

JD SPORTS / FOOTASYLUM MERGER INQUIRY REMITTAL

Conduct of the Remittal

The CMA invites written comments on all of the matters set out in this document by 16 April 2021.

Background to the remittal

1. On 6 May 2020, the CMA announced its decision that the completed acquisition by JD Sports Fashion plc (**JD Sports**) of Footasylum plc (**Footasylum**) (the **Merger**) has resulted or may be expected to result, in a substantial lessening of competition as a result of horizontal unilateral effects in:
 - (a) the retail supply of sports-inspired casual footwear in-store and online in the UK; and
 - (b) the retail supply of sports-inspired casual apparel in-store and online in the UK.¹

2. On 17 June 2020, JD Sports submitted a Notice of Application (**the Application**) to challenge certain of the CMA's findings in the Phase 2 report (the **Phase 2 Final Report**) to the Competition Appeal Tribunal (**CAT**). JD Sports advanced three grounds of review:
 - (a) **Ground one:**
 - (i) The CMA erred in law in failing to apply the Merger Assessment Guidelines (**MAG**) in determining whether any lessening of competition caused by the Merger was "substantial" and/or its reasons were inadequate.
 - (ii) The CMA erred in law and/or failed rationally to assess the aggregate constraints on the combined JD Sports / Footasylum group (the **Merged Entity**) posed by (i) suppliers and (ii) retail rivals, currently and in the future and/or failed to provide sufficient reasons for its conclusion.

¹ [JD Sports/Footasylum Final Report](#)

(b) Ground two:

- (i) The CMA erred in law and/or acted irrationally in excluding from the counterfactual the effect of COVID-19 on Footasylum.
- (ii) The CMA erred in law and/or acted irrationally in finding that COVID-19 would not materially affect Footasylum's competitive constraint.

(c) Ground three:

- (i) The CMA failed to provide adequate reasons, departed from the MAG and/or acted irrationally in finding that Frasers Group plc's elevation strategy will not significantly change the strength of the competitive constraint on the Merged Entity from Frasers Group plc in the next two years.
- (ii) The CMA made irrational findings in concluding that the constraint posed by suppliers (in particular, Nike and adidas) was not so significant as to sufficiently discipline the Merged Entity, which had the consequence that the contribution to the aggregate constraint posed by suppliers was wrongly understated.
- (iii) The CMA failed to provide adequate reasons and/or acted irrationally in finding that Nike's and adidas's own direct to consumer retail offer will not become a significantly stronger constraint on the Merged Entity.²

3. The CAT dismissed JD Sports' Application under Ground 1 and under Grounds 3 (i) and (ii) but upheld the Application under Ground 2 and under Ground 3(iii) to the extent that the latter concerns the likely effects of COVID-19. The CAT quashed the Phase 2 Final Report in so far as its conclusions are based on the CMA's assessment of the likely effects of the COVID-19 pandemic (i) on the relevant markets, (ii) on the Parties³ and/or the Merged Entity, and (iii) on the competitive constraints likely to apply to the Parties and/or the Merged Entity. The CAT further remarked that *'we consider that the assessment of these effects is sufficiently material to the CMA's overall conclusions as to require further examination of the FR [Phase 2 Final Report] as a whole and we therefore remit the case to the CMA for reconsideration in the light of this judgment.'*⁴

Scope of the remittal

4. Given the errors the CAT identified in the CMA's assessment of the effects of the COVID-19 pandemic and the scope of the remittal – the CAT considered

² [JD Sports Fashion plc v CMA](#)

³ JD Sports and Footasylum together, the 'Parties'

⁴ [\[2020\] CAT 24, JD Sports Fashion plc v CMA](#)

that the CMA should undertake further examination of the Phase 2 Final Report as a whole – we expect that our evidence gathering and analysis will be extensive across many parts of our Phase 2 Final Report.

5. Following the further information-gathering, analysis and consultation to be carried out during the remittal (as described further below), the CMA will consider whether the Merger has resulted or may be expected to result in an SLC, and if so, what action should be taken to remedy, mitigate or prevent the SLC or any adverse effect resulting from the SLC.

Information gathering and consultation

6. In keeping with its usual practice, the CMA will collect further evidence from the Parties and third parties through voluntary or mandatory information requests and conference calls.
7. The CMA is now inviting written submissions on the matters that fall within the scope of the remittal, including in particular on the impact of COVID-19 on the merging parties, their competitors and the markets in which they operate more generally. The CMA requests, in accordance with its guidance⁵ that all parties making submissions provide both a confidential and non-confidential version of such submissions. The non-confidential submissions will either be published on the CMA website or, in cases of sensitivity, will be provided to the Parties and selected third parties.
8. In order to discharge its statutory duty to consult, the CMA will issue a Provisional Report around July 2021 which will be published on the CMA's website. The Parties will also have the opportunity to make written submissions in relation to any additional materials disclosed to it prior to the publication of the CMA's Provisional Report. Both Parties will be provided with the opportunity to make oral representations to the Group in advance of the publication of the CMA's Provisional Report. If the CMA has provisionally found an SLC arising from the Merger, response hearings with the Parties will also take place after the CMA's Provisional Report.

Duration of remittal

9. The CMA anticipates publishing the Final Report on the remittal around September 2021.
10. An administrative timetable is published along with this notice. Compliance with any deadlines specified will help to ensure that the timetable is met.

⁵ [CC7 \(Revised\): Disclosure of information in CMA work](#)

11. The CMA invites written comments on any of the matters set out in this document **by 16 April**. Comments should be made, by email or in writing, to JDSports.Footasylum@cma.gov.uk.