisons of Footasylum's (and other retailers') received volumes across different periods to provide direct insight into any change in competitive position. As received volumes are by definition not available for future periods, like-for-like comparisons are only possible across different historical periods.

(b) We recognise that since the start of the COVID-19 pandemic there have been substantial impacts on supply chains, including Nike's, which have reduced the number of products[327] available (sometimes unexpectedly and at short notice). [✂]. We note that it remains uncertain how much longer and to what extent COVID-19-related supply issues will continue to impact allocations.

(c) Taking account of the above, we recognise that it is not appropriate to assume that a given retailer will ultimately receive volumes of Nike products in future periods equal to its expected or initial allocations. On the same basis, we consider that any attempt to estimate for future periods the extent to which a given retailer's received volumes will be lower (or higher) than their initial or expected allocations would be too

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[326] For further detail on the distinction between 'allocated' and 'unallocated' products, see paragraphs 7.53 and 7.215.
[327] Nike has clarified that these reductions can impact both allocated and unallocated products, as these products are treated in exactly the same way in the production and delivery process.

uncertain to be reliable (for instance the difference between initial allocations, expected allocations and received products varies significantly between each quarter, as can be seen in Figure 2).

7.210 In this section we consider the future Nike product allocations for Footasylum using the framework set out in paragraph 7.207. Any insights from looking at this data, which we think are limited, as discussed below, are based on the relatively near future, given allocations are only decided 6-9 months in advance and as such Footasylum [✂].

7.211 Footasylum has provided data [✂].[328] In order to assist our interpretation of that data we obtained further data from Footasylum, which we set out below (see Figure 2, with the total footwear allocations [✂]). We consider that overall this shows that [✂].

Figure 2: [✂] [329]

[✂]

7.212 For [✂] Footasylum have made submissions explaining that initial allocations [✂]. In particular:

(a) Footasylum stated that its Nike allocations [✂] compared to the same period [✂].[330] Footasylum stated that these changes [✂].[331]

(b) The Parties also provided an analysis of Footasylum's Nike initial allocations for [✂]. The Parties have interpreted certain products labelled as [✂], and on that basis have assessed that Footasylum's initial allocations [✂] for the same periods.

(c) The Parties have also provided updated information from Nike which set out an estimation by [✂], [332] and later information from Nike that altered this to [✂], across certain segments of footwear, apparel and accessories products.[333] These [✂] primarily impact footwear, and our analysis of their impact is detailed below. Footasylum has stated that it expects to receive information [✂]).[334]

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[328] [✂]. We analyse separately Footasylum's purchases on Nike.net.
[329] The data provided here is for Total Units of footwear. [✂]
[330] [✂]
[331] [✂]
[332] [✂]
[333] [✂] We note that in the latest information from Footasylum, [✂].
[334] [✂]

(d) The Parties also provided data on impacts on JD Sports in [✄]. The Parties' analysis of the latest information from Nike, which includes only the product segments for which Nike provided information, compares the [✄] for Footasylum with a [✄]% for JD Sports.[335]

(e) Finally, Footasylum also detailed larger impacts [✄].[336]

7.213 We have assessed the product allocation data Footasylum submitted and sought to understand Nike's position on product supply.

7.214 Nike submitted in September 2021 that a number of its factories in Asia were currently closed and had been since August 2021 due to recent COVID-19 related lockdowns in those areas, which was expected to result in market-wide (ie affecting both its Strategic and non-Strategic partners) supply shortages affecting [✄], and which would be communicated to retail partners [✄].[337] Nike specified that it had consequently [✄].[338] [✄].

7.215 In relation to the use of 'unallocated' terminology, [✄] has clarified that the use of the 'unallocated' terminology applies to product styles that are not subject to the practice of 'allocating' finite quantities of stock which applies to some high demand products, and that there was no difference in the likelihood of products being delivered (or not) between the 'unallocated' and 'allocated' categories.[339] Nike has further clarified that the process by which it determines which products will be 'allocated' versus 'unallocated' in future selling seasons is typically informed by a range of consumer-driven factors and as such is partner-agnostic (it also confirmed there was no difference in approach between retail partners, including between its Strategic and non-Strategic Partners). It noted that in its experience many of its retail partners were generally aware - irrespective of any communication from Nike - of which Nike products were more likely to be classified as 'allocated' in a given season, as many retail partners already have an understanding of certain consumer-driven factors on which Nike bases its decisions in that context. Finally, it clarified that this process was entirely separate from the process by which it determines the volumes of allocated products that will be made available to each of its retail partners in future selling seasons.[340] We consider

[335] Parties Response to Provisional Findings, p17.
[336] Parties Response to Provisional Findings, paragraph 55 to 57.
[337] Nike noted that it is currently facing "ongoing acute supply challenges … which are having a significant impact on the volumes of product available", due to rising levels of COVID-19 infection in Asia, and particularly Vietnam, leading to a reduction in Nike's overall manufacturing capacity. Nike has stated that it is anticipated that Nike and its retail partners "across all geographies and channels (including in the UK) – will experience delays in supply for [✄]. [✄].
[338] [✄]
[339] Nike has further clarified that the production and delivery processes for allocated and unallocated products is the same. [✄].
[340] [✄]

that the evidence set out above does not support the Parties' submission that [✄].

7.216 Taking into account Nike's position as set out above, we consider that it is not appropriate to make a distinction between the two product categories (ie allocated and unallocated) in our analysis of Q4 2021 and 2022 data. In addition, in relation to Q4 2021, while the [✄] shows a [✄] compared to its [✄] in the same period in 2020, in Q4 2020 Footasylum experienced [✄] in [✄] compared to the [✄] for that period. Footasylum's current [✄] for Q4 2021 is in fact [✄] than the latest [✄] for Q4 2020. For the reasons set out in paragraph 7.209 it remains uncertain, even at the start of the quarter, whether there might be [✄] Q4 2021 given the quarter is not yet complete. We therefore cannot estimate with sufficient certainty what Footasylum's [✄] are likely to be for this period – but equally there is no evidence to suggest there will be a [✄] fall in [✄] compared with Q4 2020.

7.217 Reflecting the [✄] which have been communicated to Footasylum at this stage (from initial to [✄]), we have calculated that there is a [✄] in the overall footwear volumes that Footasylum is [✄] for [✄][341] compared to the [✄] from Nike, and a [✄] in apparel ([✄]).[342] While these [✄] are currently [✄] than Footasylum's [✄] in Q1 of the preceding three years, for the reasons set out in paragraph 7.209 we have not assumed that Footasylum is likely to [✄] its current [✄] in [✄]. Indeed, we note that Footasylum has not yet received information on some important categories of products, and it appears likely that the situation will remain fluid as Nike adapts allocation plans to changing circumstances in its supply chain (ie in fact, we consider it likely there could be [✄] to its allocations for that period). Taking into account the above, it is not possible to estimate with sufficient certainty what the [✄] may be [✄].

7.218 In terms of the comparative impact of Nike's supply issues on JD Sports' allocations for [✄], while [✄] JD Sports' current expected allocations involve a [✄] reduction compared to its initial planned allocations for that period. This is consistent with the evidence from Nike indicating that its supply chain issues are anticipated to result in [✄] for all channels, including Nike DTC and its Strategic Partners. It follows from the above that the relative impact on Footasylum's competitive position of its [✄] allocations for [✄] than might be the case if such [✄].

7.219 In relation to the Air Force 1 and Air Jordan 1 franchises, Footasylum's submissions on its communications with Nike indicate that there will be a [✄] in [✄] than across all Nike footwear. These are also [✄]. However, we

[341] [✄]
[342] CMA analysis of [✄]

consider that any such impact on specific franchises would need to be particularly severe and over a sustained period to prevent Footasylum from competing effectively given there are [✂] of different Nike footwear lines that Footasylum sell. Even if these two franchises are the most important for driving footfall, they are not the only two that are important at any given point in time. However there are certain difficulties with measuring the importance of a franchise in driving brand and footfall. For instance, among other things, demand for particular footwear lines varies over time, there are different colourways, new items and exclusives and retailers may have different views on the importance of a particular franchise (for further detail, see paragraphs 8.22 and 8.23). We therefore consider that an overall assessment of Footasylum's footwear product allocations provides a more robust indication of its competitive position than assessing specific franchises.

7.220 As noted above, Nike has also stated that it anticipates COVID 19-related impacts on its ability to supply its products in [✂]. Nike has provided an initial footwear allocation to Footasylum for [✂], which is [✂]. [✂].[343]

8. Evidence relevant to footwear

Introduction

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

8.2 This chapter sets out the evidence relevant to how closely the Parties compete and how closely they and rival retailers compete in the retail supply of sports-inspired casual footwear. We present the evidence on:

(a) The importance of different brands in the Parties' sales of footwear;

(b) The proportion and rankings of each retailer's overlap with JD Sports and Footasylum with respect to Nike and adidas footwear products;

[343] Footasylum provided the CMA with a voluntary submission containing updated information in relation to its expected allocations for [✂]. In accordance with Footasylum's previous submissions on reductions to its allocations for Q1 2022, the CMA has interpreted these product categories as encompassing all allocated and unallocated products from Nike for that period (see paragraph 7.32). Footasylum also highlighted [✂]. [✂]. The CMA considers that, as regards the overall allocations, Footasylum's submission corroborates the evidence provided by Nike in relation to the COVID-19 related supply issues which it has anticipated will lead to substantial adverse impacts on allocations for all channels in the near term and [✂], with retailers to be notified of reductions [✂] (see paragraph 7.189). [✂]. As such, taken at face value, Footasylum's submission is consistent with the evidence set out in Chapter 7.

(c) The diversion ratios calculated from our Remittal Online Survey (ie the proportion of other retailers selected by the Parties' customers as their best alternative);

(d) The GUPPI that we have estimated;

(e) Market shares; and

(f) Sales forecasts for the Parties.

Importance of the brands

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

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

	JD Sports		*Footasylum*
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
[✂]	[✂]	[✂]	[✂]
Other	[✂]	Other	[✂]
Total	100%	Total	100%

Note: Nike owns the Jordan and Converse brands
Source: CMA analysis of the Parties' data.

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

Product overlaps

8.5 We assessed the extent to which Nike and adidas footwear products sold by each Party are also sold by other retailers to show the Parties and their competitors overlap in terms of footwear products offered. We used Nike and adidas footwear products as these are the two largest suppliers of sports-inspired casual footwear to the Parties. The data used for this analysis was supplied by Nike and adidas and is for the six months to March 2021. The overlaps are expressed in two ways: as a proportion of their value (sales-weighted)[344], and as a proportion of the number of products sold.[345] [346][347]

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

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

Retailer	Proportion of JD sales	Proportion of JD products
JD Sports		
[✂]		
[✂]	71%	66%
[✂]	58%	43%
[✂]	54%	29%
[✂]	41%	28%
[✂]	39%	32%
[✂]	32%	25%

Retailer	Proportion of FA sales	Proportion of FA products
Footasylum		
[✂]		
[✂]	92%	87%
[✂]	87%	76%
[✂]	81%	64%
[✂]	53%	40%
[✂]	50%	43%
[✂]	44%	32%

Source: CMA analysis of data received from Nike and adidas.
Note: * refers to the total number of products sold by the Parties.

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

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

8.9 Table 4 shows the results for adidas's products.

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

[344] For example if JD Sports sold 300 Nike products with a value of £39,000 and JD Sports and Footasylum sold the same 150 Nike products, with a value of £18,000 for JD Sports, the overlap would be 46% (18,000/39,000).
[345] For example, if JD Sports sold 300 Nike products and JD Sports and Footasylum sold the same 150 Nike products, the overlap would be 50% (150/300).
[346] Whether expressed as a sales-weighted proportion or simply as a proportion of the number of products sold, this attempts to understand whether the Parties and other retailers sell the same range of Nike and adidas products. However, this does not measure whether different retailers sell the same proportions of different items; for instance, if a retailer sells (or has in stock) just a single unit of an item, it would still count as an overlap.
[347] This analysis does not include Nike and adidas DTC. Nike DTC has total product overlap with both Parties for Nike footwear, and adidas DTC has total product overlap with both Parties for adidas footwear.

Retailer	Proportion of JD sales	Proportion of JD products
JD Sports [✂]		
[✂]	22%	27%
[✂]	19%	23%
[✂]	19%	24%
[✂]	16%	14%
[✂]	14%	10%
[✂]	13%	9%

Retailer	Proportion of FA sales	Proportion of FA products
Footasylum [✂]		
[✂]	72%	48%
[✂]	67%	59%
[✂]	67%	42%
[✂]	62%	33%
[✂]	48%	20%
[✂]	45%	32%

Source: CMA analysis of data received from Nike and adidas.
Note: * refers to the total number of products sold by the Parties.

8.10 For the adidas footwear products sold by JD Sports, Table 4 shows that, on a sales-weighted basis, [✂] has the highest product overlap with JD Sports, followed by [✂]. Footasylum has the [✂] overlap with JD Sports on a sales weighted basis. Footasylum's overlap of adidas footwear products with JD Sports is [✂] in percentage terms, using either methodology.

8.11 For the adidas products sold by Footasylum, Table 4 shows that, on a sales-weighted basis, [✂] has the highest product overlap, followed by [✂] and [✂]. JD Sports has [✂] product overlap with Footasylum on a raw product count basis. Using either methodology, JD Sports' overlap with Footasylum is [✂] than Footasylum's overlap with JD Sports, in both percentage terms and ranking.

8.12 Appendix C shows further detail including the comments from the Parties and our responses.

Nike footwear product allocations

8.13 Footasylum has provided quarterly data [✂] to the latest quarter for which data is available, including upcoming forecasts. This data includes both [✂] (see paragraphs 7.215 and 7.216).[348] As outlined above, this data includes the number of items in [✂].

8.14 Our analysis of this data (see Figure 2) shows that with few exceptions since [✂], Footasylum has experienced [✂] in the number of its received volumes of footwear products [✂]. Some of these [✂] were communicated in advance (ie impacting [✂]), while some [✂] were experienced by Footasylum at the point items were received (ie impacting [✂]). [✂].

8.15 These [✂] Footasylum's submissions to us have focussed on the [✂] and the related communications from Nike concerning [✂] (see following two paragraphs). As discussed above, we consider that the [✂] are a direct means of assessing Footasylum's competitive strength (paragraph 7.209).

[348] [✂]

These [✂] have been significant supply shocks during the COVID-19 pandemic, [✂] (paragraph 7.53). These issues are also addressed in our analysis of anticipated future allocations (from paragraph 7.210).

8.16 We have considered the Parties' submission that Footasylum's "[✂]."[349] In support of that submission, the Parties have highlighted the [✂] (including for specific franchises) discussed in more detail below and [✂].[350]

8.17 We considered that the evidence received from Nike does not support a finding that, notwithstanding the [✂]:

(a) Nike has confirmed that it is [✂] allocations and which has been in place at least throughout the pandemic (ie it was established before November 2020). However, it has also confirmed that [✂] is on a par with [✂] (see paragraphs 7.56 to 7.60).

(b) While Footasylum had [✂] [✂].

(c) Nike has submitted that it considers [✂] (see further paragraph 7.57).

(d) In addition to the above, we note a Footasylum document '[✂]'.[351]

8.18 The Parties have also stated that "[✂], so far, relate to [✂]. As such, [✂][352] at paragraphs 10.56 to 10.99.

8.19 While the [✂] for [✂], data is now available for [✂] for [✂]. In relation to [✂]. We note that there would need to be [✂] (which we have recognised is possible) during the course of the [✂].[353]

Key franchises

8.20 The Parties have highlighted that there are key franchises (e.g. Nike Air Force 1 and Nike Air Jordan 1) in relation to which Footasylum has [✂]. The Parties consider that these [✂] are particularly important when considered in the context of [✂] more broadly as they are indicative of [✂] [✂]. Furthermore, these [✂] for brand perception with consumers within Footasylum's target demographic.[354] In relation to this second point, we understand this means

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[349] Parties response to Provisional Findings page 14
[350] [✂]
[351] [✂] (Parties' Initial Submission, page 23).
[352] [✂]
[353] [✂]
[354] Parties response to Provisional Findings, paragraph 7.

these franchises can be particularly important in drawing customers to a store/online and driving other purchasing [✂]: [355]

(a) [✂];

(b) [✂]; and

(c) [✂].

8.21 In relation to some of the [✂], Nike provided details of COVID-19 related capacity constraints or demand changes which had led to reductions in allocations, and confirmed that these reductions were decided in line [✂] (as set out in paragraph 7.53). Nike confirmed that overall [✂].[356, 357] Nike confirmed in relation to some of these products that it did not anticipate that restrictions would continue in the future, [✂].[358] The impacts on future periods submitted by the Parties are discussed from paragraph 7.212.

8.22 We recognise that certain franchises will be more important than others for driving Footasylum's brand and footfall. However, we do not consider that a more detailed quantitative analysis on specific individual franchises can be done robustly and we note the Parties have not submitted any framework which in their view would enable this to be done. In our view, this is because there are certain difficulties with measuring the importance of a franchise in driving brand and footfall in relation to other franchises, including:

(a) Demand for specific footwear lines varies over time [✂].[359]

(b) Within specific franchises there are key colourways or brands that can be particularly important, and these change according to demand patterns.[360]

(c) New items and exclusives can also be particularly important, with the exact timing of release being a draw to highly motivated customers.[361]

(d) Retailers may have differing views on the importance of a particular franchise and may as a result market them in differing ways; equally, consumers in different segments or geographic areas may value a specific franchise differently.

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[355] [✂]
[356] [✂]
[357] For instance, Air Max 97 and the Vapor Max EVO use thermoform airbags that were subject to severe capacity constraints, and all retailers aside from Nike's global partners received zero or very limited volumes. But in the SP21 selling season Footasylum did received some volumes while Office did not.
[358] [✂]
[359] Nike has stated that [✂]. [✂]
[360] See CMA's Phase 2 Final Report, Chapter 2, paragraph 2.10.
[361] See for example [✂] (paragraph 7.166).

8.23 We therefore consider that an overall assessment of Footasylum's footwear product allocations provides a more robust indication of its competitive position than assessing specific franchises (which also recognises that although some franchises see greater reductions, others may see smaller reductions or even increases). Given the number of different Nike footwear products sold by Footasylum ([✂]), and that it sells various other brands and that apparel forms a significant proportion of its overall offering, we also consider that [✂] would need to be [✂] over a sustained period to prevent Footasylum from competing effectively.

Survey Evidence

8.24 As part of the evidence gathering for the Remittal we commissioned a survey of the Parties' online customers. This survey – the Remittal Online Survey – was based on a list of contact details of customers who had placed orders with either party that were dispatched between 18 April and 1 May 2021.[362] This was after most non-essential shops in the UK had re-opened following a period of lockdown. Fieldwork for the Remittal Online Survey took place between 10 May and 23 May 2021 and 691 and 634 survey responses were received from JD Sports and Footasylum customers respectively, representing response rates of 7% among JD customers and 6.4% among Footasylum customers.[363] We regard the Remittal Online Survey as providing robust evidence for the Remittal.[364]

8.25 Appendix G discusses the Parties submission on the Remittal Online Survey.

8.26 A survey of the Parties' online customers was conducted during the Phase 2 inquiry (the Phase 2 Online Survey). The CMA's Phase 2 Final Report noted that because the response rates in that survey were lower than the 5% minimum threshold set out in the CMA's best practices document, it did not give full weight to the results in the CMA's Phase 2 Final Report.[365] Given we have more recent and robust results from the Remittal Online Survey, we have not relied on these results in the Remittal, although we do refer to some of the diversion ratios from that survey for comparison purposes below.

[362] See 'Survey of online retail customers for a merger inquiry: JD Sports and Footasylum', DJS Research, June 2021 for a full account of the survey methodology and main findings.
[363] All these figures relate to the half of the sample that were incentivised with a £5 online voucher. Response rates for the non-incentivised half of the sample very low and responses from this sample have not been used in any of the analyses.
[364] This means that we are not applying the same caveats and caution about applying evidential weight as were applied to the survey of online customers conducted for the Phase 2 Inquiry for which the response rates were much lower.
[365] Good practice in the design and presentation of customer survey evidence in merger cases (CMA78)

8.27 As explained in Chapter 4, we decided not to commission a new survey of the Parties' in-store shoppers during the Remittal given the continuing impact of COVID-19 restrictions. We consider that the Phase 2 Exit Survey of in-store shoppers, conducted in November 2019 as part of the CMA's Phase 2 Inquiry[366] has remained relevant and we have placed weight on the results of that survey in the Remittal. We note in particular that many stores have been shut for much of the period since the Phase 2 Exit Survey was conducted due to the COVID-19 pandemic restrictions, none of the main competitors to the Parties have exited the market and there have been no significant new entrants. We therefore consider there to have been no significant structural changes in the in-store part of the market since the time of the Phase 2 Exit Survey that would render the results of the survey uninformative for our purposes. We also note that the Parties submitted that we should not conduct a new exit survey during the Remittal. We do, however, recognise that there have been changes in the online segment and these may have an impact on, for example, the propensity of in-store shoppers to divert to different online alternatives as their next best alternative. We have therefore included, in Appendix H on GUPPIs, some sensitivity analyses around our estimates which consider some of these changes.

Diversion ratios

8.28 Diversion ratios show the percentage of shoppers who would go to a specific different retailer if their first choice was unavailable.[367] We have measured diversion directly from the Remittal Online Survey which shows that 9% of online footwear customers from JD Sports would divert to Footasylum (Table 5). This has nearly halved since the Phase 2 Online Survey from which diversion was estimated to be 16%. From our Phase 2 Exit Survey we estimated that 21% of JD Sports' in-store footwear customers would have diverted to Footasylum; 4% to its online offering and 17% to its stores (Table 6).

8.29 Our Remittal Online Survey showed that 43% of Footasylum's online footwear customers would divert to JD Sports (Table 5), down from 46% in our Phase 2 Online Survey. From our Phase 2 Exit Survey we estimated that 68% of Footasylum's in-store footwear customers would divert to JD Sports; 11% online and 57% to JD Sports stores (Table 6).

366 'Exit Survey retail of retail customers for a merger inquiry', DJS Research, January 2020

367 All diversion ratios used in this report are not weighted by how much the customer spent, do not allow own party diversion (ie for shoppers to switch to a different brand or a different store under the same ownership) and are based on the full sample (ie are not restricted to, for example, price marginal customers).

8.30 Table 5 shows that for 69% of Footasylum's online shoppers', the next best alternative is another online retailer, with 23% diverting to an in-store option. JD Sports is by far the closest competitor in both channels, receiving 43% of overall diversion, with Nike the next closest at 13% and Foot Locker at 8%.

8.31 Among JD Sports online customers, 70% gave an online retailer as their next best alternative while 21% diverted in-store. Nike was the strongest competitor receiving 23% of diversion, nearly all of which was online, with adidas and Foot Locker both receiving 11% of diversion and Footasylum receiving 9% (Table 5).

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

%

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

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

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

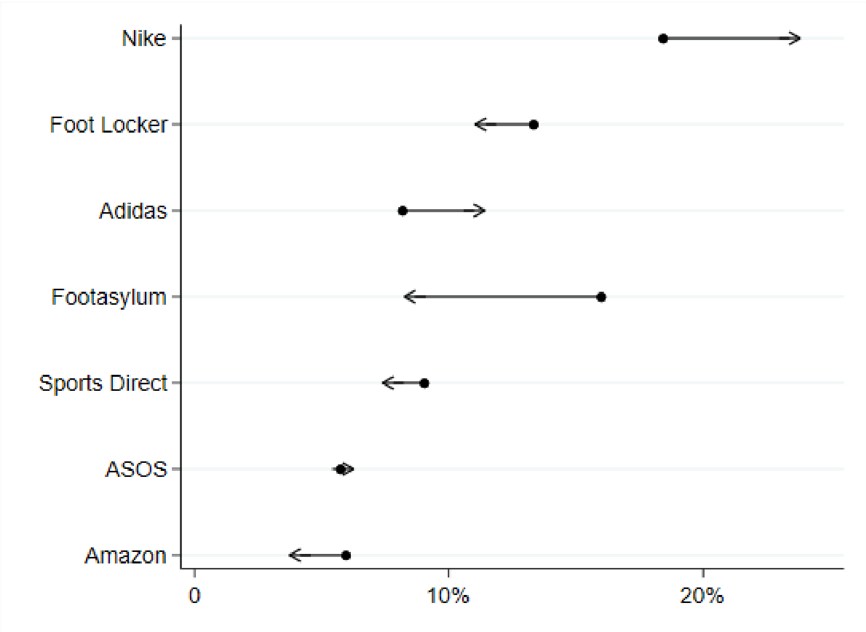
%

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

Source: CMA Phase 2 Exit Survey
Note: No spend-weighting was applied. Own-party diversion was excluded. Fourteen percent of JD Sports customers and 12% of Footasylum customers would not make a purchase

8.32 Figure 3 shows the changes in diversion ratios for JD Sports between the Remittal Online Survey and the Phase 2 Online Survey. It shows the fall in the share of diversion to Footasylum and the corresponding rise in diversion to Nike and adidas. While in the Phase 2 Online Survey Footasylum was the second closest competitor, not far behind Nike, in the Remittal Online Survey Footasylum was the fourth closest competitor with Nike clearly the strongest competitor.

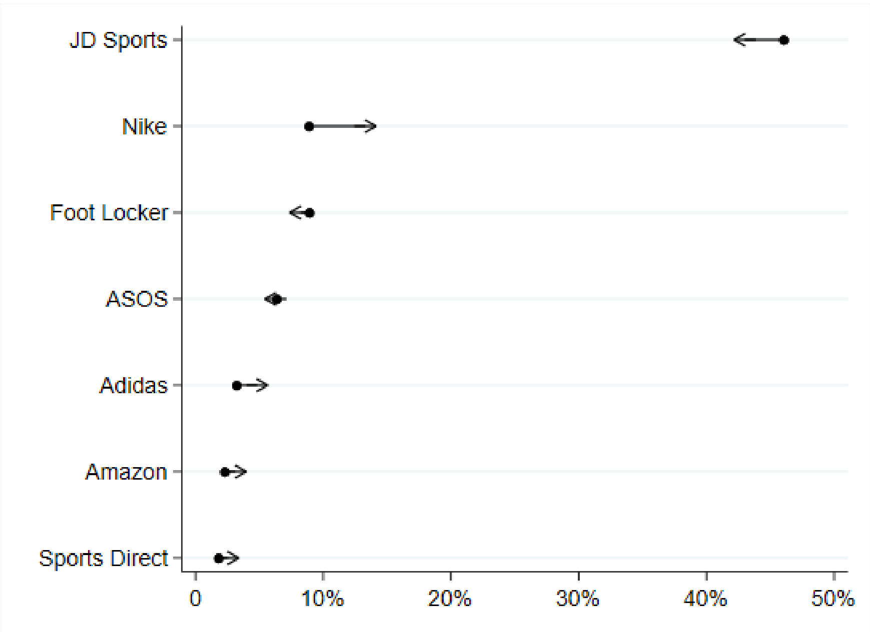
Figure 3: Change in online JD Sports customer diversion: footwear



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

8.33 Figure 4 shows the equivalent comparison for Footasylum customers. While it shows that diversion to both Nike and adidas have risen between the two surveys, JD Sports is still by far the closest competitor.

Figure 4: Change in online Footasylum customer diversion: footwear



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

GUPPIs

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

Parties' submissions

8.35 The Parties made a number of submissions related to the use of GUPPIs in the assessment of the competitive effects of the merger. These were focused around three areas:

(a) the level of the GUPPI;

(b) the static nature of the GUPPI; and

(c) that the GUPPI assessment did not take account of certain counteracting incentives.

8.36 In relation to the level of the GUPPI, the Parties[368] set out their own GUPPI analysis.[369] They also made the following points in relation to the level of the GUPPI:

(a) The threshold of concern for GUPPIs should not be set as low as it was in groceries in *Sainsbury's/Asda* due to differences in the type of market.

(b) The CMA has recognised the need to account for uncertainty in previous cases, for example in *Sainsbury's/Asda* where the CMA allowed for 0.5% to account for uncertainty in convenience grocery.[370]

(c) If Footasylum were [✄], the GUPPI would be zero at that point.

(d) Footasylum is [✄], and so the GUPPI must be assumed to materially overstate the incentives on JD Sports.[371]

8.37 In relation to the static nature of the GUPPI, the Parties made a number of submissions related to the GUPPI being a static assessment and that

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[368] [✄]
[369] See Appendix H for a discussion of the GUPPI analysis.
[370] We note that the uncertainty in that example was around the methodology used in the calculation of the GUPPI.
[371] The Parties submitted that capacity constraints are also binding on JD Sports. Parties' response to Provisional Findings, paragraph 158.

diversion ratios are likely to change over the next few years as a result of changes to the market (including due to the growth of DTC, disintermediation and the growth of digital).[372]

8.38 In relation to the point that the GUPPI assessment did not take account of certain counteracting incentives, the Parties submitted a list of five strategic considerations which they believe would restrain Footasylum from acting on the incentives implied by any particular level of GUPPI.[373]

(a) Worsening PQRS as implied by GUPPI would be [✂];

(b) Worsening PQRS as implied by GUPPI would make [✂];

(c) [✂];

(d) Acting on the GUPPI incentive necessarily involves increasing the sales made by others (whether DTC or other retailers), which the Parties argue could strengthen these retailers' short-term importance to the brands and help them secure allocations.[374]

(e) The relative diversion ratio from Footasylum to JD Sports compared to the brands [✂].

8.39 Finally, the Parties submitted that "the most acute issue on the Footasylum side [✂]. That constraint is [✂]. Were JD Sports to worsen the offer of Footasylum it would presumably [✂]".[375] The parties submit that the GUPPI framework does not account for this.[376]

8.40 In summary, in response to our Provisional Report, the Parties submitted that '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.'[377] The Parties submitted that they were not able to interrogate why, in the Provisional Report, we considered these factors to be speculative and the effects ambiguous.[378] The Parties claimed that a proper assessment of the strategic considerations arising from DTC growth on the Parties' incentives to

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[372] Parties' Supplementary SLC paper from 28th May, paragraph 4.3 and 4.9 to 4.26.
[373] Parties' response to Provisional Findings, paragraph 89. In the Parties' submissions following working papers the Parties had an additional point that was only relevant to whether JD Sports would worsen its offer. This was that customers have a [✂] to JD Sports after a hypothetical diversion to Footasylum due to [✂]. Given the nature of the findings in this report, we have not covered this point.
[374] Parties' Supplementary SLC paper from 28th May, paragraph 4.42
[375] Parties' Supplementary SLC paper from 28th May, paragraph 4.46
[376] [✂]
[377] Parties response to PFs, paragraph 92
[378] Parties response to PFs, paragraph 93.

deteriorate PQRS is essential to a meaningful interpretation of the incentives implied by the GUPPI.[379]

GUPPI estimates

8.41 We used diversion ratios estimated from the results of our Remittal Online Survey and variable margins based on data from the Parties during the Remittal to estimate GUPPIs for each Parties' online offering.[380] We estimate the GUPPI for JD Sports online offering to be [✄]%, while the GUPPI for Footasylum's online offering to be far higher, at [✄]%.

8.42 We also used the diversion ratios estimated from the Phase 2 Exit Survey with the variable margins based on data from the Parties during the Remittal to estimate GUPPIs for each of the Parties' in-store offerings. We estimate the GUPPI for JD Sports in-store offering to be [✄]%, while the GUPPI for Footasylum's in-store offering to be far higher, at [✄]%. However, we consider these in-store estimates to be the upper limit of a range of possible estimates, as we describe below.

8.43 We then weighted the online and in-store GUPPIs together, using recent proportions of total sales occurring online and in-store, to estimate combined GUPPIs.[381] This gave us a 'base' calculation which we regard as the upper limit of a range of possible estimates because we considered it likely that due to market developments since the Phase 2 Exit Survey, the in-store diversion ratios would have changed. We applied a sensitivity analysis to reflect those market developments, namely the growth of DTC online since November 2019, the possible strengthening of online offerings for in-store customers and the possibility that Footasylum may have weakened as an in-store alternative among JD Sports customers. In order to consider a range of sensitivities we applied some fairly extreme assumptions at the lower end (eg assuming a very significant increase in diversion to DTC and a significant decrease in diversion to Footasylum). The estimates cover a range of possibilities and as such, while we do not rely on specific GUPPI numbers, the range gives us a broad sense of the Parties' potential incentives.

8.44 Within the framework of the sensitivity analysis described above (and in more detail in Appendix H), we estimate a combined GUPPI in the range of [✄]% to [✄]% for JD Sports.

