

CASE ME/6827/19



FOOTASYJUM 

RESPONSE TO THE NOTICE OF POSSIBLE REMEDIES

JD Sports Fashion plc

25 February 2020

1 Introduction and Executive Summary

- (1) JD Sports categorically rejects the CMA's view that its acquisition of Footasylum (the "Merger") will lead to any substantial lessening of competition, or to any adverse effects upon consumers and this response to the CMA's Notice of Possible Remedies of 11 February 2020 (the "Remedies Notice") is made without prejudice to JD Sports' forthcoming response to the CMA's Provisional Findings.
- (2) JD Sports therefore firmly believes that no remedial action is required in relation to the Merger and that unwinding the deal via the forced divestiture of the Footasylum business would be a disproportionate course of action that would deprive customers of the benefits that will arise from the Merger.
- (3) Without prejudice to JD Sports' central position that no remedy is required, JD Sports makes the following observations with respect to the issues in the Remedies Notice which the CMA continues to consider and/or upon which the CMA has invited specific views:
 - (a) Behavioural remedies would be unnecessary to support any structural remedy in this case;
 - (b) It is not possible to make meaningful proposals on a partial or "mix and match" remedy given that the CMA has not conducted local analysis. For the avoidance of doubt, JD Sports would not be prepared to dispose of any of its own stores;
 - (c) JD Sports does not consider that any type of purchaser, including non-UK retailers and financial buyers, should be ruled out at this stage as a class or in the abstract. JD Sports is fully cognisant of the fact that individual purchasers must meet the CMA's standard purchaser-specific approval criteria. While there will be many potential purchasers who meet all these criteria, JD Sports accepts that there will be a minority who will not be suitable purchasers on the grounds that they will create a "realistic prospect of further competition or regulatory concerns";
 - (d) With Footasylum under stable post-Merger ownership, whose independence is protected by the CMA's Interim Order supervised by the Monitoring Trustee, there is no factor in favour of a divestiture period [X] from the date of acceptance of undertakings/making of an order. On the other hand, the factors that "favour a longer duration, such as canvassing a sufficient selection of potential suitable purchasers and facilitating adequate due diligence" are present as there will be sufficient purchaser interest, provided the CMA process does not unduly curtail the divestiture period, including the period required to facilitate due diligence; and
 - (e) There would be no reason to appoint a divestiture trustee at the outset of the process, or to expand the functions of the Monitoring Trustee to oversee the process: JD Sports has the necessary expertise to run an effective process, with support from external advisers, and will provide regular updates to the CMA as required.

2 Full divestiture is disproportionate

- (4) The CMA's Remedies Guidance states that "*[in] order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, of those remedy options that it considers will be effective*"¹ and that "*[the] CMA will seek to ensure that no*

¹ Remedies Guidance, at paragraph 3.6.

remedy is disproportionate in relation to the SLC and its adverse effects".² The CMA has an important and overarching duty to act in a manner that is reasonable and proportionate when conducting a merger review and considering remedies.³

- (5) Requiring the disposal of the entire Footasylum business would be disproportionately costly and intrusive. It is the most extreme form of remedy and would effectively unwind the Merger, depriving customers from the benefits that would arise from the Merger, including:
- Preserving and enhancing Footasylum's differentiated brand mix, product ranges and retail positioning, for the longer-term benefit of the consumer experience (using JD Sports' brand relationships to enable Footasylum to access new brands, in addition to the continued development of own-label brands and "bedroom" brands, ensuring it remains relevant to its fashion-inspired customer);
 - Stabilising Footasylum's financial position and ensuring the continued employment of its staff and supplier base;
 - Maintaining the footwear product range available in Footasylum stores (in particular desirable limited allocation lines), under the umbrella of JD Sports as a global strategic partner to Nike and adidas, relative to absent the Merger;
 - Investment in the existing distinctive Footasylum labels and the development of new own-label brands. With JD Sports' international reach it expects to be able to offer Footasylum brands in a number of its stores outside the UK, which offers return on investment to develop these brands further within the UK. JD Sports also expects to be able to invest further in the identification and development of "bedroom" or niche apparel brands, and, as indicated above has a much larger UK store network and international operation to roll out these brands more widely once they have achieved more general interest; and
 - Improvements to the efficiency of Footasylum's operations by putting to work JD Sports' best of breed back office, technology, logistic and infrastructure platform.

3 Response to additional issues in the Remedies Notice

- (6) Without prejudice to JD Sports' central position that no remedy is required, JD Sports makes the following observations with respect to the issues in the Remedies Notice which the CMA continues to consider and/or upon which it has invited specific views.

3.1 Behavioural remedies are unnecessary to support structural remedies

- (7) The CMA notes at paragraph 16 of the Remedies Notice that it will consider whether any behavioural remedies would be required in a supporting role to safeguard the effectiveness of any structural remedies. In JD Sports' view there is no reason why behavioural remedies would be required to safeguard the effectiveness of a structural remedy in this case.

² Ibid.

