



**JD SPORTS' RESPONSE TO THE CMA'S REMEDIES PAPER**

**SUBMITTED ON BEHALF OF JD SPORTS FASHION PLC**

**9 SEPTEMBER 2021**

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### 1 Introduction

- (1) This submission sets out the response of JD Sports Fashion plc ("**JD Sports**") to the CMA's remedies paper published on 2 September 2021 (the "**Remedies Paper**") in relation to the completed acquisition by JD Sports of Footasylum Limited ("**Footasylum**") and together with JD Sports, the "**Parties**") (the "**Merger**").
- (2) JD Sports notes that the Remedies Paper has, as its necessary premise, the provisional finding of a substantial lessening of competition ("**SLC**") as identified in the CMA's Provisional Findings report ("**PFs**").
- (3) JD Sports disagrees with this premise because there are fundamental flaws in the PFs that, once corrected, should lead the CMA to conclude in its Final Report that the Merger does not result in an SLC. For this reason, as JD Sports considers the SLC finding is unjustified, the same applies to the CMA's proposal in the Remedies Paper, as any such remedy will unnecessarily deprive customers of the benefits arising from the Merger.
- (4) JD Sports' comments on this Remedies Paper are without prejudice to these points which, as to the SLC analysis, will be addressed in the Response to the PFs and not repeated below.
- (5) The rest of this response considers the following topics in turn: (i) composition risks; (ii) purchaser risks; (iii) asset risks; (iv) the potential for JD Sports to relist Footasylum's share on the Alternative Investment Market ("**AIM**") and (v) relevant customer benefits.

### 2 Composition risks

- (6) Without prejudice to its position that the Merger does not result in an SLC, JD Sports agrees with the CMA's conclusion that the full divestiture of Footasylum is the only remedy which can effectively address the SLC as identified in the PFs.
- (7) The CMA's national SLC finding<sup>1</sup> means that a partial divestiture of Footasylum – for example, divesting only Footasylum's stores, but retaining its online business – is unlikely to be effective. Similarly, JD Sports considers that a mix-and-match remedy would also be unworkable as it would lead to composition risks that would undermine the effectiveness of the CMA's proposed remedy.<sup>2</sup> For example, it would be impossible to ensure that Footasylum assets are swapped for equivalent assets from JD Sports and that the remedy comprehensively reverses the Merger.
- (8) Finally, the attractiveness of a mix-and-match divestment is further diminished by the fact that there is a ready-made remedy – the divestiture of Footasylum – that has none of these issues.

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<sup>1</sup> Remedies Paper, paragraph 12.

<sup>2</sup> As set out in more detail in the CMA's Merger Remedies guidelines, CMA87 (13 December 2019), paragraph 5.3.

## 3 Purchaser risks

### 3.1 Purchaser suitability criteria

- (9) JD Sports notes the CMA's finding in the PFs that, absent the Merger, an independent Footasylum would have continued to compete effectively in the relevant markets.<sup>3</sup> To the extent that the CMA retains its counterfactual findings, JD Sports agrees that there is no reason for the CMA to depart from its normal purchaser criteria (which the CMA considers sufficiently comprehensive to identify a suitable purchaser).
- (10) JD Sports also agrees that there is no need for the CMA to depart from its usual practice of allowing JD Sports to determine which candidate buyer(s) it submits for the CMA's approval as a suitable purchaser.
- (11) JD Sports further agrees with the CMA's conclusion that it does not need to rule out any individual purchaser at this stage in the abstract<sup>4</sup> given the premise of a large pool of available purchasers which JD Sports will select from to put forward for approval.

### 3.2 Purchaser availability

- (12) JD Sports notes the CMA's findings in paragraph 46 of the Remedies Paper that Footasylum: (a) has broadly maintained its store portfolio; (b) has good recent financial performance; and (c) will not be significantly negatively impacted in terms of [REDACTED] in the next two years. Assuming for sake of argument that these findings were correct (which, for the avoidance of doubt, JD Sports disputes) then JD Sports would agree it follows that "*Footasylum... remains an attractive business*" and that the risk that a suitable purchaser is not available is low.
- (13) On this basis, JD Sports also agrees that it will not be necessary for the CMA to require an upfront buyer prior to the acceptance of the final undertakings or the appointment of a divestiture trustee (as set out in more detail in Section 4.3).

