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Case No. : 1354/4/12/20

5 **IN THE COMPETITION**

6 **APPEAL**

7 **TRIBUNAL**

8  
9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP  
12 (Remote Hearing)

13 Thursday 24th September 2020

14  
15 Before:  
16 Peter Freeman CBE QC (Hon)  
17 Paul Dollman  
18 Tim Frazer  
19 (Sitting as a Tribunal in England and Wales)

20  
21  
22 **BETWEEN:**

23  
24 JD Sports Fashion plc

**Applicant**

25  
26 v

27  
28 Competition and Markets Authority

**Respondent**

29  
30  
31  
32 **A P P E A R A N C E S**

33  
34 Mr Brian Kennelly QC and Mr Alistair Lindsay (On behalf of JD Sports Fashion plc)  
35 Ms Marie Demetriou QC and Mr Ben Lask (On behalf of the CMA)

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Thursday 24 September 2020

(10.30 am)

**THE CHAIRMAN:** Right, good morning everybody. Welcome back to this hearing. Before I ask Ms Demetriou to continue, are there any reflections overnight that anybody wants to share with us, or are we as we were when we left?

**MR KENNELLY:** From our side we are where we were when we left.

**THE CHAIRMAN:** Ms Demetriou, then please resume.

**Opening submissions by MS DEMETRIOU (continued)**

**MS DEMETRIOU:** Thank you.

I was about to embark on my submissions in response to ground 1.1 when we finished yesterday. You will recall that JD Sports' skeleton argument and notice of appeal advances the point that the CMA's approach to the SLC was contrary to the guidance, to the Merger Assessment Guidelines. Mr Kennelly, in his oral submissions, focused on the statute itself. His argument, in a nutshell, was that a parameter by parameter approach is required on causation in order to satisfy the statutory test.

We say that this is incorrect. I would like to, first of all, take you back to section 35.1(b), which I know you know very well, but if you would just indulge me for a moment and pick it up in the first authorities bundle behind tab 1.

**THE CHAIRMAN:** Mm-hm.

**MS DEMETRIOU:** That provides that the CMA has to decide, on a reference, the following questions. (b) is the critical one here. So:

"If a relevant merger situation has been created, if so whether the creation of that situation [in this case] may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services."

We agree with Mr Kennelly that this certainly incorporates a causation question but

1 we say that what it does not do is lay down any rigid rule as to how the CMA must  
2 approach that causation question. The CMA must establish that the merger may be  
3 expected to result in a substantial lessening of competition on a balance of  
4 probabilities but it does not have to approach that question separately for each  
5 parameter of competition. There is nothing in the statutory language that mandates  
6 that approach.

7 We say that the guidance doesn't provide for this either. So, even leaving aside the  
8 question of the bindingness of the guidance -- and as to that we say that it is not  
9 binding and it is intended to be applied flexibly -- but even leaving that question of law  
10 aside, there is nothing in the guidance that mandates the type of approach argued for  
11 by JD Sports.

12 If we could please turn that up behind tab 2.1 in the same bundle. We see  
13 immediately -- and Mr Kennelly took you to this -- paragraph 1.5 on page 28, which  
14 states that the OFT and the CC, now the CMA, will have regard to these guidelines.  
15 Then it states:

16 "Merger assessment is inevitably case specific. It must take account of the particular  
17 transaction and the markets being analysed. The methodologies of merger analysis  
18 cannot be applied in a rigid and mechanistic way."

19 We say that is what, in fact, JD Sports is trying to impose in this case.

20 "The authorities will therefore consider each merger with due regard to the particular  
21 circumstances of the case, including the information available and the time constraints  
22 applicable to the case, and they will apply these guidelines flexibly, departing from  
23 them where they consider it appropriate to do so. Past case references are included  
24 for illustrative purposes only and do not constrain the approach of the authorities."

25 We say that is very clear.

26 SLC is then addressed in part 4. Let's have a look, please, at the paragraphs relied

1 on by JD Sports.  
2 Paragraph 4.1.2 on page 42 explains what "competition" is. You can see there various  
3 aspects of competition are referred to, not just price, but output, quality, efficiency,  
4 introduction of new and better products. Then at 4.1.3, this paragraph is relied on by  
5 JD but it does not lay down the rigid parameter by parameter test advocated by JD.  
6 All it does, on the contrary, is explain what an SLC is and what the CMA must do to  
7 consider -- it was plainly on the basis of this that the CMA proceeded in its report.  
8 There is nothing in the CMA's report which is contrary to what is said here in paragraph  
9 4.1.3.

10 Then moving across to --

11 **THE CHAIRMAN:** Just before you leave that, Ms Demetriou, what do you say to  
12 Mr Kennelly's point that a merger that gives rise to an SLC will be expected to lead to  
13 an adverse effect for customers, and evidence on that will therefore play a key role?  
14 Do you agree with that?

15 **MS DEMETRIOU:** Yes. Generally, we say that where there is a substantial lessening  
16 of competition, one would expect that to lead to an adverse effect on customers. There  
17 is evidence of that in the report and I am going to come to that point.

18 **THE CHAIRMAN:** So it is one way of establishing whether or not there is an SLC?

19 **MS DEMETRIOU:** That's correct.

20 **THE CHAIRMAN:** But not the only way.

21 **MS DEMETRIOU:** It is not the only way.

22 Generally speaking, an absence of competition generally on parameters such as price  
23 or quality or innovation will have a detrimental effect on customers, so that is one way  
24 of establishing an SLC. The report, as I will come to, does establish that the  
25 parameters of competition that were considered by the CMA were ones that were  
26 important to customers.

1 **THE CHAIRMAN:** Not every merger that gives rise to an SLC will necessarily have  
2 an adverse effect on customers. There must be some that don't?

3 **MS DEMETRIOU:** That is correct. One can see, however, just to qualify that, perhaps,  
4 it may be -- whether or not there is an effect on customers may be relevant to whether  
5 there is a substantial lessening of competition. For example, in the Ottakar's case that  
6 Mr Kennelly relies on in his skeleton, although he didn't press it orally, the CC in that  
7 case found that, in fact, there was limited competition between the parties and that  
8 such competition that there was focused on book signings and store refurbishments.  
9 They found that book signings were actually not very important for customers and so,  
10 when it comes to looking at effect on customers, one can see that if a parameter of  
11 competition is in fact not important to customers, that may well go to whether or not  
12 there is the S in the SLC.

13 **THE CHAIRMAN:** There is nothing in this paragraph about what period of time the  
14 assessment is, because you can imagine a merger which appears to benefit  
15 customers in the short term but may harm them in the longer term. So presumably  
16 the approach is flexible enough to cover that also.

17 **MS DEMETRIOU:** It is flexible enough to cover that. Of course, you see in the first  
18 sentence that:

19 "The authorities consider any merger in terms of its effect on rivalry over time."

20 **THE CHAIRMAN:** Over time, yes.

21 **MS DEMETRIOU:** So, certainly, what the CMA is not doing is looking only at the  
22 immediate effects. That would not be a correct approach to assessing an SLC. The  
23 CMA inevitably has to make predictions about the structure of the market going  
24 forward in the foreseeable future, and that is the approach that was taken in this case.

25 **THE CHAIRMAN:** Okay.

26 **MS DEMETRIOU:** So, sir, moving on to paragraph 4.2.3. You can see that at the top

1 of page 44. There is a recognition in this paragraph that price is not the only parameter  
2 of competition -- I don't think that is disputed -- and it includes non-price aspects, too.  
3 What the CMA must do is consider how rivalry might be affected and, as we will see  
4 in more detail, that is precisely what the CMA did in this case.

5 Part 5 is concerned with analytical approaches and methodologies. Section 5.4 deals  
6 with horizontal mergers and unilateral effects. That starts on page 64 of the guidance.  
7 So you can see at 5.4.2:

8 "A theory of harm relevant to the consideration of horizontal unilateral effects is the  
9 loss of existing competition. Other theories of harm consider the unilateral effects  
10 arising from the elimination of potential competition."

11 So the important starting point in this case is that the CMA identified that these parties  
12 were very close competitors and they were significant players in the market, that they  
13 competed on a number of parameters and what the merger did was it resulted in the  
14 loss of existing competition, because of the merger. So the CMA -- that was a very  
15 important starting point. That, in itself, is a prima facie lessening of competition.

16 The CMA then considered whether, nonetheless, that in fact would not eventuate  
17 because of constraints from suppliers and other retailers in the market.

18 Then you see at 5.4.6:

19 "Where products are differentiated, for example by branding or quality, unilateral  
20 effects are more likely where the merger firms' products compete closely."

21 We say that is the case here, as the CMA found on the basis of overwhelming  
22 evidence.

23 "To assess whether the merger results in unilateral effects, the authorities may analyse  
24 the change in the pricing incentives of the merger firms, created by bringing their  
25 differentiated products under common ownership or control."

26 That is what the CMA did in the GUPPI analysis.

1 Moving on, 5.47 to 5.10 give an example of a unilateral effect on price competition.  
2 Then, 5.411 over the page:  
3 "It may be relevant to take into account constraints placed by other suppliers on the  
4 incentives of the merged firm."  
5 We know that the CMA did that.  
6 Then, 5.4.12:  
7 "Unilateral effects resulting from the merger are more likely where the merger  
8 eliminates a significant competitive force in the market or where the customers have  
9 little choice of alternative suppliers."  
10 We say this is a case where a significant competitive force was eliminated because of  
11 the close nature of competition between the parties.  
12 So, in short, we say that the CMA proceeded in accordance -- nothing that the CMA  
13 did in this case jars or is inconsistent with the guidance and there is nothing in the  
14 guidance that requires the rigid steps laid down by JD Sports as regards a parameter  
15 by parameter approach to causation.  
16 **THE CHAIRMAN:** Is there anything in the guidance to define the term "significant"?  
17 **MS DEMETRIOU:** Can I come back to that? I am not sure off-hand whether there is.  
18 Somebody will help me. I am not sure that there is but can I come back to answer  
19 your question?  
20 **THE CHAIRMAN:** Or are we working on the old definition from the House of Lords,  
21 that it is significant if it is worth intervening about? It would be helpful to have your  
22 view on that.  
23 **MS DEMETRIOU:** We will come back on that point, sir.  
24 **THE CHAIRMAN:** Thanks.  
25 **MS DEMETRIOU:** Turning now to the report, which is in bundle 2. If we could start,  
26 please, at paragraphs 6.7 to 6.9. This is on page 60 of the report, page 64 of the

1 bundle. Those paragraphs are entitled -- there is a heading, "Horizontal unilateral  
2 effects theories of harm". You see there that the CMA says:

3 "Horizontal unilateral effects may arise when one firm merges with a competitor that  
4 previously provided a competitive constraint, allowing the merged entity to worsen its  
5 offering profitably or not improve that offering as much as it otherwise would have  
6 done, for example by increasing prices and/or reducing quality, range and/or service  
7 levels, collectively referred to as PQRS."

8 The point about not improving the offering as much as it otherwise would have done,  
9 or as quickly as it otherwise would have done, is important when it comes to looking  
10 at supplier constraints. One of the points that I am going to make is that Mr Kennelly's  
11 key point was that there is a selective distribution system. If the retailers don't comply  
12 with that, the suppliers can step in. That is only looking at one facet of how competition  
13 can be diminished. It is not taking into account a slower or a less intense improvement  
14 of the competitive offering, which is what you would expect to see over time in  
15 a competitive market.

16 Then, at 6.8:

17 "Horizontal unilateral effects are more likely when the merging parties are close  
18 competitors."

19 Again, that is what we have. There is overwhelming evidence, and it is not disputed,  
20 that the merging parties are close competitors.

21 "After the merger, it is less costly for the merged entity to worsen or not improve its  
22 offering because it will recoup the profit on recaptured sales from those consumers  
23 that switched to the other merging party, and which would have been lost absent the  
24 merger."

25 Then, of course, the CMA says it goes on to consider whether an SLC may arise as  
26 a result of horizontal unilateral effects in chapters 8 and 9 respectively.



1 Turning to chapter 8, and paragraph 8.8, like Mr Kennelly I am largely going to focus  
2 on footwear but the analogous references to apparel are all in our defence. So  
3 paragraph 8.8 on page 95 of the report, 99 of the bundle, you see there that what the  
4 chapter does -- so whether the merger has removed a competitor which previously  
5 provided a competitive constraint, the ultimate purpose of this assessment is:  
6 "To determine whether, as a result of the merger, the merged entity would have the  
7 ability and/or incentive to deteriorate, worsen or not improve its offering as much as it  
8 would otherwise have done, absent the merger."  
9 That is the language you see again that I just picked up in chapter 6.  
10 Again, the point at 8.9:  
11 "Generally, the closer the two firms are, the stronger their competitive constraint which  
12 would be lost as a result of the merger."  
13 Then, what is meant by "close competitors" at 8.10.  
14 Then the CMA says, at 8.11:  
15 "We therefore considered how closely the parties compete with one another and  
16 whether the removal of the constraint that the parties placed on each other is likely to  
17 lead to an SLC in the sports inspired casual footwear market. As part of this  
18 assessment, we also considered in aggregate current competitive constraints on the  
19 parties from other retailers, in addition to the constraints from suppliers."  
20 That is the CMA clearly setting out what it is going to do in this chapter. In my  
21 submission, that accords entirely with the statutory duty imposed on it and also  
22 accords with the guidance, as we have seen.  
23 The next point to make about the report is that it is clear that the CMA, in addressing  
24 the SLC, was looking at all of the ways in which the merger could result in deterioration  
25 of the offering to customers, or failure to improve it as much as it would have done  
26 absent the merger, as compared with the counter-factual. The CMA was looking at

1 various aspects or parameters of competition, in particular various aspects the parties'  
2 PQRS offering which they could flex post-merger to the detriment of the consumers.

3 If you would turn forward in this chapter, please, to paragraph 8.101, which is at  
4 page 124 of the report, page 128 of the bundle, you see there -- so at this stage -- and  
5 I am going to come back to the suppliers point -- we found that suppliers affect some  
6 aspects of retailers offering:

7 "In this section we have considered in further detail how retailers compete in this  
8 market and the different aspects of the parties' PQRS offering which could be flexed  
9 post-merger to the detriment of consumers."

10 So we see there what the CMA is doing, which is that it is considering various aspects  
11 of competition, which it is going to examine to see whether or not those could be flexed  
12 post-merger to the detriment of consumers.

13 You see, just incidentally, at paragraph 8.102, JD Sports' submission that the footwear  
14 and apparel markets were each subject to intense market-wide rivalry. One asks  
15 rhetorically, well, how can they now be submitting that there were no parameters of  
16 competition which could be flexed post-merger if they were actually intensely  
17 competing pre-merger, if there was intense competition pre-merger? What does that  
18 mean, "intense competition", if not on parameters or aspects of PQRS?

19 Anyway, moving on, we see that that view was held also by third parties -- you see  
20 that at 8.107 -- that retailers competed on different areas of PQRS, and examples are  
21 given. So these are submissions; this is the evidence at the moment.

22 Then at 8.108 over the page, "our assessment":

23 "We considered whether the parties are able to and do compete on PQRS and,  
24 therefore, whether the merged entity could flex aspects of its offering post-merger to  
25 the detriment of consumers. We would expect an SLC to occur if the merged entity  
26 worsened its PQRS offering or did not improve its offering as much or as quickly as it

1 otherwise may have done absent the merger."

2 Then what you see is a series of passages which deal with the aspects of PQRS on  
3 which the parties are able to, and do, compete pre-merger. So you have, first of all,  
4 price.

5 The point that is made in summary is, yes, pricing is generally in line with RRP but that  
6 they also undertake discounts. We know that the discounts, the clearance discounts,  
7 are significant. They are a significant proportion of the parties' revenue. We can see  
8 that from paragraph 8.109 (a) in respect of JD Sports and (c) in respect of Footasylum.  
9 So that aspect of price competition is important. I am going to come on to show you  
10 why the suppliers in due course -- I will show you why the suppliers have no incentive  
11 at all to do anything about that. So there is no supplier constraint when it comes to  
12 that discounting, which is an important aspect of competition.

13 **THE CHAIRMAN:** Do you accept Mr Kennelly's point that the discounting is mostly in  
14 relation to clearance?

15 **MS DEMETRIOU:** Yes, we accept that it is mostly in relation to clearance. What we  
16 don't accept is that it is not driven by competition. He said, well, it is all about getting  
17 rid of inventory and it is not driven by competition, there is no competition element to  
18 it. We don't accept that. I will come back, if I may, to deal with that when I come to  
19 look at the supplier constraints.

20 We say this is an important aspect on which the parties compete, and that is what the  
21 CMA found. It is really not open to JD Sports to say, "well, we disagree with that", that  
22 really is a merits challenge. For them to say that is not driven by competition but by  
23 inventory requirements, really, is quintessentially a merits challenge.

24 We then see at 8.111 that the parties compete on other aspects of their QRS offering.  
25 Examples include their marketing activity, on which they spend a sizable amount and  
26 is a key way for retailers to differentiate themselves; store opening times;

1 refurbishment plans; store fittings; in store queueing times; staff training and  
2 knowledgeability; website functionality; loyalty programmes; the range of brands  
3 offered; staffing levels; and quality. As discussed in the previous section -- and again  
4 I am going to come back to that -- we recognise that suppliers may have some control  
5 or influence over some of these aspects.

6 Then we see, at 8.112, documentary evidence of the parties monitoring some of these  
7 aspects of QRS, which is then considered later. I am going to come on to that.

8 Then at 8.113 -- and this is an important point:

9 "In addition to the competition which occurs on these existing aspects of competition,  
10 innovation also plays a role in this market, in terms of changes and improvements to  
11 retailers' services and offerings. For example, technological improvements such as  
12 JD Sports' introduction of in store kiosks which gives consumers access to a broader  
13 range of products than is available in a specific store, improvements to website and  
14 app functionality ..."

15 And so it goes on.

16 Then it says:

17 "While such innovation is, by its nature, hard to predict, we have seen retailers making  
18 improvements across these areas. These aspects of competition are all features that  
19 consumers value and from which they benefit. Our store exit survey shows that around  
20 a third of customers reported quality or service as a reason for choosing to shop at the  
21 parties' stores."

22 Then you see that store numbers, locations and openings are also aspects of  
23 a retailer's offerings on which it competes, that is 8.115, and then you have the  
24 conclusion at 8.116:

25 "We found that there is evidence that the parties compete head to head as well as with  
26 other competitors on various different PQRS aspects in a bid to attract consumers and

1 generate sales. Retail competition in this market manifests in many different ways  
2 and these aspects are important to consumers. Indeed, we consider that the evidence  
3 of the parties' market monitoring [discussed in paragraphs there cited] indicates there  
4 is retail competition across all aspects of PQRS. This supports our view that, whilst  
5 suppliers impose some constraint on retailers in this market, there is retail competition  
6 on various important aspects of PQRS which could be lost as a result of the merger."  
7 We then see at 8.117 that some of the competitive parameters -- so the CMA is  
8 acknowledging one of the points made by Mr Kennelly, that some of the competitive  
9 parameters are influenced by factors other than competitive constraints, e.g. vertical  
10 constraints from suppliers, stocking decisions, sale performance. But the evidence  
11 suggests that the merged entity could change some aspects of its offering in the UK  
12 in response to changes in competitive pressure post-merger.

13 So there we see that the CMA is expressly dealing with the point that Mr Kennelly is  
14 putting, which is that there are other reasons for these differentiations, and not  
15 competition, despite the fact they have said that they competed competitively. But the  
16 CMA has considered that and said, well, we acknowledge that, and we do accept that  
17 to some extent, but we still think that the loss of competition is going to lead to  
18 a worsening of the offering overall, or a non-improvement or a slower improvement.

19 Then we have the conclusion at paragraph 8.118. I would ask you to note at  
20 sub-paragraph (c) that the CMA has expressly found there that it is not sensible to try  
21 to quantify the particular, specific aspects of PQRS which would be flexed  
22 post-merger. That should be approached with caution. So it doesn't think that that  
23 would be a robust exercise to carry out. It has considered it and rejected it.

24 Nonetheless, on the basis of all of the evidence, it has determined that the parties can  
25 and do flex some competitive parameters and therefore -- this is at (d):  
26 "We expect that if there were a substantial lessening in the competitive constraints

1 due to the merger, this would create the incentive for the merged entity to deteriorate,  
2 worsen or improve relatively more slowly or to a lesser extent any of these aspects of  
3 PQRS."

4 So that is the conclusion that is being reached.

5 We see also, if we move forward to paragraph 8.129 -- this is under the heading,  
6 "market shares" -- that in response to a question that the tribunal put to me  
7 yesterday -- and it goes to the substantial point that I am going to return to -- that you  
8 can see at 8.129 and 8.130 the importance on the market of these two parties, and  
9 also that there is only a small number of other retailers with significant presence. The  
10 reference, just for your note, for that latter point is 8.462 for footwear and 9.293 for  
11 apparel.

12 Moving forward, please, to paragraph 8.165 and following, this is on page 144 of the  
13 report, page 148 of the bundle references, the CMA, in this section, examined a large  
14 number of the parties' own documents which showed how the parties monitored each  
15 other very closely. We see what the CMA is doing there at paragraph 8.165. You can  
16 see the submission made by JD Sports, which is a submission that is now made on  
17 this appeal that, while the parties referenced each other in their internal documents,  
18 that doesn't mean that they were competing on these parameters. JD Sports'  
19 argument then was, as it is now, that what the CMA has to show is an actual response  
20 on the documents rather than just monitoring. The CMA considers and deals with that  
21 point, as I will come to show you.

22 Now, at 8.170 on page 145, you can see the scope of the review of the internal  
23 documents. It is a subset of documents but you see that it is a large number. The  
24 CMA, you can see in the footnote, estimates to have reviewed in total more than 2,500  
25 internal documents; more than 900 of them have been explicitly assessed in this  
26 section.

1 Then, over the page to paragraphs 8.176 and following, there is an analysis of  
2 Footasylum's internal documents. Sir, I am not going to read all of this out but I would  
3 urge the tribunal, if it hasn't already read these passages, please to do so, and to skim  
4 read them.

5 **THE CHAIRMAN:** You can take it that we have read the decision.

6 **MS DEMETRIOU:** I assumed that, sir, which is why I don't want to read it out in detail  
7 where it is unnecessary. I am just now --

8 **THE CHAIRMAN:** I am sure we can all benefit from reading it again but I just want to  
9 assure you that we have read it.

10 **MS DEMETRIOU:** I would have thought nothing less of you, sir. Thank you very much  
11 for confirming, though.

12 We have, at paragraph 8.179, the conclusion on Footasylum's documents -- so  
13 page 158 -- that JD Sports is the competitor most closely monitored by Footasylum.  
14 You then have the section on JD Sports' internal documents, a lot of which is redacted.  
15 The conclusion on that is at paragraph 8.182 on page 165:

16 "Footasylum is one of the competitors most closely monitored by JD Sports, alongside  
17 Footlocker, ASOS, Nike and Adidas."