[379] Parties response to PFs, paragraph 99.
[380] The GUPPI calculation and methodology is explained in Appendix H.
[381] See Appendix H.

8.45 For Footasylum, using the online GUPPI, and in-store GUPPI based directly on the Phase 2 Exit Survey diversion, gives a 'base' combined GUPPI of [✂]%. We have not conducted a sensitivity analysis around this estimate, but note that even if we were to take the online GUPPI alone as a lower variant of the range of estimates for the combined GUPPI (which would be extreme as it would not include any in-store diversion component) it would still generate a GUPPI of [✂]%.

8.46 In relation to the specific points about the level of any GUPPI raised by the Parties in paragraphs 8.36:

(a) We agree with the parties that there are differences in the type of market compared to those considered in the *Sainsbury's/Asda* case. In that case, a GUPPI threshold was used as a tool as part of a decision rule to assess hundreds of local markets, whereas in this case we have not set GUPPI thresholds and our assessment is based on all evidence in the round, including GUPPIs.

(b) As we are not using a decision rule approach and therefore have not set thresholds, the need for specific uncertainty adjustments does not arise.

(c) We consider the most likely counterfactual to be one in which Footasylum [✂][382] and therefore one in which Footasylum continues to compete effectively.

8.47 The Parties submitted that capacity constraints can have an impact on the Merged Entity's ability to act on incentives arising from the Merger. The extent to which these constraints might arise is addressed in our assessment of the evidence on [✂] (see paragraphs 10.43 to 10.55). We note here, however, that the potential for these constraints is predominantly asymmetrical as JD Sports will only be supply-constrained to a certain extent, particularly given its position as [✂] (paragraph 6.28). Furthermore, JD Sports sells a range of products of which only some are capacity constrained by suppliers. JD Sports is therefore not uniquely constrained and in general, JD Sports has a more favourable position with suppliers than many other competitors, bar the suppliers' own DTC channels. Given that Nike controls capacity in terms of the supply of its footwear to JD Sports, if customers moved from Footasylum to JD Sports we would expect Nike to move allocations to JD Sports (assuming a separate allocation were maintained for JD Sports and Footasylum), if the Merged Entity were not able to move stock between the retail brands itself. Taking all these points together, we consider that the

[382] See Chapter 10

capacity constraints JD Sports faces on some products are unlikely to greatly impact on the Merged Entity's ability to act on incentives implied by the GUPPI and indeed any impact would be insignificant in comparison to the diversion recorded by the surveys.

8.48 We have also considered the Parties' submissions in relation to the static nature of the GUPPI and any counteracting incentives. We discuss this in the following paragraphs.

8.49 Whilst we note that the Parties made similar arguments regarding GUPPIs not accounting for the threat of reduced allocations and the loss of relevance to the brands in the CMA's Phase 2 Final Report,[383, 384] in the Remittal we have considered the extent to which the evidence has changed and whether this alters our assessment of these points. We considered in earlier sections the role of suppliers and how the Parties compete (Chapter 6). In particular we found that there are aspects of PQRS on which retailers compete and which suppliers do not monitor at all or do not influence (paragraphs 6.80 to 6.87). We therefore consider that, with respect to those aspects of PQRS, suppliers would not sufficiently constrain the Parties from acting on the incentives implied by the GUPPI estimates. In relation to Footasylum losing sales and therefore some of its retrospective discounts from suppliers, (regardless of the aspect of PQRS that may be deteriorated), we consider that this does not preclude worsening PQRS from still being a profitable strategy, as discussed in more detail in paragraphs 6.78 and 6.79.

8.50 We accept that our GUPPI estimates are reflections of the Parties' positions now and do not capture future market dynamics. As such, we recognise that substantial changes in this market could limit the relevance of findings derived from a static GUPPI. We have therefore undertaken a thorough and separate assessment of evidence on future competition which we consider in the round with all the evidence in Chapter 11. However, we consider for Footasylum in particular, that given the size of the GUPPI estimates based on current competition, the change in future competition would need to be significant because it would need to reduce the incentives to a level which do not raise concerns.

8.51 In considering the Parties' remaining strategic considerations (paragraph 8.38),[385] we believe there are two related overarching points, plus a number of points related to specific strategic considerations. Firstly, many of the Parties' considerations are related to the GUPPIs being static, and secondly,

383 See paragraphs 8.221 and 8.222 of the CMA's Phase 2 Final Report.
384 This was also the Parties first strategic consideration in paragraph 8.38 above.
385 Ie all but the first strategic consideration which is discussed in paragraph 8.38.

some points relate to the contention that “diverted” customers are [✂], or other retailers in the future. Therefore these points are both related to how competition will evolve in the future. As noted above, in reaching a view on whether there is a substantial lessening of competition we have taken the GUPPI evidence in the round with the other relevant evidence, including in particular evidence on future competition (see 11.88 to 11.131). In the context of very high diversion from Footasylum to JD Sports these effects would need to be very substantial to mitigate the incentive to worsen PQRS, and we have not seen any evidence that suggests these would have anything other than a small impact on that incentive, individually or cumulatively. Below we discuss this and further points in more detail around each strategic consideration.

8.52 In relation to the Parties’ arguments in paragraph 8.38(b) and (c) we firstly note that the survey diversion establishes where customers will divert to when, say, Footasylum worsens its offer. In this situation, customers who either stay at Footasylum, or have moved to JD Sports as their second preference are clearly worse off. The extent to which these customers are vulnerable and likely to switch again will depend on the improvements from other retailers (assuming those retailers do not also worsen their offer).[386] This will be the case in all mergers and is not unique to this case. However, this does not change the fact that the GUPPI implies that Footasylum has a strong incentive to worsen its offer, and that Footasylum customers would be worse off as a result. In addition the extent to which competitors such as Nike DTC pick up some of these more marginal customers depends on how the market evolves in the future, including how and whether other competitors (and the Parties) improve their offer (for instance we would still expect the remaining more marginal customers at Footasylum to be more likely to divert to JD Sports than Nike DTC). As we noted in paragraph 8.50, we consider the issue of how the competitive constraints will evolve as part of our assessment of future competition (see paragraphs 11.88 to 11.128). To the extent the Parties suggest [✂], we do not think this would affect Footasylum’s incentives, because Footasylum could adjust its PQRS at the time if that concern materialised. However as explained in paragraph 11.94 we do not think the growth of Nike DTC, adidas DTC and other constraints would be of such an extent as to diminish diversion to JD Sports to a level which does not give rise to concerns. In Chapter 11, we consider the extent to which the evidence on future competition impacts on our assessment of the incentives implied by the GUPPIs.

[386] In many markets you may expect rivals to worsen their offer in response to the merger, however we have not attempted to assess that in this case.

8.53 In paragraph 8.38(d), the Parties argued that if enough sales go to other retailers this may give those retailers a more favourable position in the eyes of suppliers such that it may help them secure better product allocations. In response we consider that the survey evidence suggests diversion from Footasylum to other retailers is small and hence is likely to have only a very limited effect on Nike's decision making.[387]

8.54 In paragraph 8.38(e) the Parties argued that if Footasylum loses a customer to JD Sports, it may have a better prospect of getting the customer back than if it loses the customer to the brands, given the latter operate ecosystems and have numerous retention tools not available to retailers. Thus, the Parties argued, the present value of a loss to JD Sports is numerically smaller than to the brands for any given level of diversion.[388] However, firstly, in assessing the incentive to worsen an offer, the GUPPI framework does not assume that diverting customers lost to JD Sports or Nike, or other competitors, would be re-won by Footasylum. Secondly, the Parties have provided no evidence of either the extent that customers are retained to a greater extent at the brands, or the associated impact of this on Footasylum's decision making. Given the relative differences in diversion to JD Sports compared with diversion to Nike DTC (43% vs 13% for online customers and 68% vs 2% for in-store customers, respectively) a small increase in diversion to Nike DTC in the future would have a limited effect on the constraint that JD Sports places on Footasylum.

8.55 Overall, we therefore consider GUPPIs to provide useful and robust evidence on the Parties' current incentives to degrade PQRS. However, we are not using the GUPPI as a decision rule and we recognise that it does not take account of changes in future competition. The GUPPI is just one piece of evidence which we consider in the round with the other evidence in our overall assessment in Chapter 11.

Market shares

8.56 In this section, we show the market shares of suppliers in the sports-inspired casual footwear market.

8.57 In some markets where products are very similar, measures of concentration like market shares can usefully inform an assessment of the structural change as a result of a merger. But in other markets, where products are more

[387] We also consider that as described in Chapter 7, there is a lot of volatility in product allocations so it would be difficult to attribute an effect of a small increase in customers on product allocations changes due to changes in PQRS.
[388] Parties' Supplementary SLC paper from 28th May, paragraph 4.43

differentiated, not all firms within a market compete with each other in the same way. As such, within that market some firms will be closer competitors than others. In these cases, shares provide some relevant evidence but are not as informative about the effect of a merger, as such shares do not fully capture the closeness of competition between firms.

8.58 Due to the differentiated nature of this market, we looked at market shares as an indicator of the presence that different retailers have in the relevant markets.

8.59 For the purposes of the Remittal, we asked retailers to provide their UK revenue data covering the sports-inspired casual footwear market. Using this data from retailers, we calculated shares of supply in the relevant markets for the latest full calendar year of data available (2020).

8.60 There are limitations with these market shares including: there is not a clear boundary between products inside and outside the market; and it is unlikely that all market participants hold data in categories that precisely match the sports-inspired casual footwear market definition that we have adopted.

8.61 Across all distribution channels in the UK, JD Sports is the largest retailer of sports-inspired casual footwear, with a [✂][20-30]% share. The next largest competitors are Nike ([✂][10-20]%), Office ([✂][5-10%), adidas ([✂][5-10]%), and Foot Locker ([✂][5-10]%). Footasylum is the sixth largest, and significantly smaller than JD Sports, with a [✂][0-5]% share across all channels. JD Sports is the largest retailer of sports-inspired casual footwear in both the in-store and online channels, but particularly large in the in-store channel, with a [✂][40-50]% share. The Parties' combined in-store share ([✂][50-60]%) is higher than its combined online share ([✂]20-30]%). Finally, the Parties' combined share across all channels is [30-40]%. Appendix C shows further details on the shares including the Parties' comments and our responses to their comments.

Parties' sales forecasts

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

JD Sports

8.63 [✂].[389, 390] [✂].

[✂]

8.64 [✂].[391] [✂].

8.65 [✂].

8.66 [✂].

[✂]

8.67 [✂].

[✂]

Footasylum

8.68 [✂].[392]

8.69 [✂].[393]

8.70 [✂].[394]

8.71 [✂].[395]

[✂]

9. Evidence relevant to apparel

Introduction

9.1 Chapter 7 set out the evidence that is applicable to competition in both the retail supply of sports-inspired casual footwear and apparel (and which it is

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389 [✂]
390 [✂]
391 [✂]
392 [✂]
393 Given stores were closed for much of 2020, and stores only opened in April in 2021, we consider this the most meaningful comparison of how Footasylum expects its near-future sales to perform in comparison to pre-COVID-19 performance.
394 [✂]
395 [✂]

difficult to attribute to footwear only or apparel only). This chapter sets out the remaining evidence relevant to competition in the retail supply of sports-inspired casual apparel.

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

(a) the importance of different brands in the Parties' sales of apparel;

(b) the proportion and rankings of each retailer's overlap with JD Sports and Footasylum with respect to Nike and adidas apparel products;

(c) the diversion ratios calculated from our survey of online shoppers (ie the proportion of other retailers selected by the Parties' customers as they best alternative);

(d) the GUPPI metrics that we have estimated;

(e) market shares; and

(f) sales forecasts for the Parties.

Importance of the brands

9.3 Table 11 shows the suppliers' share of the Parties' sports-inspired casual apparel revenue for 2020.

Table 11: Suppliers' share of the Parties' sports-inspired casual apparel revenues (2020)

[✂]

Source: CMA analysis of Parties' data.

9.4 Table 11 shows that [✂] are [✂]. [✂] is still the [✂] brand for JD Sports and Footasylum but the proportion of [✂] products in apparel is [✂] than in footwear.[396] [✂] is still the [✂]brand for JD Sports but the difference between [✂] and [✂] is [✂] in apparel than in footwear. [✂] is [✂] brand for Footasylum, this position is held by [✂]. [✂] is [✂] brand for Footasylum but [✂] between the [✂] and that [✂] in the top 10 positions, with the exception of [✂]. [✂].

[396] Two of Nike's brands are very small in apparel (Jordans and Converse).

Product overlaps

9.5 For the reasons given in paragraph 8.5, we assessed the extent to which Nike and adidas apparel products sold by each Party are also sold by other retailers to show the Parties' and their competitors' overlap in terms of apparel products offered. However, it should be noted that this is less important for apparel compared with footwear given the greater diversity of sales for each brand and the greater reliance on own brand revenue in apparel, particularly for Footasylum. The methodology is described in paragraphs 73 to 76 of Appendix C.[397]

9.6 Table 12 shows the results for Nike's apparel products.

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

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

Source: CMA analysis of data received from Nike and adidas.
Note: * refers to the total number of products sold by the Parties.

9.7 For the Nike apparel products sold by JD Sports, Table 12 shows that, on a sales-weighted basis, [✂] has the highest product overlap with JD Sports, followed by [✂] and [✂]. Footasylum has the [✂] overlap with JD Sports, selling [✂] of JD Sports' products on a sales-weighted basis.

9.8 For the Nike apparel products sold by Footasylum, Table 12 shows that, on a sales-weighted basis, [✂] has the highest product overlap followed by [✂]. JD Sports' overlap with Footasylum's products is [✂] than Footasylum's overlap with JD Sports' products.

9.9 Table 13 shows the results for adidas's apparel products.

Table 13: Proportion of adidas apparel products sold by the Parties that were also sold by other retailers (six months to March 2021)

[397] This analysis does not include Nike and adidas DTC. Nike DTC has total product overlap with both Parties for Nike apparel, and adidas DTC has total product overlap with both Parties for adidas apparel.

Retailer	Proportion of JD sales	Proportion of JD products
JD Sports		
[✂]*		
[✂]	11%	27%
[✂]	10%	28%
[✂]	8%	29%
[✂]	5%	11%
[✂]	4%	15%
[✂]	4%	6%

Retailer	Proportion of FA sales	Proportion of FA products
Footasylum		
[✂]*		
[✂]	71%	54%
[✂]	63%	53%
[✂]	58%	49%
[✂]	52%	36%
[✂]	26%	17%
[✂]	19%	7%

Source: CMA analysis of data received from Nike and adidas.
Note: * refers to the total number of products sold by the Parties.

9.10 For the adidas apparel products sold by JD Sports, Table 13 shows that, on a sales-weighted basis, [✂] has the highest product overlap with JD Sports, followed by [✂] and [✂]. Footasylum has the [✂] overlap with JD Sports on a sales weighted basis, and this is [✂], using either methodology.

9.11 For the adidas apparel products sold by Footasylum, Table 13 shows that, on a sales-weighted basis, [✂] has the highest product overlap followed [✂] and [✂]. JD Sports has the [✂] overlap, selling [✂] of Footasylum's adidas apparel products on a sales-weighted basis.

9.12 Appendix C shows further detail including the comments from the Parties and our responses.

Apparel product allocations

9.13 For apparel, there are [✂] few [✂].[398] Footasylum has stated that during the COVID-19 pandemic it has [✂].[399]

9.14 Footasylum has provided data on the apparel it requested from Nike, and the apparel it received. This has confirmed that there have been [✂], compared to the same quarter of the preceding year.[400] [✂].[401]

Diversion ratios

9.15 As for footwear, we used the Remittal Online Survey to calculate diversion ratios[402] for customers of JD Sports and Footasylum in apparel. The Remittal

[398] Footasylum has provided data on numbers of apparel items that have been [✂], and two specific lines [✂]. [✂]. We asked Nike for details on, and Nike confirmed that increases in demand combined with COVID-19 related capacity constraints meant that it had to begin allocating volumes for certain product styles in Q3 and Q4 2021. Nike stated that it did not currently plan to apply the allocations process to any products in the Club Fleece range for 2022. [✂].
[399] [✂]
[400] CMA analysis of data provided by Footasylum, [✂]
[401] [✂]
[402] All diversion ratios are not spend weighted, do not allow own party diversion and are based on the full sample (ie are not restricted to, for example, price marginal customers)

Online survey shows that 8% of JD Sports apparel customers would divert to Footasylum as their best alternative (Table 14), down from 13% in the Phase 2 Online Survey. Our Phase 2 Exit Survey of in-store customers showed diversion to Footasylum of 17%; 4% to its online offering and 13% to its stores (Table 15).

9.16 Among Footasylum's online apparel customers our Remittal Online Survey showed that 50% would divert to JD Sports, down from 61% in our Phase 2 Online Survey. 69% of Footasylum's in-store apparel customers diverted to JD Sports in our Phase 2 Exit Survey; 13% online and 57% to JD Sports stores.

9.17 Table 13 shows that 68% of Footasylum's online shoppers' best alternative is another online retailer while 22% diverted in-store. JD Sports is by far the closest competitor in both channels, receiving half of overall diversion with Nike the next closest competitor at 9% and ASOS next at 6%.

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

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

%

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

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

Table 15: Apparel diversion ratios of store customers to the merger party and third parties

%

	JD Sports customers			*Footasylum customers*		
	To a store	*To online*	*Total*	*To a store*	*To online*	*Total*
Footasylum	13	4	17			
JD Sports				57	13	69
Sports Direct	15	2	17	1		2
Foot Locker	6	2	8	2	1	3
Nike	4	4	8		1	2
adidas	4	3	7	1	1	1
DW Sports	3	1	4			
Other	9	6	15	4	2	6

Total	59	24	84	68	20	87

Source: CMA Phase 2 Exit Survey
Note: No spend-weighting was applied. Own-party diversion was excluded. Sixteen percent of JD Sports customers and 13% of Footasylum customers would not make a purchase.

9.19 Figure 5 shows the changes in diversion ratios for JD Sports between the Phase 2 Online Survey and the Remittal Online survey. Diversion to Foot Locker, Amazon and, particularly, Footasylum has fallen whereas diversion to Nike, ASOS and adidas has increased. The equivalent for Footasylum's online customers shows again the extent to which JD Sports is the strongest alternative, even after a decrease in its share of diversion. Among other competitors, Nike's share has grown to become the second strongest competitor, albeit a long way below JD Sports.

Figure 5: Change in JD Sports online customer diversion: apparel

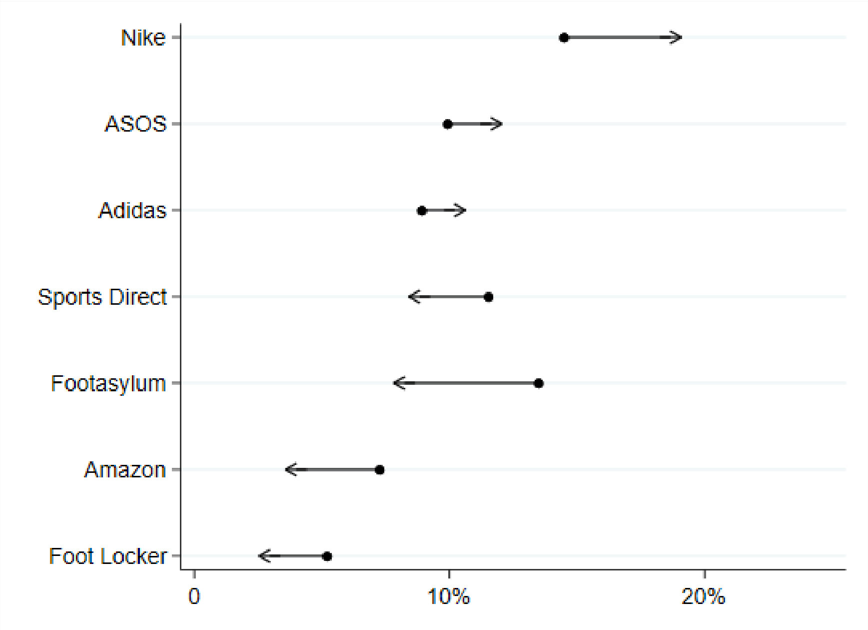
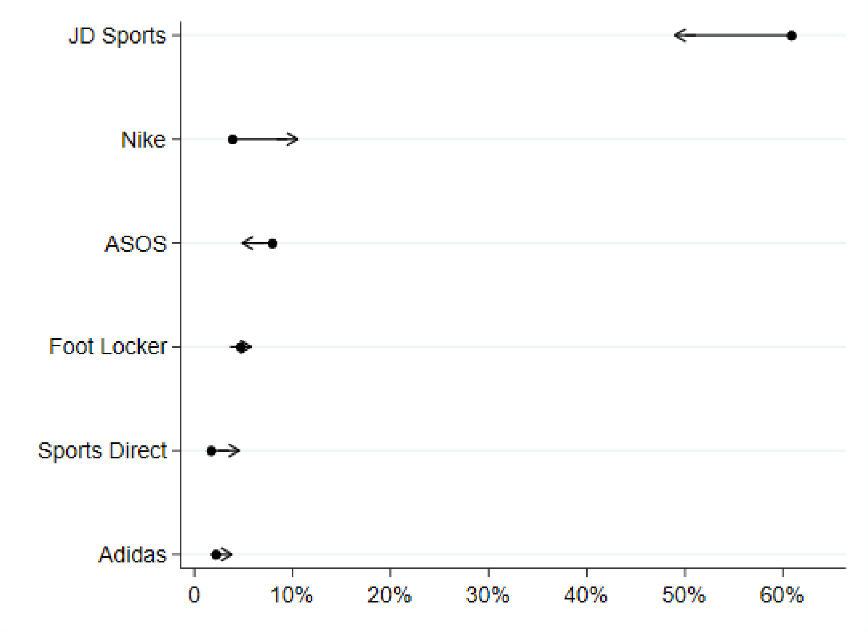


Figure 6: Change in Footasylum online customer diversion: apparel



GUPPIs

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

9.21 We used diversion ratios estimated from the results of our Remittal Online Survey and variable margins based on data from the Parties during the Remittal to calculate GUPPIs for each Parties' online offerings.[403] We estimate the GUPPI for JD Sports online offering for apparel to be [✂]%, and the apparel GUPPI for Footasylum's online offering to be far higher, at [✂]%.

9.22 We also used the diversion ratios estimated from the Phase 2 Exit Survey with the variable margins based on data from the Parties during the Remittal to estimate GUPPIs for each of the Parties' in-store offerings. We estimate the GUPPI for JD Sports in-store offering for apparel to be [✂]%, while the apparel GUPPI for Footasylum's online offering to be far higher, at [✂]%. For the reasons set out in paragraph 8.43, we consider these in-store estimates to be the upper limit of a range of possible estimates.

[403] The GUPPI calculation and methodology is explained in Appendix H.

9.23 We also weighted the online and in-store GUPPIs together, using recent proportions of total sales occurring online and in-store, to estimate combined GUPPIs. As we did for footwear, we applied a sensitivity analysis to reflect market developments. In order to consider a range of sensitivities we applied some fairly extreme assumptions at the lower end (eg assuming a very significant increase in diversion to DTC and a significant decrease in diversion to Footasylum). The range of estimates covers a wide range of possibilities and as such, while we do not rely on specific GUPPI numbers, the range gives us a broad sense of the Parties' potential incentives.

9.24 Within the framework of the sensitivity analysis (as described in paragraph 8.43 and more detail in Appendix H), we estimate a combined apparel GUPPI in the range of [✂]% to [✂]% for JD Sports.

9.25 For Footasylum, using the online GUPPI, and in-store GUPPI based directly on the Phase 2 Exit Survey diversion, gives a 'base' combined apparel GUPPI of [✂]%. We have not conducted a sensitivity analysis around this estimate, but note that even if we were to take the online GUPPI alone as a lower variant of the range of estimates for the combined GUPPI (which would be extreme) it would still generate a GUPPI of [✂]%.

9.26 Overall, we therefore consider GUPPIs to provide useful and robust evidence on the Parties' current incentives to degrade PQRS. However, we are not using the GUPPI as a decision rule and we recognise that it does not take account of changes in future competition. The GUPPI is just one piece of evidence which will be considered in the round with the other evidence.

9.27 In response to the Parties' submissions around the level of the GUPPI, that it is static and does not take account of certain counteracting incentives (discussed from 8.35 to 8.40), we consider the points made in paragraphs 8.46 to 8.54 to apply equally in relation to apparel. However, in addition, in relation to apparel, Nike and adidas are far less important to Footasylum than they are in footwear, and therefore the impact on incentives of two of the strategic considerations would be even more marginal (in particular (a) and (d) described in paragraph 8.38).

Market shares

9.28 In this section, we show the market shares of suppliers in the sports-inspired casual apparel market.

9.29 For the reasons given in paragraphs 8.57 and 8.58 we looked at market shares as an indicator of the presence that different retailers have in the relevant markets.

9.30 Across all distribution channels in the UK, JD Sports is the largest retailer of sports-inspired casual apparel, with a [30-40]% share. The next largest competitors are Primark ([10-20]%), Nike ([5-10]%), M and M Direct ([5-10]%), and adidas ([5-10]%). Footasylum is the sixth largest, and significantly smaller than JD Sports, with a [0-5]% share across all channels. JD Sports is the largest retailer of sports-inspired casual apparel in both the in-store and online channels, but particularly large in the in-store channel, with a [40-50]% share. The Parties' combined in-store share ([40-50]%) is higher than its combined online share ([30-40]%). Finally, the Parties' combined share across all channels is [40-50]%. Appendix C shows further details on the shares including the Parties' comments and our responses to their comments.

Parties' sales forecasts

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

JD Sports

9.32 [✂]

Table 16: **[✂]**

[✂]

Source: [✂].
Note: [✂]

9.33 [✂]

9.34 [✂]

9.35 [✂]

Table 17: [✂]

[✂]

Source: [✂].
Note: [✂]

9.36 [✂]

Table 18: [✂]

[✂]

Source: [✂].

Footasylum

9.37 [✂][404]

9.38 [✂][405]

9.39 [✂][406]

9.40 [✂][407]

Table 19: [✂]

[✂]

Source: [✂].
Note: [✂]

10. Counterfactual

Introduction

10.1 The assessment as to whether the creation of a relevant merger situation has resulted or may be expected to result in an SLC involves a comparison of the prospects for competition with the merger against the competitive situation that would exist in the absence of the merger. This situation, referred to as the 'counterfactual', is the benchmark against which we assessed the competitive effects of the Merger.[408]

10.2 The counterfactual is not about benchmarking market dynamics at a specific point in time. Events which occur after the completion of a deal but before the completion of our review of the Merger and which are not a result of the Merger can be incorporated into the counterfactual.[409] At the same time,

[404] [✂]
[405] Given stores were closed for much of 2020, and stores only opened in April in 2021, we consider this the most meaningful comparison of how Footasylum expects its near-future sales to perform in comparison to pre-COVID-19 performance.
[406] [✂]
[407] [✂]
[408] Merger Assessment Guidelines, paragraph 4.3.1
[409] See, in this regard, British Sky Broadcasting Group plc v Competition Commission (CC) (Cases 1095/4/8/08 and 1096/4/8/08) [2008] CAT 25, paragraph 138. See also, for example, Ryanair Holdings plc/Aer Lingus Group plc, paragraph 7.10

events which occur during a merger review and which are attributable to the Merger, should not form part of the counterfactual.

10.3 Therefore, we consider that Footasylum's trading performance since the Merger (and during the COVID-19 pandemic) can provide some insight into what would have occurred absent the Merger.[410] For example, we understand that [✂]. Footasylum has also made a series of improvements to its online and mobile app offer over the past year or so.

10.4 We seek to avoid importing into the assessment of the appropriate counterfactual any spurious claims to accurate prediction or foresight. Given that the counterfactual incorporates only those elements of scenarios that are foreseeable (ie that events or circumstances and their consequences can be predicted with some confidence), it will not in general be necessary to make finely balanced judgements about what is and what is not included in the counterfactual.[411] In reaching a view on the appropriate counterfactual, we must determine what future developments we foresee arising absent the Merger based on the evidence available to us. Where future events or 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.[412]

10.5 The time period over which the CMA considers the effects of a merger is determined by the nature of the markets in question and the time period over which events and their consequences are foreseeable.[413] Where there is evidence that the most likely counterfactual includes a particular event or development occurring in the future (and that development can be predicted with some confidence), the time period used in the CMA's assessment will reflect that.

10.6 In this case, the Parties have submitted that in reviewing the time period over which the effects of the Merger are considered, we should take into account the fact that suppliers and analysts are forecasting to 2025 or 2026,[414] and therefore, we are able to gather sufficient evidence to make forecasts extending beyond two years. The Parties considered it important to do this in order to avoid overlooking some of the significant dynamic changes that are in progress – in particular, the growth of Nike's and adidas's DTC channel sales. In addition, the Parties consider that the near-term may be harder to forecast

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[410] We note that Footasylum has been operated separately from JD Sports (footnote 4)
[411] Merger Assessment Guidelines, paragraphs 4.3.2 and 4.3.6
[412] Merger Assessment Guidelines, paragraph 4.3.2
[413] Merger Assessment Guidelines, paragraph 4.3.2
[414] The Parties highlight adidas's public statements forecasting growth in DTC to 2025 and RBC Capital Markets forecast of Nike's CAGR EPS out to FY26.

given the unpredictability of the COVID-19 pandemic.[415] In their response to the Provisional Report, the Parties submitted that the growth of DTC in the period to 2025 is both likely and foreseeable and should be incorporated into the counterfactual despite the fact that other aspects of competition cannot be foreseen for the same period.[416]

10.7 Our view is that the evidence we have received during the Remittal is not sufficiently definitive to make projections about the period as far ahead as 2025 or 2026 as the Parties have suggested. The counterfactual defines the conditions of competition that the Merger can be assessed against. The evidence that the Parties have submitted in the previous paragraph – suppliers' and analysts' forecasts – does not directly address the question about conditions of competition between the Parties in the absence of the Merger (which includes competitive constraints from rivals, both supplier DTC channels and other rivals). We have assessed the evidence on the future growth in sales via Nike's and adidas's DTC channels and have incorporated this in our competitive assessment. However, that suppliers, who have considerable influence over retail competition, have DTC sales targets for several years in advance does not mean that we can foresee with confidence what conditions of competition will be like this far into the future.

10.8 Moreover, there are other aspects relevant to the conditions of competition that we cannot predict with confidence as far ahead as 2025 or 2026. In our Remittal inquiry, the detailed internal forecasts of suppliers that do help provide the type of evidence that enables us to foresee conditions of competition with some confidence are often for far shorter periods (eg up to the end of the current financial year). We believe that this reflects a degree of uncertainty around whether they will achieve their longer term targets.[417] Although this does not preclude us from placing weight on the growth of Nike's and adidas's DTC sales in our competitive assessment (which we do), it does mean that we cannot foresee with confidence how much stronger these suppliers' sales will be in 4 or 5 years' time or what impact other developments may have on that predicted growth.

10.9 In addition, there are a number of factors relevant to assessing the conditions of competition in retail which may be changed in the longer term (including, for example, store or brand elevations, brand re-positioning and changes in the shopping experience). We cannot foresee how retail competition will develop several years in advance.

415 Parties' Initial Submission, 30 April 2021, footnote 32.
416 Parties' Response to the Provisional Report, paragraphs 102-104.
417 [✂]

10.10 Finally, we note that in considering the appropriate timeframe for our assessment we have focussed on what is foreseeable with respect to the conditions of competition.

10.11 Therefore, we have assessed the Merger over a period of around two years into the future (from the time of our assessment).

10.12 In considering the counterfactual, we have focussed on the position of Footasylum since the Parties have focussed their submissions made to us on this.

10.13 The chapter assesses:

(a) Footasylum's likely future access to sports-inspired casual footwear and apparel from its main suppliers (Nike and adidas) and

(b) Footasylum's financial performance and budget forecasts including financial support available during the COVID-19 pandemic.

Parties' submissions

10.14 The Parties submitted that the most likely scenario for the counterfactual is that Footasylum will be a [✂] competitor of JD Sports [✂].[418] Further, the Parties submitted that the strategy of Nike and other brands of implementing [✂] in the relevant markets over the next few years. The Parties submitted that this [✂]. The Parties further submitted that Nike's approach to Footasylum's allocation of products is indicative of the [✂].

