Neutral citation [2020] CAT 24

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1354/4/12/20

Salisbury Square House
Salisbury Square
London EC4Y 8AP

13 November 2020

Before:
PETER FREEMAN CBE QC (Hon)
(Chairman)
PAUL DOLLMAN
TIM FRAZER

Sitting as a Tribunal in England and Wales

BETWEEN:

JD SPORTS FASHION PLC

Applicant

- v –

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard remotely on 23-24 September 2020

JUDGMENT (NON-CONFIDENTIAL VERSION)

APPEARANCES

Mr Brian Kennelly QC and Mr Alistair Lindsay (instructed by Linklaters LLP and Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Applicant.

Ms Marie Demetriou QC and Mr Ben Lask (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

Note: Excisions in this Judgment (marked "[✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

CONTENTS

A. INTRODUCTION

1. On 5 June 2019, the Applicant JD Sports Fashion plc ("JD Sports") acquired the entire issued ordinary share capital of Footasylum plc ("Footasylum") ("the Merger"). The Respondent ("the CMA") began an investigation and the Merger was referred for an in-depth (Phase 2) merger investigation on 1 October 2019 pursuant to s.22 of the Enterprise Act 2002 ("EA"). Although JD Sports has already bought Footasylum, the two businesses are currently held separate.

2. The CMA issued its final report ("FR") on the Merger on 6 May 2020. In summary, the CMA found that the Merger would result in a substantial lessening of competition ("SLC") in sports-inspired casual footwear and apparel products sold both in stores and online. As a result, shoppers would be worse off. In particular, the CMA concluded that the merging parties were close competitors in the relevant markets and that the Merger would result in the removal of a direct and significant constraint on each of them. The combined JD Sports/Footasylum group ("the Merged Entity") would have the ability and a strong incentive to deteriorate (i.e. worsen or improve relatively more slowly or to a lesser extent than in the absence of the Merger) price, quality, range and services ("PQRS") across its sports-inspired casual apparel offerings post-Merger. The aggregate constraint provided by other retailers and suppliers such as Nike and adidas would not be sufficient to prevent the SLC. The CMA therefore required JD Sports to divest Footasylum in full to a suitable purchaser.

3. By this application (the "Application"), filed at the Tribunal on 17 June 2020, JD Sports challenged, by way of judicial review, the FR on three grounds:

   (a) **Ground 1:**

      (i) The CMA erred in law in failing to apply its Merger Assessment Guidelines (September 2010) ("MAGs") in determining whether

any lessening of competition caused by the Merger was "substantial" and/or its reasons were inadequate.

(ii) The CMA erred in law and/or failed rationally to assess the aggregate constraints on the Merged Entity posed by (i) suppliers and (ii) retail rivals, currently and in the future and/or failed to provide sufficient reasons for its conclusion.

(b) **Ground 2:**

(i) The CMA erred in law and/or acted irrationally in excluding from the counterfactual the effect of COVID-19 on Footasylum.

(ii) The CMA erred in law and/or acted irrationally in finding that COVID-19 would not materially affect Footasylum's competitive constraint.

(c) **Ground 3:**

(i) The CMA failed to provide adequate reasons, departed from the MAGs and/or acted irrationally in finding that the elevation strategy of Frasers Group Plc ("Frasers Group") will not significantly change the strength of the competitive constraint on the Merged Entity from Frasers Group in the next two years.

(ii) The CMA made irrational findings in concluding that the constraint posed by suppliers (in particular, Nike and adidas) was not so significant as to sufficiently discipline the Merged Entity, which had the consequence that the contribution to the aggregate constraint posed by suppliers was wrongly understated.

(iii) The CMA failed to provide adequate reasons and/or acted irrationally in finding that Nike's and adidas' own direct to consumer ("DTC") retail offer will not become a significantly stronger constraint on the Merged Entity.

4. JD Sports does not challenge the CMA's conclusions on market definition or its finding that JD Sports and Footasylum ("the Parties") are close competitors in the markets defined. Nor does it contest the CMA's divestment remedy.[1]

5. A remote case management conference took place on 6 July 2020, at which the Tribunal gave directions for the future conduct of the Application, including directions (the "Directions Order") for disclosure.[2] In accordance with the Directions Order, the CMA filed its Defence and supporting witness evidence of Mr Kip Meek, the Chair of the Inquiry Group that conducted the Phase 2 investigation into the Merger, on 16 July 2020. The CMA disclosed with Mr Meek's witness statement a number of new documents including requests for information made by the CMA pursuant to s. 109 EA and sent to adidas and Nike on 9 March 2020, and to Frasers Group on 13 March 2020.

6. On 24 July 2020, in accordance with the Directions Order, the CMA disclosed into the confidentiality ring[3] a version of the FR that was unredacted as regards the paragraphs that the CMA stated that it considered to be relevant to the areas in dispute, based on its review of the Application and Defence.

7. On 31 July 2020, JD Sports applied for specific disclosure of:

[1] On 16 July 2020 JD Sports agreed with the CMA undertakings to dispose of its entire shareholding in Footasylum.
[2] See paragraphs 4 – 6 of the Order of the Chairman made on 6 July 2020.
[3] The confidentiality ring was established by the Order of the Chairman dated 8 July 2020.

(a) passages in the FR that remained subject to redactions in the version disclosed into the confidentiality ring on 24 July 2020 that were directly relevant to the areas in dispute; and

(b) responses of Nike and adidas to questionnaires conducted by the CMA; questions asked by the CMA of Nike about Nike's historic response to deterioration in price or quality by retailers and Nike(s) response(s); any other questions (and responses) to questions of Nike and adidas on how they would respond to a deterioration in PQRS by the Merged Entity; and the inquiries made by the CMA of Nike and adidas about how they would discipline JD Sports and Footasylum as a Merged Entity if there was a deterioration in PQRS.

8. In its written submissions in response to JD Sports' specific disclosure application dated 7 August 2020, the CMA agreed to unredact further paragraphs in the FR within the confidentiality ring and it enclosed an updated version of the FR, reflecting these further unredactions. The CMA also provided JD Sports with a number of further documents.

9. The Tribunal issued its ruling on JD Sports' application for specific disclosure on 21 August 2020 ([2020] CAT 20), which directed the CMA to disclose certain additional questionnaire responses of Nike and adidas into the confidentiality ring but refused JD Sports' application that further passages of the FR be unredacted. The CMA disclosed the additional questionnaire responses of Nike and adidas to JD Sports on 28 August 2020.

B. FACTUAL BACKGROUND

(1) The Parties

10. JD Sports was established in 1981 and listed on the London Stock Exchange in 1996. It is an international multi-brand and multi-channel retailer of sports, fashion and outdoor products. Pentland Group plc, a privately-owned global group with wholesale and retail businesses supplying branded apparel and footwear products, acquired 57% of the shares of JD Sports in 2005 and currently holds 55%.

11. Footasylum was formed in 2005. It is a retailer of fashionwear and sports casualwear. At the time of the FR, Footasylum owned and operated 69 stores in the UK.

(2) The Merger

12. Prior to the Merger, Footasylum's shares were listed and admitted to trading on London's Alternative Investment Market. In the run-up to JD Sports' bid, Footasylum had run into trading difficulties and had issued three profit warnings.

13. JD Sports made a public bid for Footasylum on 18 March 2019. The bid was successful, and JD Sports acquired Footasylum for a total consideration of approximately £90m on 5 June 2019.

14. Anticipating that the Merger would complete, the CMA made an initial enforcement order on 17 May 2019. On the same day, the CMA served an initial enforcement order ("IEO") under s 72(2) EA on Pentland and JD Sports in relation to the Merger. The IEO was subsequently replaced by an interim order on 26 November 2019 and then by the Undertakings. Pursuant to the Undertakings, Footasylum continues to be operated separately from JD Sports.

15. The CMA commenced its Phase 1 investigation on 24 July 2019 and announced on 19 September 2019 its decision that the test for a reference was met. The Merger was referred for a Phase 2 investigation on 1 October 2019. The CMA published an issues statement on 24 October 2019. The CMA published its Provisional Findings on 11 February 2020 and, on the same day, exercised its power to extend its Phase 2 investigation from 24 to a total of 32 weeks.

16. The FR was adopted on 6 May 2020.

(3) The COVID-19 pandemic

17. The factual context in which the CMA considered the impact of COVID-19 is set out in Mr Meek's witness statement.

18. The COVID-19 pandemic's effects in the UK began to be felt to a significant extent during the latter stages of the CMA's Phase 2 investigation. During the period from mid-to-late March (following the introduction of social distancing measures and the closure of non-essential retail stores in the UK) until early May (when the CMA published its FR), the Parties made several submissions in relation to the impact of COVID-19 on their respective businesses and the retail industry more generally.

19. On 12 March 2020, Peter Cowgill, Executive Chairman of JD Sports, sent a letter to the CMA which highlighted the '*serious impacts*' that COVID-19 was having on retailers.

20. On 30 March 2020, alongside their response to the Remedies Working Paper, the Parties submitted a report by McKinsey (the "McKinsey Report") on the impact of the COVID-19 pandemic on consumer behaviour in China, South Korea and Japan, and noting that COVID-19 would lead to an '*accelerated digitization of consumer journeys*.'

21. On 21 April 2020, JD Sports submitted an email containing submissions on certain impacts of COVID-19 on the retail sector generally and providing its views on how COVID-19 impacted on the CMA's assessment.

22. On 24 April 2020, the Parties submitted a paper from Alix Partners (the "Alix Paper") on the potential impact of COVID-19 on Footasylum's business for the purposes of the counterfactual. On the same day, JD Sports drew the CMA's attention to an ONS report published that day ("the ONS Report") on the impact of COVID-19 on the retails sector and quoted the ONS head of retail, who said that *"retail sales saw their biggest monthly fall since records began over 30 years ago with large declines in clothing and fuel, only partially offset by strong food sales."*

23. On 28 April 2020, Footasylum submitted information concerning its response to COVID-19. On the same day, in the context of 'put back' (extracts of the draft FR which are put back to relevant parties to check factual accuracy and to identify confidential information), JD Sports submitted information relating to Nike's and adidas' latest financial results and made submissions as to the conclusions that should be drawn from these as regards the impact of the COVID-19 crisis. This information included details relating to adidas' e-commerce sales in China which were growing faster than they had been before the pandemic.

24. On 1 May 2020, JD Sports submitted additional information concerning certain recent industry developments. Specifically, it referred to Amazon's announcement of its latest quarterly results. It also referred to a statement by the chief executive of the British Independent Retailers Association, who told the Business, Energy and Industry Strategy Committee that it was *'the worst time ever for retail'* and that that one in five retailers did not intend to reopen after the lockdown restrictions are relaxed.

25. During the same period, the CMA also made limited further enquiries for information from key third parties. To that end, the CMA issued s. 109 notices to Frasers Group, Nike and adidas. Specifically, the CMA sought:

(a) from adidas, information on whether it had made any recent changes to its DTC strategy and DTC forecasts to 2023; and

(b) from Nike, information on whether it had made any recent changes to its DTC strategy and revised forecasts.

26. The requests to adidas and Nike did not specifically refer to COVID-19.

27. In its response, adidas said that 'the current disruption caused by the COVID-19 pandemic effectively renders the previously submitted short term forecasts for 2020 and 2021 obsolete'.[4] It also submitted that the impact of COVID-19 may change the ratio of its DTC and wholesale sales as physical stores are closed for a proportion of the year. Nike said that it was continuing to track market conditions and anticipated that the currently developing situation connected with the spread and containment of COVID-19 may have an impact on UK sales, without providing any more specific estimate of that impact, noting that it remained to be seen.

28. The s. 109 notice issued to Frasers Group sought in part confirmation that internal strategy documents previously submitted had not been superseded. The notice also asked Frasers Group to describe any conditions that may increase or reduce the number of stores it planned to elevate up to December 2021.

29. Frasers Group's response confirmed that its strategy documents remained current and cited a public statement it had made, which stated an expectation that the impact of COVID-19 will cause "*significant disruption*" to its business

[4] FR, para 8.412.

but also noting that "*it is too early to estimate what the full impact from COVID-19 will be on the Company's performance for the current financial year ending 26 April 2020, and future periods."*

30. The CMA did not consider that it was necessary to seek information directly from Footasylum's primary lender about the impact of COVID-19. The CMA had already obtained information from Footasylum at the outset of the Phase 2 process in relation to Footasylum's financial position as noted above, Footasylum provided further relevant information on 28 April.

31. The FR contained extensive references to the impact of COVID-19 on the counterfactual, competitive assessment and remedies. The CMA decided that it was inappropriate to place much weight on some of the evidence set out above because any findings the CMA made relating to the impact of COVID-19 needed to be "*securely rooted in the evidence*." In particular, the Inquiry Group considered that it was important "*not to leap to any conclusion*" about the impact of COVID-19 without robust evidence.[5]

32. The evidence it had seen did not satisfy the CMA that the impact of COVID-19 would materially change the SLC analysis. The material received from the Parties concerning COVID-19 was – in the CMA's view - to a large degree of a speculative nature which did not lend itself to robust conclusions as to the impact of COVID-19 beyond the very short term. It was also focussed on the impact on the Parties (particularly Footasylum) and so did not provide a basis for the CMA to draw any comparisons with the impact on other retailers in the relevant markets.

33. The CMA's overall conclusion on the impact of COVID-19 was:

[5] Meek 1, para 19.

> "While COVID-19 is clearly impacting the market, we have not seen evidence to suggest that either of the Parties is being more negatively impacted by COVID-19 relative to each other or relative to other retailers in this market. We also do not envisage that COVID-19 would increase the likelihood of success of any retailer's future plans, which involve substantial investment. Therefore, we do not consider that COVID-19 would reduce materially the extent to which the Parties are close competitors, or increase materially the aggregate constraints posed by retailers on the Parties, now or in the foreseeable future, such that it would not be likely, on the balance of probabilities, that the Merger would or may be expected to result in an SLC."[6]

34. The CMA considered whether its remedies process could accommodate future COVID-19 related developments. The CMA concluded that it could reduce the need to make changes to the divestiture remedy after the FR by not including overly prescriptive conditions or requirements for divestiture at the outset of the remedies process and in the FR. The CMA concluded that the divestiture period could be extended beyond the usual six months, in order to provide JD Sports with greater scope to achieve divestiture at a time when the retail and financial markets had stabilised.

C. THE FINAL REPORT

35. The FR is a very full document comprising 558 pages. After a 10-page summary, it is divided into 13 numbered sections and 11 appendices, some of which are very detailed. The most significant for the purposes of the Application are:

(5) Counterfactual[7]

(7) Market definition[8]

[6] FR, para 8.477.
[7] See also Appendix B.
[8] See also Appendix D.

(8) Competitive assessment of horizontal unilateral effects[9] – footwear

(9) Competitive assessment of horizontal unilateral effects – apparel

(11) Countervailing factors

(13) Remedies

(1) Market definition

36. The CMA found that there were separate product markets for the retail supply of sports-inspired[10] casual footwear ("footwear") in the UK and for the retail supply of sports-inspired" casual apparel ("apparel") in the UK.[11] The CMA found in the case of each of footwear and apparel, that both in-store and online channels formed parts of a single market. It also found that the relevant markets covered the whole of the UK.[12] There is no challenge to the CMA's findings on market definition.

(2) Counterfactual

37. The CMA found that the counterfactual was that Footasylum would have continued to compete effectively absent the Merger despite the financial difficulties it faced. The CMA also found that Footasylum would have continued to compete despite COVID-19:

> "5.86. […] Overall, we recognise that Footasylum had been in a weaker financial position around the time of the Merger which may have had some impact on its competitiveness in the short term, while it was recovering from this position. However, we concluded that, on the balance of the evidence set

[9] See also Appendices C, F and J.
[10] Fashionable branded sportswear used primarily for leisure rather than sport.
[11] FR, para 7.134.
[12] FR, para 7.133, and see Appendix D, which sets out the submissions and evidence from the Parties and further detail on the CMA's assessment.