18 The CMA then considered, over the page at paragraphs 8.183 and following -- and  
19 you can see the heading -- the extent to which the parties' monitoring of each other  
20 indicates closeness of competition. So they are here fronting up to the point made by  
21 JD Sports and advanced also in this appeal. What you see at 8.184 to 8.185 is that  
22 the documents show -- there are examples in the documents of competitor monitoring  
23 informing commercial decision making. You see, at 8.185:

24 "The CMA found that these documents show, in some instances, the parties'  
25 monitoring of each other and of other retailers is likely to have influenced their  
26 commercial decisions and was sometimes followed by competitive responses."

1 Then, at 8.186, and this is important:

2 "The CMA has considered JD Sports' submission and has said that we don't consider  
3 that a direct response to competitor monitoring is required."

4 So, despite the fact that they have found some of that, they don't think it is required in  
5 order to demonstrate closeness of competition.

6 "We consider that monitoring in itself is demonstrative of close competition, noting that  
7 (a) it is unlikely that the parties would undertake extensive regular monitoring of  
8 competitors' activities if it weren't to inform business decisions, either directly or  
9 indirectly."

10 And then, secondly:

11 "The parties' internal documents don't tend to include detailed reasons for each  
12 commercial decision."

13 So they wouldn't expect to see a paper trail, an express paper trail, following up the  
14 monitoring and connecting it to a decision.

15 Both of those are reasonable -- is a reasonable basis for finding that, even though the  
16 CMA has observed some direct responses, it doesn't need to in order to draw the  
17 inference that all of this close monitoring is because, actually, the close monitoring,  
18 what the main competitor does, does inform, whether directly or indirectly, commercial  
19 decision making, and thereby helps establish close competition.

20 You see at 8.187, that is not the only basis for the CMA's findings. The CMA says:

21 "This supports a more general finding that they are close competitors."

22 Of course, there is lots more evidence in the report and it wasn't contested that they  
23 were close competitors.

24 Then it says:

25 "This position would not be undermined even if the internal documents contain no  
26 specific record of the parties having taken responsive actions."



1 And they explain why they found that.

2 Now, Mr Kennelly also made the point that the CMA failed to identify any evidence  
3 that a loss of local competition -- so this was another of his complaints -- would affect  
4 consumers at a national level. That puts the point the wrong way round because the  
5 CMA found that, whilst demand was locally driven, the main parameters of competition  
6 were set nationally. I will just give you the reference where that conclusion is reached.  
7 It is paragraph 7.129 of the report, page 96 of the bundle, and, of course, that is not  
8 a finding that is challenged. Therefore, it is a loss of competition at the national level  
9 that the CMA was concerned about, with its adverse consequences for local  
10 consumers.

11 We say, on that point JD Sports' argument is based on the incorrect premise that the  
12 only, or the main, parameters on which the parties were found to compete were local  
13 ones. We see that mistaken premise at paragraph 62 of their skeleton argument,  
14 which I don't ask you to turn up now.

15 **THE CHAIRMAN:** Aren't all consumers in this industry local, by definition?

16 **MS DEMETRIOU:** Yes. So consumers are local by definition, sir, you are right. So  
17 the effects will be felt locally but the parameters of the competition are set nationally  
18 by these firms.

19 **THE CHAIRMAN:** So you are saying the CMA looked at national competition effects?

20 **MS DEMETRIOU:** That's right. That's right. Which then caused disadvantage to local  
21 consumers.

22 The point that I am addressing is JD Sports' argument that the CMA failed to identify  
23 any national parameters of competition that were affected. We say that that is not  
24 right.

25 JD Sports also says that there is nothing to indicate that the PQRS aspects on which  
26 the parties competed were important to customers. This is wrong. I have already

1 taken you to some references earlier, in the earlier section, but can I just take you to  
2 some more in the report.

3 If we look at 8.192 over the page, it is page 168 of the report, page 172 of the bundle,  
4 you can see there that the CMA undertook two large customer surveys to understand  
5 their views. Moving on to 8.200 on page 170, we can see that price was important to  
6 customers. That is at 8.200.

7 At 8.201, quality and service are a value of customers. Indeed, more JD Sports in  
8 store footwear customers stated their main reason to shop at JD Sports is to do with  
9 either the quality range or the service provided rather than its prices.

10 8.202, product range is important to customers.

11 Then, 8.204:

12 "Overall, the parties' customers gave a range of price and non-price elements for the  
13 parties' offering as the main reason why they shop with the parties. This is consistent  
14 with consumers valuing elements of QRS as well as price."

15 So the idea that the CMA didn't look at whether these PQRS elements were important  
16 to customers is unfounded. It conducted customer surveys precisely -- in part,  
17 precisely in order to ascertain that.

18 Moving on to --

19 **MR FRAZER:** Just before you move on, Ms Demetriou, I think Mr Kennelly made  
20 an additional point which was that, in relation to these elements, the suppliers had  
21 such an overwhelming constraint upon the parties in relation to price RRP, in relation  
22 to range, because of the limiting of premium products et cetera, that those elements  
23 were not subject to flex between the parties and, therefore, were not a parameter of  
24 competition which you demonstrated would change as a result of the merger. I am  
25 putting words in Mr Kennelly's mouth and he will come back if I am wrong, but how do  
26 you respond to that?

1 **MS DEMETRIOU:** Sir, I am going to come on to that almost immediately. Do you  
2 mind if I just take it in the order in which I was going to approach it?

3 You are right that Mr Kennelly did make that point and I have to address it. I am going  
4 to come back to that section of the report in about five minutes, if that is all right?

5 **MR FRAZER:** Of course.

6 **MS DEMETRIOU:** Thank you.

7 Just because we are in this section of the report now, back to the question of whether  
8 the parties would have an incentive to deteriorate their offering post-merger. Now,  
9 you have my point that, absent constraints, or absent sufficient constraints -- and I am  
10 going to come back to the supplier constraint point -- once you have established that  
11 these are very close competitors and that they compete closely on these PQRS  
12 elements, once you have established that, then, as a matter of pure logic, once you  
13 merge them then you are taking away a significant competitive constraint. That does  
14 cause, by virtue of the merger, an incentive to deteriorate the offering or not to improve  
15 it as quickly or as much as they would have done absent the merger.

16 What the CMA then went on to do was to measure the strength of that incentive by  
17 carrying out a GUPPI analysis. You see that -- if you could turn to 8.217 on page 174  
18 of the report, 178 of the bundle -- you see that there the CMA say:

19 "As I am sure the tribunal knows, the GUPPI is a commonly used metric designed to  
20 indicate the upward pricing incentive for merging parties post-merger. The rationale  
21 underpinning the GUPPI is that it is less costly for a merged entity to deteriorate its  
22 offering post-merger, for either or both of the merging parties, as it will recoup the profit  
23 on recaptured sales from those customers that divert and purchase products from the  
24 other merging parties. GUPPIs are calculated by combining diversion ratios and profit  
25 margin information, see appendix X for more detail. The CMA has used GUPPIs in its  
26 assessments in a number of merger enquiries."

1 We see at 8.230, skipping ahead, the conclusion that:

2 "The GUPPIs indicate a strong incentive for the merged entity to deteriorate its offering  
3 post-merger. For example, through raising prices or deteriorating elements of QRS.  
4 The asymmetry of the GUPPIs between the parties is consistent with other evidence  
5 presented elsewhere in this chapter."

6 Then:

7 "Although the online and combined GUPPIs are lower than the in store GUPPIs, they  
8 still indicate a strong incentive on the merged entity to deteriorate PQRS, for example  
9 through raising prices or deteriorating elements of QRS."

10 Then at 8.231, over the page:

11 "We consider the surveys and the GUPPIs as part of a wide range of evidence  
12 reviewed in our investigation and base our decision on all of the evidence in the round."

13 That is an analysis which measures the strength of the incentive and establishes  
14 a strong incentive. Then, having established that they are very close competitors, that  
15 a competitive constraint is going to be removed and that the merged entity has a very  
16 strong incentive to deteriorate its PQRS post-merger, the CMA then went on to look  
17 at the important question of constraints. That is what I am going to turn to now.

18 So before getting to suppliers, you have the consideration of retailer constraints. You  
19 see that if you turn to page 191 of the report, paragraphs 8.278 and following. You  
20 see there, "Overview of current constraints" and then "Market developments", that  
21 starts at page 8.311 on page 199. The overall conclusion is that the constraints from  
22 other retailers is moderate at best.

23 Turning, finally, in response to Mr Frazer's question, the supplier constraints are dealt  
24 with at an earlier stage of the chapter, no doubt in recognition of the fact that this was  
25 an important argument being made by JD Sports. That section starts at page 8.60 of  
26 the report, of the CMA's assessment (inaudible). Before that you have the

1 submissions made by the parties and by third parties, and you have the CMA's  
2 assessment, starting at page 8.59 on page 108 of the report, page 112 of the bundle.

3 You can see there what the CMA is doing:

4 "Assessed a wide range of information provided by retailers and from suppliers on  
5 their selective distribution arrangements, segmentation policy, standard terms and  
6 conditions, and individual trade terms with retailers. In this section we assess the  
7 possible impact suppliers have on retailers' offerings as a result of their wholesale  
8 relationship with retailers. In particular, we consider the extent to which retailers' ability  
9 and/or incentives to flex the PQRS aspects of their retail offering are constrained by  
10 suppliers. That is whether the relationship is such as to prevent retailers from  
11 deteriorating PQRS in light of how suppliers could in theory, or do in practice, respond  
12 to any such deterioration."

13 Then at 8.61:

14 "This assessment is relevant to our investigation because it informs our determination  
15 of whether the merged entity would have the ability and/or incentive to deteriorate its  
16 offering post-merger."

17 So you can see there, as a starting point, that the CMA is expressly directing its mind  
18 to the question that Mr Kennelly was focusing on and which, of course, JD Sports  
19 focused on during the investigation; the question whether supplier constraints are so  
20 strong that you didn't have to worry about any diminution of competition following the  
21 merger because, in practice, the supplier constraints would be such that the parties  
22 could not flex these aspects of PQRS.

23 What you then see is a specific consideration of the impact of suppliers' actions on  
24 these different aspects of the offering, the PQRS offering. So at 8.64, at the bottom  
25 of page 109, the CMA says there:

26 "[It] considers there is a spectrum of constraints that suppliers may possibly exert on

1 retailers' offerings and the level of such constraint may depend on the precise element  
2 of PQRS under consideration. Within this spectrum, we consider there are broadly  
3 three levels of any such constraint."

4 So you can see there the CMA actually taking a very nuanced approach to supplier  
5 constraints. It is analysing the level of constraint and recognising that they may differ  
6 according to the aspect of PQRS. It is certainly not rejecting the submission and  
7 refusing to engage with it.

8 We then have, at 8.66 and onwards, the assessment by the CMA of the extent to which  
9 suppliers constrain aspects of PQRS and then go on to consider the extent to which  
10 suppliers monitor PQRS aspects of retailers offerings as a potential means to impact  
11 PQRS. We start with pricing.

12 That is at 8.67, as you see. 8.67 to 8.69. Essentially, the point that is being made is  
13 that suppliers do not have an incentive to constrain price competition because they  
14 are interested, essentially, in keeping prices high. They want to preserve a strong  
15 brand image of an expensive product, which is why they use RRP. So you see at  
16 8.68:

17 "We consider that suppliers may not be concerned about or react adversely to  
18 a reduction in price competition post-merger, for example a reduction in discounting  
19 or less competition over other pricing elements, such as the minimum spend threshold  
20 for free delivery. Suppliers may not have an incentive to drive retail price competition  
21 where it undermines consumers' perceptions of their branded products."

22 Then you see at 8.69:

23 "Notwithstanding the use of selective distribution arrangements and RRP, there is  
24 discounting in this market."

25 That is the point about the clearance discounting, which is significant. We do place  
26 reliance on the significance of that in terms of the percentage of revenues.

1 "There could be less discounting post-merger as a result of any loss of competition  
2 between the parties."

3 Can I ask you, please, to look at footnote 335, because what Mr Kennelly said is, well,  
4 clearance discounting is only driven by inventory needs and getting rid of stock. The  
5 CMA considered that and they said that they found on the evidence that, regarding  
6 clearance discounting:

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

13 So, sir, members of the Tribunal, this is another example of JD Sports making  
14 an assertion which is, in this case, well, clearance discounting, you can forget about  
15 that as an important parameter of competition because it is all driven by inventory  
16 needs, but that is a point that the CMA has expressly considered and has reached the  
17 opposite conclusion on, and a nuanced conclusion. It doesn't say, well, it has nothing  
18 to do with inventory needs, it says, well, that comes into it but there is also an important  
19 competition element. Really, that is the kind of finding that it really is not open for  
20 JD Sports to try to challenge in these proceedings.

21 **THE CHAIRMAN:** I don't want to be pedantic about that but the CMA has set out the  
22 reasons for its conclusion in footnote 335. It is actually open to JD Sports to assert  
23 that that reasoning doesn't stack up. That is at least something that can be  
24 considered. Just because the CMA has come to a conclusion and expressed it, it  
25 doesn't mean that it is completely unimpeachable. I am not saying that that is our view  
26 but I am saying that there is an entry point for an applicant on judicial review to

1 question the authority's reasoning. I think that is what Mr Kennelly is probably trying  
2 to do.

3 **MS DEMETRIOU:** Sir, you are completely right. I probably overstated -- I got carried  
4 away and overstated the point.

5 Sir, what is important to bear in mind is the case law that I took you to. I know, of  
6 course, you will bear this in mind and it is common ground, the case law that I took  
7 you to, summarised in Ecolab, which is that, if an appellant wishes to challenge this  
8 kind of finding, essentially they have to show that there is an absence of evidence to  
9 support the CMA's conclusion. That is really the threshold. No evidence of any  
10 probative value, are the words, which could support the CMA's conclusion. That is  
11 a more accurate way, sir -- I accept your point -- of putting the point. But we say that  
12 it still stands. It is simply not the position here that there is no evidence of any probative  
13 value, or no probative reasons to support the CMA's conclusion.

14 So that is price.

15 If we go over the page, we have range. We see there, at 8.70, an acknowledgement  
16 of the point made by Mr Kennelly to some extent. In terms of range:

17 "We consider that a supplier's selective distribution arrangements and its  
18 segmentation decisions typically have a direct impact on a given retailer's product  
19 access and, in turn, provide a constraint on its retail offering in terms of product range.  
20 Retailers, however, can, and often do, offer less than the full range available to them  
21 in their stores due to limitations in store size, although they typically offer a fuller range.  
22 In this context there is limited evidence that suppliers may influence retailers'  
23 incentives to flex their range of other suppliers' brands and products."

24 We see at the end of that:

25 "We have not seen any evidence of suppliers taking action in response to retailers  
26 flexing their range of other suppliers' brands or products."



1 That is an important point because, even though Nike and Adidas impose a large  
2 constraint on the range of their own products, of course their own products are not the  
3 only products that these stores carry. They carry products of other suppliers and,  
4 indeed, their own in-house branded products as well. You will see that that is  
5 particularly important in apparel.

6 That is an area that the CMA has indicated is an area concerned with range which is  
7 not constrained by its suppliers; so range of other suppliers' products.

8 Then we have, moving on -- I am so sorry, if you just bear with me for a moment.  
9 I have lost my place.

10 Yes, so, moving on we see that quality and service is dealt with over the page. I am  
11 not going to read it all out but you see all of the reasoning there on range, culminating  
12 in the conclusion at 8.76, that:

13 "Potentially, suppliers could withdraw/lessen retailers' access to their products.  
14 Presence of these provisions may create a degree of uncertainty for retailers as  
15 regards product access. Access to range can be viewed as an actual or potential  
16 means by which suppliers may respond to or constrain deterioration of retailers'  
17 offerings, however, in principle, we consider that this would be the case only if the  
18 deterioration of PQRS damages suppliers' sales or brand image."

19 Then we have quality and service and we have the analysis of the impact of the  
20 constraints posed by suppliers on quality and service. Of course, Mr Kennelly is right  
21 that these are selective distribution arrangements which impose minimum  
22 requirements as to quality and service but the point here that the CMA is making is  
23 that, above those minimum requirements, there can be competition. We see that at  
24 8.79:

25 "Where restrictions on quality and service are imposed under suppliers' standard  
26 terms and conditions, suppliers establish a minimum contractual standard beyond

1 | which retailers can, at least in principle, flex their offering in setting such floors.  
2 | Suppliers enable retailers to differentiate aspects of their QRS offering above this floor,  
3 | while still ensuring that their minimum standards are met."  
4 | Then there is an analysis of how retailers compete, or the extent to which they do  
5 | compete on the quality and service aspects.  
6 | Then you see that there is, at 8.81:  
7 | "The presence of such granular requirements [that is in the supplier' conditions] means  
8 | that there may not be deterioration of these aspects in absolute terms. However, this  
9 | may still be an area where improvements could happen more slowly than it would have  
10 | done absent the merger."  
11 | Then at 8.84:  
12 | "We observed the following examples of competition above minimum contractual  
13 | standards."  
14 | So there are some examples that the CMA refers to there.  
15 | Then we have a section -- so that is, in a sense, the CMA there has considered very  
16 | carefully the question of supplier constraints, has concluded that suppliers do impose  
17 | a constraint but not a sufficient constraint on all aspects of PQRS to mean that the  
18 | merger is not going to result in an SLC.  
19 | **THE CHAIRMAN:** Just to interrupt you there, I may have misunderstood what  
20 | Mr Kennelly was saying but I don't think he was disputing that the report considers the  
21 | question of supplier constraint and whether retailers, nonetheless, have some freedom  
22 | to compete. That would be a difficult proposition to disagree with. I think what he was  
23 | objecting to was that there is no effort to say how much that freedom amounts to.  
24 | I think that feeds into his point about the significance of the substantial lessening of  
25 | competition.  
26 | I mean, what you have described, and obviously we are perfectly well aware that that

1 has been considered at some length, is a description of factors but not a weighing of  
2 the weight of different factors. Would you address that point?

3 **MS DEMETRIOU:** Sir, the CMA has found that it was not sensible in this case to  
4 quantify -- to engage in some kind of quantification as to the extent to which each  
5 aspect of PQRS could be diminished post-merger. Indeed, that aspect of the CMA's  
6 decision is not disputed. Mr Kennelly says in terms in his skeleton, "we are not saying  
7 that they should have quantified".

8 Having considered and rejected that as a means of approaching the causation issue,  
9 what the CMA then does is engage in, essentially, a qualitative analysis. It has, of  
10 course, undertaken the GUPPI, which measures the strength of the incentive, but it  
11 then engages in a qualitative assessment of the way in which this market operates,  
12 based on multiple strands of evidence from the suppliers themselves, the data, the  
13 internal documents of the parties. What it is doing in this section is explaining why,  
14 having analysed all of that evidence, it has been unable to come to the conclusion that  
15 supplier constraints are such as to mean that there is no SLC.

16 It has explained and it has given reasons for that. The reasons are that the price  
17 aspects of competition, including the important issue of discounting, is not touched on  
18 by suppliers. There is no real constraint in relation to that. And, whilst there are  
19 constraints on other aspects, these constraints are not absolute.

20 So when one sees this analysis, together with the other strands of evidence, including  
21 the GUPPI, we say it is clear that, having considered all of the evidence, the CMA was  
22 entitled to take that view.

23 It is a little bit hard to -- once you have accepted, as JD Sports has, that it is not  
24 appropriate to try and quantify each of these things, it is a little bit hard, in my respectful  
25 submission, to see what else the CMA could have done, other than analyse all of the  
26 evidence before it and explain why it was not satisfied that the constraint was sufficient

1 from suppliers, giving full reasons, as it has done.

2 It is quite hard, in our submission, to understand what the CMA could have done.

3 If it is right that it didn't have to try and quantify this in some way because it felt that  
4 would be insufficiently robust and be a spurious approach, what it has done is  
5 assessed it all in the round, analysed the market, considered all of the submissions  
6 and the evidence, and it has explained very carefully why there are elements -- why  
7 the constraint imposed by suppliers is far from absolute. We say that that is more than  
8 sufficient in terms of explaining its conclusion.

9 **THE CHAIRMAN:** The CMA's view that there is sufficient competition to be restricted  
10 by this merger despite supplier constraints, that is a value judgment by the authority  
11 in the light of everything that it has investigated and found. Is that what you are  
12 saying?

13 **MS DEMETRIOU:** Sir, yes. It is an expert judgment of assessment. I would put it in  
14 that way.

15 If you go back to paragraph 8.64 on page 109 -- this is the point that I took you to  
16 before, but just to unpick that a little bit -- the CMA there has analysed -- it has not, if  
17 I can put it this way, simply take an impressionistic view of the evidence. You have  
18 seen the care with which the CMA gathered evidence and analysed it. What it has  
19 done is applied a disciplined approach to the evidence. You see in 8.64 that it has  
20 considered levels of constraint -- and I rather passed over this -- but it has identified  
21 three levels of constraint: (a) no constraint, maybe because suppliers don't actively  
22 monitor aspects of retailers' PQRS offering; some constraint; and then a significant  
23 constraint.

24 It then says at 8.65 that what it has done, in considering whether the relationship  
25 between retailers and suppliers is such as to prevent retailers from deteriorating the  
26 PQRS:

1 "We have considered (1) whether the extent of any constraint we found, taken alone,  
2 is so significant as to sufficiently discipline the merged entity's ability and/or incentive  
3 to deteriorate its offering and, if not, whether the extent of any constraint we found is  
4 sufficient in aggregate with other constraints."

5 So this is not some kind of impressionistic finger in the air analysis. The CMA has  
6 applied a logical, disciplined approach to the evidence and has considered all of the  
7 evidence in the round. You have seen me explain what the nature of that evidence is,  
8 including all of the data that it gathered and all of the communications between the  
9 parties and the evidence from the suppliers, and it has looked at the nature of the  
10 constraint and the various aspects of competition and has reached an expert  
11 judgment, giving full reasons and, very, very properly, acknowledging the areas in  
12 which the suppliers do exercise a constraint but pointing out the limitation of that  
13 constraint.

14 Sir, if you are not going to quantify it then that is what the CMA has to do. It has to  
15 look at all of the evidence, assess it carefully in a disciplined way and reach an expert  
16 value judgment. That is what it has done in this case. We say that it is unimpeachable.

17 **THE CHAIRMAN:** I think that was the answer, yes, to my question.

18 **MS DEMETRIOU:** Sorry to have been so long winded. That was the answer, yes, to  
19 your question.

20 **THE CHAIRMAN:** Thank you.