10.15 The Parties submitted that this concerns Footasylum's market position and is a separate issue from Footasylum's financial position although any deterioration of its financial position may exacerbate these issues.[419] Finally, the Parties submitted that if [✂] allocations are only factored into the counterfactual to a certain degree, eg because above a certain level they are considered to be possible but not likely, then the further [✂] allocations above the counterfactual level remains relevant in the SLC analysis as it would operate as a threat for Footasylum.[420]

[418] [✂]
[419] [✂]
[420] [✂]

10.16 The Parties submitted that [✂] of Footasylum by Nike should form part of the counterfactual, whether the time frame is 2-3 years or longer. The Parties told us that the longer the time frame that is used, [✂].[421]

Footasylum's future access to products

10.17 The Parties have told us during the Remittal that absent the Merger Footasylum would be [✂] since it would be [✂].

10.18 We have considered the evidence of Footasylum being a weaker competitor in the counterfactual [✂]. We assess the evidence relating to each of these scenarios separately below.

10.19 Nike and adidas have told us that they continue to treat Footasylum independently from JD Sports under their distribution policies and in terms of product allocation.[422] On that basis, we consider that evidence relating to the period post-completion is relevant to the assessment of the counterfactual.

10.20 We have also taken into account evidence relating to Nike's and adidas's plans [✂].respective distribution policies and product allocations in the future.

[✂]

10.21 The evidence that we have clearly shows [✂]. We have considered whether the counterfactual should include [✂]. This is because, in the event of [✂], Footasylum would be a substantially weaker competitor to JD Sports given the importance of [✂] and the importance more generally of footwear to Footasylum's ability to compete effectively with JD Sports. JD Sports itself is [✂] – indeed, Nike has categorised JD Sports as [✂], which generally is Nike's [✂].

10.22 As discussed below, there is considerable uncertainty surrounding whether Nike will [✂]. However, the presence of uncertainty about the future does not in itself lead us to default to a particular position (eg the pre-Merger situation). Instead, we will consider the evidence in the round, including not only evidence of Nike's stated intentions but also evidence of its incentives and strategic objectives, to establish the most likely counterfactual scenario. The counterfactual incorporates only those scenarios that are foreseeable – ie those events or circumstances and their consequences can be predicted with

[421] [✂]
[422] [✂]

some confidence.[423] It is not generally necessary for the counterfactual assessment to take detailed decisions on future competitive conditions.

10.23 Given the importance of this issue, we have used our formal information gathering powers to collect evidence from Nike on this question, including responses to our questionnaires and requests for internal documents. In particular, we have obtained evidence from Nike concerning its future plans for retailer partnerships in the UK and the status of its decision-making in this context, on which we have placed significant weight, and the factors that may drive that decision-making.[424] We have also held a formal hearing with Nike.

The Parties' submissions

10.24 One of the Parties' main arguments to us in their submissions is that Footasylum is [✂] as a part of Nike's strategy [✂]. The Parties have submitted that the key suppliers are favouring brands with global coverage and a presence in key cities, are reducing costs by cutting the number of accounts they have to manage, and are extending their control over the remaining retailers. The Parties have stated that: "For the first time, Nike (and similarly adidas) in public 2021 statements has been unusually blunt about the strategic shake-out post-pandemic: "divesting" less valuable retail partners, while the criteria to be of "differentiated" value to them are at both extremes: "large strategic", plus "neighbourhood". [✂]."[425] The Parties referenced Nike public statements on "large strategic retailers" and "local neighbourhood partners", and stated that "The takeaway from these two statements is that Nike will not support retailers that do not fall into either of these two categories."[426] In addition to a number of other references to Nike's statements along the same lines, the Parties submitted that in Nike's Q1 Earnings Call from this year Nike's Executive Vice President and CFO said '… 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'.[427]

10.25 The Parties also highlighted [✂] to [✂], and statements by Nike to Footasylum that [✂]."

[423] Merger Assessment Guidelines, paragraph 4.3.6.
[424] We sent 6 formal notices for information to Nike and we held a formal hearing with Nike on 21 May 2021.
[425] [✂]
[426] [✂]
[427] Parties' Response to the CMA Provisional Report, paragraph 23.

10.26 The Parties summarised that "considering Nike's evidence in the round, it is evident that the uncertainty is mainly about [✄]."[428]

10.27 The Parties submitted as part of their response to the Provisional Report that we should take into account not just the likelihood but also the severity of [✄], in particular to the extent such risk is taken into account as part of the competitive assessment.[429]

Nike's submissions

Nike's future plans [✄]

10.28 We consider that evidence from Nike shows that Nike is [✄]. This is broadly consistent with Nike's public statements concerning its plans to consolidate the marketplace in particular around its strategic and neighbourhood accounts. [✄].[430] [✄].

10.29 Nike has told us [✄][431] [✄][432] [✄]. Nike [✄].[433] Nike has also stated that [✄].[434]

10.30 Nike stated in [✄]. It confirmed this in November 2021.[435]

10.31 [✄].

Nike's options

10.32 [✄].[436] [✄].[437] [✄].

10.33 Our analysis of internal Nike documents describing [✄].

10.34 There is evidence that Nike is currently taking steps to implement the initial steps [✄]. However, the steps already underway [✄]. Indeed, Nike has stated that its business relationship with Footasylum [✄] (see paragraph 7.57).

10.35 Taking account of the above, we do not consider that the fact that Nike has begun to implement its rationalisation strategy in the UK [✄]. Further, Nike

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[428] [✄]
[429] Parties' response to the CMA's Provisional Report, paragraph 65.
[430] [✄]
[431] [✄]
[432] [✄]
[433] [✄]
[434] [✄]
[435] [✄]
[436] [✄]
[437] [✄]

has noted that it ‘is not currently in a position to predict with any degree of certainty the outcome(s) or timing(s) of its decision-making process.’

10.36 As a means to probe the extent of that uncertainty we have also reviewed internal Nike strategy documents which contain further details [✂].

[✂]

10.37 We have asked Nike a considerable number of questions concerning [✂]. Nike has told us that [✂] will depend on a range of factors that might include [✂] (paragraph 6.57).

10.38 We have not seen evidence showing that Nike [✂].[438] [✂].

10.39 [✂]. Nike has also told us that [✂].[439] Nike also told us that it considered that the unresolved nature of the merger with JD Sports (ie continued CMA review and the challenge at the Tribunal) has likely [✂].[440]

10.40 Nike’s internal documents show that [✂].[441] [✂].[442]

10.41 [✂][443]

10.42 [✂]

Our assessment

10.43 In order to conclude that in the counterfactual Footasylum [✂], we would need to be satisfied on the basis of the evidence and facts available that this is the most likely scenario absent the Merger.[444]

10.44 Taken together, we consider the key factors arising out of the evidence [✂] are the following:

(a) [✂]

(b) [✂]

(c) [✂]

[438] [✂]
[439] [✂]
[440] [✂]
[441] Other retailers assessed include [✂]. [✂].
[442] [✂]
[443] [✂]
[444] Merger Assessment Guidelines, paragraph 4.3.6.

(d) [✂][445]

(e) [✂]

10.45 Whilst we have considered all these factors in the round, [✂]. More particularly, we have placed weight on Nike's internal documents and answers to our notices for information which are targeted for the UK marketplace and, where necessary, Footasylum specifically. Although we have taken into consideration Nike's public statements as submitted by the Parties in our overall conclusions, we have placed greater weight on the evidence provided to us directly by Nike, and Nike's public statements need to be considered in light of such evidence.

10.46 On that basis, we consider that the evidence we have received [✂], meaning that in the counterfactual Nike would continue to supply Footasylum.

10.47 We have however taken into account that [✂].[446] [✂].

10.48 We next consider the evidence that in the counterfactual Footasylum would have [✂] from Nike and adidas.

Footasylum's product allocations by Nike and adidas

10.49 We have considered whether the counterfactual should include [✂] from Nike and/or adidas ([✂]).

10.50 We have evidence that the main suppliers, Nike and adidas, [✂]. We note that some of these changes have already happened and are therefore likely to have also occurred in the counterfactual.

10.51 Taken together, we consider the key factors arising out of the evidence on changes to Footasylum's product allocations are the following:

(a) Footasylum remains within Nike's [✂] category and consequently [✂] (paragraph 7.53). [✂] affected by market-wide or short-term supply shortages (paragraph 7.200). However, the evidence from Nike does not indicate that [✂] (paragraph 10.29).

(b) adidas has made [✂]. adidas's current forecasts to [✂] indicate that [✂].

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445 [✂]

446 The CMA may still consider the effects of the merger in the context of an event or circumstance occurring even if that event or circumstance is not sufficiently certain to include in the counterfactual (Merger Assessment Guidelines, paragraph 4.3.2)

10.52 We consider that since the completion of the Merger, Nike and adidas have treated Footasylum as if it were an independent entity from JD Sports. Neither supplier has consolidated its supply to JD Sports and Footasylum combined and Footasylum has experienced supply [✂] that JD Sports has not (or at least not to the same extent). Although suppliers may have some incentive to treat Footasylum differently than they would have done had Footasylum been independent of JD Sports, on balance we consider that Footasylum's experience of receiving products from Nike and adidas (paragraphs 7.53 to 7.103) provides at least some insight into what would have been the case absent the Merger.[447] On that basis, we consider that the evidence we have received indicates that, absent the Merger, Footasylum's product allocations from Nike and adidas would have been [✂]. [✂]. We will consider the impact of product allocations in the competitive assessment in further detail.

10.53 In regard to JD Sports' position in the counterfactual we note that since the CMA's Phase 2 Final Report, JD Sports' has remained a strong competitor. It has [✂], in-store and online (paragraphs 7.122 to 7.127). Moreover, in the foreseeable future JD Sports' will remain as [✂] and [✂] to adidas.

10.54 The Parties have not submitted to us any reasons why JD Sports' position in the counterfactual has changed since the CMA's Phase 2 Final Report.

10.55 We have considered the evidence on Footasylum's product allocations on its likely future competitive strength in our competitive assessment.

Footasylum's financial performance and access to credit

10.56 As part of our assessment of the appropriate counterfactual, we considered the likely impact of COVID-19 on Footasylum in the counterfactual, and whether we consider it likely that, absent the Merger, the primary lender would have continued to support Footasylum to enable it to continue to compete in the relevant markets.

10.57 As a part of our consideration of Footasylum's overall financial position we have also considered Footasylum's financial performance and budget forecasts.

10.58 We are also conscious that the financial position of Footasylum and other evidence relevant to how the COVID-19 pandemic may have affected Footasylum's position in the counterfactual were relevant to JD Sports'

[447] The Parties have been effectively held separate by a series of interim measures and undertakings since May 2019. Such measures would have prevented them from negotiating with suppliers as a single entity and receiving a single, consolidated supply of products.

Application to the Tribunal. The Tribunal held that the CMA was entitled to consider the likely effects of COVID-19 as part of its competitive assessment rather than the counterfactual but that the CMA should have made further inquiries of suppliers and of Footasylum's primary lender, even at a late stage in its investigation, in order to be able to conclude as to whether there was robust evidence that could affect its conclusions. We have done this in the Remittal.

Recent financial performance and budget

10.59 We have considered the financial health of Footasylum since it is relevant in considering Footasylum's strength as a competitor absent the Merger. Table 20 shows Footasylum's financial performance from 2018/19 to 2020/21, and its latest budget reforecast for 2021/22.

Table 20: Footasylum historic financial performance from 2018/19 to 2020/21 and reforecast for 2021/22

£'m	***2018/19***	***2019/20***	***2020/21***		***2021/22***
	Actual	***Actual***	***Actual***		***Reforecast (RF2)***
- In-store	[✂]	[✂]	[✂]		[✂]
- Online	[✂]	[✂]	[✂]		[✂]
- Wholesale	[✂]	[✂]	[✂]		[✂]
Total revenue	[✂]	[✂]	[✂]		[✂]
Gross Profit	[✂]	[✂]	[✂]		[✂]
EBITDA	[✂]	[✂]	[✂]		[✂]
GP Margin (%)	[✂]	[✂]	[✂]		[✂]
EBITDA (%)	[✂]	[✂]	[✂]		[✂]
Capital expenditure	[✂]	[✂]	[✂]		[✂]
Marketing	[✂]	[✂]	[✂]		[✂]
Marketing spend as percentage of revenue	[✂]	[✂]	[✂]		[✂]

Source: [✂]
ǂ 2018/19 and 2019/20 figures are from Footasylum [✂].
ǂǂ 2020/21 capital expenditure are from Footasylum [✂].
Notes:
(i) Footasylum's financial year runs from March to February for 2018/19, and February to January from 2019/20 onwards.
(ii) 2021/22 budget includes 1 new store.

10.60 Table 20 shows that Footasylum's revenues were [✂] by the COVID-19 pandemic, but its reforecast for the current year (2021/22) [✂] (2019/20). Footasylum's overall total revenue [✂]. Within the overall decline in revenue from 2019/20 to 2020/21, which coincided with the COVID-19 pandemic, in-store revenue [✂] while online revenue [✂]. Footasylum's management reforecast for 2021/22 shows that total revenue is expected to [✂].

10.61 In relation to Footasylum's profitability, between 2018/19 and 2020/21, Footasylum's gross profit margin [✂], and EBITDA margin from [✂]. Footasylum's 2021/22 reforecast shows that [✂].

10.62 Footasylum told us that it usually set its marketing budget at around [✂].[448] Footasylum's marketing spend as a percentage of revenue [✂], and its 2021/22 reforecast shows that its marketing spend will [✂].

10.63 Footasylum's capital expenditure for 2020/21 shows that the actual capital expenditure for 2020/21 was [✂][449] compared to its pre-COVID-19 pandemic budget for 2020/21, and it has [✂] its capital expenditure during the COVID-19 pandemic. Further, Footasylum's capital expenditure in its 2021/22 reforecast is set at around [✂].

10.64 Footasylum's reforecast for 2021/22 show that it will [✂] (see Figure 1, Appendix D Footasylum's Financial Position).[450]

Our assessment of Footasylum's financial performance and budget forecast

10.65 We considered the financial position of Footasylum and how the COVID-19 pandemic may have affected Footasylum's position in the counterfactual (ie absent the Merger). We note that while the CMA's interim measures have prevented further integration between the Parties and therefore maintained the separate operation of the Parties' respective businesses, we are mindful that Footasylum's performance may have been affected by the uncertainty and disruption associated with the Merger and ongoing investigation. We therefore consider post-Merger events and performance, but only to the extent that they provide some insight into the competitive situation absent the Merger.

10.66 In considering the evidence set out above, we are mindful that Footasylum's actions in response to the COVID-19 pandemic may limit the comparability of 2020/21 EBITDA with prior periods. For example, due to the impact of rent-free periods and staff furlough. As such, we note that it may be more informative to make prior period comparisons at revenue and gross profit

[448] [✂]
[449] Footasylum's capital expenditure for 2020/21 (before the COVID-19 pandemic) was set at £[✂], and Footasylum's actual spend for the year was £[✂]. ([✂]).
[450] [✂]

margin levels. Notwithstanding this, we consider that the profitability analysis is sufficiently robust for us to consider Footasylum to be a profitable entity.

10.67 Footasylum's financial performance from 2018/19 to 2020/21 showed that since the Merger completed in early 2019, Footasylum has continued to trade successfully.

10.68 We note that although Footasylum's overall revenue [✂] in 2020/21 during the COVID-19 pandemic, compared to the previous year, the [✂], while its gross profit and EBITDA margins [✂] during this time. Therefore, in our view, while the COVID-19 pandemic did have a [✂], Footasylum's financial performance, mainly in terms of the performance of its online business and [✂] in its gross margins, indicate the underlying resilience of Footasylum during the COVID-19 pandemic.

10.69 The Parties told us that despite being a mature business, Footasylum was [✂] before financing for financial years 2018/19, 2019/20 and forecast 2021/22 ([✂]) and therefore, it was wrong to characterise Footasylum [✂].[451] We note that Footasylum's revenues are currently growing and it operates in the growing athleisure sector. When we analyse EBITDA as a proxy for cashflows from operating activities in 2021/22 (thereby eliminating any timing effects arising from working capital movements and fluctuations), it shows that they [✂].[452] We also note that Footasylum had consistently [✂] and that its utilisation of the credit facility in the current 2021/22 financial year was [✂] than its utilisation in the prior year ([✂]), which support a finding that Footasylum is trading well.

Footasylum's reforecasts

10.70 Footasylum's financial budget reforecasts for 2021/22 showed that total revenues will [✂] to 2019/20 levels (the financial year before the COVID-19 pandemic).

10.71 Footasylum reforecasts showed that it will [✂] its marketing spend as [✂]% of its revenue, and the capital expenditure will be only £[✂] than 2019/20 (before the COVID-19 pandemic). Therefore, during the COVID-19 pandemic, Footasylum has [✂].

10.72 Based on the above, Footasylum's budget reforecast for 2021/22 shows that: *(a)* Footasylum is forecasting revenue to [✂], which is [✂] with pre-COVID-19 pandemic levels (2019/20); *(b)* gross margin is forecast [✂]; *(c)* it is

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[451] The Parties, Response to the CMA's Provisional Report, paragraph 67-74
[452] [✂]

generating [✄]; and *(d)* Footasylum will [✄] (see paragraph 19, Appendix D Footasylum's Financial Position).[453] We would also note that based on Footasylum's actual year-to-date trading results for the first 37 weeks of its current financial year 2021/22 (ie the period to 16 October 2021), Footasylum generated net revenues of £[✄], which [✄] of £[✄] by [✄]%, and its [✄] of £[✄] by [✄]%.[454] [✄][455]

10.73 On balance, we consider that we should place some weight on Footasylum's financial performance given that we consider that Footasylum's trading performance since the completion of the Merger is a good indicator of what may have happened absent the Merger (ie its competitive strength in the counterfactual). We have considered this evidence in light of the other relevant evidence.

Footasylum's access to credit

10.74 The Tribunal's Judgment considered that the CMA should have made further inquiries of Footasylum's primary lender as part of the CMA's assessment of the counterfactual in the CMA's Phase 2 Final Report. In the course of the Remittal, we have gathered evidence from the primary lender, and this evidence is set out below.

Evidence from Footasylum's primary lender

10.75 The primary lender told us that its strategy was to support 'all of its clients' provided they remained a viable business with a range of measures (such as [✄], and the UK Government's Coronavirus Business Interruption Loan schemes[456]) to mitigate any trading impact due to the COVID-19 pandemic. It also told us that [✄].[457]

10.76 The primary lender told us that it was [✄], and that Footasylum's [✄].[458]

10.77 The primary lender's support to Footasylum continued throughout the COVID-19 pandemic. This is evidenced in a [✄].[459]

10.78 The primary lender told us that it did not consider that Footasylum would be [✄]. It told us that the suppliers of footwear continued through the pandemic

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453 [✄]
454 [✄]
455 [✄]
456 CBIL scheme which were available to business turnover of up to £45 million maximum. Therefore, Footasylum was ineligible.
457 [✄]
458 [✄]
459 [✄]

and challenges were primarily related to operations such as running distribution centres in accordance with Government guidelines, and that [✂].[460]

10.79 The primary lender also told us that its decision to [✂]. The primary lender also told us that it took 'into consideration' the Interim Order and its provision that JD Sports would have to ensure that Footasylum remains as a going concern, but [✂].[461]

Our assessment of Footasylum's access to credit

10.80 We now consider the question of whether the primary lender would have [✂][462], and then the question of whether the primary lender would have supported Footasylum during the COVID-19 pandemic to the present day, in the absence of the Merger.

Primary lender's decision to [✂]

10.81 We note that Footasylum's [✂].

10.82 [✂]

10.83 While Footasylum's [✂], we note that this was hypothetical, and [✂] only related to [✂]. Therefore, this would have no bearing on the primary lender's decision either to [✂] or to [✂].

10.84 Footasylum's [✂] for 2021/21 [✂].[463] [✂].

10.85 We also note that based on Footasylum's [✂].

10.86 In relation to whether the primary lender would have supported Footasylum during the COVID-19 pandemic in the counterfactual, we have considered the primary lender's views of Footasylum's business during the COVID-19 pandemic. In this regard, we note that the [✂] (see paragraph 4, Appendix D Footasylum's Financial Position).

10.87 Although JD Sports was obliged to maintain Footasylum as a going concern under the Interim Order, Footasylum did not at any time receive any form of support from JD Sports, either in the form of any financial support;

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460 [✂]
461 [✂]
462 [✂]
463 Footasylum had also managed its cashflow [✂].

operationally; or in terms of stock, eg by way of JD Sports diverting some of its products to Footasylum.

10.88 We consider that the primary lender's strategy was to support its clients, and that it would have continued to support Footasylum, irrespective of ownership given Footasylum's good financial performance (see paragraphs 10.75 and 10.76). Further, the primary lender considered that the Footasylum business would not be adversely affected compared to competitors (see paragraph 10.78). We also note that Footasylum has not received any financial support from JD Sports since the Merger. Therefore, it is our view that Footasylum would had been able to [✂], and that based on the forecast provided to the primary lender in [✂].

10.89 We consider that, although JD Sports' obligation under the Interim Order (and later the Final Undertakings from 13 July 2020) to maintain Footasylum as a going concern may have provided some comfort to the primary lender, the primary lender was [✂], and that absent the Merger, the primary lender would have continued to support Footasylum ([✂]) (see paragraph 10.79).

[✂]

10.90 We consider below the [✂][464] and its reasons, and whether this would affect Footasylum's ability to compete effectively under the counterfactual.

10.91 We note that Footasylum's credit facility is a [✂], which by its nature is [✂].

10.92 Footasylum's drawdowns under its credit facility are determined by the stock level Footasylum plans to hold, which itself is a function of the time of year (eg due to the seasonality of trading where higher stock levels are needed for the Black Friday and Christmas trading periods) and product allocations by the key suppliers (Nike and adidas). Therefore, we consider that the [✂].

10.93 Footasylum and the primary lender told us that the reduction was in line with [✂] (see paragraphs 15 and 16, Appendix D Footasylum's Financial Position). We note that Footasylum's reforecast for its financial year 2021/22 and 2022/23 shows [✂]. [✂].

Range of support available to Footasylum

10.94 We note that Footasylum has been able to benefit from publicly funded schemes since 1 March 2020[465], which supported Footasylum during the

[464] We note that in the amended credit facility agreement (dated February 2021), the Guarantors of the loan are [✂].
[465] The total benefits received by Footasylum from publicly funded schemes [✂], [✂].

COVID-19 pandemic in the financial year 2020/21, and thereafter. We note that Footasylum's ability to access the publicly funded schemes was not contingent on JD Sports' ownership, and that these schemes were also available to other retailers.

10.95 In addition, Footasylum [✂].[466] We note that other retailers, [✂], had also negotiated rent-free and rent reduction periods for their store portfolio.

10.96 It is our view that absent the Merger, Footasylum would have been able to access and receive a combination of financial support (eg from publicly funded schemes, landlords and the primary lender support, as discussed in the previous section), on the basis that the financial support Footasylum received was not contingent on JD Sports' ownership. We also note that at no time did Footasylum require any support or assistance from JD Sports or rely on JD Sports to access other forms of financial support to enable it to continue to [✂].

The primary lender's support during the COVID-19 pandemic and thereafter

10.97 Based on the above, it is our view that absent the Merger, the primary lender would likely have [✂] and remained supportive thereafter (during the COVID-19 pandemic), eg by [✂], given that:

(a) the primary lender based its decision to [✂];

(b) Footasylum was [✂];

(c) Footasylum's stand-alone financial performance during 2020/21 [✂];

(d) evidence from the primary lender showed that its support would not have been different absent JD Sports' ownership; and

(e) the primary lender [✂].

10.98 On the basis that the evidence provided by the primary lender [✂], we did not consider it necessary to consider the question of an alternative purchaser of Footasylum absent the Merger.

10.99 Based on the above, we have found that absent the Merger, it is likely that the primary lender would have supported Footasylum during the COVID-19 pandemic.

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466 [✂]

Conclusion on the counterfactual

10.100 Therefore, we have found that, on the basis of the evidence set out above, the most likely counterfactual is broadly the conditions of competition of today including [✂]. That is, absent the Merger, Footasylum would have continued to exert a similar competitive constraint on JD Sports to the constraint it exerts on JD Sports today and that JD Sports would have exerted the same degree of competitive constraint as it does today. As noted above, we will consider the impact of product allocations in further detail in the competitive assessment in further detail.

11. Our assessment of the competitive effects in footwear and apparel

Introduction

11.1 This chapter provides our assessment of our two theories of harm:

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

(b) horizontal unilateral effects in the retail supply of sports-inspired casual apparel (in-store and online) in the UK (paragraph 4.22).

11.2 Our approach to the Remittal has been discussed in Chapter 4. We have used our formal information gathering powers to obtain evidence from the Parties and some third parties (particularly Nike and adidas). We have held calls with some third parties and formal hearings with Nike and adidas.

11.3 We have used some evidence from the CMA's Phase 2 Final Report and we have gathered fresh evidence during the Remittal. Although not an exhaustive list of the fresh evidence that we have gathered, we have obtained:

(a) survey evidence of online shoppers of JD Sports and Footasylum;

(b) recent internal documents from JD Sports and Footasylum;

(c) questionnaire responses from third party retailers and suppliers;

(d) internal documents from Nike and adidas;

(e) sales growth targets from Nike and adidas and some third parties;

(f) sales performance data from retailers relating to the period following the CMA's Phase 2 Final Report;

(g) product allocation and overlap data for retailers from Nike and adidas; and

(h) qualitative evidence from retailers and suppliers (as regards their DTC channels) on improvements that they have made since the CMA's Phase 2 Final Report.

11.4 We have set out the evidence that we are relying on in Chapters 5-9 and we have presented our assessment of the appropriate counterfactual in Chapter 10. We have presented our assessment of how retail competition operates in Chapter 6 which discusses the parameters on which we have found retailers, including the Parties, compete (and can be varied according to conditions of competition). A worsening of one or more of these parameters of competition are the possible adverse effects that could arise from the Merger.

11.5 We have taken into account the context and effects of the COVID-19 pandemic on the two relevant markets and including distinguishing between longer term trends and shorter term shocks (paragraphs 4.17 to 4.19).

Horizontal unilateral effects in footwear

Assessment of current competition

11.6 An SLC based on horizontal unilateral effects is more likely when the merging parties are close competitors. Unilateral effects can arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices on its own and without needing to coordinate with its rivals.[467] Firms may not necessarily place equal constraints on each other however, and therefore a merger may result in a much greater loss of competitive constraint in one direction (ie only from one merger party to the other party) than the other direction (an asymmetric constraint). Indeed, it is commonly accepted that an SLC can arise if a merger results in substantial lessening of competition in one direction only.

11.7 Firms are close competitors if their customers view them as alternatives to each other, ie customers would be willing to switch between the two firms, and, as a result, the two firms compete to win and retain customers by offering a better product and service.[468] Two closely competing firms place a stronger immediate constraint on each other than do other firms within the same market, and customers benefit from this competitive rivalry. If those

[467] Merger Assessment Guidelines, September 2010, CC2 (revised), paragraph 5.4.1. See also paragraphs 5.4.6-5.4.9.
[468] This process of rivalry is set out in Merger Assessment Guidelines, September 2010, CC2 (revised), paragraphs 4.1.2 and 4.1.3

closely competing firms merge, each will be under less competitive pressure which means they will not work as hard to offer good deals for their customers or make improvements to their businesses as they otherwise would have done.[469] Therefore, our assessment considers whether consumers would get a worse deal relative to the situation without the Merger (this may or may not be a worse offer than what customers get today). Where the constraint exerted by two merging firms is asymmetric, consumers can still be harmed by the loss of competitive pressure resulting from the merger for the reasons outlined above, even if this loss impacts significantly more on one firm than the other, provided the loss of competition overall is considered to be substantial.

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

Our assessment of how closely the Parties compete

11.9 To assess whether the Parties compete closely in the retail supply of sports-inspired casual footwear, below we examine the evidence relating to:

(a) the Parties' general characteristics and access to products;

(b) the degree of product overlap between the Parties for Nike and adidas footwear products;

(c) the extent to which JD Sports and Footasylum shoppers view the other Party as an alternative based on our Remittal Online Survey and the Phase 2 Exit Survey;

(d) GUPPIs;

(e) views of third parties

(f) the Parties' internal documents; and

(g) market shares.

[469] Merger Assessment Guidelines, September 2010, CC2 (revised), paragraph 4.1.3

The Parties' general characteristics

11.10 We first note that the Parties have some general characteristics as retailers that we consider make them likely to be close competitors. They are both large, national, retailers of sports-inspired casual footwear. They each serve a large number of customers, have national reach (JD Sports has around 385 stores in the UK[470] and Footasylum has 65 stores; both have nationally operating online delivery services).

11.11 Physical stores are an important part of the Parties' respective offerings. There is a high degree of geographic overlap of the Parties' physical stores and since the CMA's Phase 2 Final Report there has been relatively little change in the Parties' store estates.[471] While Footasylum has received derogations from the Interim Order for the purpose of closing some stores (paragraph 7.147) we consider that Footasylum's closure of stores ([✂] since the start of 2020) has not had a significant adverse effect on its competitiveness at the national level.

11.12 The Parties both target a similar demographic; 16-24-year-old male consumers (although the focus on males is more pronounced for Footasylum).[472] Both retailers offer footwear (and apparel) across a range of leading brands.[473] The evidence indicates that having a large multi-brand range is valued by their customers. The evidence also shows that JD Sports and Footasylum have a very similar sales profile in the footwear brands they sell, with [✂] of the biggest two suppliers, Nike and adidas, and the same brands mainly featured in both Parties' top 10 lists (Table 2 and paragraph 8.4).

The Parties' range of footwear products

11.13 The Parties compete across a range of parameters in the retailing of sports-inspired casual footwear (paragraphs 6.80 to 6.87). The brands and products that they stock are an important aspect to this. In particular, the footwear products of Nike and adidas are important to the Parties' overall branding and position in the retail marketplace and how consumers perceive them.[474]

11.14 Both Nike and adidas prioritise [✂] (in accordance with its status as a [✂]/[✂], paragraphs 7.53 and 7.62-7.63), while [✂] (as it is not a classified

[470] Plus a further 23 Size? And Footpatrol stores.
[471] Paragraphs 7.7 to 7.9.
[472] JD Sports, Response to Issues Statement, paragraphs 6 and 14.
[473] For example, [✂] state [✂]
[474] In their [✂] the Parties submitted that they [✂] and "Footasylum's brand and reputation is centred on its position as a retailer of popular footwear products from brands such as Nike and adidas".

as a [✂]/[✂]). In terms of the range of products the Parties have access to, Nike and adidas continue to [✂] (paragraphs 7.53 and 7.62).

11.15 During the pandemic, [✂][475] in Nike footwear allocations. Due to its [✂], these have been [✂] for Footasylum than for JD Sports (although [✂] to Footasylum) (paragraph 7.60). These [✂] on Footasylum's recent financial performance (paragraph 8.18) partly because Footasylum has been able to partially [✂] with [✂] (paragraph 7.45 and Footnote 154). Most of our evidence dates from after the point at which Footasylum started to [✂] and therefore the [✂] on Footasylum is already reflected in our assessment. Further we do not consider the evidence shows [✂] in Footasylum's supply relationship with Nike since [✂] (paragraph 7.60). Footasylum's [✂] may have been a factor in its recent decisions to [✂] but whether stores are performing well (which is the key metric informing such decisions) is likely to be based on a number of other factors, including factors unrelated to allocations such as a reduction in footfall in the general area and/or the level of rent.[476]

11.16 In terms of the specific Nike and adidas products sold, we have found, through our product overlap analysis,[477] that JD Sports consistently stocks a high proportion of the specific products that Footasylum sells ([✂]% of Nike footwear products – a higher proportion than any other retailer – and [✂]% of adidas footwear products, second only to Very) (Tables 3 and 4).[478,479] In contrast, while Footasylum sells [✂]% of the Nike footwear products that JD Sports sells (only [✂] sold a higher proportion), it [✂] sells [✂]% of the adidas footwear products that JD Sports sells (although 4 rival retailers had a higher proportion of product overlap with JD Sports, the highest proportion ([✂]) was only 22%).[480] Regarding the overlap in Nike footwear, the proportion of JD Sports' products sold by Footasylum was only [✂] percentage points lower than [✂] but it was [✂] percentage points lower than [✂].[481]

How the Parties' customers view their options

11.17 We also collected evidence directly from customers.

[475] Ie the scale of [✂]. See Figure 2.
[476] For example, Footasylum has decided not to renew some leases [✂] and has instead closed a small number of stores.
[477] See Appendix C for an explanation of this analysis. As noted in paragraph 8.5, Nike DTC and adidas DTC have a total overlap with both Parties for Nike and adidas footwear, respectively.
[478] These are the highest and 2nd highest overlaps respectively of all retailers.
[479] Sales-weighted, paragraph 8.7.
[480] Sales-weighted, paragraph 8.10.
[481] Although, as discussed in Appendix C, Zalando may not necessarily sell all these products in the UK, given its large European presence, but very small UK presence.

