

Completed acquisition by JD Sports of Footasylum

Remedies paper on the case remitted to the Competition and Markets Authority by the Competition Appeal Tribunal on 13 November 2020

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The Competition and Markets Authority has excluded from this published version of the Remedies Paper information which the inquiry group considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✂]. Non-sensitive wording is also indicated in square brackets.

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Introduction and invitation to comment

1. On 2 September 2021, the CMA published its provisional report (**‘Remittal Provisional Report’**) on the case remitted to the CMA by the Competition Appeal Tribunal (**‘Tribunal’**), which provisionally concluded that the Merger has resulted, or may be expected to result, in a substantial lessening of competition (**‘SLC’**) 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.
2. Where the CMA finds an SLC in its final report, it must decide what, if any, action should be taken to remedy, mitigate or prevent that SLC or any adverse effect resulting from the SLC.¹ The CMA must then state in its final report the remedial action to be taken.
3. This paper (**‘Remedies Paper’**) sets out our assessment of, and provisional decision on, the appropriate remedy to the SLCs and resulting adverse effects we have provisionally identified in our Remittal Provisional Report.
4. At this stage, our provisional decision is that a remedy requiring JD Sports to divest the entire Footasylum business would be the only effective remedy available to address the SLCs and resulting adverse effects we have provisionally found. We have provisionally found that this remedy would not be disproportionate to the provisional SLCs and their resulting adverse effects.
5. Our provisional decision on the appropriate remedy is based on the provisional SLCs identified in our Remittal Provisional Report. We have not reached any final conclusions on the nature and scope of the provisional SLCs or on the appropriate remedy. Our final views on the SLCs (if any) may differ in our final report. In reaching our final conclusions, we will consider any further evidence and responses we receive to our public consultation on the Remittal Provisional Report and this Remedies Paper.
6. We are seeking views from interested parties on the assessment and provisional conclusions set out in this Remedies Paper by 9 September 2021, in particular in relation to our questions in paragraphs 20, 43 and 87.
7. The remainder of this Remedies Paper sets out:
 - (a) the CMA’s framework for assessing remedies (see paragraphs 8 to 11);

¹ Section 35(3) of the Enterprise Act 2002 (the **‘Act’**).

- (b) the nature of the provisional SLCs and resulting adverse effects (see paragraphs 12 to 13);
- (c) an overview of possible remedy options (see paragraphs 14 to 20);
- (d) our assessment of the effectiveness of a full divestiture remedy (see paragraphs 21 to 73);
- (e) our provisional conclusions on effective remedies (see paragraphs 74 to 81);
- (f) our assessment of any relevant customer benefits ('**RCBs**') (see paragraphs 82 to 87);
- (g) our assessment of the proportionality of the effective remedy (see paragraphs 88 to 103);
- (h) our consideration of remedy implementation issues (see paragraphs 104 to 106); and
- (i) our provisional decision on the appropriate remedy (see paragraph 107).

CMA framework for assessing remedies

8. When considering possible remedial actions, the Act requires that the CMA shall 'in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it'.²
9. To fulfil this requirement, the CMA will seek remedies that are effective in addressing the SLC and any resulting adverse effects. The effectiveness of a remedy is assessed by reference to its:³
 - (a) impact on the SLC and its resulting adverse effects;
 - (b) duration and timing – remedies need to be capable of timely implementation and address the SLC effectively throughout its expected duration;
 - (c) practicality in terms of its implementation and any subsequent monitoring; and

² Section 35(4) of the Act.

³ [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 3.5.

- (d) risk profile, relating in particular to the risk that the remedy will not achieve its intended effect.
10. The Tribunal has held that the CMA has ‘a clear margin of appreciation to decide what reasonable action was appropriate for remedying, mitigating or preventing the SLC’.⁴
11. The CMA will then select the least costly and intrusive remedy that it considers to be effective. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. The CMA may also have regard, in accordance with the Act, to the effect of any remedial action on any RCBs arising from the merger.⁵

Nature of provisional SLCs and resulting adverse effects

12. In our Remittal Provisional Report, we provisionally found that the Merger has resulted, or may be expected to result, in an SLC in:⁶
- (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.
13. For some parts of our assessment in this Remedies Paper we have relied on the remedy assessment undertaken by the CMA in chapter 13 of the CMA’s Phase 2 Final Report. We have provisionally found that the SLC is derived from the loss of competitive constraint exerted by JD Sports on Footasylum as we did not find Footasylum to be a substantial constraint on JD Sports. However, we do not consider that this would alter our assessment of the appropriate remedy, as we still find provisional SLCs in each of the relevant markets and we must have regard to the need to achieve as comprehensive a solution as possible to those SLCs.

Possible remedy options

14. Remedies are conventionally classified as either structural or behavioural:

⁴ *Somerfield PLC v Competition Commission [2006] CAT 4* (Somerfield), paragraph 88.

⁵ *Merger remedies guidelines*, CMA87 (13 December 2018), paragraph 3.4.

⁶ Remittal Provisional Report, Chapter 13.

