Completed acquisition by JD Sports Fashion plc of Footasylum plc

Decision to impose a penalty on JD Sports Fashion plc under sections 94A and 110 of the Enterprise Act 2002

Decision to impose a penalty

1. The Competition and Markets Authority (the **CMA**) hereby gives notice[1] to JD Sports Fashion plc (**JD Sports**) of the following:

   (a) that it has imposed a penalty on JD Sports under section 94A of the Enterprise Act (the **EA02**) because it considers that JD Sports has, without reasonable excuse, failed to comply in certain respects with the requirements imposed on it by the interim order issued by the CMA under section 81 of the EA02 on 19 May 2021 to JD Sports, Footasylum Limited, formerly Footasylum plc (**Footasylum**) and Pentland Group Holdings Limited and Pentland Group Limited (together, **Pentland**) (the **IO**); and

   (b) that it has imposed a penalty on JD Sports under section 110(1) of the EA02 because, JD Sports has, without reasonable excuse, failed to comply with the requirements of the section 109 EA02 notice sent to JD Sports on 10 August 2021 (**RFI9**).

2. The total penalty for the breaches of the IO is a fixed amount of £4.3 million, comprising the following:

   (a) £2.5 million for Breach 1 (Failure to have measures in place to manage the exchange of CSI and the potential exchange of CSI);

   (b) £800,000 for Breach 2 (Exchange of CSI between Footasylum and JD Sports without the CMA's consent); and

   (c) £1 million for Breach 3 (Failure to immediately report).

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[1] In accordance with paragraph 5.2 of *Administrative penalties: Statement of Policy on the CMA's Approach* (CMA4) (**Penalties Guidance**).

3. The penalty for JD Sports' failure to comply with RFI9 is £20,000.[2]

Chronology

4. On 12 November 2021, the CMA by letter to JD Sports set out its initial concerns in relation to the suspected failures to comply with the terms of the IO and JD Sports' conduct and approach to IO compliance. The CMA stated that it was considering imposing a penalty on JD Sports. JD Sports provided its representations by letter dated 26 November 2021 (the **PL Representations**).

5. On 7 January 2022, the CMA issued to JD Sports a decision to impose a penalty under sections 94A and 110(1) of the EA02 (the **Provisional Penalty Decision**). JD Sports provided written representations on the Provisional Penalty Decision on 28 January 2022 (the **PD Representations**).[3] The CMA has considered the PD Representations and has reviewed the Provisional Penalty Decision accordingly. The submissions in the PL Representations and the PD Representations are addressed in sections D to G below.

Structure of this document

6. This document is structured as follows:

   (a) **Section A** sets out an executive summary.

   (b) **Section B** sets out the legal framework.

   (c) **Section C** sets out the factual background to the IO breaches.

   (d) **Section D** sets out the failures to comply with the IO without reasonable excuse.

   (e) **Section E** sets out the CMA's reasons for finding that a penalty of £4.3 million for the IO breaches is appropriate and proportionate in this case.

[2] Section 111(7) of the EA02 sets a statutory cap on a fix penalty imposed under s110(1) of £30,000.
[3] The Provisional Penalty Decision also stated that JD Sports should contact the CMA within 2 days of receipt of the Provisional Penalty Decision to arrange a telephone conference call to discuss its written response. On 11 January 2022, JD Sports' external legal advisers (Linklaters LLP) and the CMA attended a conference call to discuss JD Sports' request, made by way of prior email dated 11 January 2022, to make oral representations on the Provisional Penalty Decision. During this call, JD Sports' external legal advisers confirmed they were working to meet the deadline of 21 January 2022 to provide JD Sports' response. JD Sports' external legal advisers then contacted the CMA on 18 January to request an extension to 31 January 2022 to respond to the Provisional Penalty Decision. On 19 January, the CMA declined the requested extension to 31 January 2022 and approved an extension to 28 January 2022.

(f) **Section F** sets out the factual background to the failure to comply with RFI9.

(g) **Section G** sets out the CMA's reasons for finding that a penalty of £20,000 for failure to comply with RFI9 is appropriate and proportionate in this case.

(h) **Section H** sets out next steps and JD Sports' right to appeal the CMA's decision to impose the penalties.

A. Executive Summary

Failure to comply with the IO

7. The CMA has found that JD Sports has failed to comply with certain provisions of the IO without reasonable excuse.

8. On at least two occasions since the IO was issued, the Executive Chairmen and Chief Executive Officers (the **CEOs**) of JD Sports, Peter Cowgill, and Footasylum, Barry Bown, have had meetings, one in person and one by telephone, where information amounting to business secrets, know-how, commercially sensitive information, intellectual property or any other information of a confidential or proprietary nature (collectively referred to as **CSI**) passed. Neither of these meetings were reported to the CMA before or immediately reported afterwards, even when a reporting requirement was triggered by their content, or, in circumstances where there was some reason to suspect a breach of the IO.

9. The CMA found that JD Sports did not take steps to proactively and at all times prevent the disclosure of CSI in breach of paragraph 6(l) of the IO, by having in place fit for purpose policies, procedures and safeguards which would capture meetings between senior members of management of the respective businesses before those meetings took place, assess or check those meetings for compliance with the IO and ensure appropriate records were maintained. The failure to do so amounted to a breach of the IO (**Breach 1**).

10. CSI passed between the Parties on at least two occasions, one in a meeting in a carpark and one over the telephone (**Breach 2**).

11. JD Sports also failed to make a satisfactory effort to notify the CMA or the Monitoring Trustee following the meetings that those meetings occurred and involved, or that there was at least reason to suspect that they involved, exchanges of CSI (**Breach 3**). JD Sports did not, at any time, query with the

CMA or the Monitoring Trustee whether the meetings were compliant with the IO. Only one of the meetings, the telephone discussion of 4 August 2021 (**August Meeting**) is referred to in a compliance statement (**August Compliance Statement**) submitted by JD Sports to CMA, dated 20 August 2021. Indeed, even in that case the compliance statement appeared only after the CMA had prompted JD Sports to report on meetings held between the Parties, being after section 109 EA02 notices were sent to JD Sports (that is, RFI9) and Footasylum (being, **RFI7**) by the CMA on 10 August 2021, inquiring about all meetings held between the Parties since July 2020. In that context, an email was sent on 19 August 2021 to the CMA by Footasylum's external legal advisers (Eversheds Sutherland) and JD Sports' external legal advisers (Linklaters) (**19 August Email**), ie on the day before the 20 August 2021 compliance statement was submitted to the CMA by JD Sports referring to the August Meeting.

12. JD Sports' conduct shows serious failures to comply with the IO. A consequence of these failures is that the CMA has no contemporaneous information on which to assess whether the meetings between the CEOs of the Parties involved or risked pre-emptive action. As the Parties themselves have, in response to the CMA's two s109 notices, been unable to provide complete and accurate accounts of the July and August Meetings, the CMA has had to make some inferences on certain matters. The CMA has concluded that there was, at the very least, a risk that the Parties' conduct involved pre-emptive action. Such failures to comply undermine the CMA's ability to properly monitor and enforce compliance with the IO.

