IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1354/4/12/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Wednesday 23rd September 2020

Before:
Peter Freeman CBE QC (Hon)
Paul Dollman
Tim Frazer
(Sitting as a Tribunal in England and Wales)

BETWEEN:

JD Sports Fashion plc

Applicant

v

Competition and Markets Authority

Respondent

A P P E A R AN C E S

Mr Brian Kennelly QC and Mr Alistair Lindsay (On behalf of JD Sports Fashion plc)
Ms Marie Demetriou QC and Mr Ben Lask (On behalf of the CMA)

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Wednesday, 23 September 2020

(10.30 am)

Housekeeping

THE CHAIRMAN: Good morning, everybody. Can I welcome you to this remotely conducted, no longer unusual, hearing format.

I think, Mr Kennelly, you are going to open but, before that, could I just mention some housekeeping points.

MR KENNELLY: Of course.

THE CHAIRMAN: Very helpfully, we have had last minute amendments to the bundles. We do appreciate the striving for completeness and accuracy, I am very grateful for this. Can I take it that the flow of amendments has now ceased? It is getting a little bit difficult for us to deal with them, particularly as my other two panel members are operating remotely and are not in the building. Can I take it that process is now complete and we have the bundles as they should be?

MR KENNELLY: Sir, yes.

THE CHAIRMAN: That is point one. Thank you.

There is a certain amount of material in both of the sets of documents which is confidential. There is stuff about Footasylum and there is material that is obviously confidential to JD sports. Obviously, we want to deal with this in a sensible normal way, and I am sure counsel have this very much in mind. We may have to go into a closed session to deal with some of the points that arise so if you could give us an indication of when you think that might be, that would be helpful.

MR KENNELLY: Of course, sir. Yes.

THE CHAIRMAN: Transcription. There will be an electronic, uncorrected transcript every evening available. Please correct this as quickly as you can. I can't thank the transcript writers for their efforts because they are not in the building, but I do so remotely anyway.

Finally, the way we are working, as I mentioned, Mr Frazer and Mr Dollman are not in the building. They are remote. I am in the CAT. We are working off both hard copy and electronic bundles. We will endeavour to make this as normal and as effective as possible and, as you have very helpfully given us an agreed timetable, we will stick to that if we may. We will have the normal breaks after about an hour, hour and a quarter, in each session, I think. It partly helps the transcript writers; it also helps me, and you no doubt.

So, I think we will aim to go on until 1 o'clock with a break mid-morning, around about 11.45, that sort of time.

Unless there is anything else you want to raise by way of housekeeping, please now proceed.

Opening submissions by MR KENNELLY

MR KENNELLY: Good morning.

May it please the tribunal, I appear with Mr Lindsay for the applicant, JD Sports. My learned friends Ms Demetriou QC and Mr Lask appear for the CMA.

We have dealt with housekeeping but, just to be absolutely sure, you should have four hearing bundles and three authorities bundles. I can see myself they are there.

On my submissions generally, my overall focus will be on footwear. Unless I say otherwise, the same point is being made for apparel. The reference for apparel are in the skeletons and the pleadings. I will proceed on that basis.

Therefore, sir, if I may get straight into the grounds.

I want to open on ground 1.1. For this, my submissions will be under three headings. First, I will set out the correct approach in law to establishing an SLC. Second, I will seek to explain why it was so important to follow that approach in this case, where suppliers limit the scope for competition on key parameters. Thirdly, I will then turn to what the CMA actually did in this case and why we say it fails to show the necessary chain of causation to an SLC.

With that brief introduction, if I may turn then to the law and the causation test.

I appreciate that the provision of the Enterprise Act is very familiar to you, so I will just take you to it very briefly, if I may. It is in the authorities bundle 5A, tab 5.1.1, section 35.1(b) of the Enterprise Act.

As I say, a provision very familiar to all of us but it is worth looking at again just to recall the importance of causation in satisfying the legal test. One sees in section 35.1(b) that:

"The duty of the CMA is to decide the question of, where a relevant merger situation has been created, whether the creation of that situation has resulted, or may be expected to [and I emphasise the word] result, in an SLC."

You see that reflected in the guidelines. The Merger Assessment Guidelines, which are in the same bundle behind tab 5.2.1. If I can take you, please, to paragraph 4.1.2 of the guidelines under the heading, "what is an SLC?"

4.1.2 says:

"Competition is viewed by the authorities as a process of rivalry between firms, seeking to win customers' business over time by offering them a better deal."

And then this:

"Rivalry creates incentives for firms to [and I say here these are referring to parameters of competition] cut price, increase output, improve quality, enhance

efficiency or introduce new and better products."

So it is rivalry on parameters. That is the focus.

Below that at 4.1.3, if you can skip down, please, four lines to the sentence beginning:

"Some mergers will lessen competition but not substantially so, because sufficient post-merger constraints will remain to ensure that rivalry continues to discipline the commercial behaviour of the merger firms."

That makes the obvious point that the reduction in competition in a merger is not sufficient of itself to lead to an SLC, it is necessary to look at the other constraints.

The rivalry that is referred to in that last paragraph, that last sentence, is, we say, rivalry on particular parameters.

Then it goes on:

"A merger gives rise to an SLC where it has a significant effect on rivalry over time."

Again, we say rivalry by reference to parameters of competition.

"Therefore [and this is important] on the competitive pressure on firms to improve their offer to customers will become more efficient or innovative.

"Mergers giving rise to an SLC will be expected to lead to an adverse effect for customers."

The adverse effect for customers, that is what the CMA is required to seek.

"Evidence [and this is important] on likely adverse effects will therefore play a key role in assessing mergers."

That emphasis on evidence is important, we say, in this case in particular.

Over the page to the last paragraph of the guidelines that we will take you to now, it is 4.1.5, and of course this is the unilateral effects case, the first bullet:

"Unilateral effects. These may arise in horizontal mergers where the merger

involves two competing firms and removes the rivalry between them, allowing the merged firm profitably to raise prices."

Of course, that is the classic example of a unilateral effects SLC, the raising of prices. The reference to prices, again, is a reference to a parameter of competition, but that is not the only parameter of competition, as we have seen.

So, if you can put away, members of the Tribunal, the guidelines.

THE CHAIRMAN: Just before we do, can I ask you, Mr Kennelly, what is your view of the status of these guidelines? And here I have to declare an interest because I think I am personally, in part, responsible for this particular 2010 version. I remember the process of drafting it very well. This was an attempt to capture existing practice and to lay down some guidelines for how merger cases would be assessed, bearing in mind that every merger case is different and that the Commission, as it was then, reserved the right to depart from them in particular cases.

So what, in your view, is the legal status of these guidelines?

MR KENNELLY: Sir, in common with all guidelines, as a matter of public law they are not strictly legally binding in the manner of a statutory legal requirement. That is reflected in paragraph 1.5 of the guidelines that says in terms that the authorities may deviate from them where it is appropriate to do so.

THE CHAIRMAN: Yes.

MR KENNELLY: But where the authority has not chosen to depart from the parties' own expectation, which will be vindicated in law, the authority will adhere to them.

There is no suggestion in this case that the CMA has chosen, for particular reasons in this case, to deviate from these guidelines.

THE CHAIRMAN: So you would say there is an expectation in law that the CMA will

follow the guidelines unless it clearly departs from them. That is your case, is it?

MR KENNELLY: Indeed**.** And the CMA has not said that, in this case, there was particular reasons and it was appropriate to deviate from them. So they are bound by them.

MR FRAZER: Can we just -- sorry to interrupt, Mr Kennelly, can we just explore that a little bit.

You are saying that the guidelines are not binding but that the law requires that, if the CMA doesn't declare that it is departing from the guidelines, they become binding because there is no alternative for the CMA but to follow them; is that correct?

MR KENNELLY: Yes. Again, it is a matter of an expectation, an expectation upon which the parties may rely, in common with all parties, in merger investigations. That is the purpose of these guidelines. The guidelines have built within them a large degree of flexibility which the CMA needs to have, but where the CMA has decided to adhere to them and hasn't chosen to deviate from them, the CMA is bound to follow them. So they create an expectation that they will be followed.

Again, in common with general public law principles, unless they can show some compelling reason why they should be permitted to deviate from them, they must adhere to them.

It has not been suggested by the CMA at any point in these proceedings that they should be allowed to deviate from the guidelines or that the guidelines don't bind them in any way. They assumed that they are bound by the guidelines, with all of the flexibility that the guidelines contain for the purposes of this case.

THE CHAIRMAN: Are you not at risk of trying to convert an alleged error of

assessment into an alleged error of law?

MR KENNELLY: That is the submission that is made against me, sir, certainly. But, no.

Really, for this purpose, the guidelines, sir, have only to reflect the requirement for causation which is in the statute. The guidelines provide, really, a gloss on the statute. My real reliance is on the word "result" in the statute. I can't get home unless I can really persuade you that this is a requirement for causation which is required by the Act itself. The important point here is 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.

THE CHAIRMAN: Can we just go back to that statutory definition, because I think we are with you that that is the legal basis for all of this argument.

This is a completed merger but a merger that was frozen, if you like. So the market effect of the merger has never been observed because the companies have been held separate.

MR KENNELLY: Yes.

THE CHAIRMAN: Right. In those circumstances, what is the meaning of "has resulted"? Because there is no lessening of competition to observe. So aren't we in to the second limb, which is "may be expected to result", which is what you would see happening if the merger were allowed to go ahead?

MR KENNELLY: Sir, yes.

THE CHAIRMAN: So it is the "may be expected" we should be focusing on, is that right?

MR KENNELLY: Indeed**.** Indeed, yes.

Just to address the tribunal's concern that we are seeking to elevate guidelines to some form of statutory requirement, as I said --

THE CHAIRMAN: It was just a question, just a question, Mr Kennelly, not a concern.

MR KENNELLY: Indeed. As I said a moment ago, our focus is on the statutory test. In order to show that, it is not a question of assessment, it is a question of establishing the chain of causation, addressing the steps which need to be addressed in order to show the chain of causation through to an SLC. In addressing those steps, in making the assessments necessary at each stage, the CMA is accorded a wide margin of appreciation and we don't seek to second guess their analysis under this ground for that purpose. We are focusing on whether the steps have been addressed at all, which is why this is an error of law and not an attack on any factual assessment made by the CMA.

THE CHAIRMAN: Please continue.

MR KENNELLY: Of course, the CMA's case, which I think has been reflected in the questions put to me, is there is no need to focus on competitive constraints by reference to a parameter of competition, an overall view of the market is sufficient. We say that they, as I have said, need to examine constraints on particular identified parameters, because the parameters are the foundation of the SLC analysis. We make the obvious point that rivalry doesn't happen in a vacuum. It takes place on specific parameters of competition. The lessening of competition and any adverse effects on customers take place on specific parameters. Only by looking at the parameters can the CMA show whether the merger will result in an SLC or not.

That is why the chain of causation required by the Act must be demonstrated by reference to at least one parameter of competition. We say the CMA is required to show that there was competition pre-merger on a parameter of competition that will be lost through the merger and will not be replaced by

actual or potential competition or other constraints on that parameter.

The CMA is not --

THE CHAIRMAN: Sorry to keep interrupting you. A parameter just means a way in which parties compete, is that right?

MR KENNELLY: Indeed**.**

THE CHAIRMAN: A long word for a simple thing.

MR KENNELLY: Indeed, sir. Not the only long word for a simple thing in this area. The important point, sir, is that, as you have said, as you have anticipated, there is no magic to the word "parameter", it is simply drilling down into how competition takes place. But it is an important word and it is an important requirement to drill down, because otherwise one has simply a broad brush analysis of the market without any real understanding of how competition is affected by the merger at all.

THE CHAIRMAN: Economists tend to use price competition as a proxy for everything else and then they break that down into other forms, discounts.

MR KENNELLY: Yes.

THE CHAIRMAN: That sort of price competition. Conditions of price, conditions attached to price, and then you get into innovation, choice, and other ways of competing.

MR KENNELLY: Indeed**. Indeed.**

It is important to see what the CMA says about this requirement to analyse things by parameter. For that we need to look at their skeleton at paragraph 19. This reflects their approach to the legal test and it is reflected in their words in the final report. At 19.1 the CMA says that they:

"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 entities' offering."

Then at 19.2 -- and this the particular focus of my submission now -- it found there were various aspects of PQRS (price, quality, range, service) 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.

It says:

"These included price, delivery, customer service and innovation."

The cross-reference is given to the final report, to which I will return.

If we just take that in stages, keeping the skeleton open. First, there is no reference here to the need to examine the closeness of competition, pre-merger, on any particular parameter. In the final report the CMA did identify some competition on certain parameters but it failed to show that the parties were close competitors on any of them. In fact, as you will see, the evidence showed they weren't close competitors on these particular parameters.

The CMA failed to address it either way. The closeness of competition was not addressed on any particular parameter. What that means is that the CMA didn't have a starting point for the causation question on any particular parameter. That starting point has to be how much competition was there in the first place.

Secondly, in 19.2, you see the CMA says:

"It is sufficient to find that the merged entity would deteriorate its offering generally. There is no need to look at the impact on specific parameters."

In fact, for the parameters that they mention, delivery, services, customer service and innovation -- we will come back to price separately -- but for those three there is no evidence that the parties even competed with each other on those three parameters in the first place.

Then we see 19.3:

"In these 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."

So the simple fact of the merger meant that the merged entity would have the incentive to deteriorate PQRS on all of these parameters. As far as the CMA was concerned, there was no need to show the effect of the remaining constraints -- and we will come back to supplier constraints -- on any individual parameter. They were just all lumped in together.

The CMA doesn't accept, it appears here, that there was any need to show, on any particular parameter, that the merged entity had in fact an incentive to inflict that deterioration on customers.

So we say that, even if the CMA had a proper starting point, so even if they had identified the closeness of competition on any particular parameter pre-merger, they never demonstrated what change the merger would bring to the merged group's incentive and ability to deteriorate its offering on that parameter.

Then at 19.4 they say:

"The subsequent analysis showed that the merger would remove a direct, significant constraint between the parties and that remaining post-merger constraints would not be sufficient."

8.48 -- we will come back to that. Then this:

"The GUPPI analysis revealed a strong overall incentive on the part of the merged entity to deteriorate its offering without, it acknowledges, distinguishing between individual PQRS parameters."

But the GUPPI, by definition, doesn't distinguish between parameters, as they acknowledged, and it ignores the supplier constraints, which is a critical factor

in this case. I will take you, later, to the parameters that are in issue and why the need to examine them individually was so great in this particular case.

THE CHAIRMAN: Mr Kennelly, you are not disputing the CMA's finding that the parties were close competitors, am I correct?

MR KENNELLY: Overall, no, we are not contesting that.

THE CHAIRMAN: No. You are putting forward an argument that it should be more granular and you should be able to identify the closeness of competition in relation to each of these ways of competing, is that your argument?

MR KENNELLY: It is. Because the fact that they are close competitors alone cannot be sufficient to make out an SLC.

THE CHAIRMAN: No, okay. But if they are close competitors then there must be some aspect in which they compete and are close rivals, and that must be in the perception of customers.

MR KENNELLY: Indeed, sir. Absolutely. And that is why it is so important to focus on those parameters where there is evidence that they do compete on parameters that are important to customers. And, in respect of those parameters, identify what effects the merger will actually have. Because when one digs down into those parameters, one sees that the merger will not produce adverse effects for consumers. It will not do that and the CMA did not address that in the final report. That is the missing link -- the second of the two missing links in their chain of causation.

Just on the point of the parameters that are important to customers, those are actually summarised in the final report and that is a good background for the submission I am about to make. So if you could turn, please, to the final report. The particular bit I want to look at is 8.200 and 8.204.

THE CHAIRMAN: 8.2?

MR KENNELLY: 8.200 to start.

MR FRAZER: Sorry, Mr Kennelly, did you say 8.208?

MR KENNELLY: I am sorry, 8.200.

MR FRAZER: Okay, thank you. Sorry.

MR KENNELLY: These are parameters that are important to customers. I can move over it very quickly, because it is not in dispute. 8.200 refers to prices. Halfway down 8.200 it says:

"Our online survey suggests that price is the most important factor for nearly half of Footasylum's customers and two fifths of JD's."

Then, below that:

"What else is important to customers?"

8.201:

"Quality and service to be of value."

In fact, more of JD's in-store footwear customers said the main reason to shop was the quality, range or service provided, rather than price.

Then, 8.202, product range is also important. So we have had price, quality, service, and now product range.

Over the page to 204, overall the conclusion:

"The customers gave a range of price and non-price elements."

So that is the summary of what was important to customers, and that reflects the parameters that we will come on to look at.

Now, in the decision -- and there is no need to turn it up for this purpose -- the CMA mentioned some examples of parameters where retailers compete and you will see in the report several passing references to other parameters. It is important to focus on the parameters for which the CMA actually cites evidence. As we read the final report, there are only seven parameters where

there is any specific evidence at all of actual competition between the parties. We list them at paragraph 62 of our skeleton, so that is where we need to go now. If the tribunal could go to paragraph 62 of our skeleton in volume 1.

Before we get in to the detail of these parameters, just for clarity, for the purposes of ground 1 I am going to assume that there was a proper evidential basis for the finding that the parties competed on these seven parameters. But, as I said a moment ago to the chairman, even with that assumption we say the CMA failed to establish the chain of causation ending in an SLC on these seven parameters. Before we get into them, I want to make four overall points.

The first is, as I said, there was no attempt to establish the closeness of competition between the parties pre-merger on any of these seven. That is how you understand how much competition there was to lose through the merger. That is particularly important where the market share increment is so low. The CMA acknowledges it is fairly low in the decision at paragraph 27.

Just to see that point about the increment, could you please turn up the final report at paragraph 8.130. It is confidential, so I can't read the figures out, but the tribunal can read them. 8.130, line 3.

THE CHAIRMAN: I am not sure we can read them either.

MR KENNELLY: Line 3 for footwear. So you see the increments from the merger of Footasylum.

If you go to 9.93 you see it for apparel. 9.93, fourth line down.

So the market share increments are indeed fairly low. That is an understatement.

My second overall point, before we get into the report on the parameters, is there is no attempt to show that, for any of these seven parameters, the suppliers would be likely to permit the merged entity to offer worse PQRS and that the merged entity was likely to do so, even if the suppliers permitted it.

The third overall point is on the student discounts parameter, which we will come back to. There was no evidence that the existing competition from other retailers would be sufficient to replace the loss of competition caused by the merger.