21 **MR DOLLMAN:** Can I just ask one quick question about that. Notwithstanding that  
22 you cannot quantify any of this stuff, can you give us any sort of flavour as to which  
23 elements of this the CMA were most concerned about? Was it price, was it service,  
24 was it range? Is there any, you know, ballpark feeling of where the concern lay?

25 **MS DEMETRIOU:** Sir, what I am keen not to do is to put any gloss on the decision.  
26 It is not really for me to put a gloss on the decision; the decision stands or falls by

1 | itself. I am going to come on to a section in due course which looks at -- I am so sorry,  
2 | I think that, from this section, what we can see is that the area in which  
3 | suppliers -- there is an obvious area, pricing, which includes the clearance discounts,  
4 | which are important; an obvious area where suppliers simply don't have an incentive  
5 | to step in or constrain. That is explained clearly in that section.

6 | Then, in a sense, you have a reducing -- the way I read it is a sort of reducing cascade  
7 | of importance, in the sense of, not so much of importance of the PQRS element, but  
8 | significance of the constraint imposed by suppliers. So you have, for range, the point  
9 | that is made about the lack of constraint on other suppliers' ranges and brands, and  
10 | then you have the quality and service. The fact that there is an immediate constraint,  
11 | namely the terms and conditions which are imposed as part of the selective distribution  
12 | system, but that creates a floor. So it is quite possible, and in fact the CMA has pointed  
13 | to evidence of competition above that floor.

14 | The other point that the CMA has made in the report, and I have shown you this  
15 | already, is that there are elements of competition which the suppliers are simply  
16 | unable to monitor. That is a point I am going to come to in due course in my  
17 | submissions. The point being that, what the CMA has found is that, in a competitive  
18 | market, you would expect close competitors to compete not only by -- sorry, the  
19 | question post-merger, it is not only whether there is a deterioration of PQRS but  
20 | whether there is a slower improvement, or less of an improvement than there  
21 | otherwise would have been. Those particular points are very hard for a supplier  
22 | monitoring PQRS to pick up. So that is another important point that the CMA has  
23 | alighted on.

24 | I think that is as far as I can take it because I think that the CMA, probably -- my  
25 | reading of this section is that it started with the most important elements. I can't really  
26 | put a gloss on the decision; the decision is what it is. That is my reading of it.

1 **THE CHAIRMAN:** I am sure my colleague is not asking you to put a gloss on the  
2 decision. Perhaps if you were to make sure that you have referred us to those  
3 paragraphs of the decision that might speak to the point he raised, that would be  
4 helpful.

5 Perhaps you would like to do that after the break, which I think is imminent?

6 **MS DEMETRIOU:** I am very happy to do that after the break. Shall I press on for  
7 a moment or would you like to take the break now?

8 **THE CHAIRMAN:** Well, what stage have you reached in your presentation?

9 **MS DEMETRIOU:** Well, it might be as well to take the break now, then I can deal with  
10 that point immediately after the break, which takes me nearly to the end of ground 1.1.

11 **THE CHAIRMAN:** Yes, I think that is where we are heading, to the end of ground 1.1.  
12 All right, we will adjourn for 15 minutes. We will resume at 11.55 am.

13 **(11.40 am)**

14 **(A short break)**

15 **(11.55 am)**

16 **THE CHAIRMAN:** Right, welcome back everybody. Shall we resume?

17 **MS DEMETRIOU:** Thank you, sir.

18 I would like to take you back to the section of the report that I was on, just to take you  
19 through the remainder of that section, if I may.

20 If we can go back to page 116 of the report, paragraph 8.84, let me pick up here.

21 **THE CHAIRMAN:** Mm-hm.

22 **MS DEMETRIOU:** I have taken you through the various PQRS aspects. We are on  
23 quality and service. This paragraph contains examples of competition above minimum  
24 contractual standards imposed by suppliers. The CMA has also set out what it says  
25 are other examples in variations of retailer offerings in the next section. You can see  
26 there at (a) the standard condition that [REDACTED] requires of retailers. Yet the CMA has

1 found that retailers can and do compete to offer faster deliveries than these minimum  
2 requirements. You can see detail of that in the remainder of that sub-paragraph.

3 Then you see at (b) that those suppliers require retailers to have a returns policy and  
4 to comply with applicable consumer laws, yet retailers clearly do compete to offer  
5 policies that are more advantageous than that required by such laws. For example,  
6 the options for making returns. You can see the footnoted evidence.

7 Similarly, while that particular supplier that is redacted requires that consumers have  
8 at least 14 days to make returns, there is clear competition above this threshold;  
9 Footasylum and JD Sports both offer 28 days to make returns.

10 Then you have the other example at (c).

11 Then at 8.85:

12 "Store numbers, locations and openings can be thought of as part of retailers' quality  
13 and service offering because they are relevant factors for consumers. Suppliers may  
14 act to prevent retailers from deteriorating these aspects. However, suppliers' DTC  
15 channels which compete directly may reduce their incentive to encourage increased  
16 retail competition, particularly in locations near their own DTC. Magnitude of this effect  
17 is likely to be small because the key suppliers have relatively few stores."

18 So, again, that is another example of an instance of where supplier constraint has  
19 some limitations.

20 Then, moving over the page, we see at 8.88 there is a heading just above that,  
21 "Suppliers' monitoring of retailers and potential response to deterioration". Of course,  
22 this is important because, in order to provide a constraint, then the suppliers need to  
23 know about the deterioration. That is an obvious point. So that is why it was important  
24 for the CMA to assess that.

25 You can see that at the end of paragraph 8.8. The point is made there that the CMA  
26 considers that:



1 "The suppliers' ability to respond to any deterioration on the part of retailers' offerings  
2 would depend in practice on the scope and frequency of any such monitoring and audit  
3 activities."

4 They then assessed, and we have seen this at 8.89:

5 "The extent to which the parties' ability and/or incentive to flex their PQRS offerings  
6 may be impacted by such monitoring, in this context we consider the following factors  
7 are of particular relevance..."

8 We see that suppliers typically monitor and audit retailers' compliance with their  
9 minimum requirements in their standard terms and conditions. Then at (b):

10 "Suppliers may find it difficult in some cases to detect a deterioration of retailers'  
11 offerings, particularly if the deterioration involves a lack of improvement relative to  
12 what otherwise would have been achieved. For example, retailers may not decide to  
13 reduce the level of their offering, but may slow their rate of innovation or other  
14 improvements, which would be much more difficult for suppliers to monitor and detect."

15 Then at (c):

16 "Suppliers may monitor retailers infrequently, such that there are periods of time during  
17 which a change may occur unobserved."

18 Then:

19 "Evidence [this is 8.19] from suppliers shows that they do not seek to monitor all  
20 aspects of retailers' PQRS offerings. Given this and the factors at (a) to (c), we  
21 consider that suppliers' monitoring is such that they are likely to have some but not full  
22 visibility over some aspects of retailers' offerings."

23 Then you have the rather important point at 8.91, which is to do with benchmarking.

24 So suppliers are likely to benefit from competition between retailers and quality of  
25 service and, hence, have an activity to encourage such competition. You will see there  
26 that, as is common ground, there is evidence that suppliers do monitor the compliance

1 with their standard terms and conditions. We note that the merger reduces the extent  
2 to which suppliers can rely on such benchmarking to improve the parties' offerings, as  
3 they can no longer benchmark JD Sports and Footasylum operating as  
4 an independent competitors against each other post-merger.

5 Then at 8.92:

6 "We also considered how suppliers may respond to any observed deteriorations in  
7 retailer offerings, and the potential consequences of this for retailers."

8 And you have, at (a):

9 "Suppliers may have little, if any, incentive to respond to some deteriorations, e.g.  
10 reduction in student discounts;

11 "(b) even if suppliers did identify and respond to a deterioration, there is a likelihood  
12 that some customers would react by diverting to the other part of the merged entity."

13 You can see that the consumer surveys found that the diversion ratios between the  
14 parties was high. That indicates that the merged entity would have an incentive to  
15 engage in such deterioration post-merger, even if customers responded to the  
16 deterioration itself and/or to any response from suppliers by diverting away from their  
17 first choice retailer.

18 Then at (c):

19 "There is very limited evidence of Nike and Adidas having taken action to respond to  
20 a retailer for a deterioration in quality and/or service. We recognise that the threat of  
21 any such action may, to some extent, act as some constraint without evidence of direct  
22 response.

23 "We note the two examples of response to deterioration raised by the parties in  
24 paragraph 8.50. We consider it is not clear that either of these are direct responses.

25 The example could equally be explained as a more general recalibration of its  
26 segmentation policy..."

1 And you see the rest of that paragraph, most of which is redacted.

2 Then at 8.93 --

3 **THE CHAIRMAN:** Yes, can I just say that the extent of that evidence and the CMA's  
4 obtaining of it is one of the grounds of appeal, of course.

5 **MS DEMETRIOU:** Yes. We say that in relation to that, and that is a point that I will  
6 come on to under another ground --

7 **THE CHAIRMAN:** I am sure you will, I am just flagging that.

8 **MS DEMETRIOU:** Sir, yes.

9 **THE CHAIRMAN:** That is disputed, if you like.

10 **MS DEMETRIOU:** Yes. So what is said is that we should have got more evidence  
11 than that. But, sir, what we say in relation to this point -- so the point I am dealing with  
12 now is that the CMA, quite rigorously and properly, considered the extent of monitoring  
13 and the likely retailer reaction if suppliers did pick up on a deterioration. What they  
14 did -- and this was quite proper and rigorous, in my respectful submission -- was to  
15 ask the suppliers, the two most important suppliers, for any examples of where they  
16 had reacted, they had re-segmented their products and responded to deterioration in  
17 quality and service.

18 It was quite right that the CMA sought that evidence and that evidence showed that  
19 there was limited monitoring -- there was limited direct evidence of that type of  
20 monitoring.

21 So then at 8.93, taking into consideration the evidence set out in (a) to (c):

22 "We consider that suppliers have some impact on aspects of retailers' PQRS through  
23 monitoring and benchmarking. However, suppliers have little incentive to respond to  
24 some deteriorations post-merger and suppliers would be unlikely to identify all  
25 instances of any deterioration. Further, we have seen limited evidence of suppliers  
26 responding to deteriorations of retailers' PQRS."

1 Then you have the conclusion. You can see at 8.94 an acknowledgement that the  
2 suppliers play an important role and their selective distribution arrangements.

3 Then at 8.95 a summary of the CMA's conclusion, in terms of their impact on retailers'  
4 ability and incentives to flex PQRS.

5 So, at (a):

6 "Exert some influence over pricing by providing RRP. But retailers' discount prices  
7 and flex other elements, such as delivery costs, which could be deteriorated  
8 post-merger."

9 We have seen why that is; that is because there is no incentive for these suppliers to  
10 do anything about that.

11 Then (b):

12 "Suppliers can control retailers' range through the products and volumes that they can  
13 access. In the short term, and in relation to specific orders, the use of such  
14 cancellation provisions may create a degree of uncertainty."

15 So that is acknowledged.

16 Then:

17 "Suppliers exert some influence on retailers' quality and service offerings."

18 But then you see that the granular standards don't encompass all aspects of retailers'  
19 offerings. We have seen evidence that suppliers may also encourage retailers to  
20 compete with each other beyond minimum requirements.

21 "Suppliers undertake engagement, feedback, monitoring and benchmarking of  
22 retailers on some but not all aspects of PQRS."

23 We see that, post-merger, the ability to benchmark would be hindered.

24 Then at 8.96:

25 "We therefore consider that suppliers play an important role in shaping retail  
26 competition in this market. In particular, we consider that Nike and Adidas impose the

1 most restrictions and have the greatest influence. Other suppliers have some  
2 influence but considerably less."

3 Then at 8.97:

4 "However, we note that these restrictions and requirements arise primarily from  
5 suppliers' own strategic decisions. Further, their incentives as to how they allocate  
6 products are derived from an overall view, taking account of both their wholesale and  
7 DTC channels. We also found that the constraint suppliers exert on retailers has limits,  
8 e.g. they don't monitor all aspects of a retailer's offering and, as such, retailers have  
9 the ability and incentive to flex important aspects of their offering in relation to PQRS."

10 Then at 8.98:

11 "Suppliers can, and to some extent do, act as a constraint. However, on balance the  
12 constraint is not so significant as to sufficiently discipline the merged entity's ability  
13 and/or incentive to deteriorate its offering post-merger. In particular, this is for the  
14 following reasons ..."

15 I am not going to read them out but you can see they are summarised at (a), (b) and  
16 (c). They relate to the matters that I have just gone through in more detail.

17 Then at 8.99:

18 "Given this, we also considered whether the extent of the constraint we found is  
19 sufficient, when taken in aggregate with other constraints on the merged entity to  
20 prevent the merged entity from deteriorating its retail offering post-merger."

21 They found that it was not.

22 We then come to the next section, which I have taken you to already, so I am not going  
23 to go through this in any detail. May I just flag that, of relevance to the point that we  
24 have just been looking at, this section is of relevance. You see at 8.109, the passage  
25 I have already taken you to as to the importance of the discounting in terms of price  
26 competition. You see in this section -- and I have taken you to it

1 already -- substantiated findings by the CMA that the parties do compete on various  
2 aspects of PQRS.

3 In relation to Mr Frazer's question to me in terms of the hierarchy, as it were, I think  
4 that 8.118, which we have already seen, is probably the most illuminating. Here, what  
5 the CMA say, in my respectful submission, is that there are a variety of PQRS aspects  
6 on which the parties compete and which could be flexed, but that is not going to be  
7 robust to try and quantify specific aspects of PQRS. We see that at (c).

8 **THE CHAIRMAN:** I think it was Mr Dollman, not Mr Frazer, just for the record.

9 **MS DEMETRIOU:** I am so sorry, Mr Dollman.

10 **THE CHAIRMAN:** Give him his due.

11 **MS DEMETRIOU:** I am so sorry, Mr Dollman, it was indeed your question.  
12 I apologise.

13 So here, in my respectful submission, the CMA is quite deliberately saying, well, we  
14 are not giving you a hierarchy. There are these important aspects of PQRS on which  
15 the parties compete, we are not going to quantify individual aspects but, assessed in  
16 the round, and taking into account the varying supplier constraints on those various  
17 aspects, the CMA has reached the evaluative judgment that the supplier constraints  
18 are not sufficient to remove the SLC or to mean that there is no SLC. That is both in  
19 themselves and in aggregate with the retailer constraints.

20 Sir, before I leave -- I have really come to the end of this section but before I leave it  
21 can I just come back to the question which you posed to me about SLC and the  
22 guidance. There is nothing in the guidance which purports to define "substantial". In  
23 terms of the document before the court, can I just ask you to turn up our defence. That  
24 is bundle 1, tab 2.2, and it is paragraph 51, so page 142 of the bundle.

25 If the tribunal has that, you will see that we say:

26 "The CMA is not required to quantify the lessening of competition or the impact on

1 customers, nor is it required to establish that the effect should be large, considerable  
2 or weighty. We have referred to Global Radio Holdings in that context."

3 We don't have that in the authorities bundle because I think that is common ground as  
4 a proposition, but we can, of course, provide it if that would be helpful.

5 We say that:

6 "In this context, 'substantial' has a broad meaning, calling the exercise of judgment."

7 Which is the House of Lords authority, sir, I think you were referring to; the  
8 South Yorkshire Transport case.

9 **THE CHAIRMAN:** It was.

10 **MS DEMETRIOU:** We say in summary, in relation to ground 1.1, when one bears in  
11 mind that case law on the meaning of SLC, it is that there is no requirement to quantify  
12 but it is a matter of judgment, the CMA was fully entitled to take the approach that it  
13 did and, in fact, what one sees is a very, very careful qualitative judgment, looking in  
14 great detail on a wide range of evidence at these issues, including the elements on  
15 which the parties competed and the constraints imposed by the suppliers and the  
16 limitations on those constraints. We say there is nothing at all unlawful in the CMA's  
17 assessment.

18 So, sir, that is what I wanted to say about ground 1.1, unless the tribunal has any  
19 further questions on that ground for me?

20 **THE CHAIRMAN:** Not for the moment, no. Please proceed.

21 **MS DEMETRIOU:** Thank you.

22 Ground 1.2 I can deal with very shortly, as Mr Kennelly did.

23 The argument made by JD Sports is that, having set out the different constraints and  
24 assessed them, the CMA needed to show how they interacted parameter by  
25 parameter. He also said, I think, that the CMA needed to show how they, the different  
26 constraints, interacted inter se.

1 Mr Kennelly took you to the CMA's conclusion on this point, which is at  
2 paragraph 8.478, which is 251 of the bundle. Let me just find the -- so it is 247 of the  
3 report. You will recall that he took you to this paragraph and said, well, that is all there  
4 is and that is not enough on the question of aggregate. We say that that can't be  
5 viewed in isolation. It is part of a longer conclusion section, so this is the very end  
6 point of chapter 8. If you start -- if we look just at the conclusions section, you see,  
7 just to orientate the tribunal with the CMA's reasoning -- if you start from  
8 paragraph 8.461 on page 243, you have the finding that the constraint suppliers exert  
9 has limitations, which of course is a summary against the backdrop of the much longer  
10 assessment that I have taken you to.

11 Then you have, at 8.472 to 8.473, looking at the aggregate constraint posed by  
12 retailers, you see:

13 "Taken together and in the round, the evidence shows that the parties are close  
14 competitors to each other. There are currently few other strong competitors to the  
15 parties, with only Footlocker providing a strong constraint and Nike and Sports Direct  
16 exerting some constraint, but less than each party does on the other."

17 So at 8.473:

18 "While we found that numerous other retailers offer sports inspired casual footwear,  
19 taken together and in the round the evidence shows that their aggregate constraint on  
20 the parties is only moderate at best.

21 "While suppliers also exert some constraint in addition to retailers, as noted above this  
22 has limitations. Taking the evidence in the round and on balance, we found that the  
23 aggregate constraints from retailers and suppliers would not be sufficient to prevent  
24 the merged entity from deteriorating PQRS post-merger and to prevent an SLC."

25 These conclusions, of course, are based on earlier findings in the report. So, just to  
26 locate them, if you turn, please, to paragraph 8.295, which is at paragraph 195 of the



1 report, you can see there the paragraph starting at 8.295:

2 "We considered the current aggregate constraints from other retailers on the parties  
3 in this market, based on the same evidence."

4 So you have the GUPPIs, which do do that in terms of the aggregate constraints from  
5 the other retailers. You see that. I am not going to read through the paragraphs but  
6 this is where the aggregate retailer constraints are dealt with.

7 In 8.303:

8 "In addition to the constraints from other retailers, we also assessed the constraints  
9 that other suppliers exert on retailers in the market."

10 And a recognition that they play an important role but it is not so significant as  
11 sufficiently to discipline the merged entity's ability and/or incentive to deteriorate its  
12 offering post-merger.

13 Then you see at 8.304, again a consideration of the aggregate constraints.

14 Over the page you have the impact of COVID. At 8.308, a conclusion there as to -- and  
15 we are going to come back to that in ground 2 -- they have considered COVID and a  
16 conclusion as to whether that would impact the aggregate constraints.

17 Then, 8.309:

18 "Based on our assessment of the aggregate constraints of retailers and suppliers, we  
19 found that the merger would result in the removal of a direct and significant constraint  
20 on each of the parties and that, overall, the remaining constraints post-merger would  
21 not be sufficient to prevent an SLC."

22 8.3.10:

23 "... recognise that the market is dynamic."

24 You then have a section on market developments.

25 The conclusion, skipping forward, at 8.453, which is at page 241 of the report, you  
26 have the conclusion on market developments. Again, that is a conclusion on

1 aggregate constraints.

2 If you would just, sorry, go forward to paragraph 8.473, which I did take to you. I forgot  
3 to take you to the footnote, 828:

4 "The aggregate constraint is ...(reading to the words)... but, more generally, we have  
5 considered the aggregate constraint by recognising that it is appropriate to consider  
6 the effect of all of the retailers and suppliers, considered as a combined constraint on  
7 the parties."

8 So you can see there what the CMA has done.

9 The position is that the aggregation question was considered at all key stages in both  
10 the current competitive assessment and the consideration of future development. The  
11 CMA was, throughout those sections, addressing the cumulative constraints.

12 We say that, by parity of reasoning with my response to ground 1.1, there was no need  
13 to quantify or to break these down parameter by parameter. In fact, the CMA found,  
14 consciously found, that it would be inappropriate to do that.

15 In short, the approach of the CMA was entirely reasonable on this point and it certainly  
16 did not, in our submission, commit any illegality.

17 **THE CHAIRMAN:** Okay. What does this actually mean? When you say the  
18 aggregate constraint simply recognises that it is appropriate to consider the effect of  
19 all the retailers and suppliers, for example, in the footnote, as a combined constraint.  
20 That just means that you have considered all of the constraints together, is that really  
21 all you are saying?

22 **MS DEMETRIOU:** Exactly.

23 **THE CHAIRMAN:** There is no particular science to this, it is just that you considered  
24 all of them and then called that effect the "aggregate effect"? There is no actual  
25 aggregation exercise, it is just simply a manner of speaking, am I right?

26 **MS DEMETRIOU:** Sir, that is exactly right. The CMA has considered the cumulative

1 effect of all of the constraints that it has identified and it has done that throughout the  
2 SLC analysis. Again, we say, well, what else is required?

3 **THE CHAIRMAN:** You could have called it "cumulative effect".

4 **MS DEMETRIOU:** Could have called it "cumulative effect".

5 **THE CHAIRMAN:** And when you say "in the round", that means the same thing again,  
6 does it?

7 **MS DEMETRIOU:** Well, yes. I mean, the CMA refers "in the round", I think, in two  
8 respects in these particular paragraphs. "In the round" can mean, in some contexts,  
9 the cumulative effect, you are right. But sometimes they are referring to considering  
10 the evidence in the round. I am not quite sure which part you are looking at, but yes.

11 **THE CHAIRMAN:** I was looking at a number of parts. I was just looking, at the  
12 moment, at 8.474, which is about market developments.

13 **MS DEMETRIOU:** Yes.

14 **THE CHAIRMAN:** Where the conclusion is:

15 "Overall and on balance we found that, taken together, the evidence does not show  
16 ..."

17 So there is an element of accumulation there and there is an elements of balancing  
18 and then there is an overall conclusion.

19 **MS DEMETRIOU:** Yes, that's right.

20 **THE CHAIRMAN:** The terminology does skip around a bit, doesn't it. I just wonder  
21 whether we are trying to be too sophisticated here. You are basically saying that the  
22 authority weighed up all of the factors, added them together and decided whether they  
23 were significant?

24 **MS DEMETRIOU:** That's right. That is all I am saying.