11.18 The Remittal Online Survey found that 43% of Footasylum footwear customers would shop at JD Sports if they could not shop at Footasylum, which was 3 percentage points lower than the Phase 2 Online Survey.[482] This was a substantially higher level of diversion than to any other retailer. Nike was the next highest alternative mentioned by 13% of respondents.

11.19 Diversion to Footasylum from JD Sports online customers was significantly lower at 9%, with Nike, Foot Locker and adidas all receiving more diversion than Footasylum. This represents a 7 percentage points reduction in diversion compared to the Phase 2 Online Survey. This reduction in diversion is explained by an increase in the diversion to Nike and adidas DTC.

11.20 In recent years, online sales accounted for a significant minority of both Parties' footwear business. Since March 2020 there have been a number of occasions where the Parties' stores have had to close due to government lockdowns, leading to a shift toward online sales. However, the evidence we collected suggests that the Parties and other multichannel retailers continue to see the importance of their in-store offer despite a steep increase in online sales. For instance, both Parties opened all stores they were able to when they were allowed to do so,[483] few stores have been permanently closed down by the Parties,[484] and in the 2 weeks to 3rd July 2021, [✂]% of JD Sports sales were in-store sales, while in the 3 weeks to 19th July 2021 [✂]% of Footasylum sales were in-store. In addition, the Remittal Online Survey, the consumer behaviour data from ONS and Mintel and views from many retailers all pointed out the importance of presence across sales channels. In particular, the Remittal Online Survey suggested the greatest increase in consumers' channel preference is likely to be in customers using a mix of online and in-store, rather than purely one or the other,[485] and the ONS and Mintel evidence suggests that while some increase in online shopping will persist, a significant proportion of customers will go back to shopping in-store, as concerns around the pandemic decrease.[486] We therefore consider that in-store shopping currently does, and will continue to, play an important role in this market.

11.21 As noted in paragraph 4.32, we did not undertake a survey of in-store shoppers during the Remittal. However, the Phase 2 Exit Survey was a robust survey of in-store shoppers and it found diversion between the Parties (in both directions) was significantly higher than in the Phase 2 Online Survey (68%

[482] The Phase 2 online survey did not reach the required response rate so its results need to be interpreted with caution.
[483] Paragraph 7.139
[484] Paragraphs 7.143 and 7.145
[485] Paragraph 7.117 and 7.123.
[486] Appendix E.

from Footasylum to JD Sports and 21% from JD Sports to Footasylum). We consider that we can still place evidential weight on the results of that survey (paragraph 8.27).

GUPPI analysis

11.22 We used the diversion ratios from our Remittal Online Survey and the Parties' variable margins to estimate GUPPIs - which give an indication of the strength of incentive to worsen certain elements of PQRS. The online footwear GUPPI for Footasylum is [✂]%, which is high and indicates a strong incentive to worsen PQRS. In contrast the online footwear GUPPI for JD Sports is much lower at [✂]%.

11.23 As we were unable to conduct a new in-store survey during the Remittal (paragraph 4.32) we considered whether we could use the diversion ratios from the Phase 2 Exit Survey to produce an updated in-store GUPPI and an updated combined GUPPI by making certain adjustments to the inputs for the GUPPI calculation to reflect market developments. The adjustments included using up-to-date margins, and recognising that that there have been changes in the online segment and these may have an impact on, for example, the propensity of in-store shoppers to divert to different online alternatives as their best alternative.[487]

11.24 For Footasylum, we considered that there is no credible scenario where in-store diversion to JD Sports would be lower than online diversion to JD Sports. Based on the evidence from the Phase 2 Exit Survey we consider that in-store diversion from Footasylum to JD Sports would likely be higher than online diversion, given there are fewer significant competitors with a national in-store offering, there is a high degree of geographic overlap of the Parties' stores and in-store customers have a lower likelihood of choosing an online retailer than online customers. Therefore, we believe the online GUPPI of [✂]% represents the absolute lower boundary of the possible value for the in-store or combined GUPPI. These indicate very strong incentives for the Merged Entity to worsen PQRS at Footasylum.

11.25 For JD Sports we also considered that in-store diversion between the Parties would be slightly higher than their online diversion based on the Phase 2 Exit Survey. We broadly estimated an in-store and combined GUPPI of 1 to 2 percentage points higher than the online GUPPI – in the region of [✂] to

[487] We do find there have been no significant structural changes to the market since the P2 inquiry survey given none of the main competitors have exited the market and there have been no significant new entrants or store expansion (albeit there have been some store closures). This is discussed in more detail in paragraph 8.36 and Appendix H.

[✂]%, with the low end of this estimate being based on relatively extreme assumptions regarding changes in in-store consumer preferences. This suggests a considerably lower incentive for the Merged Entity to worsen PQRS at JD Sports than at Footasylum post-Merger.

Views of third parties

11.26 Almost all competitors responding to our questionnaires told us that the Parties compete closely, with the majority finding the Parties are close competitors, often along with Foot Locker and less often Nike DTC.[488]

The Parties' internal documents

11.27 We also found that the Parties regularly monitor each other as well as a range of other retailers in their day to day business documents.[489] [✂] [✂].

Market shares

11.28 The Parties' combined market shares in sports-inspired casual footwear are [✂][[✂] [30-40]%, with JD Sports ([✂][([✂] [20-30]%) substantially larger than Footasylum ([✂][0-5]%) (see Chapter 8 market shares). The Parties' combined in-store share ([✂][50-60]%) is higher than its combined online share ([✂][20-30]%). Due to the differentiated nature of this market, we looked at market shares as an indicator of the presence that different retailers have in the relevant markets, but do not consider them to be very informative as to how closely the different competitors in the market complete or the strength of competition each imparts.

Conclusion on how closely the Parties compete

11.29 Overall, a range of evidence from different sources is consistent with JD Sports being by far the closest competitor to Footasylum. In particular, this is shown by JD Sports' similar target demographic, store locations (and mix of online and in-store sales), the similarity of their general offerings and of the Nike and adidas footwear products in particular, the monitoring in Footasylum's internal documents, and the diversion evidence from our Remittal Online Survey, the Phase 2 Exit Survey, and the large Footasylum GUPPIs.

[488] We note that many third parties did not provide a separate view for footwear and apparel while other third parties provided the same scoring on closeness for both footwear and apparel. For further detail, see the section 'third party views' in Chapter 7.
[489] See Appendix I for our assessment of the Parties' internal documents submitted during the Remittal.

11.30 This evidence also indicates that Footasylum has weakened as a competitor to JD Sports since the CMA's Phase 2 Final Report and while it exerts some competitive constraint on JD Sports, this is more limited now than before the COVID-19 pandemic, while some other rivals exert stronger constraints. Diversion to Footasylum for JD Sports customers has nearly halved based on the Remittal Online Survey (whereas it has increased significantly to Nike and to a lesser extent for adidas). More JD Sports customers now consider Nike, Foot Locker and adidas as their best alternatives than they do Footasylum. Previously Footasylum was the second-best alternative after Nike. Whilst in-store diversion between the Parties may still be higher than online diversion, we consider these changes in online diversion to be informative and consistent with other evidence on market developments. However, we note that certain evidence remains broadly the same as set out in the CMA's Phase 2 Final Report, including the Parties' general characteristics and internal documents, classification by key suppliers ([✄]), the extent of their overlap in key branded footwear products, third parties' views, and market shares.

Competitive constraints from rivals

11.31 We have considered the extent to which other retailers, in isolation, or collectively, present a competitive constraint that would offset the loss of competition between the Parties (which results primarily from removing the constraint that JD Sports exerts on Footasylum). As such, we have considered how closely other retailers compete with the Parties currently.

11.32 When considering the competitive constraints that the Merged Entity might face, where available and appropriate, we have assessed the strength of rivals using the following evidence:

(a) The proportion of the Parties' customers who identified the third party as their best alternative in our Remittal Online Survey and the Phase 2 Exit Survey;

(b) The overall magnitude of UK sales by the third party relative to JD Sports and Footasylum;

(c) The proportion and ranking of the product overlap with the Parties;[490]

(d) The sales performance of the retailer since the CMA's Phase 2 Final Report;

[490] We have used product overlaps on a sales-weighted basis.

(e) Nike's and adidas's product allocation category for the retailer. This includes the type of products that the retailer is being supplied (ie lifestyle, general sports or fashion-specialist).[491]

(f) Views of third parties;

(g) the extent the Parties' monitor these competitors in their internal documents; and

(h) Indications of the retailer's future performance, whether through a supplier's product allocation category (eg a Strategic Partner to Nike or adidas), the retailer's own growth forecasts or recent changes to the business or investment.

Nike

11.33 Nike is both a supplier of products to retailers and a retailer itself (via its stores and online sales channels). Unlike the Parties, it does not retail footwear of any brands other than its own. Nike DTC, of course, has total product overlap with both Parties for Nike footwear but it does not offer the same product range *across* brands.

11.34 The evidence indicates that Nike's DTC sales channels have grown strongly over the past year and are expected to grow further in footwear. In the year to March 2021, Nike's online footwear sales were [✂]% higher than would be expected absent the pandemic.[492] In market share terms, its share of the retail of sports-inspired casual footwear across in-store and online channels has increased from [✂]% in 2018 to [✂]% in 2020 ([✂]). Nike's share may even be greater now given its growth in online footwear sales in the year to March 2021 was higher than [✂].

11.35 In the Remittal Online Survey, Footasylum's online shoppers ranked Nike as second only to JD Sports when asked about alternatives to Footasylum for footwear and Nike was the most popular alternative for JD Sports' online footwear shoppers. However, the CMA's Phase 2 Exit Survey showed that diversion to Nike in-store was relatively low for both Parties at only 4% for JD in-store customers and 1% for Footasylum's in-store customers. This is consistent with the fact that Nike has fewer physical stores than the Parties

[491] In our assessment of each retailer below we do not discuss recent impacts of the COVID-19 pandemic on reductions in product allocations. These are already captured in our assessment of current competition through metrics such as diversion and product overlaps.
[492] See Appendix F.

and the majority of its stores are factory outlets, which [✂]. As such, the evidence suggests that Nike is a stronger constraint online than in-store.

11.36 Nike is [✂] and the Parties have submitted that Nike [✂]. Some retailers regard Nike as a competitor to the Parties.

11.37 Other third party retailers generally consider Nike to be a close competitor to both Parties (paragraph 7.79) although it was not considered as close a competitor to Footasylum as JD Sports by other retailers.

11.38 We consider that Nike exerts a competitive constraint on both Parties in footwear. In terms of constraints for online consumers, Nike is a stronger constraint on JD Sports than Footasylum is, but is a much weaker constraint on Footasylum than JD Sports is. Put another way, the evidence indicates that JD Sports imposes a very significant constraint on Footasylum and that, while Nike also imposes some constraint on Footasylum, it is considerably less than the constraint from JD Sports. We consider that the evidence also shows that Nike's constraint is likely to be weaker for in-store consumers given its more limited store presence and its lower diversions for in-store customers from the CMA's Phase 2 Exit Survey. We consider that Nike has become a stronger competitor since the CMA's Phase 2 Final Report and is likely to become a stronger constraint to both Parties in the future as a result of growth in its DTC offering (even if it does not meet its specific targets). We discuss the future growth of Nike in our assessment of future competition below.

adidas

11.39 adidas is both a supplier of products to retailers and a retailer itself (via its stores and online sales channels). Unlike the Parties, it does not retail footwear of any brands other than its own. Adidas DTC has total product overlap with both Parties for adidas footwear.

11.40 Similar to Nike, adidas DTC sales performance has been strong over the past year. Its online sales growth in footwear in the year to March 2021 ([✂]% higher than would be expected absent the pandemic)[493] has outstripped [✂]. However, in market share terms its share from 2018 to 2020 was reasonably [✂]and within the online segment its share [✂][✂].

11.41 adidas is [✂] and some retailers regard adidas as a competitor to the Parties.

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[493] See Appendix F.

11.42 adidas has a relatively small store presence. Its share of supply of in-store sales is smaller than Footasylum and Nike (as well as Foot Locker, Office and Schuh). Our Phase 2 Exit Survey showed that diversion to adidas in-store was low and at similar levels to Nike for JD Sports' customers and was even lower for Footasylum's customers. The evidence indicates that adidas is a stronger constraint online than in-store.

11.43 In the Remittal Online Survey, adidas was ranked lower than Nike, Foot Locker and ASOS in terms of online shoppers' best alternative to Footasylum for footwear. For JD Sports' online shoppers of footwear, adidas's ranking was on a par with Foot Locker but was only around half that of Nike.

11.44 Other third party retailers generally consider adidas to be a close competitor to both Parties (paragraph 7.79).

11.45 We consider that adidas exerts some competitive constraint on both Parties in footwear although less than Nike. In terms of constraints for online consumers, adidas is a more important constraint on JD Sports than it is on Footasylum and it is a much weaker constraint on Footasylum than JD Sports is. adidas is likely to become a stronger constraint on both Parties in the future, particularly in the online segment, as a result of growth in its DTC offering (discussed further below).

Multichannel retailers

- *Foot Locker*

11.46 Foot Locker is a multi-brand, multi-channel retailer of similar scale to Footasylum in the UK (and therefore is materially smaller than JD Sports) although it also has a global network.

11.47 The CMA's Phase 2 Final Report found that Foot Locker was a close competitor to both Parties and imposed a strong constraint on the Parties in footwear.

11.48 We have found that Foot Locker has a large product overlap with respect to Nike footwear with both Footasylum ([✂]%) and JD Sports ([✂]%).[494] However, it does not have a high product overlap with either Party for adidas footwear. Evidence from Nike and adidas show that Foot Locker, like JD Sports, is and will remain in the highest strategic category [✂].

[494] Sales-weighted, paragraph 8.7.

11.49 In the Remittal Online Survey JD Sports customers ranked Foot Locker second only to Nike, and ahead of Footasylum in terms of online shoppers' best alternative, while it was a slightly less popular option for Footasylum online shoppers but still third behind JD Sports and Nike. The CMA's Phase 2 Final Report identified Foot Locker as being a particularly close competitor to the Parties for in-store shoppers and we have seen no evidence to show that this is likely to have changed.[495]

11.50 Foot Locker has an online presence but [✂] (paragraph 7.17). Foot Locker's [✂].

11.51 The Parties [✂] closely [✂]. Most third party retailers regard Foot Locker as a close competitor to the Parties.

11.52 We consider that Foot Locker exerts some competitive constraint on both Parties in footwear, although slightly less than Nike (and Foot Locker poses a weaker constraint on Footasylum than JD Sports does).

- *Sports Direct*

11.53 Sports Direct is a large multi-channel retailer of sporting footwear and apparel. Sports Direct has very little product overlap with either Party given the different position it occupies in a differentiated marketplace. Within the relevant market Sports Direct has only a very small presence (Appendix C, Table 11).

11.54 Sports Direct is in the process of undergoing an elevation of its position in UK retail, focusing on an enhanced shopping experience and a greater selection of premium products. To date Sports Direct has not been successful in getting the same sports-inspired casual footwear products as JD Sports and Footasylum. [✂] (paragraph 7.18). [✂].

11.55 Some consumers view Sports Direct as being a credible alternative to both JD Sports and Footasylum. The Remittal Online Survey showed that 8% of JD Sports online shoppers thought Sports Direct would be their best alternative. However, we note that we are more concerned with the competitive constraints on Footasylum (paragraphs 11.29 and 11.30) and only 3% of Footasylum online shoppers thought Sports Direct would be their best alternative. This is consistent with Footasylum's own statement to us that given Sports Direct are '[✂].'[496]

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[495] Foot Locker has told us that it has not made any significant changes since the CMA's Phase 2 Final report (paragraph 7.50)
[496] [✂]

11.56 The Parties' internal documents demonstrate [✂]. Some retailers named Sports Direct as a competitor to the Parties (even though Frasers Group itself does not view itself as being a significant competitor to either of the Parties).[497]

11.57 We therefore consider that given its different product focus Sports Direct is not a close competitor to either of the Parties and exerts only a limited constraint on the Parties in footwear.

- *Other multichannel retailers*

11.58 We have considered the evidence regarding the competitive constraint of Office, Schuh[498] and [✂].

11.59 Office is larger than Footasylum in both in-store and online sales of footwear although less than a third of the size of JD Sports. Its stores have a high geographic overlap with both Parties. Office sells [✂]% of JD Sports' Nike footwear products and [✂]% of Footasylum's Nike footwear products, and [✂]% of JD Sports' adidas footwear products and [✂]% of Footasylum's adidas footwear products.[499]

11.60 Nike places Office [✂][✂] in relation to the determination of its core product assortment ([✂]), which is also relevant for the purpose of allocation. However, Office's core customer base is different to either Footasylum's or JD Sports' customer base given that it is predominantly female. In our Remittal Online Survey, Office was only considered by 1% of either JD Sports or Footasylum customers as their best alternative. In the Phase 2 Exit Survey, fewer than 2% of in-store customers of either JD Sports or Footasylum said they would divert to Office.

11.61 The CMA's Phase 2 Final Report found that Office had some similarities with the Parties but less so than some other retailers and less than the Parties to each other. Third party retailers did not consider Office to be a close competitor to either of the Parties. [✂] (paragraph 7.149).

11.62 We consider that the evidence indicates that Office imposes only a weak constraint on either Party.

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497 Appendix C
498 In paragraph 7.59 we consider data from Nike on reduced allocations for Office and Schuh in comparison with Footasylum, which suggests [✂]. In addition, given these reductions have already occurred, this is already incorporated into our assessment of current competition.
499 Sales-weighted. Paragraphs 8.7 to 8.11.

11.63 Schuh's product overlaps with the Parties are [✂]% and [✂]% for JD Sports and Footasylum respectively on Nike footwear products and [✂]% and [✂]% for JD Sports and Footasylum respectively on adidas footwear products.[500] [✂]. Although Schuh's scale in the UK is similar to Footasylum's, its market share has declined between 2018 and 2020. JD Sports is much larger than Schuh (around 7 times bigger, Appendix C, Table 11). In our Remittal Online Survey 5% of JD Sports online shoppers and only 3% of Footasylum online shoppers responded in favour of Schuh being their best alternative to JD Sports and Footasylum respectively. Schuh received similar rates of diversion in-store in our Phase 2 Exit Survey. We have found that JD Sports and Footasylum [✂] than each other and certain other retailers in their [✂]. Third party retailers did not consider Schuh to be a close competitor to either of the Parties. The evidence indicates that Schuh imposes a greater constraint on the Parties than Office but this is still relatively limited.

11.64 [✂][✂][✂] (paragraph 7.152) [✂][501] It has a very small presence in the relevant market and third party retailers did not consider [✂] to be a close competitor to either of the Parties. We consider any constraint imposed by [✂] on JD Sports or Footasylum to be very limited.

Online only retailers

- *ASOS*

11.65 ASOS is an online retailer. It has an overall market share of a similar size to Footasylum[502] (and therefore much smaller than JD Sports) and targets a different core customer base to Footasylum and JD Sports.[503]

11.66 ASOS's product overlap with the Parties is [✂]% of Footasylum's Nike footwear and [✂]% of JD Sports' Nike footwear. For adidas footwear, it is [✂]% of Footasylum's adidas footwear and [✂]% of JD Sports' adidas footwear.[504] Therefore, it has a [✂]overlap with Footasylum's footwear products, [✂] than some other retailers for both brands, and a [✂] overlap with JD Sports' footwear products, especially [✂] footwear.

11.67 That ASOS has [✂] with the Parties than other retailers is consistent with the estimated diversions from the Remittal Online Survey. Only 6% of both

[500] Sales-weighted. Paragraphs 8.7 to 8.11.
[501] [✂]
[502] See Appendix C, Table 11.
[503] See Appendix C, paragraph 50.
[504] Sales-weighted, paragraph 8.7 to 8.11.

Footasylum's and JD Sports' online shoppers considered ASOS to be a good substitute for Footasylum and JD Sports respectively for footwear products.

11.68 In the Phase 2 Exit Survey, less than 2% of both JD Sports and Footasylum in-store shoppers for footwear mentioned ASOS as their best alternative, which is consistent with the fact that it does not have any stores.

11.69 ASOS is one [✂]. Nike also confirmed that [✂]. The evidence indicates that ASOS will have a different focus from the Parties in terms of the products it will retail, consistent with its different core customer base. Therefore, ASOS is not as close a competitor to either of the Parties in footwear as they are to each other.

11.70 We note that both Footasylum and JD Sports [✂] We consider that the evidence indicates that ASOS imposes only a relatively limited constraint on either Party for footwear.

- *Zalando, Very and Amazon*

11.71 Zalando is an online only retailer with a significant presence in Europe. Zalando is [✂] to Nike in EMEA and an [✂] to adidas. However, we have been told by Nike that [✂]).[505] It receives product allocations centrally for its entire European operations (ie it does not have a separate UK allocation). It has a [✂] of product overlap with both Parties for Nike footwear (on a European wide basis) but for adidas footwear products the overlap is [✂]. [✂]. Third party retailers did not consider Zalando to be a close competitor to either Party.

11.72 Very few online shoppers of the Parties identified Zalando as a substitute for JD Sports or Footasylum in the Remittal Online Survey. Like ASOS, it does not have stores in the UK and the CMA's Phase 2 investigation did not find that Zalando offered a good alternative for in-store shoppers. Zalando is not among the retailers [✂].

11.73 The retailer Very has a [✂]product overlap with Footasylum for adidas footwear and although it does not have [✂] overlap with JD Sports on adidas footwear ([✂]%), it is nevertheless [✂] retailer. However, it [✂] overlap with either Party for Nike footwear.[506] We consider this means it is not a close competitor to either party. Few online shoppers of the Parties identified Very as a substitute for JD Sports or Footasylum. Very has a small market share (smaller than Footasylum and considerably smaller than JD Sports) and in the

[505] [✂]
[506] Sales-weighted, paragraph 8.7 to 8.11.

online segment its share has [✄] since the CMA's Phase 2 Final Report from [✄]% to [✄]%.

11.74 Amazon does not have a [✄] product overlap with either Party for Nike or adidas footwear products. [✄]. Online shoppers of the Parties did not identify Amazon as a significant substitute for JD Sports (4% of its shoppers) or Footasylum (3% of its shoppers). The CMA's Phase 2 investigation did not find that Amazon offered a good alternative for in-store shoppers. Its market share is very low and it is [✄].

11.75 We consider that the evidence indicates that Zalando, Very and Amazon are, at best, only weak constraints on either Party.

Conclusion on competitive constraints from rivals

11.76 As set out above, we have found that JD Sports is by far the most significant competitive constraint on Footasylum and that this constraint will be lost as a result of the Merger. Whilst there will also be a loss of constraint from Footasylum on JD Sports, we consider this to be much lower and therefore the loss of competition in the market for sports-inspired casual footwear is driven principally by the removal of JD Sports' constraint on Footasylum. We have therefore considered whether the remaining constraints are sufficient, individually and collectively, to prevent an SLC from arising.

11.77 In our Provisional Report, we concluded that aggregate constraints from third parties were not sufficient to prevent an SLC. In their response to our Provisional Report, the Parties submitted that the provisional SLC was 'incoherent' as it depends on the constraint by Nike and adidas (not just individually but together with every other third party) being much lesser in respect of Footasylum than JD Sports.[507] The Parties also submitted that our reasoning did not demonstrate that all evidence could support the notion that all other rivals, even collectively, were not sufficient alternatives to JD Sports for Footasylum customers to prevent an SLC.[508]

11.78 We have considered the Parties' submissions on this point, and others, and set out below our assessment of the aggregate constraints and whether they are sufficient to prevent an SLC arising primarily as a result of the loss of constraint from JD Sports on Footasylum.

11.79 We consider that Nike, adidas and Foot Locker exert a competitive constraint on both Parties in footwear. In terms of constraints for online consumers, they

[507] Parties response to CMA Provisional Report, paragraph 6 c.
[508] Parties response to CMA Provisional Report, 110.

are stronger constraints on JD Sports than Footasylum is but are much weaker constraints on Footasylum than JD Sports is. Nike and adidas are stronger constraints on the Parties for online customers than in-store customers (we also consider that Nike is a stronger constraint on both Parties than adidas). While we found that numerous other retailers offer sports-inspired casual footwear, taken in the round, the evidence indicates that other retailers, individually and collectively, impose only a weak competitive constraint on the Parties.

11.80 Despite JD Sports' very considerable competitive constraint on Footasylum, we do not believe Footasylum is insulated from other competitors, including the growth of DTC. Nike, adidas and Foot Locker all act as at least some constraint on Footasylum, but the evidence shows that each of these constraints are far smaller than the constraint imposed by JD Sports.

11.81 Further, taking the current constraints from Nike, adidas and Foot Locker in aggregate, we found they pose a smaller constraint on Footasylum than JD Sports does. The survey diversion (from both online and in-store customers) gives a good illustration of the magnitude of the strength of the constraint of JD Sports on Footasylum, and in comparison to other rivals, with nearly as much diversion to JD Sports as all over rivals combined.

11.82 While we place significant weight on the survey diversion and GUPPI in our assessment of current competition, we have not relied on it in isolation and have taken into consideration other evidence in order to reach our conclusion. In our view, the other evidence set out above, in relation to each Party and third party, is consistent with the survey diversion. For example, in relation to Nike DTC, while Nike clearly has the highest product overlap with Footasylum on Nike footwear, it does not have the number or proximity of stores, does not offer the same product range across brands, and is not monitored as intensively as JD Sports in Footasylum's internal documents. In addition, Nike was consistently not considered as close a competitor to Footasylum as JD Sports by other retailers.

11.83 Given how closely JD Sports competes with Footasylum, and the size of the gap to the next closest competitor, we do not consider the current aggregate horizontal constraints to be sufficient to offset the incentive to deteriorate PQRS at Footasylum as indicated by the GUPPI and other evidence.

11.84 As such the evidence indicates that JD Sports plays a significant role in shaping Footasylum's offer to consumers.

Supplier constraints on the incentive to degrade PQRS

11.85 There are parameters of competition that suppliers influence and, in some instances, actively monitor. While we consider that, since the CMA's Phase 2 Final Report, there has been some increase in the targets and expectations that the main suppliers set for retailers, and their monitoring and auditing of retailer performance against those, these are not comprehensive, and in the suppliers' view, do not represent a significant change in approach. Therefore 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.

11.86 Notwithstanding this, we consider that the suppliers' constraint is not so significant as to sufficiently discipline (through product allocation punishments or other mechanisms) the Merged Entity's ability and/or incentive to deteriorate its offering post-Merger compared to what it would have been absent the Merger. Suppliers may find it difficult in some cases to detect a deterioration of retailers' offerings, particularly if the deterioration involves a lack of improvement relative to what otherwise would have been achieved; and suppliers may monitor retailers infrequently such that there are periods of time during which a change in a retailer's standards may occur unobserved. For example, despite the prevalence of RRP, we have found that retailers do compete on pricing through discounts and sales.

11.87 In addition there are significant parameters of competition that are important to consumers that suppliers do not influence or in relation to which retailers retain some discretion. We note this includes parameters in relation to which suppliers may not be harmed by or may even benefit from a deterioration by retailers, for example less discounting, free delivery thresholds for online orders, and a broad range of non-price parameters (see paragraph 6.71).

Assessment of future competition

11.88 Our analysis of current competition shows that the Parties compete closely in footwear, with JD Sports being a much stronger constraint on Footasylum than Footasylum is on JD Sports. The Parties also face competition from some third-party rivals, notably Nike, adidas and Foot Locker, and weaker competition from a number of other retailers. Next, we assess whether conditions of current competition are likely to be a good prediction of competition in the foreseeable future.

11.89 The evidence received during the Remittal indicates that the most likely reasons current competition would not be a good prediction of future competition are if:

(a) rivals, especially Nike and adidas, continue to grow their DTC channels in direct competition to the Parties; and/or

(b) Footasylum [✂].

Future growth of rivals

11.90 We have considered the current strength of rivals in our assessment above. We have found that a number of multi-channel retailers plan to improve their online offer to enable them to continue to compete in the future. However, we did not receive evidence that any of these retailers had plans that would significantly change their overall offer to such an extent as to materially change the constraint they placed on the Parties.

11.91 The evidence indicates that Nike's DTC channel has become a stronger constraint on both Parties since the CMA's Phase 2 Final Report (paragraph 11.38). We have found that adidas imparts some competitive constraint on the Parties but as far as Footasylum is concerned this constraint is weaker than that imposed by JD Sports, Foot Locker and Nike. Nike and adidas have ambitious growth targets for their DTC operations and even if they do not meet those specific targets we nonetheless expect them to continue to grow their DTC sales and become stronger competitors in the UK.[509] We note that unlike other retailers, Nike and adidas control the type and volume of a significant proportion of products supplied to retailers and therefore are in a relatively advantageous position to grow their own DTC sales.[510] As noted by the Parties (paragraph 6.52 and 7.32), Nike has [✂], although Nike [✂] (paragraph 6.57). We have also seen internal documents from the suppliers forecasting their future sales which are then used in their strategic decision-making. The expectation of Nike's and adidas's DTC capturing a greater proportion of footwear sales in the near future is shared by the Parties (paragraphs 7.183 to 7.186) and a number of third parties. Indeed, the Parties' internal documents [✂] discuss and monitor the suppliers' DTC sales. However, we also note that the suppliers have told us that they expect to [✂] (paragraphs 7.196 and 7.197) which will enable supplied retailers to [✂] (paragraph 7.198).

[509] The DTC growth targets for both Nike and adidas are targets, not forecasts.
[510] As noted by the Parties, consolidation within the wholesale channel means that, even if overall channel sales are flat, they are being redistributed through [✂], whereby DTC and strategic partners benefit and less-favoured retailers lose out.

11.92 We therefore expect both Nike and adidas to be stronger competitors in the future. In fact we expect Nike and adidas to be stronger constraints on the Parties than currently, although we do not expect them to be as strong a constraint on Footasylum as JD Sports, given JD Sports' strong position and forecasts (paragraphs 8.63 to 8.67) and for the reasons given in paragraph 11.83. Given the significant gap between the constraint posed by JD Sports and that of Nike or adidas on Footasylum we consider that their growth will not be of a sufficient magnitude to place them in a comparable position to JD Sports within the foreseeable time period. We also note that adidas is starting from a weaker position than Nike. However, we also expect Footasylum to continue to become a relatively less important constraint for JD Sports than Nike and adidas.

11.93 We expect Foot Locker to remain a stronger constraint on JD Sports than Footasylum, given its [✂] (in particular [✂]). We do not however consider that the evidence shows that the competitive strength of Footlocker is likely to grow significantly in future, meaning that the strength of the constraint it exerts on Footasylum is also unlikely to grow significantly in future. ASOS may become a stronger competitor but its starting position in footwear is much weaker and it has a different consumer focus than these other rivals and so, even if it does grow, its constraint is unlikely to be as strong as these other rivals. We do not expect any other retailers' constraint to change significantly in future.

11.94 Having assessed the potential for rivals to become stronger in the future, we then considered the impact of this future strengthening on the aggregate constraint on the Parties, particularly in relation to the constraint imposed by Nike and adidas and to the constraints on Footasylum. Overall, we find that the aggregate constraint on the Parties is likely to strengthen. However, on the basis of the evidence described in paragraphs 8.63 to 8.67, 11.83 and 11.92 we consider that, in the counterfactual, JD Sports will likely continue to be the largest constraint on Footasylum by some margin.

Impact of suppliers' strategies on future strength of Footasylum and other retailers

11.95 The Parties have consistently told us throughout the Remittal that, absent the Merger, Footasylum will be a [✂] because [✂] which Nike [✂] in pursuit of Nike's wholesaler consolidation strategy. The Parties submitted that [✂]. Further, the Parties have submitted that Footasylum can already be considered a [✂] than at the time of the CMA's Phase 2 Final Report because [✂] (relative to [✂][✂] and [✂]).

11.96 We concluded in Chapter 10 above that the most likely scenario for the counterfactual [✂]. This section assesses whether the evidence indicates that any retailer (including JD Sports) may be impacted materially by a future change in supplier strategy [✄]. This evidence and assessment is applicable to both footwear and apparel.

Changes in distribution policies and product allocation categories

11.97 We have considered whether there is evidence that planned changes by the main suppliers to their distribution policies may result in changes to the product allocations received by the Parties or their competitors which could materially increase (or decrease) their ability to compete in the foreseeable future. We consider the impact on other retailers first before considering the more detailed evidence relating to potential changes which may impact Footasylum.