My final overall point, such evidence as there was of competition was at the local level only. There was no evidence to show that these local instances affected outcomes for customers at a national level. So even if these instances of local competition disappeared, there is no evidence that would affect customers at a national level.

With those opening remarks, can we turn to the final report itself. If you could go, please, to the power of the supplier. We see that, first of all, the importance of the suppliers to the parties, that is at page 140 table 8.1.

When we talk about suppliers, members of the Tribunal, we mean Nike and Adidas. You see that from table 8.1:

"Suppliers' share of the parties' sports, casual and footwear revenues for JD and for Footasylum."

THE CHAIRMAN: Which version of the final report are we working off, please?

MR KENNELLY: Forgive me, it is the bundle page --

THE CHAIRMAN: It is the 7 August version, is it, as disclosed?

MR KENNELLY: Yes. Yes, it is.

THE CHAIRMAN: Right, okay.

MR KENNELLY: The bundle numbering, sorry, is -- sorry, the internal page number is 136.

THE CHAIRMAN: Yes.

MR KENNELLY: The bundle number is 140.

THE CHAIRMAN: Okay. If you could just bear the internal page numbers in mind

for me, because I have my own copy of the report.

MR KENNELLY: Of course, sir.

THE CHAIRMAN: Thank you.

MR KENNELLY: That is table 8.1.

Then go, please, to 8.96:

"The CMA acknowledges that suppliers play an important role in shaping retail competition. In particular, we consider that Nike and Adidas impose the most restrictions and have the greatest influence, given their importance to retailers in this market."

Turning then to the first parameter. The first parameter is price. The CMA examines this in the context of the retailer -- sorry, the supplier constraints from paragraph 8.67. Please go to paragraph 8.67, which is internal page number 111.

From this paragraph up to 8.118, the CMA cites -- these are relied on in the CMA's skeleton in the passage I took you to earlier, so the CMA relies on this against us on this ground. In 8.67, if the tribunal could read that to itself then I can make a short point on it afterwards.

(Pause)

What this tells us is that this is not a typical case where price, as we ordinarily understand it, is the main parameter in play. The retailer's price by reference to the RRPs, save in respect of some discounting -- so it is to discounting we now turn and we see the level of discounting at 8.69. We see that, notwithstanding the use of selective distribution RRPs, there is discounting and they refer to JD's clearance and non-clearance discounting. You see the split between the percentage of clearance discounting and non-clearance discounting.

We say it is clear from this that only clearance discounts are significant. But what,

we ask, is clearance discounting? It is shifting stock to free up space. That is driven, obviously, more by inventory needs than by competition.

To engage with that point, all the CMA has is footnote 335 on this page:

"Regarding clearance discounting, we consider it is driven by a range of factors, including product, life cycle, seasonal changes. However, we also consider that competition influences clearance discount, because where seasonal changes in products apply equally to all retailers, multiple retailers may engage in clearance discounting and compete with each other. As such, we consider the merged entity could reduce such discounting post-merger as a result of any loss of competition between the parties."

That is it.

First of all, the CMA recognises that clearance discounts are driven by factors other than competition, particularly inventory management. That is the product life cycle and seasonal changes. There is no attempt to assess the relative importance of inventory management as opposed to local competition as a driver of clearance discount decisions. There is no attempt to ask how frequently the parties find themselves trying to clear similar products at similar times in nearby stores. All that footnote 335 says is that the merged entity could reduce discounting. That is not a finding that it had the incentive and the ability to do so for SLC purposes. It is just a narrow finding about ability.

Every retailer, or almost every retailer, gets to set some PQRS parameter.

Finally on this parameter, you see the competition on clearance discounts is local but the SLC identified by the CMA is national. The point we make at footnote 84 of our skeleton. That is clearance discounts. The only evidence of any competition relating to price at all is one example of monitoring on non-clearance discounts; promotional discounts and student discounts.

Now, non-clearance discounts are tiny, as you have seen in the redacted number at 8.69. Let's look at them nonetheless. Promotional discounts. Where is the evidence? It is at 8.180(d), which is on internal page 161. All they have here is JD monitoring Black Friday discounts offered by Footasylum, and a number of other retailers also. You can read 180(d) from 161 going over to 162. There is no evidence of any action taken by JD in response to the information that they are noting through their monitoring. There is no evidence that the remaining retailers, post-merger, would be insufficient to constrain the merged entity to continue to offer materially similar Black Friday discounts over the next two years. None of that.

On student discounts, the evidence is in 8.180(g), which is on page 163 internal numbering. There are internal documents discussing and monitoring competition in the student customers segment. We accept that this shows that the parties are competing but there is no evidence, even here, that the merged entity would deteriorate the discounts to students significantly. We say it is very unlikely that the merged entity would deteriorate discounts to students significantly because of ASOS, because it is ASOS that is the dominant operator in relation to student discounts. You have that in G(iii) on that same page, 163. The CMA hasn't disputed that.

The constraints on this parameter are therefore different from other parameters where JD is a more powerful player. Even if Footasylum disappears, ASOS could fill the gap here. There was no examination of that fact at all. What we in fact see, instead of a proper examination, is footnote 587 where, second line, the CMA says:

"We have not assessed in detail the segment for students."

We would say fair enough. It is less than 1 per cent of JD's sales. But if it is not

going to be assessed properly, it can't be used as the basis for an SLC finding. So we go to the next parameter, where there is evidence of some competition between the parties. That is range. You saw the importance of range to customers. But range is the area where the suppliers exercise quite extraordinary levels of constraint. For that, you need to go back to the final report at 8.30, internal page numbering 100. These are the findings of the CMA in relation to range.

To start with, suppliers -- and in fact it may be quicker if the tribunal read 8.30 and then went on to read 8.32.

THE CHAIRMAN: Mm-hm.

(Pause)

This is competition on quality and service derived from selective distribution incentives, is that right?

MR KENNELLY: The short point here, sir, is simply that they control the supply of products to the retailers. At 8.32, a standard feature is that the supplier agrees to supply only to retailers who meet certain specified criteria; financial and quality requirements. For that you see footnote 295, which is confidential, and you see the criteria, for example set by Adidas, and the kind of criteria it requires before it will supply its goods to retailers.

What you see are extremely detailed criteria from Adidas and, on the same footnote, you see the Nike criteria. For Nike, one of the criteria to become a Nike authorised retailer -- this is just one of them -- is the rest of that redacted passage, which is about six lines long. Please read that also.

(Pause)

So not only are the criteria imposed by suppliers incredibly broad and detailed, they are also complicated in practice. You see that in 8.36:

"The process by which the suppliers determine a given retailer's product access may be quite complicated in practice."

Skipping down six lines from the bottom of that same paragraph on page 102:

"The criteria on which suppliers classify certain retailers into certain categories and tiers is not always fully transparent and it is not always clear how this impacts the products that retailers can access. Nike and Adidas' segmentation policies appear to be less transparent than other suppliers, which means it is harder for retailers to understand and engage with such policies. The criteria are incredibly detailed and broad and they are applied in a non-transparent way, which has an obvious impact on the power that the suppliers have over the retailers."

You see that again in footnote 303 on that same page, 102; the CMA analysis and segmentation policies. Someone is saying something about how they are shown the products that Nike and Adidas choose to show, so they only get to see the products that they are allowed to see, never outside of their distribution allocation.

At 8.37, very limited ability for retailers to change their allocated segmentation category once it is unilaterally determined by supplier. Some suppliers -- and you have the names there which you can see -- include broad -- and you see the redacted words -- cancellation provisions within their standard terms and conditions, enabling them to do that thing which is redacted at the end of 8.37.

Then if you go, please, to 8.73 and range. Now we are dealing specifically with this criterion. 8.73 on page 112:

"In relation to product access, suppliers vary in the level of restrictions they impose on retailers."

And then:

"Nike and Adidas' segmentation policies ..."

And we see that they are the only two ones that count:

"... are materially more restrictive compared to those of smaller suppliers. In particular, the evidence suggests that, compared to smaller suppliers, Nike and Adidas are ..."

And you can read the rest of that sentence, which goes to a point I shall make later about the fact that these suppliers ration the premium products to retailers.

Pausing there, you will have seen from the papers that access to the premium products is a life or death matter for the retailers, because it is the premium products, supplied only or mainly by these suppliers, that determine footfall and activity both in the bricks and mortar stores and the online shops. It is not in dispute that access to premium products is a key factor in retail competition in this market.

Then footnote 338, you can see what third parties have said about trying to access high end products and the way in which the suppliers deal with them. Footnote 338.

MR FRAZER: Mr Kennelly, I don't want to jump around but, just whilst we are at 8.37 that you pointed to us --

MR KENNELLY: Yes.

MR FRAZER: -- which is that it is very difficult for a retailer to change an allocated segmentation category.

MR KENNELLY: Yes.

MR FRAZER: But later on in your grounds you argue that Frasers Group indeed could have changed its allocation category. Will you be dealing with that apparent conundrum when you come to that ground?

MR KENNELLY: I will indeed. What that demonstrates -- and there is no

inconsistency between the two -- the key fact in this case is the power of the suppliers. That is the overriding factual point which ultimately leads to the CMA's decision being vitiated.

The Frasers Group elevation strategy is as a result of the power of the suppliers, because they need access to premium products and they are required to undertake a massive investment and effort in order to persuade the suppliers to give them the products they need to survive. The word "survive" is appropriate in this context. We will come to the efforts they have made -- successful efforts they have made -- to attract premium products to a greater extent. The fact they are getting greater access to premium products is not in dispute in this case but it is entirely consistent with the power of the suppliers to control range.

The submissions from Frasers Group on the way the suppliers control product range, we rely upon them for the purposes of this ground.

THE CHAIRMAN: Mr Kennelly, subject to the point about direct to customer sales, which I am sure you will come on to, it is not a one way relationship between these brand owners and retailers customers. Each needs each other, surely? The retailer needs access to the high quality brands but the brand suppliers need people to display and sell their products. They are not in a position to arbitrarily withhold supplies.

MR KENNELLY: Absolutely.

THE CHAIRMAN: You have described it as mephistophelean pact. I mean, it does seem to work.

MR KENNELLY: Remember, the point we are discussing here, sir, is the parameter. The parameter of competition between the parties which, on the question of range -- we will come to quality and the same point can be made about that. The question is how much space do the suppliers leave for the

parties to compete on the question of product range and, post-merger, to what extent will the merged entity be able to deteriorate its range in view of the supplier's control, standards, monitoring and enforcement? That is why it is so important that suppliers' constraints are so strong, and will continue to be strong, that they plainly remove any potential for SLC that will come post-merger. It is the CMA's failure to engage with that that I rely upon.

So for the purposes of this, we are looking only at the extent to which the CMA has examined competition on the parameter and product range. That is why it is so important to look at the supplier constraints because, on product range, those constraints are extremely strong.

THE CHAIRMAN: You are saying that the constraints imposed by the suppliers means that there isn't really any competition between retailers, because there is no change they can make to attract customers. Is that your proposition?

MR KENNELLY: On product range, yes. But that is not -- I don't need to go that far, sir. All I have to show you is that, on product range, the scope for a competitive detriment, a PQRS detriment for consumers, is extremely limited. It was therefore for the CMA to examine, post-merger, really, whether there would be a deterioration of PQRS harming customers on this parameter and they failed to do it. Their failure to do it is all the more striking because of the supplier constraint on this parameter. That is the point.

Sir, this isn't just background factual material. The important point from the supplier constraint is that it is all one way. Sure, it is a two way street in the sense that the suppliers need the wholesalers, but what you don't see in these thousands of pages is any instance where the wholesalers are defying the suppliers or pushing back or disagreeing with them or querying their decisions. The suppliers are omnipotent and there is no evidence of any push back from the

retailers. That is a really striking factor in analysing the competitive constraints in this market.

On that same theme you see -- and I have taken you to 8.73 in footnote 338, but then also 8.73. This is the point going to Mr Frazer's point about Frasers Group, because at 8.73 we obviously make the point that we made to the CMA about JD's experience in dealing with the suppliers, or the brands as they are called. You can see that in (a).

Then (b) we have Footasylum's submission on what the retailers can get from the suppliers. Then Frasers Group refers to its own difficulties in accessing product from the suppliers. Then, importantly, at the end of (c) an example of the suppliers enforcing their standards as against Sports Direct. That is an important point we come later to look at; whether the suppliers actually enforce these extremely onerous standards against the retailers, which the CMA says is not clear.

You see then at footnote -- over the page at 114, the footnote at 343. Again, it is redacted but it is an important point about the terms and conditions imposed by the suppliers and the arbitrary nature in which they can be applied. That is very important again in terms of keeping the retailers off balance in their relationship with the suppliers. The fact that such terms and conditions exist tells you about the power relationship between them.

THE CHAIRMAN: What is your answer to paragraph 874, which is in terms of incentives? That is the CMA's view of the three (a), (b), (c) points that you just referred to.

MR KENNELLY: There are two points to be made here. First of all -- and I would rely on this paragraph. The first is that it is the suppliers' strategic decisions that count here. The restrictions reflect their incentives both in respect of DTC

and wholesale. So it is open to the suppliers to restrict access of product to wholesale if they wish to divert products to DTC. They are free to do that and the retailers can do nothing about it.

It says:

"The suppliers' incentives in this regard are unlikely to change significantly for the foreseeable future."

Pausing there, the suppliers' incentives, as described currently, are sufficient for my purposes. We make the point separately, but it does need to be made for this purpose, that their incentives are in fact changing because of Covid. That was clear to the CMA before they took the final report. But I don't need to rely on future incentives, their current incentives as at the time of the report are more than enough to make the point that I am trying to make.

Then it says:

"Selective distribution of agreements and segmentation policies could be amended by the suppliers at any time post-merger."

Again, all that tells you, members of the Tribunal, is the power of the suppliers. They can amend them unilaterally. So it goes to support the point that I have been trying to make.

Terms of the way in which they would do that, you have footnote 345. Again, I am relying here on what Frasers Group submitted to the CMA at page 114.

The CMA is drawn to make the conclusion at 8.76. If the tribunal could read 8.76 to yourselves then I can make a short submission about that.

(Pause)

In the face, we say, of these extraordinary constraints, we ask what does the CMA say about the degree of competition between the parties on range? Remember, that is the parameter we are looking at. And how will the merged

entity deteriorate its range post-merger?

We see what the CMA says, that is 8.176 (g), which is on page --

THE CHAIRMAN: 148?

MR KENNELLY: 152. These are the cross-references which the CMA provides. So we look to see what they say at 176(g), it is all redacted so I shan't read it to the tribunal. The only bit that matters is the last two lines of (g), which is the evidence of one party responding to another; one party responding to another's competitive efforts in relation to range. So you see how thin that piece of evidence is.

Then, over the page -- sorry, 154, it is the last sentence of paragraph (i). So the paragraph is 176(i). The particular line I want to rely on is at the top of page 154:

"Other documents note that Footasylum has done something ..."

Again that goes to range.

That is it on range. There is nothing to suggest any incentive to actually deteriorate range nationally, post-merger. That is not surprising, because range is entirely within the gift of the suppliers in any event.

We come then to the next parameter, where there is evidence of some competition between the parties. That is local level marketing. The cross-reference for that is in our skeleton at paragraph 62 but there is no need to turn that up.

Evidence of competition at local level marketing. 8.91. Again, unsurprisingly, we see the suppliers constraining the retailers in this regard. 8.91, about halfway down:

"There is evidence that..."

This is on page 119, sir:

"... suppliers compare and monitor retailers, store quality, app capabilities, payment

and check out, customers services, delivery ..."

And then this:

"... the quality of marketing campaigns across the retailers."

In any event, the evidence, when you come to see it, of local marketing competition between the parties is extremely thin. I shan't go to all of the references now in view of the time but you will see, for example, booking a DJ when a rival store is opening. It is limited to a handful of instances along those lines.

The crucial point here is that even this limited evidence is only local. There is nothing to suggest any incentive to deteriorate marketing nationally post-merger.

The next parameter for which there is evidence, narrowed down to monitoring evidence only. At this stage we are not looking at evidence of the parties responding to one another, it is just monitoring. Again, they are listed in our skeleton at footnote 83. There is no need to turn it up.

The next one is store refurbishment. Store refurbishment is obviously on the parameter of quality and service. You get that at 8.77.

So 8.77 in the final report, again:

"Quality and service are often related. Some aspects of a retailers offering can be placed in either category. For the purposes of our assessment, we looked to quality to capture aspects of the retail presentation of products, store environment, website design; and service to capture aspects related to customer during the process of purchase."

So store refurbishment is covered by that.

8.78, what do you see from the suppliers? They impose explicit restrictions affecting the consumer experience with regards to quality and service levels in store and online through their standard terms and conditions.

Then, skipping down to footnote 348 -- I am sorry, before I go to 348, 8.79:

"Where restrictions on quality and services are imposed in suppliers' terms and conditions, suppliers establish a minimum contractual standard beyond which retailers can, at least in principle, flex their offering."

So this is the CMA's point. The suppliers are establishing a floor. Then later on the CMA examines -- or they purport to examine the extent to which parties can compete on quality and service above the floor.

To be very clear about just how high this floor is, you see in footnote 348 JD submitting documents from Nike and Adidas. This is confidential so I shan't read it. You see the size of the particular playbook gives you a sense of the extent of the control and, really, where this so-called floor is raised.

At 8.81 even the CMA says:

"We recognise the presence of such granular requirements impacting the specific qualities of quality and service means that there may not be a deterioration of these aspects in absolute terms."

But they say there may still be an area where improvement could happen more slowly than it would have done absent the merger. Improvement would happen more slowly with the merger.

We have to say how? How is that? It is completely counter-intuitive. You see from the earlier paragraphs that the suppliers don't care if a company has an extra few per cent of market share or not. The plain evidence gathered by the CMA is that the retailers comply with their standards or else.

I haven't taken you to the Adidas requirements, which are also incredibly granular. You see those at 8.80 and there is no need to go back to these.

What you see overall is that there is, as I said, very little space for competition between the retailers on the parameters controlled by the suppliers.

THE CHAIRMAN: Are you going to take us to 883 and onwards? That is where the CMA sets out what they found --

MR KENNELLY: Yes.

THE CHAIRMAN: -- in relation to quality and service. You are going to come on to that, are you?

MR KENNELLY: Yes, indeed. In fact, that is where we are going now.