25 We say that there is no error of law. That was an evaluative judgment. You have  
26 seen that they carefully considered each of the constraints relied upon and, what the

1 authority did, quite properly, was to consider their cumulative effect. That is all that  
2 we need and I don't seek to make it any more complicated. It is quite a simple point.

3 **THE CHAIRMAN:** I have to say, it is quite complicated but it is nice to have it  
4 simplified. Thank you.

5 **MS DEMETRIOU:** Sir, I hope I am not glossing over any complications.

6 **THE CHAIRMAN:** No, I don't think so. I think you are just pointing out that the same  
7 concept is sort of approached using slightly different language but we shouldn't read  
8 anything into that, I think.

9 **MS DEMETRIOU:** Sir, that's right. I am happy to use the word "cumulative" because  
10 that is the approach that the CMA took. I don't think I am putting any gloss on the  
11 report by perhaps simplifying it in that way.

12 **THE CHAIRMAN:** Okay.

13 **MS DEMETRIOU:** Sir, that takes me to the end of ground 1 and I would like now to  
14 move on to ground 2, if I may.

15 **THE CHAIRMAN:** Yes, indeed.  
16 How are you doing on your timetable?

17 **MS DEMETRIOU:** I am doing well on my timetable. I am going to be ahead of time,  
18 I hope.

19 **THE CHAIRMAN:** That is what Mr Kennelly said.

20 **MS DEMETRIOU:** Indeed. Well, I have, as I understand it, until 3.15?

21 **THE CHAIRMAN:** You do, indeed. Barring accidents, that's right.

22 **MS DEMETRIOU:** I am confident -- famous last words but I am confident I can finish  
23 by 3.15.

24 **THE CHAIRMAN:** So you are on time, not ahead of time.

25 **MS DEMETRIOU:** I am on time and I hope to be ahead of time, depending on how  
26 I get on. But let's see.

1 Sir, you will recall that JD Sports advances two arguments in relation to COVID-19.  
2 The first criticises the CMA in relation to its finding on the counter-factual; the second  
3 relates to the CMA's competitive assessment. The two arguments are overlapping in  
4 that, in respect of each, the argument that Mr Kennelly pressed in his oral submissions  
5 was that the CMA acted irrationally in not seeking more information. In particular, he  
6 focused his submissions on saying that the CMA should have sought more information  
7 from Nike and Adidas. Also he had a discrete point on Footasylum's lender.

8 I am going to summarise now, in a nutshell, the CMA's overriding submission in  
9 response to both arguments, so both counter-factual and competitive assessment.  
10 I will then take the tribunal to the relevant documents, which I hope make my  
11 submission good. Finally, I will deal with some discrete points that are made in relation  
12 to the counter-factual and competitive assessments. I hope at the end I can make my  
13 submissions on both of the sub grounds, as it were, quite quickly.

14 The CMA's overriding submission in relation to both arguments is this: first, the CMA  
15 had a significant amount of information before it from the parties as to the impact of  
16 COVID-19 but that information was of a very generalised and speculative nature. It  
17 did not permit the CMA to make robust findings as to the enduring impact of the  
18 pandemic.

19 Second, this was unsurprising given the timing of events. Lockdown happened at the  
20 end of March, the statutory deadline was 11 May and the statutory deadline could not  
21 be extended. Any information obtained at that stage, in terms of the pandemic events,  
22 was bound to be speculative and represent snapshot predictions at a time when the  
23 impact of the pandemic was entirely unclear.

24 Thirdly, there were also obvious practical constraints on the amount of information that  
25 the CMA could obtain and assess.

26 We say that, in those circumstances, the CMA decided it would not be fruitful to obtain

1 further information. That decision, the decision not to obtain further information, was  
2 plainly, in our view, not irrational.

3 I would like to start with the information that the CMA had before it from the parties.  
4 At times in his argument yesterday, Mr Kennelly gave the impression that the CMA  
5 had obtained almost no information on the potential impact of COVID. He said, at  
6 various times, well, it was irrational to proceed without asking some questions. But  
7 this is wrong. The reason that it is important is that the information that the CMA had  
8 at that point demonstrated that any predictions at that stage would not enable the CMA  
9 to form robust conclusions as to the structure of the market over the next two or  
10 more years, which is the question it was trying to address.

11 May I ask you, please, in the first instance to pick up Mr Meek's witness statement in  
12 bundle 4, behind tab 1. Mr Meek's, as you will have seen, was the inquiry chair for the  
13 phase 2 merger inquiry. At paragraph 7 of his witness statement, starting at the bottom  
14 of page 3 of the bundle, page 2 of the witness statement, he explains that:

15 "During the period from mid to late March until early May, when the CMA published its  
16 final report, the parties made several submissions in relation to the impact of  
17 COVID-19 on their respective businesses and the retail industry more generally."

18 You see that what he does here is summarises the evidence and submissions  
19 received from the parties in a number of sub-paragraphs. We make two points about  
20 it before I turn to the materials.

21 The first point is that the parties had every opportunity to put information to the CMA  
22 about the impact of COVID. This is not a case in which they were not given sufficient  
23 opportunity; they were. Despite the impending statutory deadline, the CMA allowed  
24 this material in and considered it.

25 Secondly, the other point that I wish to make is that the material that the parties put  
26 before the CMA in relation to the impact of COVID was necessarily speculative and

1 generalised in nature.

2 Now I wish to turn briefly to some of the materials.

3 You see at sub-paragraph B that, on 30 March, the parties submitted a report by  
4 McKinsey regarding the impact of the COVID-19 pandemic on consumer behaviour in  
5 China, South Korea and Japan, noting that COVID-19 will lead to an accelerated  
6 digitisation of consumer journeys. In addition, they pointed to a press release from  
7 Nike recording its third quarter results, stating that digital remains Nike's fastest  
8 growing channel.

9 Now, if you turn to that report -- that is behind tab 2 of the sub tabs, so tab 1.2 of the  
10 bundle -- you can see that most of it -- we see from page 2, so the page that says  
11 "context", page 21 of the bundle:

12 "The current COVID-19 situation remains fluid and is changing rapidly from one day  
13 to the next. As of now, the medium term implications are far from clear but, despite  
14 the ambiguous situation, companies are beginning to take decisive action. In the  
15 upcoming weeks we will continue to evolve this insight and provide further  
16 perspectives. This document summarises current and directional views, as  
17 of March 23, 2020."

18 What you see -- and I am not going to take you through all of it but if you turn, for  
19 example, if you flick through, you will see this is all heavily focused on what has  
20 happened in China. You see, if you turn to page 30 of the bundle, for example,  
21 that -- sorry, I don't think it is page 30. That is the wrong reference. If you just bear  
22 with me for a moment. I think I meant page 30 of the document.

23 Yes, so it is page 11 of the -- oh, no, maybe it is. I am getting confused with my bundle  
24 references.

25 It is page 11 of the document, page 30 of the bundle. You can see it says:  
26 "Learnings from China confirm apparel and fashion is disproportionately affected."

1 The point here is, without taking you through all of it, is that, on its own terms, this  
2 report says that the situation is fluid and changing very rapidly. What provisional  
3 conclusions it seeks to draw relate to findings in China, which is, of course, a different  
4 market.

5 Now, turning back to paragraph 7(c) of Mr Meek's statement, he there refers to  
6 a submission by JD Sports on 21 April on certain impacts of COVID on the retail sector  
7 generally, and providing its views on how COVID-19 impacted the following areas of  
8 the CMA's assessment. Again, you can see it summarised.

9 I am getting into confidential material and I am endeavouring not to read it out, so I am  
10 just going to ask the tribunal to have a look. But, again, this refers to third party  
11 commentators in support of the assertion that consumer preferences would change.

12 Essentially, the view that the CMA took was that this was speculative and generalised.

13 Then you have at (d) the parties submitted a paper from AlixPartners on the potential  
14 impact of COVID-19 on Footasylum's business for the purposes of the counter-factual.

15 If you, please, would turn that up -- that is at 1.6 -- and turn to page 76 of the bundle,  
16 1.3.3.

17 AlixPartners models three scenarios. If you would just read to yourselves  
18 paragraph 1.3.3. It is confidential so I am not going to read it out.

19 **(Pause)**

20 I think the point I can say is that the report, very fairly, points out the limitations at that  
21 stage in any ability to assess the impact of the crisis on Footasylum.

22 You then see a reference to various articles and Sky News reports, which do not give  
23 the type of granular information that the CMA would need to reach robust conclusions  
24 as to any enduring changes to the structure of the market going forward.

25 Going back to Mr Meek's statement, you see there at sub-paragraph E:

26 "JD Sports drew the CMA's attention to an ONS report published the same day."



1 Again, this provided a snapshot at that moment in time. We don't need to turn up that  
2 particular report.

3 Then you have, at (f):  
4 "Footasylum submitted information concerning its response."  
5 Then you have some redacted material.

6 I am going to come back to that in the context of the covenants so I am not going to  
7 ask you to turn it up now.

8 Then at (g) JD provided Adidas' financial results. Let's just have a look at that, that is  
9 at tab 9.

10 If you could turn, please, to page 132 of the bundle, you have a slide which says, "what  
11 we know and what we don't know". One of the things that is not known is duration of  
12 closures in Europe and consumer sentiment through the year. What you see is, at the  
13 bottom, "2020 outlook not quantifiable".

14 Going back to Mr Meek's and sub-paragraph (h) you see there an additional  
15 submission on 1 May concerning recent industry developments, referring to Amazon's  
16 announcement of its latest quarterly results. Again, this was generalised information  
17 that represented a snapshot in time at the early stages of the pandemic.

18 Similarly, if you move forward in Mr Meek's statement to paragraph 10, there was  
19 some information from some material from third parties, we see that at paragraph 10  
20 and then at paragraph 12. Paragraph 12 refers to Frasers Group's response,  
21 confirming that its strategy document remains current.

22 Perhaps we can just have a look at that. That is behind tab 14. This is confidential  
23 but, again, I will just ask you to read it. It is page 167 of the bundle. Under paragraph 3  
24 there are two paragraphs in italics, which is the response. I would just ask the tribunal  
25 to read those paragraphs if you haven't read them already.

26 **(Pause)**

1 Really, the key point is it is too early. Too early at that stage.

2 **THE CHAIRMAN:** I think the point made against you, just to make sure we don't miss  
3 it, is that, okay, there was this information obtained from third parties in response to  
4 requests for information. Some of the responses raised questions themselves which  
5 the CMA didn't follow up. I think it is the not following up that is the point in dispute  
6 here.

7 **MS DEMETRIOU:** Sir, yes.

8 **THE CHAIRMAN:** What do you say to that?

9 **MS DEMETRIOU:** Sir, yes. I have a number of responses to that.

10 The first response is that it was reasonable -- so, first of all, I am going to get to that  
11 point and deal with it methodically, if I may, but can just tell you in a nutshell what my  
12 submission is, since you have asked the question now, sir.

13 We say that, on a fair characterisation of both the request for information and the  
14 response, what the CMA asked the suppliers for were up to date forecasts and any  
15 changes, and none were provided. They were given an opportunity to provide up to  
16 date forecasts, which they didn't do, presumably because they couldn't do.

17 That is the first point. It would not have been fruitful to have gone back to have pressed  
18 the point. It wasn't that they weren't asked. They were given the opportunity and they  
19 didn't provide them.

20 The second point is that what all of this material shows -- and Mr Kennelly rather  
21 glossed over all of this material which the parties had put before the CMA -- what all  
22 of this shows is that nobody at that stage was able to predict in a robust way how  
23 COVID-19 was likely to change the market in an enduring way over the next two or  
24 more years.

25 In those circumstances, we say that it was certainly rational for the CMA not to go back  
26 and ask further questions.

1 I am going to deal with the point in a little bit more detail, I just wanted to give you in  
2 a nutshell what our submission is.

3 **THE CHAIRMAN:** The general view that online sales were bound to benefit, you think  
4 that wasn't sufficiently clear?

5 **MS DEMETRIOU:** No, because the CMA considered that. That is why I want to take  
6 this in turn, I want to take you to the report. The CMA considered that and found that  
7 it didn't have sufficient information to believe that it would be enduring.

8 **THE CHAIRMAN:** So it is the enduring nature that was unclear?

9 **MS DEMETRIOU:** That is the key point, the enduring nature.

10 What Mr Kennelly said was it would have been useful to have, for example, six weeks  
11 of trading figures. But that was neither here nor there in a sense, because the CMA  
12 was not looking at the immediate effect. It needed to reach robust conclusions as to  
13 whether or not those changes would be enduring. It took the view -- reasonably took  
14 the view -- that it was not possible to that at that point in time, given the type of  
15 information that was being provided to it by the parties and the view it took as to the  
16 ability of suppliers properly and robustly to predict that.

17 It would only have been their predictions. At that point in time, they were not capable  
18 of giving robust evidence as to the enduring impact, because of the huge uncertainty  
19 as to the impact of the pandemic generally and as to how events would unfold.

20 So, sir, that is our point -- that is our answer in a nutshell.

21 Going back to Mr Meek's statement, he goes on -- if we turn to paragraph 15, he  
22 explains -- this is his evidence as to why the group decided not to conduct further  
23 enquiries. You see there, at paragraph 15:

24 "We recognised that the COVID-19 crisis could potentially have a significant impact  
25 on the retail sector."

26 It wasn't, of course, closing its mind on any of that.

1 "However, we were also acutely aware of the limitations on gathering robust  
2 information that was capable of shedding light on the nature and extent of this impact,  
3 particularly over the medium to long term. These limitations arose primarily from the  
4 high level of uncertainty around the impact of COVID-19. It is important to keep in  
5 mind that, at this stage, we had only just entered lockdown and there was no visibility  
6 as to where the situation was heading, including how long lockdown would last and  
7 the nature and impact of any mitigatory measures that might be adopted by the  
8 government."

9 Then you have, at 16 to 17, the practical constraints that the CMA was operating  
10 under. The tribunal has already seen the evidence that was put to the CMA on COVID,  
11 and indeed the COVID events emerged very late on in the investigation, so the scope  
12 for gathering robust information was limited.

13 In any event, with the best will in the world the evidence that could be gathered at that  
14 stage was not, for the reasons set out at paragraph 15 of this statement, going to yield  
15 robust conclusions.

16 Then we see at 18 of the statement:

17 "The CMA did indeed consider in detail everything that was gathered at this late stage  
18 but most of the evidence was of such a speculative and generalised nature that it was  
19 insufficiently robust or relevant for us to place much weight on it."

20 I hope you have seen that from the material that I have shown you, in terms of what  
21 the parties put forward.

22 Turning now to the requests made to --

23 **THE CHAIRMAN:** Just before you do, can I just say, I mean obviously we have read  
24 Mr Meek's statement very carefully. It sets out a process of reasoning and alludes to  
25 deliberations, presumably of the panel and the staff team involved. It doesn't actually  
26 give any indication of when this decision not to pursue the third party evidence further,

1 or to ask specifically about COVID-19 in relation to Nike, Adidas and Frasers. Was  
2 that a definite decision? Was it communicated to anybody? Was there any notice  
3 published? Where the parties informed? The CMA is very transparent in what it does.  
4 Or was it an entirely internal decision, which has, in a sense, only come to light  
5 because of this challenge?

6 **MS DEMETRIOU:** Sir, I don't read this as there being -- quite to the contrary, the CMA  
7 accepted evidence provided by the parties up to a very late point in the investigation.  
8 There was certainly no decision that it was going to bring down the drawbridge, as it  
9 were, and stop considering any information that was provided to it voluntarily.  
10 Obviously, it is for the CMA to decide whether to make information requests of third  
11 parties. It did -- and I am going to come to this now -- it did ask Adidas and Nike for  
12 up to date information at the beginning of the COVID crisis, and then, obviously, it  
13 decided not to follow up and that it wouldn't be useful to seek further information.

14 **THE CHAIRMAN:** Well, that is my point. That is simply an internal process; part of  
15 the group's deliberations?

16 **MS DEMETRIOU:** Part of the group's deliberations. There certainly was no decision  
17 to, as it were, stop considering any information voluntarily submitted to it; quite to the  
18 contrary.

19 **THE CHAIRMAN:** There was an attempt to hold the line at 31 March but that was  
20 flexed because more material was coming in.

21 **MS DEMETRIOU:** That's right.  
22 Obviously the CMA, in a situation like this, where external events are fast moving,  
23 towards the end of a hard statutory deadline, has to balance the returns it thinks it will  
24 get by actively seeking more information -- here, they didn't think they were going to  
25 get anything very robust -- with the practical constraints of actually analysing the  
26 information that had been provided and reaching a decision within the statutory

1 deadline. That balance is a matter for the expert judgment of the CMA, we say, and  
2 of course subject to review on public law grounds.

3 **MR DOLLMAN:** Can I ask one specific question on that?

4 **MS DEMETRIOU:** Yes.

5 **MR DOLLMAN:** In the report on 8.414 you basically say that Adidas had already told  
6 you that their forecasts were obsolete.

7 **MS DEMETRIOU:** Yes.

8 **MR DOLLMAN:** I get your point that you took the view that you wouldn't get any more  
9 robust forecasts from them, although you may or may not have asked them. But you  
10 then say:

11 "[You] still consider these to be the best forecasts available at the time of the report."  
12 So, despite the absence of anything robust coming forward, surely these reports were  
13 not robust themselves. How can you rely on these reports, given that they had been  
14 declared obsolete by Adidas?

15 **MS DEMETRIOU:** Sir, I think in relation to that, I think all that is being said  
16 there -- I don't think that at 8.414 the CMA is saying, well, we considered these reports  
17 to be robust nonetheless, I think what they are saying is, well, they didn't give us  
18 anything else. I don't read this as a statement of the CMA placing a lot of weight on  
19 the forecasts that had been given, more that they had asked for revised forecasts and  
20 no more robust forecasts had been forthcoming. That is all I read that as saying.

21 Of course, the assessment made by the CMA as to market developments going  
22 forward did take account -- and I am going to come to this because I want to come to  
23 the report in some detail on both the counter-factual and the competitive  
24 assessment -- did take account, as far as it could, of the impact of COVID. But I don't  
25 read 8.14 as the CMA saying, well, we are placing lots and lots of weight on these  
26 forecasts, even though they are said to be obsolete. More that, well, nobody has given

1 us anything more robust. I think it is a question of how you read it. I didn't read it in  
2 the same way as you did, sir.

3 **MR DOLLMAN:** After they were declared obsolete, you did ask Adidas for further  
4 reports?

5 **MS DEMETRIOU:** Yes. Can I take you to the requests?  
6 If we go to Mr Meek's -- to bundle 4, you will see the request to Adidas at tab 11.  
7 Tab 1.11.

8 **THE CHAIRMAN:** Yes. The responses are confidential, so we have to be a bit  
9 careful.

10 **MS DEMETRIOU:** Yes. I don't think these can be confidential, these are the requests.

11 **THE CHAIRMAN:** Right.

12 **MS DEMETRIOU:** You see at annex 1 that what the CMA is asking for there is up to  
13 date forecasts:  
14 "The CMA wishes to understand whether there has been any recent changes to  
15 strategy."  
16 Then they are asking for up to date forecasts. You see that at 2:  
17 "Forecast growth for its online DTC channel."  
18 The Nike request is similar. That is behind the next tab.  
19 What is being asked for in each case is any recent changes and, "can you please give  
20 us your up to date forecasts". So this is the opportunity for Nike and Adidas to provide  
21 changed forecasts. They are being asked in terms, well, we have had your forecasts  
22 already but please give us any changed, revised forecasts. That is the request.  
23 Then you have the responses, which are confidential. Let's just turn them up, I am not  
24 going to read them out. The Nike one is behind tab 2.4. You see at page 212 of the  
25 bundle, if you could read (c) to yourselves, which is the question, and then you see  
26 the answer in the next. So no changes.

1 Then you see the next paragraph, which is, you know, let's wait and see.

2 Then we have the Adidas response behind the next tab. You see, at page 217, the  
3 obsolete point.

4 The point here is both that no revised forecasts have been proffered, despite the direct  
5 requests for them, but secondly you can see in the commentary -- and I can't read it  
6 out --

7 **THE CHAIRMAN:** No.

8 **MS DEMETRIOU:** -- but what is being said is expressly said to be short term. So  
9 what is being predicted is expressly caveated by reference to the short term.

10 I am told by Mr Lask, if we can go back to the decision at paragraph 8.412, that is  
11 page 230 of the decision -- it is not confidential here, I think is the point that Mr Lask  
12 is making. What is being said is:

13 "As many retailers close their bricks and mortar doors, in the short term there will  
14 inevitably be a shift to more online consumption. In addition, we anticipate a significant  
15 overall contraction of demand in the short term."

16 So they are very careful to caveat their predictions.

17 **THE CHAIRMAN:** Yes. Given that, you are putting to us that the authority decided,  
18 in its judgment, that there was no point in asking for predictions for the longer term,  
19 the medium term, the short term. They took the view that they wouldn't be of any  
20 value, is that your submission?

21 **MS DEMETRIOU:** That is my submission.

22 **THE CHAIRMAN:** That wasn't articulated in the decision. It was nonetheless what  
23 they decided to do.

24 **MS DEMETRIOU:** In a sense the decision -- of course it wasn't articulated in the  
25 decision, we would submit, because the decision wasn't facing up to this procedural  
26 point that is being put on the appeal. So there was no reason for the decision to go



1 into this at all. The CMA, of course, has a wide discretion as to what material it calls  
2 for. No one was saying to the CMA at that point you should go back and ask Nike -- not  
3 that I know of. This point has now been put on appeal and so I am responding to it  
4 but, sir, it is not surprising, in my submission, that the decision doesn't go into it. It is  
5 a procedural complaint that is raised ex-post facto.

6 Sir, the key point --

7 **THE CHAIRMAN:** Nonetheless, if it was articulated in the decision, there would be  
8 no procedural point to make.

9 **MS DEMETRIOU:** Well, sir, I think that Mr Kennelly would probably still say that, even  
10 if the CMA had explained in its decision what I am explaining to you now, it would still  
11 be open to JD Sports to say that that was irrational.

12 **THE CHAIRMAN:** It would be a harder hurdle to overcome, I think. But, still, carry  
13 on.

14 **MR FRAZER:** Sorry, just before you do carry on, you talked a few minutes ago about  
15 the need to deal with the practicality of the looming end of the statutory period and the  
16 likely utility of any additional information and you have to take a (inaudible) too. Just  
17 taking up that point, the documents you have pointed us to now were enquiries as of  
18 9 March, which is quite a long time before the end of the statutory period. Are you  
19 submitting that it was not irrational to decide not to seek a renewal of that information,  
20 albeit that there was quite a period of time between the information as requested and  
21 the end of the period?