> out above and taken in the round, the most likely counterfactual is one in which Footasylum would have continued to compete effectively absent the Merger.
>
> 5.87 We considered the effects of COVID-19 on Footasylum's financial position in the absence of the Merger. While it is clear that it would have been negatively impacted, on the basis of the evidence we have seen, we concluded that it would have continued to compete. However, in line with our Guidance, we consider that the impact of COVID-19 on the strength of Footasylum's competitive constraint is not sufficiently clear to incorporate into the counterfactual. Therefore, we have given further consideration to the impact of COVID-19 in our competitive assessment in chapters 8 and 9."[13]

(3) Competitive assessment and countervailing factors

38. Having decided not to take the effects of COVID-19 into account in the counterfactual, the CMA did so in its competitive assessment of the Merger. For example, in the summary section of the FR the CMA stated:

> "The evidence gathering for this investigation was mostly completed before the effects of COVID-19 arose, so it largely reflects the market prior to this. However, we have looked at the impact of COVID-19 on our assessment, as far as possible, to see if it changes our views on the Merger. The extent and duration of the impact of COVID-19 in the medium to long term is uncertain. All retailers are subject to the same change in market conditions, although it is difficult to predict the effect on different retailers and how each will respond to the circumstances. While the sector is clearly being impacted by COVID-19, it is not clear that either of the Parties is being hit harder relative to other retailers, such that either would be in a much weaker competitive position in comparison to each other and other retailers, or that other competitors would become significantly stronger. While recognising the uncertainties from the impact of COVID-19, we do not consider that it will significantly increase the constraints on the Parties now or in the foreseeable future, such that there would no longer be competition concerns from the Merger. The Parties have not told us that either of them will go out of business (ie that it is a 'failing firm')."[14]

39. In the introduction to Chapter 8 of the FR, the part containing the CMA's competitive assessment of horizontal unilateral effects in footwear, the CMA stated:

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[13] See also Appendix B to the FR, in which the CMA sets out the evidence from the Parties that it considered in its assessment of the appropriate counterfactual.
[14] FR, para 4.

> "There remains considerable uncertainty about the extent and duration of the impact of COVID-19. We note that all retailers in the relevant markets are subject to the same change in market conditions, although it is difficult to predict the effect on different retailers and how each will respond to the circumstances.
>
> Our merger assessments are forward-looking and evidence-led, and typically look beyond the short term in considering what lasting structural impacts a merger might have on the relevant markets. In this case, as far as possible, we have considered the impact of COVID-19 in our assessment on competition between the Parties and the constraints from other retailers and suppliers, both now … and in the foreseeable future…"[15]

40. The CMA's competitive assessment explored the extent to which the Parties were close competitors, and the sufficiency of any competitive constraints remaining post-Merger. The purpose of this assessment was to determine whether, as a result of the Merger, the Merged Entity would have the ability and/or incentive to deteriorate its PQRS offer to the detriment of customers. As the CMA explained in the summary section of the FR:

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

41. In its detailed assessment in Chapter 8 of the FR the CMA stated:

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

[15] FR, paras 8.4 and 8.5.

collectively referred to as PQRS. As explained in chapter 6, this is referred to as a 'horizontal unilateral effects' theory of harm."

42. The CMA considered a wide range of evidence relating to the Parties and the markets in which they operate (e.g. two large customer surveys with resultant Gross Upward Pricing Pressure Indices ("GUPPIs"),[16] a large number of the Parties' internal documents, evidence from suppliers and competitors, and an entry-exit analysis[17]). An assessment of that evidence revealed that the Parties were close competitors[18] and, in particular, that they:

(a) competed head-to-head on various aspects of PQRS that were important to customers;[19]

(b) would have the ability to deteriorate aspects of their PQRS post-Merger to the detriment of customers;[20] and

(c) would have a strong incentive to do so (as demonstrated by the GUPPIs).[21]

43. The CMA found that the Merger would be bad for shoppers because the Merged Entity would have the ability and a strong incentive to deteriorate aspects of its PQRS on which the Parties currently compete and from which consumers value and benefit.

44. The CMA assessed the constraint from suppliers such as Nike and adidas.[22] It concluded that, whilst suppliers exerted some constraint on retailers, this

[16] FR Appendix F contains details of the CMA's approach and methodology in the calculation of GUPPIs.
[17] See FR, Appendix C for details of this analysis.
[18] FR, paras 25, 8.472, and 9.301.
[19] FR, paras 8.108 – 8.116, 9.79 – 9.83.
[20] FR, paras 8.117; 8.460, 8.462, 9.86, 9.290, 9.292.
[21] FR, paras 8.217 – 8.231 8.470, 9.163 – 9.169, 9.299.
[22] FR, paras 8.24 – 8.100.

constraint had limitations and would not be sufficient to constrain the Merged Entity's ability and/or incentive to deteriorate its PQRS post-Merger.[23]

45. The CMA found that action by suppliers may impact both retailers' ability and incentives, without there being any clear distinction between the two. Accordingly, its assessment focussed on the way suppliers may affect retail competition in general, considering both aspects but without distinguishing between whether this was through influence on ability or incentives.[24] The CMA also found that the constraint from suppliers was limited because (a) suppliers did not monitor all aspects of retailers' offerings; (b) there were limits to suppliers' ability to detect a deterioration of retailers' offerings; and (c) suppliers had no incentive to respond where any deterioration did not harm supplier interests or may benefit suppliers.[25]

46. The CMA acknowledged that, whilst GUPPIs provided evidence of the Merged Entity's current incentive to deteriorate its PQRS, they did not capture the impact of future entry, expansion and repositioning. Accordingly, the CMA examined the effects of future market developments in subsequent sections of the FR:[26]

    (a) the CMA assessed the potential for repositioning or expansion by existing rivals (including Sports Direct, Foot Locker, and the DTC propositions of Nike and adidas).[27] It concluded that the evidence did not show with sufficient certainty that the aggregate effect of such

[23] FR, paras 8.459 – 8.462.
[24] FR, para 8.63.
[25] FR, para 8.461.
[26] FR, para 8.228(e).
[27] FR, paras 8.311 – 8.457 and paras 9.228 – 9.286. See also Appendix J for details of the CMA's consideration of the impact of the opening of elevated Sports Direct stores on the revenues of the Parties' nearby stores.

developments would amount to a materially stronger constraint on the Merged Entity than at present;[28] and

(b) the CMA assessed the potential for entry and expansion by retailers outside the relevant markets.[29] It concluded that, in the absence of any concrete plans, such entry and expansion would not be timely, likely or sufficient to prevent the SLCs that it had found.[30]

47. The CMA considered whether the aggregate constraint posed by suppliers and retail rivals would be sufficient to prevent a deterioration in PQRS. In relation to footwear:

(a) it concluded that the constraint posed by suppliers had limitations and would be insufficient on its own to constrain the Merged Entity. Having reached that conclusion, the CMA identified the need to consider aggregate effects, i.e. *"whether the extent of any constraint we found is sufficient in aggregate with other constraints on the Merged Entity to prevent the Merged Entity from deteriorating its offering post-Merger"*;[31]

(b) observed that some of the evidence, e.g. diversion ratios, provided a direct indication of aggregate constraints;[32]

(c) in respect of the current constraints posed by other retailers, the CMA concluded that *"[t]aking these current constraints in aggregate, we found that the constraint on the Parties is only moderate at best (eg the*

[28] FR, paras 8.457, 9.286.
[29] FR, paras 11.2 – 11.69 of the FR.
[30] FR, para11.69.
[31] FR, para 8.65; see also paras 8.98 – 8.99, 9.41, 9.69 – 9.70.
[32] FR, paras 8.99, 9.70.

aggregate diversion to other retailers was low) and would not be sufficient to prevent an SLC";[33]

(d) the CMA then considered whether combining the moderate constraint posed by rival retailers with the limited constraint posed by suppliers altered the analysis. It concluded that *"[w]hile suppliers exert some constraint, in addition to retailers, as noted above this constraint has limitations. Taking the evidence in the round, and on balance, we found that the aggregate constraints from retailers and suppliers would not be sufficient to prevent the Merged Entity from deteriorating PQRS post-Merger"*;[34]

(e) the CMA next considered the aggregate effect of future market developments such as the expansion or repositioning of certain retailers' offerings. It concluded that *"[o]verall and on balance, the evidence does not show with sufficient certainty that the aggregate effect of the market developments examined above would amount to a materially stronger competitive constraint in the market for the supply of sports-inspired casual footwear on the Merged Entity in the foreseeable future"*;[35] and

(f) finally, the CMA set out its conclusion on the overall position, both current and in the future: *"[b]ased on our assessment, we found that the Merger would result in the removal of a direct and significant constraint on each of the Parties and that overall the remaining constraints post-Merger (both now and in the foreseeable future) would not be sufficient to prevent an SLC"*.[36]

48. The CMA reached a similar set of conclusions in relation to apparel.

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[33] FR, para 8.304; see also paras 8.473, 9.222 and 9.302.
[34] FR, para 8.304; see also paras 8.473, 9.222, 9.302.
[35] FR, para 8.453; see also paras 8.474, 9.284, 9.303.
[36] FR, para 8.478.

(4) Remedy

49. The CMA found that a full divestiture remedy, requiring JD Sports to sell Footasylum to a suitable purchaser, was the only effective remedy. [37] it further concluded that the Merger gave rise to no relevant customer benefits.[38]

50. The CMA accepted that it would be implementing the remedy in unusual circumstances as a result of COVID-19, it pointed to the flexibility of the implementation process, and indicated that it would take account of any further developments in relation to COVID-19 throughout the implementation process.[39] There is no challenge to the decision on remedy.

D. LEGAL FRAMEWORK

(1) The Enterprise Act 2002

51. Where, as here, a reference of a completed merger is made under s. 22 EA, the questions to be decided by the CMA are prescribed by s.35 EA, which provides insofar as relevant:

> **"35 Questions to be decided in relation to completed mergers**
>
> (1)… the CMA shall, on a reference under section 22, decide the following questions—
>
> (a) whether a relevant merger situation has been created; and
>
> (b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.

52. Section 35(2) provides that there is 'an anti-competitive outcome' if, inter alia, 'a relevant merger situation has been created and the creation of that situation

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[37] FR, para 13.162.
[38] FR, para 13.202.
[39] FR, paras 13.216 and 13.227.

has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.' (s. 35(2)(a)).

53. Where the CMA has decided that there is an anti-competitive outcome (within the meaning given by subsection (2)(a)), it shall also decide the following additional questions under s. 35(3) —

> (a) whether action should be taken by it under section 41(2) for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition;
>
> (b) whether it should recommend the taking of action by others …
>
> (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.

54. In deciding the questions mentioned in subsection (3), s. 35(4) provides 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.'

55. In this judgment, we refer to the questions to be decided by the CMA under s. 35 EA as the "statutory questions".

56. Sections 38-39 EA provide that the CMA shall prepare and publish a report on a reference under s.22, containing its decisions on the questions it is required to answer by virtue of s.35, within 24 weeks of the date of the reference. Section 38(3) further states:

> "The CMA shall carry out such investigations as it considers appropriate for the purposes of preparing a report under this section."

57. Section 39(3) states:

> "The CMA may extend, by no more than 8 weeks, the period within which a report under section 38 is to be prepared and published if it considers that there are special reasons why the report cannot be prepared and published within that period."

58. Only one extension under s.39(3) is permitted: s.40(4).[40]

59. Section 41 EA addresses the imposition of a remedy. If the CMA finds that there is an anti-competitive outcome, it is required to determine whether action should be taken by it under s.41(2) EA for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effects which may be expected to result from the SLC.

60. Further, s.103(1) EA provides:

> "103 Duty of expedition in relation to references
>
> (1) In making any decision for the purposes of its functions of making and determining references under this Part, the CMA shall have regard, with a view to the prevention or removal of uncertainty, to the need for making a decision as soon as reasonably practicable."

61. Section 106(1) EA requires the CMA to prepare and publish guidance concerning the making and consideration of references under s.22. The CMA published the MAGs in September 2010.

(2) The Merger Assessment Guidelines

62. The MAGs (CC2, Revised, September 2010) are published under s.106 EA. Paragraph 1.5 explains that CMA '*will have regard to these guidelines*' when carrying out its functions. However, it goes on to explain that:

> "[…] merger assessment is inevitably case specific. It must take account of the particular transaction and the markets being analysed. The methodologies of merger analysis cannot be applied in a rigid and mechanistic way. The [CMA]

[40] The CMA can, however, extend the statutory timetable if a relevant person has failed to provide the CMA with necessary information: see ss.39(4) and 109 EA.

will therefore consider each merger with due regard to the particular circumstances of the case, including the information available and the time constraints applicable to the case, and will apply these guidelines flexibly, departing from them where they consider it appropriate to do so."

63. In paragraphs 4.1.2 and 4.1.3, the MAGs state that:

> "Competition is viewed by the [CMA] as a process of rivalry between firms seeking to win customers' business over time by offering them a better deal. Rivalry creates incentives for firms to cut price, increase output, improve quality, enhance efficiency, or introduce new and better products because it provides the opportunity for successful firms to take business away from competitors, and poses the threat that firms will lose business to others if they do not compete successfully.
>
> The [CMA] will consider any merger in terms of its effect on rivalry over time in the market or markets affected by it. Many mergers are either pro-competitive or benign in their effect on rivalry. But when levels of rivalry are reduced, firms' competitive incentives are dulled, to the likely detriment of customers. Some mergers will lessen competition but not substantially so because sufficient post-merger competitive constraints will remain to ensure that rivalry continues to discipline the commercial behaviour of the merger firms. A merger gives rise to an SLC when it has a significant effect on rivalry over time, and therefore on the competitive pressure on firms to improve their offer to customers or become more efficient or innovative. A merger that gives rise to an SLC will be expected to lead to an adverse effect for customers. Evidence on likely adverse effects will therefore play a key role in assessing mergers."

64. Paragraph 4.2.3 stipulates:

> "In formulating theories of harm, the [CMA] will consider how rivalry might be affected. They may set out those aspects of the merger firms' competitive offers to customers over which firms compete and which could worsen as a result of the merger, whether in terms of price or non-price aspects such as the quantity sold, service quality, product range, product quality and innovation. The ability of firms to adjust these aspects, and also the time within which they can do so, will depend upon the market concerned."

65. As regards the CMA's approach to the counterfactual, the MAGs state:

> "4.3.6. [The CMA] has to make an overall judgement on whether or not an SLC has occurred or is likely to occur. To help make this judgement on the likely future situation in the absence of the merger, the [CMA] may examine several possible scenarios, one of which may be the continuation of the pre-merger situation; but ultimately only the most likely scenario will be selected as the counterfactual. When it considers that the choice between two or more

> scenarios will make a material difference to its assessment, the [CMA] will carry out additional detailed investigation before reaching a conclusion on the appropriate counterfactual. However, the [CMA] will typically incorporate into the counterfactual only those aspects of scenarios that appear likely on the basis of the facts available to it and the extent of its ability to foresee future developments; it seeks to avoid importing into its assessment any spurious claims to accurate prediction or foresight. Given that the counterfactual incorporates only those elements of scenarios that are foreseeable, it will not in general be necessary for the [CMA] to make finely balanced judgements about what is and what is not the counterfactual…"

66. Section 5.4 of the MAGs deal with horizontal mergers and unilateral effects. Paragraphs 5.4.2 and 5.4.6 state:

> "A theory of harm relevant to the consideration of horizontal unilateral effects is the loss of existing competition. Other theories of harm consider the unilateral effects arising from the elimination of potential competition…and from increased buyer power…
>
> …
>
> Where products are differentiated, for example by branding or quality, unilateral effects are more likely where the merger firms' products compete closely. To assess whether the merger results in unilateral effects, the [CMA] may analyse the change in the pricing incentives of the merger firms created by bringing their differentiated products under common ownership or control."

(3) Merger assessments during the Coronavirus (COVID-19) pandemic (22 April 2020) ("the COVID-19 Guidance")

67. The CMA issued the COVID-19 Guidance (CMA 120) on 22 April 2020. This explains that the CMA has not implemented any relaxation of the standards by which mergers are investigated or assessed. It states:

> "The CMA's merger investigations are forward-looking and evidence-led, and the impacts of Coronavirus will be factored into the substantive assessment of a merger where appropriate. It is clear that, at least in the short-term, there will be a substantial impact across the UK as a result of changes in market conditions. There remains considerable uncertainty about the extent and duration of this impact. 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."