The point here, sir, is they say the retailers can in principle compete above and beyond the minimum standards. The use of broad terms gives the retailers some leeway. Again, I will comment as I go along, there is no evidence of that. There is no evidence of the existence of leeway or the exercise of leeway. They say they have seen evidence of such differentiation in practice:

"With variation on retailers offerings in important aspects of quality and service."

You see the examples listed in paragraph 8.111. We will come to that:

"It is indicative of such competition. Overall, such differentiation appears largely in areas other than in store quality."

So it is not in store quality that they are talking about. Remember, store refurb is the parameter for which evidence is actually cited but they are accepting that, for in store quality, the differentiation is extremely limited because the suppliers control that in such detail.

They say they:

"Expect suppliers to encourage competition in the courts by the use of selective distribution arrangements."

That is a different point. The suppliers are actually forcing the party, the retailers, to provide a good service by imposing their requirements. There is no suggestion that they would do that to a lesser extent to the merged entity.

Then we have the examples at 8.84. These are the following examples of

competition above minimum contractual standards. So this is what they are left with, sir. It is (a), you see what is required for online delivery. You see that some retailers can offer faster deliveries than those minimum requirements. There is a reference to some facts but there is no evidence that the parties are actually competing on this parameter. There is no evidence -- and I will be corrected if I am wrong -- that they are monitoring on this parameter or responding on this parameter.

Then (b) there is a requirement about a returns policy but it turns out that the parties offer a better period for returns than is required by the suppliers. No evidence that the parties are monitoring each other on this or responding to each other's competitive efforts on this. There is no evidence that they are competing at all.

Then (c) one of them requires that the websites meets minimum loading speeds but some retailers do better than that. Then we see at 359, here, finally, we have some evidence of some monitoring. You see it in 359, Footasylum -- it is three lines up from the bottom of 359 -- they are monitoring something and you see what they are monitoring.

That is it. That is it for the evidence of the parties competing with each other. And this is just the first stage of the causal chain, the pre-merger competition. This is the only thing they have showing even monitoring, still less the parties responding to one another based on what they have learned from their monitoring.

The final parameter where there is evidence of competition, although again it is only monitoring, store openings and closures. Our short point here is that Footasylum was highly unlikely to be expanding its store state, given its level of debt and the problems on the High Street. I will come back to those under ground 2. I will give you some references, again, members of the Tribunal,

because here, again, the suppliers exercise a powerful constraint. There is confidential material relating to one of the suppliers at paragraph 8.85 of the final report -- this is just for your note -- footnote 360.

The constraint in relation to store opening wasn't limited to that one instance. For your note, you will see Footasylum's representations on the provisional findings, that is bundle 3/3.1.15, page 537, paragraph 6.4. That will show you, also, how the suppliers constrain the extent to which retailers can actually open their own shops. I can't go into greater detail in open because of the confidential information.

That, members of the Tribunal, is it by the way of evidence on specific parameters where the parties competed.

What does the CMA say? Well, in the face of the suppliers' power, they say, well, the suppliers don't monitor every parameter and the monitoring might be infrequent. We say right way, based on what you have seen -- and what you have seen is a few highlights of the evidence that even the CMA have to acknowledge reflecting the suppliers' constraints -- but we say based on those standards, those detailed granular standards and the submissions they received, it was highly unlikely that they would be infrequently monitoring their own parameters. In fact, the evidence the CMA gathered is that the suppliers certainly do monitor their standards and they stand ready to take immediate action.

For that we need to turn to bundle 4. You see the question to [redacted] This is bundle 4, tab 4.2.1.

This is the question that the CMA asked [redacted] You see the question at page -- it is internal page number 8, bundle page number 182. The CMA asks [redacted] how they would respond to a deterioration in relation to the following. As part of the

response they explain [redacted]. You see the long list. I think there are 16 parameters of competition there. The answer is at 4.2.2.

Among them, you will see, obviously, discounts, clearance discounts and student discounts. The answer is at 4.2.2 and it is at page 6 of 10, bundle page 190. [redacted] says -- right away, you will note that [redacted] is not saying, well, we are not interested in one or two or three of those parameters. In respect of all of them [redacted] says:

[redacted]

The bundle is full of examples, by [redacted] among others, of [redacted] raising concerns in an unequivocal way, and in an aggressive way, with retailers.

What the CMA says about this is that, based on what [redacted] told them, [redacted]. There is no need to turn it up, it is in footnote 365 of the final report. It is on page 123 of the bundle.

The two that [redacted] Everything else [redacted], as it said to the CMA.

Then you need to go to 4.2.3. This is the December 2019 response on action taken

by [redacted] At the bottom of page 6 of 14, bundle page 201, [redacted] says:

[redacted]

Then this:

[redacted]

Our submission here is the lack of disciplinary action based on what the CMA itself recorded about the power of the suppliers is much more likely to be a sign that the retailers obey the requirements of the suppliers. As I said, there is absolutely no evidence that they have any ability to defy the suppliers in any respect.

For [redacted] it is at 4.2.5 of the same bundle. 4.2.5, page 218 of the bundle. Here you see two pieces of evidence. One is an earlier point made by [redacted] supplemented by the information in blue.

First of all, the CMA says:

"In response to our PF you said that [redacted]

Below that, a list of examples of the action that had been taken at [redacted]

The point is made -- and I will come back to this -- that some of these examples are deteriorations by retailers in Ireland, which the CMA says don't count. But that

doesn't follow at all. There is no indication as to why the fact that [redacted] took action in Ireland would mean that they wouldn't take action in England or the UK or that any link can be drawn. This shows [redacted] taking action to maintain its brands and we can infer from that that they would do the same in the UK if there was deterioration by the merged entity.

THE CHAIRMAN: Mr Kennelly, how are you getting on with your argument in view of the passage of time?

MR KENNELLY: Indeed. I have the note in front of me.

This is a convenient moment. What I would propose to do next is to go back to the final report and show how the CMA concluded its analysis on the parameters. I can make my submissions about that after that.

THE CHAIRMAN: Okay. We will adjourn, if we may, until 12 o'clock.

MR KENNELLY: Thank you.

(11.46 am)

(A short break)

(12.00 pm)

THE CHAIRMAN: Right, are we all here? Yes. Welcome back everybody.

Mr Kennelly, you are going to stick to your timetable, aren't you?

MR KENNELLY: Yes.

THE CHAIRMAN: As well as covering all of your points, you need to finish by 3.45.

MR KENNELLY: Indeed, sir.

THE CHAIRMAN: All things being equal.

MR KENNELLY: Absolutely. I will do, sir.

THE CHAIRMAN: Thank you very much. Please proceed.

MR KENNELLY: We are now turning to the conclusion on the issue from the CMA. It is the final report, 8.98.

If the tribunal could read the beginning of 8.98 down to (a). It is on page 123, the internal numbering. They are dismissing the points I have been making to you at 8.98 but at (a) they say:

"That is because retailers can and do compete on various aspects of PQRS, as is evidenced by variations in their offerings, including levels of discounting, delivery charges and times, customer service and innovation."

You have my point based on the actual evidence in the report, that there is no evidence at all that the parties compete on those parameters, except in relation to non-clearance discounting. As you saw, and you have seen the extent of that.

Then it says:

"There are limits to a supplier's abilities to detect a deterioration of retailer's offerings, for example less and slower rates of innovation or other improvements."

No evidence of that. You have seen the evidence that there is on how the suppliers monitor.

Then this:

"The merger reduces the ability to benchmark."

Again, not backed up by any evidence of any analysis.

The short point there is that there is no geographical product limitation to the ability of the suppliers to benchmark; no shortage of retailers in the UK and internationally that allows the suppliers to benchmark; no evidence, no analysis of how the loss of Footasylum has a material impact on their benchmarking.

Then (c):

"The suppliers have no incentive to discipline retailers when the deterioration doesn't harm their interests, or it may benefit them."

It says:

"For example, less discounting."

That is the only example. You have the evidence on that.

Before I get on to the conclusion, you will obviously see here, still, no examination of how, on any of these specific parameters, the merged entity would actually deteriorate PQRS. I have been showing you how there isn't even evidence that the parties are competing but, even if they were competing and they were close competitors, there is still no attempt to address the second part of the chain of causation. How, on any specific parameter, will the merged entity deteriorate PQRS?

Then, the final conclusion at 18.118. This is important because it is the sole paragraph relied on in the CMA's skeleton at paragraph 19.3. 18.118, their conclusion:

"We consider the parties' argument that the CMA didn't find evidence that the parties are materially influencing or responding to each other on any of the identified aspects of PQRS and the CMA failed to consider whether the extent of costs saved from a worsening of non-price parameters would be sufficiently profitable."

This is their response:

"(a) the parameters assessed above represent what the CMA believes are the most straightforward ways in which an SLC could manifest but this is not necessarily exhaustive. The effect of the merger on the merged entity's incentives may not be uniform across all aspects of the PQRS."

So it is accepting, as it has to, that the constraints are different depending on the parameter. You have seen how that happens.

Then it says this:

"Evidence such as our survey results and our GUPPI estimates capture the overall

incentive of the merged entity to deteriorate its offering post-merger."

I will come back to the GUPPI.

It says:

"We accept that any quantification of the incentive to deteriorate specific aspects of PQRS is subject to uncertainty and should be interpreted with caution."

So it is saying it is uncertain. Well, that reflects a serious lack of evidence to support the conclusion that it is about to make.

Then this at 118 (d):

"Nonetheless, we note that the evidence assessed above suggests that the parties can and do flex some competitive parameters."

That is the competition pre-merger.

Then this:

"Therefore, we expect that if there were a substantial lessening of the competitive constraints due to the merger..."

So the absence of the competition between Footasylum and JD:

"... this, and this alone, would create the incentive for the merged entity to deteriorate any of these aspects of PQRS."

So, because the parties have flexed some unspecified parameters in the past, therefore, once merged, they have an incentive to worsen their offer on these unspecified parameters.

It simply doesn't follow. In any horizontal merger there will be parameters upon which the parties competed. The fact that parties will no longer compete does not automatically give them an incentive to worsen PQRS on any parameter. The chain of causation is simply not made out.

Even if the CMA had established that the parties were close competitors on any parameter, which they have failed to do, but even if they were, there is no

separate analysis of why and how the merged entity would worsen its offering; how adverse effects would be caused to customers despite the supplier constraints in particular. There is nothing. Nothing except the GUPPI. The I in GUPPI stands for "index". It is a screening tool. It cannot be determinative.

The limitations of the GUPPI are acknowledged, as we have seen in paragraph 8.118 itself. 8.118 (b) acknowledges that the effect of the merger on incentives may not be uniform. As I said, that is not taken into account by the GUPPI and we know, for example, that, on quality and range, the space for competition is extremely limited because of the suppliers and their granular control, and on student discounts ASOS is the main player, not JD.

The CMA acknowledged that the GUPPI is agnostic as to which parameter could be flexed post-merger. But this is simply covering up the fact that, on the parameters that matter to customers and on which the parties actually competed, there is no evidence that they have an incentive to deteriorate their offer post-merger. Even the agnostic comment is incorrect because the GUPPI will change depending on the diversion ratios, and they will change depending on which competitive parameter is being flexed. The customers are not agnostic as to which parameter is being flexed.

The input into the GUPPI is important. We see that it was based on an in store survey. The CMA accepts that the online survey was too small to be probative, and I will give you the references for that. That is the final report -- no need to turn it up -- 8.227, 8.192 and 8.228(a). It is based on -- the only probative evidence in the GUPPI is the in store survey. That matters because, among the few parameters that are actually linked to evidence, online shopping is key. Student discounts. 93 per cent of JD's sales are online. That is -- and there is no need to turn it up -- in the response to the CMA's 109 request dated

10 October and 22 November 2019.

MR FRAZER: I am sorry to interrupt you, Mr Kennelly, but I think we have lost Ms Demetriou.

MS DEMETRIOU: Hello, I have just come back. You had lost me. For some reason the connection -- I lost the connection but I managed to retrieve it. I think I have lost a couple of minutes of Mr Kennelly but I will catch up over the lunchtime adjournment because my clients were watching.

THE CHAIRMAN: Thank you, Ms Demetriou. I am sorry about that, I hope it wasn't our fault.

MS DEMETRIOU: I am sure it wasn't your fault. I think I was the only one to lose connection.

MR KENNELLY: Just to clarify, basically the GUPPI, as you can see, it is store centric and it is pre COVID. That is why little weight can be placed on it. In fairness to the CMA, they don't suggest that it is decisive. Ultimately, the whole case 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. That is why, members of the Tribunal, this case really has important policy implications because, in any horizontal merger, you will have customer diversion and a positive GUPPI score. If the CMA is not required to show how the merger will cause adverse effects for customers on at least one parameter by comparing the actual competition on that parameter with the likely constraints and incentives on that parameter post-merger, there is a real risk of some very poor decision taking. The need rigorously to show causation in establishing an SLC is not, as the CMA suggests, a rigid straight jacket; it is the law. And for a very good reason. The powers granted to the CMA once an SLC is established are extremely broad and onerous. A basis for their

exercise must be properly demonstrated.

To be clear about what the law requires, we had a discussion earlier about the relationship between the Act and the MAG. To be clear, as I said, our primary reliance is on the Act. Not only the section to which I took you, section 35.1(b), but to the extent that there is any doubt about the importance of showing adverse effects on customers, the Act also makes that clear in section 30. I don't have that in the authorities bundle but the members of the Tribunal will have it well in mind. That is why it is necessary to look not only at the competition on the parameter but also what is being delivered for customers.

THE CHAIRMAN: That is relevant customer benefits. That is countervailing benefits, which might --

MR KENNELLY: Exactly.

THE CHAIRMAN: -- counter the SLC finding.

MR KENNELLY: On the MAG itself, just to remove any doubt that it is directly in play and we are entitled to rely on it against the CMA, the CMA acknowledges that they were required to publish, under section 106 and also the defence, the CMA's own defence at paragraph 23, accepts as they had to, that they had to have regard to the MAG in adopting this final report.

THE CHAIRMAN: Yes. Can I just -- you drew us back to the statute and I think when I asked you before you agreed we were in a situation where what mattered was the CMA's expectation.

MR KENNELLY: Yes.

THE CHAIRMAN: This had to be "may be expected to result". You haven't really addressed us on what comprises an expectation. Is that something you want to do?

MR KENNELLY: Sorry, I think it is common ground that that means more likely than

not.

THE CHAIRMAN: You are happy with that?

MR KENNELLY: More likely than not.

THE CHAIRMAN: Just bear that in mind because that is what you are asking us to judge, I think.

MR KENNELLY: Indeed**.** Of course, as I have said before, on this ground the challenge is not that in addressing each parameter they have failed to show something more likely than not, it is that the actual steps haven't been addressed at all.

THE CHAIRMAN: I appreciate that. But in assessing causation we are looking at an expectation that something will cause something.

MR KENNELLY: Indeed**.**

THE CHAIRMAN: Not an absolute certainty.

MR KENNELLY: No, absolutely not. I hope we made that clear in the skeleton and in our notice of application.

Those are my submissions, members of the Tribunal, on ground 1.1.

Turning to ground 1.2, this is the failure to rationally assess the aggregated constraints for each parameter. It is linked to the first ground and it won't take me long to address you on it because the ground has been largely covered under ground 1.1.

THE CHAIRMAN: Yes. That is what I thought you were going to say.

MR KENNELLY: Hoped.

THE CHAIRMAN: I didn't say "hoped", I said thought!

MR KENNELLY: Oh, sorry.

Different constraints were at play on each parameter. That is my submission already. They needed to be aggregated, aggregated per parameter. Instead

what you see is the CMA has aggregated all of the constraints for all of the parameters in one lump, without any supporting reasoning. We see that they assess the constraints opposed currently by retailers, and they separately assess those posed currently by retailers and suppliers and they separately assess constraints posed by rival retailers in the future. They don't do that by parameter and you have my submission as to why that is a fundamental flaw already.

My point here is a different one. Having set out these different constraints, the CMA needs to show how they interacted also by parameter. The combined effect of the supplier constraint, and the actual and future competition from retail rivals, had to be examined in that context. Any reasonable regulator would have done that exercise in a case like this because it is so obviously necessary.

For example, you have seen on student discounts that ASOS is the main player. That is current retail competition. Now, we know that the suppliers monitor student discounts so how will future supplier constraints affect ASOS? Even if the parties no longer compete, how will the current retail competition on bricks and mortar store refurb, that is a parameter, be affected by the future supplier and retail focus on online sales? The interaction between the constraints differs between parameter and, in a case like this where the suppliers exercise such extraordinary power, the constraints may be more than the sum of their parts.

So we see then what do the CMA actually do? We see that in paragraph 8.478 of the final report. This is what they say. This is their analysis in analysing how the different constraints operate when they are aggregated. 8.478:

"Based on our assessment [to be clear that is the assessment of the individual constraints which I have mentioned] we found that the merger results 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."

This is it. It is the sole paragraph cited for this purpose in the defence at paragraph 59.6. A single sentence, which leaves us, and indeed the tribunal, completely in the dark. We have absolutely no idea how the CMA weighed the different constraints as they were aggregated per parameter. The work which any rational regulator would have done is completely lacking and, in any event, there are insufficient reasons in this single sentence to allow us to understand what they have done, and indeed to allow the tribunal to understand what they are doing.

Those are my submissions.

THE CHAIRMAN: We would normally read the whole of the conclusions section, I think, before describing the conclusion as a single sentence. It starts on 8.458 --

MR KENNELLY: Indeed**.**

THE CHAIRMAN: It would be fair presumably?

MR KENNELLY: It would be fair. I am not suggesting that you do it now but I urge you to do it, because it demonstrates that this is it on aggregation. The prior paragraphs, which, as I say, I encourage you to read, deal with the individual constraints, the current retail constraints, the current supplier constraints, the future constraints, separately. There is no analysis before this paragraph of how they interact on an aggregated basis.

THE CHAIRMAN: Okay.

MR KENNELLY: That is a matter for the tribunal to review and my learned friend will come back on that in her submissions.

Those are my submissions on ground 1.

If I may turn then -- oh, sorry, I have been reminded by my learned junior to make the point which we made in our skeleton argument that, to the extent that any of this is said to be novel or onerous, we have pointed out that the authorities, the CMA's predecessor, has done precisely what we said they ought to have done in this case, in for example the Ottakar's v HMV case and the Celesio case. I will take you briefly, if I may, just to Ottakar's, to show you how these matters may be examined per parameter, to Ottakar's alone. That is in the authorities bundle at 5(c) behind tab 5.4.1. I am not suggesting by the way, for a moment, that this is a binding precedent on the CMA.