## 4 Asset risks

### 4.1 Divestiture period

- (14) JD Sports considers that, while it would work expeditiously, it would be appropriate to retain the [REDACTED] initial divestiture period that the CMA adopted in its Phase 2 Final Report to make allowance for the following considerations, rather than having recourse to extensions. Retaining the previous initial divestiture period will allow purchasers to plan their due diligence with greater depth and timetable certainty than the mere possibility of an extension at the CMA's discretion.
  - (i) **Supply issues:** as the CMA is aware, [REDACTED]. JD Sports' expectation is that any purchaser will want to assess: (a) the extent to which this [REDACTED] continues into future quarters; and (b) the impact that the [REDACTED] will have on Footasylum's sales in Q4 2021, its key commercial period. [REDACTED] will not provide enough time for this information to be available and this diminishes the likelihood of JD Sports being able finding a purchaser for Footasylum. Moreover, it goes without saying that a highly opportunistic purchaser (i.e. one who was not interested in [REDACTED] and their impact)

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<sup>3</sup> PFs, Chapter 10.

<sup>4</sup> Remedies Paper, paragraph 41.

would be unlikely to give comfort that their acquisition would be in the medium to long-term interests of Footasylum, competition and, in turn, consumers.

- (ii) **COVID-19:** While “*the COVID-19 pandemic... [has] not prevented M&A transactions from taking place*”<sup>5</sup>, it has made transactions more complicated which in turn increases the time to finalise a transaction. For example, JD Sports anticipates that purchasers will want to carry out enhanced due diligence into the impact of COVID-19 on Footasylum and the degree to which its financial position has been distorted by government support [REDACTED] (notwithstanding the Interim Order provisions that guarantee that Footasylum is run and has been run independently). Furthermore, JD Sports would expect that purchasers will be reluctant to proceed with an acquisition until they understand the likelihood of further lockdowns in response to a new wave of COVID infections. Both of these processes risk significant compromise within the [REDACTED] timeframe that the CMA is proposing.
- (iii) **Interim Measures / Undertakings:** JD Sports notes that there is relatively little risk from a CMA perspective in increasing the divestiture period given the ongoing effectiveness of the CMA’s interim measures and previous undertakings. The Remedies Paper concludes that the interim measures “*have prevented the integration of the JD Sports and Footasylum businesses*” and have ensured “*that there was no deterioration of the Footasylum business*” - there is no reason why this would not continue to be the case if the divestiture period were extended by [REDACTED] months.<sup>6</sup> The duration of the interim measures would be the same in the event of a [REDACTED] extension to a [REDACTED] initial period. By extending the divestiture period by [REDACTED], it means that there is a great likelihood of JD Sports being able to find a purchaser which prioritises the long-term interests of Footasylum.

## 4.2 Interim measures

- (15) The undertakings adopted at the end of the Phase II process were effective (as acknowledged in paragraph 62 of the Remedies Paper) and JD Sports sees no reason why any new undertakings would need to be materially different.
- (16) Similarly, JD Sports agrees that extending the scope of the monitoring trustee’s role to include monitoring the Parties’ compliance with the undertakings adopted during Phase 2 was successful. JD Sports sees no reason to depart from this approach.

## 4.3 Divestiture trustee

- (17) JD Sports agrees with the CMA that it is not necessary to appoint a divestiture trustee at the outset of the divestiture process. As the Remedies Paper acknowledges, during Phase 2 JD Sports engaged constructively with the CMA to carry out its divestiture obligations, including submitting monthly progress reports, which shows JD Sports is capable of achieving the divestment of Footasylum in accordance with the parameters set by the CMA.<sup>7</sup>

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<sup>5</sup> Remedies Paper, paragraph 57.

<sup>6</sup> Remedies Paper, paragraph 62.

<sup>7</sup> Remedies Paper, paragraph 56.