68. In relation to the counterfactual in particular, the COVID-19 Guidance explains that, whilst the business impact of COVID-19 can be incorporated into the counterfactual, this will not always be the case:

> "…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. Accordingly, where a business's financial difficulties do not meet the conditions of the exiting firm counterfactual…the implications of those financial difficulties (where appropriately evidenced) could still be considered within the CMA's competitive assessment."

(4) Challenges to CMA decisions

69. Section 120 EA enables any person aggrieved by a decision of the CMA under Part 3 EA, which includes ss. 35-4, to apply to this Tribunal for a review of that decision. Section 120(4) states that in determining such an application, the Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.

70. It was common ground between the Parties that the principles which the Tribunal should apply in determining the Application, so far as the irrationality of the CMA's decision is concerned, were those recently restated by the Tribunal in *Ecolab Inc. v Competition and Markets Authority* [2020] CAT 12:

> "58. Ecolab's challenge is brought essentially on rationality grounds. The approach to be adopted in such a case has been considered extensively in previous cases. In *BAA v Competition Commission* [2012] CAT 3, the Tribunal, chaired by Sales J (as he then was), helpfully summarised the principles derived from the authorities. That case concerned a judicial review under s. 179 EA of a decision of the Competition Commission ("CC") on a market investigation but the approach is the same as for an application under s. 120 EA: see s. 179(4). The Tribunal stated, at [20]:

"(3) The CC, as decision-maker, must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it .... The CC "must do what is necessary to put itself into a position properly to decide the statutory questions": *Tesco plc v Competition Commission* [2009] CAT 6 at [139]. The extent to which it is necessary to carry out investigations to achieve this objective will require evaluative assessments to be made by the CC, as to which it has a wide margin of appreciation as it does in relation to other assessments to be made by it: compare, e.g., *Tesco plc v Competition Commission* at [138]-[139]. In the present context, we accept Mr Beard's primary submission that the standard to be applied in judging the steps taken by the CC in carrying forward its investigations to put itself into a position properly to decide the statutory questions is a rationality test: see *R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55; [2005] QB 37 at [34]-[35] and the following statement by Neill LJ in *R v Royal Borough of Kensington and Chelsea, ex p. Bayani* (1990) 22 HLR 406, 415, quoted with approval in *Khatun*:

> "The court should not intervene merely because it considers that further inquiries would have been desirable or sensible. It should intervene only if no reasonable [relevant public authority – in that case, it was a housing authority] could have been satisfied on the basis of the inquiries made."

(4) Similarly, it is a rationality test which is properly to be applied in judging whether the CC had a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did. There must be evidence available to the CC of some probative value on the basis of which the CC could rationally reach the conclusion it did: see e.g. *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320, 1325; *Mahon v Air New Zealand* [1984] AC 808; *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142; [2004] ICR 1364 at [93]; *Stagecoach v Competition Commission* [2010] CAT 14 at [42]-[45];"

59. In that case, the CC imposed a divestiture remedy, and BAA challenged the requirement that it should sell Stansted airport. Among its complaints, BAA alleged a disproportionate interference with its property rights under Article 1 of Protocol 1 to the European Convention on Human Rights. Addressing the position where property rights were in issue, the Tribunal stated at [20(5)]:

> "Where social and economic judgments regarding "the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken" are called for, a wide margin of appreciation will apply, and – subject to any significant countervailing factors, which are not a feature of the present case – the standard of review to be applied will be to ask whether the judgment in question is "manifestly without reasonable foundation": *James v United Kingdom* (1986) 8 EHRR 123, para. 46 (see also para. 51). Where, as here, a divestment order is made so as to further the public interest in securing effective competition in a

relevant market, a judgment turning on the evaluative assessments by an expert body of the character of the CC whether a relevant AEC exists and regarding the measures required to provide an effective remedy, it is the "manifestly without reasonable foundation" standard which applies."

60. Further, the Tribunal stated generally, at [20(6)]:

"It is well-established that, despite the specialist composition of the Tribunal, it must act in accordance with the ordinary principles of judicial review: see *IBA Health v Office of Fair Trading* [2004] EWCA Civ. 142 per Carnwarth LJ at [88]–[101]; *British Sky Broadcasting Group plc v Competition Commission* [2008] CAT 25, [56]; *Barclays Bank plc v Competition Commission* [2009] CAT 27, [27]. Accordingly, the Tribunal, like any court exercising judicial review functions, should show particular restraint in "second guessing" the educated predictions for the future that have been made by an expert and experienced decision-maker such as the CC: compare *R v Director General of Telecommunications, ex p. Cellcom Ltd* [1999] ECC 314; [1999] COD 105, at [26]."

61. We also refer to *Stagecoach Group PLC v Competition Commission* [2010] CAT 14, which, like the present case, was a judicial review of a decision on a completed merger. The Tribunal, chaired by Ms Vivien Rose (as she then was), stated at [45] that on a rationality challenge the hurdle which the applicant (Stagecoach) had to overcome is a high one, and continued:

"Where Stagecoach asserts that there is no or no sufficient evidence to support one of the Commission's key findings, Stagecoach must show either that there is simply no evidence at all to support the Commission's conclusions or that on the basis of the evidence the Commission could not reasonably have come to the conclusions that it did. The fact that the evidence might have supported alternative conclusions, whether or not more favourable to Stagecoach, is not determinative of unreasonableness in respect of the conclusion actually reached by the Commission. We must be wary of a challenge which is "in reality an attempt to pursue a challenge to the merits of the Decision under the guise of a judicial review" ..."

E. GROUND 1(1): THE CMA'S ASSESSMENT OF SUBSTANTIAL LESSENING OF COMPETITION

(a) The parties' submissions

(i) JD Sports

71. JD Sports submitted that the CMA erred in law by failing to establish that the Merger has caused, or is likely to cause, customer harm and therefore of giving rise to an SLC. It had therefore failed to apply its own MAGs.

72. Applying para 4.1.3 of the MAGs, JD Sports argued that the key question is whether the inevitable lessening of competition that occurs as a result of mergers between competitors is substantial because it "*will be expected to lead to an adverse effect for customers.*" It argued further that this adverse effect for customers must be established by reference to rivalry between the merging parties on at least one parameter of competition, and that this question can only be determined by examining each relevant parameter in turn:

    (a) unilateral effects arise when a worsening of a price or non-price offer by one party, relative to the other, causes switching away from the relatively worsened offer to (amongst others) the other merging firm, such that the merged group will recoup some of the profits lost as a result of customer switching;

    (b) establishing customer harm – and therefore an SLC – requires evidence that the PQRS offer of one merging party on at least one parameter meaningfully affects the PQRS of the other merging party and is important to customers.

73. The need to link the adverse effect to a specific parameter of competition is even more important in the present case because the typical parameter – price – is not in play. Unlike in most horizontal merger cases, where an SLC arises because the merged group will be able to charge higher prices, in this case price competition does not operate as in most other markets because product is almost invariably sold at RRP, except during clearance sales.

74. According to JD Sports, the process that is required to answer the statutory question on SLC is to assess the issue of causation in relation to each parameter separately. Thus, an examination of the following questions is essential:

(a) how much competition would there have been between the merging parties on that parameter but for the Merger (bearing in mind in particular in this case the constraints posed by suppliers)?;

(b) how much competition will there be on that competitive parameter following the Merger, from retail rivals, currently and in future?;

(c) what is the difference between (a) and (b)?; and

(d) is the difference identified in (c) sufficient, in itself or together with any lessening of competition identified in respect of other parameters, to give rise to an SLC?

75. JD Sports rejected the CMA's position that such a process is a rigid analytical approach; it did no more than articulate a legal test for causation. At the Hearing, Mr Kennelly explained that he relied for this argument on the importance of the word 'result' in s. 35(1)(b), which requires the CMA to determine, where it has been established that a merger situation has been created, 'whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition […].' He argued that "*in order to show the chain of causation required by the Act, by section 35.1(b), it needs to be demonstrated by reference to a specific parameter*."

76. In its skeleton argument, JD Sports referred to a report by the Competition Commission in 2006 - *HMV Group plc and Ottakar's plc*, as an example of the approach the CMA ought to have taken.

77. According to JD Sports, in the present case, the CMA made no finding that competition between the merging parties caused one of them to offer lower prices or make a superior non-price offer on any parameter of competition. There was no finding as to how much competition there would have been between the merging parties on any individual parameter but for the Merger. The first link in the chain of causation was therefore never established, and to find an SLC in the absence of causation is an error of law.

78. In the absence of findings regarding particular parameters of competition, JD Sports contended that the CMA relied on its overall assessment of incentives to deteriorate PQRS and closeness of competition. The CMA used these overall assessments to contend that the Merged Entity would have an incentive to deteriorate at least one of the several individual parameters of competition where the Parties compete. JD Sports argued that it cannot be assumed from the CMA's analysis of incentives and closeness of competition at an overall level that the Merged Entity would have the ability profitably to deteriorate its offering on any individual parameter, let alone on a key competitive variable where competition adversely affects market outcomes for customers.

79. Further, the CMA's failure to analyse the effect of competition in general, or from the other merging party in particular, on any individual PQRS parameter, was demonstrated by its treatment of student discounts, which was given prominence in the FR. It does not follow from the CMA's findings that (i) the Merged Entity would have an overall ability and incentive to deteriorate PQRS offerings (the latter principally suggested by the CMA's in-store GUPPI estimates), and (ii) because the parties are close competitors in general, they are close competitors in student discounts specifically. Still less does it follow that the Merged Entity would have the ability and incentive to take steps in relation to student discounts that would result in an adverse effect on customers.

80. As to the adequacy of reasoning, JD Sports' claim was narrowed at the Hearing to an argument that, because the parameter-by-parameter process had not been followed by the CMA, it had not adequately explained how the Merger will cause harm to customers, nor whether any such harm demonstrates that the lessening of competition is substantial.

(ii) The CMA

81. In the CMA's submission, JD Sports failed to identify any part of the MAGs that requires the CMA to adopt a parameter-by-parameter approach as described by JD Sports. JD Sports' challenge was an attempt to superimpose a rigid and detailed analytical framework onto an investigative process that is necessarily broad and flexible. The CMA pointed to para 1.5 of the MAGs, which provided that:

> "…merger assessment is inevitably case specific. It must take account of the particular transaction and the markets being analysed. The methodologies of merger analysis cannot be applied in a rigid and mechanistic way. The [CMA] will therefore consider each merger with due regard to the particular circumstances of the case…and will apply these guidelines flexibly."

82. The CMA submitted that the MAGs do not require it to establish an effect on individual parameters of competition or to follow the sequence of causation formulated by JD Sports. Pursuant to para 4.1.3, the CMA will consider the likelihood of an adverse effect on customers as part of the SLC assessment. It is not, however, necessary (and may not be appropriate) for the CMA to adopt JD Sports' framework in order to show customer harm.

83. The CMA accepted that it did need to show causation in its determination of the statutory question on SLC. It satisfied this by approaching the analysis of the Merger as follows:

(a) it considered various individual parameters of competition in assessing how retailers compete in the relevant markets and the extent to which

suppliers could constrain any deterioration in the Merged Entity's offering;[41]

(b) it found that there were various aspects of PQRS that the Parties competed on, which were important to customers and which the Merged Entity would be able to deteriorate to the detriment of customers. These included price, delivery services, customer service and innovation;[42]

(c) in those circumstances, the CMA explained that any substantial lessening in the competitive constraints faced by the Parties *"would create the incentive for the Merged Entity to deteriorate…any of these aspects of PQRS"*;[43] and

(d) its subsequent analysis showed that the Merger would remove a direct and significant constraint on each of the Parties, and that remaining post-Merger constraints would not be sufficient.[44] The GUPPI analysis revealed a strong incentive on the part of the Merged Entity to deteriorate its offering, without distinguishing between individual PQRS parameters.[45]

84. Thus, the CMA's analysis showed a strong incentive to deteriorate the important PQRS aspects which the Parties competed on and were able to flex. That was sufficient to demonstrate an adverse effect on consumers. It was not necessary for the CMA to measure that incentive by reference to individual parameters (even if it could reliably be done, which was unclear). Nor would this have been appropriate in circumstances where retail competition occurred across all

[41] FR, paras 8.67 – 8.100, and 8.108 – 8.115.
[42] FR, paras 8.95, 8.98, 8.108–8.115 and 8.200–8.204.
[43] FR, para 8.118(d).
[44] FR, para 8.478.
[45] FR, paras 8.118(b) and 8.470.

aspects of PQRS and the parameters discussed by the CMA were not necessarily exhaustive.[46]

85. The CMA rejected JD Sports' argument that price competition was not significant. It found that, whilst retailers generally priced in line with RRP, they nevertheless competed on price by discounting a sizeable proportion of their sales. Since suppliers would have little incentive to constrain a reduction in discounting, price was therefore an important parameter which could be flexed post-Merger, to the detriment of customers.[47] Similarly, the CMA disagreed with JD Sports' assertion that student discounts are given *"greatest prominence"* in the FR. Such discounts were simply one of the many aspects on which the Parties were found to compete.[48]

86. Further, the CMA argued that JD Sports' attempt to rely on the manner in which the Competition Commission reached its decision in the unrelated *Ottakar* case was misconceived. The CMA's approach in any given case depends on its facts and circumstances. Thus, the fact that it has taken a particular approach on the evidence in one investigation does not oblige it take the same approach in an entirely different one.

87. The CMA contended that its approach in this case is entirely consistent with the approach advocated by the Tribunal in *Intercontinental Exchange v CMA* [2017] CAT 6 ("*ICE*"). In *ICE*, the Tribunal held that, having identified various foreclosure strategies that ICE would benefit from, *"[i]t was not necessary for the CMA to identify in advance which of those partial foreclosure strategies would be employed and what precise gains would arise…"* [268] (see also [256]). By the same token in the present case, having identified various PQRS aspects that the Merged Entity would have the ability and incentive to

[46] FR, para 8.118(a).
[47] FR, paras 8.68–8.69 and 8.108-8.109.
[48] FR, paras 8.110, 8.116.

deteriorate, the CMA was not required to identify which of those aspects would in fact be deteriorated or to what extent. It rejected JD Sports' contention that this case did not apply to the present Application, because the CMA had failed to identify any parameter of competition which affected outcomes for customers, was important to customers, and was free of competitive constraints post-Merger.

88. As to the adequacy of reasons, the CMA relied on its explanation in the MAGs that, whether an effect on competition is substantial depends on, inter alia, how closely the merging parties competed pre-merger and the sufficiency of post-merger constraints. It contended that it had addressed those matters at length in the FR and had substantial evidence for its finding that an SLC would result. It also rejected JD Sports' argument that the CMA ought to have quantified the effects of the Merger:

(a) the CMA's obligation under s.35(1) EA is to determine whether a merger results in a 'substantial' lessening of competition. The CMA is not required (under s.35 or the MAGs) to quantify the lessening of competition or the impact on customers, nor is it required to establish that the effects would be 'large', 'considerable' or 'weighty': *Global Radio Holdings Ltd v Competition Commission* [2013] CAT 26 at [18]-[25]. In this context, 'substantial' has a broad meaning calling for *"the exercise of judgement rather than exact quantitative measurement"*: *R v Monopolies and Mergers Commission, ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23 at p.32;

(b) nor is the CMA required to address whether a merger results in a lessening of competition and then separately whether that lessening is substantial. Accordingly, for each of the relevant markets, the CMA addressed the single question whether the Merger resulted in a substantial lessening of competition; and

(c) whilst closeness of competition between the merging parties is an important indicator of a substantial lessening of competition, the CMA did not proceed on the basis that an SLC was an *"inexorable consequence"* of its finding that the Parties were close competitors. The CMA found, not only that the Merger would result in the removal of a direct and significant competitive constraint, but, in addition, that the Merged Entity would have both the ability and a strong incentive to deteriorate its PQRS offering post-Merger; and that neither the constraint from suppliers nor the constraint from rival retailers (now or in the foreseeable future) would be sufficient to prevent this. In those circumstances, the CMA was reasonably entitled, in the exercise of its judgement, to conclude that there would be a 'substantial' lessening of competition.