13. If the CMA is unable properly to monitor compliance with its interim measures (such as the IO) because the parties to the IO do not adequately comply with their obligations (as happened in this case), this undermines a key aspect of the UK's voluntary, non-suspensory merger regime. The imposition of interim measures is essential to the CMA's role in regulating merger activity, and the CMA's ability to regulate mergers effectively is a matter of public importance.[4]

14. As explained more fully in this document, the CMA has come to the conclusion that JD Sports failed to comply with the IO in the following respects:

    (a) **Breach 1 (Failure to have in place policies, procedures and safeguards to manage the exchange of CSI, and the potential**

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[4] See *Electro Rent Corporation v Competition and Markets Authority* [2019] CAT 4 ***(Electro Rent)*** at [120], [200] and [206]. The Competition Appeal Tribunal stated at [200] that "It is a matter of public importance that the merger control process, and the duties that it creates, are strictly, and conscientiously, observed." [5] Penalties Guidance, paragraph 4.4.

exchange of CSI, between JD Sports and Footasylum): JD Sports has failed to comply with paragraph 6(l) of the IO by failing to 'at all times… procure' that, except with the prior written consent of CMA, no CSI was exchanged between JD Sports and Footasylum, except where it is strictly necessary in the ordinary course of business;

(b) **Breach 2 (Exchange of CSI between Footasylum and JD Sports without the CMA's consent):** JD Sports has failed to comply with paragraph 6(l) of the IO as CSI has passed between Footasylum and JD Sports, without the CMA's prior consent and in circumstances where it was not strictly necessary in the ordinary course of business, on at least two occasions; and

(c) **Breach 3 (Failure to immediately report):** JD Sports has failed to comply with paragraph 16 of the IO by failing to immediately report suspected breaches of the IO to the CMA and Monitoring Trustee, including the exchange of CSI at a meeting that took place on 5 July (the **July Meeting**). Subsequently, a failure to notify the CMA and the Monitoring Trustee immediately after the August Meeting took place. In both meetings CSI passed between Footasylum and JD Sports without the CMA's consent and in circumstances where it was not strictly necessary in the ordinary course of business. The CMA has found that JD Sports could not have been unaware this was a breach and must at least have, or ought to have, suspected it to be a breach, engaging paragraph 16.

15. For the reasons set out more fully below in section D, the CMA considers Breach 1 (Failure to have measures in place to manage the exchange of CSI and the potential exchange of CSI) created the environment where Breaches 2, and 3 were, if not inevitable, then certainly much more likely, to occur. As such, Breaches 2 and 3 provide (non-exhaustive) examples of the types of issues that should have been captured were JD Sports' compliance mechanisms appropriate and fit for purpose. Similarly, the CMA is concerned that Breach 1 has led to a situation where JD Sports' monthly compliance statements, required to be produced to the CMA by paragraph 11 of the IO, could not be relied on by the CMA as confirming ongoing compliance with the IO, although this is not dealt with as a standalone breach in this decision.

Risk of pre-emptive action

16. The CMA's ability to adopt interim measures has a similar purpose to the suspensory effect of merger notifications in many mandatory merger control regimes (such as the European Union). Interim measures play a critical role in preventing pre-emptive action. Breaches of the IO undermine the CMA's

ability to prevent, monitor and ultimately remedy any pre-emptive action taken by merger parties, ie action that might prejudice the outcome of the CMA's investigation or impede the taking of any remedial action that might ultimately be appropriate.

No reasonable excuse

17. The CMA has found that JD Sports has no reasonable excuse for its failures to comply with the IO. The CMA has carefully considered JD Sports' PL Representations and its PD Representations (together the **Representations**) and concluded that these explanations do not amount to a reasonable excuse.

18. These failures were not caused by a significant and genuinely unforeseeable or unusual event. Nor were they caused by events beyond the control of JD Sports.[5]

Decision to impose penalty for the IO breaches

19. The CMA has decided, having had regard to its statutory duties and the Penalties Guidance, and to all the relevant circumstances of the case, that:

    (a) It is appropriate to impose a penalty in connection with Breaches 1 to 3, including the serious nature of JD Sports' failure to comply with the IO and the risks arising from it, and the fundamental undermining of the CMA's ability to prevent, monitor and ultimately remedy any pre-emptive action is substantially undermined. In relation to Breach 3 the CMA has considered the serious and flagrant nature of the breach.

    (b) that a penalty of:

        i. £2.5 million for Breach 1 (Failure to have measures in place to manage the exchange of CSI and the potential exchange of CSI);

        ii. £8000,000 for Breach 2 (Exchange of CSI between Footasylum and JD Sports without the CMA's consent); and

        iii. £1 million for Breach 3 (Failure to immediately report),

        is appropriate and proportionate in the round to achieve the CMA's policy objectives of incentivising compliance with interim measures and

[5] Penalties Guidance, paragraph 4.4.

deterring future failures to comply by both JD Sports and other persons who may be considering future non-compliance.

(c) The penalty for JD Sports' failure to comply is proportionate, given the penalty for Breaches 1 to 3 represents only 0.063% of JD Sports' global turnover (substantially below the statutory maximum of 5% of JD Sports' global turnover), and in view of JD Sports' significant financial resources, a penalty of the amount in this decision is not anomalous, nor would it affect JD Sports disproportionately at 0.98% of operating profit, 1.65% of profit after tax, and 0.25% of net assets.

Failure to comply with RFI9

20. The CMA has found that JD Sports failed to comply with RFI9 when JD Sports' response to RFI9 stated that a meeting which took place on 22 December 2020 (**December Meeting**) between Mr Cowgill and Barry Bown (Footasylum's CEO) did not involve any documents being tabled and/or exchanged. Video footage of that meeting, which the CMA has shared with JD Sports, shows that during the meeting which took place in Mr Bown's black Porsche, Mr Cowgill and Mr Bown shared and discussed a document, which appears to be a spreadsheet. RFI9 specifically required JD Sports to 'provide any documents that were tabled or exchanged during that meeting'.[6] The CMA has found that failure to identify and disclose any documents which were tabled and/or exchanged at the December Meeting is a serious failure to comply with RFI9 and s 109 of the EA02.

Decision to impose penalty for the failure to comply with RFI9

21. The CMA has decided, having had regard to its statutory duties and the Penalties Guidance, as well as to all the relevant circumstances of the case and JD Sports' Representations, to impose a penalty for the failure to comply with RFI9. The CMA considers that the failure to fully and properly respond to RFI9 is a flagrant and serious breach of JD Sports' obligations to comply with its obligations under the EA02 which undermines the purpose of section 109 EA02 notices and the CMA's ability to accurately gather information about potential issues connected to the Merger.

22. The CMA has decided to impose a penalty of £20,000, which is appropriate and proportionate in the round to achieve the CMA's policy objectives of incentivising compliance with section 109 EA02 notices and deterring future

[6] JD Sports RFI9.

failures to comply by both JD Sports and other persons who may be considering future non-compliance.

B. Legal Framework

Relevant legislation

23. Section 81 of the EA02 is the basis for the IO. Section 81(2) provides that the CMA may, by order, for the purpose of preventing pre-emptive action, impose certain restrictions and obligations.

24. Section 80(10) of the EA02 defines 'pre-emptive action' for the purposes of section 81, as 'action which might prejudice the reference concerned or impede the taking of any action … which may be justified by the CMA's decisions on the reference'.