11.98 We consider that the evidence set out in Chapter 7 indicates that in future the main suppliers will at least maintain JD Sports' product allocations in line with its [✄]. We do not consider that the evidence available shows that any of the Parties' key competitors who are not also suppliers will become a materially stronger competitor due to increased allocations resulting from a change in supplier segmentation.[511]

11.99 The evidence indicates that Footasylum's segmentation by Nike and adidas is [✄] (paragraph 11.1411.13). Nike's and adidas's submissions both indicate that they have [✄].

11.100 However, we consider that the evidence does not indicate that Footasylum's relationship with either supplier has worsened such that it would have a material effect on the products Footasylum will receive (paragraph 7.56 to 7.60, 8.17). In particular, submissions from Nike suggest it [✄] (see paragraph 7.57).

11.101 That said, retailers that are [✄][✄][✄][✄][✄][✄]. Ultimately, this means that Footasylum and other retailers [✄][✄][✄][✄][✄][✄][✄].[512]

11.102 Footasylum has made a number of submissions relating to upcoming future quarters [✄] (paragraph 7.212).

11.103 Overall, given the likely continuation of supply shocks at least in the near future, [✄], we think the data provides limited insight into likely future

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511 The CMA considers the fact that [✄].

512 Footasylum (and other retailers) may be able to lessen the impact of any future reductions in allocations to some extent through their continued ability to purchase Nike products through Nike.net. However, some high demand products are not available for purchase through Nike.net and retailers will pay a higher wholesale price compared to normal product allocations.

numbers of products Footasylum will receive, with this particularly the case for periods after Q2 2022. The data shows that Footasylum [✂] (paragraph 7.60 and Figure 1). Given Nike's submission that there will likely be a continuation of supply issues (paragraph 7.214), in our view, we consider it likely Footasylum will [✂]. We can see from data submitted by Footasylum that there have already been [✂].[513] While the evidence available does not allow us to infer the precise extent to which there will be [✂] across those periods (for the reasons set out above in and in paragraph 7.209), and hence whether the situation is [✂] or not, we expect that due to Nike's anticipated supply issues [✂], at least in the near future. In addition, given [✂] the relative impact on Footasylum's competitive position of its [✂] for [✂] (and potentially following periods) is less than might be the case if such [✂] were [✂].

11.104 We also recognise that certain franchises will be more important than others for driving Footasylum's brand and footfall, and that certain franchises may suffer larger reductions in allocations and/or received volumes, while others may fare better.[514] However, as explained in paragraph 7.219, [✂] for specific franchises would [✂], while difficulties with measuring the importance of a franchise in driving brand and footfall in relation to other franchises would seriously impact the robustness of any analysis that attempted to place more weight on one franchise than another. We therefore consider that the overall assessment of Footasylum's footwear product allocations (as discussed in the above paragraph) is more appropriate than assessing specific franchises.

11.105 In our view, these supply issues will likely continue to affect Footasylum [✂].[515] However, based on the submissions from Nike (see paragraphs 7.53 to 7.58), and the evidence on actual products received during the pandemic, we consider that Footasylum is being broadly similarly affected to other retailers [✂].

11.106 We consider that while there is evidence that the supply issues [✂].

11.107 [✂]. However, we consider that our other evidence shows that to date these issues have not significantly undermined Footasylum's ability to compete, or its significance on the market as a whole. [✂].[516] However, Footasylum's

[513] See further paragraph 7.195
[514] See paragraphs 7.219 in relation to Footasylum's submissions around reduced allocations of Nike Air Force 1 and Air Jordan 1 franchises.
[515] See paragraph 7.212.
[516] As set out in further detail in paragraphs 7.207 to 7.209, we consider that the received volumes of products are the key metric for assessing the competitive situation, rather than the level of reduction compared to the allocations which were planned in advance of a season.

financial results indicate that it has continued to trade [✂]. In our view, Footasylum has demonstrated that it can compete effectively [✂]. We therefore consider that it is likely to be able to continue to compete in the future [✂]. It is also important to bear in mind that [✂] do not affect the constraint that JD Sports exerts on [✂].

11.108 Therefore, this evidence does not lead us to expect Footasylum to become a materially weaker competitor in the foreseeable future.

Risks to future supply[517]

11.109 In our counterfactual assessment in Chapter 10 we concluded that [✂] [✂].

11.110 This means that we have assessed the Merger against the benchmark that in the absence of the Merger Footasylum would have continued to exert a similar competitive constraint to the one that it exerts today. In our assessment of the counterfactual we noted that Nike told us that [✂] (paragraph [✂]) and therefore we considered [✂][✂] (paragraph 10.44).

11.111 In light of this, we have assessed the evidence on whether taking into account the uncertainty surrounding the question of [✂], there is still an effect on competition that arises. The Parties submitted that as a part of our competitive assessment we should assess the impact of [✂] on Footasylum's and the Merged Entity's incentives.[518] The Parties submitted that [✂] is incentive to avoid taking steps that would increase the risk that it crystallises because the cost of misjudging the risk is [✂].[519] We have assessed this, firstly by examining the effect on Footasylum pre-Merger and then examining the effect on the Parties post-Merger.

11.112 We note that the Parties have submitted that Footasylum [✂] because the strategy of Nike and adidas is for future wholesale sales to be channelled to fewer, strategically important retailers (as well as its own DTC channels).[520]

11.113 The Parties have highlighted to us various public statements from Nike which they have told us signals [✂] (paragraph 10.24). However, the Parties are not certain about what action Nike might take, nor do they have any insight into the timings of any possible actions. In that context, the Parties have told us that we should consider the impact on competition of the mere possibility of Footasylum [✂] represented by those statements.

[517] Although this discussion is about footwear, it is also relevant to apparel to some extent
[518] Parties' response to the CMA's Provisional Report, paragraph 66
[519] Parties' response to the CMA's Provisional Report, paragraph 66
[520] We have considered whether it is likely that Footasylum would [✂] in our assessment of the counterfactual.

11.114 Regarding the effect of the threat of [✂] pre-Merger, in our view the best evidence on how the Parties, and Footasylum in particular, is reacting to, or is likely to react to, [✂] is likely to rest with Footasylum.

11.115 Footasylum might react to the [✂] in two broad ways: [✂]. We would expect any such reaction to be captured in Footasylum's internal strategy documents.

11.116 However, we have seen little evidence showing any tangible result of how Footasylum is responding to [✂]. For example, we have seen little evidence of an improvement it has made to avoid [✂] or a change not made [✂] in that respect.

11.117 Taking into account the above, we have considered whether Footasylum's internal documents provide a clearer illustration of the extent of the constraint on Footasylum arising from the [✂]. We have been struck by how few Footasylum internal documents discuss the possibility of [✂] (beyond the few documents highlighted to us by the Parties).[521]

(a) One Footasylum internal document shows that its senior management are [✂] (which we have captured in our assessment set out in paragraphs 6.59 to 6.72).[522]

(b) A Footasylum strategy document [✂].[523]

(c) A Footasylum document giving feedback from a meeting with Nike reported that [✂].[524]

11.118 The Parties submitted that it is not realistic for Footasylum to [✂][525] [✂].

11.119 The Parties submitted to us that it is not realistic to assume that Footasylum could materially change its offering and continue its current position given Footasylum's brand and reputation is centred on it being a retailer of popular footwear products from popular brands.[526] Further, the Parties submitted that if Footasylum could successfully change its business model [✂] it would make it and JD Sports less close competitors.[527]

[521] We are mindful that the Merger completed in April 2019 which may have influenced this.
[522] [✂]
[523] [✂]
[524] [✂]
[525] [✂]
[526] [✂]
[527] [✂]

11.120 The Parties' position is, therefore, that Footasylum is likely to remain in a category of retailers that are [✂] by Nike.

11.121 The evidence indicates that Footasylum has not changed its approach or business model in response to [✂]. It has continued to receive supply of products from Nike (and adidas) albeit [✂] discussed above. We have also found that Footasylum's supply relationship with Nike has [✂], when Footasylum considered that the relationship [✂] (for further detail see paragraph 8.17).

11.122 [✂].

11.123 With respect to the threat of [✂], the Parties submitted that the Merged Entity would not worsen its offer to customers since this would put it at risk of [✂]. The Parties argued:

(a) the brands have increased their monitoring and auditing of JD Sports and Footasylum in an environment of looking to reduce the number of retail partners that they use;

(b) worsening aspects of PQRS will be disciplined by competition in the market; and

(c) our theory of harm of Footasylum worsening its offer and losing customers does not make sense in the context of there being [✂].[528]

11.124 We have considered these factors in our competitive assessment. We have considered the overall ability and incentive of the Merged Entity to worsen some aspect of its PQRS offer to customers in our 'assessment of current competition' analysis. This assessment includes the Parties' arguments regarding supplier monitoring of the Merged Entity (paragraphs 11.85 to 11.8711.87) and the role of the remaining competition in the market to discipline the Merged Entity. In that context, we note JD Sports' submission that [✂] (paragraph 6.50), which the CMA considers indicates that factors (a) and (c) set out in 11.122 would be considerably less significant for the Merged Entity as compared to Footasylum.

11.125 We also note that we have found that the Merged Entity would have the ability to worsen aspects of Footasylum's PQRS offer (paragraph 6.79) and that the fact Footasylum would lose some sales does not preclude the Merged Entity worsening the offer of the Footasylum business. (paragraph 8.49).

[528] [✂]

11.126 Although we have not seen internal documents discussing [✂], we note that some of JD Sports' internal documents do acknowledge [✂]. We have used this to give some insight into how the Merged Entity may react to the threat noting that the Parties have submitted that the Merger makes the possibility of [✂]. JD Sports' documents say:

(a) One internal document said '[✂].'[529]

(b) [✂] JD Sports Board document [✂].[530]

(c) Another Board document said that [✂].[531]

11.127 Overall we have carefully considered all of the evidence on the risks to Footasylum [✂] should be a part of our counterfactual (Chapter 10), the time periods involved (Chapter 10 as well as paragraph 11.110) and how the threat of [✂] may be affecting competition. The evidence shows that whilst [✂], we do not consider this threat to be affecting Footasylum's competitive behaviour. In addition, although there may be a [✂] for the Merged Entity, it is considerably less significant than the threat to Footasylum given JD's overall position.

Conclusion on future competition

11.128 Overall compared with the situation now, we expect Nike DTC and to a lesser extent, adidas DTC to be stronger competitors to JD Sports and Footasylum in footwear going forward. We expect Foot Locker to maintain its position [✂]. ASOS may become a stronger competitor but given its starting position in footwear we expect to still provide a relatively limited constraint. Finally in relation to Footasylum, while it is likely to be [✂], we do not expect Footasylum to become a materially weaker competitor in the foreseeable future.

Parties' submission on the provisional SLC finding

11.129 In response to our Provisional Report, the Parties made a number of arguments that are related to the fact that the SLC is expected to arise primarily from the removal of the constraint imposed by JD Sports on Footasylum, in other words the asymmetric nature of the SLC. In particular the Parties submitted that:

529 [✂]
530 [✂]
531 [✂]

(a) the 2010 Merger Assessment Guidelines ("the Guidelines") used in this case do not mention the possibility of an asymmetric SLC;[532]

(b) we provisionally found an asymmetric SLC despite no material reduction in consumer choice, centred on a retailer that is not a 'significant competitive force', and despite leaving over 95% of the market – and a large competitor set of third-party rivals – unaffected;[533]

(c) the Guidelines require a 'significant effect on rivalry over time',[534] but the dynamics of the market will reduce the merger's impact on competition over time.[535;] and

(d) Customers switching from Footasylum to JD Sports [✂] and other alternatives, which would constrain the Merged Entity's ability to deteriorate PQRS. Alternatively, if JD Sports is so close a competitor to Footasylum that customers who switch to JD Sports are not vulnerable to switch away to third parties, there is no loss of utility for customers in switching from Footasylum to JD Sports, and the Guidelines require 'adverse effects on customers.'[536]

11.130 We have considered each of the Parties' points above and taking each in turn, in our view:

(a) We disagree that the finding that we have arrived at is not supported by the Guidelines. We have applied the framework for assessment approved by the Tribunal in the Judgment. In particular, the Guidelines state that 'unilateral effects can arise in a horizontal merger when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to raise prices on its own and without needing to coordinate with its rivals'.[537] It is well established in theory and in practice[538] that an SLC can arise if the competitive constraint between merger parties is stronger in one direction. There is nothing in the Guidelines which precludes an asymmetric SLC and the Guidelines make clear that a merger gives rise to an SLC when it has a significant effect on rivalry over time.[539]

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532 Parties' response to the CMA's Provisional Report, paragraph 5.
533 Parties' response to the CMA's Provisional Report, paragraph 11.
534 Parties' response to the CMA's Provisional Report, paragraph 6a.
535 Parties' response to the CMA's Provisional Report, paragraphs 6b – f.
536 Parties' response to the CMA's Provisional Report, paragraph 165(v).
537 Merger Assessment Guidelines, paragraph 5.4.1.
538 *Sainsburys/Asda, paragraph 11.65*.
539 Merger Assessment Guidelines, paragraph 4.1.3.

(b) The Guidelines state that unilateral effects are 'more likely' where the merger eliminates a significant competitive force in the market',[540] they do not state that this is a pre-requisite for finding an SLC. Nonetheless, we consider that the evidence shows that Footasylum remains a significant competitive force in the market (notwithstanding its relatively lower constraint on JD Sports), taking into account its continued ability to compete and financial health. Footasylum's market shares are similar to [✂], while survey diversion from JD Sports was similar to Sports Direct, and only slightly lower than Foot Locker and adidas for online customers, and higher than any other competitors for in-store customers. Whilst we note that Footasylum's overall share of the relevant markets may be relatively small, this ignores the importance of the closeness of competition between the Parties. The Guidelines make clear that horizontal unilateral effects are more likely in cases where the parties are close competitors, as demonstrated by high diversion ratios and other evidence set out in our assessment above.[541] The Parties' focus on overall shares does not take into account the differentiated nature of the market. We do not place significant weight on market shares given the differentiated nature of the market and we have not found that 95% of the market would be unaffected by the Merger as submitted by the Parties. Specifically, in a differentiated market Footasylum will be closer and more important to some retailers than others, regardless of its market share. Equally for many Footasylum customers there is a very significant and real reduction in choice, as going to a retailer other than JD Sports will be a far worse choice, or not a choice at all. It is sufficient for our analysis to show that the Parties are particularly close competitors who compete on a number of parameters (and other competitors are significantly less close to Footasylum) and that the merger leads to the loss of this competition, which in the context of the competition that exists in the market, and in the foreseeable future, we consider on the basis of all of the evidence in the round to be substantial. The Tribunal endorsed this framework for considering closeness of competition in the CMA's Phase 2 report.[542]

(c) We have not disregarded the likely growth of Nike and adidas DTC, or the dynamics of the market.

(d) As set out in *(c)* above, we have taken into account the constraint from DTC and third parties but we do not consider that this is sufficient to offset

[540] Merger Assessment Guidelines, paragraph 5.4.5
[541] Merger Assessment Guidelines, paragraph 5.4.9(a).
[542] Judgment, paragraphs 94-95, in which the Tribunal notes that the CMA 'proceeded on the basis that, given the closeness of competition, the Merger would remove a significant competitive force on the market, which is in itself capable of leading to a substantial lessening of competition'

the loss of competition between the Parties. The Parties' argument that, in these circumstances, they must be such close competitors as to mean there would be no loss of utility (and therefore no adverse effects) for customers who switch to JD Sports is unevidenced and ignores the importance of competition as "a process of rivalry" which "creates incentives for firms to cut prices, increase output, improve quality, enhance efficiency, or introduce new and better products".[543] It is the loss of the dynamic arising as a result of this rivalry that leads to harm to competition and, ultimately, consumers.[544] Adopting the framework approved by the Tribunal, we consider that the evidence demonstrates that the Parties have an incentive to deteriorate the aspects of PQRS that they are able to flex, which is "sufficient to demonstrate an adverse effect on consumers".[545]

Conclusion on horizontal unilateral effects in footwear

11.131 In our competitive assessment, we have considered:

(a) how retailers compete and the scope for the Merged Entity to worsen aspects of the PQRS offer to customers;

(b) how closely the Parties compete;

(c) the strength of the competition that would remain after the Merger; and

(d) the evidence on what is likely to change in the foreseeable future, including as a result of the impact of COVID-19.

11.132 We have first looked at the ability of the Merged Entity to worsen aspects of PQRS. We found that although suppliers, particularly Nike and adidas, play an important role in monitoring and influencing some aspects of retail competition (paragraph 6.83), this constraint is not so significant on its own as to sufficiently discipline the Merged Entity's ability and/or incentive to deteriorate its offering to customers (paragraphs 6.84 to 6.87).

11.133 For the reasons set out in paragraphs 11.9 to 11.30, we have found that JD Sports is by far the closest competitor to Footasylum and it applies an especially strong constraint on Footasylum. We have also found that Footasylum exerts some competitive constraint on JD Sports, but this

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543 Merger Assessment Guidelines, paragraph 4.1.2
544 Merger Assessment Guidelines, paragraph 4.1.3: "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".
545 Judgment, paragraph 84

constraint is more limited, particularly in comparison to some other rivals which drive JD Sports' offer to a greater extent (paragraph 11.30).

11.134 We have considered the extent to which rivals, in isolation, or collectively, present a competitive constraint that would offset the loss of competition from the Merger in order to prevent an SLC from arising. As such we have considered how closely other retailers compete with the Parties currently.

11.135 We have found that Nike DTC and to a lesser extent, adidas DTC and Foot Locker impose some constraint on Footasylum. Other retailers that we have assessed only offer a limited constraint (paragraphs 11.31 to 11.84). Each of these rivals is a much weaker constraint on Footasylum than JD Sports is (paragraph 11.79).

11.136 We have also considered these constraints on Footasylum in aggregate, including that some competitors may become stronger in the future. We have found the collective constraint on Footasylum from rivals relative to JD Sports to be only moderate. Our assessment is based on all evidence set out in paragraphs 11.31 to 11.84. The survey diversion (both from online and in-store customers) gives a good illustration of the magnitude of the strength of the constraint of JD Sports on Footasylum relative to these rivals. Given the strength of this constraint coupled with any reasonable expectation of the future performance and growth of the remaining rivals (especially Nike DTC and adidas DTC), we do not consider the aggregate constraint would be sufficient to replace the competition lost on Footasylum.

11.137 We have also considered Footasylum's likely product allocations in the foreseeable future. While it is likely to [✂], we do not expect Footasylum to become a materially weaker competitor in the foreseeable future (see paragraph 11.128).

11.138 We have therefore found that the aggregate constraints from retailers, combined with the constraints that suppliers impart on the retailers (in terms of how retailers can flex PQRS or in product allocation), would not be sufficient to offset the very substantial loss of competition from JD Sports on Footasylum in the retail supply of sports-inspired casual footwear. Therefore, the Merger is likely to give rise to the ability and incentive to deteriorate PQRS at Footasylum post-Merger. We believe this would result in harm to Footasylum customers. Subject to any countervailing factors, we consider that the Merger gives rise to an SLC in the retail supply of sports-inspired casual footwear.[546]

11.139 The SLC that we have found in our Remittal differs from the CMA's Phase 2 Final Report in that whilst there will also be a loss of constraint from Footasylum on JD Sports as a result of the Merger, the SLC is derived principally from the removal of the constraint imposed by JD Sports on Footasylum.

Horizontal unilateral effects in apparel

Introduction

11.140 The previous section assessed whether, subject to countervailing factors, we consider that the Merger has resulted or may be expected to result in an SLC in the retail supply of sports-inspired casual footwear in the UK.

11.141 This section assesses whether, subject to countervailing factors, we consider that the Merger has resulted or may be expected to result in an SLC in the retail supply of sports-inspired casual apparel in the UK.

11.142 Some of the evidence and findings in relation to footwear is also pertinent to apparel. In our analysis below we have referred to the relevant analysis in our assessment of footwear if we are placing weight on it in our assessment of apparel.

Assessment of current competition

Our assessment of how closely the Parties compete

11.143 As discussed in paragraph 11.7 in relation to footwear, we expect firms to be closer competitors where their offerings are similar on the most important parameters of competition. As noted in paragraphs 11.10 to 11.12 we consider that the Parties have some general characteristics as retailers that we consider make them likely to be close competitors.

11.144 However, with respect to apparel there are some notable differences between the Parties' general characteristics. [✂], Footasylum has a large collection of own brand apparel that accounts for [✂]% of its apparel sales.

[546] A merger gives rise to an SLC when it has a significant effect on rivalry over time, and therefore on the competitive pressure on firms to improve their offer to customers or become more efficient or innovative. A merger that gives rise to an SLC will be expected to lead to an adverse effect for customers. Merger Assessment Guidelines, paragraph 4.1.3

JD Sports' own brand apparel accounts for only around [✂]% of its apparel sales (paragraph 9.4 and Table 11). This proportion of own brand sales for Footasylum is [✂] as its sales of Nike apparel products (its biggest selling branded apparel items).

11.145 To assess whether the Parties closely compete in the retail of sports-inspired casual apparel, below we examine the evidence relating to:

(a) the degree of product overlap between the Parties for Nike and adidas apparel products;

(b) the extent to which JD Sports and Footasylum shoppers view the other Party as an alternative based on our Remittal Online Survey and the Phase 2 Exit Survey;

(c) GUPPIs;

(d) views of third parties;

(e) the Parties' internal documents; and

(f) market shares.

The Parties' range of apparel products

11.146 Similar to footwear, the Parties compete across a range of parameters in the retailing of sports-inspired casual apparel, with access to branded Nike and adidas apparel products an important part of the Parties' offering and how consumers perceive them. However, Nike and adidas account for a lower proportion of the Parties' apparel sales, as such sales are dispersed across more suppliers, meaning the Parties are less dependent on those suppliers (which in turn means the suppliers are less influential in apparel, see paragraph 6.39).

11.147 Again similar to footwear, both Nike and adidas [✂] JD Sports for allocations due to its [✂] to Footasylum, though both Parties have access to the [✂]. We have seen evidence that there have been some reductions and volatility in Nike apparel allocations, but to a much lesser degree than for footwear allocations.

11.148 In terms of the specific Nike and adidas apparel products sold, we have found, through our product overlap analysis,[547] that JD Sports consistently stocks a high proportion of the specific products that Footasylum sells ([✂]%

[547] Nike DTC and adidas DTC have a total overlap with both Parties for Nike and adidas apparel, respectively

of Nike apparel products and [✄]% of adidas apparel products, which is the [✄] overlap among retailers respectively).[548] In contrast, Footasylum sells a lower proportion of Nike and adidas apparel products that JD Sports sells ([✄]% of the Nike apparel products and only [✄]% of the adidas apparel products – [✄] overlap respectively). However, we note that this analysis covers a far lower proportion of the Parties' apparel sales than it does footwear sales (ie Nike and adidas account for around 80-90% of footwear sales at the Parties but between 20-50% of apparel sales).

11.149 In our view, as with footwear, this evidence suggests the Parties have a particularly similar retail offering, focusing heavily on the same brands (albeit to a slightly lesser extent for apparel than for footwear). JD Sports specifically sells many of the same Nike and adidas apparel products that Footasylum sells (although Footasylum sells a far lower proportion of the Nike and adidas apparel products sold by JD Sports).

How the Parties' customers view their options

11.150 The Remittal Online Survey found that 50% of Footasylum apparel customers would shop at JD Sports if they could not shop at Footasylum. This was 11 percentage points lower than in the Phase 2 Online Survey but remains a very high rate of diversion and over five times higher than that of any other retailer.[549] Nike was the next highest with 9% of respondents citing it as their next best alternative.

11.151 The same survey found that the proportion of online customers who said they would switch to Footasylum from JD Sports was significantly lower at 8%, with Nike, ASOS, adidas and Sports Direct all receiving more diversion than Footasylum.[550] This represents a 5 percentage points reduction in diversion to JD Sports compared to the Phase 2 Online Survey. This reduction in diversion is explained by an increase in the diversion to Nike, adidas and, to a lesser degree, ASOS.[551]

11.152 As discussed in paragraph 11.21 we consider that in-store shopping currently plays, and will continue to play, an important role in these market segments, and that we can still place evidential weight on the results of Phase 2 Exit Survey (see also paragraph 8.27). In the Phase 2 Exit Survey, diversion between the Parties (in both directions) was significantly higher

548 Sales-weighted, paragraph 9.7 to 9.11.
549 The Phase 2 Online Survey did not reach the required response rate so its results nee\d to be interpreted with caution.
550 The 8% diversion to Footasylum is slightly lower than the 9% figure recorded for footwear (paragraph 11.19).
551 In contrast diversion from Footasylum to ASOS reduced from 8% to 6%.

than in either of the online surveys (69% from Footasylum to JD Sports and 17% from JD Sports to Footasylum).

GUPPI analysis

11.153 We have used the diversion ratios from the Remittal Online Survey and the Parties' variable margins to estimate GUPPIs. The online apparel GUPPI for Footasylum is [✄]%, which is high and indicates a strong incentive to worsen some aspects of PQRS. In contrast the online apparel GUPPI for JD Sports is much lower at [✄]%.[552]

11.154 As described in Chapter 4, as we were unable to conduct an in-store survey during the Remittal, we considered whether we could use the diversion ratios from the Phase 2 Exit Survey to estimate a range of updated in-store GUPPIs and combined GUPPIs by making certain adjustments to reflect market developments (such as those described in relation to footwear in paragraphs 8.41 to 8.43).

11.155 For Footasylum, we consider there to be no credible scenario where in-store diversion to JD Sports would be lower than online diversion to JD Sports. In fact, based on the evidence from the Phase 2 Exit Survey, we consider that in-store diversion from Footasylum to JD Sports would likely be somewhat higher than online diversion. Therefore, we consider the online GUPPI of [✄]% represents the absolute lower boundary of the possible value for the in-store or combined GUPPI. This indicates a very strong incentive for the Merged Entity to worsen PQRS at Footasylum.

11.156 For JD Sports we also considered that in-store diversion would be likely to be slightly higher than online diversion based on the Phase 2 Exit Survey. We broadly estimated an in-store and combined GUPPI of 1 to 2 percentage points higher than the online GUPPI – in the region of [✄] to [✄]%, and slightly higher than the footwear GUPPI with the low end of this estimate being based on relatively extreme assumptions about changes in in-store consumer preferences. This suggests a considerably lower incentive for the Merged Entity to worsen PQRS at JD Sports than at Footasylum post-Merger.

Views of third parties

11.157 Almost all competitors responding to our questionnaires told us that the Parties compete closely, with the majority finding the Parties the closest

[552] See paragraph 9.19.

competitor to each other, often along with Foot Locker and less frequently Nike DTC.[553]

The Parties' internal documents

11.158 We also found that the Parties [✂] monitor each other as well as a range of other retailers in their day to day business documents. [✂]. [✂].

Market shares

11.159 The Parties' combined market shares in apparel are [✂] [40-50]%, with JD Sports ([✂] [30-40]%) substantially larger than Footasylum ([✂] [0-5]%) (paragraph 9.30). The Parties' combined share for the in-store segment ([✂] [40-50]%) is higher than their combined online share ([✂] [30-40]%). Due to the differentiated nature of this market, we looked at market shares as an indicator of the presence that different retailers have in the relevant markets, but do not consider them very informative in describing how closely the different competitors in the market compete.

Conclusion on how closely the Parties compete

11.160 Overall, the evidence from our Remittal Online survey, the Phase 2 Exit Survey, the large Footasylum GUPPIs, the Parties' internal documents, and the evidence on the similarity of their general offerings are all consistent with JD Sports being by far the closest competitor to Footasylum.

11.161 The evidence indicates that Footasylum has weakened relative to JD Sports since the Phase 2 inquiry and while it exerts some competitive constraint on JD Sports, this is more limited now than before the COVID-19 pandemic, while some other rivals exert stronger constraints. Diversion to Footasylum for JD Sports customers has reduced from 13% to 8% in the Remittal Online Survey (whereas it has increased significantly for Nike and to a lesser extent for adidas and ASOS). More JD Sports customers now consider Nike, ASOS, adidas and Sports Direct as better alternatives than they do Footasylum. Whilst in-store diversion between the Parties may still be higher than online diversion, we consider these changes in online diversion to be informative and consistent with other evidence on market developments. However, we note that certain evidence remains broadly the same as set out in the CMA's Phase 2 Final Report, including the Parties' general characteristics and internal documents, segmentation by key suppliers, the

[553] We note that many third parties did not provide a separate view for footwear and apparel while other third parties provided the same scoring on closeness for both footwear and apparel. For further detail, see the section 'third party views' in Chapter 7.

extent of their overlap in key branded apparel products, third parties' views, and market shares.

11.162 We consider that the evidence shows that Footasylum remains a significant competitive force in the market (notwithstanding its relatively lower constraint on JD Sports), taking into account its continued ability to compete and financial health. Footasylum's market shares are similar to [✄] while survey diversion from JD Sports was only slightly lower than adidas and Sports Direct for online customers, and joint highest (with Sports Direct) for in-store customers.

Competitive constraints from rivals

11.163 We have considered the extent to which other retailers, in isolation, or collectively, present a competitive constraint sufficient to offset the loss of competition between the Parties (which results primarily from removing the constraint that JD Sports exerts on Footasylum). As such, we have considered how closely other retailers compete with the Parties currently.

11.164 We have adopted the same approach and framework to assessing competitive constraints from rivals in the sports-inspired casual apparel market as we did for footwear (paragraph 11.32).

Nike

11.165 Nike retails its own brands in-store and online and has total product overlap with both Parties for Nike apparel.

11.166 The evidence indicates that Nike's DTC sales channels have grown strongly over the past year and are expected to grow further in apparel. In the year to March 2021, Nike's online apparel sales were [✄] than would be expected absent COVID-19.[554] In market share terms, its share of the retail of sports-inspired casual apparel across in-store and online channels has [✄] in 2020. Nike's share was higher than all other retailers bar [✄]. However, Nike's share may be greater now given its growth in online apparel sales in the year to March 2021 relative to expected sales absent the pandemic was higher than [✄].

11.167 In the Remittal Online Survey, Nike was second only to JD Sports in terms of diversion when customers were asked where they would shop for apparel if Footasylum was not available. It was a clear first choice (19% of shoppers) for customers of JD Sports if JD Sports was not available. In the Phase 2

[554] See Appendix F, Table 3.

Exit Survey, diversion to Nike for JD Sports in-store apparel customers was much lower at only 8% and diversion to Nike for Footasylum's in-store apparel customers was only 2%.[555] This is consistent with the fact that Nike has fewer physical stores than the Parties and the majority of its stores are factory outlets, which [✂]. As such, the evidence suggests that Nike is a stronger constraint online than in-store

11.168 As noted in relation to footwear, Nike is [✂] and some retailers regard Nike as a competitor to the Parties.

11.169 We consider that Nike exerts a competitive constraint on both Parties in apparel. In terms of constraints for online consumers, Nike is a stronger constraint on JD Sports than Footasylum is, but is a much weaker constraint on Footasylum than JD Sports is. This is particularly pronounced given the lower importance of Nike products for Footasylum's apparel sales (Table 10). The evidence also shows that Nike's constraint is likely to be less important for in-store customers given its more limited store presence and its lower diversions for in-store customers in the CMA's Phase 2 Exit Survey. We consider that Nike has become a stronger competitor since the CMA's Phase 2 Final Report and is likely to become a stronger constraint to both Parties in the future as a result of growth in its DTC offering (even if it does not meet its specific targets). We discuss the future growth of Nike in our assessment of future competition below.

adidas

11.170 adidas retails its own brands in-store and online and has total product overlap with both Parties for adidas apparel.

11.171 Similar to Nike, adidas DTC sales performance has been strong throughout the COVID-19 pandemic. Its online sales growth in apparel in the year to March 2021 ([✂]% higher than would be expected absent COVID-19) has outstripped [✂].[556] In market share terms its share from 2018 to 2020 was reasonably [✂] which implies its UK DTC sales are of a similar magnitude to Footasylum's. adidas has a relatively small store presence. Its share of the in-store segment is smaller than [✂].

11.172 As noted in relation to footwear, adidas is [✂] and some retailers regard adidas as a competitor to the Parties.

[555] See Table 13 and Table 14.
[556] See Appendix F, Table 3.

11.173 adidas has a relatively small store presence. Our Phase 2 Exit Survey showed that diversion to adidas in-store was lower than to Nike for JD Sports' customers and was minimal for Footasylum's customers. The evidence shows that adidas is a stronger constraint online than in-store.