22 **MS DEMETRIOU:** I am submitting that, sir. The reason I am submitting that is  
23 because, with the best will in the world, we were still, even in May, at the very  
24 beginning of the pandemic. There was still a lot of uncertainty as to the enduring  
25 impact of the pandemic. There still is uncertainty but there was much more uncertainty  
26 then. With the best will in the world, the information that you have seen that the parties

1 were submitting, right up until the end, was speculative and generalised in nature and  
2 was not the sort of information that the CMA could rely on to draw robust conclusions  
3 as to the structure of the market going forward.

4 Sorry, I am hesitating because my screen says it is about to turn off, which is rather --

5 **THE CHAIRMAN:** Perhaps it is anticipating lunch.

6 **MS DEMETRIOU:** -- disconcerting. I hope it doesn't turn off, and I am not sure how  
7 to stop it.

8 **MR FRAZER:** It doesn't matter, we can continue to hear you even if it does, I think.

9 **MS DEMETRIOU:** Okay.

10 For those reasons, we say that, even if the CMA had gone back and asked for either  
11 up to date sales figures or for predictions, they would not have been sufficiently robust,  
12 given the nature of the exercise that the CMA was engaged in, which was not just  
13 looking at the short, sharp shock of the pandemic but trying to draw conclusions as to  
14 the structure of the market going forward and, in particular, whether Footasylum would  
15 be disproportionately impacted.

16 I hope I can help make this good by reference to the CMA's approach in the report  
17 itself.

18 **MR FRAZER:** It sounds to me like the practicality of the time constraints were far less  
19 important than the view taken by the CMA that no information was likely to arise, even  
20 if there were more weeks to go, because of the speculative nature of the knowledge  
21 about the pandemic at the time. Is that correct?

22 **MS DEMETRIOU:** I would agree that the more important factor was the speculative  
23 nature of the information. Of course, as Mr Meek says, there were practical  
24 constraints and so what the CMA had to weigh up was whether or not seeking further  
25 information -- so using its resources at that stage, where it was at the end point of the  
26 statutory deadline and there was a huge amount of information already, just that had

1 | been obtained in the inquiry generally; there were oral hearings to assess and all of  
2 | the submissions that one gets and evidence in a merger inquiry, all of that had to be  
3 | assessed, analysed, distilled, and the report written up. So in that situation, the  
4 | authority has to consider, you know, is it right to divert resources from that task to  
5 | a different task of seeking further information? That, in turn, will depend on whether  
6 | or not that further information is likely to be useful.

7 | So there is an interplay between the two elements but I would agree with you, sir, that  
8 | actually the predominant thing here was the nature of the information and the fact that  
9 | it was unlikely to be sufficiently probative or robust.

10 | **THE CHAIRMAN:** I must confess, I am a little puzzled now, Ms Demetriou. You said  
11 | that you didn't expect the non-following up of the Adidas and Nike enquiries to be  
12 | referred to in the report because it has only come about because of a procedural  
13 | challenge. I mean, my impression from reading the administrative procedure  
14 | documents is that the case was fairly strenuously disputed from the start. I would have  
15 | thought that the panel would have anticipated that its conclusions might be the subject  
16 | of an appeal.

17 | Having received detailed, albeit speculative, material from the parties about the effect  
18 | of COVID, the COVID-19 issue would be quite an important issue for the report to deal  
19 | with. I am just puzzled why, in addition to going through the parties' evidence and  
20 | referring to it -- I know that you are going to take us to that -- the authority wasn't, given  
21 | the very thorough way in which it had approached the inquiry up to now, didn't actually  
22 | cover that point off also. I am puzzled.

23 | If you can help me there I would be grateful.

24 | **MS DEMETRIOU:** Yes. In relation to that, we would say it did cover it off by asking  
25 | for the up to date information from Nike and Adidas, and indeed Frasers Group. You  
26 | have seen the requests that I have taken you to. What was said was they were asked

1 specifically whether there were any changes in strategy or whether or not there were  
2 any changes to their forecasts. That was the opportunity for those third parties to  
3 provide answers.

4 You have seen that what they said -- one of them said that there was no change and  
5 that it was too soon to be able to draw conclusions in relation to COVID. The other  
6 one said that their forecasts were obsolete but they didn't offer anything else up. We  
7 see that, insofar as they tried to make predictions, they themselves explained that  
8 those were very short term.

9 So it is not a question, in our submission, of not seeking information through third  
10 parties, the CMA did do that. The question then was, as I think Mr Frazer put to me,  
11 well, that was mid March and there still wasn't time left until the statutory deadline. So  
12 was it rational of them not to go back and seek further information?

13 We say, well, it was obviously rational, in our submission, because the information that  
14 they had got when they asked for the information in mid March was wholly  
15 un-illuminating. That, in combination with all of the material that had been put to the  
16 CMA by the parties, which was equally of a generalised, speculative nature, and which  
17 really took a snapshot in time without being of a nature that enabled the CMA to draw  
18 robust conclusions in the medium to long term, on that basis we say that it was  
19 rational -- plainly rational, in my submission -- for the CMA not to go back to the third  
20 parties and say, well, you know, you didn't offer us any changed forecasts, would you  
21 like to reconsider now?

22 **THE CHAIRMAN:** But the view that there would be unlikely to be anything further that  
23 was useful was an inference drawn from the existing replies, is that correct?

24 **MS DEMETRIOU:** Well, we see Mr Meek explain that in terms. He says that the  
25 nature of all of the evidence that had been submitted to the CMA up to that point  
26 demonstrated that it was of a speculative and generalised nature. That is why they

1 did not actively seek any further information than that which they had already sought  
2 and already received.

3 **THE CHAIRMAN:** So it was an inference that there wasn't much point in asking any  
4 more questions at that stage?

5 **MS DEMETRIOU:** Well, I suppose strictly speaking it was an inference, but it was  
6 an inference based on all of the material that they had received. So the CMA  
7 exercised its judgment as to whether or not more robust information was likely to be  
8 forthcoming and, on the basis both of all of the material it had received but also the  
9 stage that they were at. I don't mean, now, in terms of the practical constraints, it is  
10 not that point, but in terms of the timing of events. The pandemic was very new and  
11 they had to make the decision quickly. The idea -- and I do want to come to the report,  
12 which I will come to after lunch -- that what the CMA was concerned about was  
13 reaching robust conclusions about the enduring impact in the medium term. Given  
14 both the information that it had received already, which was insubstantial and  
15 speculative, and also the timing of events, the CMA rationally decided that it was going  
16 to be unfruitful to seek more material.

17 **THE CHAIRMAN:** Shall we leave it there? It is 1 o'clock.

18 We will reassemble at 2 o'clock, if that is all right. Thank you very much.

19 **MS DEMETRIOU:** Thank you.

20 **(1.03 pm)**

21 **(The short adjournment)**

22 **(2.00 pm)**

23 **THE CHAIRMAN:** Right, good afternoon. Here we are, back again.

24 Ms Demetriou, before you go on it just occurred to us, if you are going to talk about  
25 the Nike, Adidas and Frasers questions and responses, do you need to go into  
26 confidential session?

1 **MS DEMETRIOU:** No. I have already taken you to them and asked you to read them,  
2 and I have made most of my submissions on them. We know that the key point relied  
3 upon by Mr Kennelly is not confidential in the report itself.

4 **THE CHAIRMAN:** Right. Is there nothing that you are going to refer to in relation to  
5 possible punitive measures by suppliers for deterioration in PQRS, or is that not  
6 something you are going to take us to?

7 **MS DEMETRIOU:** I don't think so. I don't think I need to take you to anything  
8 confidential on that, unless you have any questions, because I have dealt with most  
9 of this in response to ground 1.

10 **THE CHAIRMAN:** So you think you can deal with the questionnaire responses by  
11 asking us to read them, where necessary?

12 **MS DEMETRIOU:** Yes.

13 **THE CHAIRMAN:** Okay.

14 **MS DEMETRIOU:** I think so. If that changes and you think that that is inadequate,  
15 obviously please say and we can go into closed sessions. I am intending to try and  
16 avoid that.

17 **THE CHAIRMAN:** Okay. That is fine. We will go with that.  
18 Right, please continue.

19 **MS DEMETRIOU:** The tribunal has a large chunk of my submissions, as it were, in  
20 relation to both limbs of ground 2. What I want to deal with now, specifically, are the  
21 separate limbs of ground 2, so the counter-factual and the competitive assessment by  
22 reference to the report. I am not going to repeat the submissions I have already made  
23 which are applicable to both limbs.

24 If we could please turn up the report at page 37, which is paragraph 5.12 and onwards,  
25 page 41 of the bundle. This is the CMA's assessment of the appropriate  
26 counter-factual.

1 You can see at paragraph 5.14 that the parties have not put forward any failing firm  
2 defence and the CMA have not seen evidence that either of the parties met the  
3 conditions set out in the exiting firm scenario.

4 That is an important point, in our submission, because what I am going to come on to  
5 say is that it is very hard, actually, to see, once a party is not putting forward a failing  
6 firm defence, it is hard, actually, to see much daylight between what the CMA actually  
7 found in terms of the counter-factual and what Mr Kennelly says the CMA should have  
8 found. So one is looking at degrees; questions of degree.

9 When Mr Kennelly referred to the Amazon decision, which he didn't take you to in the  
10 event, a key difference between that case and this is that the parties in that case did  
11 run a failing firm defence.

12 Now, paragraph 5.15 states that the CMA took account of the analysis of the potential  
13 impact of Covid-19 on Footasylum's finances and its ability to compete in its  
14 counter-factual assessment and considers this further at paragraphs 15.21 to 15.32.

15 Then you see, at paragraph 5.16, an acknowledgement of the significant impact that  
16 COVID-19 is having at that stage, but the extent and duration of the impact of  
17 COVID-19 in the medium to long term is considerably uncertain.

18 "Because we can't predict the impact of COVID-19 with any confidence, we have given  
19 it limited consideration in our counter-factual assessment. We have considered it as  
20 far as possible in our competitive assessment."

21 Then we turn to paragraphs 15.21 to 15.31. This specifically considers the analysis  
22 submitted by the parties. You have seen already that the analysis presented three  
23 scenarios and those scenarios are summarised.

24 You then see, at paragraph 5.31 -- and I am going to come back to the lender point in  
25 due course, I am going to come back to some of the detail of this but I won't read out  
26 the confidential parts. You see at 5.31:

1 "We accept the parties' submission that, absent the merger, as a result of COVID-19  
2 Footasylum's financial position would have been negatively impacted."

3 Then we see at 5.32:

4 "We considered the effect of COVID-19 on competitive conditions and the competitive  
5 constraint between the parties and from other retailers in chapters 8 and 9."

6 Now, members of the Tribunal, turning at this stage to the guidelines, if I may, so that  
7 is in the first authorities bundle behind tab 2.1, and paragraph 4.3.6. That is page 45  
8 of the bundle. You see there -- and Mr Kennelly took you to this passage, but I do  
9 want to emphasise it because we say that what the CMA did is entirely in line with  
10 this -- so you see that, halfway through that paragraph:

11 "When it considers that the choice between two or more scenarios will make a material  
12 difference to its assessment, the CC will carry out additional detailed investigation  
13 before reaching a conclusion on the appropriate counter-factual. However, the CC will  
14 typically incorporate into the counter-factual only those aspects and scenarios that  
15 appear likely on the basis of the facts available to it and the extent of its ability to  
16 foresee future developments. It seeks to avoid importing into its assessment any  
17 spurious claims to accurate prediction or foresight. Given that the counter-factual  
18 incorporates only those elements and scenarios that are foreseeable, it will not, in  
19 general, be necessary for the CC to make finely balanced judgments about what is  
20 and what is not in the counter-factual."

21 What we say about that is, that is what the CMA did here. It was not faced with a failing  
22 firm defence, so it wasn't said that Footasylum would exit the market. It was accepted  
23 that it would impose a competitive constraint. So here the CMA in its report -- and  
24 I have just shown you in chapter 5 -- found that it was unable to reach any robust  
25 conclusions as to the effect of COVID on the medium term looking forward. So for  
26 that reason, it quite rightly did not incorporate any spurious predictions into its



1 counter-factual analysis.

2 Stepping back, one asks, well, what could the CMA have done? It wasn't faced with  
3 a failing firm defence, it found that there was a prospect that Footasylum would be  
4 weakened by COVID, so what is it quite that JD Sports says it should have found was  
5 the proper counter-factual? It certainly wasn't in a position, at that stage of events, to  
6 engage in spurious assessments of quite how far it would be weakened. There simply  
7 was not the information available for it to do that.

8 Just turning to our defence, if I may, we set out in our defence, conveniently, the  
9 relevant passage of the COVID guidance. That is at bundle 1, tab 2.2, and it is  
10 paragraph 69 of our defence.

11 **MR DOLLMAN:** What is the page number?

12 **MS DEMETRIOU:** I am so sorry, it is page 152 of the bundle. It may be a wrong  
13 reference of that.

14 Can I come back to that point and find the right reference? I think I have the wrong  
15 reference.

16 The point is that the annex to the COVID guidance states, in terms, that there may  
17 well be considerable uncertainty about the duration of COVID and so it is perfectly  
18 proper to consider it, if at all, in the competitive assessment rather than in the  
19 counter-factual.

20 I am told it is paragraph 82 of the defence. Rather than me paraphrasing it, you have  
21 it set out there. You can thank Mr Lask for that.

22 You see there that is an excerpt from the COVID-19 guidance issued by the CMA:

23 "The CMA's investigations are forward looking and evidence led. The impact of  
24 Coronavirus should be factored into the substantive assessment where appropriate.

25 It is clear, at least in the short term, that there will be a substantial impact across the  
26 UK. There remains considerable uncertainty about the extent and duration of this

1 impact. A merger control investigation typically looks beyond the short term and  
2 considers what lasting structural impacts the merger might have on the markets at  
3 issue. Even significant short term industry wide economic shocks may not be sufficient  
4 in themselves to override competition concerns that a permanent structural change in  
5 the market brought about by the merger could raise. The CMA needs to ensure its  
6 decisions are based on evidence and not speculation, and will carefully consider the  
7 available evidence."

8 We say, again, that is what the CMA did.

9 In conclusion on the counter-factual -- and this is subject to the lender's response  
10 point, which I am just about to come to -- we say that the CMA plainly reached  
11 a rational decision and that there is really no hard edged error that can be identified in  
12 its approach. You have my submissions already about the key point that Mr Kennelly  
13 made about making further enquiries. I have already dealt with that at length.

14 I am going to turn to the [REDACTED]. Essentially,  
15 JD Sports contends that the CMA acted irrationally in failing to ask a question of  
16 Footasylum's lender. Our response to that is that that was not the only rational course  
17 of action open to CMA in the circumstances.

18 Can we pick up Mr Meek's statement again. It is bundle 4 and it is paragraph 13 of  
19 Mr Meek's statement. That is page 8 of the bundle, page 7 of the statement.

20 You see there:

21 "The CMA did not consider it was necessary to seek information directly from  
22 Footasylum's primary lender about the impact of COVID-19. This is because the CMA  
23 had already obtained information from Footasylum at the outset of the phase 2 process  
24 showing that ..."

25 And I just ask you to read the rest of the paragraph, please, because it is largely  
26 redacted.

1 **(Pause)**

2 Now, as to the recent further information provided by Footasylum, you see that in the  
3 same bundle at tab 1.8, so if you could please turn that up. Could I ask you please  
4 just to read, or re-read probably, the paragraph under item 2.

5 **(Pause)**

6 Really there are two points to be drawn here from this. The first is the point that the  
7 comfort to be gained from the first couple of sentences, which are redacted. The  
8 second point is, in relation to the second part of that paragraph, Footasylum is saying  
9 that it is difficult to assess its financial position more generally until it has more  
10 certainty. This, again, chimes with the type of information and the rest of the evidence  
11 that the CMA was looking at. Indeed, it paints something of an optimistic picture, if  
12 you have a look at the rest of that paragraph.

13 Going back, please, to the report, and to the sections that I skated over and said  
14 I would come back to. We are back at paragraph 5.70 on page 53 of the report.

15 **THE CHAIRMAN:** Just before we do that, I think Mr Kennelly made a point in relation  
16 to the Footasylum lender.

17 **MS DEMETRIOU:** Yes.

18 **THE CHAIRMAN:** That, of course, those statements were made at a time when  
19 JD Sports' possible support for Footasylum was apparent, because it had already  
20 been acquired at that point; am I right?

21 **MS DEMETRIOU:** Yes, that's right.

22 **THE CHAIRMAN:** So one has to decide whether you actually take those statements  
23 as a reliable indicator of what would have been the case if there had been no JDS  
24 merger.

25 **MS DEMETRIOU:** Sir, yes.

26 **THE CHAIRMAN:** You are going to deal with that?

1 **MS DEMETRIOU:** Yes, can I deal with it now.

2 Can I make two points in relation to that. The first point is that, of course, the lender  
3 would have been aware that the merger was under investigation by the CMA, so there  
4 was a risk that it would be blocked. That is the first point.

5 **THE CHAIRMAN:** Are lenders that sophisticated?

6 **MS DEMETRIOU:** Well, sir, one would imagine that if the lender was taking into  
7 account -- was sophisticated enough to take into account JD Sports' support, then it  
8 would also -- it is a matter of public record. Presumably, JD Sports would have had to  
9 have told it, or Footasylum would have had to have told it, that the merger was under  
10 investigation. So I would be very surprised if a lender did not acquaint itself with that  
11 fact.

12 That is the first point I wish to make.

13 The second point is, of course, one has to -- it really leads on to this, which is that what  
14 Mr Kennelly is suggesting the CMA should have done is to ask the lender a question.  
15 Now, it is really important, in my submission, to think about what the nature of that  
16 question was. Mr Kennelly presented it as something very simple that is capable of  
17 a yes or no answer but, sir, the question was a question about what the lender would  
18 have done in a hypothetical counter-factual. That is not a straightforward question for  
19 anybody to answer.

20 So, sir, what we say, and this is our key submission in relation to this point, is this: the  
21 CMA acted rationally in deciding to look at the real world evidence before it and make  
22 inferences from that real world evidence, as opposed to asking a wholly hypothetical  
23 question relating to the counter-factual of the lender. That is a wholly rational way to  
24 proceed because counter-factual questions are very difficult for anyone to answer.

25 They are wholly hypothetical and they are, by definition, not real world questions.

26 In those circumstances -- in effect, the lender would have been -- the question that

1 would have had to have been asked was, in a counter-factual world of no merger, and  
2 taking into account Coronavirus and its impact and any mitigating action that the  
3 government might take, and taking into account [REDACTED]

4 [REDACTED], what would you have done? We say that  
5 is a question that is so speculative and hypothetical that it is unlikely to yield a useful  
6 answer.

7 **THE CHAIRMAN:** You have rather over complicated it, haven't you? Surely, one  
8 would just have to ask to the lender: knowing what you know about your client,  
9 Footasylum, and knowing what you know about the current state of the market, in the  
10 absence of any possibility of financial support from JD Sports what would your attitude  
11 be to [REDACTED]?

12 **MS DEMETRIOU:** Well, sir, with respect, I don't agree that that is a simple question,  
13 for the same reason as I have been advancing in relation to the degree of speculation  
14 that is required in terms of predicting the enduring effects of Coronavirus generally.  
15 We have seen -- and I am going to come to this now -- we have seen that there is  
16 evidence that the lender [REDACTED]. Presumably its answer would depend  
17 on what its forecasts were in terms of Footasylum's ability to adapt in terms of the  
18 Coronavirus pandemic, and also what the enduring impact of Coronavirus was. So  
19 packed into a seemingly simple question is a difficult hypothetical prediction, in our  
20 submission.

21 The question, of course, for the tribunal is not does the tribunal think that would have  
22 been a good idea to have asked, but did the CMA act rationally in deciding is not to  
23 ask that question? And did it act rationally instead by basing its conclusion on the real  
24 world evidence it had, which is set out in the report?

25 If we could just turn to that. We see at paragraph 5 -- I am sorry, if you just bear with  
26 me for a moment while I find my place.

1 Yes, so going back to paragraph 5.25 on page 40, you can see that -- rather 5.28. We  
2 see there that the action that can be taken was uncertain. It is the hypothetical nature  
3 of the scenarios. So bear in mind that Footasylum have put forward three different  
4 scenarios and, given the hypothetical nature of those scenarios, it is difficult to predict  
5 what would happen in the counter-factual.

6 Of course, sir, the question of what would happen in the counter-factual is ultimately  
7 an evaluative question for the CMA. It is not really for the CMA to delegate that  
8 predictive exercise to anyone else.

9 So what we have is the CMA acknowledging that the hypothetical nature of these  
10 scenarios makes it difficult to predict what would happen in the counter-factual:

11 "However, we make the following observations ..."

12 I would just ask you to read (a) to yourself. Then (b), and (b) is important because  
13 these are the scenarios described by Footasylum. They are optimistic in terms of the  
14 ultimate outcome, all of them are. Then we see that there are uncertainties over the  
15 medium to long term effects of COVID:

16 "This analysis suggests that the effects of COVID may not be enduring."

17 Then we see a reference to the likely incentives of the lender at 5.29 and then we see  
18 the up to date evidence at 5.30.

19 We then have the conclusion at 5.31, which refers also to other mitigating action that  
20 might be available.

21 In short, what we say is that this was plainly an adequate evidential basis for the CMA  
22 to reach the conclusion that it did -- so that I am not breaching any confidentiality -- to  
23 reach the conclusion that it did with respect to the lender.

24 The parties themselves were certainly not saying to the CMA that this was unlikely.

25 Quite the opposite. So we say, in view of that evidence, the CMA was reasonably  
26 entitled to decide that it was not necessary to approach the lender directly and, as

1 I say, important in that context is the nature of the question that the CMA would be  
2 asking, which is a hypothetical question about the counter-factual. We say one that is  
3 not easy to answer.

4 Even if the lender purported to give a yes or no, uncaveated answer, then we say that  
5 that would not necessarily have provided the CMA with very robust guidance, given  
6 the nature of the exercise that it was conducting and given the uncertainties, the  
7 attendant uncertainties, in both the course that COVID was going to take, the enduring  
8 impact that it would have on the market, and how Footasylum would react to all of that.  
9 Sir, that is what we say about ground 2.1. I am now going it turn to ground 2.2, which  
10 is the competitive assessment.

11 The complaint made here is a narrow one. The complaint is that the CMA should have  
12 asked further questions of Nike and Adidas so as to establish up to date trading data  
13 on online DTC sales. Mr Kennelly argues that it was irrational of the CMA not to do  
14 this before reaching a conclusion as to the competitive constraints posed by suppliers  
15 on the merged entity.

16 The short submission in response is that the CMA had evidence before it, on the basis  
17 of which it rationally took the view that it would be unable to reach -- it had reached  
18 a conclusion that there was a strong SLC and it rationally took the view that it would  
19 be unable to reach robust conclusions as to the enduring effects of COVID-19. It was  
20 rational for it to reach the view that this position would not be altered by seeing, on  
21 a best case scenario, 6 weeks' worth of trading data from Adidas and Nike.