(b) The Tribunal's analysis

89. The essential difference between the parties relates to the methodology of analysis required to determine the statutory question in s. 35(1)(b) EA: whether the Merger has resulted, or may be expected to result, in a substantial lessening of competition. JD Sports was of the view that, in order to determine that statutory question, each relevant parameter of competition should be separately assessed. This, it says, is necessary in order to demonstrate the underlying issue of causation. The CMA, on the other hand, argued that this was not required by the statute or by the MAGs.

90. Although it was common ground that JD Sports and Footasylum were close competitors, Mr Kennelly's complaint was that the closeness of competition was not sufficiently addressed on any <u>particular</u> parameter – so that the CMA did not have a starting point for the causation question on any particular parameter. That starting point has to be how much competition there was in the first place. He also argued that the CMA had not attempted to address how, on

any specific parameter, the Merged Entity might have the incentive and ability to deteriorate PQRS. He argued that the FR "*rests on an approach to causation which is so broad brush as to be unlawful and a reliance on the GUPPI in lieu of parameter-specific evidence*."

91. In JD Sports' view the different constraints at play in relation to each parameter must be aggregated per parameter, in contrast to the CMA's approach which was to aggregate "*all of the constraints for all of the parameters in one lump, without any supporting reasoning*."

92. As indicated by the Tribunal in *Stagecoach,* where there is a rationality challenge against a merger decision of the CMA, the hurdle which the applicant has to overcome is a high one. In this case, JD Sports must show either that there was simply no evidence at all to support the CMA's conclusions on SLC or that, on the basis of the evidence, the CMA could not reasonably have come to the conclusions that it did. As the Tribunal indicated in *Stagecoach,* we must be wary of a challenge which is "*in reality an attempt to pursue a challenge to the merits of the Decision under the guise of a judicial review.*"

93. In support of its argument that the CMA had erred by departing from the MAGs, JD Sports laid some emphasis on the existence of a lawful expectation that the CMA will follow the approach laid down in the MAGs unless it has expressly indicated a departure from it. Accepting that the MAGs permit a large degree of flexibility, Mr Kennelly argued that "*where the CMA has decided to adhere to them and hasn't chosen to deviate from them, the CMA is bound to follow them*."

94. The CMA's approach, as evidenced in the FR, was less of a granular taxonomy. Having established that the parties were close competitors on a number of grounds, it 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, if it weren't

constrained either by other retailers or by suppliers. Ms Demetriou described it in the following terms:

> "…once you have established that these are very close competitors and that they compete closely on these PQRS elements, once you have established that, then, as a matter of pure logic, once you merge them then you are taking away a significant competitive constraint. That does cause, by virtue of the merger, an incentive to deteriorate the offering or not to improve it as quickly or as much as they would have done absent the merger. What the CMA then went on to do was to measure the strength of that incentive by carrying out a GUPPI analysis."[49]

95. We agree with the CMA that it followed the MAGs in its overall approach to the Merger – including, in its detailed analysis in Chapters 8 and 9 of the FR: identifying that the parties were close competitors and significant players in the market; establishing that they competed on a number of parameters; and determining that the merger resulted in the loss of existing competition. Finding a *prima facie* lessening of competition, the CMA then considered whether, nonetheless, it would not eventuate because of constraints from suppliers and other retailers in the market. In assessing the potential unilateral effects of the Merger, the CMA used a GUPPI analysis to determine pricing incentives post-Merger.

96. We see this as an orthodox approach to analysis, one that is certainly within the CMA's wide margin of appreciation. In this regard, we agree with the CMA that it is not particularly useful to refer to prior investigations by the CMA or its predecessor authorities, as each one turns on its own facts. The Tribunal said as much in *Ecolab*, where it held (at [93]) *"...merger decisions of the CMA do not constitute precedents and its axiomatic that each case turns on its own facts and that the characteristics of one market may be very different from those of another. Consistency is achieved by the CMA applying its statutory guidance..."*

[49] Hearing transcript, Day 2, page 19, line 21 and following.

97. We find no reason in law to impose on the CMA's analytical approach the parameter-by-parameter taxonomy required by JD Sports. We agree with the CMA that the approach argued for by JD Sports is not required by the statute or by the MAGs. The MAGs make this clear in para 1.5: parties are not entitled to rely on an expectation that any particular analytical methodology will be used in each and every investigation. The CMA is of course bound to determine the statutory questions in a rational manner as set out most recently in *Ecolab,* but the requirements of rationality do not require the CMA to adopt a particular analytical technique. Given the case-specific nature of merger investigations, there can be no expectation that the analytical methodology will be applied in a rigid and mechanistic way. In addition, it is clear that the CMA can depart from the MAGs "*where they consider it appropriate to do so*."

98. Nothing in this approach absolves the CMA from determining the statutory questions in a rational and lawful manner, properly supported by the evidence and sufficiently reasoned.

99. We therefore agree with the CMA that, where it finds evidence that (a) the merging parties are close competitors, who compete on a variety of aspects of PQRS; and (b) sufficiently demonstrates that the merger will result in an SLC, there is no need to undertake a granular exercise in respect of each of the parameters of competition. So long as the CMA has properly found that a chain of causation has been established by the evidence, there is no error of law, and it is not for the Tribunal to second guess the CMA's methodology of analysis. Rather, as Ms Demetriou submitted to us, what the Tribunal must judge under the proper approach described in *Ecolab* is whether the CMA had some evidence available to it of some probative value to answer the question posed by the statute: whether the Merger is expected to give rise to a substantial lessening of competition.

100. Since we do not find that the CMA has erred in law simply because it did not adopt the parameter-by-parameter methodology preferred by JD Sports, in order to succeed JD Sports would need to establish that there was simply no evidence at all in the FR to support the CMA's conclusions on SLC or that the evidence cannot reasonably support the CMA's conclusions.

101. Having regard to the extensive evidence collected and assessed by the CMA in its determination of SLC, summarised in paragraphs 40 to 48 above, we find that there is more than sufficient evidence – other than in relation to certain matters covered in Ground 2 and 3(3) of the Application (see paragraphs 186 and 247 of this judgment) – on which the CMA could reasonably rely in order to come to the conclusions that it did on the question of SLC. There is abundant evidence to show that the CMA did not err in law by adopting the methodological approach it did. In consequence, the Applicant cannot succeed under this ground.

F. GROUND 1(2): THE CMA'S ASSESSMENT OF AGGREGATE CONSTRAINTS ON THE MERGED ENTITY

(a) The parties' submissions

(i) JD Sports

102. JD Sports argued that the CMA considered three categories of competitive constraints separately - that is, those posed: (i) by suppliers; (ii) currently by retail rivals, including suppliers' DTC channel; and (iii) by retail rivals in the foreseeable future (e.g. as a result of Frasers Group's investment in elevating Sports Direct stores). JD Sports argued that there were two flaws in the CMA's approach. First, it objected to the CMA's approach of weighing all the evidence in the round as a matter of broad judgement, without specifying how it weighted the evidence, characterising the CMA's reasons as *"simply a bare assertion that*

the three constraints taken in aggregate would not be sufficient to prevent an SLC." Secondly, there was no place for a broad judgement; rather there should have been a granular assessment on a parameter-by-parameter basis, as argued for in Ground 1(1).

103. Further, the CMA should rationally have assessed for each (or at least one) parameter relied upon whether: competition between the parties affected outcomes for customers, the parameter is important to customers, and the competitive constraints remaining post-merger would prevent an SLC. The combined effect of the constraints from suppliers and current and future competition from retail rivals should have been examined in that context. The CMA had not done this work, which any reasonable regulator would have done. Had the CMA adopted the methodology put forward by JD Sports, it would have been able rationally to assess the aggregate effect of the supplier constraint and that posed by rivals.

104. In summary, JD Sports' case was that the CMA was under a legal obligation to assess whether the Merger had caused, or was likely to cause, an SLC taking account of the aggregate constraints. It was not rational – or possible – to analyse the different constraints simply as a matter of "broad judgement" without examining the inter-relationships between the different constraints.

(ii) <u>The CMA</u>

105. The CMA rejected JD Sports' argument that the CMA had either failed to provide adequate reasons for its assessment of aggregate effects, or that it had erred by assessing aggregate effects as a matter of broad judgement, rather than on a by-parameter basis.

106. The CMA asserted that the FR explained clearly the CMA's approach to the assessment of aggregate effects. In particular, it explained that *"[t]he aggregate*

constraint is evaluated directly in some of the evidence, eg diversion ratios, but more generally we considered the aggregate constraint by recognising that it is appropriate to consider the effect of all of the retailers and suppliers together as a combined constraint on the Parties".[50]

107. The CMA submitted further that it examined in detail the nature and force of the constraints posed by suppliers and retailers taken on their own, based on both quantitative and qualitative evidence. It was entirely reasonable, when considering the aggregate effect of those constraints, to address this as a matter of broad judgement, weighing up all the evidence in the round. The CMA submitted that its approach was not on any view irrational.

108. As to JD Sports' argument concerning the requirement for a parameter-by-parameter examination, it referred to its arguments under Ground 1(1).

(b) The Tribunal's analysis

109. We have already found, in Ground 1(1), that the CMA was not obliged to analyse the Merger on a parameter-by-parameter basis as called for by JD Sports. We reject the argument that the CMA erred in law by preferring to assess aggregate effects as a matter of broad judgement.

110. The proper questions for the Tribunal are (a) whether the CMA had a sufficient basis in light of the totality of the evidence available to it for making the assessments, and reaching the decisions on aggregate effects that it did; and (b) whether there was evidence available to the CMA of some probative value on the basis of which the CMA could rationally reach the conclusion it did.

111. Having regard to the substantial evidence included in the FR, reviewed in Section C of this judgment, we find that – subject to our findings on Ground 2

[50] FR, para 8.99.

and Ground 3(3) below – the CMA had very substantial evidence on which to base a reasonable decision relating to the aggregate effects of the competitive constraints, and provided substantial reasons for its assessment. Consequently, it made no error of law in this regard.

(c) Conclusion on Ground 1

112. We therefore conclude that JD Sports' claims under this ground fail and we find no basis for concluding that the CMA was in error in the manner in which it conducted its assessment of whether the merger was likely to result in a substantial lessening of competition.

G. GROUND 2: THE CMA'S (1) EXCLUSION FROM THE COUNTERFACTUAL OF THE EFFECT OF COVID-19 ON FOOTASYLUM; (2) ASSESSMENT OF THE EFFECT OF COVID-19 ON FOOTASYLUM

(a) The parties' submissions

(i) JD Sports

113. According to JD Sports, the CMA failed to make reasonable enquiries in relation to the impact of COVID-19, either at the stage of addressing the counterfactual or when assessing the competitive impact of the Merger.

114. In particular, JD Sports contended that the CMA did not follow up evidence provided by the principal suppliers or from Footasylum's primary lender in relation to the impact of COVID-19 at a time when there was still an opportunity to do so. It did not ask further questions of adidas following its statement in response to the s. 109 notice of 9 March 2020 that its forecasts for 2020 and

2021 were "*obsolete*"[51] (even though the two-year period identified by adidas significantly overlapped with the CMA's two-year forecast period). The CMA also failed to follow up Nike's statement in response to a s. 109 notice of the same date concerning the likely impact of COVID-19 on its UK sales.[52] Nor did the CMA ask Footasylum's primary lender [✂].

115. In JD Sports' submission, even if the CMA could not, in early May 2020, make detailed forecasts about all the respects in which the COVID-19 crisis would evolve over the next two years, by that time a number of the important effects of COVID-19 were sufficiently obvious to be taken into account. Those important effects were, in JD Sports' view, obviously going to weaken the competitive constraint posed by Footasylum over the two-year forecast period used by the CMA. They should not have been put to one side simply because other effects were more difficult to forecast.

116. JD Sports had provided the CMA with information and projections concerning the likely impact of COVID on the competitive condition of Footasylum. These were that: (a) Footasylum's store revenues would be disproportionately affected by reason of its retail estate being skewed more heavily towards small-medium stores, where social distancing would lead to fewer shoppers being accommodated, particularly where located in high streets and shopping centres; (b) a shift to online shopping was a likely effect of COVID-19 and that this would prejudice Footasylum because its store channel was a greater proportion of its overall sales, meaning that its online presence was relatively small compared to its rivals; (c) the projected recession would reduce consumer spending, particularly on discretionary spending items like sports-inspired footwear and apparel; and (d) Nike and adidas would migrate customers to their online businesses.

[51] Adidas's response to Q. 1(c).
[52] Nike's response to Q.2(c).

117. In addition, JD Sports had provided the CMA with the Alix Paper, dated 24 April 2020, which detailed the likely impact of the pandemic on Footasylum's revenues and trading condition. This concluded that Footasylum would likely be [✂].

118. JD Sports submitted that, prior to the Merger, Footasylum had a [✂] debt burden. The debt was subject to covenants and breach of a covenant might result in the lender declaring an event of default which, in practical terms, would be likely to result in the business entering administration.

119. Prior to the Merger, [✂].

120. JD Sports claimed that the CMA acted irrationally in failing to ask the primary lender what [✂]. Instead, it relied on inconclusive and unsubstantiated hearsay evidence from Footasylum that [✂].

121. JD Sports argued that it was by no means obvious what the primary lender [✂], and it was irrational of the CMA to fail to take very straightforward, basic steps to obtain primary evidence from the primary lender on this very important topic. If Footasylum [✂], any loss of competition arising from the Merger would be much reduced.

(ii) <u>The CMA</u>

122. The CMA accepted that it had a significant amount of information before it from the parties as to the impact of COVID-19, but argued that the information provided "*was of a very generalised and speculative nature*" which "*did not permit the CMA to make robust findings as to the enduring impact of the pandemic*." The CMA considered this to be unsurprising, given the fact that the pandemic was in its early days and the investigation into the Merger was in sight of its statutory deadline. Ms Demetriou argued at the Hearing that "*[a]ny information obtained at that stage, in terms of the pandemic events, was bound*

to be speculative and represent snapshot predictions at a time when the impact of the pandemic was entirely unclear."

123. In addition, the CMA had regard to the practicality of processing information at a late stage in the investigation. As Ms Demetriou put it at the Hearing "*there were also obvious practical constraints on the amount of information that the CMA could obtain and assess [and] decided it would not be fruitful to obtain further information*." The CMA argued that such a decision was plainly not irrational. Contrary to the arguments made by JD Sports, the CMA asserted that it was not irrational to proceed without asking some questions, because the information that the CMA had at that point – which it considered to be generalised and speculative, in Ms Demetrious's words - "*demonstrated that any predictions at that stage would not enable the CMA to form robust conclusions as to the structure of the market over the next two or more years, which is the question it was trying to address*."

124. The CMA argued that the parties had every opportunity to provide information on the likely impact of COVID-19, and that the CMA had received and considered material at a late stage in the investigation.

125. In his witness statement, Mr Meek indicated that information on the then current market conditions was sought from adidas and Nike in the s. 109 notices of 9 March 2020, and from Frasers Group on 13 March. The suppliers were required to provide information on any recent changes to their DTC strategy. The CMA referred to the suppliers' respective prior general overview of their UK DTC strategies and internal documents. It asked for an explanation of any material change to their DTC strategy in the UK. It also requested details of any changes to planned store openings in the UK, and for annual forecasts or projections of total future UK DTC sales relative to wholesale sales up to the financial year 2023. Frasers Group was required to provide details of any changes to its previously provided plans for elevated stores or to the underlying elevation

strategy set out in previously submitted internal documents. It was also required, inter alia, to describe if there were any conditions that would lead Frasers Group to change the number of stores it planned to elevate.

126. Mr Meek said that these notices were intended to be of broader relevance than COVID-19 but that "*the CMA expected that, so far as relevant, the responses would take account of the unfolding COVID-19 situation*."[53]

127. The responses from the two suppliers, which were required by the CMA to reflect the situation as of 9 March 2020, did indeed take COVID-19 into account. In its response, adidas stated that [✂]. Plans for store openings [✂]. As to annual forecasts and projections, adidas stated that the disruption caused by the pandemic "*effectively renders the previously submitted short term forecasts for 2020 and 2021 obsolete*" adding that "*there will inevitably be a shift to more online consumption for both [wholesale] partners and Brands D2C channels alike. In addition, we anticipate a significant overall contraction of demand in the short term*." Mr Meek summarised this last point as a submission that a closure of physical stores for a proportion of the year "*may change the ratio of its DTC and wholesale sales*".[54]

128. Nike responded that there had been [✂]. As to annual forecasts and projections, Nike stated that there had been no material changes but that it "*anticipates that the currently developing situation connected with the spread and containment of COVID-19 may have an impact on UK sales, but it remains to be seen*."