11.174 In the Remittal Online Survey, adidas was ranked lower than Nike, ASOS Foot Locker and Sports Direct in terms of online shoppers' best alternative to Footasylum for apparel (at 3%). For JD Sports' online shoppers of apparel, adidas was ranked behind Nike and ASOS at 10%. In the Phase 2 Exit Survey, diversion to adidas was lower for in-store customers of both JD Sports and Footasylum at 7% and 1% respectively.[557]

11.175 Other third party retailers generally consider adidas to be a close competitor to both Parties (paragraph 7.79).

11.176 We consider that adidas exerts some competitive constraint on JD Sports for online customers although less than Nike. adidas imposes a much more limited constraint than JD Sports on Footasylum. As with Nike, adidas's in-store constraint is more limited given its much smaller store estate. adidas is likely to become a stronger constraint on both Parties in the future as a result of growth in its DTC offering (discussed further below).

ASOS

11.177 ASOS sells [✂]% of Footasylum's Nike apparel products and [✂]% of JD Sports' Nike apparel. For adidas apparel, ASOS sells [✂]% of Footasylum's adidas apparel and [✂]% of JD Sports' adidas apparel.[558] Therefore, it has a [✂] overlap with Footasylum's apparel products, and a [✂] overlap with JD Sports' apparel products. For both Footasylum and JD Sports, it is always ranked between [✂] and [✂] in terms of retailers' product overlap.

11.178 From the Remittal Online Survey, 6% of Footasylum's and 12% of JD Sports' online shoppers considered ASOS to be a good substitute for Footasylum and JD Sports respectively.

11.179 Similarly, in the Phase 2 Exit Survey, few JD Sports or Footasylum in-store shoppers noted ASOS as an alternative, which is consistent with the fact that it does not have any stores. Given [✂]% of Footasylum sales[559] and [✂]%

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[557] See Table 13 and Table 14.
[558] Sales-weighted, paragraph 9.7 to 9.11.
[559] [✂]

of JD Sports apparel sales[560] take place in stores we consider that this greatly reduces ASOS' constraint overall.

11.180 As noted by the Parties we recognise that ASOS has seen some growth during the pandemic (paragraph 7.130).[561] [✂].[562] ASOS is one [✂]. However, it is [✂] which is a different classification to the Parties who are more focused on [✂] (with some overlap). Therefore, in terms of the products that ASOS will retail, the evidence does not indicate that ASOS will be an especially close competitor to either JD Sports or Footasylum.

11.181 We note that both Footasylum and JD Sports [✂] and some retailers consider ASOS to be a competitor to the Parties.

11.182 We consider that the evidence indicates that ASOS exerts some competitive constraint on both Parties in apparel. In terms of constraints for online customers, ASOS imposes a limited constraint on Footasylum relative to JD Sports, but a stronger constraint than Footasylum on JD Sports. The constraint exerted by ASOS is more limited for in-store customers which is consistent with ASOS' online-only model.

Sports Direct

11.183 As described in relation to footwear in paragraph 11.53, Sports Direct has very little product overlap with either Party given its different focus on sporting goods. We have noted our views on Sports Direct's elevation plans in paragraph 11.54.

11.184 Our analysis indicates that Sports Direct has a very small share of the relevant market (Appendix C, Table 12). Some consumers view Sports Direct as being a credible alternative to both JD Sports and Footasylum. The Remittal Online Survey showed that 9% of JD Sports online shoppers thought Sports Direct would be their best alternative (ie a similar proportion to Footasylum) and 4% of Footasylum online shoppers thought Sports Direct would be their best alternative which is very similar to the diversion levels for footwear. Further, we note that in the CMA's Phase 2 Exit Survey, Sports Direct did not receive a material level of diversion from Footasylum shoppers (less than 2%) although 17% of JD Sports shoppers thought Sports Direct would be a good alternative. We also note that Footasylum told us that [✂]

[560] [✂]
[561] ASOS' interim results for the 6 months to 28 February 2021 showed UK sales increased by 39% and by 19% in the financial year 2020 (Parties' Response to the CMA Provisional Report, paragraph 124)
[562] [✂]

(paragraph 11.55). Frasers Group does not view itself as being a significant competitor to either of the Parties (paragraph 7.82).

11.185 We therefore consider that, given its different product focus and the evidence discussed above, Sports Direct is not a close competitor to either of the Parties and exerts only a limited constraint on the Parties in apparel.

Foot Locker

11.186 Foot Locker is focused on footwear rather than apparel [✄].

11.187 However, we have found that Foot locker has a [✄] product overlap with respect to Nike apparel with both Footasylum ([✄]%) and JD Sports ([✄]%). Foot Locker [✄]product overlap with either Party for adidas apparel ([✄]).[563] Our analysis indicates that Foot Locker has a very small share of the relevant market (Appendix C, Table 12) and is of a scale smaller than Footasylum in apparel.

11.188 The Remittal Online Survey showed that 3% and 5% of JD Sports and Footasylum apparel customers respectively gave Foot Locker as their best alternative. In the CMA's Phase 2 Exit Survey diversion to Foot Locker was slightly higher for JD Sports customers with 8% giving Foot Locker as their best alternative whereas diversion for Footasylum in-store shoppers was 3%. We have not seen any evidence indicating that Foot Locker would have increased its constraint for in-store apparel shoppers.

11.189 The Parties both [✄] and most retailers regard Foot Locker as a competitor to the Parties.

11.190 We consider that Foot Locker exerts a competitive constraint on both Parties in apparel but this is relatively limited and is far less than the constraint it exerts in footwear.

Next

11.191 Next's product overlap rates with the Parties are similar to ASOS with Next selling [✄]% of Footasylum's Nike apparel and [✄]% of JD Sports' Nike apparel. For adidas apparel, it is [✄]% of Footasylum's adidas apparel and [✄]% of JD Sports' adidas apparel.[564] Next's market share is[✄]. However, only 2% of Footasylum's and 6% of JD Sports' online shoppers considered Next to be a good substitute for Footasylum and JD Sports respectively.

[563] Sales-weighted, paragraph 9.7 to 9.11.
[564] Sales-weighted, paragraph 9.7 to 9.11.

Next did not receive any meaningful diversion (less than 2%) from the CMA's Phase 2 Exit Survey.

11.192 We consider that Next exerts a weak competitive constraint on both Parties in apparel.

Other online only retailers

- *Very, Amazon, Zalando*

11.193 The evidence referred to at paragraph 11.71 regarding Zalando's product allocation status with the key suppliers applies equally to apparel. As regards Nike apparel products, Zalando has [✂] with both JD Sports and Footasylum on a sales-weighted basis. However, there is [✂] with both Parties for adidas products. Our analysis indicates that Zalando has a very small share of the relevant market (Appendix C, Table 12).

11.194 In the Remittal Online Survey, less than 1% of both JD Sports and Footasylum customers mentioned Zalando as their best alternative. Zalando also did not receive any material diversion in the Phase 2 Exit Survey as would be expected given its lack of stores. Third party retailers did not consider Zalando to be a close competitor to either Party.

11.195 Very has [✂] product overlap with both JD Sports and Footasylum for adidas products on a sales-weighted basis and it has the [✂] overlap with JD Sports for Nike products (although it is [✂] for Footasylum with regard to Nike products). [✂].

11.196 However, in the Remittal Online Survey, less than 1% of JD Sports and Footasylum customers mentioned Very as their next best alternative. Nor did Very receive any material diversion in the Phase 2 Exit Survey.

11.197 Amazon does [✂] overlap with either Party for Nike or adidas apparel products. In the Remittal Online Survey, 4% of JD Sports customers and less than 1% of Footasylum customers mentioned Amazon as their next best alternative for apparel products. Amazon did not capture any material diversion from either of the Parties in the Phase 2 Exit Survey.

11.198 We consider that the evidence indicates that despite the relatively high product overlaps in some areas, Zalando, Very and Amazon are, at best, only weak constraints on either Party in apparel.

Conclusion on constraints from rivals

11.199 As set out above, we have found that JD Sports is by far the most significant competitive constraint on Footasylum and that this constraint will be lost as a result of the Merger. Whilst there will also be a loss of constraint from Footasylum on JD Sports, we consider this to be much lower and therefore the loss of competition in the market for sports-inspired casual footwear is driven principally by the removal of JD Sports' constraint on Footasylum. We have therefore considered whether the remaining constraints, individually and collectively, are sufficient to prevent an SLC from arising.

11.200 We consider that Nike, adidas and ASOS exert a competitive constraint on both Parties in apparel. In terms of constraints for online consumers, they are stronger constraints on JD Sports than Footasylum is but are much weaker constraints on Footasylum than JD Sports. All three competitors are stronger constraints on the Parties for online customers than in-store customers. We consider that Sports Direct and Foot Locker also provide only a limited constraint on Footasylum and JD Sports in apparel, although this may be more material in-store. While we found that several other retailers offer sports-inspired casual apparel, taken in the round, the evidence indicates that other retailers impose only a weak competitive constraint on the Parties. Given how closely JD Sports competes with Footasylum, and that it is a considerably stronger competitor to Footasylum than Footasylum's next closest competitor, we do not consider the current aggregate horizontal constraints to be sufficient to offset the incentive to deteriorate PQRS at Footasylum as indicated by the GUPPI and other evidence.

Supplier constraints on the incentive to degrade PQRS

11.201 As described in relation to footwear in paragraphs 11.85 to 11.87, there are parameters of competition that suppliers influence and, in some instances, actively monitor. While we consider that, since the CMA's Phase 2 Final Report, there has been some increase in the targets and expectations that the main suppliers set for retailers, and their monitoring and auditing of retailer performance against those, these are not comprehensive, and in the suppliers' view, do not represent a significant change in approach. Therefore 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. However, for the Parties, this influence is felt less strongly in apparel than footwear, reflecting the fact that the main suppliers represent a much greater proportion of the Parties' sales in footwear than apparel (paragraph 6.39).

11.202 We consider that the suppliers' constraint is not so significant as to sufficiently discipline (through product allocation punishments or other mechanisms) the Merged Entity's ability and/or incentive to deteriorate its offering post-Merger compared to what it would have been absent the Merger. Suppliers may find it difficult in some cases to detect a deterioration of retailers' offerings, particularly if the deterioration involves a lack of improvement relative to what otherwise would have been achieved; and suppliers may monitor retailers infrequently such that there are periods of time during which a change in a retailer's standards may occur unobserved. For example, despite the prevalence of RRP, we have found that retailers do compete on pricing through discounts and sales.

11.203 In addition there are significant parameters of competition that are important to consumers that suppliers do not influence or in relation to which retailers retain some discretion. We note this includes parameters in relation to which suppliers may not be harmed by or may even benefit from a deterioration by retailers, for example less discounting, free delivery thresholds for online orders, and a broad range of non-price parameters (see paragraph 6.71). Footasylum also has a considerable range of own brand apparel on which it competes across price and non-price attributes and which are not subject to supplier influence.

Assessment of future competition

11.204 Our analysis of current competition shows that the Parties compete closely in apparel, with JD Sports being a much stronger constraint on Footasylum than Footasylum is on JD Sports. The Parties also face competition from some third-party rivals, notably Nike, adidas and ASOS, and weaker competition from a number of other retailers. Next, we assess whether conditions of current competition are likely to be a good prediction of future competition.

11.205 As with footwear, for apparel we consider that the most likely reasons as to why current competition would not be a good prediction of future competition is if:

(a) rivals, especially Nike and adidas, continue to grow their DTC channels in direct competition to the Parties; and/or

(b) Footasylum [✂].

Future of growth of rivals

11.206 We have considered the current strength of rivals in our assessment above. As noted in relation to footwear, we did not receive evidence that any multi-channel retailers had plans that would significantly change their overall offer to such an extent as to materially change the constraint they placed on the Parties.

11.207 The evidence indicates that Nike's DTC channel has become a stronger competitive threat to the Parties since the CMA's Phase 2 Final Report (paragraph 11.167). We have found that adidas imparts some competitive constraint on the Parties (in particular only Nike and ASOS provide a stronger constraint on JD Sports, but it is currently weaker than JD Sports, Nike, ASOS, Foot Locker and Sports Direct on Footasylum). Both Nike and adidas have ambitious growth targets for their DTC operations and even if they do not meet those specific targets we nonetheless expect them to continue to grow their DTC sales and become stronger competitors in the UK.[565]

11.208 We therefore expect both Nike and adidas to be stronger competitors in the future. Although we expect them to remain a stronger constraint on JD Sports than Footasylum, we do not expect them to be as strong a constraint on Footasylum as JD Sports (for the reasons given in paragraphs 11.170 and 11.176).

11.209 We expect ASOS may also become a slightly stronger constraint on both Parties, given it is [✂]) and by virtue of [✂].[✂] Sports Direct receives different products from Nike and adidas, and Foot Locker has a limited presence in apparel. Therefore, while we believe their constraint is unlikely to diminish, we do not consider it will increase substantially either.

Impact of suppliers' strategies on future strength of Footasylum and other retailers

11.210 In paragraphs 11.95 to 11.128 we assessed the evidence on the future strength of Footasylum, and in [✂]. While this evidence and assessment is applicable to both footwear and apparel[566], we consider that [✂]there [✂] evidence on supply restrictions impacting apparel, [✂].

11.211 We concluded in Chapter 10 above that the most likely scenario for the counterfactual [✂].

[565] The DTC growth targets for both Nike and adidas are targets, not forecasts.
[566] See further paragraph 7.195.

Conclusion on future competition

11.212 Overall compared with the situation now, we expect Nike DTC and to a lesser extent, adidas DTC to be stronger competitors to JD Sports and Footasylum going forward. We expect ASOS may also become a stronger competitor but not to the extent of Nike DTC (given its starting position is much weaker and has a different consumer focus than these other rivals).

Conclusion on horizontal unilateral effects in apparel

11.213 In our competitive assessment, we have considered:

(a) how retailers compete and the scope for the Merged Entity to worsen aspects of the PQRS offer to customers;

(b) how closely the Parties compete;

(c) the strength of the competition that would remain after the Merger; and

(d) the evidence on what is likely to change in the foreseeable future including as a result of the impact of COVID-19.

11.214 As described in relation to footwear (paragraph 11.132), we first looked at the ability of the Merged Entity to worsen aspects of PQRS and found there are various ways in which suppliers monitor and influence some aspects of retail competition. We found that this constraint is less significant in apparel than in footwear, particularly given there is a wider range of other suppliers of branded products and the Parties design, stock and price own-brand products. Overall, we have found that this constraint from suppliers is not so significant on its own as to sufficiently discipline the Merged Entity's ability and/or incentive to deteriorate its offering to customers (paragraphs 6.84 to 6.87).

11.215 For the reasons set out in paragraphs 11.144 to 11.163 we have found that JD Sports is by far the closest competitor to Footasylum and it applies an especially strong constraint on Footasylum. We have also found that Footasylum exerts some competitive constraint on JD Sports, but this constraint is more limited, particularly in comparison to some other rivals which drive JD Sports' offer to a greater extent (paragraph 11.162)

11.216 We have considered the extent to which other retailers, in isolation, or collectively, present a competitive constraint that would offset the loss of competition from the Merger in order to prevent an SLC from arising. As such we have considered how closely other retailers compete with the Parties currently.

11.217 We have found that Nike DTC and to a lesser extent, adidas DTC and ASOS impose some competitive constraint on Footasylum. Sports Direct and Foot Locker offer a more limited constraint on Footasylum, while other retailers that we have assessed only offer a weak constraint (paragraphs 11.165 to 11.20011.199). Each of these rivals is a much weaker constraint on Footasylum than JD Sports is.

11.218 We have also considered these constraints on Footasylum in aggregate, including that some competitors may become stronger in the future. We have found the constraint on Footasylum from other retailers relative to JD Sports to be only moderate. Our assessment is based on all evidence set out in paragraphs 11.165 to 11.200. The survey diversion (both from online and in-store customers) gives a good illustration of the magnitude of the strength of the constraint of JD Sports on Footasylum relative to these rivals. Given the strength of this constraint coupled with any reasonable expectation of the future performance and growth of the remaining rivals (especially Nike DTC and adidas DTC), we do not consider the aggregate constraint would be sufficient to replace the competition lost on Footasylum.

11.219 We have also considered Footasylum's likely product allocations in the foreseeable future. Our assessment in paragraphs 11.95 to 11.128 is applicable to both footwear and apparel. However we also considered that [✂] (see paragraph 11.21011.128). We do not expect Footasylum to become a materially weaker competitor in the foreseeable future.

11.220 We have therefore found that the aggregate constraints from retailers, combined with the constraints that suppliers impart on the retailers (in terms of how retailers can flex PQRS or in product allocation), would not be sufficient to offset the very substantial loss of competition from JD Sports on Footasylum in the retail supply of sports-inspired casual apparel. Therefore, the Merger is likely to give rise to the ability and incentive to deteriorate PQRS at Footasylum post-Merger. We believe this would result in harm to Footasylum customers. Subject to any countervailing factors, we consider that the Merger gives rise to an SLC in the retail supply of sports-inspired casual apparel.[567]

11.221 The SLC that we have found in our Remittal differs from the CMA's Phase 2 Final Report in that whilst there will also be a loss of constraint from Footasylum on JD Sports as a result of the Merger the SLC is derived

[567] 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. Guidelines, OFT1254, paragraph 4.1.3

principally from the removal of the constraint imposed by JD Sports on Footasylum.[568]

12. Countervailing factors

12.1 In this section, we consider whether there are countervailing factors which may prevent the SLCs we have found from arising. We have considered the likely direct responses to the Merger by rivals and potential rivals. If effective entry and/or expansion occurs as a result of the Merger and any consequent adverse effect, the effect of the Merger on competition may be mitigated.

12.2 We note that the conclusions on this in the CMA's Phase 2 Final Report were not challenged before the Tribunal and we have not received any further evidence during the Remittal in relation to rivalry-enhancing efficiencies. Indeed, the Parties have not made any submissions on efficiencies during the Remittal and we have not considered efficiencies further.

Entry or expansion

Parties' submissions

12.3 During the Remittal, the Parties told us that support from Nike and adidas remained critical to a retailer's viability into the relevant markets, and that without support from the bands, it would be unprofitable and commercially irrational for a retailer to attempt to enter or expand into the relevant markets.[569] The Parties said that public statements from Nike and adidas make clear that they intended to reduce the number of smaller retailers that stocked their products, and therefore, it followed that the brands were less likely to support entry and/or expansion by these same retailers either in-store or online.[570] Therefore, barriers to entry and/or expansion for retailers who were less valuable to the brands had significantly increased.[571]

12.4 The Parties also told us that the barriers to expansion for the brands themselves (Nike and adidas DTC) had significantly decreased, and that many customers had moved to shopping online and would continue to do so once the pandemic was over.[572]

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568 We have addressed the Parties' arguments in relation to the asymmetric nature of the SLC in paragraph 11.130. Insofar as our SLC is based on the finding that Footasylum remains a significant competitive force in the apparel market, the specific reasoning for that finding is as set out at paragraph 11.219.
569 [✂].
570 [✂]
571 [✂]
572 [✂]

Third parties' submissions

12.5 [✂] [✂]'.[573][574]

12.6 Frasers Group (which owns Sports Direct) told us that barriers to entry and expansion have become more pronounced as the most desirable brands have decided to focus on a small number of Strategic Partners and DTC offerings. It added that without access to restricted premium lifestyle products from Nike and adidas new entrants and existing entrants hoping to expand could not realistically compete.[575] Frasers Group added it did not expect Nike or adidas would support an entrant.[576]

12.7 Schuh told us that there would be more options for properties with closures/contraction and potentially lower rents with lesser demand (so barriers have decreased) on the high street.[577]

12.8 Zalando told us that as a result of the COVID-19 pandemic, barriers to entry had increased due to increased competitive pressure from 'larger players', as well as 'logistics challenges' brought on by COVID-19 and Brexit. It added that for physical retail, logistic barriers to entry were the same, but that the barriers to entry on securing retail locations might be lower. It explained that the price of commercial retail rent had declined due to store closures across key cities, making it more accessible to new entrants.[578]

Our assessment of entry and expansion

12.9 We consider that the evidence indicates that [✂] create a significant barrier to successful entry and expansion.

12.10 We have not seen evidence of any significant entry or expansion plans that we would expect to change materially the ability of a retailer outside the relevant markets to exert a significant and sufficient competitive constraint on the Merged Entity over the foreseeable future. The third party views reported above clearly show that retailers themselves consider barriers to entry and expansion to be high.

12.11 In this regard, the evidence we have received during the Remittal, suggests that successful entry or expansion in the relevant markets continues to depend highly on gaining access to the key products of the key suppliers,

573 [✂].
574 [✂]
575 [✂]
576 [✂]
577 [✂]
578 [✂]

consistent with the CMA's Phase 2 Final Report, but that since then securing that access (or sufficient access) is widely expected to become more challenging.

12.12 We have found that the major suppliers, Nike and adidas, [✂]. In practice, this means that it is likely that both of these suppliers will [✂].

12.13 We therefore do not consider that entry and/or expansion would be timely, likely and sufficient to prevent the SLC we have found in either the retail supply of sports-inspired casual footwear or in the retail supply of sports-inspired casual apparel.

13. Overall conclusion

13.1 We have concluded that the completed acquisition by JD Sports of Footasylum has resulted in the creation of a relevant merger situation.

13.2 We have concluded that the Merger has resulted, or may be expected to result, in an SLC in:

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

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

14. Remedies

14.1 We have found that the Merger has resulted, or may be expected to result, in an SLC in:

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

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

14.2 Having concluded that a relevant merger situation has resulted, or may be expected to result, in an SLC, the CMA is required to decide whether action should be taken to remedy, mitigate or prevent the SLC or any resulting adverse effect.[579] The CMA must then state in its final report the remedial action to be taken.

[579] *Merger remedies guidelines*, CMA87 (13 December 2018), paragraph 1.2.

14.3 This chapter sets out our assessment of and final decision on the appropriate remedy to these SLCs and resulting adverse effects.

14.4 For some parts of our assessment in this chapter, we consider that the logic and reasoning the CMA applied in its remedy assessment in chapter 13 of the CMA's Phase 2 Final Report, which concluded that only a full divestiture of Footasylum to a suitable purchaser approved by the CMA would represent an effective and proportionate remedy to the SLCs identified in the CMA's Phase 2 Final Report, will still apply to our consideration of remedies in this Remittal.[580] In chapter 11 of this report, we explained that the SLCs that we have found in our Remittal differs from the CMA's Phase 2 Final Report in that whilst there will also be a loss of constraint from Footasylum on JD Sports as a result of the Merger, the SLCs are derived principally from the removal of the constraint imposed by JD Sports on Footasylum. We will adopt the same approach to assessment of the appropriate remedy for the SLCs, as we have still found SLCs arise in each of the relevant markets and therefore we must have regard to the need to achieve as comprehensive a solution as possible to those SLCs and their resulting adverse effects.

14.5 In light of the circumstances of the Remittal and the CMA's public consultation on the notice of possible remedies during the CMA's Phase 2 investigation, we published alongside our Provisional Report and in lieu of a notice of possible remedies, a remedies paper (Remedies Paper), which set out our assessment and provisional view that a full divestiture of Footasylum to a purchaser approved by the CMA would be the only effective and proportionate remedy.[581] In reaching our final decision on the appropriate remedy, we have considered the evidence gathered from the Parties and third parties,[582] including their responses to our public consultation on the Remedies Paper.

14.6 This chapter sets out:

(a) the CMA's framework for assessing remedies (see paragraphs 14.7 to 14.10);

(b) the nature of the SLCs we have found (see paragraph 14.11);

(c) an overview of possible remedy options (see paragraphs 14.12 to 14.20);

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[580] CMA's Phase 2 Final Report, Chapter 13, eg paragraphs 13.149, 13.150 and 13.160.
[581] Remedies Paper.
[582] We received responses to our public consultation on the Remedies Paper from JD Sports [✂] on 9 September 2021. JD Sports and Footasylum each declined our invitation of a formal response hearing. Instead, CMA staff requested, and held, calls with each of JD Sports and Footasylum on 24 and 28 September 2021 respectively to discuss remedies. [✂].

(d) an overview of the effectiveness of a full divestiture remedy (see paragraphs 14.21 to 14.24);

(e) our assessment of the effectiveness of a full divestiture remedy under a managed sale process (see paragraphs 14.25 to 14.91);

(f) our assessment of the effectiveness of a full divestiture remedy under an IPO process (see paragraphs 14.92 to 14.132);

(g) our conclusions on effective remedies (see paragraph 14.133);

(h) our assessment of any relevant customer benefits (RCBs) (see paragraphs 14.134 to 14.141);

(i) our assessment of the proportionality of the effective remedy (see paragraphs 14.142 to 14.157);

(j) our consideration of remedy implementation issues (see paragraphs 14.158 to 14.160); and

(k) our decision on the appropriate remedy (see paragraph 14.161).

CMA framework for assessing remedies

14.7 When considering possible remedial actions, the Act requires that the CMA shall 'in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it'.[583]

14.8 To fulfil this requirement, the CMA will seek remedies that are effective in addressing the SLC and any resulting adverse effects. The effectiveness of a remedy is assessed by reference to its:[584]

(a) impact on the SLC and its resulting adverse effects;

(b) duration and timing – a remedy needs to be capable of timely implementation and to address the SLC effectively throughout its expected duration;

(c) practicality in terms of its implementation and any subsequent monitoring; and

[583] Section 35(4) of the Act.
[584] *Merger remedies guidelines*, CMA87 (13 December 2018), paragraph 3.5.

(d) risk profile, relating in particular to the risk that the remedy will not achieve its intended effect.

14.9 The CMA will then select the least costly and intrusive remedy that it considers to be effective. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. The CMA may also have regard, in accordance with the Act, to the effect of any remedial action on any RCBs arising from the merger.[585]

14.10 The Tribunal has held that the CMA has 'a clear margin of appreciation to decide what reasonable action was appropriate for remedying, mitigating or preventing the SLC'.[586]

Nature of SLCs

14.11 We found that the Merger has resulted, or may be expected to result, in an SLC in:[587]

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

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

Overview of possible remedy options

14.12 Remedies are conventionally classified as either structural or behavioural:

(a) Structural remedies, such as divestiture, are generally one-off measures that seek to restore or maintain the competitive structure of the market by addressing the market participants and/or their shares of the market.

(b) Behavioural remedies are normally ongoing measures that are designed to regulate or constrain the behaviour of the merging parties with the aim of restoring or maintaining the level of competition that would have been present absent the merger.

14.13 In merger inquiries, the CMA generally prefers structural remedies over behavioural remedies because:[588]

[585] *Merger remedies guidelines*, CMA87 (13 December 2018), paragraph 3.4.
[586] *Somerfield PLC v Competition Commission* [2006] CAT 4 (Somerfield), paragraph 88.
[587] Chapter 13.
[588] *Merger remedies guidelines*, CMA87 (13 December 2018), paragraph 3.46.

(a) structural remedies are more likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;

(b) behavioural remedies are less likely to have an effective impact on the SLC and its resulting adverse effects, and are more likely to create significant costly distortions in market outcomes; and

(c) structural remedies rarely require monitoring and enforcement once implemented.

14.14 In the CMA's Phase 2 Final Report, the CMA concluded that a full divestiture of Footasylum by JD Sports was the only effective and proportionate remedy to address the SLCs and their resulting adverse effects,[589] and that the CMA had not been able to identify a smaller (or differently configured) divestiture package that could form the basis of an effective structural remedy.[590]

14.15 The CMA's Phase 2 Final Report also noted that none of the Parties or third parties submitted that it should pursue a behavioural remedy option,[591] and indicated that any behavioural remedy was very unlikely to be effective given that there would be significant risks in designing effective behavioural remedies that could comprehensively address the national SLCs and their resulting adverse effects, in particular given the broad scope of the adverse effects identified and the need for extensive and ongoing monitoring.[592]

14.16 In response to our Remedies Paper in the Remittal, JD Sports told us that, without prejudice to its disagreement with our provisional SLC findings, it agreed with our provisional conclusion in the Remedies Paper that a full divestiture of Footasylum was the only remedy that could effectively address the SLCs provisionally identified in our Provisional Report. In this regard, JD Sports told us that:[593]

(a) the CMA's national SLC finding meant that a partial divestiture of Footasylum, eg divesting only Footasylum's stores, but retaining its online business, was unlikely to be effective;

(b) similarly, a 'mix-and-match' remedy[594] would also be 'unworkable' as it would lead to composition risks that would undermine the remedy's

[589] CMA's Phase 2 Final Report, Chapter 13, paragraph 13.223.
[590] CMA's Phase 2 Final Report, Chapter 13, paragraph 13.51.
[591] CMA's Phase 2 Final Report, Chapter 13, paragraph 13.19.
[592] CMA's Phase 2 Final Report, Chapter 13, paragraph 13.16.
[593] JD Sports' response (dated 9 September 2021) to the Remedies Paper, paragraphs 6 to 8.
[594] For example, where JD Sports may be permitted to substitute a JD Sports store for a Footasylum store within the divestiture package.

effectiveness, eg it would be 'impossible' to ensure that Footasylum assets were swapped for equivalent assets from JD Sports and that the remedy would comprehensively reverse the Merger; and

(c) the 'attractiveness' of a 'mix-and-match' approach was further diminished by the fact that there was a 'ready-made' remedy in the form of a full divestiture of Footasylum, which had none of these issues.

14.17 We have not received any further evidence or argument to date to suggest that the risks in designing either an effective partial (or differently configured[595]) divestiture remedy or a behavioural remedy have materially reduced since the CMA's Phase 2 Final Report (if at all).

14.18 Therefore, it is our view that it would not be possible to design an effective partial divestiture remedy or behavioural remedy (either on its own or as an adjunct to a partial divestiture remedy) that could comprehensively address the SLCs and resulting adverse effects we have found.

14.19 We note however that in its response to our Remedies Paper, JD Sports told us that a full divestiture of Footasylum could be achieved by way of relisting 100% of Footasylum's shares on AIM of the London Stock Exchange through an Initial Public Offering (IPO), and that the CMA should conclude that, in principle, the IPO route was one that JD Sports could possibly pursue as one option to implement a full divestiture remedy, alongside other options to transfer the business to a single suitable purchaser from among a wide purchaser set.[596]

14.20 We therefore set out below our overall views on the effectiveness of a full divestiture remedy, before turning to a more detailed assessment of the effectiveness of achieving this remedy under each of the two procedural mechanisms: a managed sale process and an IPO process.

Overview of the effectiveness of a full divestiture remedy

14.21 Under a full divestiture remedy, a successful divestiture will effectively address at source the loss of rivalry resulting from the Merger by changing or restoring the structure of the market.[597]

14.22 For the purpose of addressing the SLCs and resulting adverse effects we have found, we would expect a full divestiture remedy, if designed to address the practical risks normally associated with any divestiture remedy (see

[595] For example, by adopting a 'mix-and-match' approach.
[596] JD Sports' response (dated 9 September 2021) to the Remedies Paper, paragraphs 21 and 24.
[597] *Merger remedies guidelines*, CMA87 (13 December 2018), paragraph 3.38.

paragraph 14.23 below), would re-establish the structure of the market and thereby restore the dynamic process of competition existing between the Parties prior to the Merger, as well as restore the loss of competitive constraint on Footasylum from JD Sports. It would address all of our concerns at source by reversing the Merger which has given rise to the SLCs, and therefore represent a comprehensive solution to all aspects of the SLCs we have found.

14.23 There are three categories of risk that could impair the effectiveness of any divestiture remedy:[598]

(a) composition risk arises if the scope of the divestiture package is too narrowly constrained or not appropriately configured to attract a suitable purchaser, or does not allow a purchaser to operate as an effective competitor;

(b) purchaser risk arises if a divestiture is made to a weak or otherwise inappropriate purchaser or if a suitable purchaser is not available; and

(c) asset risk arises if the competitive capability of the divestiture package deteriorates before completion of the divestiture.

14.24 An effective divestiture remedy should give us confidence that these practical risks can be properly addressed in its design. As such, an assessment of the design of a full divestiture remedy is integral to our assessment of its effectiveness. Given that we consider there to be substantive differences between the implementation of a full divestiture remedy by way of a managed sale process and an IPO process in terms of their design, we have set out our assessment of the design risks and effectiveness of each process separately. Our assessment for the managed sale process is set out in paragraphs 14.25 to 14.91; and for the IPO process in paragraphs 14.92 to 14.132.

Effectiveness of a full divestiture remedy (managed sale process)

14.25 This section sets out:

(a) a brief description of a remedy involving a full divestiture of Footasylum implemented by way of a managed sale process;

(b) our assessment of its effectiveness; and

(c) our conclusions on its effectiveness.

[598] *Merger remedies guidelines*, CMA87 (13 December 2018), paragraph 5.3.