22 I want to take the tribunal to the CMA's reasoning in the decision. If you could please  
23 turn up paragraph 8.306, that is page 198, and perhaps start with 8.305, where the  
24 CMA say:

25 "The market is clearly being impacted by COVID-19."

26 So it is not shutting its eyes to that:

1 "The impact upon our assessment of the competitive effects of the merger is less  
2 certain. There remains considerable uncertainty about the extent and duration of the  
3 impact of COVID-19."

4 Then, 8.306, it sets out the parties' submissions. Essentially the parties were  
5 saying -- one of the submissions they were making, the one that is relevant to  
6 Mr Kennelly's point before the tribunal, is that the impact of COVID-19 would result in  
7 the growth of DTC. What they must mean by that is the growth of DTC relative to  
8 wholesale, because what the CMA had found was that DTC and wholesale -- DTC,  
9 yes, would expand but so would wholesale and they would effectively be in tandem.

10 Then we see at 8.307:

11 "All retailers in the market are subject to the same change in market conditions and  
12 the measures put in place by the government. Although it is difficult to predict the  
13 effect on different retailers and how each will respond to the circumstances, we note  
14 that online sales are not being impacted to the same extent as in store sales and that  
15 online sales make up a sizable proportion of the parties' sales. We also note that the  
16 parties submitted forecasts of Footasylum's online sales ..."

17 And you see the redacted words:

18 "... compared to the same period in 2019/2020, although they submitted this was  
19 optimistic."

20 Then you see at 8.38:

21 "Overall, it is not clear to what extent COVID-19 is affecting the relative constraints  
22 posed by different retailers and suppliers in the footwear market, we have not seen  
23 evidence to suggest that either of the parties is being more negatively impacted by  
24 COVID-19 relative to each other, or relative to other retailers in the market. Therefore,  
25 it is not clear that, as a result of COVID-19, either of the parties would be in a much  
26 weaker competitive position to each other and to other retailers, or that other



1 competitors would become significantly stronger. For example, in our view it is likely  
2 that all retailers are [and then you have some redacted words] given the current  
3 circumstances.

4 "Therefore, whilst recognising these uncertainties, we do not envisage that the impact  
5 of COVID-19 is likely to reduce materially the extent to which the parties are close  
6 competitors, or to increase materially the current competitive constraints on the parties  
7 in footwear.

8 "We consider the impact of COVID-19 on competitive constraints in the foreseeable  
9 future in terms of market developments in the next section."

10 So then we turn to --

11 **THE CHAIRMAN:** Just a minute. The point that Mr Kennelly raised about Footasylum  
12 having small stores, therefore being more vulnerable to social distancing measures, is  
13 that dealt with anywhere?

14 **MS DEMETRIOU:** Well, let me come back to it and see if that is specifically dealt with.  
15 Of course, that is all part and parcel of the information that is being looked at by the  
16 CMA. I am not sure that it is right that Footasylum alone has smaller stores compared  
17 to other retailers.

18 What the CMA is concluding here -- of course Mr Kennelly is picking out for the  
19 purposes of this appeal facts which support his argument, but there is a whole plethora  
20 of evidence that the CMA has considered when reaching this decision. I will come  
21 back, sir, to see if there is a reference that I can assist you with on that particular point.

22 **THE CHAIRMAN:** Thank you.

23 **MS DEMETRIOU:** The conclusion that they have reached is that they are unable to  
24 predict the effect on different retailers.

25 Of course, when one is looking at -- just to avert to one complication that arises from  
26 Mr Kennelly's submission, the fact that a store is smaller doesn't necessarily mean it

1 is going to be impacted worse by COVID if its online sales presence is strong. If that  
2 is increasing. So it is not accurate to point to one parameter like that and say, well,  
3 that obviously means Footasylum is going to be worse off, when you can see here  
4 evidence that their online sales were set to increase.

5 **THE CHAIRMAN:** Yes. I wasn't asking whether it was a correct point, I was asking  
6 whether it was referred to in the report at all.

7 **MS DEMETRIOU:** Yes. I will come back to that. I think Mr Lask is assisting me to  
8 see if he can find a reference.

9 I do want to make the point, and I have made the point, that there are a variety of  
10 relevant factors that have to be looked at in the round, such as online capacity. The  
11 size of a store is not, in itself, a conclusive factor.

12 Then, sir, if we go forward to look -- the CMA then looked at market developments in  
13 the next section. If you turn forward, please, to 8.415, that is on page 231.

14 Well, perhaps, just to locate this, we have, if you go back to page 229, you see  
15 a heading, "DTC growth forecasts". The suppliers were forecasting that their DTC  
16 channel will increase in size. Then you have, over the page, you see that there is  
17 then, on 231, "DTC to wholesale ratio forecast". That is really the critical question,  
18 because whether DTC increases is not very informative; the question is whether it  
19 increases at the expense of wholesale.

20 We see that point at 8.415 and you will read the words at the end of that, which are  
21 redacted.

22 Then, over the page, we see, at 8.419, if you could just read that paragraph, please.  
23 That is the conclusion at that stage.

24 Then, moving forward in the report to 8.431 on page 236, we have a conclusion on  
25 DTC growth. At 8.431:

26 "We consider it likely that their DTC [that is Nike and Adidas] will continue to grow

1 | strongly in the UK, predominantly online."  
2 | Then we see:  
3 | "Such growth is likely reflective of general growth in the market and that the ratio of  
4 | DTC sales to wholesale sales will not change significantly in the foreseeable future.  
5 | We consider that the initiatives which they are undertaking in order to achieve their  
6 | projected DTC growth do not appear to amount to a substantial repositioning of their  
7 | offering. On that basis, our view is that, over time, the two key suppliers DTC offer  
8 | may become more of a constraint. However, the evidence does not show with  
9 | sufficient certainty that Nike's and Adidas' DTC offering across their channels will  
10 | become a significantly stronger constraint on the merged entity in the market for the  
11 | retail supply of sports and supply of casual footwear in the foreseeable future."  
12 | That is the conclusion.  
13 | Then you see the impact of COVID discussed from paragraph 8.444 on page 239.  
14 | You see the parties' submissions that:  
15 | "COVID and social distancing measures will result in long term structural market  
16 | changes as retailers, and particularly the key suppliers, through their DTC offerings,  
17 | shift to online."  
18 | So not just the suppliers, but all retailers shifting to online. It is not clear how long it  
19 | will take the UK retail market to reopen. That is the submission.  
20 | Then the CMA says, at 8.445:  
21 | "We agree that it is uncertain what the market will look like in the medium to long term.  
22 | Therefore, while a greater shift to online could be a potential outcome, we cannot  
23 | determine with sufficient certainty whether this is likely to be the enduring structure  
24 | once doors have reopened and other restrictions have been lifted. We also consider  
25 | that the figures the parties have submitted regarding Nike's and Adidas' projected  
26 | online sales are ..."

1 And then you see the redacted words.

2 So, here the CMA is looking beyond the immediate short term and seeing whether it  
3 can satisfy itself that there is going to be an enduring change. It finds that it can't.

4 Then we see at 8.447, and this is important:

5 "We also note that, in principle, should there be a greater shift to online more  
6 permanently [so they are considering that possibility], while the constraint from some  
7 retailers might be strengthened as a result, it is possible that the strength of other  
8 retailers who currently exert a stronger in-store constraint may be weakened.  
9 Therefore, we do not consider that we can be sufficiently certain that any market  
10 changes, were they to arise, would increase materially the aggregate competitive  
11 constraints posed by retailers, including suppliers, through their DTC offerings in the  
12 round."

13 That is an important point, and it is one that JD Sports simply doesn't grapple with,  
14 which is, even if there is a shift online, that doesn't mean to say that, in the round, the  
15 constraints are going to be greater. There are some people who impose a constraint  
16 now whose position is likely to be weakened. One can't just pick out one set of  
17 retailers -- here the suppliers through DTC -- and say, well, that is going to increase,  
18 the constraint from them is going to increase, without also taking a view as to whether  
19 the constraint posed by others is going to weaken.

20 Essentially, what the CMA is saying is this is all just too speculative in terms of  
21 predicting enduring effects. In my submission, it is understandable -- wholly  
22 understandable -- why they reach that view.

23 Then we see, moving forward to 8.476, which is on page 246. Here -- and this is the  
24 conclusions section:

25 "We hear that COVID-19 is having a significant impact on retailers, recognise that  
26 retailers are facing uncertain and challenging trading conditions. At the time of

1 publishing this report, there is considerable uncertainty about the extent and duration  
2 of this impact in the medium to long term. It is difficult to predict the effect on different  
3 retailers and how each will respond to the circumstances, and therefore its impact on  
4 current competition and market developments in the foreseeable future."

5 Then at 8.477:

6 "Not seen evidence to suggest that either of the parties is being more negatively  
7 impacted by COVID-19 relative to each other or relative to other retailers in the market.  
8 Do not envisage that COVID-19 will increase the likelihood of success of any retailers'  
9 plans which involved substantial investment. Therefore, we do not consider that  
10 COVID-19 would reduce materially the extent to which the parties were close  
11 competitors, or increase materially the aggregate constraints such that it would be  
12 likely on the balance of probabilities that the merger would or may be expected to  
13 result in an SLC."

14 Before just rounding up on this submission, Mr Lask has handed me some references  
15 in response, sir, to your question. So if we can just pick up paragraph 8.300 of the  
16 report -- sorry, 8.306. The CMA there acknowledged and obviously took into account  
17 the submission made by Footasylum that Mr Kennelly was referring to. There they  
18 recorded the submission and took it into account. Then we see 8.307 is the  
19 conclusion. So, despite having looked at that, the CMA is unable to decide that  
20 Footasylum is going to be more negatively impacted than others. In particular -- and  
21 this is really key -- it is a predictive exercise because there are constraints which are  
22 going to apply to a greater or lesser extent. So the same difficulties apply to each  
23 retailer but they may effect them in different ways and the retailers may respond in  
24 different ways.

25 What the CMA can't do robustly at this stage is predict how retailers are going to  
26 respond. In particular, there is the reference there to online sales. The online sales

1 make a sizable proportion of the parties' sales and we see -- in case you want more  
2 references to the percentage of Footasylum's online sales, I will just give you it for your  
3 note, 7.45 and 7.92 of the decision.

4 **THE CHAIRMAN:** I had been reading those two paragraphs when I asked the  
5 question. It was a very limited question, which is whether there was anything in the  
6 report which deals with the point about Footasylum's stores being smaller than maybe  
7 JD Sports stores. If the answer is no, that is fine, but I just wanted to ask that. I don't  
8 think there is any reference to it in 306 and 307.

9 **MS DEMETRIOU:** Well, sir, the reference is there to the argument in 306. That is  
10 what I just showed you, sir. The middle of the paragraph:

11 "The parties submitted that the business relies on delivering sales with a relatively low  
12 level of square footage and stores tend to be very busy during key periods."

13 So there is an express reference to the point. That is the point that was made by the  
14 parties.

15 **THE CHAIRMAN:** That is the only one, okay. Leave it there, it is not a big point.

16 **MS DEMETRIOU:** Mr Lask is asking me to take you to our defence. Perhaps you  
17 could just pick that up. So paragraph 111.2. That is the first bundle, tab 2.2, page 53.  
18 It is 111.1 and 111.2 and 111.3 of that point. That includes I think more references  
19 and grapples with that point. Would it be okay for me to leave you with those  
20 passages?

21 **THE CHAIRMAN:** Yes, it would be very satisfactory. Thank you.

22 **MS DEMETRIOU:** Thank you.

23 So to wrap up on this point, the tribunal can see that the CMA took account of all of  
24 the information that it received in relation to the impact of COVID, and also took  
25 account and found that it was very difficult to predict what the enduring impact would  
26 be of COVID, both in terms of the direct impact and the response of retailers.

1 The tribunal has seen that the CMA requested Nike and Adidas to produce up to date  
2 forecasts and they were both unable to provide different figures. That, in itself,  
3 substantiates the CMA's view that it was spurious, at that stage, to produce accurate  
4 forecasts because of the uncertainty. Even if Mr Kennelly's other point, which is, well,  
5 they should have been asked to provide six weeks of trading figures for DTC, we say  
6 that, even assuming that they had been asked and that those showed a shift to DTC,  
7 the CMA could not be satisfied that this would endure. We see that found at 8.445,  
8 I have taken you to it, in the CMA's report.

9 Even if there were, because of COVID, a more permanent shift to online sales  
10 because of the social distancing restrictions, this would not necessarily increase the  
11 strength of DTC. As you have seen, the parties have a strong online preference and  
12 Footasylum's online sales were forecast to increase. Even if DTC did increase its  
13 (inaudible) and even if the increase in online sales resulted in a comparative increase  
14 in DTC vis-a-vis wholesale, this would not necessarily mean an increase in the overall  
15 aggregate constraints, as a shift to DTC might weaken the constraint of retailers with  
16 a greater in store focus and less of an online presence. I have shown you the findings  
17 in the report that said that.

18 In those circumstances, we say it was entirely rational for the CMA to proceed as it did  
19 and to not seek further information.

20 Sir, unless you have any questions, those are my submissions on ground 2.

21 **THE CHAIRMAN:** No. Fine.

22 **MS DEMETRIOU:** So I move to ground 3.1.

23 This concerns Frasers Group's elevation strategy.

24 Mr Kennelly very fairly acknowledged, and we don't complain about this, that

25 JD Sports has abandoned much of its ground 3.1 as presented in its notice of appeal.

26 He said that the key question now is whether Nike and Adidas would reallocate product

1 to Frasers Group if the merged entity worsened its offering, such that Frasers Group  
2 could be expected to impose a greater competitive constraint.

3 Now, whilst that is all that is left of ground 3.1, it is only one aspect of the CMA's  
4 consideration of Frasers Group's elevation strategy. It is important, in my submission,  
5 to have regard to the whole of the CMA's analysis in that respect because it would be  
6 wrong to assume that the question alighted on now by JD Sports was the only basis  
7 for the CMA's conclusion in respect of the constraint imposed by Frasers Group. Just  
8 because they have now zoned in on this point, that is not the only basis for the CMA's  
9 finding as regards constraint.

10 Could I please now take you to the relevant section of the report. It starts at  
11 paragraph 8.322 on page 203 of the report. Sorry, it is 8.321 but you see the question  
12 posed at 8.322, which is:

13 "Whether the elevation strategy means that the Frasers Group would become a closer  
14 competitor to the parties in the foreseeable future, while recognising some parts of the  
15 elevation strategy have already been implemented."

16 That was the point.

17 Then, over the page at 8.325 and onwards, you have a detailed consideration in the  
18 report of the elevation strategy itself.

19 At 8.334, this is on page 206, you can see there that the -- and I am looking about  
20 a third of the way down, after the footnote:

21 "We concluded that the rationale, like the elevation strategy itself, is wide ranging."

22 If you could just read the rest of that sentence, which is redacted.

23 Then moving forward to 8.344, and if I could just ask you to read that paragraph, which  
24 was redacted.

25 And then similarly if you could read the first sentence of 8.346 over the page, which is  
26 also redacted.



1 And then we have some information from the suppliers as to how they are actually  
2 responding to the elevation strategy, and we see that at 8.349 on page 212. And then  
3 we see the last sentence of that, we can see that this means that Frasers Group is  
4 only able to access some of the products for its stores that are available to the parties.  
5 And similarly we see supportive evidence at 8.350 down to 352 in relation to that point.  
6 So this is the suppliers providing information as to how they actually are responding  
7 to the elevation strategy. And so all of those findings and that evidence is also relevant  
8 to the question of the constraint that can be expected.

9 Now, what JD Sports then does now is alights on one feature, which is the question  
10 addressed at 8.253. So:

11 "The suppliers submitted we should consider how the suppliers and Frasers Group  
12 would react if the merged entity sought post-merger to reduce it is PQRS. The parties  
13 admitted it was clear that key suppliers were already giving them access to premium  
14 sports inspired casual products. There is no evidence to suggest that this trend will  
15 not continue or accelerate if the parties opted to deteriorate the PQRS of their stores  
16 and online offering."

17 And the CMA says:

18 "We accept post-merger if the merged entity were to deteriorate aspects of its PQRS  
19 which went against the key suppliers' interests, Nike and Adidas may have  
20 an incentive to reallocate products to Frasers Group in line of its elevation strategy.  
21 However, we have seen no evidence that Nike or Adidas would favour ...(reading to  
22 the words)... higher volumes of products and which are categorised as best and better  
23 retailers in their retailer segments. We therefore can't say with sufficient certainty what  
24 actions the suppliers may take in terms of allocating their projects should the merged  
25 entity deteriorate its PQRS. Even if the key suppliers were to reallocate products to  
26 Frasers Group, it is not clear over what timeframe this might result in a material

1 increase, if at all, in the strength of Frasers Group's constraint."  
2 And so you see a number of reasons there in that paragraph why the submission made  
3 by the parties was rejected.  
4 You then see, moving forward at 8.354 and following, a data analysis, this is all part  
5 of the same consideration, a data analysis to assess whether the elevation strategy  
6 has led to better product access. And then you see a conclusion at 8.363. This is on  
7 page 218; not clear evidence of an upward trend in Frasers Group receiving and  
8 selling these products. The latest evidence suggests its volumes remain low.  
9 And then 8.366 indicates that the CMA considered evidence, internal documents and  
10 strategy documents and emails from the parties.  
11 And then moving on to 8.376 on page 222 you have an examination of the impact of  
12 opening Frasers Group stores on the parties. So that is another strand to the analysis.  
13 And then you have the overall conclusion at 8.395 on page 227. So:  
14 "Frasers Group is a significant and successful player in the retail market and the  
15 effects of its elevation strategy has required careful consideration. However, overall  
16 on the basis of the evidence currently available we cannot conclude with sufficient  
17 certainty that Frasers Group's elevation strategy will significantly change the strength  
18 of the competitive constraint on the merged entity from Sports Direct in the relevant  
19 market in the foreseeable future."  
20 And so JD argues, JD Sports argues that the conclusion -- so out of this they pick the  
21 point at 8.353 and they argue that that conclusion was irrational and the narrow point  
22 that is made is that the CMA was irrational in not asking Nike and Adidas whether, if  
23 the merged entity deteriorated its offering, they would reallocate relevant products to  
24 Sports Direct's elevated stores. So that is the complaint that is made.  
25 But again, and this is a theme of my submissions, we need to be clear about the nature  
26 of the question that the CMA would be asking on the hypothesis put by Mr Kennelly,

1 because it is a hypothetical question. So the question would be if the merged entity  
2 deteriorated its offering post-merger so presumably in unspecified ways, and to  
3 an unspecified degree, and at an unspecified time, what would the suppliers do?  
4 Would they allocate products to Frasers Group or to other retailers or not take any  
5 action? And they would have to answer that question in the abstract, presumably,  
6 without knowing what the state of the market was at the time, at that point in time,  
7 when they spotted the deterioration, including how other retailers were performing and  
8 how Frasers Group's elevation strategy had actually panned out in practice, in fact, at  
9 that time.

10 And so my submission is that it is entirely rational for the CMA to take the view not to  
11 ask that question, because one can see that it is unlikely to yield an illuminating  
12 answer. What the CMA did instead was to assess the real world evidence, including  
13 evidence from the suppliers, which was relevant to the question before it. And so as  
14 the tribunal has seen, the CMA asked Nike and asked Adidas for any examples of  
15 action which they had taken in response to a deterioration in retail quality or service in  
16 the last two years, and very few examples were provided. Can I just remind you of  
17 that? I am going to take you back to hearing bundle 4, and it is tab 2.3, is the Nike  
18 response. And that is page 201. This is all confidential, so I am not going to read it  
19 out. But I am just going to ask you to read, again to yourselves, the last paragraph on  
20 that page.

21 **(Pause).**

22 And then the response from Adidas is at tab 2.5 of the same bundle at page 218 and  
23 could you just remind yourselves, please, of what was said there. And you see that at  
24 the top of the page. So in mine it is blue text in response to the question.

25 And I already took you earlier today to footnote 371 in the CMA's report where it  
26 interprets this, and what the CMA understands through this is that it is not really good

1 evidence responding in real time, as it were, to deteriorations by retailers. This is more  
2 of a systematic effort that is being described here, so it is not a direct response to  
3 deterioration in PQRS of any individual retailer, that is the CMA's view in footnote 371,  
4 and that is certainly not a view, an interpretation of this, that can be thought irrational.  
5 So then in addition to that, and just going back to the report, I have taken you to this  
6 already, but I just want to remind you that the CMA had identified -- this is  
7 paragraph 8.88, page 118 of the report, and we looked at this in detail this morning,  
8 so I just want to remind you that it is there.

9 **MR FRAZER:** Ms Demetriou, just before you go there.

10 **MS DEMETRIOU:** Yes.

11 **MR FRAZER:** Mr Kennelly said that the more likely reason behind the lack of action  
12 on the part of suppliers to take remedial action following an audit was because the  
13 retailers were so anxious to put matters right that the audit itself would have led to  
14 a voluntary action and no need for a recategorisation. Do you have anything to say to  
15 that?

16 **MS DEMETRIOU:** Yes, sir, really that is the point that I dealt with this morning, which  
17 is the nature -- so Mr Kennelly's assertion rests on a conclusion that the suppliers are  
18 imposing a complete constraint. So really it goes back to all of the points that I made  
19 this morning. So the CMA did not accept that reason, and so the premise is wrong.  
20 And so the premise of Mr Kennelly's assertion is wrong. That was considered by the  
21 CMA and it is really part and parcel of the same point about the suppliers' constraint  
22 being not the total constraint that Mr Kennelly's clients would have it, but actually the  
23 position being much more nuanced, as the CMA has found, both because of the lack  
24 of incentive of the suppliers in relation to some elements of PQRS, and also because  
25 they simply do not monitor in that all encompassing way.

26 **MR FRAZER:** Yes, but this concerns situations where they are monitoring.

1 **MS DEMETRIOU:** Yes.

2 **MR FRAZER:** And where there has been an audit and where no action is taken  
3 because the retailer has responded immediately. I think that was Mr Kennelly's point.

4 **MS DEMETRIOU:** So Mr Kennelly's point being that there is no need to monitor? I am  
5 just making sure that I understand. He is shaking his head.

6 **MR FRAZER:** No, there is no need for any action on the part of the suppliers, because  
7 the mere finding on the visit or on the monitoring would be enough to make the audited  
8 retailer act straight away to correct the issue.