- (a) Structural remedies, such as divestiture, are generally one-off measures that seek to restore or maintain the competitive structure of the market by addressing the market participants and/or their shares of the market.
 - (b) Behavioural remedies are normally ongoing measures that are designed to regulate or constrain the behaviour of the merging parties with the aim of restoring or maintaining the level of competition that would have been present absent the merger.
- 15. In merger inquiries, the CMA generally prefers structural remedies over behavioural remedies because:⁷
 - (a) structural remedies are more likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;
 - (b) behavioural remedies are less likely to have an effective impact on the SLC and its resulting adverse effects, and are more likely to create significant costly distortions in market outcomes; and
 - (c) structural remedies rarely require monitoring and enforcement once implemented.
- 16. In the CMA's Phase 2 Final Report, the CMA concluded that a full divestiture of Footasylum by JD Sports was the only effective and proportionate option to remedy the SLCs and their resulting adverse effects,⁸ and that the CMA had not been able to identify a smaller (or differently configured) divestiture package that could form the basis of an effective structural remedy.⁹
- 17. The CMA's Phase 2 Final Report also noted that none of the Parties or third parties submitted that it should pursue a behavioural remedy option,¹⁰ and indicated that any behavioural remedy was very unlikely to be effective given that there would be significant risks in designing effective behavioural remedies that could comprehensively address the national SLCs and resulting adverse effects, in particular given the broad scope of the adverse effects identified and the need for extensive and ongoing monitoring.¹¹
- 18. For the purpose of addressing the SLCs we have provisionally found in our Remittal Provisional Report, we have not received any further evidence or compelling argument to date to suggest that the risks in designing either an

⁷ [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 3.46.

⁸ [CMA's Phase 2 Final Report](#), Chapter 13, paragraph 13.223.

⁹ [CMA's Phase 2 Final Report](#), Chapter 13, paragraph 13.51.

¹⁰ [CMA's Phase 2 Final Report](#), Chapter 13, paragraph 13.19.

¹¹ [CMA's Phase 2 Final Report](#), Chapter 13, paragraph 13.16.

effective partial (or differently configured¹²) divestiture remedy or behavioural remedy have since the CMA's Phase 2 Final Report, materially reduced (if at all).

19. It is our provisional view that it would not be possible to design an effective partial divestiture remedy or behavioural remedy (either on its own or as an adjunct to a partial divestiture package) that could comprehensively address the SLCs and resulting adverse effects we have provisionally found. We therefore consider below the effectiveness of a divestiture remedy involving the full divestiture of Footasylum.
20. **For consultation: we invite views on whether there is an alternative remedy option (either structural or behavioural) to a full divestiture remedy, which can effectively address the SLCs and resulting adverse effects we have provisionally identified, and if so, how that effective alternative remedy could be designed to mitigate the various design risks (see footnote) which could undermine its effectiveness to comprehensively address the SLCs and resulting adverse effects we have provisionally identified.**¹³

Effectiveness of a full divestiture remedy

21. In this section, we set out:
 - (a) a brief description of a remedy involving a full divestiture of Footasylum;
 - (b) our assessment of the remedy's effectiveness; and
 - (c) our provisional conclusions on the effectiveness of a full divestiture remedy.

Remedy description

22. Under a full divestiture remedy, JD Sports would be required to divest the whole of the Footasylum business to a suitable purchaser within a timeframe specified by the CMA.
23. Since completion of the Merger and for the entire duration of the CMA's phase 1 and 2 investigations and the Remittal, our interim measures have ensured

¹² For example, by adopting a 'mix-and-match' approach, where JD Sports may be permitted to substitute a JD Sports store for a Footasylum store within the divestiture package.

¹³ [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 5.3 lists the broad categories of risks that may impair the effectiveness of divestiture remedies, and paragraph 7.4 lists the categories of risk which can undermine the effectiveness of a behavioural remedy.

the preservation and separation of the legal entity comprising the whole of the Footasylum business from the rest of the JD Sports and Pentland businesses.¹⁴ Therefore, a full divestiture remedy would involve the sale of all of JD Sports' shareholding in Footasylum. This would mitigate the risk of any key Footasylum assets being omitted from the final divestiture package (and, as a result, JD Sports retaining any key Footasylum assets) and ensure that the remedy comprehensively reverses the Merger, which has given rise to our provisional SLCs and resulting adverse effects.

Assessment of remedy effectiveness

24. A successful divestiture will effectively address at source the loss of rivalry resulting from the Merger by changing or restoring the structure of the market.¹⁵
25. In the CMA's Phase 2 Final Report, the CMA concluded that a full divestiture of Footasylum would represent a comprehensive solution to every aspect of the SLCs, and that it would address the SLCs throughout their expected duration and could be implemented in a timely way with a low risk profile.¹⁶
26. For the purpose of addressing the SLCs and resulting adverse effects we have provisionally found in the Remittal Provisional Report, we would expect a full divestiture remedy, if designed to address the practical risks normally associated with any divestiture remedy (see paragraph 28), would re-establish the structure of the market and thereby restore the dynamic process of competition existing between the Parties prior to the Merger, as well as restore the loss of competitive constraint on Footasylum from JD Sports. It would address all of our provisional concerns at source by reversing the Merger which has given rise to the provisional SLCs, and therefore represent a comprehensive solution to all aspects of our provisional SLCs. A full divestiture remedy would also fully restore any loss in Footasylum's competitive constraint on JD Sports arising from the Merger.
27. As such, the remainder of this section focuses on the design of a full divestiture remedy, which is integral to our assessment of its effectiveness. We end this section with our provisional conclusion on the effectiveness of a full divestiture remedy.

¹⁴ Further details of our interim measures are provided in paragraph 62 of this paper.

¹⁵ [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 3.38.

¹⁶ [CMA's Phase 2 Final Report](#), Chapter 13, eg paragraphs 13.149, 13.150 and 13.160.