Remedy description (managed sale process)

14.26 A full divestiture remedy achieved under a managed sale process would require JD Sports to run a managed sale process to market the Footasylum business to potential purchasers and ultimately divest the whole of the Footasylum business to a suitable purchaser approved by the CMA, and within a timeframe specified by the CMA.

Assessment of remedy effectiveness (managed sale process)

14.27 We have considered, below, each of the design risks for a full divestiture remedy implemented by way of a managed sale process, before setting out our conclusions on its effectiveness.

Composition risks – scope of the divestiture package

14.28 In defining the scope of a divestiture package that will satisfactorily address an SLC, the CMA will normally seek to identify the smallest viable, stand-alone business that can compete successfully on an ongoing basis.[599]

14.29 In this case, we have found no reason to depart from the findings reached in the CMA's Phase 2 Final Report that:[600]

(a) Footasylum, divested in its entirety, would meet all of the requirements to be an effective competitor in the relevant markets, namely having access to the relevant branded products in both sports-inspired casual footwear and apparel; being a national multi-channel retailer with a national in-store footprint and online business; and offering a retail fascia brand and an in-store and online retail experience and proposition that appeal to the Parties' target consumers and meet the requirements set by suppliers;

(b) anything less than full divestiture would substantially increase the risk of a divestiture remedy being ineffective, eg if a break-up of the Footasylum business resulted in undermining the divested Footasylum business's financial viability and consequently its ability to invest in its business and to access branded products from suppliers;

(c) a full divestiture of Footasylum would address any composition risks by ensuring that the divestiture package:

(i) addresses the SLCs and any resulting adverse effects;

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[599] *Merger remedies guidelines*, CMA87 (13 December 2018), paragraph 5.7.
[600] CMA's Phase 2 Final Report, Chapter 13.

(ii) is attractive to potential purchasers; and

(iii) enables the eventual purchaser to operate the divested business as an effective competitor; and

(d) the COVID-19 pandemic would not affect the CMA's consideration of the question of whether Footasylum should be divested in its entirety or whether a partial divestiture or 'mix-and-match' approach could be effective, ie the COVID-19 pandemic would not be relevant to the question of what the scope of the divestiture package should be (eg in terms of the assets and businesses that should form part of any divested Footasylum business) to address the SLCs identified in the CMA's Phase 2 Final Report.

14.30 We would note that since completion of the Merger and for the entire duration of the CMA's investigation, our interim measures have ensured the preservation and separation of the legal entity comprising the whole of the Footasylum business from the rest of the JD Sports and Pentland businesses.[601] Therefore, a full divestiture remedy would involve the sale of all of JD Sports' shareholding in Footasylum. This would mitigate the risk of any key Footasylum assets being omitted from the final divestiture package (and, as a result, JD Sports retaining any key Footasylum assets) and ensure that the remedy comprehensively reverses the Merger, which has given rise to the SLCs and resulting adverse effects we have found.

Conclusion on scope of the divestiture package

14.31 Based on the above, we conclude that the divestiture package should comprise the whole of the Footasylum business.

Purchaser risks – criteria and availability of a suitable purchaser

14.32 We consider below the risks that under a managed sale process, Footasylum may be sold to a weak or otherwise inappropriate purchaser or that a suitable purchaser may not be available. These risks, if not properly addressed, could undermine the effectiveness of any divestiture remedy.

14.33 As part of this assessment, we consider whether there have been any developments since the CMA's Phase 2 Final Report, which require us to update or amend the CMA's conclusions that are relevant to purchaser risk in the CMA's Phase 2 Final Report, specifically in relation to:

[601] Further details of our interim measures are provided in paragraph 14.64..

(a) the appropriate purchaser suitability criteria and whether a purchaser requires pre-existing relationships with key suppliers; and

(b) the availability of a suitable purchaser.

14.34 We consider each of these in turn below.

Purchaser suitability criteria and need for pre-existing relationships with key suppliers

14.35 In the CMA's Phase 2 Final Report, the CMA concluded that a potential purchaser must satisfy the CMA's normal purchaser suitability criteria,[602] ie that a purchaser:[603]

(a) is independent of the merging parties (in this case, both JD Sports and Pentland);

(b) has the necessary capability to compete in the relevant markets;

(c) is committed to competing in the relevant markets; and

(d) will not create further competition concerns.

14.36 Our Remedies Paper set out our provisional view that we found no reason to believe that a purchaser should be required to satisfy additional criteria over and above our normal purchaser criteria (which we already considered to be sufficiently comprehensive for the purpose of identifying a suitable purchaser), to ensure the effectiveness of a full divestiture remedy.[604]

14.37 Based on the further evidence we received since the publication of our Remedies Paper, there was a broad consensus from the Parties and third parties that the CMA's normal purchaser suitability criteria would be sufficient for the purpose of identifying a suitable purchaser (save for one third party's view that there should be an additional criterion requiring a purchaser to have pre-existing relationships with the key suppliers):

(a) In its response to the Remedies Paper, JD Sports told us that to the extent the CMA maintained its findings that absent the Merger, an independent Footasylum would have continued to compete effectively in

[602] *Merger remedies guidelines*, CMA87 (13 December 2018), paragraph 5.21.
[603] CMA's Phase 2 Final Report, Chapter 13.
[604] Remedies Paper, paragraph 41.

the relevant markets, it would agree that there was no reason for the CMA to depart from its normal purchaser criteria.[605]

(b) One third party [✂].[606]

(c) A different third party [✂].[607]

(d) A further third party ([✂]) told us that a purchaser must meet 'at least the following suitability criteria' of: (i) being independent from JD Sports and Pentland; (ii) having the capability to operate Footasylum as an effective competitor, including by being able to obtain supplies of 'must-have' branded products; (iii) having adequate financial resources to make (among other things) the appropriate levels of capital expenditure; and (iv) 'preferably', having 'deep expertise and a strong track record in owning and operating retail businesses in the UK, and 'preferably' in the sporting and/or lifestyle goods sectors'.[608] It added however that it was 'fundamental' for the eventual purchaser of Footasylum to also have 'some existing contacts with Nike and adidas'. It explained that by divesting Footasylum to a purchaser who did not have the ability to secure access to 'must-have' products for Footasylum, JD Sports would achieve the same outcome that it sought to achieve through its acquisition of Footasylum – eliminating one of its closest competitors (if not the closest competitor) in both footwear and apparel.[609]

14.38 The majority of submissions took the view that it would not be necessary for a purchaser to have pre-existing relationships with the key suppliers to ensure Footasylum continued to receive branded products from the key suppliers:

(a) JD Sports told us that it maintained the position it held at the time of the CMA's Phase 2 Final Report that a purchaser would not need to have its own relationships with the key suppliers, and that supply depended on Footasylum's own relationships with the key suppliers.[610]

(b) Footasylum told us that while the 'retailer-brand relationship' was important in its market, it would [✂] for a purchaser to have its own relationships with the key suppliers.[611]

[605] JD Sports' response (dated 9 September 2021) to the Remedies Paper, paragraphs 9 to 11.
[606] [✂]
[607] [✂]
[608] [✂]
[609] [✂]
[610] [✂]
[611] [✂]

(c) One third party [✂] told us that consistent with its submission to the CMA during the CMA's Phase 2 investigation, it continued to consider that a pre-existing relationship with [✂] should not be a pre-requisite, and that equally, it did not consider that a purchaser without such pre-existing relationship would not be able to partner with [✂] (just as) effectively. It added however that it considered that a 'pre-existing relationship with [✂] would be an advantage', since it would be an indication that the incoming purchaser was already familiar with [✂] strategy and values (and would therefore likely be able to 'work with [✂] more easily').[612]

(d) Another third party [✂].[613]

14.39 The CMA's Phase 2 Final Report had concluded that it would not be necessary to require a purchaser to have its own pre-existing relationships with the key suppliers, and noted the evidence it received from the Parties and third parties on the importance of Footasylum's own ability to continue to meet Nike's and adidas's respective standards and requirements to ensure ongoing access to their branded products, rather than be dependent on a purchaser's pre-existing relationships with the key suppliers. The CMA's Phase 2 Final Report considered that Footasylum's ability to ensure the ongoing supply of the key suppliers' branded products through its own relationships with them, would not be impacted by the implementation of a full divestiture remedy, provided that the new owner supported Footasylum in continuing to meet the key suppliers' expectations, eg with Footasylum continuing to invest in its business in terms of marketing and advertising, as well as its in-store and online offerings. The CMA's Phase 2 Final Report therefore concluded that a purchaser who met the CMA's normal purchaser suitability criteria would also likely meet the requirements of the key suppliers such that under the ownership of a suitable purchaser, Footasylum would be able to continue having access to the key suppliers' branded products.[614]

14.40 Therefore, based on the evidence we have received since the CMA's Phase 2 Final Report, in particular [✂] that it was not necessary for the eventual purchaser to have its own pre-existing relationships with the key suppliers, we found no reason to believe that a purchaser should be required to satisfy additional criteria over and above our normal purchaser criteria, which we already consider to be sufficiently comprehensive for the purpose of identifying a suitable purchaser, to ensure the effectiveness of a full divestiture remedy. Given that we found in chapter 11 of this report that JD Sports is a particularly close competitor to Footasylum, in part because of its

612 [✂]
613 [✂]
614 CMA's Phase 2 Final Report, Chapter 13.

product range across brands and that JD Sports, like Footasylum, has a mix of online and in-store sales, we would expect as part of the CMA's purchaser approval process for the CMA to be satisfied that a purchaser would preserve these elements of the Footasylum business.

14.41 We also did not consider it necessary to depart from our usual practice and rule out any purchaser at this stage. We have therefore reserved judgement on the suitability of any particular purchaser and consider that, in line with our usual practice, it would be for JD Sports to determine which potential purchasers it would submit for the CMA's approval as a suitable purchaser.

- *Conclusion on purchaser suitability criteria*

14.42 In order to ensure that a full divestiture remedy under a managed sale process achieves its intended effects in this case in both footwear and apparel, we have concluded that:

(a) we would wish to satisfy ourselves that a potential purchaser meets our normal purchaser suitability criteria (see paragraph 14.35);

(b) it would not be necessary at this stage to rule out any potential purchaser – the CMA will assess the suitability of any potential purchaser on its individual merits, and against our normal purchaser suitability criteria; and

(c) in line with our normal practice, the eventual purchaser and final transaction documents would be subject to CMA approval.

Availability of a suitable purchaser

14.43 In the CMA's Phase 2 Final Report, the CMA concluded that the risk that a suitable purchaser would not be available was low given that Footasylum was a profitable and growing business, and that it was well-placed to compete effectively in the relevant markets given its access to the key suppliers' branded products and the strength of Footasylum's brand and retail offering. The CMA considered that these factors would be attractive to potential purchasers.[615]

14.44 At the time of the CMA's Phase 2 Final Report in May 2020, the CMA also concluded that given the continually evolving situation concerning the COVID-19 outbreak, provided that JD Sports was given an appropriate timescale to

[615] CMA's Phase 2 Final Report, Chapter 13.

complete the divestiture, the CMA considered that the risk that a suitable purchaser was not available was low.[616]

14.45 In our view, we consider that Footasylum fundamentally remains an attractive business which is capable of being sold to a potential purchaser, and that the evidence to date indicates that Footasylum continues to be a resilient and attractive business. In chapters 7, 10 and 11 of this report, we found that:[617]

(a) in terms of store numbers, Footasylum had broadly maintained its store portfolio, with a relatively small number of [✂] since the onset of the COVID-19 pandemic;

(b) Footasylum's financial performance, primarily in terms of the performance of its online business and gross margins, as well as its forecast revenues, [✂], indicate the underlying resilience of Footasylum during the COVID-19 pandemic; and

(c) while there have been some [✂]in Footasylum's [✂], these should not have a significant impact on Footasylum's ability to compete effectively in the relevant markets for the foreseeable future.

14.46 In its response to the Remedies Paper, JD Sports told us that [✂], then it would agree that Footasylum would be an attractive business and that the risk that a suitable purchaser was not available was low, and therefore, it would not be necessary for the CMA to require an upfront buyer prior to the acceptance of any final undertakings or the appointment of a Divestiture Trustee.[618]

14.47 We consider that provided that the asset risk (ie the risk that Footasylum's competitive capability deteriorates prior to completion of the divestiture remedy) is appropriately mitigated during any divestiture process, we would expect the Footasylum business to remain an attractive business capable of being sold to a suitable purchaser. In this regard, given our view that a suitable purchaser for the Footasylum business will likely be available, we do not consider it necessary to consider a requirement for an upfront buyer prior to the acceptance of final undertakings (or the making of a final order).

14.48 Finally, notwithstanding our view that we have no reason to consider the risk of not finding a suitable purchaser to be material, we would note that our guidance on remedies states that substantial uncertainty as to whether a suitable purchaser will emerge will generally not be sufficient for the CMA to

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616 CMA's Phase 2 Final Report, Chapter 13.
617 Chapters 7, 10 and 11.
618 JD Sports' response (dated 9 September 2021) to the Remedies Paper, paragraphs 12 and 13.

conclude that any form of divestiture remedy is not feasible. In this regard, the CMA has found that it is normally possible to implement divestiture remedies (eg a sale of a business to a suitable purchaser approved by the CMA), despite such uncertainties, given the flexibility in the disposal price.[619]

- *Conclusion on availability of a suitable purchaser*

14.49 We have concluded that provided that Footasylum's ability to compete effectively in the relevant markets is preserved during any divestiture process (which we turn to when we consider asset risk below), the risk that no suitable purchaser will emerge is not material.

Asset risks – ensuring an effective process

14.50 An effective divestiture process will safeguard the competitive potential of the divestiture package before disposal and will enable a suitable purchaser to be secured in an acceptable timescale, as well as allowing prospective purchasers to make an appropriately informed acquisition decision.[620]

14.51 We consider further below whether there have been any developments since the CMA's Phase 2 Final Report, which require us to update or amend the CMA's conclusions in the CMA's Phase 2 Final Report that go to asset risk.[621] In this regard, we consider the following areas:

(a) the appropriate timescale to complete a divestiture;

(b) the need for further interim measures during the divestiture process to mitigate any risks that the competitive capability of Footasylum will deteriorate before completion of divestiture; and

(c) whether, and under what circumstances, there is a need to appoint an external and independent trustee to complete a divestiture (Divestiture Trustee) to mitigate the risk that the divestiture does not complete within the agreed timescales.

Appropriate timescales to complete a divestiture

14.52 We considered what might be an appropriate timescale in which JD Sports should fully implement a full divestiture remedy (the Initial Divestiture Period), which would normally run from the acceptance of final undertakings or the

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[619] *Merger remedies guidelines*, CMA87 (13 December 2018), paragraph 3.51.
[620] *Merger remedies guidelines*, CMA87 (13 December 2018), paragraph 5.33.
[621] CMA's Phase 2 Final Report, Chapter 13.

making of a final order (for which the Act provides a period of up to 12 weeks after the final report) until legal completion of an effective divestiture (ie a sale to a purchaser approved by the CMA under a managed sale process).

14.53 In considering the appropriate Initial Divestiture Period, CMA guidance on remedies states that we 'will seek to balance factors which favour a shorter duration, such as minimising asset risk and giving rapid effect to the remedy, with factors that favour a longer duration, such as canvassing a sufficient selection of potential suitable purchasers and facilitating adequate due diligence'. Our guidance on remedies also states that the Initial Divestiture Period will normally not exceed six months.[622]

14.54 In the CMA's Phase 2 Final Report, the CMA concluded that the Initial Divestiture Period should be [✂]. In reaching this decision, the CMA had regard to the growing uncertainty and the ongoing situation at the time concerning the COVID-19 pandemic, and the impact of this on the appropriate Initial Divestiture Period.[623] The CMA also concluded that it would keep the Initial Divestiture Period under review if evidence were to emerge that JD Sports would not be able to sell Footasylum to a suitable purchaser within this timescale as a result of COVID-19, noting that the CMA would have the discretionary power to grant extensions to the Initial Divestiture Period where this was necessary to achieve an effective divestiture.[624]

14.55 In its response to the Remedies Paper, JD Sports told us that while it would work 'expeditiously', it would be appropriate to [✂] Initial Divestiture Period [✂] to make allowance for the following considerations, [✂][625] In this regard, JD Sports cited the following reasons for [✂]:[626]

(a) *Supply issues:* JD Sports told us that [✂]. It told us that its expectation was that any purchaser would want to assess: (i) the extent to which this [✂]would continue into future quarters; and (ii) the impact that the [✂] would have on Footasylum's sales in Q4 2021 and Q4 2022, its key commercial periods. JD Sports told us that [✂] would not provide enough time for this information to be available and that this diminished the likelihood of JD Sports being able finding a purchaser for Footasylum. Moreover, it told us that a 'highly opportunistic' purchaser (ie one who was not interested in [✂] and their impact) would be unlikely to give comfort

[622] *Merger remedies guidelines*, CMA87 (13 December 2018), paragraph 5.41.
[623] Phase 2 Final Report, Chapter 13.
[624] Phase 2 Final Report, Chapter 13.
[625] JD Sports' response (dated 9 September 2021) to the Remedies Paper, paragraph 14.
[626] JD Sports' response (dated 9 September 2021) to the Remedies Paper, paragraph 14.

that their acquisition would be in the medium- to long-term interests of Footasylum, competition and, in turn, consumers.

(b) *COVID-19:* JD Sports told us that while the Remedies Paper noted that the COVID-19 pandemic had not prevented M&A transactions from taking place, it considered that the pandemic had made transactions more complicated, which in turn increased the time to finalise a transaction. For example, JD Sports told us that it anticipated that purchasers would want to carry out enhanced due diligence into the impact of COVID-19 on Footasylum and the degree to which its financial position had been distorted by government support [✂] (notwithstanding the Interim Order provisions that guaranteed that Footasylum was run and had been run independently). Furthermore, JD Sports told us that it would expect that purchasers would be reluctant to proceed with an acquisition until they understood the likelihood of further lockdowns in response to a 'new wave of COVID infections'. It therefore considered that both of these processes risked significant compromise within a [✂] timeframe.

(c) *Interim measures / undertakings:* JD Sports told us that there was relatively little risk from a CMA perspective in increasing the divestiture period given the ongoing effectiveness of the CMA's interim measures and previous undertakings. JD Sports told us that the Remedies Paper had provisionally concluded that the CMA's interim measures had prevented the integration of the JD Sports and Footasylum businesses, and had ensured that there was no deterioration of the Footasylum business. It therefore argued that there was no reason why this would not continue to be the case if the divestiture period was extended by a further [✂]. JD Sports also told us that the duration of the interim measures would be the same in the event of a [✂] extension to a [✂]. Finally, it told us that by extending the [✂], this meant that there was a greater likelihood of JD Sports being able to find a purchaser which prioritised the long-term interests of Footasylum.

14.56 Subsequent to its written response to the Remedies Paper, JD Sports told us that the need for a [✂] Initial Divestiture Period [✂], as well as to understand which Nike products would be available to Footasylum in Q4 2022 (which Footasylum would have greater clarity on from September 2022). JD Sports considered that [✂]. It added that under a [✂] Initial Divestiture Period, it would be possible for potential purchasers to have clarity on Footasylum's [✂].[627]

[627] CMA staff call with JD Sports (24 September 2021).

14.57 In our view, there were particular circumstances that justified a [✂] Initial Divestiture Period at around the time the CMA's Phase 2 Final Report was published in May 2020, when 'non-essential' stores were required to be, and remained, closed; when there was considerable uncertainty in relation to when these stores would reopen; and the need for potential purchasers to receive a minimum period of consecutive in-store trading results for the Footasylum business as part of their due diligence exercise. These particular circumstances do not currently apply in the present case, and we found no other reason to grant an Initial Divestiture Period [✂].

14.58 We also consider that there are factors that indicate that it would not be appropriate to grant a longer Initial Divestiture Period. For example:

(a) Footasylum told us that the prolonged CMA process was having a [✂], and therefore, the longer the CMA process continued, it could become an increasing 'challenge' [✂];[628]

(b) after the Final Undertakings were accepted on 13 July 2020 (until those obligations were subsequently suspended by the CMA following the Tribunal's judgment), JD Sports and Footasylum had already taken certain steps to prepare for the sale of the Footasylum business; and

(c) the significant time that has already elapsed since the CMA's Phase 2 Final Report and the need to give rapid effect to the remedy, as well as the views from third parties during the Remittal on the negative impact of a prolonged CMA process on Footasylum, eg:

(i) One third party ([✂])told us that the additional time that had 'already elapsed through the appeal and remittance process increased the need for a prompt divestment of Footasylum to a suitable purchaser to allow Footasylum to 'exit its current transitional period' and continue operating as a viable and effective competitor on the market'.[629]

(ii) Another third party ([✂]) told us that since JD Sports' acquisition of Footasylum, [✂], it considered that as a result of the uncertainty in relation to the outcome of the CMA's merger inquiry, Footasylum was in a 'holding pattern' with regard to its 'future ownership' and its 'investments'. [✂].[630]

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[628] CMA staff call with Footasylum (28 September 2021).
[629] [✂]
[630] [✂]

14.59 We have also not found any other factors that would cause us to provide a longer Initial Divestiture Period. In particular:

(a) In response to JD Sports' submission above that potential purchasers would need to have an indication of Footasylum's trading up to Q4 2022, we consider that a [✂] Initial Divestiture Period provides the appropriate balance between the need to give rapid effect to the remedy (as well as minimise asset risk), and facilitating adequate due diligence. In particular, we would expect potential purchasers as part of their due diligence exercise to undertake the appropriate level of review of Footasylum's historic and forecast performance (as updated from time to time for Footasylum's current trading), and then determine how they should account for any future risk or uncertainty in their respective bids.

(b) In relation to JD Sports' submission that the COVID-19 pandemic had made transactions more complicated, which in turn would increase the time required to finalise a transaction, we consider that JD Sports could take early steps as part of its preparations for a divestiture process to address and provide potential purchasers with sufficient information concerning the potential issues cited by JD Sports. Furthermore, in relation to the risk of any further lockdowns and their potential impact on Footasylum and the divestiture process, we consider that if that risk materialises (which at this stage it has not), the CMA will consider based on the evidence available to it at the time, whether it would be necessary to grant an extension to the Initial Divestiture Period.

(c) In response to JD Sports' submission that there was relatively little risk from a CMA perspective in increasing the divestiture period given the ongoing effectiveness of the CMA's interim measures and previous undertakings, we do not consider it appropriate to prolong and extend the use of our interim measures beyond what is strictly necessary to give effect to the remedy. In particular, we note the risks of a prolonged remedies process and its negative impact on Footasylum set out in paragraphs 14.58(a) and 14.58(c) above.

14.60 Based on the above, it is our view that an Initial Divestiture Period of [✂] provides an appropriate balance between the need to give rapid effect to the remedy (in particular, given the significant time that has already elapsed since the CMA's Phase 2 Final Report and its associated asset risks) and minimise asset risk, and the need to provide JD Sports with sufficient time to canvass a sufficient selection of potential suitable purchasers and facilitate adequate purchaser due diligence. We also do not consider it necessary to grant a longer period given the progress the Parties have already made to date in relation to their preparations for a divestiture process under the Final

Undertakings, and given that the past and remaining uncertainties arising from the COVID-19 pandemic have not prevented M&A transactions from taking place in the UK retail sector.

14.61 We will keep under review the need for extensions to the Initial Divestiture Period and will engage with the Parties on this matter. In considering whether to grant an extension, one of the factors the CMA will consider will be the potential purchasers' requirement to have sufficient time in the circumstances to consider the transaction or to undertake adequate due diligence.

- *Conclusion on the Initial Divestiture Period*

14.62 We have concluded that the Initial Divestiture Period should be [✂] from the date of any final undertakings or final order.

Whether to impose further interim measures

14.63 We considered whether there were any risks that the competitive capability of Footasylum would deteriorate before completion of a divestiture, and if so, what safeguards could be put in place to ensure that the Footasylum business is maintained and properly supported during the course of the divestiture process.

14.64 We have had interim measures in force since the CMA's Phase 1 investigation, which have prevented the integration of the JD Sports and Footasylum businesses. A Monitoring Trustee was appointed at the start of the CMA's Phase 2 investigation to monitor the Parties' compliance with these interim measures, including ensuring that there was no deterioration of the Footasylum business.[631]

14.65 In our Remedies Paper, we provisionally concluded that there was no compelling reason to depart from the conclusions of the CMA's Phase 2 Final Report and require additional measures to safeguard the viability and competitive capability of the Footasylum business, beyond those set out in the CMA's Phase 2 Final Report. In this regard, the Remedies Paper provisionally concluded that:[632]

[631] Our interim measures comprised an Initial Enforcement Order, which came into force on 17 May 2019, during the CMA's Phase 1 investigation, which was subsequently replaced by an Interim Order (which came into force on 26 November 2019) during the CMA's Phase 2 investigation. The Interim Order was subsequently replaced by the Final Undertakings, which were accepted on 13 July 2020. Finally, for the duration of the Remittal, the Parties and Pentland were released from the Final Undertakings on 19 May 2021, and at the same time, a new Interim Order was put in place.
[632] Remedies Paper, paragraphs 61 and 67.

(a) the Parties' obligations under the CMA's existing interim measures should continue to apply until completion of the full divestiture remedy, and that the appointment of the Monitoring Trustee should continue in order to monitor the Parties' compliance with these interim measures;

(b) the scope of the Monitoring Trustee's engagement should be expanded to monitor the Parties' compliance with any final order or undertakings in relation to a divestiture remedy and to ensure an efficient divestiture process; and

(c) it would not be necessary to appoint a hold separate manager to operate the Footasylum business during the divestiture process (Hold Separate Manager) but that the CMA would reserve its right to appoint one if Footasylum's current circumstances were materially to change, eg if there was a risk that the existing Footasylum management team would not remain in place during any divestiture process.

14.66 In its response to the Remedies Paper, JD Sports told us that it agreed with the provisional conclusions in the Remedies Paper that: *(a)* the undertakings adopted at the end of the Phase 2 process were effective and that JD Sports saw no reason why any new undertakings would need to be materially different; and *(b)* extending the scope of the Monitoring Trustee's role to include monitoring the Parties' compliance with the undertakings adopted during Phase 2 was successful, and that it saw no reason to depart from this approach.[633]

14.67 In relation to the possible asset risks arising during a divestiture process, Footasylum separately told us that it would continue with its marketing and advertising initiatives (eg through social media platforms and digital advertising) and that it did not consider there to be a risk that Footasylum would reduce the level of its marketing and advertising activity during any divestiture process. However, as we noted above in paragraph 14.58(a), Footasylum told us that one possible risk of a prolonged CMA process was that it could become an increasing 'challenge' [✂].[634]

14.68 For the purpose of maintaining the viability and competitive capability of the Footasylum business until completion of the divestiture remedy, we consider that the relevant provisions of the Interim Order should be carried over into any final undertakings or order under a divestiture remedy and should remain in force for the duration of the divestiture process until completion. We will consider amending the obligations to focus on those that are necessary to

[633] JD Sports' response (dated 9 September 2021) to the Remedies Paper, paragraphs 15 and 16.
[634] [✂]

ensuring the independent operation and preservation of the divestiture business. We also consider that the existing Monitoring Trustee's appointment should continue, but expand to monitor the Parties' progress in relation to ensuring a timely completion of the divestiture process.

14.69 In relation to the uncertainties arising from COVID-19 and/or future developments and their impact on Footasylum, which may arise during the course of the divestiture process, we will interpret the Parties' asset maintenance obligations under any final undertakings or final order in light of the relevant circumstances and developments applicable at the time.[635]

14.70 We consider that the design of our remedy and its implementation process has sufficient flexibility to enable us to take into account the impact of COVID-19 and/or future developments (based on what we currently know or the factors we are able to predict). To ensure that our remedy provides the necessary flexibility to enable an effective divestiture process that can be responsive to the uncertainties arising from COVID-19 and/or other future market developments, we will keep under review the need for any further flexibility both before any final undertakings or order and during the remedy implementation period. Further, we note the ongoing flexibility we have under the Act allowing remedies to be reassessed in light of material changes in circumstances or other special reasons (see sections 41(3),[636] 41A(2),[637] and see also section 92(2)[638] of the Act), to ensure we can continue to respond to any relevant developments which are, at this point in time, difficult to anticipate.

14.71 Based on the above, we have found no compelling reason to depart from the conclusions of the CMA's Phase 2 Final Report and require additional measures to safeguard the viability and competitive capability of the

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[635] We also refer to our recently published guidance on merger assessments during the COVID-19 pandemic, which notes that derogations 'can be, and have been, granted rapidly where merging parties demonstrate that such steps are necessary to ensure the viability of their businesses, and appropriate safeguards are put in place to protect the CMA's ability to take appropriate action to protect UK consumers as part of the merger review process' (Source: CMA, Merger Assessments during the Coronavirus (COVID-19) pandemic). While this guidance applies in the context of interim measures during merger investigations, this can also apply in the context of measures preserving the divestiture package during any remedy implementation process.
[636] Under section 41(3) of the Act, the action the CMA takes in implementing remedies must be consistent with the decisions in the final report, unless there has been a material change of circumstances since the preparation of the report or the CMA otherwise has a special reason for deciding differently.
[637] Under section 41A of the Act, the CMA is subject to a statutory deadline of 12 weeks following its final report to accept final undertaking or to make a final order. This period may be extended once by up to six weeks if the CMA considers there are special reasons for doing so.
[638] Under section 92 of the Act, the CMA has an ongoing responsibility for the monitoring and enforcement of the final undertakings or final order. From time to time, the CMA must consider whether, by reason of any change in circumstances, the final undertakings are no longer appropriate and should be released, varied or superseded or the final order is no longer appropriate and should be varied or revoked.

Footasylum business, beyond those set out in the CMA's Phase 2 Final Report.

- *Conclusion on the need for further interim measures*

14.72 On the basis set out above, we have concluded that:

(a) the Parties' current obligations under our existing interim measures should be carried over into any final undertakings or final order and remain in place until completion of the full divestiture remedy;

(b) the Monitoring Trustee's appointment should continue, but that the scope of its engagement should be expanded to monitor the Parties' compliance with their broader obligations under any final undertakings or order in relation to a divestiture remedy and to ensure an efficient divestiture process; and

(c) it would not be necessary to appoint a Hold Separate Manager at this stage, albeit this would be revisited if Footasylum's current circumstances were materially to change, eg if there were a risk that the existing Footasylum management team would not remain in place during any divestiture process.

Divestiture Trustee considerations

14.73 We consider below whether there is a need for the appointment of a Divestiture Trustee, either from the outset of the divestiture process or, alternatively, should the CMA have concerns that an effective disposal will not be achieved within the Initial Divestiture Period. If appointed, a Divestiture Trustee would normally be tasked with completing the divestiture to a potential purchaser approved by the CMA and at no minimum price.[639]

14.74 In the CMA's Phase 2 Final Report, the CMA concluded that:

(a) it would not be necessary to appoint a Divestiture Trustee at the outset of the divestiture process; but

(b) the CMA would reserve its right to appoint one if: (i) JD Sports fails to complete the divestiture process within the Initial Divestiture Period; (ii) the CMA reasonably believes that there is a risk that the divestiture process would be delayed or fail to complete within the Initial Divestiture Period; and/or (iii) JD Sports is not engaging constructively with the

[639] *Merger remedies guidelines*, CMA87 (13 December 2018), paragraph 5.28.

divestiture process, eg if it does not comply with its obligations under any final order or undertakings.

14.75 In the Remedies Paper, we provisionally concluded that given our view that the risk of no suitable purchaser being able to be found was low, there was no compelling reason to depart from the conclusions of the CMA's Phase 2 Final Report in relation to the appointment of a Divestiture Trustee.[640]

14.76 In response to the Remedies Paper, JD Sports told us that it agreed with the provisional conclusion in the Remedies Paper that it was not necessary to appoint a Divestiture Trustee at the outset of the divestiture process, and that the Remedies Paper acknowledged that during Phase 2, JD Sports had engaged constructively with the CMA to carry out its divestiture obligations, including submitting monthly progress reports, which showed that JD Sports was capable of achieving the divestment of Footasylum in accordance with the parameters set by the CMA.[641]

14.77 However, one third party ([✂]) told us that it would be necessary to appoint a Divestiture Trustee at the outset of the divestment process to ensure that a suitable purchaser was secured and the SLC eliminated in a timely manner,[642] and asserted the following:

(a) 'allowing JD Sports an initial period of time to run the divestment process is likely to result in delay and consequent erosion of the competitive capability of the Footasylum business' given that JD Sports had 'no commercial incentive to procure divestiture of Footasylum to a suitable purchaser [✂];[643]

(b) '[✂];[644]

(c) moreover, the additional time that had 'already elapsed through the appeal and remittance process', further increased the need for a prompt divestment of Footasylum to a suitable purchaser to allow Footasylum to 'exit its current transitional period' and continue operating as a viable and effective competitor on the market;[645] and

(d) the Divestiture Trustee should seek to ensure that, as part of the divestiture process, Footasylum procures 'contractual assurances' from Nike and adidas that the two brands will supply it with the appropriate

[640] Remedies Paper, paragraphs 72 and 73.
[641] JD Sports' response (dated 9 September 2021) to the Remedies Paper, paragraph 17.
[642] [✂].
[643] [✂].
[644] [✂].
[645] [✂].

volume and range of 'must-have' products in the long term, or failing that, JD Sports should be obliged to procure that Footasylum obtains appropriate supplies of 'must-have' products.[646]

14.78 In paragraph 14.49, we concluded that the risk that a suitable purchaser is not available was not material. As such, we do not consider it necessary to appoint a Divestiture Trustee at the outset to ensure a timely completion of the divestiture process.

