

COMPLETED ACQUISITION BY JD SPORTS FASHION PLC OF FOOTASYLUM PLC

Notice of possible remedies under Rule 12 of the Competition and Markets Authority Rules of Procedure¹

Introduction

1. On 1 October 2019, the Competition and Markets Authority (CMA), in exercise of its duty under section 22(1) of the Enterprise Act 2002 (the Act), referred the completed acquisition by JD Sports Fashion plc (JD Sports) of Footasylum plc (Footasylum)² (the Merger), for further investigation and report by a group of CMA panel members (the Inquiry Group).
2. In its provisional findings on the reference notified to JD Sports and Footasylum (the Parties) on 11 February 2020,³ the CMA provisionally concluded that the Merger has resulted in the creation of a relevant merger situation, and that the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition (SLC) at a national level in: (i) the retail supply of sports-inspired casual footwear (in-store and online) in the UK; and (ii) the retail supply of sports-inspired casual apparel (in-store and online) in the UK.
3. The CMA has provisionally concluded that these national SLCs have resulted, or may be expected to result, in adverse effects, for example in the form of less discounting, a reduced range, and/or not improving quality or service as much as would otherwise have been the case absent the Merger.
4. This Notice sets out the possible actions we might take for the purpose of remedying the SLCs and/or any resulting adverse effect identified in the provisional findings.
5. The CMA invites comments on possible remedies by **25 February 2020**.

¹ Published under the CMA Rules of Procedure for Merger, Market and Special Reference Groups (CMA17, 2014).

² On 19 September 2019, Footasylum plc became Footasylum Limited. References to Footasylum in this document should be interpreted as covering both Footasylum plc (in the period prior to 20 September 2019) and Footasylum Limited (in the period since 20 September 2019).

³ Our provisional findings can be found on our case page [here](#).

Interim measures

6. On 17 May 2019, the CMA imposed an Initial Enforcement Order (IEO) for the purpose of preventing pre-emptive action⁴ in accordance with section 72(2) of the Act. On 7 October 2019, the CMA issued directions under the IEO for the appointment of a monitoring trustee (Monitoring Trustee) in order to monitor and ensure compliance with the IEO.
7. On 26 November 2019, the CMA imposed an Interim Order for the purpose of preventing pre-emptive action in accordance with section 81 of the Act. The IEO consequently ceased to be in force under section 72(6) of the Act.

Criteria

8. In deciding on a remedy, the CMA shall in particular have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLC and any adverse effects resulting from it.⁵
9. To this end, the CMA will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will select the least costly and intrusive remedy that it considers to be effective.
10. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.⁶

Possible remedies on which views are sought

11. In merger inquiries, the CMA will generally prefer structural remedies, such as divestiture (if the merger is completed) or prohibition, rather than behavioural remedies designed to regulate the ongoing conduct of the Parties or control market outcomes (eg prices) following the Merger,⁷ because:
 - (a) structural remedies are likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring the rivalry that would be lost as a result of the merger;

⁴ Interim measures are designed to ensure that the viability and competitive capability of each of the merging parties are not undermined pending the outcome of the CMA's investigation, as this would risk prejudicing the ability of the CMA to achieve an effective remedy if it were to find that the merger gives rise to a substantial lessening of competition (see also *Interim measures in merger investigations: CMA108* (28 June 2019)).

⁵ Sections 35(4) and 36(3) of the Act.

⁶ *Merger Remedies: CMA87* (13 December 2018), paragraph 3.4.

⁷ *Merger Remedies: CMA87* (13 December 2018), section 7 for further guidance on behavioural remedies.

- (b) behavioural remedies may not have an effective impact on the SLC and its resulting adverse effects, and may create significant costly distortions in market outcomes; and
- (c) structural remedies do not normally require ongoing monitoring and enforcement once implemented.⁸
12. At this stage, our initial view is that the full divestiture of Footasylum by JD Sports is likely to be the only effective remedy to the SLCs and the resulting adverse effects that we have provisionally found.⁹ Our current view is that a full divestiture of Footasylum would represent a comprehensive solution to all aspects of the national SLCs we have provisionally found (and any resulting adverse effects) and that the risks in terms of its effectiveness are very low. Our initial view is also that the full divestiture of Footasylum would be a proportionate remedy.
13. We have not, at this stage, been able to identify another structural remedy, including a differently configured or smaller divestiture package, that could form the basis of an effective remedy, given the need for the divested business to be a multi-channel national retailer in order to be an effective competitive constraint. Our initial view is that a structural remedy other than a full divestiture of Footasylum would not comprehensively address the national SLCs we have provisionally found and would have an unacceptable level of risk in terms of its effectiveness, in particular in relation to composition risks.¹⁰
14. We currently consider that a behavioural remedy is very unlikely to be an effective remedy given our initial view that there are significant risks in designing effective behavioural remedies that could comprehensively address the national SLCs and resulting adverse effects we have provisionally found.¹¹

⁸ *Merger Remedies: CMA87* (13 December 2018), paragraph 3.5.