Divestiture remedy design risks

28. There are three categories of risk that could impair the effectiveness of any divestiture remedy:¹⁷
- (a) composition risk arises if the scope of the divestiture package is too narrowly constrained or not appropriately configured to attract a suitable purchaser, or does not allow a purchaser to operate as an effective competitor;
 - (b) purchaser risk arises if a divestiture is made to a weak or otherwise inappropriate purchaser or if a suitable purchaser is not available; and
 - (c) asset risk arises if the competitive capability of the divestiture package deteriorates before completion of the divestiture.
29. An effective divestiture remedy should give us confidence that these practical risks can be properly addressed in its design. In addressing these practical risks, we considered in the design of our remedy (including its implementation process) the ongoing impact of COVID-19 where relevant (and to the extent possible). In particular, we considered the extent to which the uncertainty arising from COVID-19 increases the composition, purchaser and asset risks associated with a divestiture remedy, and whether the remedy can be designed such that these risks can be appropriately mitigated, for example by ensuring that the remedy and its implementation process are sufficiently flexible to respond to any relevant developments.
30. We consider each of these design risks in turn below.
- *(a) Composition risks – scope of the divestiture package*
31. In defining the scope of a divestiture package that will satisfactorily address an SLC, the CMA will normally seek to identify the smallest viable, stand-alone business that can compete successfully on an ongoing basis.¹⁸
32. In this case, we have found no reason to depart from the CMA's findings and conclusions reached in the CMA's Phase 2 Final Report that:¹⁹
- (a) Footasylum, divested in its entirety, would meet all of the requirements to be an effective competitor in the relevant markets, namely having access to the relevant branded products in both sports-inspired casual footwear

¹⁷ [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 5.3.

¹⁸ [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 5.7.

¹⁹ [CMA's Phase 2 Final Report](#), Chapter 13.

and apparel; being a national multi-channel retailer with a national in-store footprint and online business; and offering a retail fascia brand and an in-store and online retail experience and proposition that appeal to the Parties' target consumers and meet the requirements set by suppliers;

- (b) anything less than full divestiture would substantially increase the risk of a divestiture remedy being ineffective, eg if a break-up of the Footasylum business resulted in undermining the divested Footasylum business's financial viability and consequently its ability to invest into its business and to access branded products from suppliers;
- (c) a full divestiture of Footasylum would address any composition risks by ensuring that the divestiture package:
 - (i) addresses the provisional SLCs and any resulting adverse effects;
 - (ii) is attractive to potential purchasers; and
 - (iii) enables the eventual purchaser to operate the divested business as an effective competitor; and
- (d) COVID-19 would not affect its consideration of the question of whether Footasylum should be divested in its entirety or whether a partial divestiture or 'mix-and-match' approach could be effective, ie the COVID-19 pandemic would not go to the question of what the scope of the divestiture package should be (eg in terms of the assets and businesses that should form part of any divested Footasylum business) to address the SLCs identified in the CMA's Phase 2 Final Report.

33. ***Provisional conclusion on scope of the divestiture package:*** based on the above, it is our provisional conclusion that the divestiture package should comprise the whole of the Footasylum business.

- *(b) Purchaser risks – criteria and availability of a suitable purchaser*

34. We consider below the risks that Footasylum may be sold to a weak or otherwise inappropriate purchaser or that a suitable purchaser may not be available. These risks, if not properly addressed, could undermine the effectiveness of any divestiture remedy.

35. We consider further below whether there have been any developments since the CMA's Phase 2 Final Report, which require us to update or amend the CMA's conclusions that go to purchaser risk in the CMA's Phase 2 Final Report, specifically in relation to: (a) the appropriate purchaser suitability

criteria and whether a purchaser requires pre-existing relationships with key suppliers; and (b) the availability of a suitable purchaser.

36. We consider each of these in turn below.
- *Purchaser suitability criteria and the need for pre-existing relationships with key suppliers*
37. In the CMA's Phase 2 Final Report, the CMA concluded that a potential purchaser must satisfy the CMA's normal purchaser suitability criteria,²⁰ ie that it:²¹
- (a) is independent of the merging parties (in this case, both JD Sports and Pentland);
 - (b) has the necessary capability to compete in the relevant markets;
 - (c) is committed to competing in the relevant markets; and
 - (d) will not create further competition concerns.
38. The CMA in its Phase 2 Final Report also concluded that it would not be necessary to require a purchaser to have its own relationships with the key suppliers. The CMA noted the evidence it received from the Parties and third parties on the importance of Footasylum's own ability to continue to meet Nike's and adidas's respective standards and requirements to ensure ongoing access to their branded products, rather than be dependent on a purchaser's pre-existing relationships with the key suppliers. The CMA considered that Footasylum's ability to ensure the ongoing supply of the key suppliers' branded products through its own relationships with them, would not be impacted by the implementation of a full divestiture remedy, provided that the new owner supported Footasylum in continuing to meet the key suppliers' expectations, eg with Footasylum continuing to invest in its business in terms of marketing and advertising, as well as its in-store and online offerings. The CMA therefore concluded in its Phase 2 Final Report that a purchaser who met the CMA's normal purchaser suitability criteria would also likely meet the requirements of the key suppliers such that under the ownership of a suitable purchaser, Footasylum would be able to continue having access to the key suppliers' branded products.²²

²⁰ [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 5.21.

²¹ [CMA's Phase 2 Final Report](#), Chapter 13.

²² [CMA's Phase 2 Final Report](#), Chapter 13.