129. Frasers Group responded, in relation to the question concerning planned increases or decreases in the number of planned elevated stores, by quoting a public statement issued on 20 March 2020, the date of its response to the s. 109 notice. This public statement indicated that it had been monitoring the potential

[53] Meek 1, para 10.
[54] Meek 1, para 10.

impact of the pandemic on its businesses, "*Whilst it is too early to estimate what the full impact from COVID-19 will be on the Company's performance for the current financial year […] and future periods, the Board expects that COVID-19 will cause significant disruption to its business, including reducing customer footfall* […]"

130. The CMA said that it carefully considered several submissions from the Parties and a number of responses by third parties to s. 109 notices on the impact of the pandemic, as set out in Mr Meek's witness statement. Based on its analysis of that evidence, and having regard to all the circumstances, the CMA decided not to seek further evidence on the issue. At the time of the investigation there was *"considerable uncertainty"* about the extent and duration of the pandemic's impact in the medium to long term. It was difficult at that stage to predict those effects, not least because they depended on matters such as how long government restrictions would remain in place, how retailers would respond, and what impact this might have on consumer behaviour over time. The evidence before the CMA indicated that neither retailers nor suppliers were in a position to provide robust evidence on the medium to long term impact, from which reliable conclusions could properly be drawn. In the circumstances, the CMA's decision not to carry out further inquiries into the impact of COVID-19 was a reasonable one.

131. According to the CMA, whilst JD Sports' submissions criticised the CMA's approach, they failed to address the following key points:

(a) the purpose of a merger investigation is to assess the merger's effects on competition *"over time"*.[55] In assessing those effects, the CMA must ensure that *"its decisions are based on evidence and not speculation"*, recognising that *"[e]ven significant short-term industry-*

[55] MAGs para 4.1.3.

wide economic shocks may not be sufficient, in themselves, to override competition concerns" (COVID-19 Guidance, page 5);

(b) the effects of the pandemic in the UK emerged at a very late stage in the CMA's investigation. Mr Meek said in his witness statement that, at that stage, the scope for gathering robust and informative evidence on the medium to long term effects of the pandemic was limited, both by the practical constraints arising from the statutory timetable and by the *"very high level of uncertainty around the impact of COVID-19"*;

(c) in particular, the CMA considered that any further evidence that it obtained on the medium to long term impact would be speculative and insufficiently robust for reliable conclusions to be drawn. This was borne out by the evidence already received and examined by the CMA. Thus, the material from the Parties was, according to Mr Meek, *"to a large degree – and necessarily – of a speculative nature which did not lend itself to robust conclusions as the impact of COVID-19 beyond the very short term"*; and

(d) similarly, the CMA was of the view that the responses to the third party s. 109 notices indicated that retailers were not in a position to forecast the longer-term impact of the pandemic at that stage. Thus, Frasers Group stated that it was *"too early to estimate what the full impact from COVID-19 will be"*. Nike said the impact was *"unknown"* and *"remains to be seen"*. And whilst adidas said that its existing forecasts for 2020 and 2021 were now *"obsolete"*, it did not provide new forecasts incorporating the impact of the pandemic.

132. In those circumstances, the CMA argued that JD Sports' suggestion that the only rational course of action was for the CMA to follow up with Nike and adidas was detached from reality. So too was the suggestion that those companies

would have been in a better position to forecast the impact of the pandemic had the CMA referred to it expressly in its s. 109 notices. The CMA faced unavoidable practical constraints by virtue of the statutory timetable and justifiably considered that any further inquiries into the medium to long term effects of the pandemic would be futile. Indeed, as the existing evidence made clear, the prospect of retailers or suppliers being able to provide robust evidence as to those effects at an early stage in the crisis was slim to say the least. In all the circumstances, the decision not to conduct further inquiries into the impact of COVID- 19 was entirely reasonable.

133. The CMA rejected JD Sports' argument that it was *"sufficiently obvious"* that COVID-19 would weaken the competitive constraint posed by Footasylum. This was an impermissible attack on the merits of the CMA's conclusions. The CMA argued that it had carefully considered the potential impact of COVID-19 on Footasylum, both in its counterfactual assessment (section 5 of the FR) and in its competitive assessment (sections 8 and 9). The CMA accepted that Footasylum's financial position would suffer, much like that of many other retailers who were subject to the same restrictions. It concluded, however, that (a) the most likely counterfactual scenario was one in which Footasylum would continue to compete; and (b) there was no evidence that Footasylum or JD Sports would be hit harder than any of their competitors, such as to significantly weaken their relative position or strengthen that of their competitors. Thus, it was not obvious that the pandemic would weaken Footasylum's competitive constraint.

134. According to the CMA, JD Sports' submissions did no more than suggest that the restrictions imposed by Government would have a short-term negative impact on Footasylum's performance. But that was wholly insufficient absent any evidence as to the impact on its competitors or as to the effects of the pandemic over time. A business whose sales suffer as a result of an industry-wide economic shock does not necessarily become a less effective competitor

if its competitors are also affected by the same event. In the CMA's view, its approach and conclusions on this issue were entirely rational and in accordance with its published guidance.

135. In relation to the CMA's decision to seek no further evidence from Footasylum's lender, the CMA referred to the submission it had received on behalf of Footasylum at a very late stage in the investigation, shortly before the FR was finalised, in which Footasylum informed the CMA that [✂]. This was consistent with (a) Footasylum's forecasts, which predicted that it would [✂]; (b) the CMA's assessment, which indicated that Footasylum's primary lender, [✂].

136. In the CMA's submission, this was an adequate evidential basis for the CMA to conclude that [✂]. In view of this evidence, the CMA was reasonably entitled to decide that it was not necessary to approach Footasylum's primary lender directly.

(b) The Tribunal's analysis

137. The question for the Tribunal in Ground 2 is whether the CMA acted irrationally in relation to its decision not to seek further information concerning the impact of COVID-19, either in the counterfactual or in the competitive assessment of the Merger. The two parts of this ground – counterfactual and competitive assessment - are overlapping in that, in both cases, the argument made by JD Sports was that the CMA acted irrationally in not seeking more information, particularly from the principal suppliers and Footasylum's primary lender.

138. We find that the CMA was entitled, within its wide margin of appreciation and subject to obtaining the necessary evidence, to consider the likely effects of COVID-19 as part of its competitive assessment rather than the counterfactual. However, we find that the CMA did act irrationally in determining whether it

had a sufficient basis to make the assessments it made in its consideration both of the counterfactual and of the competitive effects of the Merger.

General principles and issues to consider

139. We described the legal principles to be applied in our assessment at para 70 above. Applying these principles, the issues for consideration by the Tribunal in relation to this ground are:

(a) did the CMA taken reasonable steps to acquaint itself with the relevant information concerning the impact of COVID-19 to enable it to answer each statutory question posed for it, bearing in mind that the extent to which it is necessary to carry out investigations to achieve this objective will require evaluative assessments to be made by the CMA, as to which it has a wide margin of appreciation?; and

(b) did the CMA have a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did. There must be evidence available to the CMA of some probative value on the basis of which the CMA could reasonably reach the conclusions it did?

140. We have exercised particular restraint in 'second guessing' the educated predictions for the future that have been made by the CMA, an expert and experienced decision-maker, and acknowledged that it enjoys a wide margin of appreciation in its assessment. For the reasons set out in this section, we find that the CMA did not take reasonable steps to acquaint itself with relevant information concerning the impact of COVID-19 on the statutory questions, or on the likely attitude of Footasylum's primary lender, even taking account of its wide margin of appreciation.

141. It is common ground that the CMA did not actively seek the information that JD Sports argued was necessary as the basis for a finding on SLC that was not irrational. One of the principal reasons for the CMA's decision not to seek that information was the view it had taken on the nature of the COVID-19 related evidence that had already been provided by the parties and third parties. Mr Meek thought it inappropriate to place much weight on some of this information for the reasons explained by him at para 19 of his witness statement. This is an important paragraph and we set it out in full:

> "The Group was mindful that any findings it made relating to the impact of COVID-19 needed to be securely rooted in the evidence. In particular, having received a substantial body of evidence that was relevant to the question of SLC, the Group considered that it was important not to leap to any conclusion about the impact of COVID-19 without robust evidence on which conclusions could safely be drawn as to its impact on the matters under consideration. As explained in the Final Report, the evidence before the Group did not satisfy us that the impact of COVID-19 would materially change the SLC analysis. The material received from the Parties concerning COVID-19 was to a large degree – and necessarily – of a speculative nature which did not lend itself to robust conclusions as to the impact of COVID-19 beyond the very short term. It was also, understandably, focussed on the impact on the Parties (particularly Footasylum) and so did not provide a basis for the Group to draw any comparisons with the impact on other retailers in the relevant markets. For example, JD Sports' submissions of March 30 and April 28 invited the Group to draw conclusions based on the earlier experience of the outbreak and subsequent recovery in certain Asian countries. Despite these containing some useful indicators as to the magnitude of the impact of COVID-19 on retail markets, the Group's ability to place much weight on this evidence was limited by considerations concerning the various material differences between the market dynamics in those countries and the UK (including the presence of different suppliers and retailers as well as the inability to make any assumptions about the similarity of the consumer populations). Indeed, most of the evidence on impact received by the Group suffered from limitations and the Group considered that on balance such evidence was insufficiently robust to justify a material change to any of the CMA's findings on the counterfactual or competitive assessment."

142. This discloses several relevant points concerning the CMA's conduct of the investigation of the Merger:

(a) the CMA agrees that findings relating to the impact of COVID-19 "*needed to be securely rooted in the evidence*";

(b) such evidence must be sufficiently robust and be rooted in the relevant geographic markets, in order to draw safe conclusions;

(c) the evidence provided by the Parties was not sufficiently robust because it was largely speculative and/or rooted in other geographic markets; and

(d) the CMA believed that "*most of the evidence on impact*" received by it (presumably including the evidence received from third parties) was also insufficiently robust to cause the CMA to change any of its findings on the counterfactual or competitive assessment. Mr Meek contrasted the "*speculative and generalised*" nature of the evidence gathered on the impact of COVID-19 with the "*extensive volume of evidence on the effects of the Merger that had already been gathered*."[56]

143. In spite of finding that the evidence it had received was insufficiently robust to form a view on the possible or likely effect of COVID-19, the CMA decided not to conduct further enquiries to see if sufficiently robust evidence had become available in time to be included in the FR. This was in spite of an intention, according to Mr Meek, to take account of the issue "*to the extent appropriate, reasonable and practicable*" because the crisis "*could potentially have a significant impact on the retail sector*".[57]

144. We find that decision to be irrational. Even given its wide margin of appreciation, the CMA's decision to seek no further information prevented it from putting itself in a position properly to answer the statutory question, and

[56] Meek 1, para 18.
[57] Meek 1, para 15.

prevented the CMA from having a sufficient basis for making the assessments and reaching the decisions it did.

145. There were two reasons motivating the CMA's decision not to obtain further evidence. First, the CMA doubted that robust evidence, capable of shedding light on the nature and extent of the impact over the medium to long term, would be available. It therefore proceeded to conclude its investigation as if such information was unavailable. Secondly, the CMA was aware of the "*unavoidable practical constraints*" imposed by the statutory timetable, the unextendible deadline of which was 11 May 2020. The practical constraints on the gathering and assessment of evidence were exacerbated by the need to assign an increasing number of the case team to focus on completing the necessary administrative tasks to allow the CMA to publish its report. Having originally envisaged a cut-off date for submissions of evidence of 31 March 2020, it continued to accept submissions well past that deadline "*in recognition of the fact, due to the unusual and rapidly developing circumstances, it was necessary and important to take into account the most current possible information*."[58] It accepted and considered evidence provided to it on 24 April (the Alix Paper) and 28 April (the submission from Eversheds Sutherland), and dealt with them in detail in the FR. Yet it did not seek information from third parties during that period that might have been sufficiently robust to affect its prior findings.

146. This trade-off between the constraints of the administrative timetable and the perceived futility of searching for sufficiently robust evidence was explored further by Ms Demetriou at the Hearing. She summarised that, on the basis of that trade-off, the CMA decided *"it would not be fruitful*" to obtain further information, a decision that she described as "*plainly […] not irrational*". She submitted that the suppliers were given the opportunity to provide up-to-date forecasts when responding to the s. 109 notices of 9 March 2020 and they did

[58] Meek 1, para 17.

not do so. She submitted that *"[i]t would not have been fruitful to have gone back to have pressed the point. It wasn't that they weren't asked. They were given the opportunity and they didn't provide them*." We disagree; it took no account of the pace at which companies may have been developing strategies for the pandemic and collecting relevant data for that purpose. The principal suppliers may well have been able to supply relevant and persuasive evidence had they been asked in April or early May. At the same time, there does not seem to be a basis for a belief that they would have volunteered this information in the absence of a further s. 109 notice, given the management time that may have been devoted to adapting the respective businesses to a pandemic.

147. The reason why the principal suppliers were not asked at a later date in the investigation – when the CMA was still capable of receiving and assessing information – was explained by Ms Demetriou in two points. The first is as to the nature of the evidence the CMA was seeking, and the second relates to the CMA's view of the relative importance of the twin concerns. She emphasised at the Hearing that the principal issue with the evidence already provided to the CMA was its short term nature. She argued that the CMA required evidence that allowed it to take a view on the enduring nature of any changes wrought by the pandemic. The CMA, she said, took the view that "*it was not possible do that at that point in time, given the type of information that was being provided to it by the parties and the view it took as to the ability of suppliers properly and robustly to predict that*." Rather, the evidence provided by the parties and the suppliers "*would only have been their predictions. At that point in time, they were not capable of giving robust evidence as to the enduring impact, because of the huge uncertainty as to the impact of the pandemic generally and as to how events would unfold*."

148. The CMA had therefore determined that it would not have been possible for the suppliers to provide information on the potentially enduring changes relating to the pandemic, but without consulting the very enterprises who might have been

able to supply it. Moreover, it had formed the view that any information that the suppliers would have produced, had they been asked, would only have been their predictions, based on uncertainty. But all business forecasts and projections are, by definition, predictions as to likely future structure and performance, based on uncertainty about future events. Such projections lie at the very heart of the determination of the statutory question relating to SLC. In the event, the CMA appears to have formed its own view on the level of uncertainty and concluded that it would preclude the suppliers from providing useful information. It therefore declined to ask them for it.

149. Ms Demetriou explained that the CMA was open to considering evidence provided voluntarily to it but had made a decision not to seek further information on the impact of COVID: "*There was certainly no decision that it was going to bring down the drawbridge, as it were, and stop considering any information that was provided to it voluntarily. Obviously, it is for the CMA to decide whether to make information requests of third parties. It did […] ask adidas and Nike for up to date information at the beginning of the Covid crisis,*" this being a reference to the s. 109 notices sent on 9 March 2020, "*and then, obviously, it decided not to follow up and that it wouldn't be useful to seek further information*."

150. The CMA had posed relevant questions at the beginning of March, prior to the enforcement of social distancing and the closure of non-essential retail premises, but came to the view that it would not be useful to pose relevant questions after that date, at a time when such information could still have been considered prior to the statutory deadline for the publication of the FR. Moreover, it was willing to consider information provided voluntarily but would not seek it. The outcome of its investigation might therefore have been influenced by whether or not third parties chose to volunteer information, unasked, to the CMA. We have come to the view that each of these positions is

an irrational approach to the determination of the statutory questions under s. 35 EA.

151. We heard from Ms Demetriou that this was the principal motivator - the CMA's conviction that a search for more information was futile. The timing issue played a more subsidiary role: "*there is an interplay between the two elements but […] actually the predominant thing here was the nature of the information and the fact that it was unlikely to be sufficiently probative or robust*."