THE CHAIRMAN: I don't think you would get very far with that, Mr Kennelly.

MR KENNELLY: Yes. It was suggested by the CMA that that is what we were trying to do and I really opened in our pleadings and in our skeleton that it was clear that that is not what we were doing. We are simply relying on this to show, and the Celesio case to show, that this is not novel and it is not excessively onerous for the CMA.

In the Ottakar's case the facts are summarised in the summary section. If you could go, please, to paragraph 21 under the headings, "local and regional competition, existing degree of competition". In this case the competition in book retailing at the local level was concentrated on non-price factors. In a similarity to our case, there was limited price competition for deep range stock in Ottakar's. So the competition was on non-price factors, range of titles in stock, range and the quality of in store service. The CC found in paragraph 23 a measurable difference in existing levels of service quality between overlap and non-overlap stores in two areas: book signings and store refurbishments. They didn't consider book signings to be a key competitive

variable, so you have the CC examining the importance of the parameter to consumers. But on refurbishments:

"Although Waterstones and Ottakar's may have used these to compete, we didn't consider those to be significant."

Then at 25:

"Having examined the existing degree of competition on parameters [this is the summary, we will come to the text in a moment] they look at the effects of the proposed merger."

So doing the chain of causation, they are satisfying the requirements of the causal test by going on to look at the effects of the proposed merger. They say, three lines down:

"The merged entity would not have an incentive to depart from national pricing by reducing discounts in overlap areas. In the short term, we do not believe that the proposed merger will result in an SLC in relation to range. In the longer term, we consider store closures will lead to an SLC. We found no evidence that competition at a local level had a significant effect on service quality. That is reinforced by the counter-factual. We concluded there is no SLC at a local level."

So again, you have the CC examining the effects of the merger per parameter.

THE CHAIRMAN: So your point on this case is not about the conclusion or the facts it was a clearance or anything like that, you are just drawing our attention to the methodology adopted by the CMA's predecessors.

MR KENNELLY: That is precisely my point, sir, yes. And no more than that.

To complete the picture, at 5.92 the effects of the proposed merger, again by reference to the methodology -- there is no need to go through it, but you see there, again, a per parameter analysis of the effects of the proposed merger by

reference to, ultimately, harm to customers.

You can put the authorities bundle away and I will turn to ground 2.

Ground 2 and the impact of the COVID-19 pandemic. As you have seen in our pleadings and in our skeleton, this ground has two parts. The first part goes to the failure to include the impact of COVID on Footasylum in the counter-factual and, in particular, the likely impact of that in view of Footasylum's debt burden.

The second part of our challenge is to the finding that there was no evidence that COVID would make a material difference to the competitive constraint posed by any of the retailers, including suppliers DTC.

If I may take the first point first, the counter-factual point. The CMA in its skeleton, its opening remark on this, suggests that omitting the COVID impact in the counter-factual doesn't make a difference because it went on to consider it in the competitive assessment. We say that is wrong. We make the obvious point that the counter-factual 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 see what the CMA found -- there is no need turn it up -- at the final report, for your reference at 5.80. They found, in the counter-factual, that Footasylum would have remained an effective competitor despite its financial issues.

To understand how the CMA got this wrong we need to go back to the MAG, to the guidelines, which, as you have seen, are in bundle 5(a), tab 4.3.6. Sorry, 5.2.1 is the tab, 4.3.6 is the paragraph number. It is under the heading, "the authority's approach to the counter-factual":

"Phase 2 body: the CC takes a different approach to the one described above. It has to make an overall judgment as to whether or not an SLC has occurred or is likely to occur. To help make this judgment on the likely future situation in the

absence of the merger, the CC may examine several possible scenarios, one of which may be the continuation of the pre-merger situation."

I rely on this:

"Ultimately, only the most likely scenario will be selected as the counter-factual."

So the CMA includes what it regards as the most likely scenario. And it must include what it regards as the most likely scenario in the counter-factual:

"When it considers that the choice between two or more scenarios makes a material difference, it will carry out additional detailed investigation. However, CC will typically incorporate into the counter-factual only those aspects or scenarios which appear likely on the basis of the facts available to it and the extent of its ability to foresee future developments."

This is important:

"It seeks to avoid importing into its assessment any spurious claims to accurate prediction or foresight."

Two points arise out of that. One is that the CMA will include those matters which are likely, in its view, but in deciding what is likely it is not held to any spurious claim of absolute accuracy that informs the degree of certainty that it has to have when deciding what is sufficiently likely for the counter-factual.

We make two broad points about this: we say that a certain small number of impacts arising from COVID-19 were so obvious that any reasonable regulator would have regarded them as likely and included them in the counter-factual. Our second point is that if there was uncertainty, even on these impacts, a reasonable regulator would have sought to address that uncertainty by making reasonable enquiries in relation to it. In fact, the CMA failed to make any enquiries at all specifically in relation to the impact of COVID.

I will begin, if I may, with the impact on Footasylum, that we say were obvious, and

would have been obvious, to any reasonable regulator.

The parties wrote to the CMA on 12 March 2020 and 24 April 2020 on the question of COVID. You will, members of the Tribunal, of course recall that the nationwide lockdown, closing all bricks and mortar retail, was on 23 March 2020. The timing is important. The summary of the points that we put to the CMA is set out most conveniently in our notice, so if you please turn that up in bundle 1. It is behind tab 1.2.1. The notice of application, paragraph 4 -- sorry, yes, you have the tab 1.2.1, paragraph 85, which is on page 34 of the internal numbering, page 98 of the bundle numbering.

We are looking at paragraphs 85 to 87. I will have to take these slowly because I will need to come back to them several times in the course of my submissions on this ground.

First, 85:

"As regards COVID-19 related social distancing measures, Footasylum's store revenues will be disproportionally prejudiced because it is more heavily skewed towards small, medium store formats than its rivals."

You have the footnote making that point good at the bottom of that page:

"These measures mean that fewer shoppers can be accommodated and, because they are harder to implement in smaller stores, those stores become less attractive relative to larger stores. Hence long queues and a perception that a more confined space may be unsafe.

"Moreover, Footasylum stores are mostly located in busy high streets and shopping centres rather than out of town retail parks, which aggravates the difficulty in implementing these social distancing measures and are overall likely to be less attractive venues for shoppers due to public health concerns."

Again, you see the footnote where the point was made to the CMA on 21 April 2020.

Pausing there, what we are dealing with here is the impact, the disproportionate impact, on Footasylum arising from social distancing measures imposed as a result of the COVID pandemic.

I wish to make a further point about this which isn't in the notice of application but is in the supporting material. If we turn up -- just for this single point about the timing of social distancing measures -- in bundle 4, keeping the notice of application open because I will go back to it, but in bundle 4 you will see that one of the submissions on COVID that the parties put to the CMA. That is at bundle 4, tab 4.1.6. This is a submission made on 24 April 2020 by Alix Partners for the parties. The points in this are largely drawn out in the notice of application but this is the point I want to take you to.

It is on page bundle reference 76, page 76, internal page number 6, paragraph 1.3.6. This is about how likely social distancing measures were going to continue for the rest of 2020 and beyond. How likely were they to continue? We quoted our news report, which was itself quoting the chief medical officer, who explained in the article that an exit from the lockdown and social distance measures imposed since the outbreak required a highly effective vaccine and/or highly effective drugs. The chance of having both by the end of 2020 was, he said, incredibly small. Until then, that is until a vaccine and/or highly effective drugs had been obtained, the UK would need to rely on disruptive social distancing measures.

Now, we said then:

"Accordingly, any realistic counter-factual should assume serious harm to 2020 sales."

That was understating it. That is important when you come to look at the likelihood that COVID-19 would be a passing blip; a passing, unfortunate episode that

would not have long-lasting implications for Footasylum in particular.

Going back -- you can put that away, members of the Tribunal and go back to the notice of application. You will see the other points that were put on this to the CMA. That is at paragraph 86:

"Secondly, the enduring effect of COVID-19 is likely to be a faster shift to online shopping. In addition to its store size skew, Footasylum was more exposed overall to the store channel, the bricks and mortar channel, for it is pre COVID-19 sales in footwear..."

You see the percentage there:

"... than a number of JD Sports' other competitors, such as Adidas [you see the percentage], Nike and pure online players such as ASOS and Zalando."

Now, pausing there, the point is made against us that, okay, this is all fine but you have left out Sports Direct and Footlocker, which also were exposed to a large degree by reliance on their store channel. The point here is not about a comparison with Sports Direct, the first point is about the relative impact on Footasylum relative to the DTC supplier propositions. But, in particular, the emphasis on Footasylum itself. The focus here is on is there a likely disproportionate harm to Footasylum?

Finally -- and this is why it is particularly important for Footasylum -- 87:

"Footasylum, absent the merger, would be in a compromised financial position and far less able than rivals to access ready cash reserves or raise additional equity or debt funding to continue to make either the investments required rapidly to develop its online presence, including logistical support, warehousing and delivery services to counteract the fact that it is more exposed to retail store closure than its rivals, or the investments required by their brands to secure must stock product."

You will see how the brands, the suppliers, impose onerous restrictions on retailers to make investments to keep their stores and their online propositions at an extremely high level as a pre-condition for the supply of the products, upon which the retailers rely for their survival.

This is a summary of the points that were put to the CMA in relation to the impacts on Footasylum. A short list of three points specific to Footasylum.

So what, then, did the CMA decide? We saw their decision in the final report at 5.87. If you just turn that up, 5.87, it is on page 59 of the internal numbering, halfway down the paragraph:

"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 counter-factual."

Now, when we saw that finding it was obviously surprising in view of the evidence which had been submitted to the CMA. The assumption of course was that the CMA must have received some strong countervailing evidence to refute the evidence that the parties had provided. With the defence we saw Mr Meek's statement, which explained that the CMA had decided not to ask any questions at all about the specific impact of COVID-19. And this is the key unlawfulness raised in ground 2, because the CMA is enjoined as a matter of public law to take reasonable steps to obtain the information to enable it to answer the statutory questions correctly, and we have that long established authority from Thameside and from the tribunal in BAA v CC.

The CMA makes three points as to why it was reasonable not to ask any specific question about the impact of COVID-19 on this investigation. And to give you the cross-reference, although there is no need to turn it up now, it is in their skeleton at paragraph 33.2 to 33.4.

The first reason the CMA gives for why it was reasonable to decide to ask no questions specifically about COVID was that such a question would have been pointless because, they say, the full impact of COVID-19 was too uncertain to predict. But of course we are not talking about the full impact of COVID-19. No doubt there are many consequences of the pandemic which could not be predicted in May 2020. But the CMA was only asked to address the shortlist of clear and obvious consequences raised by the parties which were obviously sufficiently likely to include in the counter-factual. And if they were uncertain why did the CMA take no steps to try to resolve that uncertainty? And there really is no answer to that point in the CMA's evidence or in their submissions.

But they have three points, as I said. The second point seems to be that based on what they had already received from the operators in the market they could rationally decide that any specific COVID-19 query would have been futile. So for that we need to see what the CMA had got at that stage. That would allow them rationally to decide that any specific COVID question would have been futile. They had three things: they had a response from [redacted], they had a response from [redacted]. This also goes to ground 2.2, which I will come to.

The first point to make about these responses, before I take you to them, is that they were all provided before the lockdown on 23 March 2020. Take [redacted] first. That is in bundle 4 behind tab 4.1.14. So you see this document is dated at the top -- it is page 167 of the bundle, the document is dated 20 March 2020. And it is a response to a request sent on 13 March 2020. So as I said, pre lockdown. And no specific question about COVID, obviously, but then at 3:

[redacted]

[redacted]

Footfall in this context, we emphasise, the bricks and mortar footfall.

And then we turn to the [redacted] evidence and that is behind tab 4.2.4. This document is provided by [redacted] in response to a RFI [redacted]. And the relevant bit is over the page. Again it is being asked about stores. The question (c) is:

[redacted]

It remains to be seen.

And then [redacted] 4.24. Sorry, it is page 217, which is 4.25. In bundle number 217.

Sorry, 216 asks the question at (c) again, please, actually, go back to 216 you see the question at (c) halfway down the page:

"Please provide your annual forecasts and projections of the proportion of total future DTC sales in store or online relative to wholesale up to 2023."

And then following the redactions you see this:

[redacted]

For our purposes we rely on the next bit:

[redacted]

That last point is a point that has also been made to the CMA by the parties; that apart from the specific harm to Footasylum there was plainly going to be a very severe economic recession which would have an impact, a disproportionate impact, on stores in a weaker financial position.

So that is [redacted] at page 217, and interestingly the two year forecast that it is referring to, 2020 and 2021, is the same as the CMA's examination period, or very close to it; its also a two year forward looking period.

But for the purposes of my submission at this stage there is nothing in these responses to suggest that it would have been futile to ask specifically about the impact of COVID and the particular matters raised by the parties. On the contrary, what these responses show is that even unsolicited they had COVID well in mind, and they were monitoring its effect on an ongoing basis. And that

point is not about whether the CMA should have stuck the words "COVID-19" into the questions that it did ask, as seems to be the suggestion in the CMA's skeleton at paragraph 34, the CMA needed to ask the questions designed to elicit COVID-19 specific information, because that information was vitally necessary to understand the future competitive constraints over the next two years. And any rational evidence --

THE CHAIRMAN: Can I just interrupt you, Mr Kennelly.

MR KENNELLY: Yes.

THE CHAIRMAN: This is about the counter-factual.

MR KENNELLY: Yes.

THE CHAIRMAN: And you are saying that the CMA ought to have considered COVID-19 differently in its counter-factual analysis.

MR KENNELLY: Yes.

THE CHAIRMAN: And am I following you, your argument, that had they done so on the basis of whatever enquiries you are criticising them for not making, they would have been able to conclude that while Footasylum would have continued to compete it would have been disadvantaged, is that the sort of thrust of your argument?

MR KENNELLY: Yes it is. That is the thrust of the first part of it.

THE CHAIRMAN: No one has ever raised the suggestion that Footasylum would go out of business because of COVID-19.

MR KENNELLY: That is correct.

THE CHAIRMAN: So we are not in failing firm territory and you are not trying to guide us back into that in any way, are you?

MR KENNELLY: No, not at all.

THE CHAIRMAN: No.

MR KENNELLY: And the CMA --

THE CHAIRMAN: You are talking about the relative assessment of the competitive constraint, if that is the word, represented by Footasylum in the alternative scenario.

MR KENNELLY: Indeed**.**

THE CHAIRMAN: If there had been no merger. So that is what you are asking us to focus on. I just want to be clear about that.

MR KENNELLY: Absolutely, and I am grateful for the intervention, because the CMA makes the point that well, they seem to make a point against us that we are not relying on failing firm, but we don't need to and we have never sought to. Our point is simply the one that you, sir, have summarised now, and that is the point that we are seeking to make at this stage.

THE CHAIRMAN: You are criticising -- well, you are going to get on to the evidence, but you are criticising the CMA's assessment.

MR KENNELLY: Well, I was doing two things. First of all I am criticising their assessment and I am making a separate point of a separate public law error; that if there was uncertainty, if they rationally didn't have the material that they needed to decide whether or not it was likely that the COVID-19 pandemic would have a disproportionate effect on Footasylum, they failed to ask the reasonable questions, they failed to make reasonable inquiries, as they were required to do to fulfil their statutory duty, which was to construct a counter-factual in accordance with their guidelines.

THE CHAIRMAN: Okay. I am sure Ms Demetriou will have something to say on that, but please carry on.

MR KENNELLY: So I have made the point that I was about to make; that a rational regulator would have asked questions targeted at this issue. Now, of course

the formulation of these questions is for the tribunal, sorry, the CMA.

THE CHAIRMAN: I was going to say.

MR KENNELLY: Sorry. That would be an unwelcome task.

But the task that you do have, if I may say so respectfully, is to supervise whether the CMA has done that which is reasonably required to elicit the information necessary to answer the statutory question, and whether they acted reasonably in this regard is determined by the importance of having the information and the ease with which it could be sought. The importance of having information I have explained, and there is no doubt that it would have been extremely straightforward to identify targeted questions. They could, for example, have asked Nike for its scenario plans, and strategy documents for dealing with COVID-19. And as for the shift, the obvious shift that was happening to online DTC, they could have asked the key question which goes to whether that shift to online DTC was going to be enduring; do you expect these new online DTC customers to stick to online DTC or do you expect them to revert to the bricks and mortar stores? In asking that question the obvious question to ask is to what extent did your pre COVID new online DTC customers stick with you and not revert to bricks and mortar stores?

THE CHAIRMAN: It is all going to be predictions and best attempts to read the unreadable made at the time. Isn't it the difference between getting that in April or getting it in March?

MR KENNELLY: Sir, two separate points on that. It is, it ultimately boils down to the difficult task of prediction, the difficult weighing of evidence, and making predictive judgments.

THE CHAIRMAN: But you are asking the CMA to make a better prediction than you think they made on the basis of Nike's and Adidas' predictions, in an alternative

world where the merger didn't happen. This is all very nebulous, isn't it?

MR KENNELLY: Sir, the point I am making is slightly different. The predictive judgment --

THE CHAIRMAN: Please explain.

MR KENNELLY: -- which they have to make and for which they have, rightly, a broad margin of appreciation, arises once they have obtained the information reasonably necessary to answer the statutory question. So my focus is not on the predictive judgment, the question is did they have the raw material, did they have the raw material reasonably required to answer the question before they made those predictive judgments.

THE CHAIRMAN: So you would say that if Nike had answered a further question specifically raising the COVID-19 effect, if they had answered "we don't know" you would say that is sufficient because they asked the question, is that right?

MR KENNELLY: Absolutely. If by accident the CMA had received detailed information from the retailers and suppliers describing their view, up to date view as to the likely impact of COVID-19, thus providing the CMA with a sufficient evidence base to make its predictive judgments, I would have no complaint. But they didn't have it, and they didn't have it because they didn't ask the question. It would also be difficult to challenge the CMA if they had asked the questions but had simply not got useful material, and that is the point they are trying to make in resisting this ground. But what they 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.

THE CHAIRMAN: You have a third point, I think.