39. The CMA also concluded in the CMA’s Phase 2 Final Report that it would not be necessary to rule out any potential purchaser at the outset of the divestiture process, and that the CMA would assess the suitability of any potential purchaser on its individual merits, and against its normal purchaser suitability criteria.²³
40. In our Remittal Provisional Report, we provisionally found that absent the Merger, an independent Footasylum would have continued to compete effectively in the relevant markets, and that JD Sports would have exerted the same degree of competitive constraint as it did pre-Merger.²⁴
41. On this basis, we found no reason to believe that a purchaser should be required to satisfy additional criteria over and above our normal purchaser criteria (which we already consider to be sufficiently comprehensive for the purpose of identifying a suitable purchaser), to ensure the effectiveness of a full divestiture remedy. We also did not consider it necessary to depart from our usual practice and rule out any purchaser at this stage. We have therefore reserved judgement on the suitability of any particular purchaser and consider that, in line with our usual practice, it would be for JD Sports to determine which potential purchasers it would submit for the CMA’s approval as a suitable purchaser.
42. ***Provisional conclusion on purchaser suitability criteria:*** under a divestiture remedy, in order to ensure that the remedy achieves its intended effects in this case in both footwear and apparel, we provisionally conclude that:
- (a) we would wish to satisfy ourselves that a potential purchaser meets our normal purchaser suitability criteria (see paragraph 37);
 - (b) it would not be necessary at this stage to rule out any potential purchaser – the CMA will assess the suitability of any potential purchaser on its individual merits, and against our normal purchaser suitability criteria; and
 - (c) in line with our normal practice, the eventual purchaser and final transaction documents would be subject to CMA approval.
43. **For consultation: we invite views on whether we should consider any other purchaser suitability criteria, including whether a purchaser should have pre-existing relationships with key suppliers and whether a purchaser must also have international reach and scale.**

²³ CMA’s Phase 2 Final Report, Chapter 13.

²⁴ Remittal Provisional Report, Chapter 10.

- *Availability of a suitable purchaser*

44. The CMA concluded in the CMA's Phase 2 Final Report that the risk that a suitable purchaser would not be available was low given that Footasylum was a profitable and growing business, and that it was well-placed to compete effectively in the relevant markets given its access to the key suppliers' branded products and the strength of Footasylum's brand and retail offering. The CMA considered that these factors would be attractive to potential purchasers.²⁵
45. At the time of the CMA's Phase 2 Final Report in May 2020, the CMA also concluded that given the continually evolving situation concerning the COVID-19 outbreak, provided that JD Sports was given an appropriate timescale to complete the divestiture, the CMA considered that the risk that a suitable purchaser was not available was low.²⁶
46. In our Remittal Provisional Report, we provisionally found that:²⁷
- (a) in terms of [redacted], Footasylum had broadly maintained its store portfolio, with a relatively small number of [redacted] since the onset of the COVID-19 pandemic;
 - (b) Footasylum's financial performance, primarily in terms of the performance of its online business and gross margins, as well as its forecast revenues, which have [redacted], indicate the underlying resilience of Footasylum during the COVID-19 pandemic; and
 - (c) while there has been some [redacted] in Footasylum's [redacted], this should not have a significant impact on Footasylum's ability to compete effectively in the relevant markets for the foreseeable future, which we have taken to be around two years but where appropriate and where supported by evidence we have considered the impact of developments further in the future.
47. We therefore consider that Footasylum fundamentally remains an attractive business which is capable of being sold to a potential purchaser, and that the evidence to date indicates that Footasylum continues to be a resilient

²⁵ CMA's Phase 2 Final Report, Chapter 13.

²⁶ CMA's Phase 2 Final Report, Chapter 13.

²⁷ Remittal Provisional Report, Chapters 7, 10 and 11.

business, notwithstanding the considerable uncertainty of the COVID-19 pandemic to date.

48. As such, provided that the asset risk (ie the risk that Footasylum's competitive capability deteriorates) is appropriately mitigated during any divestiture process, we would expect the Footasylum business will remain an attractive business capable of being sold to a suitable purchaser. In this regard, given our provisional view that a suitable purchaser for the Footasylum business will likely be available, we do not consider it necessary to consider a requirement for an upfront buyer prior to the acceptance of final undertakings or the making of a final order, or the appointment of a Divestiture Trustee at the outset of any divestiture process (see also paragraphs 69 to 73).
49. Finally, notwithstanding our provisional view that we have no reason to consider the risk of not finding a suitable purchaser to be material, we would note that our guidance on remedies states that substantial uncertainty as to whether a suitable purchaser will emerge will generally not be sufficient for the CMA to conclude that any form of divestiture remedy is not feasible. In this regard, the CMA has found that it is normally possible to implement divestiture remedies (eg a sale of a business to a suitable purchaser approved by the CMA), despite such uncertainties, given the flexibility in the disposal price.²⁸
50. ***Provisional conclusion on availability of a suitable purchaser:*** it is our provisional conclusion that provided that Footasylum's ability to compete effectively in the relevant markets is preserved during any divestiture process (which we turn to when we consider asset risk below), the risk that no suitable purchaser will emerge is not material.

- (c) *Asset risks*

51. An effective divestiture process will safeguard the competitive potential of the divestiture package before disposal and will enable a suitable purchaser to be secured in an acceptable timescale, as well as allowing prospective purchasers to make an appropriately informed acquisition decision.²⁹
52. We consider further below whether there have been any developments since the CMA's Phase 2 Final Report, which require us to update or amend the CMA's conclusions in the P2 Final Report that go to asset risk.³⁰ In this regard, we consider the following areas:

²⁸ [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 3.51.