³ The relevant public law principles are very well established and long-standing. For a description of their key features see: *Huang* [2007] 2 AC 167, paragraph 19; *Eastside Cheese* [1999] Eu LR 968, paragraph 41 and *International Transport Roth GmbH* [2003] QB 728, paragraph 52. For the Competition Appeal Tribunal's interpretation of what the principle of proportionality requires in the context of remedies, please refer to Competition Appeal Tribunal's statements in *Tesco plc v Competition Commission* [2009] CAT 6, paragraph 137.

3.2 Scope of divestiture package

- (8) The CMA notes at paragraph 20 of the Remedies Notice that it is inviting views on whether JD Sports should be permitted to substitute some of its own stores for Footasylum stores, subject to the consent of the CMA, whether a differently configured or smaller divestiture packaging could be an effective remedy, and whether divestiture of the Footasylum brand is required.
- (9) JD Sports considers that it is not possible to make meaningful alternative proposals of this nature given that the CMA has not conducted a local analysis. For the avoidance of doubt, JD Sports would not be prepared to dispose of any of its own stores.

3.3 Identification and availability of a suitable purchaser

- (10) Paragraph 22 of the Remedies Notice invites views on whether there are:
- (a) Specific factors or requirements (beyond the standard suitability criteria listed at paragraph 21) to which the CMA should pay particular regard in assessing purchaser suitability;
 - (b) Specific purchasers or types of purchaser which should be ruled out as potentially suitable purchasers (e.g. 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.
- (11) JD Sports notes that the standard purchaser approval criteria as specified in the CMA's Remedies Guidance already require that a purchaser has access to appropriate financial resources, expertise and assets to enable the divested business to be an effective competitor in the market.
- (12) JD Sports does not consider that there are risks that a suitable purchaser is not available: in the event of a divestiture there are likely to be a number of viable purchasers who satisfy the CMA criteria, and the CMA's standard approval process would prevent divestiture to a weak or inappropriate purchaser.
- (13) JD Sports does not consider that any type of purchaser, including non-UK retailers and financial buyers, should be ruled out at this stage as a class or in the abstract. As all specific proposed purchasers are subject to the procedural safeguard of positive CMA approval, this should be sufficient to protect the CMA's remedial interests. JD Sports is fully cognisant of the fact that individual purchasers must meet each and every one of the standard CMA purchaser-specific approval criteria (independence; capability; commitment; and not creating further competition concerns) as per the Remedies Guidance. While there will be many potential purchasers who meet all these criteria, JD accepts that there will be a minority who will not be suitable purchasers on grounds that they will create a "*realistic prospect of further competition or regulatory concerns*".⁴
- (14) In *Somerfield/Wm Morrison*, the CC expressly said that "*we also believe it would be appropriate to consider purchasers who are not currently within that competitor set, because they do not currently operate within these geographical markets, but who could demonstrate that they can offer PQRS comparable to those previously available in these stores. This would include regional operators that currently do not operate in these particular areas, or*

⁴ Remedies Guidance, at paragraph 5.21(e).

new entrants that could demonstrate that they would be able to compete effectively with a comparable offer.”⁵

- (15) Thus, the CMA’s own assessment in previous cases recognises that retail operators of varying levels of “scale”, including regional operators and new entrants, are effective competitors and should be prima facie considered as viable potential purchasers. In past cases where private equity buyers and new entrants have been potential purchasers, the CMA has reviewed their suitability on a case-by-case basis, considering whether the proposed purchaser will satisfy the requirements set out in the CMA’s Remedies Guidance, and thus be able to operate the divestment business so as to resolve the SLC concern and maintain competition.⁶ The CMA should focus on whether a suitable purchaser has the resources and management expertise to run the divested business (and ensuring that the purchaser does not create competition concerns) rather than on the identity of the purchaser.⁷

3.4 Effective divestiture process

The divestiture period

- (16) With Footasylum under stable post-Merger ownership, whose independence is protected by the CMA’s Interim Order supervised by the Monitoring Trustee, there is no factor in favour of a divestiture period [X]. On the other hand, the factors that “*favour a longer duration, such as canvassing a sufficient selection of potential suitable purchasers and facilitating adequate due diligence*” are present⁸ as there will be sufficient purchaser interest, provided the CMA process does not unduly curtail the divestiture period, including the period required to facilitate due diligence, not least given Footasylum’s stand-alone position in the counterfactual. In addition, the inclusion of a short divestiture period [X].
- (17) JD Sports therefore submits that the period for achieving the divestitures should be [X] from the date of acceptance of undertakings/making of an order.

Trustees

- (18) In JD Sports’ view it would not be necessary to expand the functions of the Monitoring Trustee to oversee the divestiture process, nor would there be any need for a divestiture trustee to be appointed at the outset of any divestiture process. JD Sports has the necessary expertise to run an effective sales process with support from external advisers and would be prepared to provide updates directly to the CMA as required.

⁵ *Somerfield/Wm Morrison*, Final Report, September 2005, paragraph 11.26.

⁶ See, for example, *Acadia Healthcare Company/Priority Group* (2016), where two private equity firms were considered suitable purchasers of the divestment business, Notice of Consultation dated 7 October 2016, paragraph 23 et seq.

⁷ See, for example, the views of third parties in *Cygnat Heath Care/Cambian Adult Services*, Final Report, 16 October 2017, paragraph 14.92.

⁸ Remedies Guidance, at paragraph 5.41.