⁹ The divestiture of JD Sports instead of Footasylum would be another potentially effective remedy, but we assume that the Parties would prefer to divest Footasylum rather than JD Sports and this would seem to be the more proportionate business to divest as it is the acquired business and it is the smaller and less profitable of the two. We do not propose to assess the divestment of JD Sports further.

¹⁰ Composition risks are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market (see also *Merger Remedies: CMA87* (13 December 2018), paragraph 5.3).

¹¹ The design of behavioural remedies should seek to avoid four particular forms of risk to enable these measures to be as effective as possible: (a) *Specification risks*: these risks arise if the form of conduct required to address the SLC or its adverse effects cannot be specified with sufficient clarity to provide an effective basis for monitoring and compliance; (b) *Circumvention risk*: as behavioural remedies generally do not deal with the source of an SLC, it is possible that other adverse forms of behaviour may arise if particular forms of behaviour are restricted; (c) *Distortion risks*: these are risks that behavioural remedies may create market distortions that reduce the effectiveness of these measures and/or increase their effective costs; and (d) *Monitoring and enforcement risks*: even clearly specified remedies may be subject to significant risks of ineffective monitoring and enforcement, eg due to the volume and complexity of information required to monitor compliance; limitations in monitoring resources; asymmetry of information between the monitoring agency and the business concerned; and the long timescale of enforcement relative to a rapidly moving market. See also *Merger Remedies: CMA87* (13 December 2018), section 7 for further guidance on behavioural remedies.

This is in particular due to the broad scope of the adverse effects we have provisionally identified and the need for extensive and ongoing monitoring.

15. Having said this, the CMA will consider any other practicable remedies – whether structural or behavioural in nature – that the Parties, or any interested third parties, may propose that could be effective in addressing the SLCs and/or any resulting adverse effects.
16. The CMA will also consider whether a combination of measures is required to achieve a comprehensive solution – for example whether any behavioural remedies would be required in a supporting role to safeguard the effectiveness of any structural remedies. The CMA will evaluate the impact of any such combination of measures on the SLCs or any resulting adverse effects.

Divestiture

17. As mentioned in paragraph 12 above, our current view is that a full divestiture of Footasylum would represent an effective and proportionate remedy to the national SLCs we have provisionally found (and any resulting adverse effects).
18. In evaluating possible divestitures as a remedy to the SLCs it has provisionally found, the CMA will consider the likelihood of achieving a successful divestiture and the associated risks. In reaching a view, we will have regard to the following critical elements of the design of divestiture remedies.

The scope of the divestiture package

19. To be effective in remedying the provisional SLCs, any divestiture package would need to be appropriately configured to be attractive to potential purchasers and to enable the purchaser to compete effectively as a national multi-channel retailer and restore the competitive constraint imposed by Footasylum that would be lost under the Merger.
20. We invite views on whether:
 - (a) a full divestiture of Footasylum by JD Sports would represent an effective remedy to the SLCs and/or any resulting adverse effects that have been provisionally found;
 - (b) JD Sports should be permitted to substitute some of its own stores for Footasylum stores, subject to the consent of the CMA (in general, the CMA has a preference for avoiding ‘mix-and-match’ divestitures, eg a combination of JD Sports and Footasylum assets, which can create

additional composition risks such that a divestiture package will not function effectively),¹² and if so:

- (i) whether such a 'mix-and-match' divestiture package may be effective in addressing the provisional SLCs and/or any resulting adverse effects;
 - (ii) the risks to the effectiveness of a remedy involving a 'mix-and-match' approach and how these risks may be mitigated; and
 - (iii) what approval criteria could be applied to assess any potential store inclusions;
- (c) a differently configured and/or smaller divestiture package other than a full divestiture (eg a partial divestiture of some, but not all, of the business and operations of Footasylum) to a suitable purchaser could also be an effective remedy, and if so:
- (i) what would be the appropriate scope of the package of assets to be divested;
 - (ii) whether there are any risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market; and
- (d) divestiture of the Footasylum brand would be required to ensure that the package of divested assets can compete effectively – our initial view is that this would be the case, bearing in mind the need to achieve an effective remedy to the provisional SLCs, which cover both the online and in-store channels.