²⁹ [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 5.33.

³⁰ [CMA's Phase 2 Final Report](#), Chapter 13.

- (a) the appropriate timescale to complete a divestiture;
- (b) the need for further interim measures during the divestiture process to mitigate any risks that the competitive capability of Footasylum will deteriorate before completion of divestiture; and
- (c) whether, and under what circumstances, there is a need to appoint an external and independent trustee to complete a divestiture (**‘Divestiture Trustee’**) to mitigate the risk that the divestiture does not complete within the agreed timescales.
 - *Appropriate timescales to complete a divestiture*

53. In considering the appropriate Initial Divestiture Period, our guidance on remedies states that we ‘will seek to balance factors which favour a shorter duration, such as minimising asset risk and giving rapid effect to the remedy, with factors that favour a longer duration, such as canvassing a sufficient selection of potential suitable purchasers and facilitating adequate due diligence’. Our guidance on remedies also states that the Initial Divestiture Period will normally not exceed six months.³¹
54. We considered what might be an appropriate timescale in which JD Sports should fully implement a full divestiture remedy (the **‘Initial Divestiture Period’**), which would normally run from the acceptance of final undertakings or the making of a final order (for which the Act provides a period of up to 12 weeks after the final report) until legal completion of an effective divestiture (ie a sale to a purchaser approved by the CMA).
55. In the CMA’s Phase 2 Final Report, the CMA concluded that the Initial Divestiture Period should be [X]. In reaching this decision, the CMA had regard to the growing uncertainty and the ongoing situation concerning the COVID-19 pandemic, and the impact of this on the appropriate Initial Divestiture Period.³² The CMA also concluded that it would keep the Initial Divestiture Period under review if evidence emerged that JD Sports would not be able to sell Footasylum to a suitable purchaser within this timescale as a result of COVID-19, noting that the CMA would have the discretionary powers to grant extensions to the Initial Divestiture Period where this was necessary to achieve an effective divestiture.³³

³¹ CMA, [Merger remedies guidelines, CMA87 \(13 December 2018\)](#), paragraph 5.41.

³² CMA’s Phase 2 Final Report, Chapter 13.

³³ CMA’s Phase 2 Final Report, Chapter 13.

56. In this case, we note that since the Final Undertakings were accepted on 13 July 2020 (until those obligations were subsequently suspended by the CMA following the Tribunal’s judgment), JD Sports and Footasylum were under an obligation to progress the divestiture of Footasylum to a suitable purchaser. During that period, the CMA considered that JD Sports and Footasylum had engaged constructively with the CMA to carry out the divestiture obligations under the Final Undertakings, including the timely submission of monthly reports setting out the progress of the divestiture process.
57. It is our provisional view that an Initial Divestiture Period of [X] provides an appropriate balance between the need to give rapid effect to the remedy (in particular, given the significant time that has already elapsed since the CMA’s Phase 2 Final Report) and minimise asset risk, and the need to provide JD Sports with sufficient time to canvass a sufficient selection of potential suitable purchasers and facilitate adequate purchaser due diligence. We also do not consider it necessary to grant a longer period given the progress the Parties have already made to date in relation to their preparations for a divestiture process under the Final Undertakings, and given that the past and remaining uncertainties arising from the COVID-19 pandemic have not prevented M&A transactions from taking place in the UK retail sector.
58. We will keep under review the need for extensions to the Initial Divestiture Period and will engage with the Parties and the Monitoring Trustee on this matter. In considering whether to grant an extension, one of the factors the CMA will consider will be the potential purchasers’ requirement to have sufficient time in the circumstances to consider the transaction or to undertake adequate due diligence.
59. ***Provisional conclusion on the Initial Divestiture Period:*** it is our provisional conclusion that that the Initial Divestiture Period should be [X] from the date of any final undertakings or final order.
- *Whether to impose further interim measures*
60. We considered whether there were any risks that the competitive capability of Footasylum would deteriorate before completion of divestiture, and if so, what safeguards could be put in place to ensure that the Footasylum business is maintained and properly supported during the course of the divestiture process.
61. In the CMA’s Phase 2 Final Report, the CMA concluded that:³⁴

³⁴ CMA’s Phase 2 Final Report, Chapter 13.

- (a) the Parties' obligations under the CMA's existing interim measures should continue to apply until completion of the full divestiture remedy, and that the appointment of the monitoring trustee (**'Monitoring Trustee'**) should continue in order to monitor the Parties' compliance with these interim measures;
 - (b) the scope of the Monitoring Trustee's engagement should be expanded to monitor the Parties' compliance with any final order or undertakings in relation to a divestiture remedy and to ensure an efficient divestiture process; and
 - (c) it would not be necessary to appoint a hold separate manager to operate the Footasylum business during the divestiture process (**'Hold Separate Manager'**) but that the CMA would reserve its right to appoint one if Footasylum's current circumstances were materially to change, eg if there was a risk that the existing Footasylum management team would not remain in place during any divestiture process.
62. We have had interim measures in force since the CMA's phase 1 investigation, which have prevented the integration of the JD Sports and Footasylum businesses. A Monitoring Trustee was appointed at the start of the CMA's phase 2 investigation to monitor the Parties' compliance with these interim measures, including ensuring that there was no deterioration of the Footasylum business.³⁵
63. For the purpose of maintaining the viability and competitive capability of the Footasylum business until completion of the divestiture remedy, we consider that the relevant provisions of the Interim Order should be carried over into any final undertakings or order under a divestiture remedy and should remain in force for the duration of the divestiture process until completion. We will consider amending the obligations to focus on those that are necessary to ensuring the independent operation and preservation of the divestiture package. We also consider that the existing Monitoring Trustee's appointment should continue, but expand to monitor the Parties' progress in relation to ensuring a timely completion of the divestiture process.
64. In relation to the uncertainties arising from COVID-19 and/or future developments and their impact on Footasylum, which may arise during the