152. We have also assessed the irrationality of this decision of the light of the COVID-19 Guidance issued by the CMA on 22 April 2020, i.e. during the course of the investigation of the Merger. The COVID-19 Guidance was issued in view of the disruptions likely to be caused by the pandemic. It was not expressed to be published under a statutory obligation and was intended to provide further details on the CMA's expected approach over the coming weeks and months. The guidance stated that the CMA's merger investigations are "*forward-looking and evidence-led*" and that the impacts of COVID-19 will be factored into the substantive assessment of a merger "*where appropriate*". It explains that 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. However, the CMA reaffirmed that it "*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*."[59]

153. The non-statutory nature of the COVID-19 Guidance is not significant. The extracts quoted above concerning the need to ensure that its decisions are based on evidence and not speculation do no more than apply to the COVID-19 pandemic the overriding obligation of the CMA in relation to the conduct of its

[59] FR, footnotes 289 and 831.

investigations. As set out most recently in *Ecolab,* this obligation is to ensure that there is a sufficient basis for its decisions in light of the totality of the evidence available to it – including evidence of some probative value on the basis of which the CMA could reasonably reach the conclusion it did.

154. It was clearly appropriate for the CMA to factor the impact of COVID-19 into the investigation of the Merger. It took the view that the evidence it did have was too generalised and speculative to be reliable, but it closed its mind to the possibility that robust information on possible impacts was available. In consequence, it did not modify its findings on the statutory SLC question. Such a decision was not justified by reference to the statutory timeline for the publication of its report, as is obvious from the fact that it was able to incorporate evidence submitted as late as 28 April 2020. The CMA fell short of its obligations to ensure that its decisions are properly based on evidence.

The decision not to seek information from the principal suppliers

155. Having found that the CMA acted irrationally in refraining from seeking further information in general, this section deals specifically with the CMA's decision to seek no further evidence from the principal suppliers, Nike and adidas. The next section deals with the CMA's use of the counterfactual and its decision not to seek information directly from Footasylum's primary lender.

156. The CMA's case was that it was not irrational not to seek a renewal of information that had been obtained from the principal suppliers as of 9 March 2020, because, as at that date, there was still much uncertainty as to the enduring impact of the pandemic. Ms Demetriou expressed it thus: "[T]*here still is uncertainty but there was much more uncertainty then. With the best will in the world, the information that you have seen that the parties were submitting, right up until the end, was speculative and generalised in nature and was not the sort of information that the CMA could rely on to draw robust conclusions as to the structure of the market going forward*."

157. The CMA had decided in effect that, having regard to the information supplied by the Parties, it was simply not worth seeking further information from the suppliers on sales figures or projections - because it believed they would not provide any value to a consideration of the likely enduring nature of the Merger's competitive effects. Ms Demetriou left us in no doubt about that: "*even if it had gone back and asked for either up to date sales figures or for predictions, they would not have been sufficiently robust, given the nature of the exercise that the CMA was engaged in, which was not just looking at the short, sharp shock of the pandemic but trying to draw conclusions as to the structure of the market going forward and, in particular, whether Footasylum would be disproportionally impacted*."

158. This view affected the CMA's decision not to devote further resources to seeking further information on the impact of COVID-19 from the suppliers. Summarising Mr Meek's witness statement in this regard, Ms Demetriou referred to the resources available to the CMA, the proximity of the statutory deadline and the "*huge amount of information already, […] that had been obtained in the inquiry generally.*" Having regard to the administrative tasks to be undertaken, "*the authority has to consider[…] is it right to divert resources from that task to a different task of seeking further information? That, in turn, will depend on whether or not that further information is likely to be useful*."

159. The CMA was driven to this conclusion by the "*wholly unilluminating […]insubstantial and speculative*" nature of the information received previously. The CMA argued that it was therefore plainly not irrational to refrain from asking whether the suppliers had any renewed forecasts or sales data, on the basis that such a task would be "*unfruitful*". Its position on the statutory questions would not be altered by seeing, "*on a best case scenario, 6 weeks' worth of trading data from adidas and Nike*".

160. As we have indicated in the previous section, we find that to be an irrational decision on the part of the CMA. If it regarded the evidence it had received so far to be unilluminating, and therefore non-probative, a decision to refrain from seeking further information at a later stage, when – if available – it was still capable of being included in the FR, is not one that appears to us to give effect to an evidence-led investigation. Nor is it consistent with the CMA's overall obligation, as most recently expressed in the COVID-19 Guidance, properly to consider the available evidence in relation to the possible impacts on competition, in this case by the pandemic. Given the potential significance of the pandemic for the nature of competition in retail markets generally, and the relevant markets in particular, this appears to us to be inconsistent with the CMA's duty to ensure that its decisions are based on proper evidence.

161. The CMA appears to have closed its mind to the utility of requesting further information, that might have been useful, from the suppliers. It is not possible to know how the suppliers might have responded to any such enquiry, and it is quite feasible that the information that would have been provided at that later stage would still have been of little utility to be of value in the investigation. We simply cannot tell, because the CMA decided not to inform itself at a time when it would have been administratively possible to obtain and consider further information. The position taken by the CMA was surprising given the likelihood that – in common with many companies affected by the pandemic – the principal suppliers might be expected to have been undertaking significant amounts of strategic planning work to modify and adapt their businesses to the new trading conditions.

162. Instead, the CMA concluded that, in the absence of evidence on the impact of COVID-19 on the relative constraints posed by different retailers and suppliers in the footwear market, "[*t]herefore, it is not clear that, as a result of COVID-19, either of the Parties would be in a much weaker competitive position to each other and to other retailers, or that other competitors would become*

significantly stronger. For example, in our view, it is likely that all retailers [✂] *given the current circumstances. Therefore, while recognising these uncertainties, we do not envisage that the impact of COVID-19 is likely to reduce materially the extent to which the Parties are close competitors, or to increase materially the current competitive constraints on the Parties in footwear*." [60] As a result, the CMA concluded that the Merger would result in the removal of a direct and significant constraint on each of the parties and that overall the remaining constraints post-Merger would not be sufficient to prevent an SLC.[61]

163. The CMA also declined to seek further information from adidas, in spite of that supplier stating that its previously supplied forecasts were obsolete. Instead of asking adidas during April 2020 whether it had since replaced those forecasts with newer ones, it (a) took adidas' response to the 9 March 2020 s. 109 notice to be definitive, and (b) treated the obsolete forecasts as being the best available evidence, and based its findings partly thereon.

164. Thus:

(a) The CMA assessed the likely future development of DTC sales.[62] The CMA recognised that there was a potential for the competitive constraints exerted by suppliers' DTC offering to increase. The parties additionally submitted that the COVID-19 crisis would further strengthen the key supplier brands as they increasingly focussed on their online offering and DTC strategies. The CMA recorded adidas' most recent submission regarding the impact of COVID-19, contained in its response to the s. 109 notice of 9 March 2020.[63] As noted before, adidas

[60] FR, para 8.308, emphasis added.
[61] FR, para 8.309.
[62] FR, paras 8.396-8.432.
[63] FR, para 8.412.

stated in this response that its prior 2020 and 2021 forecasts were rendered "*obsolete*" by the disruption caused by the pandemic. It projected an inevitable shift to online consumption for both the wholesale and DTC channels and a significant contraction of demand in the short term. adidas also said that there may be a change in the ratio of wholesale and DTC sales.

(b) The CMA concluded that "[w]*hile we acknowledge the significant uncertainty around any short term forecasts in light of COVID-19, we consider that these were the best forecasts available at the time of this report, although it is reasonable to consider that these may be upper bounds given the potential for demand to contract as a result of COVID-19, at least in the short term*."[64]

(c) Later in this part of the FR, the CMA agreed with the parties that it was uncertain what the market would look like in the medium to long term, and that a greater shift to online could be a potential outcome but was not able to determine with sufficient certainty whether that was likely to be the enduring structure once stores had reopened and other restrictions had been lifted.[65]

(d) Even if a more permanent shift to online were to occur, the CMA hypothesised that:

> "while the constraint from some retailers might be strengthened as a result, it is possible that the strength of other retailers who currently exert a stronger in-store constraint, may be weakened. Therefore, we do not consider that we can be sufficiently certain that any such market changes, were they to arise, would increase materially the aggregate competitive constraints posed by retailers (including suppliers through their DTC offerings) in the round."[66]

[64] FR, para 8.414.
[65] FR, para 8.445.
[66] FR, para 8.447.

165. We agree with JD Sports' submission that, having been informed that adidas' forecasts were obsolete, a rational competition authority could not rely on them as "*the best available evidence*", but would have disregarded them. The CMA, however, proceeded to use those forecasts to examine the likely changes in the DTC-to-wholesale ratio, finding that such ratio would not change significantly in the foreseeable future,[67] and concluding that "*the evidence does not show with sufficient certainty that Nike's and adidas' DTC offer across their channels will become a significantly stronger constraint on the Merged Entity in the market for the retail supply of sports-inspired casual footwear in the foreseeable future*."[68]

166. We disagree with Ms Demetriou's argument that, because Nike and adidas did not produce up to date forecasts as part of their responses to the 9 March 2020 s. 109 notices, "[t]*hat, in itself, substantiates the CMA's view that it was spurious, at that stage, to produce accurate forecasts because of the uncertainty*." The CMA appears to have closed its mind to the possibility that the suppliers could provide accurate forecasts of any enduring value, without asking them.

167. We agree with Mr Kennelly that the CMA, faced with uncertainty about the impact of the pandemic, failed to make reasonable inquiries, as they were required to do. Mr Kennelly rightly accepted that the CMA has a wide margin of appreciation concerning its assessment of the predictive value of the information it received, but that did not absolve the CMA from ensuring that it had sufficient information available reasonably required to answer the question before they made predictive judgments. JD Sports' challenge in this regard, did not therefore concern the quality or correctness of the CMA's judgement in its

[67] FR, para 8.431.
[68] FR, para 8.432.

assessment of the relevant information. It was that the CMA had not sought to inform itself sufficiently in order to exercise its judgement.

168. As Mr Kennelly said at the Hearing "*what they* [the CMA] *cannot do is say 'we are not going to ask the question because we don't expect to get anything useful', unless they have a very, very clear evidence base for saying that. And the Nike and adidas material simply doesn't support a submission that it would have been futile to ask a follow-up question at a later stage when the COVID pandemic was progressing and the situation for bricks and mortar retail was even worse than it had been when the CMA asked its questions on 9 March 2020*." […]."

169. The CMA acknowledged in its skeleton argument that it did not have all relevant information on the impact of COVID-19, and that its conclusions were based "*principally on what was missing from the evidence rather than what it contained*." Its argument that, in the absence of evidence, the CMA was reasonably entitled to conclude that COVID-19 did not alter its competitive assessment, is not sustainable in circumstances when it declined to seek what other information might be available from the suppliers, or to test its provisional conclusions with them to see if they did indeed disagree with it.

The decision not to seek more information from Footasylum's primary lender

170. The CMA was of the view that it could determine the likely effects of COVID-19 on the financial condition of Footasylum without seeking further information directly from Footasylum's primary lender. The CMA relied on, inter alia: (a) a report from Alix Partners dated 24 April 2020; and (b) a submission by Footasylum on 28 April 2020.

171. The Alix Paper was a report in which Footasylum's external advisors described [✂] in order to assess the possible effect of COVID-19 on the business, partly prepared for [✂]. It stated that, given the uncertainties relating to the progress of the pandemic, [✂]. Alix Partners concluded that, [✂] the most likely

counterfactual was one in which [✂]. The Alix Paper also indicated [✂]. It went on to indicate that a deep recession would [✂] due to, inter alia, higher unemployment and reduced household spending on non-essential items.

172. Under all of the scenarios in the Alix Paper, Footasylum was [✂]. The CMA accepted that it was "*plausible*" that Footasylum would have [✂] in the absence of the Merger. But it considered two areas of uncertainty. First, what further mitigating actions Footasylum might have been able to take, [✂]. Secondly, it was unsure of the potential actions that its primary lender, [✂]. As a result, it concluded that Footasylum's [✂].

173. On 28 April 2020 – i.e. very late in the investigation - Footasylum's solicitors, Eversheds Sutherland, wrote to the CMA with an update of Footasylum's ongoing response to the COVID-19 crisis. In this, it was stated that Footasylum had had further discussions with its primary lender regarding [✂].

174. In view of this detailed submission, delivered very late in the investigation, and its own view of the incentives applying to Footasylum's lender and notwithstanding the material in the Alix Partners submission, the CMA did not feel it was necessary to seek further information from the primary lender itself. We find this puzzling. It was possible that Footasylum, which was separately advised from JD Sports, wished to reassure the CMA as to the likely attitude of its primary lender, but on such a crucial issue the CMA ought to have completed its information gathering before making a decision.

175. To the argument that the response of the primary lender to a question about its future conduct would itself have been speculative and unreliable, we observe that this point was also relied on by the CMA in relation to its decision not to seek further information from suppliers. The answer to it is that the reliability of a response cannot be assessed unless it is first obtained, which in this case it was not.

The counterfactual

176. JD Sports objected to the CMA's decision to address the question of whether Footasylum's current financial difficulties would affect its ability to remain an effective competitor in its assessment of the competitive effects of the merger rather than as part of the counterfactual. It also criticised the CMA's failure to obtain sufficient information on which to base its conclusions. On the other hand, JD Sports did not claim, either in the administrative procedure or before the Tribunal, that Footasylum was a 'failing firm', merely that as an independent firm, Footasylum would be a weaker competitor than the CMA had thought likely.

177. There are three questions to consider in assessing this aspect of the CMA's findings: first, whether the CMA is free to decide in which part of its analysis a particular issue should be placed; secondly, whether the CMA had the necessary evidence to conclude that Footasylum's future financial position was too uncertain to form part of its counterfactual analysis; and thirdly, whether it had the necessary evidence to conclude in its competitive analysis that Footasylum would remain an effective competitor.

The choice of counterfactual

178. In relation, first, to the CMA's freedom to decide where an issue should be analysed, the Tribunal must have particular regard to the CMA's wide margin of appreciation in relation to its expert judgment. The counterfactual, as explained in the MAGs, is an analytical tool which in general is not comparable in detail to the analysis of the competitive effects of a merger. Its description is affected by the extent to which events or circumstances and their consequences are foreseeable, enabling the CMA to predict those matters '*with some confidence*'.

179. Paragraph 4.3.6 of the MAGs states that the CMA may examine several possible scenarios, but ultimately only the most likely scenario will be selected as the counterfactual. When it considers that the choice between two or more scenarios will make a material difference to its assessment, the CMA will carry out additional detailed investigation before reaching a conclusion on the appropriate counterfactual. However, according to the MAGs:

> 'the [CMA] will typically incorporate into the counterfactual only those aspects of scenarios that appear likely on the basis of the facts available to it and the extent of its ability to foresee future developments; it seeks to avoid importing into its assessment any spurious claims to accurate prediction or foresight. Given that the counterfactual incorporates only those elements of scenarios that are foreseeable, it will not in general be necessary for the [CMA] to make finely balanced judgements about what is and what is not the counterfactual.'[69]

180. Mr Kennelly argued that "*the counterfactual is important; it is the comparator against which the merger situation is compared. If the CMA gets that wrong, it starts off on the wrong foot*." We agree the counterfactual is important, but the Tribunal must take account of the CMA's wide margin of appreciation in this respect. Whilst that does not absolve the CMA from demonstrating to the required standard that it has not acted irrationally in determining what should form part of its counterfactual assessment, there is no obligation in principle on it to construct its counterfactual in any particular way.

Evidence relating to Footasylum's financial position

181. In relation to the second question, whether the CMA had sufficient evidence on which to base its counterfactual analysis, the CMA concluded on the evidence that, despite the impact of COVID-19, the counterfactual was one in which Footasylum would have continued to compete effectively. That was consistent with Footasylum's own evidence submitted on 28 April 2020, and with the fact that JD Sports did not raise a 'failing firm' defence during the investigation of

[69] At paragraph 4.3.6.

the Merger. However, as noted earlier, the Alix Paper suggested otherwise, and the CMA did not check this view with the primary lender itself.

182. Instead, the CMA acknowledged that – because it viewed the precise impact of the pandemic on the strength of its competitive position as being insufficiently clear to incorporate into the counterfactual - it examined the matter further as part of its competitive assessment (as well as in relation to remedies).