25. Section 81(2B) of the EA02 provides that a person may, with the CMA's consent, take action (or action of a particular description) that would otherwise contravene an interim order. In practice, where the CMA grants such consent, it does so by making a derogation in respect of specific provisions of an interim order.

26. Section 86(6) of the EA02 provides that an order made pursuant to section 81 of the EA02 is an enforcement order. Sections 94(1) and 94(2) of the EA02 provide that any person to whom such an order relates has a duty to comply with it. A company is a person within the meaning of section 94(2) of the EA02 and Schedule 1 of the Interpretation Act 1978.

27. Section 94A(1) of the EA02 provides that 'Where the appropriate authority considers that a person has, without reasonable excuse, failed to comply with an interim measure, it may impose a penalty of such fixed amount as it considers appropriate'.

28. Section 94A(2) of the EA02 provides that 'A penalty imposed under subsection (1) shall not exceed 5% of the total value of the turnover (both in and outside the United Kingdom) of the enterprises owned or controlled by the person on whom it is imposed.'[7]

29. Section 94A(8) of the EA02 defines 'interim measure' as including an order made pursuant to section 81 of the EA02.

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[7] The Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014 makes provision for when an enterprise is to be treated as controlled by a person and the turnover of an enterprise.

30. There is no statutory time limit within which the CMA must impose a penalty under section 94A(1) of the EA02.

31. Section 94B(1) and (2) of the EA02 requires the CMA to prepare and publish a statement of policy on how it uses its powers to impose a financial penalty under section 94A of the EA02 and how it will determine the level of the penalty imposed.[8]

32. Section 114 of the EA02 provides an appeal mechanism for a person on whom a penalty is imposed.

The concept of pre-emptive action

33. The meaning of 'pre-emptive action' and the role of interim measures in merger control has been considered by the Tribunal on a number of occasions.

34. In *Intercontinental Exchange, Inc v Competition and Markets Authority*[9] the Tribunal observed that 'pre-emptive action" is a broad concept. It concerns conduct which might prejudice the reference or which might impede action justified by the CMA's ultimate decision'.[10] In *Facebook v CMA*[11], the Tribunal (subsequently upheld by the Court of Appeal) added that pre-emptive action includes 'action that has the potential to affect the competitive structure of the market during the CMA's investigation'.[12]

35. The breadth of the CMA's statutory powers to prevent pre-emptive action was emphasised by the Court of Appeal in *Facebook v CMA (CoA)*[13]. The Court of Appeal confirmed those powers include the ability to regulate activity merging parties might take in connection with or as a result of the merger that has the potential to affect the competitive structure of the market in question during the merger investigation.[14]

36. In *Stericycle International LLC & Anors v Competition Commission*[15] the Tribunal considered the meaning of pre-emptive action in section 80(10) of the EA02 and held that 'the word "might" implies a relatively low threshold of

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[8] Penalties Guidance
[9] Intercontinental Exchange, Inc v Competition and Markets Authority [2017] CAT 6 (***Intercontinental Exchange***).
[10] *Ibid* at [220].
[11] [2020] CAT 23.
[12] *Facebook v CMA* at [124]; see also at paragraph 21. The Tribunal's judgment was upheld by the Court of Appeal (*Facebook v CMA* [2021] EWCA Civ 701 (***Facebook v CMA* (CoA)**), at [56]).
[13] [2021] EWCA Civ 701.
[14] *Facebook v CMA* (CoA) at [56].
[15] Stericycle International LLC, Stericycle International Limited and Sterile Technologies Group Limited v Competition Commission [2006] CAT 21 (***Stericycle***).

expectation that the outcome of a reference might be impeded'.[16] The Tribunal added that at the time of considering whether to exercise the statutory powers to make an interim order (for the purpose of preventing pre-emptive action), the CMA necessarily cannot be sure whether any action being taken (or proposed to be taken) by the merging parties 'will ultimately' impede any action being taken by the CMA as a result of the reference.[17]

37. In *Intercontinental Exchange* the Tribunal held that '*[t]*he word "might" means that it is the possibility of prejudice to the reference or an impediment to justified action which is prohibited. The IEO catches more than just actual prejudice or impediments, which is why the onus is on the addressee of the IEO to seek consent from the CMA if their conduct creates the possibility of prejudice or an impediment' (emphasis added).[18] The Tribunal also held that '… where an IEO has been issued, it is incumbent on parties to take a carefully considered view as to whether their conduct might arouse the reasonable concern of the CMA that the agreements that they reach are significant enough that they might prejudice the reference or impede justified action…'.[19]

The purpose of an IO

38. The Supreme Court has held that '*[t]*he purpose of merger control is to regulate in advance the impact of concentrations on the competitive structure of markets.'[20]

39. It is of central importance to the UK's voluntary, non-suspensory merger regime to regulate in advance the impact of a merger on the competitive structure of markets that interim measures should be effective, particularly where, as in this case, the merger is completed before it is identified and examined by the CMA. In *Facebook v CMA*, the Tribunal recognised the wide power conferred on the CMA by section 72[21] of the EA02 in imposing interim measures and noted that *'[t]*he corollary of the voluntary nature of the regime is that the CMA is given wide powers to suspend the integration of merging companies and it is for merging parties to satisfy the CMA that the relaxation of any interim measures imposed by the CMA is justified.*'*[22]

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[16] *Stericycle* at [129].
[17] *Ibid*. Affirmed in *Facebook v CMA* at [124].
[18] Intercontinental Exchange at [220].
[19] *Ibid* at [223].
[20] *Société Coopérative de Production SeaFrance SA (Respondent) v The Competition and Markets Authority and another* (Appellants) [2015] UKSC 75 at [4]; see also [35].
[21] Section 72 of the EA02 relates to orders made during a Phase 1 merger investigation. The orders made during a Phase 2 merger investigation are made under section 81 of the EA02.
[22] *Facebook v CMA* at [156].

40. The purpose of an IO is to prevent any action which might prejudice the merger investigation or impede the taking of any action which may be justified by the CMA's decision on the reference.[23] The broad nature of pre-emptive action is reflected in the similarly broad wording of the IO which the Tribunal held in *Intercontinental Exchange* 'should be interpreted to give full effect to its legitimate precautionary purpose'.[24] Given the statute's precautionary purpose, the Tribunal in *Facebook v CMA* confirmed the CMA has a wide margin of appreciation in imposing an IEO under section 72 of the EA02.[25] The Tribunal further added in that case that the role of interim measures also includes preventing anti-competitive harm from the merger impacting the position of other undertakings on any affected markets, which may be irremediably detrimental.[26]

41. More generally, in *Electro Rent*[27], the Tribunal noted that '*[the]* CMA's role in regulating merger activity, and its ability to do so effectively, is a matter of public importance' and agreed with the CMA's submission that interim orders serve a particularly important function where, as in the case in question, the merger has been completed before it was examined by the CMA.[28]

42. Where a merger has been completed and an IO has been imposed, it is critical that any business which has been acquired continues to compete independently with the acquiring business and is maintained as a going concern. This is to ensure that the viability and competitive capability of each of the merging parties is not undermined pending the outcome of the merger investigation, as this would risk prejudicing the reference or impeding any action the CMA might need to undertake should it ultimately find that the merger has resulted in a substantial lessening of competition (and any resulting adverse effects).