³⁵ Our interim measures comprised an Initial Enforcement Order, which came into force on 17 May 2019, during the CMA's phase 1 investigation, which was subsequently replaced by an Interim Order (which came into force on 26 November 2019) during the phase 2 investigation. The Interim Order was subsequently replaced by the Final Undertakings, which were accepted on 13 July 2020. Finally, for the duration of the Remittal, the Parties and Pentland were released from the Final Undertakings on 19 May 2021, and at the same time, a new Interim Order was put in place.

course of the divestiture process, we will interpret the Parties' asset maintenance obligations under any final undertakings or final order in light of the relevant circumstances and developments applicable at the time.³⁶

65. As set out in our Provisional Report, we have found that COVID-19 has accelerated changes in the market, particularly in the growth of online. To ensure that our remedy provides the necessary flexibility to enable an effective divestiture process that can be responsive to the uncertainties arising from COVID-19 and/or other future market developments, we will keep under review the need for any further flexibility both before any final undertakings or order and during the remedy implementation period.
66. We consider that the design of our remedy and its implementation process has sufficient flexibility to enable us to take into account the impact of COVID-19 and/or future developments (based on what we currently know or the factors we are able to predict). Further, we note the ongoing flexibility we have under the Act allowing remedies to be reassessed in light of material changes in circumstances or other special reasons (see sections 41(3),³⁷ 41A(2),³⁸ and see also section 92(2)³⁹ of the Act), to ensure we can continue to respond to any relevant developments which are, at this point in time, difficult to anticipate.
67. Based on the above, we have found no compelling reason to depart from the conclusions of the CMA's Phase 2 Final Report and require additional measures to safeguard the viability and competitive capability of the Footasylum business, beyond those set out in the CMA's Phase 2 Final Report.
68. ***Provisional conclusion on the need for further interim measures:*** on the basis set out above, it is our provisional conclusion that:

³⁶ We also refer to our recently published guidance on merger assessments during the COVID-19 pandemic, which notes that derogations 'can be, and have been, granted rapidly where merging parties demonstrate that such steps are necessary to ensure the viability of their businesses, and appropriate safeguards are put in place to protect the CMA's ability to take appropriate action to protect UK consumers as part of the merger review process' (Source: [CMA, Merger Assessments during the Coronavirus \(COVID-19\) pandemic](#)). While this guidance applies in the context of interim measures during merger investigations, this can also apply in the context of measures preserving the divestiture package during any remedy implementation process.

³⁷ Under section 41(3) of the Act, the action the CMA takes in implementing remedies must be consistent with the decisions in the final report, unless there has been a material change of circumstances since the preparation of the report or the CMA otherwise has a special reason for deciding differently.

³⁸ Under section 41A of the Act, the CMA is subject to a statutory deadline of 12 weeks following its final report to accept final undertaking or to make a final order. This period may be extended once by up to six weeks if the CMA considers there are special reasons for doing so.

³⁹ Under section 92 of the Act, the CMA has an ongoing responsibility for the monitoring and enforcement of the final undertakings or final order. From time to time, the CMA must consider whether, by reason of any change in circumstances, the final undertakings are no longer appropriate and should be released, varied or superseded or the final order is no longer appropriate and should be varied or revoked.

- (a) the Parties' current obligations under our existing interim measures should be carried over into any final undertakings or final order and remain in place until completion of the full divestiture remedy;
- (b) the Monitoring Trustee's appointment should continue, but that the scope of its engagement should be expanded to monitor the Parties' compliance with their broader obligations under any final undertakings or order in relation to a divestiture remedy and to ensure an efficient divestiture process; and
- (c) it would not be necessary to appoint a Hold Separate Manager at this stage, albeit this would be revisited if Footasylum's current circumstances were materially to change, eg if there were a risk that the existing Footasylum management team would not remain in place during any divestiture process.

- *Divestiture Trustee considerations*

69. We consider below whether there is a need for the appointment of a Divestiture Trustee, either from the outset of the divestiture process or, more conventionally, should the CMA have concerns that an effective disposal will not be achieved within the Initial Divestiture Period. If appointed, a Divestiture Trustee would normally be tasked with completing the divestiture to a potential purchaser approved by the CMA and at no minimum price.⁴⁰
70. In the CMA's Phase 2 Final Report, the CMA concluded that:
- (a) it would not be necessary to appoint a Divestiture Trustee at the outset of the divestiture process; but
 - (b) the CMA would reserve its right to appoint one if: (i) JD Sports fails to complete the divestiture process within the Initial Divestiture Period; (ii) the CMA reasonably believes that there is a risk that the divestiture process would be delayed or fail to complete within the Initial Divestiture Period; and/or (iii) JD Sports is not engaging constructively with the divestiture process, eg if it does not comply with its obligations under any final order or undertakings.
71. In line with the CMA's normal practice,⁴¹ if appointed, a Divestiture Trustee should be tasked with completing the divestiture of Footasylum to a potential purchaser approved by the CMA and at no minimum price.