183. Whilst it is within the CMA's wide margin of appreciation to decide in which part of its analysis it considers a particular matter, it must nonetheless ensure that it obtains the appropriate evidence to enable it to make that assessment. In relation to the likely attitude of Footasylum's primary lender, we do not know what the response would have been as the CMA made no direct inquiry. It might have affected its view of whether it could construct a counterfactual scenario of sufficient certainty in relation to Footasylum's financial viability. In making its competitive assessment, the CMA must ensure that is has the necessary evidence reasonably to make the assessment, which in this instance it did not.

Evidence for competitive assessment

184. In relation to the third question, whether the CMA had sufficient evidence for its competitive analysis, we agree that, as a matter of principle, where events or circumstances are not sufficiently certain to be included in the counterfactual, they can be addressed as part of the CMA's competitive assessment but, once again, the CMA must ensure that it has necessary evidence.

185. As the issues of Footasylum's financial viability and its consequent ability to compete effectively in the medium term are exactly the same in whatever part of the analysis they are considered, it would be surprising if the CMA's failure to make direct inquiries of Footasylum's primary lender did not affect the soundness of its competitive assessment also. We consider that, here too, the

CMA should have made direct inquiries of Footasylum's primary lender as to its likely attitude to the [✂].

(c) Conclusion on Ground 2

186. We therefore conclude on Ground 2 that JD Sports' claim succeeds and that, both in relation to the failure to follow up inquiries with suppliers and the failure to make direct inquiries of Footasylum's primary lender, the CMA 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.

H. GROUND 3(1): THE CMA'S ASSESSMENT OF FRASERS GROUP'S ELEVATION STRATEGY

(a) The parties' submissions

(i) JD Sports

187. JD Sports' key submission was that the CMA had irrationally considered the constraint that would be exerted by Frasers Group as a result of its programme of elevation. Were the Merged Entity to deteriorate PQRS, Nike and adidas would be incentivised to allocate more of the premium products to the Frasers Group's elevated stores. This would therefore be a constraint on the incentive and/or ability of the Merged Entity to deteriorate its PQRS offer. According to JD Sports, the CMA irrationally failed to ask Nike and adidas whether they would divert products to Frasers Group in this event.

188. JD Sports had put this to the CMA during the investigation of the Merger. The CMA had responded:

> "We accept that post-Merger, if the Merged Entity were to deteriorate aspects of its PQRS which went against the key suppliers' interests eg negatively impacting sales of their products or their reputation, Nike and adidas may have an incentive to reallocate products to Frasers Group in light of its elevation strategy. However we have seen no evidence that Nike and adidas would favour allocating products to Frasers Group over other retailers to which they already supply higher volumes of products, and which are [✂] categorised as 'best' and 'better' retailers in their respective [✂] and [✂] retailer segments. We therefore cannot say with sufficient certainty what actions the suppliers may take in terms of allocating their products should the Merged Entity deteriorate its PQRS. Even if the key suppliers were to reallocate products to Frasers Group, it is not clear over what timeframe this might result in a material increase, if at all, in the strength of Frasers Group's constraint."[70]

189. JD Sports argued that the CMA's finding, namely that it had seen no evidence that Nike and adidas would favour Frasers Group over other retailers, was based on the suppliers' responses to the s. 109 notices of 9 March 2020.

190. In its response, adidas stated that [✂]. Adidas corroborated that evidence by providing [✂]. JD Sports argued that this demonstrated that [✂], and so the CMA needed rationally to inquire whether adidas would reallocate any such product to Frasers Group and, if so, over what period.

191. In Nike's response to the s. 109 notice, it informed the CMA that [✂]. JD Sports said that this evidence was ambiguous. It might conceivably mean that [✂]. But it is much more likely to mean that [✂]. In JD Sports' submission, the CMA could not rationally use evidence that was at best equivocal on the question of whether [✂] to support the conclusion set out in the FR.[71]

192. According to JD Sports, therefore, the evidence the CMA gathered did not enable the CMA rationally to determine whether adidas and/or Nike would divert supplies to Frasers Group from the Merged Entity if the latter deteriorated its PQRS offer and, if so, when. It was irrational for the CMA to fail to any ask any follow-up questions when the evidence necessary for the CMA to make an

[70] FR, para 8.353.
[71] At para 8.353.

educated finding on the issue was still missing. The CMA should not be allowed to rely on its own failure to undertake a rational inquiry as the justification for dismissing a *prima facie* answer to its SLC concern.

193. In its skeleton argument, JD Sports also challenged the adequacy of the CMA's reasons. The CMA had stated in the FR that it was not able to say "*with sufficient certainty*" that Frasers Group's elevated stores will become a significantly stronger constraint in the future. JD Sports argued that it was entirely unclear what threshold of proof the CMA had applied. It described the CMA's findings as one made "*applying some opaque threshold that combines the balance of probabilities and 'sufficient certainty'*." JD Sports submitted that its complaint was not that the CMA was obliged to apply a balance of probabilities threshold to the issue of the strength of the future constraint from Frasers Group elevated stores. Rather, it argued that neither JD Sports nor the Tribunal can understand what threshold has been applied because the formulation "*sufficient certainty*" indicates that the CMA had a threshold in mind but did not explain what threshold it had used. This part of Ground 3(1) was not pursued at the Hearing.

(ii) The CMA

194. The CMA submitted that it gave extensive consideration to the likely impact of the Frasers Group elevation strategy over some 25 pages of the FR, and summarised its findings: *"[o]n balance, while it is possible that Sports Direct through its elevated stores may become a more direct competitor to the Parties to some extent, we cannot say with sufficient certainty that it will be become a significantly stronger constraint in the foreseeable future."*[72]

195. The CMA argued that its conclusions were properly supported by the responses of Nike and adidas to the s. 109 notices, [✂]. The CMA denied that the Nike response was ambiguous in that [✂]. As Ms Demetriou stated at the Hearing

[72] FR, para 31.

"That is not the evidence that […] the suppliers gave. They were specifically asked what action have you taken when you spotted a reduction in PQRS? And they are not saying [✂]."

196. The CMA rejected JD Sports' argument on irrationality. It accepted that Nike and adidas may have an incentive to reallocate products away from the Merged Entity and to Sports Direct in the event of a deterioration in the PQRS offering of the Merged Entity, but had concluded in the FR that the prospect of this was uncertain, given that there were other retailers to whom the suppliers might naturally reallocate first. This did not mean that the only rational course was to explore the matter further with Nike and adidas. The CMA already had evidence relevant to the issue and was reasonably entitled to reach the conclusion it did, and its decision not to seek more information on this point was within its wide margin of investigatory discretion.

197. By way of completeness, the CMA argued in its Defence that JD Sports' reasons challenge was unsustainable. In short: (a) the CMA was not required to apply a balance of probabilities threshold, or explain whether it had done so, at each and every stage in its analysis; and (b) it is nevertheless clear that it did in fact do so in its conclusion on Frasers Group. As indicated above, that part of the ground was not ultimately pursued by JD Sports.

(b) The Tribunal's analysis

198. JD Sports' case is that the CMA acted irrationally in that it did not sufficiently inform itself about the likely response of the principal suppliers to any attempt by the Merged Entity to deteriorate its PQRS offer. In particular, given the progress of the elevation strategy for Frasers Group stores, its failure to explore the matter further with Nike and adidas inevitably meant that it did not properly consider the extent to which that retailer would exert a greater competitive response than it currently does.

199. In contrast to our finding in relation to Ground 2, (in relation to the likely effects of the COVID-19 pandemic), we do not find that the CMA acted irrationally in declining to seek further information from the principal suppliers on their hypothetical response to a potential deterioration by the Merged Entity of its PQRS offering, particularly as to the likely allocation of product relative to the allocations to other retailers and the Merged Entity. This is essentially because the CMA had much more evidence at its disposal to enable it to come to its conclusions on these points. We review below the evidence that it relied on to come to its conclusion about the potential impact of the Frasers Group elevation strategy.

200. The CMA examined the nature, scale and strategy for the Frasers Group elevation,[73] including by examining Frasers Group's board presentations, reports and other internal documents.

201. In response to a s. 109 notice of 12 December 2019, Frasers Group stated that [✂].

202. The FR also referred to (a) the Frasers Group 2019 annual report, which indicated that suppliers remained sceptical of the elevation strategy; and (b) [✂]. The CMA concluded from this evidence that, although the elevation strategy had yielded some results, it was unclear to what extent it had received access to premium products. It therefore undertook an empirical study to assess the extent to which the elevation strategy had given rise to access to premium products.[74] While the CMA found evidence that Frasers Group had accessed some premium products that were best sellers for the Parties, it did not find clear evidence of an upward trend in Frasers Group accessing and selling those products. At the date of the FR, the volumes of the relevant products "*remains*

[73] FR, paras 8.321-8.338.
[74] FR, paras 8.354-8.363.

low".[75] The CMA concluded that "*the evidence does not support a finding that volumes will materially increase to a level similar to that of either of the Parties in the foreseeable future. For* [✂]*, the changes in product access relate primarily to sporting goods and the evidence suggests […] that* [✂] *does not intend to change Fraser Group's access to products to be more aligned with the Parties' in the foreseeable future*".[76]

203. The CMA also considered data submitted by the Parties which compared the performance of JD Sports and Footasylum stores that were located near elevated Sports Direct stores (Sports Direct being one of the Frasers Group's facias) in the period after the elevation, compared to a similar period one year previously. The CMA agreed that this evidence was relevant but that an examination of 16 stores did not allow for "*estimation of a robust average effect*."[77] It therefore undertook a more detailed examination of the evolution of store-level revenues.[78] From this detailed study it concluded that, while there was some evidence that Frasers Group elevation has adversely affected some JD Sports stores, this impact does not seem to be consistent across all elevated stores.[79]

204. Finally, the CMA found that the suppliers' monitoring of retailers was limited in scope and frequency and that there was limited evidence of either Nike or adidas having taken action in response to any deterioration in PQRS. As referred to previously, JD Sports claimed that this may have been because retailers responded immediately to any observed breach of contractual standards, but we agree with Ms Demetriou that there was no evidence on which to base such a conclusion.

205. The CMA's conclusion is the one to which JD Sports took exception:

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[75] FR, para 8.363.
[76] FR, para 8.364.
[77] FR, para 8.381,
[78] see Appendix J to the FR.
[79] FR, para 8.389.

> "Frasers Group is a significant and successful player in the retail sector and the effects of its elevation strategy in the context of this Merger investigation has required careful consideration. However, overall, on the basis of the evidence currently available, we cannot conclude with sufficient certainty that Frasers Group's elevation strategy will significantly change the strength of the competitive constraint on the Merged Entity from Sports Direct in the market for the retail supply of sports-inspired casual footwear in the foreseeable future."[80]

206. This paragraph summarises the findings from a significant body of evidence of various types, relating to a period following the commencement of the Frasers Group elevation strategy. We find it was reasonable for the CMA to have reached its conclusion on Frasers Group's elevation on the basis of the inquiries it made. The extensive evidence it gathered on the actual and anticipated effect of that elevation strategy had probative value on which the CMA could reasonably reach the conclusion summarised in the FR[81]. We do not find that the probative value of such evidence is rendered unreliable through the CMA's decision not to seek further information from Nike and adidas of the type argued for by JD Sports. We therefore find no irrationality and no error of law.

I. GROUND 3(2): THE CMA'S ASSESSMENT OF THE CONSTRAINT POSED BY NIKE AND ADIDAS AND THEIR CONTRIBUTION TO THE AGGREGATE CONSTRAINT POSED BY SUPPLIERS

(a) The parties' submissions

(i) JD Sports

207. According to JD Sports, the CMA irrationally assessed "*the main point in the case*" - the fact that the principal suppliers control the market through their control of those products that are essential for the survival of retailers such as the merging parties. The CMA was irrational to focus on gaps in the supplier

[80] FR, para 8.395.
[81] FR, para 8.395.

constraint, rather than the importance to customers of any competition in the gaps and whether any loss of competition would be addressed by actual and emerging competitive constraints.

208. JD Sports argued that there was a paucity of evidence identified by the CMA that the Parties actually responded competitively to one another, citing predominantly local, sporadic, examples, namely: (i) local student discounts, (ii) local-level marketing; (iii) local store product range; and (iv) product range more generally. The CMA also found some evidence of monitoring between the Parties alongside other rivals with respect to three further issues: (v) clearance/promotional discounts; (vi) store openings and closures, and (vii) store refurbishments.

209. As argued elsewhere, the FR made no attempt to conduct the SLC analysis systematically by parameter, thereby making it difficult to identify the evidence that the CMA considered pertinent to each parameter. Nevertheless, if and to the extent that the CMA found the parties to be "*head-to-head competitors*" on parameters other than the seven identified above, the CMA's findings as to national SLCs were irrational. The Parties could not rationally be shown to be national "*head-to-head competitors*" where there was no evidence that competition between them on those parameters actually affected national market outcomes for customers (e.g. evidence that the parties responded to one another) or could reasonably be inferred (from, at the very least, monitoring by one Party of the other Party among several other rivals).

210. JD Sports submitted that there can be no lessening of competition on a parameter unless there is some meaningful <u>actual</u> competition between the parties that could be lost by the Merger.

211. Finally, JD Sports contended that the CMA was irrational in finding, in respect of the four "response" parameters (and the three "monitoring" parameters

identified in para 208 above) that the Merged Entity would have the ability and/or incentive to flex those aspects notwithstanding the constraint from suppliers:

(a) For all seven, there was no evidence that Nike and/or adidas lacked the incentive to respond to any deterioration in the Merged Entity's offering on that parameter. Nor was there any evidence that the CMA even asked suppliers (and/or received sufficient responses to) the question, i.e., how they would react to any material degradation of the parameter from prevailing levels by the merging parties post-Merger;

(b) for student discounts ((i) above) - in circumstances where the CMA positively found that JD Sports monitored eight third party rivals - there was no evidence that any competition between the Parties would not be replaced by competition from other rivals, now or in the two year period used by the CMA to assess the Merger's effects;

(c) for (i), (ii) and (iii) there was no evidence that a reduction in competition at the local level would, in aggregate, be harmful to customers at the national level.

(ii) The CMA

212. The CMA argued that JD Sports had not established any irrationality in the CMA's findings:

(a) the parameters identified by JD Sports were not the only parameters on which the Parties were found to compete. The CMA found that the Parties competed on various aspects of PQRS that were important to customers. In addition to those identified by JD Sports, such aspects

included price, customer service, online and delivery services, and innovation;[82]

(b) the CMA explained that, whilst demand was locally driven, the main parameters of competition were set nationally such that it was appropriate to define national markets;[83] and there was no challenge to that finding;

(c) the evidence before the CMA showed clearly that the Parties competed closely on those national markets. JD Sports could not sustain an argument that the evidence was insufficient for that purpose. There was ample evidence before the CMA on which it could rationally conclude that the Parties were close competitors;[84] and

(d) further and in any event, the evidence before the CMA included evidence of the kind that, JD Sports says, was required, e.g. evidence of the Parties responding to one another[85] and evidence of monitoring.[86]

213. As to JD Sports' further arguments, the CMA submitted:

(a) the CMA concluded on the evidence as a whole that suppliers may have little (if any) incentive to respond to certain deteriorations.[87] It further found that, irrespective of their incentives, suppliers were unable to detect all instances of deterioration and would not consider certain changes to constitute deteriorations.[88] As argued in relation to Ground

[82] FR, paras 8.84, 8.98 and 8.108–8.116.
[83] FR, paras 7.130–7.134.
[84] See summaries at FR, paras 20-27, 8.45 –8.480 and 9.287–9.309.
[85] FR, paras 8.184-8.185.
[86] FR, paras 8.176–8.182.
[87] FR, paras 8.68, 8.72, 8.90 and 8.92.
[88] FR, paras 8.88–8.93.

1(1), the CMA was not required to identify evidence of the suppliers' incentives in respect of each parameter on which the Parties were found to compete;

(b) the CMA found overall that any remaining countervailing constraints would be insufficient to prevent an SLC;[89] it was not required to assess the extent of those constraints on a parameter-by-parameter basis; and

(c) the CMA did not find merely a reduction in competition at the local level; it found that the Merged Entity would have the ability and a strong incentive to deteriorate various aspects of its PQRS, the most important of which were set nationally (e.g. discounts, delivery times and charges, customer service, and innovations). The deterioration of such aspects would harm customers in local areas but, since the main parameters of competition were set nationally, it was appropriate to define national markets (which was not challenged) and to find an SLC on those national markets.