MR KENNELLY: Well, before I get on to my third point I wanted to say that had -- and this is about the evidence base -- they asked the questions they would have had the raw material to examine the relative growth of pre online DTC and -- sorry, pre COVID online DTC and pre COVID online wholesale, because the key question competitively is post COVID, or during the COVID pandemic, was there a greater diversion or growth of online DTC at the expense of online wholesale? And had they ask the question they would have had raw data to allow them to observe that trend. Instead, as you will see, they didn't ask the question and relied on the old information described even by Adidas as obsolete. So they failed to ask the question, and our point is that it is simply not rational to refusal to gather any evidence on an issue of fundamental importance in a forward looking exercise on the basis that the responses might be tainted by uncertainty.

Now I come, sir, to my third point, and this is --

MR FRAZER: Before you come to your third point, I want to press, to see what the difference is between you. What you're saying is they didn't ask the questions. Had they asked questions one of two things may have happened, they would either have got the information from the people they had asked about their detailed plans for dealing with COVID and what implications that might have had.

MR KENNELLY: Yes.

MR FRAZER: Or -- and we have to bear in mind the timing here, as you yourself

have emphasised -- they may have got responses from those people saying "we simply don't know at this stage". If they had got the latter, and therefore were not a position to include it in the counter-factual, I think I heard you say that would have been okay, it is just they needed to ask the question rather than they needed to get a sufficiently certain view of what the counter-factual might be. Did I hear you correctly on that?

MR KENNELLY: So two points I make in response. That is correct. But certain of the questions could have been answered. Sir, we know for sure that certain of the questions which I just described would have resulted in an answer. So they would have been able to say "these are our week on week up to date online DTC figures and the CMA could have got from the retailers the online wholesale sales". So we know for sure that they would have got that information which would have been directly relevant to the question of whether the COVID-19 pandemic was leading to an increase, a greater than anticipated switch to online DTC, greater than the CMA had anticipated pre COVID.

THE CHAIRMAN: Sorry to interrupt, but that would be on the basis of one month's sales data. By any stretch of the imagination this inquiry could not have been taking place after the end of April, perhaps a few days into May, because the inquiry had a deadline.

MR KENNELLY: Absolutely, sir, slightly more than a month, perhaps six weeks.

THE CHAIRMAN: Six weeks.

MR KENNELLY: Six weeks, as the tribunal knows very well, in all merger cases the time periods are quite short and the deadline for providing requests is very short. I will come to the timeframe in greater detail in my next submission. But even six weeks would have given you six weeks of weekly online DTC and online wholesale sales data. That would have been hard, probative evidence

which would have informed the CMA's analysis.

THE CHAIRMAN: But your main objection is that they didn't ask the question and therefore they didn't have the responses from which to make their judgment. I don't detect that you are concentrating quite so much on whether the judgment they made was a correct one or not, although I think that is probably in your argument somewhere.

MR KENNELLY: Quite right, sir.

THE CHAIRMAN: What you would have liked them to have done is to make the enquiries and agreed with your view that the effect of COVID was likely to be disproportionate on Footasylum, therefore Footasylum was a weaker competitor, therefore the effect of the merger compared to the counter-factual was less. That is your argument, isn't it?

MR KENNELLY: Indeed**.** As you say, sir -- sorry.

THE CHAIRMAN: I am not summarising your argument because I necessarily agree with it, I am summarising it because I want to understand it, just to be absolutely clear.

MR KENNELLY: I understand that. And I respectfully agree with your summary of my argument. In particular, the emphasis is on their failure to ask the questions. That is the key.

THE CHAIRMAN: Okay, that is helpful, thank you.

MR KENNELLY: And on the question of timing, and you have seen this in Mr Meek's statement, that it all came very late, but actually the effects of COVID were first felt in earnest in early March 2020, and Mr Cowgill wrote to the CMA on 12 March 2020, so it was on their radar from the beginning of March 2020, and the bricks and mortar stores were shut on 23 March 2020, so there was a real escalation in the seriousness of the matter at the beginning

of March 2020. The statutory deadline for the CMA was 11 May 2020. So the CMA had two months from Mr Cowgill's letter of 12 March to make its enquiries. I appreciate that there has to be time built into analyse the responses and address them, but as I said a moment ago the time frames are short for everyone, including the CMA.

THE CHAIRMAN: Yes, if they didn't analyse the responses you would be criticising them for not doing that.

MR KENNELLY: The difference would be, sir, that my position would be much more difficult. Because once the CMA has the best evidence it can get, the best evidence available -- and we will come back to the use of that phrase -- it is very hard then to challenge how they have assessed it. But if they haven't tried to get the information, then the CMA is in a more difficult position, in my submission.

THE CHAIRMAN: Okay.

Are you going to finish this ground before we adjourn for lunch, this part ground? I have a feeling you have more to say on ground 2.

MR KENNELLY: I have more to say on this. This is a convenient moment, because my next point, just to put it in your minds, is the CMA says that the retailers and suppliers would have struggled to provide information in the time available, and I will address that next.

THE CHAIRMAN: Okay, all right. We do want to spend a little time on the time, as it were.

MR KENNELLY: Yes.

THE CHAIRMAN: We will reassemble at 2 o'clock, is that okay?

MR KENNELLY: Okay.

THE CHAIRMAN: Thank you very much, everybody.

MR KENNELLY: Thank you.

(1.01 pm)

(The luncheon adjournment)

(2.00 pm)

THE CHAIRMAN: Right, welcome back everybody.

Mr Kennelly, before you go on, it has been drawn to my attention that some of the materials you were reading out, namely the Nike and Adidas, possibly the Frasers responses requests, were actually disclosed into the confidentiality ring and were not public material.

MR KENNELLY: Yes, sir, that has been pointed out to me just now as well.

THE CHAIRMAN: That will need to come out of the transcript. Could I ask you and also I am sure the CMA will look at this to make sure that the confidential material is not in the version of the transcript that we will aim to put up on our website in due course.

MR KENNELLY: Yes, we will do that. I apologise for referring to it.

I must confess that, because the material was not colour coded, I made the mistake of not thinking it was not confidential. It has been pointed out to me and, when I come back to that material in the future in these submissions I will make sure not to read them out.

I do apologise.

THE CHAIRMAN: That is all right. It is rather like the old saying, just because it is not colour coded, it does not mean they are not out to get you.

MR KENNELLY: That is almost precisely what was put to me about half an hour ago, so I have it well in mind.

THE CHAIRMAN: Right. Would you like to resume ground 2.1, I think it is?

MR KENNELLY: Yes, thank you.

Just on the question of did the CMA have enough time to ask the questions necessary to elicit the information needed to assess the effect of COVID-19, and we have the period of about six weeks. I will make a short point before I get into what the parties could have done, to make the point that of course -- and I made it earlier -- in merger cases the time frames are always very tight. In fact, an entire phase 1 investigation has to be completed within two months. So a six week period, although it may seem short, is not unknown for the analysis of an issue in merger control.

Now, Mr Meek's suggested in his statement that the retailers and suppliers would have struggled to provide robust evidence on the impact of the pandemic on time. Again, we say there is nothing to support that. You have already seen that the CMA expected responses to their 9 March RFIs within seven days and the CMA regularly applies shorter deadlines than that in merger cases.

In terms of the lateness of the COVID pandemic in the process, we see, and we will see when I take you to it, that the CMA actually used in the final report information that it had received as late as 28 April 2020. That was from Footasylum. The reference is in paragraph 5.30 and I will come to that later.

So there was time, there really was sufficient time, to request the information and examine it before 11 May 2020.

In terms of what could have been sought and the ease with which the suppliers and retailers could have provided the information, as I said, they could have sought the sales data which would certainly have been there to be produced. Also, the strategy papers that retailers and suppliers would certainly have been producing. They would not have been sitting, watching the COVID-19 pandemic and doing nothing about it, they would certainly have been producing something by way of internal analysis and preparation for dealing with the

effects of the pandemic. That was what they suggested they were doing in the responses they did provide to the CMA. Had the CMA sought those, they would have received probative material.

The key point is, in these circumstances it simply wasn't reasonable to decide that no question would elicit useful information without first at least trying to ask the question. We know that the CMA could and did rely on COVID specific enquiries during this time in a different case. In Amazon v Deliveroo, which is in the bundle and I shan't take you to it. It is relevant only for the fact that in this period, April 2020, the CMA did ask targeted queries about the effect of the COVID pandemic on the parties in that case. That happened, that process in April 2020, was well before the statutory deadline of 11 May in our case.

THE CHAIRMAN: Was that a phase 1 or a phase 2 case, Mr Kennelly?

MR KENNELLY: Phase 2, sir.

You can see -- I hesitate to go to it but I will briefly. I want to be absolutely clear that this is not a precedent in any way, it is simply to show that the CMA is capable of asking targeted queries in relation to the COVID-19 pandemic.

THE CHAIRMAN: I don't think the CMA is suggesting that they would never ask COVID related questions. Presumably their position relates to the stage they had reached in this case and the evidence they had obtained in this case. The evidence gathering is always approached in the context of the particular inquiry. I am not sure going to another inquiry is going to help us terribly much.

MR KENNELLY: I understand. I won't go to it, then.

Simply to make the point that their answer to my point is not simply that they didn't expect to get useful information, it was a more general point that, because of the nature of the COVID pandemic, it was highly unlikely that anyone would give them anything useful about the longer term impacts of the pandemic within

their timeframe, therefore rendering any targeted enquiry futile. My simple point is that, in the Amazon case, they did ask targeted, forward looking queries, about the effect of the pandemic on the parties in that case. Just for your reference, not going to it, it is in tab 5.4.3 of the authorities bundle and the targeted queries you see in paragraphs 4.34 to 4.44.

THE CHAIRMAN: Okay, thank you for that.

Can I ask you something else? Is it right that in this case the two month permitted deadline extension had already been obtained, hadn't it?

MR KENNELLY: Yes, it had. Yes.

THE CHAIRMAN: So the 11 May deadline that you referred to, that was a final deadline?

MR KENNELLY: Yes, it was.

THE CHAIRMAN: It could not be further extended?

MR KENNELLY: Subject to a delay in receiving a response to a section 109 request from one of the parties, yes.

THE CHAIRMAN: Yes.

MR KENNELLY: That brings me to the next part of ground 2.1. This is the treatment of the counter-factual of Footasylum's debt burden. For this, I have done my best, in fact maybe I have done too much, to keep the proceedings in open. Now I think we do need to move into private because all of this material is highly confidential.

THE CHAIRMAN: Right, absolutely. This is about -- yes, this is coloured green --

MR KENNELLY: Yes, this has colour.

THE CHAIRMAN: -- for the benefit of everybody.

Right, we need to ask everybody who is not in the confidentiality ring to leave the courtroom. Can that be done, please? It will take a few moments.

(2.10 pm)

(Proceedings continued in private)

(2.23 pm)

(Proceedings continued in open court)

MR KENNELLY: So ground 2.2 in paragraph 8.477 of the final report. We are moving now away from the assessment of the counter-factual, we are now in the area of the competitive assessment. The conclusion in the competitive assessment by reference to COVID is, as I say, at 8.477. The important part is halfway down:

"For the reasons that we give, 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, the merger would or may be expected to result in an SLC."

My focus is on the finding that the effect of COVID-19 would not increase materially the aggregate constraints posed by retailers. That includes the suppliers in their DTC role, including online DTC, would not increase the constraints posed by them, now or in the foreseeable future. To be clear, this meant that the CMA was proceeding on the basis that the effect of the COVID-19 pandemic was neutral as regards the constraints posed and to be posed by the retailers, including Nike and Adidas DTC over the next two years.

Our case, as you have seen in our skeleton at paragraph 48, is that the evidence on the file from Nike and Adidas was not reasonably capable of supporting the CMA's conclusion.

The CMA's response, and we see it in the skeleton, we say is surprising because they don't say that the evidence from Nike and Adidas supported this decision

at 8.477. We need to turn up their skeleton to see what they say, at paragraph 42.2.

The CMA says at 42.2:

"As is clear on its face, the CMA's conclusion was based principally on what was missing from the evidence rather than what it contained."

There are two problems. We can go to the rest of that, but there are two problems, if you are keeping the skeleton open, with that answer.

First, if the conclusion of the CMA was based on the absence from its file of evidence then that conclusion was irrational, because the CMA had evidence from the parties about the disproportionate impact of COVID-19 on Footasylum. I showed you that in the summary we gave at 85 to 87 of our notice of application. We put to the CMA detailed evidence which they did not rebut and was not rebutted, about the disproportionate impact of COVID-19 on Footasylum. You have the point about, so long as social distancing was going to continue, until a vaccine was discovered, that was going to have a far worse impact on Footasylum because of the size of its stores and their locations. The accelerated shift to online DTC and the worst recession -- at least the worst impact on the High Street -- for centuries, which again would have a disproportionate impact on a weaker operator financially, such as Footasylum. None of that is mentioned in the decision.

What they say -- and now we go back to their skeleton at 42.2 -- at the next sentence:

"The CMA explained that we have not seen evidence to suggest that the parties would be hit harder than their competitors."

They can't rationally make findings based on having seen no evidence unless they have taken reasonable and basic steps to gather whatever evidence might be

available on the topic. It is one thing, sir, to fail to ask reasonable and basic questions in the counter-factual but now we are in the area of the competitive assessment. Whatever they have done on the counter-factual, they have also failed to ask the basic questions about the impact of COVID-19 for the purposes of the competitive assessment.

What the CMA says in the skeleton at 42.3 is to rely on the fact that neither Nike nor Adidas contradicted their finding at 8.477 of the decision. They haven't contradicted the finding that the impact of COVID-19 would be neutral as between them in their DTC online role and the parties, in particular Footasylum, with their skew towards bricks and mortar. They say:

"The suggestion that a particular item of evidence did not offer positive support for the conclusion or is based on the absence of probative evidence misses the point. Neither Nike nor Adidas' response contradicted the conclusion at 8.477."

Now, there would be something in this point if the CMA had set out its proposed finding in a questionnaire, for example, and asked Nike and Adidas whether they had any reason to disagree. But you saw the questions that the CMA put to Nike and Adidas. Those questions didn't even mention COVID-19, still less did they put to Nike and Adidas the proposed conclusion in 8.477 of the final report.

What it comes to is this: the CMA is defending its decision on the basis that Nike and Adidas failed to contradict a proposition that was never put to them. That, we say, is irrational.

As regards the evidence base that the CMA relied on to estimate the growth of online DTC relative to wholesale, we see that in the CMA skeleton, again at 43.2. 43.2 says, over the page:

"The CMA acknowledged there was significant uncertainty around the short term

forecasts in the light of COVID-19, inconsistently with Adidas. They concluded, however, that the existing forecasts remained the best available at the time of the decision."

They give their cross-reference at 8.414.

We have seen that 8.414 because it cross-references the forecasts which Adidas and Nike gave, in particular Adidas, for 2020 and 2021. Those forecasts had been given earlier in the process but, as you saw on 16 March 2020 -- and here I can say what I want to say because it is in the final report at paragraph 8.412, unredacted:

"On 16 March 2020, Adidas had told the CMA that those forecasts were obsolete."

2020 and 2021 covered the large majority of the CMA's two year period over which the effects of the merger were forecast. The CMA are saying here that this forecast remains the best evidence available to them in May 2020 and the CMA relied on them.

Our case here is very simple. If the forecasts are rendered obsolete -- and the CMA isn't disagreeing with Adidas -- then a rational competition authority cannot rely on them as the best available evidence. A rational competition authority would say that they are obsolete. They are no evidence at all and therefore they should be disregarded.

The CMA was told that on 16 March by Adidas. More work, fresh work, was needed to assess the relative growth of DTC and wholesale sales. It is no good for the CMA to say, well, we gathered a lot of clear evidence pre COVID and we wanted to rely on that because their pre COVID evidence was falling apart in their hands in March 2020. Not May 2020, in March 2020. They had time to address the major new development and it was completely irrational to refuse to do that and to insist on relying on evidence which was undeniably obsolete.

What is left for the CMA? They fall back in their skeleton -- this is the beginning of the skeleton at paragraph 13, no need to turn it up -- on the deference which this tribunal should show to the CMA's expertise. It is important to pause and consider what expertise was called for in this situation because the expertise that was called for, and it is the expertise the CMA has, was the careful gathering of evidence to assess the impact of a major novel event on the merger control analysis. The formulation of intelligent questions, the careful collation of responses and their appraisal as part of integrated merger control, are all properly matters within the CMA's expertise. But the tribunal has seen the CMA did not use its expertise in evidence gathering and analysis in this way. It received a large number of submissions from the parties and filed them way without incorporating the points into the decision and it asked some questions of the suppliers without mentioning COVID-19, let alone applying its expertise to the formulation of questions to elicit meaningful responses about the likely impact of COVID-19 on the SLC analysis.

THE CHAIRMAN: Mr Kennelly, let's just put your point about there being sufficient time on one side for the moment, just park that point.

MR KENNELLY: Yes.

THE CHAIRMAN: Let us suppose that the retail lockdown had taken place on 8 May.

MR KENNELLY: Yes.

THE CHAIRMAN: Just as an abstract question to you, what is a merger control authority meant to do in those situations, where it has run out of time on its statutory timetable and it can see the world is about to change? What would be your advice to them if they consulted you? Give up? Clear the merger, because they can't come to a decision in time? Ban it because they have

already completed their analysis and their evidence gathering? What would your advice be?

I appreciate it may be very expensive, but let me know.

MR KENNELLY: I wish.

The short point is that it is a hard statutory deadline and the CMA would have to do the best it can. I am not suggesting it must give the parties the benefit of the doubt and clear the merger. The CMA has to do the best it can with the evidence before it. Plainly, if this event happened on 8 May the CMA would be entitled to say that it would be very difficult to get probative evidence on the impact of COVID-19 from the parties and from suppliers.

THE CHAIRMAN: Yes, but --

MR KENNELLY: But having said that -- sorry.

THE CHAIRMAN: It is a rather unfortunate position to be in, isn't it?

MR KENNELLY: It is. But what they couldn't do, because there is obvious uncertainty there, is they could not then assume the uncertainty all one way. They can't say, because it is uncertain we are going to treat this as an entirely neutral event. If it is uncertain, as they said it was, they have to acknowledge the possibility that it may pass without long term harm, however unlikely that might be, but they have to acknowledge the equal, and we would say greater, possibility that there would be long term harm and accelerate existing trends to the detriment of the parties.