14.79 In relation to the risk that JD Sports would only put forward potential purchasers which would not adequately meet our purchaser suitability criteria, we consider that our purchaser approval process would mitigate the risk of an unsuitable purchaser acquiring Footasylum.

14.80 However, there remains a risk that the CMA may not approve any of the potential purchasers shortlisted by JD Sports during a divestiture process if no purchaser meets the CMA's purchaser suitability criteria. If this happened, it could have significant implications for the timely completion of this remedy. This would also be the case were JD Sports to fail to engage constructively with the divestiture process.

14.81 We consider that the possibility of CMA intervention by way of an appointment of a Divestiture Trustee, who would be mandated to complete a sale of Footasylum at no minimum price, would provide a sufficient incentive to JD Sports to engage constructively with the divestiture process and to ensure that the CMA's purchaser suitability criteria are considered when shortlisting potential purchasers for the CMA's approval.

14.82 We therefore consider that we should reserve our rights to appoint a Divestiture Trustee if JD Sports fails to, or is unlikely to, complete the divestiture within the Initial Divestiture Period (or as otherwise extended by the CMA), or if there is evidence that JD Sports is failing to engage constructively with the process.

14.83 Finally, in relation to whether a Divestiture Trustee should be appointed at the outset to ensure Footasylum obtains 'contractual assurances' from the key suppliers, the CMA had considered this issue in the CMA's Phase 2 Final Report,[647] where it concluded that it would neither be necessary nor feasible to direct Footasylum to secure such assurances or to require JD Sports to negotiate such assurances on Footasylum's behalf with the key suppliers. As mentioned in paragraphs 14.39 and 14.40, we consider that a purchaser who

[646] [✂].
[647] CMA's Phase 2 Final Report, chapter 13, paragraph 13.146.

meets our purchaser suitability criteria would also likely meet the requirements of the key suppliers such that under the ownership of a suitable purchaser, Footasylum would be able to continue having access to the key suppliers' branded products, without the need for assurances (contractual or otherwise) from the key suppliers. We also note that the CMA does not have the vires to make an order on a third party to enter into a contractual arrangements with Footasylum and/or JD Sports to continue to supply their branded products. Therefore, we found no reason to depart from the conclusions set out in the CMA's Phase 2 Final Report that it would neither be necessary nor feasible to direct Footasylum to secure such assurances or to require JD Sports to negotiate such assurances on Footasylum's behalf with the key suppliers.

- *Conclusion on the appointment of a Divestiture Trustee*

14.84 We have concluded that:

(a) there is no need to require a Divestiture Trustee to be appointed at the outset of the divestiture process; but

(b) the CMA reserves its discretionary power to appoint a Divestiture Trustee later in the process and that the CMA may exercise its power to appoint a Divestiture Trustee as it deems appropriate to ensure a timely completion of the divestiture process. We have also concluded that, in line with the CMA's normal practice,[648] if appointed, a Divestiture Trustee should be tasked with completing the divestiture of Footasylum to a potential purchaser approved by the CMA and at no minimum price.

Conclusions on the effectiveness of a full divestiture remedy under a managed sale process

14.85 Based on our assessment above, and with reference to the various dimensions of a remedy's effectiveness set out in paragraph 14.8, we set out below our conclusions on the effectiveness of a full divestiture remedy under a managed sale process route.

14.86 It is our view that a full divestiture remedy achieved under a managed sale process would address all of our competition concerns at source and therefore prevent any SLC and consequently any resulting adverse effects we have identified from arising. It therefore represents a comprehensive solution to every aspect of the SLCs we have found.

[648] *Merger remedies guidelines*, CMA87 (13 December 2018), paragraph 5.28.

14.87 We would expect a full divestiture remedy designed according to our specifications detailed above, to restore on its completion the market structure and dynamic rivalry expected in the absence of the Merger, and therefore, to have an immediate and comprehensive effect in addressing our SLCs and resulting adverse effects.

14.88 In relation to the practicality of implementing a full divestiture remedy, we would be able to clearly specify the scope of the divestiture package (in particular given the limited integration of the Parties to date). In this regard, we would also expect a full divestiture remedy to involve little risk of omitting any key assets that may be necessary to ensure Footasylum's stand-alone viability and competitive capability and therefore ensure Footasylum's ongoing ability to be an effective national competitive constraint in the relevant markets.

14.89 We also considered the practical issues relating to the potential composition, purchaser and asset risks normally associated with a divestiture remedy and have reached the view that the design of a full divestiture remedy as we have specified above fully addresses these risks. We have set out above our views on the criteria for a suitable purchaser and the procedural safeguards which should be put in place to ensure an effective divestiture process. We considered the likelihood of achieving a successful divestiture and consider the risk of not finding a suitable purchaser to be low. Therefore, with regard to the practicality of this remedy, we conclude that it would be capable of effective implementation and require minimal ongoing monitoring after its full implementation.

14.90 In relation to the risk profile of a full divestiture remedy, given that a full divestiture of Footasylum would address the SLCs and resulting adverse effects at source, it is our view that there is a high degree of certainty that this remedy would achieve its intended effect. We therefore consider that the risks in terms of the effectiveness of a full divestiture remedy are low.

14.91 In summary, we conclude that a full divestiture of Footasylum to a suitable purchaser would be effective in addressing the SLCs we have found. We would expect a full divestiture remedy to be a timely and low risk solution to the SLCs we have identified, with limited future monitoring requirements on the CMA or others.

Effectiveness of a full divestiture remedy (IPO process)

14.92 Having considered the effectiveness of implementing a full divestiture remedy by way of a managed sale process, we now turn to our assessment of the effectiveness of implementing a full divestiture remedy by way of an IPO process. In this section, we set out:

(a) an overview of JD Sports' proposal for a full divestiture of Footasylum to be implemented by way of an IPO process;

(b) our assessment of its effectiveness; and

(c) our conclusions on its effectiveness.

Remedy description (IPO process)

14.93 In addition to the other options proposed, JD Sports told us that a full divestiture of Footasylum could be achieved by way of relisting 100% of Footasylum's shares on AIM of the London Stock Exchange through an IPO.[649] In its response to the Remedies Paper, JD Sports told us that an IPO would result in the restoration of the pre-Merger situation as it would most closely restore the 'status quo ante prior to the Merger' because prior to the Merger, Footasylum's shares were listed on AIM.[650]

14.94 JD Sports explained that an IPO process would typically involve the preparation of a prospectus, followed by an investor roadshow to meet prospective investors, with brokers involved in marketing Footasylum's shares. It added that as part of this IPO process, [✄].[651]

14.95 JD Sports told us that the CMA should conclude that, in principle, the IPO route was one that JD Sports could possibly pursue as one option to implement a full divestiture remedy, alongside other options to transfer the business to a single suitable purchaser from among a wide purchaser set.[652]

Assessment of remedy effectiveness (IPO process)

14.96 The great majority of merger divestitures overseen by the CMA (or indeed other competition authorities) are implemented by means of a managed sale process overseen by the CMA and run by the merger parties, or a Divestiture Trustee, to a purchaser whose suitability is assessed by the CMA.

14.97 It is highly unusual for a divestiture remedy to be implemented by means of an IPO, and this has not happened in a remedy overseen by the CMA so we considered the merits of this option by reference to the framework set out in

[649] JD Sports' response (dated 9 September 2021) to the Remedies Paper, paragraph 21.
[650] JD Sports' response (dated 9 September 2021) to the Remedies Paper, paragraphs 6 to 8.
[651] [✄]
[652] JD Sports' response (dated 9 September 2021) to the Remedies Paper, paragraph 24.

our remedies guidance, reflecting our institutional knowledge of the risks that can arise in implementing a divestiture. Applying this framework indicates that effectiveness of a full divestiture implemented by means of an IPO is likely to depend on whether, and if so, the extent to which the normal design risks associated with a structural remedy can be overcome or mitigated. Therefore, in assessing the effectiveness of an IPO to implement a full divestiture remedy, we have had regard to the three categories of risk (ie composition, purchaser and asset risks) that could impair the effectiveness of any divestiture remedy set out in paragraph 14.23.

Composition risk

14.98 JD Sports told us that the composition risks associated with an IPO option would be no higher than the composition risks associated with other available options, such as the divestment of Footasylum to a single purchaser.[653]

14.99 We consider that an IPO of 100% of JD Sports' shares in Footasylum (with neither JD Sports nor Pentland retaining an equity stake) would result in a full divestiture of JD Sports' interest in Footasylum. The scope of the divestiture package would be unaffected by the means of implementation, and all relevant assets would be included in the package. We have not identified any additional composition risks associated with implementation by means of an IPO, compared with a managed sale process.

14.100 We have concluded that the composition risks associated with an IPO option are no greater than those associated with the managed sale process option.

Purchaser risk

14.101 In relation to the issue of the suitability of purchasers (ie shareholders) under an IPO option, JD Sports told us that relisting Footasylum on AIM would meet the CMA's purchaser suitability criteria, for example, Footasylum's new shareholders would be independent of both JD Sports and Pentland, and would be committed to ensuring that Footasylum competed in the relevant markets to ensure that their initial investments retained their value. It added that no shareholder would have control at the point of the IPO, and therefore a relisting of Footasylum's shares would not create further competition concerns. JD Sports also pointed out that the CMA had already found in the Provisional Report that that an independent Footasylum would continue to compete effectively in the relevant markets.[654]

[653] JD Sports' response (dated 9 September 2021) to the Remedies Paper, paragraph 22(i).
[654] JD Sports' response (dated 9 September 2021) to the Remedies Paper, paragraph 22(ii).

14.102 JD Sports told us that while pre-Merger, the percentage of Footasylum's shares which were 'free float' (and not held by Footasylum's management or its founders) was relatively small (at around 35%), from a competition point of view, Footasylum's independence (from JD Sports and Pentland) would be restored following an IPO.[655]

14.103 JD Sports told us that [✂], and added that in any case, [✂]. It also told us that individual funds would also be governed by their own fund-rules, which might place limits on the value and percentage stake (eg an equity stake of up to 10%) a fund could hold in a particular company.[656] JD Sports told us that it recognised that the CMA would in due course need to satisfy itself that all of the 'remedial criteria' were met by a proposed IPO, just as it would individually need to approve a particular purchaser against its standard criteria.[657]

14.104 In relation to the risk of an unsuitable purchaser acquiring Footasylum's shares following an IPO, JD Sports told us that while there were no restrictions on trading in Footasylum's shares in the secondary market, it would be more difficult for a purchaser to acquire control over Footasylum if there were multiple shareholders compared to a situation where there was only a single purchaser holding 100% of Footasylum's shares.[658]

14.105 In relation to whether there were any shareholders, which Footasylum would not want holding a significant stake in Footasylum, Footasylum told us that this would depend on the 'agenda' of the particular shareholder, [✂].[659]

14.106 In relation to the availability of purchasers (ie shareholders) under an IPO option, JD Sports told us that the Remedies Paper noted that Footasylum: [✂]. It added that if these findings were correct, then Footasylum would be an attractive business for potential shareholders.[660]

14.107 JD Sports also told us that there had been a number of recent listings on AIM of similar-sized companies, eg In the Style Group Plc and Virgin Wines UK Plc in 2021, and added that the practice of listing on AIM was fairly standard in the sector: with Quiz Plc listing in 2017, boohoo group Plc listing in 2014 and ASOS Plc listing in 2007. [✂].[661] JD Sports subsequently told

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655 [✂]
656 [✂]
657 JD Sports' response (dated 9 September 2021) to the Remedies Paper, paragraph 22(ii).
658 [✂]
659 [✂]
660 JD Sports' response (dated 9 September 2021) to the Remedies Paper, paragraph 22(iii).
661 JD Sports' response (dated 9 September 2021) to the Remedies Paper, paragraph 22(iii).

us that in relation to investor appetite for an IPO of Footasylum, [✂]. It added that with [✂].[662]

14.108 In the event that Footasylum's shares [✂].[663]

14.109 In relation to Footasylum's ability to raise additional funding after an IPO:

(a) JD Sports told us [✂].[664]

(b) Footasylum told us that it considered that there would be 'appetite' from investors for Footasylum to raise further funding following an IPO, [✂].[665]

14.110 Finally, JD Sports told us that it was not aware of any Competition Commission or CMA case precedents involving an IPO remedy, but that it was aware of the European Commission having an IPO remedy precedent in the past.[666]

14.111 We considered these representations. We concluded that there were a number of additional purchaser risks, and associated costs, relative to a managed sales process.

14.112 Firstly, we consider that a capital markets divestiture where no single purchaser acquires the whole business would not be an appropriate divestiture mechanism as we cannot have sufficient confidence that the divested business would be controlled by a suitable purchaser going forward. In this regard, we would note that following Footasylum's IPO, there would be no legal restrictions on shareholders selling their shares to a purchaser the CMA may consider to be unsuitable. We would not be able – legally or practically – to impose such restrictions.

14.113 We would also note that for a purchaser intent on acquiring Footasylum after the IPO, it would not be necessary for the purchaser to approach all of Footasylum's shareholders to acquire their shares. In this regard, we note that under UK takeover rules, a shareholder acquiring at least 30% of a publicly-listed company's voting rights (eg by way of acquiring its shares) would then be required to make an offer for the whole company.[667] We would also note that even a shareholder with less than 30% voting rights

[662] [✂]
[663] [✂]
[664] [✂]
[665] [✂]
[666] [✂]
[667] When a person or group acquires interests in shares carrying 30% or more of the voting rights of a company, they must make a cash offer to all other shareholders at the highest price paid in the 12 months before the offer was announced (30% of the voting rights of a company is treated by the City Code on Takeovers and Mergers (or the Code) as the level at which effective control is obtained). Source: Takeover Panel website.

could exercise some degree of control over the company, eg a shareholder may be able to veto special resolutions at shareholder meetings if its votes accounted for 25% of the votes cast by shareholders attending shareholder meetings.

14.114 While we cannot completely eliminate the risk of an approved purchaser under a managed sale process subsequently selling Footasylum to a potentially unsuitable purchaser, or purchasers, at some stage following completion, we can have more confidence that under a managed sale process, a purchaser vetted by the CMA who satisfies our purchaser suitability criteria is less likely to do so. This is because of the CMA's ability to assess the broader strategic, commercial and financial considerations underpinning the rationale for an approved purchaser's ownership, compared with the narrower considerations likely to drive institutional investors vis-à-vis their minority stake, eg with a greater focus on financial returns for their respective funds / clients. In our experience, it is unusual for a purchaser who has been approved by the CMA to seek to sell its share to an inappropriate purchaser within the years following a divestiture remedy.

14.115 We also consider that the risk of a further acquisition of Footasylum shares after an IPO is neither unrealistic nor purely speculative, and note – for example: *(a)* the relatively low threshold for triggering the requirement for a purchaser making an offer for the whole business (see paragraph 14.113above); and *(b)* that the CMA was aware of an interested trade buyer during the Phase 2 remedies process. However, we observe that we have a much greater ability to assess the risks associated with specific purchasers through a managed sales process, than under a scenario where Footasylum is acquired by a purchaser in the secondary market following an IPO process.

14.116 We therefore consider the risk of an unsuitable purchaser acquiring Footasylum following an IPO to be significantly higher than under a managed sale process. In this regard, while we note that an acquisition by another purchaser that raises competition concerns may trigger a new CMA investigation into that merger, we would highlight the broader dimensions of the CMA's purchaser suitability criteria that go beyond the question of whether a purchaser gives rise to competition concerns, which would not trigger a further merger investigation, eg in relation to a purchaser's capability and commitment to compete in the relevant markets (eg in footwear and apparel, and both in-store and online). An unsuitable purchaser may, for example, result in having a negative impact on Footasylum's relationships with its key suppliers, or decide only to develop Footasylum's online business, neither of which would trigger a merger inquiry, but which could nonetheless result in the remedy being ineffective.

14.117 Secondly, unlike a managed sale process, where the CMA would normally assess the suitability of a relatively small number of short-listed potential purchasers against the CMA's purchaser suitability criteria as set out in our guidance (see paragraph 14.35, and adapted as necessary for the circumstances of the case), we would expect under an IPO process:

(a) to be faced with a more extensive set of potential investors to assess, which would be likely to involve significant CMA time and resources and therefore, when compared to a managed sale process, likely to be: (i) less capable of timely implementation; and (ii) less practical in terms of its implementation (undermining two of the dimensions of a remedy's effectiveness set out in paragraph 14.8). For example, if it emerges that further evidence gathering and a thorough upfront assessment are required for a large number of potential investors who already hold shares in JD Sports or another UK retailer in the relevant markets, and it becomes necessary to understand the extent to which these investors have been active at these company's shareholder meetings (either alone or in concert with other shareholders); and

(b) the CMA's normal purchaser suitability criteria would need to be tailored for the purpose of assessing the suitability of investors, eg in relation to their independence and commitment (eg in relation to the typical timescales for holding their investments, and their intentions for Footasylum's shares).[668]

14.118 We therefore consider that there is a risk that the investor approval process may be highly resource-intensive and/or impractical prior to the IPO launch.

14.119 Thirdly, there are practical risks associated with an IPO that are not present, or can be more effectively handled with a managed sale process. For example, in the event the shares in Footasylum are undersubscribed, and there is a need for the IPO underwriters to allocate shares to investors after the IPO launch date, there may be a need for the CMA to monitor these residual allocations for an indefinite period following the IPO launch date to ensure that any additional investors satisfy the CMA's investor suitability criteria.

14.120 We similarly consider that following the implementation of the full divestiture remedy and under a scenario, where for example, Footasylum requires additional funding to weather the impact of the COVID-19 pandemic due to further lockdowns, we would expect Footasylum to face more challenges to

[668] For example, see Schedule 1 to Annex 1 of the final order in the Ryanair/Aer Lingus merger inquiry (2015).

raising additional financing following an IPO. In practice, we would normally expect Footasylum to have recourse to funding from its new parent company (if a full divestiture remedy was implemented by way of a managed sale process) without the need to turn to external sources of finance (which in any case, we consider would be available to Footasylum as another option if necessary). However, following the implementation of a full divestiture remedy under an IPO, Footasylum would largely be reliant on external sources for additional funding, eg banks and debt and equity capital markets, whose appetite to support Footasylum may be negatively impacted under a downside (eg further lockdown) scenario, and in particular, if Footasylum were to decide to access the equity markets (eg via a rights issue) not long after its IPO. We therefore consider that the managed sale process option provides greater certainty around Footasylum's ability to raise additional funding after the implementation of the full divestiture remedy than under an IPO option.

14.121 Based on the above, we consider that the risk of a subsequent acquisition of Footasylum by an unsuitable purchaser to be materially higher under an IPO process than under a managed sale process. As set out above, we consider that we cannot rely on our merger control to conduct an ex-post investigation in the event of an acquisition by an unsuitable purchaser given the broader dimensions of what constitutes a suitable purchaser. We would note that in any case, a further CMA investigation would also represent an inefficient and costly means of mitigating such purchaser risk.

14.122 We therefore conclude that purchaser risk would be significantly greater under an IPO process than under a managed sale process.

Asset risk

14.123 JD Sports told us that the asset risks associated with an IPO option would be no higher than the asset risks associated with other available options, such as the divestment of Footasylum to a single purchaser.[669]

14.124 While JD Sports did not rule out the possibility that an [✂], it told us that pursuing an IPO option [✂].[670]

[669] JD Sports' response (dated 9 September 2021) to the Remedies Paper, paragraph 22(i).
[670] [✂]

14.125 Footasylum told us that it was not aware of how long an IPO process would take, but noted that the IPO process could be 'arduous', eg requiring Footasylum management to attend roadshows to market the IPO.[671]

14.126 Based on the London Stock Exchange website, we note that running an IPO process from a standing start to its launch on AIM might normally be expected to take at least seven months and up to 14 months (to plan and prepare for the IPO and then undertake the IPO process, ie until the launch of the IPO). Based on other public sources, one source indicated that an IPO process could take at least six months to over a year, while another indicated that it could take an average of six months.[672]

14.127 We consider the transaction execution risk arising from an IPO process, particularly if run to a challenging timescale, to be higher than from a managed sale process, given that Footasylum's IPO could be cancelled or delayed in response to a shock to the wider economy or in response to negative investor and market sentiment towards 'athleisure' stocks prior to the IPO launch. In contrast, we consider that the transaction execution risk arising from a managed sale process to be lower, given the greater flexibility in the sale price (eg through the appointment of a Divestiture Trustee if necessary) and the involvement of potential purchasers who are likely to have a broader commercial and strategic rationale underpinning their rationale for completing a transaction, and may be more resilient to potential shocks in the wider economy.

14.128 There is a clear need for a timely resolution of this matter, given the time that has elapsed since the Merger took place. This constitutes an asset risk, in that Footasylum faces a further period of uncertainty relating to its longer-term strategy while the IPO took place, and possibly thereafter if there was a subsequent takeover bid.

14.129 Given the need to give effect to the remedy in a timely manner, one of the dimensions of a remedy's effectiveness (see paragraph 14.8) and the significant time that has elapsed since the CMA's Phase 2 Final Report, we do not consider it appropriate to provide a longer timescale to accommodate a potentially time-consuming and complex IPO process when a managed sale process route is likely to provide a more timely and efficient option.

[671] CMA staff call with Footasylum (28 September 2021).
[672] For example: *(a)* at least seven months (and up to 14 months) for planning and preparing an IPO, and then undertaking the IPO process (London Stock Exchange); *(b)* six months to over a year (Corporate Finance Institute); and *(c)* an average six months (AIM Advisors).

Conclusions on the effectiveness of a full divestiture remedy implemented by way of an IPO process

14.130 Based on our assessment above, and with reference to the various dimensions of a remedy's effectiveness set out in paragraph 14.8, we consider that while, at least in principle, the IPO option could represent an alternative mechanism to implement a full divestiture remedy, it gives rise to additional purchaser and asset risks (as we have discussed above) which could undermine its effectiveness, without any additional benefits over a managed sale process. We cannot be confident that a full divestiture remedy achieved by way of an IPO would be capable of timely implementation, and given the higher purchaser risks identified above, we cannot be confident that an IPO would address the SLCs effectively throughout its expected duration, in particular given the higher risks of a subsequent acquisition by an unsuitable purchaser.

14.131 We therefore consider that the combination of the risks we have identified, would significantly increase the risk profile of an IPO option to an unacceptable level, and increase the risk that a full divestiture remedy implemented by way of an IPO process would not achieve its intended effect to comprehensively address the SLCs and resulting adverse effects we have found. We consider that these risks cannot be mitigated through modifying our remedy design.

14.132 We therefore conclude that full divestiture remedy via an IPO process would not represent an effective remedy.

Conclusion on effective remedies

14.133 We concluded above that a full divestiture of Footasylum to a suitable purchaser by way of a managed sale process would be the only effective remedy in addressing the SLCs we have found.

Relevant customer benefits

14.134 When deciding on remedies, we may have regard to the effects of remedial action on any RCBs. In this section, we consider whether there are any RCBs (within the meaning of the Act) that should be taken into account in our remedy assessment.

14.135 RCBs are defined in the Act as:[673]

[673] Section 30 of the Act.

(a) lower prices, higher quality or greater choice of goods or services in any market in the UK, or

(b) greater innovation in relation to such goods or services.

14.136 An effective remedy to our SLCs, such as in this case a full divestiture of Footasylum, could be considered disproportionate if it prevents customers from securing substantial benefits arising from the Merger, where these benefits outweigh the SLCs and any resulting adverse effects. Insofar as these benefits constitute RCBs for the purposes of the Act,[674] the statutory framework allows us to take them into account[675] when we decide whether any remedy is appropriate.

14.137 RCBs that will be foregone due to the implementation of a particular remedy may be considered as costs of that remedy. The CMA may modify a remedy to ensure retention of an RCB or it may change its remedy selection. For instance, it may decide to implement an alternative effective remedy, or it may decide that no remedy is appropriate.[676]

14.138 As set out in the CMA's Phase 2 Final Report, the CMA assessed the Parties' claimed RCBs in light of evidence from the Parties and third parties and concluded that there was insufficient evidence to conclude that RCBs within the meaning of the Act, would arise from the Merger.[677]

14.139 In its response to the Remedies Paper, JD Sports told us that as noted during the CMA's Phase 2 investigation, it still maintained that a full divestiture remedy would deprive customers of the benefits that would arise from the Merger. In particular, JD Sports told us that the CMA's assessment of JD Sports' claim that one RCB arising from the Merger would be the maintenance of Footasylum's footwear product range (particularly, the 'top tier' limited allocation lines from key suppliers) did not take into account how Footasylum's [✂]. In this regard, it added that the Parties' submissions had outlined how JD Sports was uniquely positioned to [✂].[678]

14.140 In response to JD Sports' submission that it was uniquely positioned to restore [✂]:

(a) We considered, on the basis of the evidence, that in the counterfactual, Footasylum would continue to receive supply of branded products (including footwear) from the key suppliers and therefore Footasylum

[674] Section 30 of the Act.
[675] Section 35(4) of the Act.
[676] *Merger remedies guidelines*, CMA87 (13 December 2018), paragraph 3.16.
[677] CMA's Phase 2 Final Report, Chapter 13.
[678] JD Sports' response (dated 9 September 2021) to the Remedies Paper, paragraph 25.

would not require intervention to ensure the continuation of supply. In chapter 11 of this report, we also concluded that while there has been some [✄], this should not have a significant impact on Footasylum's ability to compete effectively in the relevant markets for the foreseeable future.

(b) For us to accept RCBs we must first be satisfied that the purported benefit is an RCB within the meaning of the Act. In this case, the Parties have not provided any evidence to show that the Merger would result in a greater choice of goods or services than would be supplied absent the Merger.

(c) We therefore consider this claim does not qualify as an RCB for the purposes of the Act nor do we consider it to be Merger-specific.

14.141 We have found no further reason to depart from the CMA's conclusions in the CMA's Phase 2 Final Report and therefore we conclude that RCBs do not arise as a result of the Merger within the meaning of the Act.

Proportionality assessment

14.142 In this section, we set out our assessment of, and conclusions on, the proportionality of our remedy, ie the full divestiture of Footasylum.

Proportionality assessment framework

14.143 In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, that it considers will be effective. If the CMA is choosing between two remedies which it considers will be equally effective, it will select the remedy that imposes the least cost or that is least restrictive. In addition, the CMA will seek to ensure that no remedy is more onerous than necessary or disproportionate in relation to the SLC and its adverse effects.[679]

14.144 To fulfil this, we first consider whether there are any relevant costs associated with each effective remedy option. When considering relevant costs, the CMA's considerations may include (but are not limited to):[680]

(a) distortions in market outcomes;

(b) compliance and monitoring costs incurred by the Parties, third parties, or the CMA; and

[679] *Merger remedies guidelines*, CMA87 (13 December 2018), paragraph 3.6.
[680] *Merger remedies guidelines*, CMA87 (13 December 2018), paragraph 3.10.

(c) the loss of any RCBs that may arise from the Merger which are foregone as a result of the remedy.

14.145 However, our guidance on remedies states that 'for completed mergers, the CMA will not normally take account of costs or losses that will be incurred by the merging parties as a result of a divestiture remedy', as it is for the merging parties 'to assess whether there is a risk that a completed merger would be subject to an SLC finding, and the CMA would expect this risk to be reflected in the agreed acquisition price'.[681]

14.146 Having considered the least costly effective remedy, we then consider whether the least costly remedy is more onerous than necessary or would be disproportionate to the SLCs and resulting adverse effects. In doing so, we are required to compare the level of harm which is likely to arise from the SLCs with the relevant costs of the proposed remedy.[682]

Our assessment of proportionality

14.147 We have identified one effective remedy – the full divestiture remedy to be achieved by way of a managed sale process. For the reasons set out in this chapter, we consider that in this case, this remedy is the only one that would be effective in achieving the legitimate aim of comprehensively remedying our SLCs and resulting adverse effects.

14.148 We also consider that the full divestiture remedy is no more onerous than is required to achieve that aim, and there is not a choice of equally effective remedies.

14.149 We have also considered whether a full divestiture remedy would produce effects that are disproportionate to the aim pursued. To help us address this question, we have considered whether there were any RCBs that would be lost as a result of pursuing a full divestiture remedy, which we would treat as a cost of the remedy. Our conclusion from that assessment was that there would be no RCBs that would be lost as a result of a full divestiture of Footasylum.

14.150 We considered whether there were any other costs of a full divestiture remedy we should take into account. Other than the Parties' claimed RCBs (which the CMA dismissed in the CMA's Phase 2 Final Report) and the costs

[681] *Merger remedies guidelines*, CMA87 (13 December 2018), paragraph 3.9.
[682] *Merger remedies guidelines*, CMA87 (13 December 2018), paragraph 3.6.

to JD Sports of selling the Footasylum business, we have not identified any other costs arising from a full divestiture remedy.

14.151 We note that JD Sports' decision to complete the Merger without it being conditional on any competition clearance was taken at its own risk, and therefore, it is our view that the costs to JD Sports of running a sale process as a result of a full divestiture remedy, should not be treated as 'relevant costs'.

14.152 Based on the above, we have not found any costs to third parties arising as a result of the full divestiture remedy.

14.153 It is our view that the harm arising from the SLCs (including its cumulative effect over time) is likely to be significant and have a widespread impact on customers at a national level in the UK, and would persist and be sustained under the Merger situation.

14.154 In relation to the 'relevant costs' of a structural remedy, we have found that no RCBs are to be taken into account in the assessment of the proportionality of a full divestiture of Footasylum. The full divestiture remedy would also not raise costs for third parties and, as such, full divestiture would not produce adverse effects that are disproportionate to the aim of comprehensively remedying the SLCs and resulting adverse effects.

Conclusion on proportionality

14.155 Having identified a full divestiture of Footasylum as the only effective remedy available, we considered its proportionality to the SLCs and resulting adverse effects we have found.

14.156 We have found that a full divestiture remedy is the only effective action to achieve the legitimate aim of comprehensively remedying the SLCs and resulting adverse effects. We consider that a full divestiture remedy is no more onerous than is required to achieve this legitimate aim and that, based on our views that the Merger is likely to lead to significant and sustained adverse effects and that there are no relevant costs which we should take into account, our view is that a full divestiture remedy would not produce adverse effects which are disproportionate to the aim pursued.

14.157 We therefore conclude that the full divestiture remedy would be proportionate to the SLCs and resulting adverse effects.

Remedy implementation issues

14.158 Having identified our proposed remedy, we now consider how it should be implemented.

14.159 The CMA has the choice of implementing any final remedy decision either by accepting final undertakings pursuant to Section 82 of the Act if the Parties wish to offer them, or by making a final order under Section 84 of the Act. Either the final undertakings or the final order must be implemented within 12 weeks of publication of our final report (or extended once by up to 6 weeks under exceptional circumstances),[683] including the period for any formal public consultation on the draft undertakings or order as specified in Schedule 10 of the Act.

14.160 In line with our guidance on remedies, once this remedy has been fully implemented in line with the conclusions set out in this remedy decision, we decide that JD Sports (and for the avoidance of doubt, Pentland) should be prohibited from subsequently acquiring the assets or shares of Footasylum or acquiring any material influence over them. Our guidance on remedies states that the CMA will normally limit this prohibition to a period of 10 years.[684] We find no compelling reason to depart from the guidance in this case by seeking a shorter or longer prohibition period.

Decision on remedies

14.161 We have concluded that a full divestiture of Footasylum would be an effective and proportionate remedy to address the SLCs and resulting adverse effects we have found, which should be fully implemented in line with the conclusions set out in this chapter.

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[683] Section 82 (final undertakings) and Section 84 (final order) of the Act.
[684] *Merger remedies guidelines*, CMA87 (13 December 2018), paragraph 5.10.