(b) The Tribunal's analysis

214. The essential nature of JD Sports' challenge is that the principal suppliers wield such a degree of power over the Merged Entity and other retailers that there is little opportunity for retailers prior to the Merger, and the Merged Entity post-Merger, to deteriorate any aspect of PQRS that is important to customers. The CMA failed to consider that sufficiently and thereby erred in law.

215. The CMA stated that it properly assessed the nature and degree of competition between retailers, as well as the influence exerted by suppliers, and concluded after a proper assessment that the suppliers were unlikely to constrain all

[89] FR, para 8.478.

opportunities for the Merged Entity to deteriorate elements of its PQRS offering.

216. We agree that the CMA's investigation of the constraints exerted by suppliers was more than sufficient to form the basis for a decision in this regard that was not irrational. We set out below the steps that the CMA took in order to illustrate this.

217. There was little doubt that the principal suppliers sought to control the manner in which their respective products were sold at retail, through detailed contractual provisions included in their selective distribution agreements. The FR therefore examined the extent to which these arrangements left the retailers with the ability and incentive to flex aspects of PQRS. In other words, whether the supplier-retailer relationship was such as to prevent any deterioration in PQRS post-Merger.

218. In the FR, the CMA recognised that there may be a difference between the retailers' ability to deteriorate PQRS (whether the suppliers' contractual requirements determined all aspects of a retailer's offering) and their incentives to do so (whether a negative impact on product access would outweigh the gains from a deterioration of PQRS). However, it considered that these would not always be distinguishable, so it looked at the two issues together. It also recognised that there is a "*spectrum of constraints*" open to suppliers, and these may differ according to which element of PQRS was under consideration. The CMA defined that spectrum as being: no constraint, some constraint or significant contraint.[90] In considering the nature of the relationship between suppliers and retailers, it took a two-step approach: (i) whether the extent of a constraint, taken alone, is so significant as to sufficiently discipline the Merged

[90] FR, para 8.64.

Entity's ability and/or incentive to deteriorate its post-Merger offering; and, if not (ii) whether it would be sufficient in aggregate with other constraints.

219. In its assessment, the CMA examined separately pricing,[91] range,[92] and quality and service.[93]

220. In relation to price, the CMA found that RRP was the starting point, but that discounting does occur, mainly for clearance purposes. It specifically found[94] that clearance discounting was driven by a range of factors, including product life cycle seasonal changes, but that it was also influenced by competition because, where seasonal changes in products applied equally to all retailers, multiple retailers may engage in clearance discounting and compete with each other. As such, it considered that the merged entity could reduce such discounting post merger as a result of any loss of competition between the Parties. It therefore disagreed with the submissions from JD Sports and Footasylum that the stance of the suppliers on price would be unlikely to have an impact on price competition.

221. In terms of range, the CMA considered that the suppliers' selective distribution arrangements constrain retailers, but that retailers can and often do offer less range in-store than the full range available to them. It also found, based on evidence submitted by Nike and adidas, that there was limited evidence that suppliers influence retailers' incentives to flex their range of other suppliers' brands and products. It did, however, accept that the risk of losing access to products from key suppliers can provide a material disincentive for retailers in terms of deteriorating certain aspects of their offerings. However, it concluded

[91] FR, paras 8.67-8.69.
[92] FR, paras 8.70-8.76.
[93] FR, paras 8.77-8.87.
[94] FR, footnote 335.

that this would be the case only if the deterioration of PQRS damages suppliers' sales or brand image.

222. In relation to quality and service, the CMA noted in the FR that suppliers impose restrictions under their standard terms and conditions, but that retailers can in principle flex their offerings above that floor in order to differentiate their non-price offer. It provided examples of where retailers competed above minimum standards, including online delivery speed, returns policies and website loading speeds. It also considered whether suppliers would act to prevent any deterioration in store numbers, locations and openings. The CMA considered the granularity of the suppliers' requirements in relation to specific aspects of quality and service and accepted that this might mean there would be no deterioration in absolute terms. However, the Merger could still lead to improvements in those aspects happening more slowly than in the absence of the Merger. A reduced level or speed of improvement was regarded by the CMA as being a type of deterioration.

223. The FR examined whether the suppliers' monitoring of retailers' stores was sufficient to detect, and therefore prevent, any deterioration in PQRS. We have considered this in the context of Ground 3(1). For the purposes of this part of Ground 3, we note that the CMA assessed the evidence it had received on the frequency and scope of suppliers' monitoring, and how they may respond to observed deteriorations in PQRS. For example, on the scope of monitoring, it found that [✂].

224. The CMA also found limited evidence that Nike or adidas had taken action in response to a deterioration in PQRS (as to which see our finding in paragraph 204 above).

225. The CMA then assessed its findings by reference to the spectrum of constraints it had described earlier. It found that suppliers exert some influence on pricing,

can control retailers' range, and exert some influence on retailers' quality and service offerings. However, "*taking account of the evidence [...] in the round*", the CMA found that "*on balance*" the constraint from suppliers was not sufficient to discipline the Merged Entity's ability and/or incentive to deteriorate its offering post-Merger.[95] In particular, the CMA based this conclusion on its findings that: retailers can and do compete on various aspects of PQRS; there are limits to suppliers' ability to detect a deterioration of retailers' offerings, such as in relation to rates of innovation or other improvements; and suppliers have no incentive to discipline retailers where a deterioration in PQRS does not harm the suppliers' interests or where it benefits from it, for example less discounting.

226. JD Sports may have disagreed with the outcome of this investigation into the constraints imposed by suppliers, but it does not succeed in showing that the CMA acted irrationally in coming to the conclusions that it did. The scope and nature of the evidence gathered by the CMA, and the nature of its assessment, do not disclose any error of law under the principles of review described earlier.

J. GROUND 3(3) THE CMA'S ASSESSMENT OF NIKE'S AND ADIDAS' DIRECT-TO-CONSUMER RETAIL OFFERS

(a) The parties' submissions

(i) JD Sports

227. JD Sports argued that it and Footasylum both depend for their commercial success on access to higher-tier products from Nike and adidas. Yet Nike and adidas sell their products through their own DTC businesses, both online and through their own stores. Other things being equal, it is more profitable for Nike and adidas to sell directly, rather than using an independent retailer that needs

[95] FR, paras 8.98 and 9.69.

to cover its costs and earn a profit. A central feature of this market is therefore that Nike and adidas have an incentive to divert higher-tier products into their DTC channels.

228. JD Sports submitted that the CMA had rejected evidence submitted to it showing that the constraint from the suppliers' DTC operations would become significantly stronger over the next two years. The CMA had instead found that the evidence did not show with "*sufficient certainty*" that Nike's and adidas' DTC offer would become "*significantly stronger*" in the foreseeable future.[96]

229. According to JD Sports, the CMA's conclusion was not adequately reasoned because neither JD Sports nor the Tribunal can understand what is meant by "*sufficient certainty*" or "*significantly stronger*". Further, the CMA's finding was irrational for the following reasons:

(a) the CMA relied on evidence about "*footwear and apparel combined*" to reach a conclusion about the footwear market. This was illogical. Having identified two separate economic markets, the CMA needed to analyse them separately; and

(b) the CMA irrationally failed to take into account the impact of COVID-19 in shifting demand from retail to online (which was already the focus of DTC prior to COVID-19).

230. As it had argued under Ground 2, JD Sports submitted that the CMA had reached its conclusions without asking sufficient questions of Nike or adidas about the impact of COVID-19. It was irrational of the CMA to make findings without testing the propositions with Nike and adidas (i.e. asking whether COVID-19 has resulted in a shift to online sales and whether and why the

[96] FR, pages 240 and 321, paras 8.432 and 9.268.

suppliers expected any shift to endure once stores reopen). In JD Sports' opinion, the CMA did not test with the suppliers any of the points made by JD Sports in its numerous submissions on the effect of COVID-19 for the two-year forecast period that the CMA was considering.

231. In JD Sports' submission, it was entirely implausible that the market would return to its pre-COVID-19 state. The large growth in online sales by Nike and adidas means that they had a much larger customer database which they can use to promote (more profitable) direct sales. Moreover, rather than speculating that customers switching to online might move to JD Sports or Footasylum's websites ahead of Nike or adidas, the CMA should have investigated this issue.

(ii) The CMA

232. The CMA submitted that there was no lack of clarity in the CMA's conclusion that the principal suppliers' DTC offerings would not become a *"significantly stronger"* constraint on the Merged Entity in the foreseeable future. The CMA's reasoning in that regard must be read in context. Thus, when it came to assess whether any future developments in respect of Nike and adidas' DTC offerings might prevent an SLC, the CMA had already found that:

(a) even including DTC, the aggregate current constraint from all other relevant retailers was moderate at best;[97]

(b) in relation to DTC offerings in particular:

(i) Nike's DTC offering exerted only some constraint on the Parties. For example, the diversion ratios to Nike for the Parties' in-store customers were only 7% (JD Sports footwear), 2% (Footasylum

[97] FR, para 8.304 (and in relation to Nike) and adidas in particular: paras 8.298 and 8.300.

footwear), 8% (JD Sports apparel), less than 2% (Footasylum apparel);[98]

(ii) adidas' DTC offering exerted an even weaker constraint on the Parties than Nike's. For example, the diversion ratios to adidas for the Parties' in-stores customers were only 6% (JD Sports footwear), less than 2% (Footasylum footwear), 7% (JD Sports apparel), less than 2% (Footasylum apparel);[99]

(c) wholesale remained very significant for both Nike and adidas, for example accounting respectively for [✂] and [✂] of their footwear sales in 2018. Moreover, neither supplier's forecasts suggested that [✂]. Indeed, Nike emphasised the importance of having successful multi-branded retailers selling its products.[100]

233. Moreover, the CMA submitted that the suggestion that this caused JD Sports prejudice is unparticularised and unsustainable. Indeed, as JD Sports acknowledges, the Parties themselves argued that the constraint from DTC would become *"significantly"* stronger over the next few years.[101]

234. The CMA argued that JD Sports' contention that the CMA came to an irrational conclusion as regards the future development of DTC was misconceived for the following reasons.

235. First, when providing forecasts for the relative growth of DTC versus wholesale, both Nike and adidas provided combined data covering both footwear and apparel. The CMA reasonably considered that it was appropriate to rely on that

[98] FR, paras 8.298, tables 8.5, 8.6, 9.5, 9.6, 9.214.
[99] FR, paras 8.300, tables 8.5, 8.6, 9.5, 9.6, 9.218.
[100] FR, paras 8.401, 8.408.
[101] Response to Provisional Findings, para 25.

data when assessing whether the relative importance of DTC was likely to change significantly in either the footwear or apparel market:

(a) the data provided by Nike and adidas for the wholesale/DTC ratios to date distinguished between footwear and apparel, but [✂];[102]

(b) information obtained from the suppliers showed that their initiatives for developing their DTC offerings [✂]. As such, they did not suggest that there would be any material difference in the rate of growth between the two.[103]

236. Accordingly, the CMA considered that it was appropriate to rely on the existing combined data in this context.

237. As to JD Sports' second argument, the CMA said that it expressly took account of the possibility of a greater shift to online sales in light of COVID-19. The CMA found, however, that whilst a greater shift to online sales was one potential outcome, it was unclear whether any such shift would endure once stores reopened and other restrictions were lifted.

238. In any event, the CMA further found that even a more permanent shift to online sales would not necessarily strengthen the overall competitive constraint faced by the Merged Entity. The CMA argues that was not an irrational conclusion in circumstances where:

(a) a more permanent shift to online sales would not necessarily lead to a growth in DTC (relative to wholesale). Whether it did would depend on how the in-store customers who switched to online spread across the different online retailers. As the CMA observed in the FR, the Parties'

[102] FR, tables 8.12, 8.13, 9.8, 9.9.
[103] FR, paras 8.427–8.430.

customers may value the differentiated multi-brand offerings of the Parties over the single-brand propositions of Nike and adidas;[104] and

(b) even if Nike and adidas became stronger competitors, this would not in itself entail an increase in the aggregate constraint faced by the Merged Entity. Whilst the constraint posed by some retailers may strengthen as a result of any permanent shift to online sales, the constraint posed by other (e.g. those who currently offer a stronger in-store constraint) may weaken.[105]

(b) The Tribunal's analysis

239. The issues arising in this part of Ground 3 overlap to a very considerable extent with those in Ground 2, namely that the CMA had erred by declining to inform itself about the post-Merger constraints from the principal suppliers' DTC offerings, and in particular how those constraints might be impacted by the COVID-19 pandemic. This error, according to JD Sports, rendered irrational the CMA's finding that "*the evidence does not show with sufficient certainty*" that the suppliers' DTC offer across their channels will become a significantly stronger constraint in the foreseeable future.

240. The CMA assessed the likely growth of DTC.[106] It examined the suppliers' public statements, internal documents and responses concerning future plans. It noted internal forecasts and Nike's and adidas' views about the impact of COVID-19, contained in their responses to the s. 109 notice of 9 March 2020. It relied on the suppliers' pre-COVID-19 forecasts concerning the DTC-to-wholesale ratios and tested them against several scenarios. It concluded that,

[104] FR, para 8.420.
[105] FR, para 8.447.
[106] FR, paras 8.402 to 8.432.

notwithstanding the uncertainties, there was likely to be only a slightly increasing DTC-wholesale ratio.

241. In support of its conclusion, it stated:

> "Nike's and adidas's DTC offer is currently present in both the in-store and online segments of the market. We consider that it is likely that their DTC offer will continue to grow strongly in the UK, predominantly online. In particular, there is evidence, as set out in Table 8.14 and Table 8.15, which indicates that such growth is likely reflective of general growth in the market and that the ratio of DTC sales to wholesale sales will not change significantly in the foreseeable future. We consider that the initiatives which they are undertaking in order to achieve their projected DTC growth do not appear to amount to a substantial repositioning of their offering."[107]

242. However, the CMA failed to investigate whether, and to what extent, the unfolding pandemic might affect the DTC-wholesale ratio. The circumstances and effect of its decision not to do so are set out in detail in our findings relating to Ground 2. For the same reasons as we set out there, we find that the CMA acted irrationally and thus erred in law in deciding not to request information from the suppliers on the impact of COVID-19 on the likely post-Merger constraints from the suppliers' DTC channels.

243. For the sake of completeness, we agree with the CMA that there was nothing inappropriate in the CMA's relying on combined apparel/footwear data to determine the likely impact in either product line, for the reasons argued by the CMA in paragraph 235 above.

(c) Conclusion on Ground 3

244. We therefore conclude on the first and second parts of this Ground 3 that the CMA came to rational conclusions on the evidence available to it that Frasers' Group would not, within the requisite time period, pose a sufficient competitive

[107] FR, para 8.431.

constraint to the Merged Entity, and that Nike's and adidas' monitoring and responsive measures would not be able to restrain the Merged Entity from deteriorating its PQRS offering.

245. In relation to the CMA's conclusion as to the possible effects of the COVID-19 pandemic on the ability and incentives of Nike and adidas to increase their DTC operations to the disadvantage of the Merged Entity, we find that, as with our findings on Ground 2, the CMA acted irrationally in that it did not have the necessary evidence from which it could properly draw such conclusions.

K. OVERALL CONCLUSION AND REMEDY

246. For the reasons given in this judgment, we have come to the following unanimous conclusions.

247. We dismiss JD Sports' Application under Ground 1 and under Grounds 3 (1) and (2) but uphold the Application under Ground 2 and under Ground 3(3) to the extent that the latter concerns the likely effects of COVID-19.

248. The FR is quashed in so far as its conclusions are based on the CMA's assessment of the likely effects of the COVID-19 pandemic (i) on the relevant markets, (ii) on the Parties and/or the Merged Entity, and (iii) on the competitive constraints likely to apply to the Parties and/or the Merged Entity. 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 as a whole and we therefore remit the case to the CMA for reconsideration in the light of this judgment.

249. In relation to the payment of costs in this case, if the parties are unable to reach agreement, we will in due course invite submissions and make appropriate directions.

Peter Freeman CBE QC (Hon) Paul Dollman Tim Frazer
Chairman

Charles Dhanowa O.B.E., Q.C. (Hon)
Registrar Date: 13 November 2020