THE CHAIRMAN: I think I am asking you to consider the position where clearly there is likely to be a major impact on the evidence base.

MR KENNELLY: Yes.

THE CHAIRMAN: But it can't be assessed in the time.

I have to say when I asked that question of one of your predecessors when I used do

these cases, I was told that if the commission was unable to come to a decision then the merger was cleared by effluxion of time.

MR KENNELLY: If I have made a mistake, sir, I am sure one of my colleagues will correct me tomorrow.

THE CHAIRMAN: I was never confronted by this situation so I never had to address it, but it is something that authorities have in mind all the time, I think.

MR KENNELLY: Indeed. And of course the authority has its ultimate statutory objectives which are concerned with customer welfare in this context. Their interests must be taken into account, as we have said, under sections 30 and 35.

Although I understand the question, it is a natural question to ask in a context such as this, it is not a point that is available to the CMA in this case because of time. We do rely heavily on the fact that in merger control the time is quite short and really, here, March is not May and they were well able to ask the questions and get the information they needed before the end of April.

THE CHAIRMAN: That is not what you said. You said they would be able to get information. It might not be what they needed but at least they would have asked the question, that is what you put to us.

MR KENNELLY: No, sir. Sorry if I wasn't clear. They would certainly have got information which they did need. In order to assess the impact of COVID, they did need to see the up to date trading data on online DTC as opposed to online wholesale. They needed that to assess the impact of COVID, and they could have got it and they would have got it had they asked for it. They are very likely to have got the up to date strategy papers from Nike, Adidas and other retailers as to their reaction and predictions of the impact of COVID.

THE CHAIRMAN: I don't want to go over old ground but had they got six week sales

figures they would have been able to assess the progress over that six weeks. Whether that would have put them in a position to make reliable predictions about the longer term effect of COVID, I don't think any of us can really say at this point in time, can we?

MR KENNELLY: Indeed, sir. That is why I am anxious not to be seen to be straying from my primary point, which is they ought to have asked the question, to what I can say about the material they would have got, their predicted analysis. That is a second stage which we never got to because they never asked the questions.

THE CHAIRMAN: You are not straying into hindsight, either?

MR KENNELLY: No. On the contrary, the need to ask the questions was even clearer in March because, in March it was looking like the worst -- I mean, it was reported to be the worst recession since the Great Frost in the 18th century, and the lockdown was in place with no end in sight. So the need to ask the questions were even greater then and that is why -- the failure has to be judged at that stage, not with the benefit of hindsight.

THE CHAIRMAN: Please, go on.

MR KENNELLY: That is the end of ground 2. I move on now to ground 3.

Ground 3, as you see, sir, has three parts. The first is the possible re-allocation of products to Frasers Group if the merged entity deteriorated its PQRS offering.

This ground of challenge has narrowed since the notice of application was filed. That is appropriate. We have examined the defence and we are seeking only to put before the tribunal the strongest and the most compelling points that we have. So this ground of challenge has narrowed.

It is common ground now that the key question is not will Nike and Adidas give Frasers Group more of the most desirable products over the next two years.

The key question is, if the merged entity deteriorated its PQRS offering, would Nike and Adidas give Frasers Group more of the most desirable products? In examining that, we need to begin with the factual findings as to the importance of Frasers Group's elevation strategy and the reaction of suppliers.

This material is all confidential so I shall ask you simply to read the paragraphs of the final report that I take you to. The first is 8.321. The only part of this 8.321 that I rely on is the part that is coloured in yellow on my version. It is a submission from Frasers Group and you see there what they say about their elevation strategy.

The next paragraph is 8.327. This goes to the planning for the elevation strategy and you see the number of elevated store openings that are planned. The numbers are very small, I apologise, but hopefully you can read them in table 8.8.

THE CHAIRMAN: Very small.

MR KENNELLY: Yes.

Then at 329. Again, the only point that I rely on is the part that is in yellow, the confidential part.

The next paragraph is 8.346. This deals with the interactions between Frasers Group and Nike.

(Pause)

If you have finished reading 8.346 --

THE CHAIRMAN: Mm-hm.

MR KENNELLY: -- two short points to make about this.

First of all, it tells you what Nike is saying to Sports Direct about its elevation strategy. There is a reference to a certain level within Nike and what they think, and I place reliance on that. Nike's comments on the elevated concepts that

Frasers Group is operating.

I also make the point -- and this links to the supplier constraints that I mentioned earlier, the point that I discussed with Mr Fraser -- that what you see in (b) is that, even when you do it right, if I can put it as generally as that, there is no guarantee of getting product. The rationing that I referred to earlier is again manifest here.

I didn't take to you this when I was discussing the supplier constraints in relation to range but I rely on it for that purpose also, on ground 1.

In terms of the importance of the elevation strategy to Frasers Group, in view of the overwhelming power of the suppliers, you see what they say at 8.347 (a), this is a Frasers Group board meeting minute dealing with strategy. If you could read 347(a) and I place particular reliance on the last four words at the end of that sub-paragraph (a).

(Pause)

That tells you how important this elevation strategy was to Frasers Group and their commitment to it.

Then at 8.351 you see how they are getting on. This is what Nike says about how they respond -- sorry, that is confidential, so I shall say no more.

351 and the top of 352, simply to make the point about how Frasers Group was obtaining increasing access to premium products. Admittedly it is still behind the parties but it is definitely getting improved access to the premium products by reason of its elevation strategy.

Now the key question. The key question is summarised in 8.353. If we move on to the key question at the heart of this ground 3.1:

"The parties submitted that we should consider how suppliers and Frasers Group would react if the merged entity sought, post-merger, to reduce its PQRS. We

said it was clear that key suppliers were already given SDI USC Frasers Group access to premium sports supply casual products. There is no evidence to suggest that this trend would not continue or accelerate if the parties opted to deteriorate the PQRS of their stores and online offering."

The CMA says:

"We accept that post-merger, if the merged entity were to deteriorate aspects of its PQRS which went against the key suppliers' interests, 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."

Just stopping there, because that is the passage that is quoted in the CMA's skeleton, our challenge is a short one. Having correctly articulated the question, the CMA irrationally failed to gather the evidence needed to answer it. The CMA only asked Adidas and Nike for examples of action taken generally in response to a deterioration in PQRS in the last two years. The CMA didn't ask Nike and Adidas, "would you allocate more of the most desirable products to Frasers Group if the merged entity deteriorated its PQRS over the next two years?" That is a straightforward question, again, to gather the evidence to enable the CMA to determine an issue that they formulated correctly.

We see what they did in the next part of the same paragraph of the final report, 8.353:

"However, we have seen no evidence that Nike and Adidas would favour allocating products to Frasers Group over other retailers to which they already supplied higher volumes of products and which are categorised as best and better retailers in their respective retail segments. We can't say with sufficient certainty what actions the suppliers may take in terms of allocating their

products should the merged entity deteriorate its PQRS."

Now, we agree that the position was uncertain. There were good reasons why Frasers Group, which, as you have seen in the report, was investing very heavily in its elevation strategy and increasing store numbers, elevated store numbers, very significantly. There are good reasons why it might be the recipient of more of the most desirable products, which the suppliers rationed, as you have seen. But the merging parties cannot know for sure what Nike and Adidas would do. We can suggest what they would do based on the evidence but we don't know for sure. They might try to expand Footlocker, they might try to decide to divert more stock to their own DTC offering. We don't know. But neither did the CMA.

Nike and Adidas knew what they would do but they weren't asked.

Again, we find ourselves in a situation where the CMA is making positive findings on the basis that it has seen no evidence. But it has seen no evidence because it failed to take the obvious and basic steps to gather the evidence to inform that conclusion.

Now, the CMA tries to argue that it could infer that Nike and Adidas would not punish the merged entity for deteriorating PQRS by moving premium products to Frasers Group, because Nike and Adidas provided very few examples of action taken in response to deteriorations in PQRS. We looked at this information under ground 1 earlier, but I need to go back to it because it is important to test the CMA's proposition under ground 3.1 also. So if we go first to the [redacted] and this is the material which I inadvertently read out earlier, so this time I will simply take you to the passages and ask you to read them yourselves. This is in [redacted] behind tab 4.2.5. And we are looking at page 218.

THE CHAIRMAN: Sorry, Mr Kennelly, just before you take us there in relation to 8.353 which you were looking at.

MR KENNELLY: Yes.

THE CHAIRMAN: You talk about a positive conclusion. Is the positive conclusion the one in that paragraph:

"We have seen no evidence and we therefore cannot say with sufficient certainty what actions ..."

You are characterising that as a positive conclusion?

MR KENNELLY: Yes, because they are proceeding on the basis that if the merged entity deteriorated PQRS, they would not divert the stock from the merged entity to elevated Frasers Group stores.

THE CHAIRMAN: Yes, it is more a sort of neutral conclusion, isn't it, they can't say that they would?

MR KENNELLY: I will take that, sir, yes.

THE CHAIRMAN: Okay.

MR KENNELLY: So let's look at the evidence base for making that finding that it is neutral. And of course once again we are in the territory of two stages. Did they ask the question? Did they ask any question that would actually elicit the answer to that issue that we have been looking at in 8.353, and then secondly what do they do with the information they did get? They are two separate legal errors, in our view, in our submission. We are looking here at what [redacted] actually said, and please read the top of 2.8, which is the information that [redacted] gave the CMA in response to the provisional findings about what they would do in view of a deterioration post-merger.

(Pause).

And the point to take from that is that there is absolutely no equivocation. I am not

saying that they might notice a deterioration and have a think about it, or show mercy to the retailer in question, depending on its circumstances. They are crystal clear that they would spot it and they would take action. I can't say any more than that; you see what they say.

And when the CMA ask for examples, [redacted] provide a list. I can't take you to the detail of them, but you can read below what [redacted] say by way of examples of enforcing their standards, both in the UK and in Ireland.

(Pause).

And you have my point that the fact that they enforce the standards in Ireland in the way that they did is probative material as to the way that they would react in the UK if the same standards were breached.

And then we turn to [redacted] And that is in 4.2.2. It is also confidential. And again you have seen this, so I will take it fairly quickly. You have seen what they say at page 190, internal number 6.10, about how it deals with concerns about PQRS deterioration. And in December 2019, because they refer back to their submission in December 2019, that is in tab 4.2.3 at the bottom of page 201 of the bundle. You have the point about instances of restrictive product access arising from a deterioration in PQRS or a breach of [redacted] standards.

And my point there, as I made earlier, is that to the extent that there is a lack of examples of the suppliers disciplining retailers for breaching their standards that, based on what we see about supplier constraint, is as a result of the strictness with which the suppliers maintain these standards. It demonstrates the lack of ability on the part of the retailers to defy the suppliers. There is nothing in the factual material before the CMA and the findings that they made to suggest that the suppliers desist from enforcing their standards because there is some concern about countervailing pressures from the retailers; quite

the opposite.

But we can accept for the purposes of this submission that this might be ambiguous. So let's assume that my submission to you that this is obvious is wrong, and in fact it is ambiguous as to what the merged entity would do, what the suppliers would do if the merged entity deteriorated PQRS. And let's assume it is ambiguous as to whether or not they would divert stock away from the merged entity to the growing, elevated Frasers Group stores. That is an important issue in determining retailer constraint. If the Frasers Group stores were to get more of the premium products their constraint would materially increase.

And the CMA failed to ask [redacted] that simple question. And again, in asking themselves was that rational you have to weigh, in our submission, the importance of the question -- and it is highly important to understanding the future constraint that the Frasers Group would exercise if the merged entity deteriorated its offering -- with the ease with which the question could be asked, and the question could be asked extremely easily, and therefore it was unreasonable not to ask it.

I move on, then, if I may --

THE CHAIRMAN: Can I just ask you are you still maintaining your point that because the CMA didn't rate that possibility as sufficiently likely, to use terminology, that they discounted it completely? In other words what you have described as a binary fallacy, or do you think they attach some weight to it but not enough weight, in your submission?

MR KENNELLY: We don't know.

THE CHAIRMAN: I think you allege that they had defaulted to zero. Are you still maintaining that point?

MR KENNELLY: That appears to be what they have done, but ultimately -- I will be

corrected if I am wrong about this -- we don't know what weight this was given when they aggregated the constraints, for the reasons I took you to in ground 1.2. It appears that they have given it zero.

THE CHAIRMAN: Okay. But you are not maintaining that with great vigour?

MR KENNELLY: Well, I can come back to it if someone tells me to, but at the moment it is hard to maintain it with any more vigour than I have given you because we are in the dark, for the reasons I have given you in ground 1.2.

THE CHAIRMAN: Okay. Please go on.

MR KENNELLY: We are moving on, then, to ground 3.2. And this is the finding of the CMA that the suppliers' constraints over the next two years would not be sufficient to deter the merged entity from deteriorating its PQRS. And I only have to describe the question to see just how irrational the CMA's conclusion was on this point, because the clearest picture that emerges from the CMA's own findings is the extent to which the suppliers exercise and will exercise a constraint and a growing constraint against any deterioration by anyone of PQRS on any of the relevant parameters of competition. Because you have seen, and the CMA doesn't doubt this, how the suppliers -- by which I mean Nike and Adidas, the only ones that count for these purposes -- how they ration the desire of a product upon which all of the retailers depend for survival, and I use that word advisedly.

You have seen in the documents, and I didn't take you to all of it, the retailers are the supplicants, they are begging for these products from the suppliers. There isn't a single document in the whole file which shows anyone fighting back against Nike or Adidas, resisting their decisions. There is no evidence of any wilful disobedience by any of the retailers, even powerful, aggressive and ambitious retailers such as Frasers Group are desperate for the product and are investing

a huge amount of money and an enormous commercial and corporate will to move, as they are, further up the tree in terms of gathering more of the premium products. They are subject to granular and detailed requirements and, even when they comply with those, there is no guarantee that they will receive the premium products.

MR FRAZER: Mr Kennelly, can I just ask you, you have mentioned rationing a couple of times. Is it clear that this was a zero sum game, in other words more to an elevated Frasers necessarily meant less to the merged entity because there was a finite quantity of product which couldn't be increased? Or are we talking about Frasers being more favourably treated, i.e. compared to current treatment or compared to the way in which the merged entity was treated?

MR KENNELLY: There are two points there, sir, if I may. The first is that there isn't a strict finite amount of product which is then allocated according to -- that we have in the evidence, demonstrating how it is allocated. The rationing happens in a far less transparent way. The suppliers allocate and divert stock between the wholesalers and their own DTC business, depending on their own commercial considerations, as the CMA found. They do limit the retailers through the wholesale channel, they limit their access to product. They deny access to product and they limit access to product that is sought, as you have seen, based, they say -- and this is what the CMA records -- based on the fact that they do not want too much of this product to be in the market at the wholesale level. So the suppliers do ration it.

Our point here, though, is not so much about the suppliers rationing generally, it is about what they would do if the merged entity deteriorated PQRS. We say they would definitely divert product away from the merged entity. There is no doubt

they would do that. If you disagree with their standards, that is the punishment. The question is, where would it go? If there was a demand on the wholesale side, they would send it, we say, to the most ambitious, fastest growing, elevated strategy Frasers stores, which are the ones most committed to getting this premium product and which have persuaded these suppliers that they are committed to the elevation strategy. That is a very likely outcome.

But we don't even get that far because the CMA failed to even ask Nike and Adidas if that is what the Frasers Group would do.

In view of the questions you have asked me, sir, I may take some instructions. I am making good time so, before I finish today, if someone wants to give me chapter and verse on that point -- I am just indicating that to my team -- I may come back with some more detail on it if there is more detail to give you.

THE CHAIRMAN: Mr Kennelly, how are you doing for time? You have until 3.45.

MR KENNELLY: I will be finished well before then, sir.

THE CHAIRMAN: Can I suggest that, subject to your taking instructions, that we carry on and have our interval after you have finished, so Ms Demetriou has time to gather her thoughts. Otherwise we are going to have two intervals.

MR KENNELLY: Indeed. I am happy with that, subject to taking instructions on that last point.

THE CHAIRMAN: Subject to your being ahead of your timetable.

MR KENNELLY: I am definitely ahead of my timetable.

THE CHAIRMAN: Wonderful news. Carry on.

MR KENNELLY: So the point I was making -- this is the leitmotif for my submissions throughout the day -- is that there is very little space for competition between the parties on these parameters of competitions that are dominated by the suppliers.

You have my submission that there is no price competition in the normal sense. The only discounting which I have addressed is of very limited impact, and you have seen the very thin evidence, or non-existent evidence, for that. The QRS, the quality, range and service parameters, are determined by the suppliers.

In these circumstances it is even more important to conduct the SLC analysis parameter by parameter, because the CMA accepts the competitive constraints, the supplier constraints, aren't the same for each parameter. But this, the CMA failed to do.

Really, those are my submissions on ground 3.2. They derive their support from the material that I took you to under ground 1 this morning.

THE CHAIRMAN: Mm-hm.

MR KENNELLY: That brings me to ground 3.3 and direct to consumer.

This is the unusual feature of this market. I have done to death the power of the suppliers. They have the greatest degree of power over the retailers. I bear in mind the point that was made to me by the chairman that the suppliers need them alive for the wholesale business but that isn't the whole story because, at the same time, the suppliers are increasing their DTC retail business, which is in direct conflict with the wholesale business. You have my point, and you have seen it in the CMA report, it is open to the suppliers, according to their own commercial considerations, to divert stock, premium stock, from the wholesale chain and direct it to the more profitable, from their perspective, direct to consumer online offering. So the key question is whether the growth of DTC, especially online, is that at the expense of wholesale?

The CMA addresses this at paragraph 4.403 and 4.405 in the final report, so could we please go to that.

Sir, I think I have given you a bad reference. I think it is 8.403.

THE CHAIRMAN: I think so.

MR KENNELLY: Yes, 8.403, internal page number 229.

This tells you about the DTC growth forecasts. You see it for Nike in particular at 404 and 405. You have the point -- and this is not confidential -- that the focus of DTC is on the online side, not on in store DTC. Their existing strategy and their future strategy -- and this is common ground -- is on the growth of online DTC.

Then you see the conclusion of the CMA on this issue at 8.431, which is on page 236 of the internal numbering. The CMA concludes:

"Nike and Adidas DTC offers are currently present in both the in store and online segments. We consider it is likely the DTC offer will continue to grow strongly in the UK, predominantly online. In particular, there is evidence set out in table 8.14 and 8.15 which indicates that such growth is likely reflective [this is important] of general growth in the market and the ratio of DTC sales to wholesale sales will not change significantly in the foreseeable future."