43. Consistent with the above, the IO contains positive obligations on the addressees to do certain things as well as obligations to refrain from taking certain actions. The Tribunal in *Facebook v CMA* noted that 'it is of the utmost importance that interim measures are scrupulously complied with when the CMA is considering a derogation request and merging parties should not themselves form judgements or reach decisions that are properly for the CMA' (emphasis added).[29] The onus is on the merging parties to seek consent if

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[23] Section 80(10) of the EA02.
[24] Intercontinental Exchange at [220].
[25] As above, Section 72 of the EA02 relates to orders made during a Phase 1 merger investigation. The orders made during a Phase 2 merger investigation are made under section 81 of the EA02.
[26] *Facebook v CMA* at paragraph 21, upheld in *Facebook v CMA* (CoA) at [59].
[27] *Electro Rent v CMA* [2019] CAT 4.
[28] Ibid at [120]. The Tribunal stated at paragraph 200 that 'It is a matter of public importance that the merger control process, and the duties that it creates, are strictly, and conscientiously, observed.'
[29] *Facebook v CMA* at [158]; see also *Electro Rent* at [206].

their conduct creates the possibility of prejudice or impediment[30] and engage with the CMA by submitting a derogation request which is 'fully specified, reasoned and supported by relevant evidence'.[31]

44. Within that context, the provision of periodic compliance statements is an important obligation in the IO to ensure that businesses take seriously their compliance obligations and put in place appropriate mechanisms to monitor and report on their compliance with the IO to the CMA.

45. This transparency also ensures the CMA becomes aware of and understands any material developments within businesses subject to an IO. This, in turn, enables the CMA to ensure that interim measures are fully complied with, to investigate in the event of potential failures to comply, to decide whether it is appropriate to impose a penalty for any instance of non-compliance, and to take action swiftly to address and seek to resolve any concerns it may identify as regards pre-emptive action.

46. In accordance with its precautionary purpose, the IO seeks to protect against the *possibility or risk* of prejudice to the reference or potential remedies. It is incumbent on merging parties to comply with all obligations under the IO, including the monitoring and reporting obligations. When assessing whether there has been a failure to comply with interim measures, the CMA does not need to demonstrate that the conduct of a merging party would impact the competitive structure of the market, nor demonstrate that it has caused actual prejudice to the outcome of a reference or impeded the taking of any appropriate remedial action.[32] A failure to comply with the obligations set out in the IO is in itself sufficient to engage the penalty provisions under section 94A of the EA02.

Relevant provisions of the IO

47. The provisions of the IO relevant to the assessment carried out in this decision are as follows:[33]

Paragraph 6

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[30] Intercontinental Exchange at [220].
[31] *Facebook v CMA* at [156].
[32] See paragraphs 79 to 81 of Notice of penalty addressed to Electro Rent Corporation dated 12 February 2019, Penalty Notice (publishing.service.gov.uk) and paragraphs 115 to 116 of Notice of penalty addressed to Paypal Holdings, Inc. dated 18 September 2019, Penalty notice (publishing.service.gov.uk).
[33] These are the provisions of the IO in force at the time the conduct described in this Decision occurred. However, a Variation Order was made on 13 October 2021 pursuant to section 81(5)(b) of the EA02 to vary the IO to apply to Pentland Capital Limited (**PCL**) and Pentland Group (Trading) Limited (**PGLT**) from that date. The Variation Order is available here.

Further and without prejudice to the generality of paragraph 5 and subject to paragraph 3, JD Sports and Footasylum shall at all times during the Specified Period procure that, except with the prior written consent of the CMA:

…

(l) no business secrets, know-how, commercially-sensitive information, intellectual property or any other information of a confidential or proprietary nature relating to either of the Footasylum business or the JD Sports business shall pass, directly or indirectly, from the Footasylum business on the one hand (or any of its employees, directors, agents or affiliates) to the JD Sports business on the other hand (or any of its employees, directors, agents or affiliates), or vice versa, except where strictly necessary in the ordinary course of business (for example, where required for compliance with external regulatory and/or accounting obligations) and on the basis that, should the Merger be prohibited, any records or copies (electronic or otherwise) of such information that have passed, wherever they may be held, will be returned to the business to which they relate and any copies destroyed.

Paragraph 16

If JD Sports, Footasylum or Pentland has any reason to suspect that this Order might have been breached it shall immediately notify the CMA and the Monitoring Trustee.

48. The definitions in the IO applicable to the provisions set out above are:

(a) '**Commencement Date**' means the date on which this Order is made, namely 19 May 2021;

(b) '**Footasylum business'** means the business of Footasylum and its subsidiaries carried on as at the Commencement Date;

(c) '**JD Sports business**' means the business of JD Sports and its subsidiaries but excluding the Footasylum business, carried on as at the Commencement Date;

(d) '**Merger**' means the completed acquisition by JD Sports of Footasylum;

(e) '**ordinary course of business**' means matters connected to the day-to-day supply of goods and/or services by the JD Sports business, Footasylum business or the Pentland business and does not include matters involving significant changes to the organisational structure or related to the post-Merger integration of JD Sports, Footasylum and Pentland;

(f) '**Specified Period**' means the period between the Commencement Date and the date that this Order ceases to be in force in accordance with section 81(7) of (8) of the Act.

C. Factual Background

The Transaction

49. On 12 April 2019, JD Sports completed the acquisition of Footasylum for approximately £90 million (as defined above, the Merger). The transaction was not notified to the CMA but was subsequently detected by the CMA's mergers intelligence committee. JD Sports was informed on 1 October 2019 that the CMA's mergers intelligence committee had determined that a merger investigation was warranted.

50. JD Sports is a publicly traded company listed on the London Stock Exchange, with headquarters in Bury, United Kingdom. JD Sports and Footasylum are each active in the retail supply of sports-inspired casual products in the UK, both in-store and online.

The IO

51. Following completion of the acquisition by JD Sports of Footasylum on 12 April 2019, the CMA imposed an initial enforcement order under section 72 of the EA02 on Pentland and JD Sports on 17 May 2019.

52. On 1 October 2019, in exercise of its duty under section 22(1) of the EA02, the CMA referred the Merger for a Phase 2 investigation.[34]

53. On 7 October 2019, the CMA issued directions under paragraph 12 of the IO for the Parties to appoint a monitoring trustee (the **Monitoring Trustee**) for the purpose of monitoring compliance with the IO.[35]

54. On 6 May 2020, the CMA issued its final report on the Merger concluding that the Merger would result in a substantial lessening of competition in sports-inspired casual footwear and apparel products sold both in stores and online. Pursuant to its final report, the CMA accepted final undertakings from the Parties and Pentland on 13 July 2020 (**2020 Final Undertakings**), which

[34] The CMA subsequently served an interim order under section 81 of the Act on Pentland Group Limited (Jersey), Pentland Group Limited, and JD Sports Fashion plc on 26 November 2019.
[35] Directions dated 7 October 2019.

contained hold separate obligations focussed on the divestment business[36] (ie Footasylum).