Identification and availability of a suitable purchaser

21. The CMA will need to be satisfied that a prospective purchaser:¹³

- (a) is independent of the Parties;
- (b) has the necessary capability to compete;
- (c) is committed to competing in the relevant markets; and
- (d) will not create further competition concerns.

¹² *Merger Remedies*: CMA87 (13 December 2018), paragraph 5.16.

¹³ *Merger Remedies*: CMA87 (13 December 2018), paragraph 5.21.

22. We invite views on whether there are:
- (a) any other specific factors or requirements to which we should pay particular regard in assessing purchaser suitability, eg to operate Footasylum as an effective national multi-channel retailer;
 - (b) any specific purchasers or types of purchasers which should be ruled out as potentially suitable purchasers (eg other UK and non-UK retailers or financial buyers); and
 - (c) risks that a suitable purchaser is not available or that the Parties will divest to a weak or otherwise inappropriate purchaser.

Effective divestiture process

23. The CMA will consider what, if any, procedural safeguards may be required to minimise the risks associated with divestiture.
24. We invite views on:
- (a) the appropriate timescale for achieving a divestiture (the initial divestiture period);¹⁴ and
 - (b) the risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture, and whether the functions of the Monitoring Trustee (see paragraph 6 above) should be expanded to oversee the divestiture process and to ensure that the operations and assets to be divested are maintained and properly supported during the course of the process.
25. The CMA will have the power to mandate an independent divestiture trustee to dispose of the divestiture package if:
- (a) the Parties fail to procure divestiture to a suitable purchaser within the initial divestiture period; or
 - (b) the CMA has reason to expect that the Parties will not procure divestiture to a suitable purchaser within the initial divestiture period.

¹⁴ The initial divestiture period will normally commence once the CMA has accepted final undertakings or made a final order (up to 12 weeks after the final report) in relation to the required remedy in the CMA's final report. The length of this initial divestiture period will depend on the circumstances of the merger, but will normally be a maximum period of six months (see also [Merger Remedies: CMA87](#) (13 December 2018), paragraph 5.41).

26. In unusual cases, the CMA may require that a divestiture trustee is appointed at the outset of the divestiture process. We invite views on whether the circumstances of this Merger necessitate such an approach.

Cost of remedies and proportionality

27. In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, that it considers will be effective. The CMA will also seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. Between two remedies that the CMA considers equally effective, it will choose that which imposes the least cost or restriction. In relation to completed mergers, the CMA will not normally take account of costs or losses that will be incurred by the Parties as a result of a divestiture remedy.¹⁵
28. When considering relevant costs, the CMA's considerations may include (but are not limited to):¹⁶
- (a) distortions in market outcomes;
 - (b) compliance and monitoring costs incurred by the Parties, third parties, or the CMA; and
 - (c) the loss of any relevant customer benefits that may arise from the Merger which are foregone as a result of the remedy (see paragraphs 30 to 32 below).
29. We invite views on what relevant costs are likely to arise in implementing a remedy requiring the full divestiture of Footasylum.

Relevant customer benefits

30. In deciding the question of remedies, the CMA may have regard to the effects of any remedial action on any relevant customer benefits in relation to the creation of the relevant merger situation.¹⁷
31. Relevant customer benefits are limited by the Act to benefits to customers in the form of:¹⁸

¹⁵ [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 3.9.

¹⁶ [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 3.10.

¹⁷ Section 36(4) of the Act, see also [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraphs 3.14 to 3.24.

¹⁸ Section 30(1)(a) of the Act, see also [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 3.17.

- (a) 'lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom ... or
 - (b) greater innovation in relation to such goods or services.'
- 32. The Act provides that a benefit is only a relevant customer benefit if:¹⁹
 - (a) it accrues or may be expected to accrue to relevant customers within the UK within a reasonable period as a result of the creation of that situation; and
 - (b) it was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.
- 33. We welcome views on the nature of any relevant customer benefits, and on the scale and likelihood of such benefits and the extent (if any) to which these are affected by the full divestiture of Footasylum.

Next steps

- 34. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish the CMA to consider, by **25 February 2020** (see Note (i)).
- 35. A copy of this notice will be posted on the CMA website.²⁰

Kip Meek
Group Chairman
11 February 2020

Note

- (i) This notice of possible actions to remedy, mitigate or prevent the SLC or any resulting adverse effects is made having regard to the provisional findings announced on 11 February 2020. The Parties have until 3 March 2020 to respond to the provisional findings. The CMA's findings may alter in response to comments it receives on its provisional findings, in which case the CMA may consider other possible remedies, if appropriate.

¹⁹ Section 30(3) of the Act, see also [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 3.19.

²⁰ A copy of this notice and our provisional findings can be found on our case page [here](#).