Pausing there --

MR DOLLMAN: Mr Kennelly, can I ask you one question on volumes, please?

MR KENNELLY: Yes.

MR DOLLMAN: Absent any PQRS issues, do the retailers have guaranteed levels of volumes from Nike and Adidas? In other words, if, for some reason, that didn't happen and the online sales massively increased, in a zero sum game they would therefore have to take less volume through retail. Or are they protected in any way, the retailers, in terms of levels of volume?

MR KENNELLY: Well, there are two points to make. I am told, first of all, there are no guaranteed volumes. Secondly, you have already seen in the documents I took you to this morning how the contracts work between the retailers and the

suppliers. Those are confidential matters. I can go back to them if I moved over them too quickly this morning but you saw in the footnote to those sections on supplier constraints how the contracts work between the suppliers and the retailers, how the cancellation provisions work, how much detail and what kind of reasons the suppliers would need to reduce or cancel a contract with a retailer and whether any reasons were needed at all. All of that you have in the final report and you have my submissions on that. The non-confidential part explains the arbitrariness of it and the lack of certainty that the retailers have, which again goes to the competitive imbalance and the commercialism imbalance between them.

I can give you those references again if I went over it too quickly this morning.

MR DOLLMAN: That is fine.

MR KENNELLY: The key question here is DTC growth. What is important to see in paragraph 8.431 is that this is all pre COVID. So pre COVID the CMA is saying it is likely that the suppliers' DTC offer will continue to grow strongly in the UK, predominantly online. That is their prediction pre COVID. But they say, based on the tables 8.14 and 8.15, that pre COVID, that growth in DTC online is reflective of a general growth in the market and the ratio of DTC to wholesale, bricks and mortar sales included, will not change significantly in the foreseeable future. They make that prediction, as I say, on table 8.14 and 8.15, which you see back on page 231, internal page numbering.

Table 8.14 and 8.15, you see Nike's share of revenues by channels in the UK, Adidas' share of revenues by channel in the UK. Those are the forecasts upon which the CMA made that conclusion in paragraph 8.431 that I took you to. We have seen these tables before.

The tribunal can anticipate the submission that I am about to make because these

Adidas forecasts were obsolete as at 16 March 2020. This, as I said, is in paragraph 8.412 of the final report. Adidas told the CMA that these forecasts were obsolete.

As for Nike, 4.2.4, you have seen the response that Nike gave and the information that the CMA sought, which was the date, the information as at the date of the questionnaire, which is 9 March 2020.

If you go to the CMA skeleton at paragraph 64 -- there is no need to turn it up -- you see that they say this was the best available evidence at the time. I repeat my submission from earlier; no, it was not the best available evidence at the time. Adidas told that you that it was obsolete at the time. Nike said what it said about the particular forecast as at 9 March, or 16 March 2020 but Nike also said that they were reviewing the situation. They were obviously open to revising the forecast, or at least they were examining it internally for their own purposes, by way of, as I discussed earlier, their internal examination of the likely impact of COVID on their business. All of this material, which they say was the best available at the time, was pre-lockdown, pre 23 March 2020.

One can have some sympathy for the CMA, in the sense that it obviously was extremely inconvenient, having gathered so much evidence, to be faced with a major, relevant deterioration from mid March 2020. That major deterioration lasted right through the end of March, right through April and into early May. The CMA chose not to ask any specific questions about it. The purpose, the critical purpose, of checking whether they were right that online DTC will continue to grow at the same rate as online wholesale, or wholesale generally, because the predictions that they had as the best available actually included bricks and mortar, in circumstances where every bricks and mortar shop was closed from 21 March.

So what does the CMA say about that? We turn to that skeleton at paragraph 64. At paragraph 64 the CMA says:

"Our argument that the CMA couldn't rationally rely on suppliers' existing forecasts since Adidas had described them as obsolete."

They say, despite Adidas telling them that they were obsolete, the CMA say they remain the best available forecast at the time. That, members of the Tribunal, is why we are in the area of irrationality.

Then they say this:

"It should be noted that Nike confirmed there had been no material changes to the forecasts provided previously."

You have my point about that had been superseded. It was out of date and there was ample time to ask them for probative material.

Then this:

"Neither supplier sought to provide new forecasts incorporating the impact of the pandemic. In the circumstances, their decision to refer to the existing ones was reasonable."

What they are saying there is that neither supplier sought to provide, voluntarily, further forecasts. They were never asked, in the six weeks between the imposition of the full lockdown and the report, they were never asked to provide a further view as to the impact of COVID.

At the same time -- I appreciate the sympathy you may have for the CMA in view of lateness of this but, at the same time, the CMA did receive information from Footasylum regarding its financial position. I am not sure I actually pointed that out to you when I went through the confidential material, but if you go to paragraph 5.30 of the final report -- sorry, it is footnote 107, yes, 5.30. They received evidence from Footasylum. There is no need to describe what the

evidence was about. The important point is they received and relied on evidence from Footasylum. You see the date upon which they received that evidence at footnote 107 and again at [redacted] You see the date upon which that evidence was provided.

It is simply not correct to say that materials provided in late April was too late to be assessed and taken into account for the purpose of the report on the 11 May.

This has consequences for the rest of ground 3.3 because the CMA says, okay, during COVID, fine. During the COVID pandemic I think they have to accept there will be a shift to online at the expense of store orientated retailers. They say there are two points about that and you see them at the skeleton 63.1. They say, first, suppliers or retailers wouldn't have been able, reliably, to estimate whether a longer term shift to online sales would occur. So there is no point in asking them; they couldn't give us anything reliable about whether a longer term shift to online sales would occur.

Secondly, they say the new customers won by the supplier's online DTC business might not stay with the supplier's DTC business once Covid-19 is behind us. These are both, we say, perfectly sensible issues to raise.

A rational competition authority would not simply leave it at identifying the issues. They would have asked whether there was any way of gathering evidence to resolve that question. Again, I repeat, the question, the terms of the question, are for the CMA to formulate but it is obvious what the target of any such question would have been. They could have asked the parties, the suppliers and the competitors to supply data about sales on a week by week basis as the government closed non-essential retail. It could have used that data to assess our submission that the brands would increase their online DTC sales at the expense of wholesale online. They could have compared the sales by Nike

and Adidas DTC online with the parties' online sales. That would have tested whether they were right to assume that they were going to move in parallel because our submission was that the parties, skewed towards bricks and mortar stores and relying on bricks and mortar stores as part of their overall commercial offering, were at a disadvantage when all bricks and mortar stores were shut and everyone was online. The pure online business, or the majority online business, which was the supplier DTC, had a massive advantage. Would that endure? They could have asked that question.

As I say, one easy way of figuring that out would be to ask the extent to which new online DTC customers stick with DTC and don't revert back to bricks and mortar. The suppliers had that information by reference to their previous pre COVID business because any online business, they certainly would have been able to say the extent to which the pre COVID new customers stayed with them or went back to bricks and mortar.

THE CHAIRMAN: Mr Kennelly, you are still emphasising the failure to ask questions; is that right?

MR KENNELLY: Absolutely.

THE CHAIRMAN: So when you are faced with the CMA's skeleton, paragraph 63.2, saying it is an impermissible challenge to the merit, the conclusions, you would say you are not challenging the merits, you are just challenging the methods; is that right?

MR KENNELLY: Yes, precisely.

THE CHAIRMAN: You are quite sure that is what you are saying?

MR KENNELLY: I am quite sure. The reason why I am having to go into the rationality of the efforts they made to formulate the question is because it is a rationality standard. They haven't got an absolute obligation to ask the

questions.

THE CHAIRMAN: I thought you said they had a public law duty to ask appropriate questions to enable them to draw conclusions?

MR KENNELLY: Yes, they have a public law duty to ask such questions as are reasonably required to enable them to answer the statutory question correctly.

THE CHAIRMAN: The whole gist of what you have been saying is that they were reasonably required to ask these questions and didn't ask them.

MR KENNELLY: Indeed**.** Indeed.

Just to avoid any doubt at all, that is the thrust of my submissions.

THE CHAIRMAN: You clearly don't agree with the conclusion that they drew but you are not challenging the conclusion on its merits, you are challenging the way by which it was arrived at; is that right?

MR KENNELLY: No. In our pleaded case -- and I will be corrected if I am wrong -- is that we also challenged the ultimate conclusion -- the rationality of their ultimate conclusion on DTC. We also make the point that their evidence gathering was irrational and that is the focus of my submission today. That is the stronger of my two points and that is why I am emphasising it before you.

THE CHAIRMAN: I am not trying to split hairs but you are challenging the rationality of the conclusion, not the correctness of it; is that what you are saying?

MR KENNELLY: Yes, of course. We are not permitted to challenge the correctness of the conclusion. I can only challenge it if its irrational.

THE CHAIRMAN: That doesn't mean you are not doing, that just means you are not permitted to do it.

MR KENNELLY: Indeed**.**

You know better than anyone, in order to challenge the rationality of it, I do need to get into the merits. Only if they have the merits very badly wrong, do I get

home on substantive irrationality.

THE CHAIRMAN: Be very careful about merits, Mr Kennelly.

MR KENNELLY: This is not a disguised merits challenge. My submission which I have been making throughout, and it really underlies all of these grounds, is that their failure to ask the questions, their failure to investigate and gather the material, is the key irrationality, the key legal error, at the heart of their final report. That is the point that I emphasise more than any other.

MR FRAZER: Mr Kennelly, can I just take you back to the rationality of the question you say they should have asked, which was about the way in which DTC online sales were progressing as compared with the retailers' online sales. That is the question they should have asked, is that correct?

MR KENNELLY: Yes.

MR FRAZER: How would that have given rise to an understanding about what would happen in the longer term after COVID? In other words, I heard you say this would have indicated whether customers would have returned to bricks and mortar or would have stayed with online. Doesn't it just tell us which online channel customers preferred during COVID? It doesn't actually tell us if they would actually prefer to go to a shop rather than online -- anybody's online. Would it have given rise to the information that you think the CMA should have gathered?

MR KENNELLY: Two points to make in response. The first is that, based on what they knew about their online business pre COVID, the suppliers would already have known the extent to which new DTC online customers, switching to them from both wholesalers online but also from bricks and mortar, were likely to stay with the online DTC offering, because they will have -- when they get new customers they have verified contact information, which is the best leads that

you can get in an online business. So they will already have their own data on their own suppliers as to how sticky new DTC customers are. The question then is to what extent -- that is the first question, and that is likely to resonate even during the COVID period.

During COVID there is undeniably a massive switch to online, and a disproportionally greater switch to the DTC online offering because that is a predominantly online offering. They have a natural advantage, both in terms of their business structure but also their cost base, because it is not based in bricks and mortar stores.

So there are two levels to this. One is the extent to which the customers are shifting to them and will stick with them. They could, if asked, have explained the extent to which they expected that to happen, based on their own data of the stickiness of new DTC customers. Also, there are broader questions about the implications of that switch over the two year reference periods, as regards the competitive constraint offered by the online DTC business as against the businesses skewed towards bricks and mortar business. It is obvious that the companies with bricks and mortar reliant businesses were at a massive disadvantage. They were not focused predominantly on online and, as soon as everything switched to online, the DTC online businesses, which their guaranteed supply of premium product, controlled as they were by the suppliers of premium products, were at a huge advantage in terms of the competitive constraints.

Now, I can say to the chairman's question, am I engaging with the merits? No. What I am describing is the kind of material the CMA had to look for in order to be able to assess the statutory question. Everything we are describing now should have been the target of a question or a query from the CMA to the

suppliers, and they have failed to do it. That is the key irrationality at the heart of the final report.

If I may pause there, because we have covered quite a lot of ground and there are questions, that concludes my submissions on ground 3. Since it is not yet 3.30, may I ask for a moment of indulgence to take any questions or instructions that might be needed? I appreciate the break was supposed to be to allow Ms Demetriou to gather her thoughts but if I may ask it to be given to me also to take any further instructions or queries and then come back very briefly on those, before handing over on time.

THE CHAIRMAN: Before you do, are there any questions from my colleagues? Paul? Tim?

MR DOLLMAN: No, thank you, chairman.

THE CHAIRMAN: Ms Demetriou, what do you make of that?

MS DEMETRIOU: Sir, what do I make of the request that Mr Kennelly have --

THE CHAIRMAN: Are you happy provided you start at 3.45?

MS DEMETRIOU: I am very happy. That is fine with me.

THE CHAIRMAN: Okay. How long do you think you are going to need to respond to the instructions you haven't yet taken?

MR KENNELLY: Five minutes. It really is a sweeping up. I am just conscious that, because of the remote hearing, ordinarily I would have notes passed to me but it is not happening.

THE CHAIRMAN: It is a relief. I thought there was somebody sitting opposite you, mouthing it at you. One way is just as easy as the other, isn't it?

MR KENNELLY: I am grateful for the indulgence, in any event. Thank you.

THE CHAIRMAN: We will reconvene at 3.40. Then you will have five minutes and Ms Demetriou must have her time.

Thank you.

(3.30 pm)

(A short break)

(3.40 pm)

THE CHAIRMAN: Well, is your time up?

MR KENNELLY: Thank you.

Sir, very briefly, on the point about allocation of products to retailers by suppliers, I said I would need to come back on that if there was more information. My instructions, and this is borne out in the documents, is that JD's experience is that if more premium product is allocated to one retailer, there is less for the others.

You see in footnote 338 of the final report that retailers cannot get all the products they want. JD never gets all of the products it wants from the suppliers. That is the rationing point. The parties also explain that Nike and Adidas are definitely shifting to a world with fewer wholesalers and that DTC is taking more of the pie. The references for the tribunal are bundle 3, 3.1.3, page 69; bundle 3.1.10, page 256; and 3.1.15 at page 585. That goes directly to the questions that they ought to have asked the suppliers in relation to the effect of COVID, because they could -- again, this is Mr Fraser's point about what could they definitely have got -- if they had asked are you allocating, in March, going forward, more premium products to DTC rather than wholesale? How are you allocating between DTC and wholesale for online sales? That would have been very probative information, testing the forecasts that they were relying on pre COVID. They never asked that question.

There is no doubt -- and for this purpose I have been given a statement made by Nike yesterday. I appreciate this is well after the decision but just to give you

a flavour of what is happening. This is a public statement. The Nike chief executive John O'Donahoe said the shift to online sales is a permanent trend: "We know that digital is the new normal. The consumer today is digitally grounded and simply will not revert back."

Now, that is --

THE CHAIRMAN: I read that too but we are going to put that out of our minds, Mr Kennelly, sorry.

MR KENNELLY: If I may say so, sir, it is a statement of the obvious and it is a point that was made to the CMA at the time.

THE CHAIRMAN: We are judging the correctness or otherwise, under judicial review principles, of the decision when it was made.

MR KENNELLY: Indeed**.**

THE CHAIRMAN: Whatever we feel about it, and I am sure we all have our own feelings, we are not allowed to take that into consideration. I am sorry.

MR KENNELLY: No, I understand, sir.

That brings me to my very final point. This, really, is the legal point. Although I have gone on at length about the supplier constraints, it is important to recall that the key error under ground 1, the legal error, was the failure to show a chain of causation through to the SLC. We accepted for the purposes of that ground that there was some evidence of competition between the parties pre-merger on certain parameters, which I took you to. The main failure of the CMA, their failure to complete the chain of causation, was their failure to examine the extent to which the PQRS would be deteriorated post-merger in view of the supplier constraints in particular. That is where there was no evidence of adverse effect on consumers. And that is the lack of a chain of causation through to an SLC conclusion which we say is the fundamental legal error

under ground 1.

I think those conclude my submissions, unless I have anything further that I can say or assist you with.

THE CHAIRMAN: Thank you very much.

My colleagues? Any further questions at this stage?

MR FRAZER: No.

MR DOLLMAN: No.

THE CHAIRMAN: In which case, thank you, Mr Kennelly.

Over to you, Ms Demetriou.

Opening submissions by MS DEMETRIOU

MS DEMETRIOU: May it please the tribunal.

The CMA's overriding submission here is that this is an impermissible challenge to the merits of the decision which has been disguised -- thinly disguised, we say -- but, despite Mr Kennelly's best efforts, valiant efforts, it is clear that what the appellants are really doing is seeking to challenge the merits of the CMA's decision.

What I would like to do is approach my submissions in the following order: first of all, I would like, briefly, to remind the tribunal of the key stages in the CMA's analysis. I am going to do that very quickly by reference to the summary at the start of the decision. We say it is important to bear that in mind because, quite understandably, what Mr Kennelly did was alight on particular paragraphs of the decision as being the subject of criticism, but of course the decision needs to be read as a whole and all of the various constituent elements need to be seen together.

Secondly, I am going to make some short submissions on the proper approach of

the Tribunal to this application. I am going to be short because they are common ground, so the applicable legal principles are common ground, but we say that in approaching and considering the arguments made by JD Sports, it is very important that the tribunal bears them in mind. I am going to take you to one authority which distils the particular principles that we say are important in the circumstances of this case.

Thirdly, I am going to then make my submissions on each of the three grounds in turn relied on by JD Sports.

So, to start with the decision and the fundamental architecture of the CMA's reasoning. The starting point, and the important starting point, is that the CMA found that JD Sports and Footasylum are very close competitors. Mr Kennelly just confirmed, and we see from the documents in this appeal, that that is not in dispute. It is not in dispute that, pre-merger, the parties were in close competition with one and other. We know that they both stock a similar range of branded, sports inspired footwear and apparel; they both target young consumers, with a focus on men.

As to this, the tribunal will have seen the way that the CMA defined the market in chapter 7 of the report. Again, the market definition that the CMA arrived at is not subject to any challenge. The key finding is that the category of footwear and apparel is "sports inspired casual footwear and apparel used primarily for leisure purposes" -- that is paragraph 7.26 of the report, which you don't need to turn up -- and that suppliers, of which two important suppliers, but not the only suppliers, are Nike and Adidas, restrict certain products to certain retailers and, although the CMA did not consider it appropriate to define a separate market for restricted products, it did find that access to these products plays a key role in assessing competition. That is paragraph 7.37.

The CMA's conclusion that the parties compete very closely was reached after a detailed analysis of the way in which retailers compete on a variety of PQRS aspects. Again, the reference for your note but I am not going to ask you to turn it up now is paragraph 8.101 and the following paragraphs.