55. On 17 June 2020, JD Sports made an application to the Competition Appeal Tribunal (the **CAT**) for a review of the CMA's decision in the final report. On 13 November 2020 the CAT handed down its judgment[37] quashing the final report in so far as its conclusions were based on the CMA's assessment of the likely effects of the COVID-19 pandemic and remitting the decision back to the CMA for reconsideration (the **Remittal**).

56. On 19 May 2021, the CMA issued the IO (based on a standard template for interim measures[38]) addressed to JD Sports, Footasylum (together, the **Parties**), and Pentland Group Holdings Limited and Pentland Group Limited (together, **Pentland**), in accordance with section 81 of the EA02 to prevent pre-emptive action.

57. Various derogations were granted in respect of the IO,[39] however, those derogations are not directly relevant to the matters that form the basis of the CMA's conclusion that JD Sports has breached the IO.

58. On 5 November 2021, the CMA issued a Final Report in which it found that the completed acquisition by JD Sports of Footasylum has resulted, or may be expected to result, in a substantial lessening of competition (**SLC**) in the retail supply of sports-inspired casual footwear and in the retail supply of sports-inspired casual apparel sold both in stores and online in the UK.[40] The Final Report has not been appealed by either JD Sports, Footasylum, or Pentland and time to appeal the Final Report has now passed.

59. On 14 January 2022, the CMA accepted final undertakings (**2022 Final Undertakings**) from the Parties which contained hold separate obligations focussed on the divestment business (ie Footasylum).

D. Failures to comply with the IO

60. On the basis of the evidence provided to the CMA, and following careful assessment of the Provisional Penalty Decision Response, for the reasons

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[36] An exception to this was that the provision within the Phase 2 interim order prohibiting the exchange of confidential information between the Parties was carried over to the 2020 Final Undertakings.
[37] JD Sports Fashion plc v Competition and Markets Authority [2020] CAT 24.
[38] The template is used by the CMA as the basis for interim measures made by it under the EA02 in relation to completed mergers. The template is available here.
[39] See for example derogations of 19 May 2021, 25 May 2021, 29 June 2021, 6 July 2021, 9 July 2021, 24 July 2021, 11 August 2021, 20 August 2021, 8 September 2020, 17 September 2021, 20 September 2021, 22 September 2021, and 9 October 2021.
[40] A copy of the Final Report is available on the CMA's case page here: https://www.gov.uk/cma-cases/jd-sports-fashion-plc-footasylum-plc-merger-inquiry#final-report-on-the-remittal

set out below the CMA has decided that JD Sports has failed to comply with the IO in the following respects:

(a) Breach 1 – JD Sports failed to comply with paragraph 6(l) of the IO by failing to have in place policies, procedures and safeguards to manage the exchange of CSI, and the potential exchange of CSI, between JD Sports and Footasylum;

(b) Breach 2 – JD Sports failed to comply with paragraph 6(l) of the IO by reason of the passing of CSI between Footasylum and JD Sports without the CMA's consent; and

(c) Breach 3 – JD Sports failed to comply with paragraph 16 of the IO by failing to immediately report suspected breaches of the IO to the CMA and Monitoring Trustee, including the passing of CSI at the July Meeting and, subsequently, a failure to notify the CMA and the Monitoring Trustee immediately after the August Meeting took place.

Factual background to the four breaches

61. Before setting out the CMA's decision in relation to each breach, it is necessary to set out the background to the CMA becoming aware of the issues with JD Sports' compliance with the IO.

62. The CMA is aware that at least two meetings between the CEOs of JD Sports and Footasylum took place in July 2021 (the July Meeting, as defined above) and August 2021 (the August Meeting, as defined above). These meetings were not reported to the CMA, either in advance of the meetings taking place, or through one of the mechanisms available in the IO for reporting to the CMA. No record of the two meetings exists, nor does it appear, from the evidence the CMA has seen, that these meetings were discussed internally, either with JD Sports' in-house counsel or its external advisers, to consider compliance with the IO before the meetings were held.

63. The CMA was first made aware by a third party that JD Sports and Footasylum may have been in breach of the 2020 Final Undertakings. The third party informed the CMA that it had video material showing senior executives of the Parties meeting on two occasions in December 2020.[41]

[41] As the video material is not being relied upon for any findings by the CMA in relation to the breaches of the IO the identity of the third party who provided it is not relevant or necessary to disclose at this time. Where the CMA does rely on the video in relation to Breach 4, the CMA does not understand the content or authenticity of the video to be in dispute. As such, the CMA does not consider it appropriate to disclose the identity of the third party in those circumstances.

64. The CMA became aware of the July Meeting and a possible breach of the IO upon receipt of the video material from the third party on 28 July 2021.

65. In order to investigate the potential breach of the 2020 Final Undertakings and to investigate the potential breach of the IO, the CMA sent two sets of section 109 EA02 notices to both parties:

(a) The first set of section 109 EA02 notices was sent to JD Sports (RFI9, as defined above) and Footasylum (RFI7) on 10 August 2021.

(b) The CMA received responses from JD Sports and Footasylum to RFI9 and RFI7 respectively on 24 August 2021.

(c) The CMA sent a further set of section 109 EA02 notices to JD Sports and Footasylum (**RFI10**) on 24 September 2021.

(d) The CMA received responses from JD Sports and Footasylum to RFI10 on 20 October 2021.[42]

66. At around the same time as the CMA sent RFI9 and RFI7, it received the 19 August Email from JD Sports' and Footasylum's external legal advisers. The 19 August Email was not referred to in either party's response to RFI9 and RFI7. JD Sports has subsequently claimed that the August Meeting was not captured by the requests in RFI9 and that the 19 August Email was an entirely voluntary disclosure of the August Meeting and a suspected breach of the IO.[43] As discussed below, the CMA does not accept this position. The August Meeting clearly fell within the ambit of RFI9 and, it would appear, the 19 August Email may have been sent in the context of the CMA probing the Parties about meetings between their respective senior employees.

67. The facts and circumstances of the July Meeting and the August Meeting based on the information contained in the RFI responses and the 19 August Email are set out below.

<u>July Meeting</u>

68. JD Sports has not explained for what purpose the July Meeting was convened, or who initiated the meeting. The evidence the CMA has seen, being JD Sports' response to RFIs 9 and 10 and Footasylum's response to RFIs 7 and 10, suggests that the July Meeting was initiated by text or instant

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[42] RFI10 required JD Sports to provide its response by 1 October 2021, however, JD Sports subsequently sought an extension to 15 October 2021 because it had engaged a third-party forensics technology team to collect mobile data in order to respond to RFI10. JD Sports then sought a further extension to 20 October 2021 on the basis that the data collection was taking longer than anticipated.
[43] JD Sports Representations at paragraph 71.

message exchange between Mr Bown (Chairman and CEO of Footasylum) and Mr Cowgill (Chairman and CEO of JD Sports). However, the messages disclosed to the CMA as part of each party's response to RFI10 do not disclose a purpose for the meeting. In any event, certain messages and/or phone records were incomplete because JD Sports' external technical advisers, Deloitte, were unable to transfer parts of Mr Cowgill's mobile phone call logs to the review platform.[44] Similarly, Mr Bown's phone records were incomplete because Mr Bown deletes these records on an 'ad hoc' basis.[45] JD Sports obtained Mr Cowgill's phone records from his mobile phone carrier for July and August which show one call between Mr Cowgill and Mr Bown on 2 July 2021 lasting approximately three minutes.[46] Mr Cowgill, however, is unable to recall what was discussed on this call 'but assumes it was to agree the arrangements for the July Meeting'.[47]

69. As a result, the CMA has only the accounts, prepared some months after the meeting and in the context of responding to RFI10, of Mr Bown, Mr Cowgill and Ms Mawdsley (JD Sports' General Counsel). Those accounts do not provide the degree of detail the CMA would expect to have been provided in the context of the IO and Merger. Instead, the accounts provide only very high-level information about topics the attendees believe were discussed, albeit in the context of fading memories. There are, as a result, serious gaps in the accounts where the details of the discussions have been omitted.