- (18) Furthermore, the CMA’s conclusion that there is a low risk of a suitable purchaser being available supports the standard position that a divestiture trustee is not required from the outset.<sup>8</sup>

## 5 Initial public offering (“IPO”) option

- (19) The CMA’s Merger Remedies guidance notes that “restoration of the pre-merger situation ... will generally represent a straightforward remedy” and that the Competition Appeal Tribunal confirmed that it was reasonable at Phase 2, as a starting point for divestment remedies, to propose to restore the status quo ante (which would normally involve reversing the completed acquisition unless the contrary were shown).<sup>9</sup>
- (20) JD Sports notes in this context that an IPO would self-evidently most closely restore the status quo ante prior to the Merger because, prior to the Merger, Footasylum’s shares were listed on AIM.
- (21) While Footasylum’s AIM listing predates COVID-19 and its impact, given the CMA’s counterfactual finding that an independent Footasylum, going forward, would continue to compete effectively in the relevant markets,<sup>10</sup> JD Sports considers that re-listing Footasylum’s shares on AIM (rather than selling them to a single purchaser) would also be an effective remedy to resolve the SLC identified in the PFs.
- (22) In particular, JD Sports notes the following:
- (i) **Composition and asset risks:** these risks are no higher than the divestment of the Footasylum business to a single purchaser.
  - (ii) **Purchaser suitability:** relisting Footasylum on AIM would also meet the CMA’s purchaser suitability criteria. For example, the shareholders would be independent of both JD Sports and Pentland Group Limited (“Pentland”) and would be committed to ensuring that Footasylum competes in the relevant markets to ensure that their initial investments retain their value. Furthermore, no shareholder would have control at the point of IPO so re-listing would not create further competition concerns. Lastly, the CMA had already found in the PFs that that an independent Footasylum would continue to compete effectively in the relevant markets.
  - (iii) **Purchaser availability:** the Remedies Paper notes that Footasylum: (a) has broadly maintained its store portfolio; (b) has good recent financial performance; and (c) will not be significantly negatively impacted in terms of **[<]** in the next two years.<sup>11</sup> If these findings are correct then Footasylum will be an attractive business for potential shareholders. Furthermore, there have been a number of recent listings on AIM of similar sized companies, such as In the Style Group Plc and Virgin Wines UK Plc in 2021. Indeed, the practice of listing on AIM is fairly standard in the sector: with Quiz Plc listing in 2017, boohoo group plc listing in 2014 and ASOS PLC listing in 2007. **[<]**.

<sup>8</sup> Remedies Paper, paragraph 72.

<sup>9</sup> *Merger Remedies*, CMA87, 2018, para. 5.6 and note 103.

<sup>10</sup> PFs, Chapter 10.

<sup>11</sup> Remedies Paper, paragraph 46(a), (b) and (c) respectively.

- (23) Obviously, the CMA would in due course need to satisfy itself that all of its remedial criteria were met in practice by a proposed IPO, just as it would individually need to approve a particular purchaser against the standard criteria.
- (24) JD Sports therefore submits that the CMA should conclude that, in principle, the IPO route is one that JD Sports could suitably pursue as an option to implement the divestiture remedy, alongside the option to transfer the business to a single suitable purchaser from among a wide purchaser set.

## 6 Relevant Customer Benefits (“RCB”)

- (25) As noted during Phase 2, JD Sports considers that a full divestiture remedy would deprive customers of the benefits that would arise from the Merger, including the following RCB:
  - (i) **Preserving and enhancing Footasylum’s differentiated brand mix, product ranges and retail positioning.** JD Sports disagrees with the CMA’s conclusion during Phase 2 that this benefit could be achieved by another purchaser. JD Sports’ position and standing means it is uniquely positioned to be able to secure Footasylum’s supply of products.
  - (ii) **Maintaining Footasylum’s footwear product range (particularly ‘top tier’ limited allocation lines) from key suppliers.** As JD Sports will set out in its response to the PFs, the CMA’s assessment does not take into account how Footasylum’s [X]. The Parties’ submissions have outlined how JD Sports is uniquely positioned to restore [X].
  - (iii) **Securing Footasylum’s financial position.** The Merger will mean that JD Sports is able to secure Footasylum’s financial in the medium to long term.
  - (iv) **Investing and developing Footasylum’s own-label brands.** JD Sports intends to invest in Footasylum’s own-label brands and potentially make them available in JD Sports’ global store network.
  - (v) **Improving Footasylum’s back-office, technology, logistic and infrastructure options.** JD Sports has a track-history of improving and optimising companies it acquires by allowing them to access JD Sports’ industry leading logistics, technology and infrastructure.