⁴⁰ [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 5.43.

⁴¹ [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 5.43.

72. Given our provisional view that we consider the risk of no suitable purchaser being able to be found to be low, we have found no compelling reason to depart from the conclusions of the CMA's Phase 2 Final Report in relation to the appointment of a Divestiture Trustee.
73. ***Provisional conclusion on the appointment of a Divestiture Trustee:*** it is our provisional conclusion that:
- (a) we currently do not see a need to require a Divestiture Trustee to be appointed the outset of the divestiture process; but
 - (b) the CMA reserves its discretionary power to appoint a Divestiture Trustee later in the process and that the CMA may exercise its power to appoint a Divestiture Trustee as it deems appropriate to ensure a timely completion of the divestiture process.

Provisional conclusions on remedy effectiveness

74. Based on our assessment above, and with reference to the various dimensions of a remedy's effectiveness set out in paragraph 9, we set out below our provisional views on the effectiveness of a full divestiture remedy.
75. It is our provisional view that a full divestiture remedy would address our provisional competition concerns at source and therefore prevent any SLC and consequently any resulting adverse effects we have provisionally identified from arising. It therefore represents a comprehensive solution to every aspect of the SLCs we have provisionally found.
76. We would expect a full divestiture remedy designed according to our specifications detailed above, to restore on its completion the market structure and dynamic rivalry expected in the absence of the Merger, and therefore, to have an immediate and comprehensive effect in addressing our provisional SLCs and resulting adverse effects.
77. In relation to the practicality of implementing a full divestiture remedy, we would be able to clearly specify the scope of the divestiture package (in particular given the limited integration of the Parties to date). In this regard, we would also expect a full divestiture remedy to involve little risk of omitting any key assets that may be necessary to ensure Footasylum's stand-alone viability and competitive capability and therefore ensure Footasylum's ongoing ability to be an effective national competitive constraint in the relevant markets.
78. We also considered the practical issues relating to the potential composition, purchaser and asset risks normally associated with a divestiture remedy and

have reached our provisional view that the design of a full divestiture remedy as we have specified above fully addresses these risks. We have set out above our provisional views on the criteria for a suitable purchaser and the procedural safeguards which should be put in place to ensure an effective divestiture process. We considered the likelihood of achieving a successful divestiture and consider the risk of not finding a suitable purchaser to be low. Therefore, with regard to the practicality of this remedy, it is our provisional view that it would be capable of effective implementation and require minimal ongoing monitoring after its full implementation.

79. In relation to the risk profile of a full divestiture remedy, given that a full divestiture of Footasylum would address the provisional SLCs and resulting adverse effects at source, it is our provisional view that there is a high degree of certainty that this remedy would achieve its intended effect. We therefore consider that the risks in terms of the effectiveness of a full divestiture remedy are low.
80. In summary, it is our provisional conclusion that a full divestiture of Footasylum to a suitable purchaser would be effective in addressing the provisional SLCs. We would expect a full divestiture remedy to be a timely and low risk solution to the provisional SLC we have identified, with limited future monitoring requirements on the CMA or others.
81. We have also not found any other effective remedy option. We therefore provisionally conclude that a full divestiture of Footasylum represents the only effective remedy to the provisional SLCs and resulting adverse effects. As such, we have found no reason to depart from the findings and conclusions reached in the CMA's Phase 2 Final Report that a full divestiture of Footasylum would represent an effective remedy to the SLCs and resulting adverse effects we have provisionally found.

Relevant customer benefits

82. When deciding on remedies, we may have regard to the effects of remedial action on any RCBs. In this section, we consider whether there are any RCBs (within the meaning of the Act) that should be taken into account in our remedy assessment.
83. An effective remedy to our provisional SLCs, such as in this case a full divestiture of Footasylum, could be considered disproportionate if it prevents customers from securing substantial benefits arising from the Merger, where these benefits outweigh the provisional SLCs and any resulting adverse effects. Insofar as these benefits constitute RCBs for the purposes of the

Act,⁴² the statutory framework allows us to take them into account⁴³ when we decide whether any remedy is appropriate.

84. RCBs that will be foregone due to the implementation of a particular remedy may be considered as costs of that remedy. The CMA may modify a remedy to ensure retention of an RCB or it may change its remedy selection. For instance, it may decide to implement an alternative effective remedy, or it may decide that no remedy is appropriate.⁴⁴
85. As set out in the CMA's Phase 2 Final Report, the CMA assessed the Parties' claimed RCBs in light of evidence from the Parties and third parties and concluded that there was insufficient evidence to conclude that RCBs within the meaning of the Act, would arise from the Merger.⁴⁵
86. During the Remittal, the Parties have made no further submissions on RCBs. Accordingly, we have not reopened our inquiry into RCBs and therefore provisionally conclude that there is insufficient evidence to conclude that RCBs within the meaning of the Act, arise from the Merger.
87. **For consultation: we invite views on whether we should consider any other RCBs which may arise as a result of the Merger, which would be foregone through the implementation of a full divestiture remedy.**

Proportionality assessment

88. In this section, we set out our assessment of, and provisional conclusions on, the proportionality of our proposed remedy, ie the full divestiture of Footasylum.

Proportionality assessment framework

89. 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. If the CMA is choosing between two remedies which it considers will be equally effective, it will select the remedy that imposes the least cost or that is least restrictive. In addition, the CMA will seek to ensure that no remedy is more onerous than necessary or disproportionate in relation to the SLC and its adverse effects.⁴⁶

⁴² Section 30 of the Act.