70. What those accounts do state is as follows:

(a) The July Meeting took place in a car park, the exact location of which has not been disclosed, on the morning of 5 July 2021,[48] inside Mr Cowgill's black Mercedes.

(b) The meeting was said to initially have been intended to take place at a Burger King near the Bridgehall Industrial Park. However, the Burger King was apparently not open that morning, perhaps due to Covid-19 or because it was not open at that time of the day. Mr Cowgill, Ms Mawdsley, and Mr Bown then appear to have each driven to a nearby B&Q at the Industrial Park where it was believed there was a café. Again, that café was either closed due to Covid-19 or never existed. Upon discovering that

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[44] JD Sports' response to RFI10, dated 20 October 2021 (**JD Sports' RFI10 Response**), at paragraph 24. The paragraph goes on to say 'Deloitte confirmed that this could be as a result of a technical issue or because some of the call records were removed during a software update or by the user. PC [Mr Cowgill] has said that he did not knowingly remove data from his call logs on his phone (nor would he know how to do so).'
[45] Footasylum's response to RFI10 dated 24 October 20210 (**Footasylum's RFI10 Response**) at paragraph 5.24.
[46] JD Sports RFI10 Response at paragraph 25.
[47] *Ibid* at paragraph25.
[48] *Ibid* at paragraph 15, the response provides that Mr Cowgill cannot recall in whose car the discussion took place. Ms Mawdsley recalls that it was Mr Cowgill's car.

there was no café at B&Q, the three decided to conduct the meeting in a nearby car park.[49]

(c) Mr Bown and Mr Cowgill said they discussed various matters relating to Footasylum's upcoming oral hearing before the CMA as well as a 'personal' matter regarding Mr Bown's [personal contact], who had recently resigned as a [✂] of JD Sports.[50]

(d) Mr Bown and Mr Cowgill also said they discussed Mr Bown's 'future role' should the Merger be approved.[51]

(e) Ms Mawdsley was present for a portion of the discussion, but cannot recall specific details, did not take any notes, [✂].[52]

71. It was initially not made clear to the CMA why Ms Mawdsley was present at this meeting.[53] JD Sports now (being after two responses to the two RFIs where this was not raised) suggest that Ms Mawdsley was present at the meeting as a safeguard against potential IO breaches.[54] However, as Ms Mawdsley did not take any notes, does not appear to have spoken at all during the meeting, was not present for the whole meeting, and does not herself have a complete recollection which can be relied on for the purposes of investigating potential breaches of the IO, the CMA does not accept this explanation as to her presence, particularly without any evidence supporting this explanation. Ms Mawdsley is said to have left Mr Cowgill's car at the point where the two men began to discuss what is described to the CMA in the JD Sports RFI10 Response as a personal matter relating to Mr Bown's [personal contact].[55]

72. There is an inconsistency between Footasylum's and JD Sports' responses to RFI10 where they describe Mr Bown's, Mr Cowgill's and Ms Mawdsley's recollections of the July Meeting. In the JD Sports RFI10 Response, Mr Cowgill said that he thinks he recalls also discussing:

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[49] JD Sports RFI10 Response at paragraph 15; Footasylum's to RFI10 Response at paragraph 1.13.
[50] JD Sports RFI10 Response, at paragraphs 5 to 8.
[51] *Ibid* at paragraph 8.
[52] *Ibid* at paragraphs 11 to 13.
[53] However, JD Sports RFI10 Response, at paragraphs 10 to 13, provides that Ms Mawdsley was informed of the meeting (which was to take place on Monday 5 July 2021) on Friday, but was not told the location until some time over the weekend. It is not clear from the response if Ms Mawdsley was told the purpose of the meeting, nor how she was told about the location over the weekend as no text messages, calls or emails were provided to support this.
[54] PL Representations at paragraph 9(d).
[55] Again, there is no contemporaneous evidence to support this claim that the two CEOs discussed a personal matter and Ms Mawdsley's account, in JD Sports' RFI10 Response at paragraph 13, does not mention her being told that the two CEOs were to discuss a personal matter, instead Ms Mawdsley says she made the assumption that it was to enable him [BB] to discuss a personal matter with PC.

> that Footasylum had two contracts that were [✂]: a lease of [✂] and a logistics contract, and that BB *[Mr Bown]* wanted to canvas *[sic]* his – PC's *[Mr Cowgill's]* – views as to whether [✂].[56]

73. It appears that Mr Bown did not recall this aspect of the July Meeting, or decided to omit it from the account of the July Meeting, as it does not feature in the Footasylum RFI10 Response (or in Footasylum's RFI7 response).

74. JD Sports' RFI10 Response confirms that neither Mr Cowgill or Ms Mawdsley took any notes at this meeting or afterwards.[57] The Footasylum RFI10 Response also confirms that Mr Bown did not take any notes,[58] leaving no contemporaneous record of the content of the July Meeting. The response also confirms that 'there was no meeting agenda (in part, because of the informal context of the meeting)'.[59] The consequence of this is that the CMA now only has the accounts of the three attendees produced more than two months after the meeting took place. The CMA therefore has to make some inferences about the content of the meeting based on those accounts and in the context of the IO being in place requiring the Parties to scrupulously comply with its terms. The inference the CMA has drawn from the July Meeting is that, based on the topics discussed, CSI was exchanged during that meeting in relation to the discussion about two contracts, a lease and a logistics/transport contract. The CMA has also concluded that the absence of contemporaneous materials, records of the purpose of the meeting, or any internal discussions about the July Meeting and its appropriateness and safeguards that needed to be in place, mean that JD Sports has failed to comply with its proactive obligations under the IO to 'at all times… procure' compliance with paragraph 6(l).

<u>August Meeting</u>

75. As set out above, the CMA did not become aware of the August Meeting until the 19 August Email. This is despite RFI9, which required JD Sports to detail all meetings between the Parties since July 2020 and detail any documents tabled and/or discussed at those meetings, having been sent to JD Sports on 10 August 2021 (ie six days after the meeting had taken place). The response to RFI9, received on 24 August 2021, does not mention the August Meeting or the 19 August Email.