The CMA then went on to consider a variety of evidence, including the parties' internal documents, and to conduct various analyses. I am going to come back to that in more detail in relation to ground 1 but, for present purposes, if the tribunal could pick up the decision at paragraphs 20 to 27 in the summary. That is page 14 of the bundle, page 10 of the internal page numbering.

Some of this evidence is summarised at paragraphs 20 to 27. You see at 20 the CMA found that the parties regularly monitor each other, as well as some other retailers. You have a reference there to a summary of what the internal document shows. So Footasylum's internal documents shows that it monitors JD Sports more closely than any other retailer. Therefore, JD Sports is a particularly significant competitor to Footasylum. Footasylum is also one of the retailers most closely monitored in JD's internal documents.

You see at 21:

"Our surveys [and I will come back to the surveys] show that the parties' customers also consider them to be a strong alternative to each other. We have found that JD Sports is by far the closest competitor to Footasylum. A very high proportion of Footasylum's customers said that they would shop at JD Sports if they could no longer shop at Footasylum, more than two-thirds of in store customers and almost half of online customers for footwear. This was similar for apparel. These figures were substantially higher than for any other retailer."

Then you see at 22 that the proportion of JD Sports footwear customers who said they would go to Footasylum was lower but still substantial, and that that in

store level was still higher than for any other retailer. Online is a close second to Nike. Then you have similar figures for apparel.

Then you see at 23:

"These numbers are important as they tell us how strong the incentives would be on the parties to worsen their offerings after the merger, or not improve them as much or as quickly as they would otherwise have done."

That is important because Mr Kennelly presents this as being some kind of gap in the CMA's analysis but it is not a gap at all. The CMA did consider -- and we will come to the main body of the report in due course -- the prospect of the parties worsening their offering or not improving their offering as much post-merger. The CMA says there in the summary:

"Using these survey results, we calculated the strength of this incentive at the national level for both parties using the GUPPI, which is commonly used in CMA merger investigations. The GUPPI results are high for both of the parties, and particularly for Footasylum."

Those figures are high as these analyses go, GUPPI analyses go.

So the idea that the CMA has not addressed its mind to whether the offering would be worsened pre-merger is simply illusory.

THE CHAIRMAN: Post-merger.

MS DEMETRIOU: I am so sorry?

THE CHAIRMAN: Post-merger, you said pre-merger.

MS DEMETRIOU: I am so sorry. So Mr Kennelly accepts that pre-merger there was competition, but the gap that he purports to identify is that there is no analysis of what would happen post-merger, that the offering -- that there is a likelihood of the parties worsening their offering. We say that that is wrong.

You see at 24 that there is an analysis of the impact of store openings and closures.

That also indicates that Footasylum is a competitive constraint on JD Sports:

"Entry by Footasylum is associated with a fall in nearby JD Sports store revenues for footwear and apparel. We do not have enough data to test the impact of JD Sports store openings on Footasylum stores."

Then, at 25:

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

Then, at 26:

"This is also supported by a range of other evidence. They stock a similar range of branded sports inspired casual footwear and apparel; they both target young customers with a focus on males; their stores are in similar areas; and many other retailers told us that they consider JD and Footasylum to be close competitors to each other."

The CMA then deals with the market share figures, this is the share increment point, but then explain why these are not particularly informative in this case:

"Delineating a market in this case is somewhat artificial. This means that these market shares are not particularly informative and do not help us to understand fully how closely retailers compete in this case. That is why we looked at a range of other evidence that tells us more about the competition in these markets and the effects of the merger."

THE CHAIRMAN: Sorry, just to interrupt for a minute. I thought the point being made in relation to market share was that the increment was rather small, not that the market share tells you about closeness of competition. I thought it was a different point.

MS DEMETRIOU: Maybe that is right, sir. Maybe that is the point that was being

made. I think that is the point Mr Kennelly was making.

We would say, equally, if the market shares to start with are not particularly informative, then equally the increment is not particularly informative. That is why the CMA looked at a range of other evidence and I am going to come on to the evidence.

THE CHAIRMAN: I am sure we can all agree that market definitions can be a little artificial.

MS DEMETRIOU: Yes, and it is not challenged in this case but you have seen in chapter 7 the way that the market was approached, and there was consideration given to whether to define the market more narrowly in terms of the restricted products. That was not in the end thought to be appropriate by the CMA, but the CMA nonetheless took into account the importance of restricted products. So market definition, I think as you are averting to, is a flexible concept. And that is why neither of the market shares nor the increments in this case are particularly informative.

Then in terms of the basic architecture of the SLC finding, the CMA then went on to consider, so having found that the parties pre-merger were very close competitors, and that they were likely post-merger to deteriorate, the merged entity would have an incentive to worsen their offering, or at least not improve it as much or as quickly, the CMA then considered whether the competitive constraint imposed by other retailers was such, both now and in the foreseeable future, that there would not be competition problems from the merger, so that there would not be a SLC. And you can see the summary at paragraph 28, and essentially it found that other retailers provide a more limited competitive constraint, which means that there would still be a substantial loss of competition from the merger. And we see that explained in summary at

paragraph 28.

And then the CMA went on to consider the constraints from the suppliers of branded products and concluded that these would not prevent competition problems arising from the merger. And we see that summarised at paragraph 35, which is on page 13 of the internal numbering, and so the CMA says it:

"Looked at whether the parties faced constraints from suppliers of branded products, in particular Nike and Adidas. While suppliers have an important role in this market [so that is acknowledged] more so in footwear than in apparel ...(reading to the words)... on retailers, particularly through controlling the products and volumes that retailers can access and setting criteria for in store quality and product presentation, in general Nike and Adidas are the most restrictive of the suppliers, but suppliers do not provide a constraint on all aspects of retail competition."

And I am going to come back to this in relation to ground 3. But the key point for now to note is that the CMA summarises at paragraph 36 the fact that retailers do compete on many aspects of business, but suppliers don't monitor and engage in all of these aspects, and in relation to some of them they don't have any incentive to do so. And so we see at 37 that suppliers provide some additional constraints to retailers on aspects of retailers' offering, but this has limitations. And so, sir, members of the Tribunal, the points made by Mr Kennelly in terms of the strength of suppliers and their influential in terms of exerting pressure on retailers, because they can decide what products to supply, those are all acknowledged by the CMA and have been considered, but despite those points the CMA has reached the conclusion that the constraint posed by suppliers is not sufficient to come to the conclusion that this merger does not result in competition problems. And as I say, we are going to get to

that in more detail under ground 3.

Now, in terms of the evidence, the CMA based its conclusions, which I have summarised, on a wide range of evidence which was considered and assessed by the group during the investigation. We can see this from chapter 6 of the report. So if you could turn up paragraph 6.17, which is on page 61 of the internal numbering, 65 of the bundle, under the heading "evidence". It is actually 6.16 it starts. So:

"Considered the views of the parties and third parties. Conducted two large surveys of the parties' customers, in store and online. Analysed the impact of retailer store entry and exit over time. Assessed financial data and reviewed an extensive number of internal documents from the parties and from third parties."

And then 6.17:

"This evidence reflects current competition in the markets e.g. the survey results and the entry/exit analysis, and also changes in the markets over the foreseeable future. We therefore considered both the static and the dynamic aspects of the markets in our assessment."

And then at 6.18:

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

And then you see over the page at 6.21 to 6.22, that the CMA gathered a large volume of internal documents, reviewed over 2,500 internal documents, and then gathered financial data for the parties' individual stores.

And then you see at 6.23 to 6.34 that the CMA also gathered information from a range of third parties, including through submissions, hearings, and requests for information and received responses to our information requests from more than 20 different retailers. And requested internal documents from several third parties related to their business strategy and plans in the relevant market.

And then at 6.26 to 6.30, the CMA also assessed evidence from consumers, so you see at 6.27, reference to the store exit survey and you see there at 6.27, an explanation of what that is. So:

"The store exit survey was of consumers who had purchased footwear or apparel products in store, at a JD Sports or Footasylum stores, conducted at 28 JD Sports stores and 28 Footasylum stores in October 2019. A total of 6,876 interviews were conducted. The stores included in the survey reflected different store types across different parts of the UK. We applied weighting to make the results representative of the parties' entire store estate."

There was also an online survey and the CMA explains here that that wasn't given full weight because, you see that in 6.29, because it wasn't, the minimum threshold that the CMA considered necessary wasn't reached. So it was given some weight but not full weight.

And then at 6.30 over the page you have a description in summary of the GUPPI analysis.

So that is, in short, the various and varying strands of evidence and analysis that the CMA took into account in reaching the conclusion that it did.

And it is just probably worth turning up briefly appendix A to the decision, which is in page 421 of the bundle reference. It is A3 of the decision. So this is appendix A. I am not going to read out the steps, you will be very, very familiar with the steps which are taken in a merger investigation, but you will see there,

in hopefully convenient form, a summary of the steps that were taken, including a site visit and the oral hearings.

Now, as we say, it is important in assessing the arguments made by JD Sports, which seem to and which alight, as it were, on individual paragraphs of this report, to bear in mind the evidence, the evidence basis for the report, which is very significant, and the way that the report hangs together as a whole, the steps that are taken as a whole, the steps, the constituent steps which lead to the conclusion of the CMA.

I am going to turn now to the principles, the legal principles, that apply which we say are relevant in this case and they are conveniently summarised in the Ecolab, the recent Ecolab decision, which is in authorities bundle 5-tab 3.19. I think that is the right reference. Now I can't find it myself. Here we are. I think it is the very last authority in the authorities bundle. It is the third of the authorities bundles and it is the very last authority, Ecolab. And if I could ask the tribunal, please, to turn to paragraph 58 on page 23 of the internal numbering, page 1529 of the bundle. And this is in my submission a helpful distillation of the principles that apply in a case like this, but are particularly important, particularly relevant in the current case. And you can see that in that case too Ecolab's challenge was brought essentially on rationality grounds and that the tribunal says there:

"The approach has been considered extensively in previous cases ..."

And refers to BAA. And I just want to highlight some of the points in BAA that are cited in this judgment. So you see there, this is paragraph 20 of BAA, so it is the inset paragraph 23:

"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 to it.

"The CC must do what it necessary to put itself in a position properly to decide the statutory questions.

"The extent to which [and this is important] 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."

And then:

"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 to properly decide the statutory questions is a rationality test."

And then you see:

"The court should not intervene merely because it considers that further enquiries would have been desirable or sensible. It should only intervene if no reasonable relevant public authority could have been satisfied on the basis of the enquiries made."

And we say that this is particularly important in this case, because you have heard the way that the argument is being put, and Mr Kennelly emphasised this. It became more apparent today in his oral submissions than it has been either in the defence or in JD Sports' skeleton argument. But the way in which JD Sports seeks to put its case, primarily, is on the basis that the CMA didn't ask for up questions and so we say -- and I think this is common ground -- that whether or not the CMA, whether or not its decision is rendered unlawful as a result of the CMA failing to ask a follow up question, it must be decided on a rationality basis and so this tribunal needs to be satisfied, for example, that it was irrational for the CMA not to ask a direct question, for example of Footasylum's lender. So that is the standard that applies, and it is not

sufficient for the tribunal to reach the view that it might have been a good thing, or it might have been sensible. That is not the test, it has to be irrational; no proper basis for the CMA to decide not to ask a follow up question. And we say that that is plainly not satisfied, and I am going to come to the substantive grounds in due course. But plainly not the case here.

And then we see at 4 it says:

"... 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."

And again that is very important here, because when it comes to for example ground 1, Mr Kennelly seeks to say that it is important for the CMA to have reached conclusions in respect of each of the parameters of competition, as he puts it. But that isn't the question asked by the statute. And we see that when it comes to the tribunal's role, what the tribunal must judge is whether the CMA had some material, some evidence available to it of some probative value to answer the question posed by the statute; could this merger be expected to give rise to a substantial lessening of competition?

Then we see over the page at paragraph 60 a reference to paragraph 20.6 of BAA where the tribunal said:

"It is well established that the ordinary principles of judicial review apply."

Despite of course this being an expert and specialist tribunal.

And then we have at paragraph 61 a reference to Stagecoach, where the tribunal was chaired by Ms Vivienne Rose as she then was, which gives some further detail on the no or sufficient evidence point. So:

"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 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 it did. The fact that the evidence the supply 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."

And that is in short what we, the CMA, say we have on our hands in this case. It is in reality an impermissible challenge to the merits of the decision.

Now, sir, members of the Tribunal, that is what I wanted to say by way of preliminaries, and I was going to turn to ground one. Shall I make a start? We have five minutes. Shall I make introductory submissions?

THE CHAIRMAN: Do any of my colleagues have any anything to ask on the first of these two aspects?

MR FRAZER: No.

MR DOLLMAN: No.

THE CHAIRMAN: Can I just ask, these principles that you have read out from Ecolab, referring to BAA, which is a very well established case, as we all know, you would presumably suggest, and I will give Mr Kennelly the chance to reply in due course, I am sure, these are not contested, these principles are common ground, and I would like to feel that they were. It gives us a firm basis to proceed on. Is that correct? Mr Kennelly, do you want to just confirm that?

MR KENNELLY: Absolutely. The legal principles are common ground.

THE CHAIRMAN: Right. Good.

MR KENNELLY: I will deal with it --

THE CHAIRMAN: That is one sentence of the judgment already written, thank you very much.

Yes, go on for five minutes, yes, that would be great.

MS DEMETRIOU: So members of the Tribunal, in relation to ground 1, before I get stuck into some of the detailed submissions that were made, we say that the starting point is that it is common ground between the parties that the parties to the merger were close competitors before the merger, so that is common ground. And we say further that the evidence that that is so -- so the CMA didn't just accept that that was common ground, the CMA carefully established that in the decision, and I am going to come to that, and the evidence on which the CMA established that was overwhelming. Therefore it is clear that given the closeness of competition the merger of these two close competitors would remove a significant competitive force on the market and that is capable of leading to a substantial lessening of competition, if it weren't constrained either by other retailers or by suppliers.

THE CHAIRMAN: Just a minute. Just to pick you up on that, I don't think the sole question of whether the parties are close competitors necessarily leads to the conclusion that there is a substantial lessening of competition. You have to give some weight to their market position and their general economic strength. And I think it is implicit in what you are saying that JD Sports is a significant enough player for the takeover of a close competitor to be put into the "substantial" basket. I am not putting words into your mouth.

MS DEMETRIOU: I entirely accept that, I entirely accept that point. But here the parties were significant players on the market, and I am going to come to the

findings, I am just giving you an overview at the moment of the structure at this point.

THE CHAIRMAN: Okay.

MS DEMETRIOU: But given the position of the parties on the market and given the closeness of the competition between them, then it follows that their merger removes a competitive force on the market. You are right that whether or not it is substantial needs to be determined. Of course subject to the question of constraints. So countervailing constraints.

And the CMA, in its decision, and I am going to come and take you through chapter 8 with some care, to explain how it approached each of those steps, the CMA reached the conclusion, as the tribunal knows, that this merger indeed would be expected to give rise to a SLC.

Now, what the appellants seek to do under ground 1 is to impose on the CMA's analysis a very granular taxonomy. They say that the CMA is compelled when answering statutory questions to address the causation issue parameter by parameter, as they put it. So that is their point. And we say that that is not correct. That is not what the statute requires. It is not even what the guidance requires. In this case the evidence was very substantial, in fact overwhelming, and we say that there was no legal reason why the CMA was compelled to follow the very granular taxonomy which is argued for by JD Sports.

Now, at various points in his submissions Mr Kennelly, in a sense, pulls himself up by his own boot straps. Because if you start with the assumption that JD Sports' taxonomy is required and that you need to approach each of the aspects of PQRS in isolation, then of course you can then pick on one of them and say well, there is not very much evidence here, there is only one example given, and that is not good enough. Well, we say that is an impermissible

approach to reading this decision. On many occasions Mr Kennelly complained that there was only one example in the evidence, but these are examples that the CMA is given and it makes that clear in its report.

So in short, we say that the CMA was fully entitled to structure its analysis the way that it did, and not as JD Sports says it had to do. And you can see, and perhaps you can turn up JD Sports' skeleton at paragraph 13. We see there the taxonomy set out. Does the tribunal have that? That is paragraph 13 of their skeleton.

THE CHAIRMAN: Yes.

MS DEMETRIOU: They say that the process that is required for any individual parameter of competition is to answer the basic causation questions set out in the notice of appeal.

They set them out here.

"How much competition would there have been between the merging parties on the parameter but for the merger, bearing in mind the constraints imposed by the suppliers?

"How much competition would there be on the competitive parameter following the merger, from retail rivals current and in future?

"What is the difference between A and B?

This is the basic causation question, and:

"Is the issue identified in C sufficient in itself, or together with any lessening in competition identified in respect of other parameters, to give rise to a SLC?"

Essentially what we say, and this is really is short answer to ground 1, is that where the evidence is as it is in this case, which is that these are close, very close competitors who are competing on a variety of aspects of PQRS, and where the evidence strongly demonstrates that the causation question, that the

merger will result in a SLC, there is no need to follow this taxonomy and carry out this granular exercise in respect of each of the parameters. That is not required by the statute and the fact that the CMA did not do that in this case is not an error of law.

THE CHAIRMAN: Ms Demetriou, would you accept the sort of granular approach, or at least the staged approach, if you deleted all references to individual parameters?

MS DEMETRIOU: Yes.

THE CHAIRMAN: These seem to be the basic questions that an authority has to ask itself.

MS DEMETRIOU: Yes.

THE CHAIRMAN: What you are objecting to is the parameter by parameter approach, is that right?

MS DEMETRIOU: That is exactly right, we accept the stage approach because of course there is a causation question posed by the statute, but the causation question was answered in the report, in the decision, and the only flaw that JD Sports points to is the failure to do it parameter by parameter, and we say there is no such requirement in the Act and indeed no such requirement in the guidance, and I am going to turn next to the guidance, but that might be a convenient moment to end.

THE CHAIRMAN: We have all persevered magnificently with this screen based approach, and I am very grateful to everybody for staying at it. Yes, thank you very much. If we could resume at 10.30 am tomorrow. Thank you very much indeed.

MR KENNELLY: Thank you.

MS DEMETRIOU: Thank you.

THE CHAIRMAN: Thank.

(4.18 pm)

(The hearing adjourned until 10.30 am the following day)