9 **MS DEMETRIOU:** Oh, I see. In relation to that we say that is simply not the evidence.  
10 That is not the evidence that the parties gave, specifically the suppliers gave. They  
11 were specifically asked what action have you taken when you spotted a reduction in  
12 PQRS? And they are not saying well, we go around, we spot that frequently and the  
13 retailers fall into line immediately. That is quite obviously not what they are saying in  
14 these responses, and so the CMA was entitled to rely on that. And also we have the  
15 point that this section that I was about to take you to shows that the monitoring is  
16 incomplete. And so they are unable to identify every instance of deterioration of  
17 PQRS, and in particular every instance of not improving PQRS as rapidly or as  
18 fulsomely as they would otherwise do. So it is a two pronged answer, sir, if that is of  
19 assistance.

20 **MR FRAZER:** Thank you.

21 **THE CHAIRMAN:** How are you doing for time, Ms Demetriou?

22 **MS DEMETRIOU:** I am doing very well, I am going to finish on time.

23 **THE CHAIRMAN:** Good.

24 **MS DEMETRIOU:** I am going to be very quick with the last two. I have about ten  
25 minutes.

26 **THE CHAIRMAN:** Right. Please carry on.

1 **MS DEMETRIOU:** So the third point -- the second point was the point about  
2 monitoring I have just made -- is addressed at 8.92 of the report. Again, I don't need  
3 to labour it because I took you to this earlier. These are limits on supplier reaction,  
4 even if they do identify a deterioration of PQRS. And so that led to the conclusion at  
5 8.93 that supplier constraints are not sufficient to prevent a SLC, and we see that it is  
6 amply clear that the CMA's decision was rational on that point. It was not, to put it  
7 another way, it was not irrational of it not to go back to Adidas or Nike. It had already  
8 asked them for direct real world evidence, and had plenty of other corroborating  
9 evidence, and the question that it would have had to have asked, the questions that  
10 Mr Kennelly's client would have liked the CMA to have asked, was an intensely  
11 hypothetical question, that was unlikely to yield a robust answer, and the CMA was  
12 entitled to reach a decision on the evidence it did. There is nothing irrational about  
13 that.

14 So moving on to ground 3.2, we say this is a straight merits challenge. The way that  
15 Mr Kennelly put the point yesterday, it relates to constraint from suppliers. It was to  
16 say that the finding that suppliers would not be able to constrain the merged entity  
17 from deteriorating its offering in the foreseeable future was irrational, essentially  
18 because in his words "the retailers are supplicants and the suppliers are all powerful".  
19 Well, apart from observing that these supplicants are very profitable supplicants, the  
20 key point is that Mr Kennelly in advancing that submission skated over all of the  
21 evidence painstakingly assessed by the CMA on the issue of supplier constraints, and  
22 I have already shown you the key passages in the report. I don't need to go through  
23 all of those again, but you have my point that there were some elements of PQRS  
24 which the suppliers were not incentivised to react to deteriorations of.

25 In relation to quality, yes, the selective distribution term set a minimum floor for quality,  
26 but retailers compete beyond those requirements. Competition on clearance

1 discounting. So I am not going to labour the point; you have all of the points I made  
2 earlier and all of those points were rational, reasonable grounds on which the CMA  
3 reached its decision. JD Sports has identified no error of law here.

4 That is all I want to say about that, 3.2, because I have covered it already.

5 Finally, ground 3.3 relates to the constraint from Nike's and Adidas' DTC offering.  
6 Again, I have really covered this in the context of ground 2.2 and, as presented  
7 yesterday, this ground really did collapse back in to ground 2.2, because what  
8 Mr Kennelly said it came down to was that it was irrational for the CMA to reach the  
9 conclusion that it did without asking Nike and Adidas to produce further information in  
10 relation to the six weeks of trading data and the updated forecasts, and that the CMA  
11 could not rationally, without that information, have concluded that DTC would continue  
12 to grow at the same rate as wholesale.

13 Just to summarise the CMA's answer to this point, I am really repeating myself but just  
14 to draw it together, the CMA had already asked Adidas and Nike whether there was  
15 any change to the previous forecasts, and to provide them if so. Neither produced  
16 revised forecasts. The remaining information before the CMA showed clearly that any  
17 predictions as to the enduring impact of COVID was speculative and, in those  
18 circumstances, it can't be said that the only rational course open to the CMA was to  
19 ask Nike and Adidas again for that information a short time later. The prospect of them  
20 producing information that could lead to robust conclusions about the enduring effects  
21 of COVID over the medium term, the medium term impact on the market structure,  
22 was extremely slim.

23 You also have the point that, even if they could show that online sales had increased,  
24 that wouldn't necessarily mean that DTC would increase over wholesale, because the  
25 parties had a significant online presence. You have the further point that, even if DTC  
26 increased, you couldn't draw robust conclusions from that about the overall aggregate

1 constraint, because an increase in DTC might mean that other retailers, imposing  
2 some constraint at the moment, who are more dependent on the in store offering, that  
3 their constraint would reduce such that the overall aggregate constraint did not  
4 increase.

5 Those are the kind of speculative questions the CMA was faced with. The provision  
6 of six weeks worth of data from these suppliers would not have put the CMA in  
7 a position to answer those questions.

8 That, really, is what we say about ground 3.3.

9 Sir, I am on time. I have finished and I am ready to answer any questions that the  
10 tribunal has but, subject to any questions, those are my submissions.

11 **THE CHAIRMAN:** Do my colleagues have anything to ask?

12 **MR FRAZER:** No, thank you.

13 **MR DOLLMAN:** No.

14 **THE CHAIRMAN:** No, I think we have no questions. Thank you very much,  
15 Ms Demetriou.

16 We will, I think, adjourn for ten minutes and then, I think Mr Kennelly, you are on at  
17 3.15 for the last hour. Is that satisfactory?

18 **MR KENNELLY:** Yes, sir, thank you.

19 **THE CHAIRMAN:** There is nothing confidential you want to say, requiring special  
20 measures?

21 **MR KENNELLY:** No, I hope not. I don't think so. I will review that over the next ten  
22 minutes.

23 **THE CHAIRMAN:** If you would, and let the staff know if there is. Thank you very  
24 much.

25 **(3.07 pm)**

26 **(A short break)**



1 (3.15 pm)

2 **THE CHAIRMAN:** Mr Kennelly, we don't want to rob you of valuable minutes of your  
3 time, so we are all ears.

4

5 **Reply submissions by MR KENNELLY**

6 **MR KENNELLY:** Thank you, sir.

7 I will begin with the role of adverse effects on consumers in the SLC analysis.

8 My learned friend, Ms Demetriou, accepted that the MAG applied, so I will take that  
9 briefly. In our submission, there is some assistance to be gained from paragraph 4.1.2  
10 of the guidelines. I am not proposing to turn it up, sir, the passages are familiar to you,  
11 so I will just give you the references.

12 **THE CHAIRMAN:** Right.

13 **MR KENNELLY:** 4.1.2 explains what rivalry is about for these purposes. It says that  
14 it delivers benefits to consumers. It is really hard to imagine an SLC unless the  
15 benefits to the consumers are being, or are likely to be, reduced. That is why evidence  
16 of adverse effects on consumers has a key role, to quote from paragraph 4.1.3 of the  
17 MAG.

18 In fairness to my learned friend, Ms Demetriou, she said in terms that the CMA's task  
19 in this case included showing how various aspects of PQRS could be flexed to the  
20 detriment of consumers.

21 **THE CHAIRMAN:** Are you using customers and consumers interchangeably,  
22 Mr Kennelly? Is that right?

23 **MR KENNELLY:** For these purposes, yes.

24 **THE CHAIRMAN:** They are not always the same.

25 **MR KENNELLY:** No, I absolutely know that, sir. But for these purposes, yes.

26 With that, I will move on to ground 1 and what you need to show for an SLC.

1 This issue has narrowed because, based on what my learned friend said yesterday,  
2 there is now partial agreement that the four stage approach in the notice of application  
3 at paragraph 57 is correct. Ms Demetriou agreed that it is appropriate in general terms  
4 but the dispute is whether the four stages need to be established by a parameter.  
5 You have the transcript reference; Day 1, page 111, line 5. To be clear, our case is  
6 not that the CMA must do this for every parameter of competition, as my learned friend  
7 suggested. We have always maintained that just one parameter will suffice. Our case  
8 has always been, and you see it in our skeleton at footnote 44, that the CMA must  
9 make out a chain of causation for at least one parameter of competition. Now, in most  
10 merger cases, that will be price. That is a single parameter of competition. But what,  
11 we ask, is a parameter anyway?

12 As you, sir, noted, on the first day, you said a parameter just means a way in which  
13 parties compete. Our submission is that the CMA is seeking to separate the SLC test  
14 from parameters. What is really happening is they are seeking to separate the SLC  
15 test from, to use the chairman's words, the way in which the parties compete. That,  
16 we say, is a contradiction in terms, because the SLC test is precisely about the way in  
17 which (inaudible) and therefore has to be made out by reference to at least one  
18 parameter of competition.

19 Now, my learned friend's response to that is there is no need to show an SLC on any  
20 one particular parameter because, in this case, it is all so obvious. They say the  
21 evidence, and I am quoting:

22 "Strongly demonstrates causation and an SLC".

23 But we have to ask, if that is right, why can't they show that customers are likely to be  
24 worse off on a single parameter as a result of the merger? If this was such  
25 a straightforward case, that would not be a difficult exercise for the CMA. If there had  
26 been so much evidence on causation and SLC, they should have been able to write

1 a decision saying, first, parties monitor and respond to one another on this parameter;  
2 second, it is important to consumers or customers; and third, the suppliers won't  
3 prevent any deterioration on that parameter; then that actual and future competitors  
4 won't prevent the deterioration. For that reason, they should have been able to say  
5 that a merger is likely to result in harm to customers and there is therefore an SLC.  
6 But that is not what they did.

7 We then have to turn to what they did do. Well, they could show that the parties were  
8 close competitors. That needs to be looked at fairly carefully because Ms Demetriou  
9 said repeatedly that they were "very close competitors". That is not in the decision.  
10 The decision found they were just "close competitors". The word "very" is a gloss  
11 which is impermissible. If you ask what does the words "close competitor" mean in  
12 this context, it doesn't tell us that the parties were one another's closest competitors.  
13 That is not the point. There might be other rivals who are closer competitors to the  
14 merging parties than they are to one another. They simply found, the CMA, that the  
15 parties were close competitors.

16 Any two companies acting within the same economic market might be said to be close  
17 competitors. Companies could be said to be close competitors when they have  
18 a similar target demographic and a similar product line. The surveys in the GUPPI  
19 also measure closeness, but not by reference to any particular parameter and, as you  
20 saw, they are static and they ignore supplier constraints.

21 That alone does not get the CMA very far.

22 So, we ask what else does the CMA have, apart from the parties being close  
23 competitors generally? My learned friend turned to the next point, which was they had  
24 lots of documents. They have lots of evidence and I was accused of cherry picking  
25 without considering the whole. It is telling -- we rely on this fact -- that the CMA  
26 reviewed a large number of internal documents; over 2,500. That would have given

1 the CMA, or should have given the CMA, a comprehensive understanding of the  
2 parties' internal documents. So what does that set of 2,500 documents show?  
3 Recalling what we are looking for here is evidence on any parameter of how much  
4 pre-merger competition on that parameter is going to be, and then evidence of  
5 whether, on that parameter, the merged entity was likely to deteriorate its offering,  
6 notwithstanding the supplier and retailer constraints.

7 As regards the extent of pre-merger competition, I went through yesterday all of the  
8 evidence on the seven parameters identified within the decision of monitoring and  
9 response by the merging parties. We are not making up these parameters, these are  
10 the parameters identified by the CMA as important and where there was some  
11 evidence of the parties responding to one another, or at least monitoring each other.  
12 To be clear, I accepted that I had to address both responding and monitoring. We  
13 never said it was irrational to rely on the monitoring evidence and I showed you every  
14 single instance of that in the report. There was no cherry picking. That was all there  
15 was from a review of over 2,500 internal documents.

16 For example, on the question of evidence of responding, the parties responding,  
17 an actual or potential response by one party to another, we calculated there were nine  
18 documents. You have seen the strength of the evidence from those nine documents  
19 in the paragraphs of the final report where they are quoted.

20 So the CMA carried out a very deep dive into the parties' internal documents and they  
21 returned, we have to say, with slim pickings.

22 My learned friend made the point that what was in the decision was merely examples.  
23 We have that at the transcript yesterday at page 114. Again, I am not turning this up,  
24 but if you go back to the final report, you will see at paragraph 8.184 -- and we have  
25 seen this paragraph at least twice -- a reference by the CMA, and I am quoting now,  
26 of:

1 "A small number of examples showing that competitor monitoring is likely to inform the  
2 parties' commercial decision making. It is sometimes followed directly by a course of  
3 action."

4 Even the CMA are saying that, from the outset, they have observed a small number  
5 of examples of monitoring and, in certain situations, a response.

6 They didn't say: we had a large number of examples and here are a few of those set  
7 out below. They themselves acknowledge that, from all of those documents, all they  
8 could find was a small number of examples. That is just the first stage, members of  
9 the Tribunal, the first stage of identifying what was the extent of competition between  
10 the parties pre-merger.

11 Then, turning to the evidence of whether, on that parameter, the merged entity was  
12 likely to deteriorate its offering, notwithstanding the supplier and retailer constraints,  
13 tracking that through from the same parameter where pre-merger competition has  
14 been analysed. Where is the evidence? There is nothing at all. If it was all so obvious  
15 and there was so much overwhelming evidence, why can't the CMA show, even on  
16 one single parameter -- and just to be clear, in respect of a single way in which the  
17 parties compete -- that the merged entity is likely to worsen its offering on that  
18 parameter, notwithstanding the supplier and retailer constraints? It is not good  
19 enough, we say, for the CMA simply to submit that you have close competitors over  
20 here, here are a few parameters where retailers appear to compete generally, and  
21 therefore the merger will result in an SLC. That is not the staged approach which  
22 Ms Demetriou herself acknowledged the causation requires. If they cannot show  
23 causation and SLC on even one way in which the parties compete, how, we say, can  
24 there be an SLC at all?

25 The next submission I wish to respond to was the reliance on the point that there is  
26 intense rivalry in the market. That is the sports market. Just to be clear what that

1 actually refers to, here I will show you one paragraph in the final report, to see the  
2 other retail (inaudible) it is 8 --

3 **THE CHAIRMAN:** Say that again?

4 **MR KENNELLY:** I am sorry. 8.464. That is on page 244 of the internal numbering.

5 **THE CHAIRMAN:** Yes.

6 **MR KENNELLY:** "Our assessment shows that the parties have a very similar  
7 footwear offering."

8 Then they say:

9 "Footlocker has a similar offering to the parties. Nike, Adidas, ASOS, Office and  
10 Schuh also have some similarity to the parties, although to a lesser extent than the  
11 parties to each other."

12 Then:

13 "Other retailers have less similar offerings."

14 Just to make clear, there are other retailers in the market, and one of them is very  
15 similar to the parties. It is not a market where it is just JD and Footasylum and their  
16 suppliers and their DTC. We acknowledge that there is, on the parameters where the  
17 space is allowed without competition from the suppliers. We never said there was no  
18 competition. But the fact there are powerful supplier and retailer constraints makes it  
19 even more important to ask whether, post-merger, when this competition between the  
20 parties is lost, is it really likely that the merged entity will deteriorate its offer on that  
21 particular parameter?

22 Let's look at the particular parameters, then, because my learned friend did seek to  
23 respond on the parameters in her submissions. The first she took you to was to  
24 discounts. My learned friend suggested that I had said that clearance discounts are  
25 never driven by competition. Well, that was not my submission. My submissions were  
26 recorded on the transcript at page 18. What I said to you was that clearance discounts

1 are driven more by inventory needs than by competition. We referred and relied on  
2 footnote 335 of the report -- there is no need to turn it up, you have seen it now twice.  
3 We don't impugn that. We rely on it.  
4 Perhaps it will be better to look at it. It is footnote 335 on page 111. As you can see  
5 in 335, the clearance discounts are driven by factors other than competition, in  
6 particular, inventory management. That is what the product life cycle and seasonable  
7 changes means. There is no attempt, no analysis in clearance discounts, to ask how  
8 close the parties are as competitors. No analysis of who else is competing, how strong  
9 they are, or in the future. There is no attempt to assess the relative importance of  
10 inventory management as opposed to local competition; no assessment of how  
11 frequently the parties find themselves trying to clear similar products at similar times  
12 in nearby stores.  
13 Even this footnote says that the merged entity could reduce discounting, clearance  
14 discounting. But that is not a finding that it had the incentive and the ability to do so  
15 for SLC purposes, it is just a narrow finding about ability. That is it on clearance  
16 discounts.  
17 The next point she made was on innovation. It is true that retailers are improving and  
18 innovating and that consumers value this. But where, we ask, is the evidence that the  
19 parties are competing on this parameter? Even if they do, in view of the supplier  
20 constraints, where is the analysis of the likelihood that the parties will deteriorate their  
21 offer on this parameter? There is nothing. And that is a fundamental error at the heart  
22 of their chain of causation.  
23 The next constraint, the next parameter that was analysed by my learned friend, was  
24 new stores. She submitted that supplier constraint here was limited because suppliers  
25 have few stores of their own. But the evidence, again, shows you suppliers do  
26 exercise constraints. There is a reference in the report itself at paragraph 8.85,

1 footnote 360, of suppliers directly constraining store openings. And that is not the only  
2 example.

3 I referred to this point yesterday but I think I gave you the wrong reference, so I will  
4 give it to you again, which demonstrates the supplier constraints in relation to stores  
5 opening in a single instance. That is tab 3.1.15, page 614, paragraph 278(a).

6 As I submitted yesterday, this scant material demonstrating pre-existing competition  
7 between the parties is largely local. Now, my learned friend said we had  
8 misrepresented or misunderstood the relevance of the fact that the evidence of  
9 competition was local when the SLC is said to be national. My learned friend referred  
10 to paragraph 62 of our skeleton argument. I said it wasn't necessary to turn it up but  
11 it really is necessary to look at paragraph 62 to understand the point, so if you could  
12 please go to our skeleton argument and look at paragraph 62.

13 At paragraph 62 we are dealing with the parameters where the final report actually  
14 cites evidence of the parties' responding to one another. You see the reference to  
15 local sporadic examples, local student discounts, local level of marketing and local  
16 store product range. Pausing there, we accept, of course, that there is another  
17 example of national product range, of competition on a national product range as  
18 a parameter. In relation to monitoring, again, there is some evidence, extremely thin,  
19 of some national competition. But the evidence relied on here, and indeed in relation  
20 to the parameters to which my learned friend took you, is local.

21 The significance of that is that it just doesn't follow that evidence of local competition  
22 can ground a national SLC. You will recall, for example, in local level marketing the  
23 evidence that the CMA had was, for example, of one retailer putting on a DJ in its  
24 store -- let's say, for example in Huddersfield -- because a competing retailer was  
25 opening a nearby store. It doesn't follow that, removing that DJ, there would be a  
26 national SLC. That is local marketing efforts. It doesn't come close to leading to



1 a finding of a national SLC on a marketing parameter.

2 The same applies for the local student discounts and local store product range. The  
3 loss of competition at those individual, isolated local levels cannot, of themselves,  
4 ground a national SLC finding.

5 Then my learned friend, having gone through the parameters, took you to the question  
6 of supplier constraints. She took you to paragraph 8.64 of the report, and I shan't take  
7 you to it. We don't impugn this paragraph. This was the methodology that was set  
8 out, which recognised the different degrees of supplier constraints and  
9 an acknowledgement by the CMA that the constraints will vary by parameter. We say  
10 yes, yes they will. The problem was that the CMA did not follow through on what they  
11 set out at 8.64 in their analysis. They failed to act on what they set out in 8.64.

12 We see that when we look at the particular parameters themselves.

13 If you look at the question of range, my learned friend said, well, first of all, when  
14 examining the question of supplier constraints and the question of range, you need to  
15 look at other suppliers, suppliers other than Nike and Adidas. That simply will not do.  
16 The only suppliers that matter in this case are Nike and Adidas. The CMA was very  
17 clear in the final report in relation to the importance of Nike and Adidas, in relation to  
18 their importance in terms of the sales of the parties and in terms of their importance to  
19 the product range in the market generally.

20 Sales figures are in footnote 293 on page 99 of the final report. If you just go briefly  
21 to that. Page 99, footnote 293 and then paragraph 2.17 -- there is no need to turn this  
22 up because this is not in dispute. 2.17 of the final report. They are fixed brands and  
23 described by the CMA as the key suppliers throughout this report.

24 The next point made in relation to parameters and supplier constraints by my learned  
25 friend was on quality of service. She referred to paragraph 8.79 -- there is no need to  
26 turn it up -- of the evidence of competition between retailers generally above the very

1 detailed standards set by the suppliers. I repeat the point that I made to the tribunal  
2 yesterday. In relation to the quality and service parameters, we look for evidence of  
3 the pre-existing competition between the parties. Instead of evidence or findings by  
4 the CMA as to the closeness of competition between the parties, we see nothing.  
5 Nothing except one reference to monitoring website speeds; footnote 359.

6 The tribunal will recall that we are still, here, engaged in only the first stage of the chain  
7 of causation.

8 The chairman put the point to my learned friend that, at this stage, they are looking at  
9 how much competition there was on the parameters between the parties. We say,  
10 yes, that is the question at the first stage, but the failure to examine how much  
11 competition there was between them on the parameter is also important in making the  
12 step to the next stage, which is to determine the likelihood of a deterioration of the  
13 merged entity's offering on that same parameter, notwithstanding the supplier and  
14 retailer constraints.

15 My learned friend said, well, we didn't quantify the effects by reference to any  
16 parameter, but it wasn't to quantify that was the focus of our submission, it was the  
17 failure to identify any single parameter. In relation to any single parameter to ask the  
18 question whether, having assessed the pre-existing competition between the parties  
19 and analysed the likelihood of a deterioration on that parameter, or indeed any  
20 parameter, notwithstanding the supplier and retailer constraints.

21 The next point that my learned friend made on supplier constraints was monitoring.  
22 She relied on paragraph 8.89 (b) of the final report. The finding by the CMA that it  
23 might be difficult for the suppliers to monitor retailers in some cases. That is the finding  
24 in 8.89 (b).

25 The tribunal will see -- we saw that finding, there is no need to look at it now -- there  
26 is no evidence at all and nothing is cited -- perhaps since I am saying that, let's go to

1 that paragraph 8.89 (b), page 119. It says here:

2 "Suppliers may find it difficult in some cases to detect deterioration of retailer's  
3 offerings, particularly if the deterioration involves a lack of improvement relative to  
4 what otherwise would have been achieved."