76. The 19 August Email describes the telephone call as being 'effectively bilateral; Mr Cowgill's executive assistant was also present but did not

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[56] *Ibid* at paragraph 9.
[57] *Ibid* at paragraph 22.
[58] Footasylum RFI10 Response at paragraph 1.18.
[59] JD Sports RFI10 Response, at paragraph 21.

participate in or pay detailed attention to the discussion'. The 19 August Email also describes the call which took place as being for the purpose of discussing:

> A pressing post-merger integration planning question which Mr Bown wanted to check with Mr Cowgill in the event that the merger were cleared by the CMA. In particular, Mr Bown had been asked by Footasylum's landlord about a [✂] lease [✂]. The purpose of the call was for Mr Bown to ask Mr Cowgill whether, if the deal were cleared, JD would have the [✂]. The answer to this question was relevant to Mr Bown's own discussion as to what to do about the lease [✂].
>
> Similarly Mr Bown also wanted to understand from Mr Cowgill, if the deal were cleared, whether JD [✂]. Mr Bown mentioned to Mr Cowgill that Footasylum's current transport contract [✂] and the answer to this question was relevant to Mr Bown's [✂].
>
> Mr Cowgill could not answer Mr Bown's question on the spur of the moment. Nor, during that call, did Mr Cowgill comment on, or otherwise, seek to influence Mr Bown's pending decisions with respect to Footasylum's landlord or other suppliers… There was no follow-up on these issues and no contact between Mr Bown and Mr Cowgill since the call of 4 August [the August Meeting].
>
> Mr Bown also recalls mentioning on the call that, [✂], Footasylum had closed [✂] stores and had a further [✂] in the pipeline; Mr Cowgill did not recall these details. In this context Mr Bown inadvertently appears to have mentioned at least some store locations. Mr Bown does not specifically recall whether store names were mentioned, but Mr Cowgill recalls general reference being made to [✂] locations, [✂] (but with no relevant detail, e.g. CMA derogation status…). The planned exit from the [✂] locations mentioned was not public information at the time. Mr Cowgill did not consider this store information to be of any consequence. He did not take a note of any kind nor pass on this information to anyone…

77. The 19 August Email did not mention whether any documents were discussed at the August Meeting. JD Sports has, in its PL Representations, claimed that the 19 August Email was a voluntary disclosure of the August Meeting and that the August Meeting was not caught by RFI9, meaning no mention of it was required in the response. For the reasons set out below, the CMA rejects this suggestion by JD Sports and instead has found that the 19 August Email was sent as a result of the CMA's probe into meetings between JD Sports and Footasylum and not as a voluntary disclosure of a suspected breach of the IO.

78. The JD Sports RFI10 Response provides a brief description of Mr Cowgill's recollection of the August Meeting; it does not mention the 19 August Email. Mr Cowgill recalls:

(a) That Mr Bown had contacted him via text to arrange a discussion before Mr Cowgill went on holiday.[60]

(b) Mr Cowgill considered the call to be a courtesy from his perspective so that Mr Bown 'did not think [he] did not have time for him'.[61]

(c) The logistics contract and lease were discussed but Mr Cowgill did not 'offer his opinion… and told [Mr Bown] that he was unable to discuss these matters in a brief telephone call'.[62] Mr Cowgill recalls that he said he 'was unable to discuss these matters in a brief telephone call'.[63] In contrast, the 19 August Email states 'Mr Cowgill did not comment on or otherwise seek to influence Mr Bown's pending decision with respect to Footasylum's landlord and other suppliers'.[64]

(d) That they discussed Footasylum 'closing a small number of stores' with reference being made to at least the [✂].[65]

79. The JD Sports RFI10 Response does not indicate that Mr Cowgill recalls there being a discussion about Footasylum '[✂]'.[66] This is, however, mentioned in the Footasylum RFI10 Response.

80. There is no evidence to suggest that any text message sent to or from Mr Cowgill by Mr Bown set out the reason for the call being set up or what was expected to be discussed during the August Meeting. There was a call, lasting approximately 6 minutes between Mr Bown and Mr Cowgill on 3 August 2021,[67] which has not been explained, as well as a missed call from Mr Bown to Mr Cowgill on 3 August[68] and a missed call, at 17:38 on 4 August 2021 from Mr Bown to Mr Cowgill.[69] These calls have not been explained.

81. JD Sports and Footasylum have provided only limited records around the August Meeting.

82. Mr Cowgill's executive assistant was in the room with Mr Cowgill when the call with Mr Bown took place, but 'the call was not on speakerphone' and 'after a brief reference to her potentially arranging a meeting between [Mr Cowgill] and [Mr Bown] she did not participate in… the call'.[70] Again, there is no

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[60] JD Sports RFI10 Response at paragraph 30.
[61] *Ibid* at paragraph 31.
[62] *Ibid* at paragraph 32.
[63] *Ibid* at paragraph 33.
[64] 19 August Email.
[65] JD Sports RFI10 Response at paragraph 33.
[66] Footasylum's RFI10 Response at paragraph 2.9.
[67] JD Sports RFI10 Response, Annex 806.
[68] *Ibid*.
[69] *Ibid*.
[70] JD Sports RFI10 Response at paragraph 35.

evidence to suggest what this potential meeting between Mr Cowgill and Mr Bown would be arranged for, ie what the purpose of such a meeting would be. As with the July Meeting, no notes or records exist of the August Meeting and the CMA understands that Mr Bown did not make any himself.[71] Similarly, the CMA understands there was no agenda prepared in advance of the telephone call, and Mr Bown does not appear to have raised the call, its intended purpose, or intended discussion points, with anyone internally at Footasylum, including in-house counsel, or Footasylum's external advisers. In fact, it appears that Mr Cowgill only disclosed the call to JD Sports' General Counsel some 14 days later when he had returned from his holiday.[72]

83. According to JD Sports, there was no meeting agenda or contemporaneous notes of the August Meeting.[73]

Breach 1 – Failure to have measures in place to manage the exchange of CSI and the potential exchange of CSI

The obligation under the IO

84. The obligation in the IO that JD Sports 'shall at all times… procure' (emphasis added) that no CSI passes between the parties, directly or indirectly, without the CMA's prior consent and except where it is strictly necessary in the ordinary course of business (paragraph 6(I)) is an important provision. Interim measures, like the IO here, operate on the basis that the merging parties are required to ensure certain things do not happen, such as the exchange of CSI. This is because such outcomes raise the very real and significant risk of pre-emptive action and may impede the CMA taking certain action in relation to the merger reference. In the context of CSI specifically, the IO requires preventative measures be adopted. Proactive steps are of fundamental importance because the risk of direct or indirect exchanges is serious, and is more likely to arise in circumstances where the merging parties have frequent contact with each other during the course of a merger review. The risk is even more so when senior people within the merging parties are meeting with each other on a regular basis and admit to having a close personal relationship with one and other.[74] As such, the importance that addressees of interim measures 'at all times… procure' that CSI does not pass between the parties is paramount and requires preventative measures to be put in place.

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[71] *Ibid* at paragraphs 38 and 39.
[72] JD Sports Representations at paragraph 26(b).
[73] JD Sports RFI10 Response at paragraphs 39 and 40.
[74] JD Sports RFI10 Response at paragraph 5.