⁴³ Section 35(4) of the Act.

⁴⁴ [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 3.16.

⁴⁵ [CMA's Phase 2 Final Report](#), Chapter 13.

⁴⁶ [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 3.6.

90. To fulfil this, we first consider whether there are any relevant costs associated with each effective remedy option. When considering relevant costs, the CMA's considerations may include (but are not limited to):⁴⁷
- (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 RCBs that may arise from the Merger which are foregone as a result of the remedy.
91. However, our guidance on remedies states that 'for completed mergers, the CMA will not normally take account of costs or losses that will be incurred by the merging parties as a result of a divestiture remedy', as it is for the merging parties 'to assess whether there is a risk that a completed merger would be subject to an SLC finding, and the CMA would expect this risk to be reflected in the agreed acquisition price'.⁴⁸
92. Having considered the least costly effective remedy, we then consider whether the least costly remedy is more onerous than necessary or would be disproportionate to the provisional SLCs and resulting adverse effects. In doing so, we are required to compare the level of harm which is likely to arise from the provisional SLCs with the relevant costs of the proposed remedy.⁴⁹

Our assessment of proportionality

93. We have provisionally identified one effective remedy – the full divestiture remedy. For the reasons set out in this paper, we consider that in this case, this remedy is the only one that would be effective in achieving the legitimate aim of comprehensively remedying our provisional SLCs and resulting adverse effects.
94. We also consider that the full divestiture remedy is no more onerous than is required to achieve that aim, and there is not a choice of equally effective remedies.
95. We have also considered whether a full divestiture remedy would produce effects that are disproportionate to the aim pursued. To help us address this question, we have considered whether there were any RCBs that would be lost as a result of pursuing a full divestiture remedy, which we would treat as a

⁴⁷ [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 3.10.

⁴⁸ [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 3.9.

⁴⁹ [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 3.6.

cost of the remedy. Our provisional conclusion from that assessment was that there would be no RCBs that would be lost as a result of a full divestiture of Footasylum.

96. We considered whether there were any other costs of a full divestiture remedy we should take into account. Other than the Parties' claimed RCBs (which the CMA dismissed in the Phase 2 Final Report and which the Parties have not raised again during the Remittal) and the costs to JD Sports of selling the Footasylum business, we have not identified any other costs arising from a full divestiture remedy.
97. We note that JD Sports' decision to complete the Merger without it being conditional on any competition clearance was taken at its own risk, and therefore, it is our provisional view that the costs to JD Sports of running a sale process as a result of a full divestiture remedy, should not be treated as 'relevant costs'.
98. Based on the above, we have not found any costs to third parties arising as a result of the full divestiture remedy.
99. It is our provisional view that the harm arising from the provisional SLCs (including its cumulative effect over time) is likely to be significant and have a widespread impact on customers at a national level in the UK, and would persist and be sustained under the Merger situation.
100. In relation to the 'relevant costs' of a structural remedy, we have provisionally found that no RCBs are to be taken into account in the assessment of the proportionality of a full divestiture of Footasylum. The full divestiture remedy would also not raise costs for third parties and, as such, full divestiture would not produce adverse effects that are disproportionate to the aim of comprehensively remedying the provisional SLCs and resulting adverse effects.

Provisional conclusion on proportionality

101. Having provisionally identified a full divestiture of Footasylum as the only effective remedy available, we considered its proportionality to the SLCs and resulting adverse effects we provisionally found.
102. We have provisionally found that a full divestiture remedy is the only effective action to achieve the legitimate aim of comprehensively remedying the provisional SLCs and resulting adverse effects. We consider that a full divestiture remedy is no more onerous than is required to achieve this legitimate aim and that, based on our provisional views that the Merger is likely to lead to significant and sustained adverse effects and that there are no

relevant costs which we should take into account, our provisional view is that a full divestiture remedy would not produce adverse effects which are disproportionate to the aim pursued.

103. We therefore provisionally conclude that the full divestiture remedy would be proportionate to the provisional SLCs and resulting adverse effects.

Remedy implementation issues

104. Having identified our preferred remedy, we now consider how it should be implemented.
105. The CMA has the choice of implementing any final remedy decision either by accepting final undertakings pursuant to Section 82 of the Act if the Parties wish to offer them, or by making a final order under Section 84 of the Act. Either the final undertakings or the final order must be implemented within 12 weeks of publication of our final report (or extended once by up to 6 weeks under exceptional circumstances),⁵⁰ including the period for any formal public consultation on the draft undertakings or order as specified in Schedule 10 of the Act.
106. In line with our guidance on remedies, once this remedy has been fully implemented in line with the conclusions set out in this provisional decision, we provisionally decide that JD Sports should be prohibited from subsequently acquiring the assets or shares of Footasylum or acquiring any material influence over them. Our guidance on remedies states that the CMA will normally limit this prohibition to a period of 10 years.⁵¹ We find no compelling reason to depart from the guidance in this case by seeking a shorter or longer prohibition period.

Provisional decision on remedies

107. We have provisionally concluded that a full divestiture of Footasylum would be an effective and proportionate remedy to address the SLCs and resulting adverse effects we have provisionally found.

⁵⁰ Section 82 (final undertakings) and Section 84 (final order) of the Act.

⁵¹ [Merger remedies guidelines](#), CMA87 (13 December 2018), paragraph 5.10.