5 There is no footnote, no evidence is cited for that, there is absolutely nothing in the  
6 materials to support that finding. That is pure speculation by them. They never put to  
7 the suppliers: is it difficult for you to monitor delay or a lack of improvement than would  
8 otherwise be made? In fact, as you saw, when Nike and Adidas were asked about  
9 monitoring by reference to a long list of parameters -- the tribunal saw the 16  
10 parameters that were listed, all of the parameters in this case -- they said they did  
11 monitor.

12 I will be careful here because it is confidential information, but the tribunal saw what  
13 Nike and Adidas said about the manner in which they monitor compliance with these  
14 parameters and whether they take action speedily or not. "Action" in the loosest term.  
15 Whether they raise it with the retailer speedily or not. The tribunal have seen the  
16 answer to that.

17 The point then is, well, the CMA says there is not much evidence of them punishing  
18 or taking specific action against the retailers. As we submitted, and the point was  
19 made or at least raised again by Mr Frazer, it is much more likely that, once the  
20 problem is identified by the audits which will be taken in the manner in which the  
21 supplier said they would take them, with the alacrity, or lack of it, which the tribunal  
22 can work out for themselves from the documents, once that is taken and the problem  
23 is identified, it is much more likely that the retailer will get in line, they will get in line  
24 and not defy the supplier such that the supplier has to take action against them.

25 My learned friend said in response to that, well, it is not really right to describe the  
26 retailers and supplicants, when they are large, profitable businesses. I have to

1 respond that the reason why these retailers are profitable, if they are -- the only  
2 reason -- is because they have access to these products. If they don't have access to  
3 these products, they won't be profitable for very long. That is an obvious inference  
4 from the findings made by the CMA.

5 The next point made by Ms Demetriou was, well, these granular standards don't cover  
6 everything. Again, we have to ask, well, what don't they cover? The CMA has to be  
7 clear about what is not covered. We saw the detail of the standards and the level of  
8 rigor in which they are drawn up and the 16 parameters put to Nike which you saw in  
9 volume 4. In fact, the CMA itself records which of these parameters are not monitored  
10 by Nike. You can see the size of that number, non-monitored parameters, at footnote  
11 365 on page 119 of the final report. I have taken you to it already, so the tribunal has  
12 it in your notes. There is no need to go back to it. But the significance of that figure  
13 will not be lost on you.

14 Those are my submissions on ground 1.1.

15 On ground 1.2, I will make a very short point on ground 1.2. It is really this: we don't  
16 take issue with the analysis, for this purpose, of retailer constraints, particularly in the  
17 relevant part of the final report, or with what the CMA says about current retailer and  
18 supplier constraints, or their separate finding about future retailer constraints. What is  
19 missing is their aggregation, what is missing is their analysis of the aggregation of  
20 those three different constraints: suppliers, rival retailers currently and rival retailers in  
21 the future. My learned friend says, well, it is just cumulative. Fine, we see that. But  
22 the problem is, if these were analysed per parameter, as we say they should have  
23 been, then it is necessary to weigh them separately. Only by weighing them separately  
24 and analysing them separately can we understand the weight that is given to the  
25 different constraints in the aggregation exercise. We get none of that from  
26 paragraph 8.478 of the report.

1 Those are my submissions on ground 1.2 and that brings an end to my submissions  
2 on ground 1 generally.

3 I move on then to ground 2. I will take ground 2.1 and 2.2 together, if I may.

4 My learned friend said she had an overriding point covering both grounds 2.1 and 2.2  
5 and they were three-fold. She said the material that the parties gave the CMA was  
6 insufficiently robust to be relied upon; the second point was based on what they had  
7 from the other retailers and suppliers, an attempt to ask any COVID specific question  
8 would have generated speculative material only and there was no point, therefore, in  
9 asking the question; and her third point was that there were practical constraints which  
10 inhibited the CMA in asking any further questions.

11 I will begin with the allegation that the material that the parties supplied was  
12 insufficiently robust.

13 The tribunal saw yesterday what we supplied to the CMA to support our concerns on  
14 the impact of COVID. There were, really, three short points on this. The first was that  
15 social distancing was likely to last to the end of 2020, at least, and that was worst for  
16 Footasylum because of its smaller stores in shopping centres relative to its rivals. On  
17 that point, about the size of Footasylum stores, my learned friend, in discussion with  
18 the chairman, drew your attention to paragraph 8.306 and 8.307. True it is that they  
19 there note the point about the disproportionate impact on Footasylum because of its  
20 smaller stores and the particular locations relative to the larger stores in out of town  
21 centres which can deal with social distancing better. They noted it. But there is no  
22 engagement with it at all. They don't just agree with it; they don't engage with it.

23 The second of the short points that we make is that the existing trend of the shift to  
24 online, and online DTC in particular, will be accelerated.

25 The third point made was there was a massive recession and it would be worse for  
26 financially weaker operations.

1 To support those narrow points, because we never suggested the full impact of COVID  
2 could be predicted, our point was that, over the two year reference period that the  
3 CMA had, 2020 and 2021, certain things were likely and could be identified. I will  
4 come to the point that, to the extent there was uncertainty, any rational regulator, if  
5 you asked them the question, would get the evidence base to address those issues.  
6 Beginning with what they had from us. You saw the AlixPartners submission. This  
7 wasn't speculative in relation to social distancing. The chief medical officer had said,  
8 at the time of that submission, that it was very likely that there would be social  
9 distancing measures until a vaccine or other medical solution was developed. For that  
10 reason, it was very, very likely that social distancing measures would be in place until  
11 the end of 2020.

12 In terms of the economic harm, this could be ascertained at a minimum for the  
13 purposes of analysis in 2020. Again, we say very likely into 2021. Because covering  
14 2020 and 2021, the impact, even on an optimistic basis, was going to be extremely  
15 bad for the High Street in particular.

16 Finally, my learned friend took you to material which we submitted from the suppliers  
17 in relation to their experience in China, and made the submission, well, that can't be  
18 of any relevance to the UK market. There is no need to go back to it but I make the  
19 short point that that material was probative to the CMA, because the COVID pandemic  
20 had happened in China much earlier and the suppliers, Nike and Adidas, are highly  
21 active in the Chinese market. They had learned how to deal with the social distancing  
22 and other public health measures arising from the COVID pandemic in that market.  
23 That gave them an insight into the distribution networks and so forth when the  
24 pandemic came to the UK.

25 That was the relevance of that material. It was entirely dismissed by the CMA. All of  
26 the material I referred to, submitted by the parties, was dismissed.

1 If we turn then to the second point my learned friend made. It is true that the material  
2 that they had was such as to allow them to make a rational finding that no further  
3 specific questioning of COVID, or no specific questioning on COVID, was (inaudible).  
4 My learned friend said their characterisation of what the CMA asked was for up to date  
5 forecasts, up to date forecasts from the suppliers. For this, I will ask you to turn to the  
6 Adidas submission in bundle 4, behind tab 4.2.5.

7 If you could go, first, to page 215 of that. 217 is the main page but I wanted to pick up  
8 215 and then I will come back to it. This is the question to Adidas, so this the  
9 question -- sorry, forgive me, I am told the whole of it is confidential. If you look at the  
10 bottom of the question, under "question 1" at the top of the page, it begins:

11 "Please explain whether ..."

12 And read from that to the end of the full stop.

13 **THE CHAIRMAN:** Ms Demetriou did read out a question earlier.

14 **MR KENNELLY:** Well, I am instructed by Mr Lindsay, and he should know, that I am  
15 not allowed to read it out.

16 **THE CHAIRMAN:** All right. We will apply the precautionary principles, it is always  
17 wise.

18 **MR KENNELLY:** In view of my previous breaches, I am having to be particularly  
19 careful.

20 **THE CHAIRMAN:** And I can read.

21 **MR KENNELLY:** I think I can read this out loud, that is the date. They want  
22 information as at the date of this questionnaire. They are not saying up to date or  
23 forward, they are not saying anything in relation to what might be updated at a later  
24 stage, it is the date of this questionnaire; 9 March 2020.

25 If you turn over the page to the passage in blue on page 217 -- and this I can read  
26 because it is quoted in full in paragraph 8.412 of the final report -- I will come back to

1 the relevance of the first sentence, but I rely on it now for a separate point:  
2 "The current disruption caused by the COVID-19 pandemic effectively renders short  
3 term forecasts for 2020 and 2021 obsolete."  
4 Adidas is saying that the short term forecasts are the ones for 2020 and 2021. You  
5 will recall that they were asked for a longer period in the question, which went beyond  
6 2020/2021. Adidas is treating 2020/2021 as the short term.  
7 They say:  
8 "As many retailers close their bricks and mortar stores in the short term [stated by  
9 themselves to be 2020/2021] there will inevitably be a shift to a more online  
10 consumption, wholesale market and DTC."  
11 Pausing there, that is the prediction by Adidas as to the shift to online consumption in  
12 2020 and 2021. That is not them saying don't bother asking us any questions,  
13 because whatever we will give you will be entirely speculative. On the contrary, they  
14 are actually saying something that they expect to happen. And then the next:  
15 "In addition we anticipate a significant overall contraction in the short term ..."  
16 Again, they are telling the CMA what they expect to happen in the future. There is  
17 nothing here to say, or to give the CMA to understand that there was no point coming  
18 back and asking them any further questions. And they say this in response to  
19 a question that isn't even COVID-19 specific.  
20 **THE CHAIRMAN:** Are you saying, Mr Kennelly, that in effect they are, they think they  
21 are able to foresee what might be called an enduring effect for 2020 and 2021?  
22 **MR KENNELLY:** No, I can't go that far. In this material all I can say is that they are  
23 telling the CMA something about the 2020 and 2021 period that is relevant to the effect  
24 of COVID. This shows --  
25 **THE CHAIRMAN:** But the short term, as they put it, is the period over which, under  
26 the Merger Assessment Guidelines, competition is assessed over time.



1 **MR KENNELLY:** Absolutely. They are saying something here is materially relevant  
2 to the CMA's analysis. I am relying on it for a more modest solution, because my  
3 learned friend relies on this for saying having read this the CMA can say they are  
4 incapable of giving us anything probative, let's not bother asking. That is an irrational  
5 view in the face of material which is actively predicting what is going to happen in two  
6 periods, the very same period the CMA is looking at. That is my submission in relation  
7 to this.

8 In terms of what they did ask, if you go back to 215, because the suggestion might be  
9 they are being asked for some broad up to date analysis of where they were in relation  
10 to COVID, but you will see what they are asked for is in relation to DTC. They are not  
11 asked for strategy, or planning documents, or anything which the suppliers are much  
12 more likely to have had in early March or mid March 2020 about COVID. One can see  
13 why they may not have had up to date full DTC strategies in mid March or  
14 late March 2020, but they certainly would have had -- and this reflects a discussion  
15 I had with Mr Frazer yesterday -- some planning or strategy documents dealing with  
16 how they expected to deal with COVID in the short term. That is very likely to have  
17 existed, and had they asked for it they were very likely to have got it. But of course  
18 they never did.

19 Because as my learned friend said -- and this is common ground -- the key question  
20 was whether the effects of the COVID pandemic would be enduring. That was the key  
21 question. And asking for a review as of 9 March 2020 in relation to one aspect of DTC  
22 strategy, and no specific COVID question, and nothing else, was not going to help the  
23 CMA analyse the question on the enduring impact of COVID. The key information,  
24 which was not sought, was the impact of winning and holding on to new online DTC  
25 customers. And as I said yesterday the evidence that would have been really useful  
26 there is the evidence of how sticky new DTC customers were pre COVID and any

1 change in the trend towards the ratio of online DTC and wholesale during those six  
2 weeks before. That is what they should have asked for, and they never did.

3 And then we come to what they did rely on. And they relied on, as we saw, Adidas'  
4 forecast. And Mr Dollman put the point to my learned friend about this, and the  
5 reliance on 8.114, how can you rely on something which you are told is obsolete? My  
6 learned friend said well, and I am quoting her, she said "we are not placing much  
7 weight on this". And that was a surprise to us, because that is not what the decision  
8 says. For this it really is useful to look at the decision itself, and for that, could we go  
9 back to it. It is in volume 2. We will start with paragraph 8.415. Both Nike and Adidas  
10 forecast their UK DTC channel will grow over the next few years, as set out in table  
11 8.14 and 8.15, and then the rest is confidential. That is obviously referring back to  
12 what has been supplied previously. And then you look down at 8.14 and 8.15, those  
13 important tables, dealing with the key question of the DTC to wholesale ratio forecasts.  
14 And then to see the reliance placed upon it you go to 8.431. This is the conclusion on  
15 DTC growth. And the CMA here is saying on this key question of the future competitive  
16 constraint offered by the suppliers' DTC in light of COVID:

17 "Nike and Adidas DTC offerings are currently present both in store and online. It is  
18 likely their DTC offer will continue to grow strongly in the UK, and predominantly online.  
19 In particular there is evidence, as set out in table 8.14 and table 8.15, indicating that  
20 such growth is likely to reflect general growth ...(reading to the words)... will not change  
21 significantly in the foreseeable future."

22 And not only that, members of the Tribunal, but my learned friend went back to this  
23 paragraph later in ground 3, and relied upon it even today in her submissions, all the  
24 while knowing, since 16 March 2020, that the Adidas material, which is the material  
25 relied on in one of those tables, was described by Adidas as obsolete. And the  
26 question put to my learned friend was after Adidas declared the material obsolete did

1 | you ask Adidas for any further reports? And the answer is they did not.

2 | **THE CHAIRMAN:** So Mr Kennelly, the qualification in 8.14 about these being  
3 | an upper band.

4 | **MR KENNELLY:** Yes.

5 | **THE CHAIRMAN:** That doesn't make any difference in your submission, because it  
6 | is just about the overall trends rather than any change to the ratio, is that right?

7 | **MR KENNELLY:** Yes, and if you look at the questions, not only did they not ask for  
8 | anything further, notwithstanding being told by Adidas that it was obsolete, if you look  
9 | at the questions they did ask, as I said earlier, none of it is looking for scenario plans  
10 | or action plans to deal with COVID. An update on the DTC strategy is not going to  
11 | help them. Something of that scale was highly unlikely to be provided. As I said, it  
12 | would have been perfectly straightforward to have got material which they definitely  
13 | would have had (the split of sales) and would have been very likely to have (action  
14 | plans and strategy documents) prepared by these sophisticated companies.

15 | And we turn then to the third of my learned friend's three overall points, that is the  
16 | practicality of it, how reasonable was it to ask for updates during the rest of March and  
17 | in April. And it emerged in the discussions between the tribunal and my learned friend  
18 | that this ultimately was less about time in the mind of the CMA and more about the  
19 | utility of asking the question. And in this respect there was, if I may say, it is my  
20 | submission, an air of unreality in the position which the CMA has adopted. Because  
21 | my learned friend said that in early March 2020 it was unclear as to whether the  
22 | COVID pandemic would, in relation to these competitors in this market, including  
23 | competitors that are heavily skewed towards High Street stores, whether the effect of  
24 | COVID would be enduring or would be, and I quote "a short sharp shock". We said  
25 | in March and in April that if you are looking at the two year period, which they were, it  
26 | was inconceivable that the effect of the COVID pandemic on businesses skewed

1 towards the High Street would be a short sharp shock. But even if we are wrong about  
2 that, in view of the facts that the CMA had it was irrational to assume that even as  
3 a possibility without gathering further evidence.

4 And I will turn, if I may, briefly, then to the particular point on the counter-factual and  
5 the Footasylum debt burden. And the submissions I want to make, I don't need to go  
6 into private session because they respond to the points of my learned friend, which  
7 were also made in public. They are short points. The first is the relevance of the  
8 assurance that was referred to being given after Footasylum had been purchased by  
9 JD. What is the relevance that that assurance was given after the purchase of  
10 Footasylum by JD? My learned friend submitted that it is possible that the person who  
11 gave the assurance was aware of the risk of a prohibition decision and ultimately, one  
12 imagines, a defeat in the tribunal if that prohibition decision was upheld. That is the  
13 first time we have ever heard that. There is no evidence to suggest that. There is  
14 nothing in the decision to that effect. There is nothing in the pleading or in the skeleton.  
15 Sure, we can see how the lender would have known the owner of Footasylum. That  
16 we can assume they knew. And that plainly would have influenced, we say, any  
17 assurance they gave. But there is no indication that the lender would have been or  
18 was across the progress of the CMA investigation. That we struggle to see, and there  
19 is certainly nothing to support it.

20 The real problem is that the information that they did have was, to assume in their  
21 favour, speculative in all directions. Ms Demetriou asked well, what could we have  
22 asked, and the chairman suggested well, what about a question that says knowing  
23 what you know about Footasylum, in the absence of any support by JD what would  
24 your attitude be? We respectfully agree. That is a straightforward question which  
25 would have got an answer which would definitely have put the CMA in a significantly  
26 better position than they were in to answer the question they had to answer to resolve

1 this important point in the counter-factual.

2 As I said, the question for them, the question for the tribunal ultimately in asking was  
3 this a rational response, is you weigh the importance of the question, the importance  
4 of the issue that has to be addressed, with the ease with which the question could be  
5 asked, and it would have been a very easy question to ask to resolve a very important  
6 issue.

7 Those are my submissions, unless I am given something else, on ground 2.

8 I move on now to ground 3.1 and I will deal with this quite shortly, and even more  
9 shortly with grounds 3.2 and then I will finish.

10 On ground 3.1, just to respond briefly to the context which was outlined by my learned  
11 friend, and there are two points to make about that. The first is that the Frasers Group  
12 had, and this is recorded in the report, invested a colossal amount of money in its  
13 elevation strategy. The figure of £1 billion is referred to at 8.330. This is a major  
14 corporation investing £1 billion for the purpose of attracting premium product from Nike  
15 and Adidas, and unsurprisingly in view of that effort and that commitment, the CMA  
16 recorded it was gaining some traction from suppliers.

17 My learned friend said, in relation to the question of whether if there was a deterioration  
18 would product be diverted to Frasers Group, that is but one factor in a long list. Well,  
19 our answer is this is the key factor, because if the merged entity was to deteriorate the  
20 offering on any of that long list of parameters monitored by Nike and Adidas, our  
21 submission first is that the merged entity would be denied the product. We make that  
22 submission on the basis of what the tribunal has already seen on the way that the  
23 suppliers enforce their criteria, and their standards. The question then is we will  
24 definitely lose it, where will it go? It is not going to go to a corner shop, it is not going  
25 to go to some struggling retailer. In view of the £1 billion investment, and the crucial  
26 importance to a Frasers Group that they have more of this premium product, it is highly

1 likely, we said to the CMA, that it will be diverted to them.

2 But that is not the thrust of my complaint. Faced with that submission, faced with  
3 that very important question that goes to the constraint to be posed by Frasers Group,  
4 the CMA responds well, it is all terribly uncertain, we can't decide it. All they had to do  
5 to resolve that uncertainty was to ask the suppliers the question, the simple question,  
6 which would have involved a hypothetical, certainly, but it is very likely to have elicited  
7 from the suppliers a useful response. What the CMA certainly can't say is because  
8 we assume no response would have been useful, we are not going to bother asking  
9 the question. That is not a rational response. That is not a rational conclusion to reach  
10 when the question is so easy and the issue is so important.

11 On grounds 3.2 and 3.3 you have my submissions made in the context of ground 1.  
12 I shan't repeat them now, because the reply which I have given in relation to grounds  
13 1 and 2 should do for the purposes of the submissions, the short submissions, which  
14 my learned friend made under ground 3.

15 And so before I close I am turning to Mr Lindsay and asking if he has anything to tell  
16 me.

17 One thing I forgot to address. There was a new point made by my learned friend that  
18 Footasylum was, and I quote "a significant competitive force" and that is not in the  
19 report. There is no material to show that it was more significant than its market share  
20 suggested.

21 And so I thank Mr Lindsay for that, but unless I can be of any further assistance to the  
22 tribunal, those are my submissions.

23 **THE CHAIRMAN:** Thank you, Mr Kennelly. Do my colleagues have anything to ask?

24 **MR FRAZER:** No.

25 **MR DOLLMAN:** No.

26 **THE CHAIRMAN:** Can I ask you, just remind us what relief you are seeking, please.

1 **MR KENNELLY:** I am ashamed to say I will have to look at my notice of application.

2 **THE CHAIRMAN:** I would have thought you would have it off by heart. You are not  
3 an optimist, then.

4 **MR KENNELLY:** No, and my mind is filled -- so I think it is best to look at the notice  
5 of application itself. It is bundle 1 behind tab 1.2.1. Page 117 of the bundle. So we  
6 seek a declaration that our grounds are well founded. We want the decision quashed  
7 and it remitted to the CMA for redirection.

8 **THE CHAIRMAN:** The declaration is on the basis of our adopting the principles of  
9 judicial review.

10 **MR KENNELLY:** Indeed.

11 **THE CHAIRMAN:** And therefore able to make declarations.

12 **MR KENNELLY:** Yes.

13 **THE CHAIRMAN:** So you want the decision quashed and remitted.

14 **MR KENNELLY:** Yes.

15 **THE CHAIRMAN:** Can I ask what effect does that have on the undertaking to dispose  
16 of Footasylum, which I understand your clients have agreed to.

17 **MR KENNELLY:** They would have to be suspended. They would either fall away or  
18 be suspended, pending the further reconsideration by the CMA.

19 **THE CHAIRMAN:** Okay. So that extends not just to the hold separate but to the  
20 agreement to dispose of Footasylum?

21 **MR KENNELLY:** Yes, it would have to.

22 **THE CHAIRMAN:** It is all suspended, so it all depends on the decision being upheld,  
23 is that right?

24 **MR KENNELLY:** Sorry, sir, I will just take instructions.  
25 So the hold separate would obviously have to stay in place.

26 **THE CHAIRMAN:** Yes.

1 **MR KENNELLY:** But the agreement to dispose of it would have to fall away in order  
2 for the reconsideration to have any meaning.

3 **THE CHAIRMAN:** I suppose what I am asking in a round about way, and it is  
4 probably none of my business, is, is it your client's wish to retain Footasylum on  
5 current market conditions?

6 **MR KENNELLY:** Absolutely, yes, sir. I don't need to take instructions for that.

7 **THE CHAIRMAN:** Right. I always like to know what the commercial background is.  
8 It makes the cases more real.

9 **MR KENNELLY:** It is very real to JD.

10 **THE CHAIRMAN:** Right, I don't think we have anything else to put to either of you.  
11 We will reserve our decision, I think you will understand that. We will give you a ruling  
12 as quickly as we can. And I would like to thank everybody if I may for the way in which  
13 all of the timings have been observed, all of the materials have been produced, I am  
14 very grateful. It is an unusual way of conducting a trial but everybody has been very  
15 forbearing and I wish you all well. We will meet again, no doubt, going over costs or  
16 something. Goodbye.

17 **MR KENNELLY:** Thank you very much.

18 **(4.16 pm)**

19 **(The hearing concluded)**

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