85. The obligation in paragraph 6(l) is a prospective obligation (rather than a retrospective one) because, where CSI is exchanged, it is very difficult to then undo or monitor how the parties subsequently use the information. This is particularly true where the CSI is exchanged between senior members of the merging businesses as the exchanged CSI may impact on decisions they take in a plethora of ways. The words 'shall at all times' and 'procure' in paragraph 6(l) of the IO make clear that the obligation is: 1) a continuous one on Parties, and 2) requires preventative and proactive measures to be in place to protect against the outcome (passing of CSI) occurring. Paragraph 6(l) therefore requires the Parties to take active steps and/or do certain things to guard against and ensure that no CSI passes between the parties; that is active steps to prevent the prohibited outcome from occurring. This would typically take the form of policies, procedures and safeguards being put in place to avoid CSI being exchanged or passing in contravention of paragraph 6(l), and to consider risks arising out of situations – such as meetings between two CEOs of competing businesses – at all times and as and when those risks arise. It would not be sufficient for a party to simply have a policy around the time the interim measures came into force and then assume from that time onwards that all individuals would simply comply with those obligations.

86. Although the CMA would typically expect these steps to be covered in policies, procedures and safeguards, other appropriately proactive and ongoing measures, were a party to have them in place, would be equally acceptable for the purposes of complying with interim measures. The CMA does not, and could not in the context of the range of mergers across different markets and with different entities that it reviews, prescribe exactly how merging parties procure that CSI is not exchanged. As a result, it is for the parties to determine the specific risks and appropriate policies relevant to their business and develop safeguards and preventative measures to ensure, with respect to CSI, that they achieve the end of procuring that no CSI passes between the parties. There is then an overarching requirement that whatever mechanisms the parties put in place, that those be fit for purpose.

87. Absent proactive mechanisms designed to prevent an exchange of CSI, there is no suitable protection against pre-emptive action and no compliance with the provision of the IO. In the context of interim measures, such as the IO, the interim measures regime is reliant on parties' scrupulous compliance in ensuring that they have put in place adequate and suitable mechanisms to, amongst other things, at all times take proactive steps to guard against the risk of CSI passing between merging parties. Importantly in this case, where no such mechanisms are in place, the means by which the CMA is able to perform its statutory functions of monitoring and enforcing interim measures is negatively impacted.

88. The importance of proactive compliance with interim measures is reflected in the CAT's judgment in *Intercontinental Exchange Inc v CMA and Nasdaq Stockhold AB*[75] where it was held that an interim order 'catches more than just actual prejudice or impediments, which is why the onus is on the addressee of the [interim order] to seek consent from the CMA if their conduct creates the possibility of prejudice or an impediment'.[76] As *Intercontinental Exchange* makes clear, it is in creating the risk that addresses need to notify the CMA. It is not an obligation to notify the CMA once the risk has been created and realised, or not as the case may be. Similarly, *Electro Rent Corporation v CMA*[77] held that the function of interim orders is 'to prevent conduct that might prejudice a reference or inhibit action required by the CMA'.[78] Again, the emphasis on prevention is important to highlighting how in practice interim measures like the IO operate; to prevent outcomes from occurring.

89. Conversely, the failure to have sufficient policies, procedures, and safeguards in place prevents the CMA from having a full picture of what transpires between the Parties while the IO is in force and prevents the CMA from properly being able to monitor compliance. This is made clear in the CAT's decision in *Stericycle International LLC v Competition Commission,* which noted section 81 of the EA02:[79]

> […] gives the CC wide powers for the purpose of preventing pre-emptive action […]. Moreover, the word "might" used in section 80(10) implies a relatively low threshold of expectation that the outcome of the reference might be impeded. At the time the CC is considering whether to exercise its powers under section 81, it necessarily cannot be sure whether any action being taken (or proposed) by the merging/merged parties will ultimately impede any action being taken by the CC as a result of the reference. The power under section 81 enables the CC to intervene where it considers that there is at least some risk of that happening.
>
> While we accept that the CC must exercise its powers reasonably and proportionately, we also accept that the CC has a considerable margin of appreciation under section 81: see also Somerfield at paragraph 88. Similarly, since the outcome of a reference may well require a remedy to restore the status quo ante (see e.g. Somerfield, at paragraphs 94 to 100), when exercising its powers under section 81 the CC may properly have regard to the need to safeguard the effectiveness of any divestiture that may ultimately

[75] [2017] CAT 6.
[76] *Ibid* at [220].
[77] [2019] CAT 4.
[78] *Ibid* at [120].
[79] [2006] CAT 21 at [129] and [130]; these passages were cited with approval in *Facebook v CMA* at [16].

be ordered (see also paragraph 4.23 of the CC's guidance Merger references CC2, June 2003).

90. As the exchange of CSI raises the very real risk of pre-emptive action and might impede the outcome of the merger reference, or here the Remittal, or otherwise reduce competition in a market it is necessary to proactively, and on a continuing basis, take steps to prevent that outcome from coming to pass and, where there is a risk or any reason to suspect that an action may result in pre-emptive action or impede the Remittal, report that to the CMA. Conversely, where a party does not have adequate measures to identify, detect, and guard against CSI passing between merging parties, that rises a very real risk of pre-emptive action and impediment, particularly in the situations described above with JD Sports and Footasylum (and their two CEOs close personal relationship).

91. This obligation is abundantly clear from the words of the IO itself, which required JD Sports and Footasylum to 'at all times… procure' that no CSI passes between them. That proactive obligation ties in with the CAT's jurisprudence where the CAT has emphasised that: 1) there is a low threshold to triggering interim measures noting that it is only conduct which 'might' prejudice or impede the reference,[80] 2) the onus is on the addressee of an interim measure to seek the consent of the CMA where conduct creates the possibility of prejudice or impediment,[81] and 3) any interpretation of the IO should 'give full effect to its legitimate precautionary purpose'.[82]

92. The obligation contained in paragraph 6(l) of the IO can, therefore, only be interpreted as creating a strict obligation on JD Sports and Footasylum to, at all times, take steps to guard against the passing of CSI, whether directly or indirectly, between them. The obligation is to prevent. That obligation can only be read as one which the Parties are always under, and always needs to be at the forefront of their minds, particularly so in situations which increase the risk of CSI passing between the parties. Where a situation raises the possibility that there may be a risk of prejudice (which itself needs to be interpreted broadly)[83] or impediment, the onus is clearly on JD Sports and Footasylum to notify the CMA and seek consent for the conduct they propose to undertake. Ultimately any determination of actual risk and steps that need to be taken, lies with the CMA.[84]

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[80] *Intercontinental Exchange* at [220]; *Stericycle* at [129].
[81] *Ibid* at [223].
[82] *Facebook v CMA* at [158]; *Electro Rent* at [206].
[83] *Facebook v CMA* (CoA) at [59].
[84] *Facebook v CMA* at 158; *Electro Rent* at [206].

93. As the IO, like all interim measures used in the UK's voluntary merger regime, seeks to protect against the possibility or risk of prejudice to the reference or potential remedies, it is incumbent on merging parties to put in place proper systems to ensure the obligations under the IO are complied with, and to enable the CMA to effectively monitor compliance. This must be especially true when CEOs of competing businesses have frequent contact with each other during the course of a merger investigation.

94. The need to have in place proactive mechanisms for complying with interim measures that are fit for purpose, and examples of the types of things that should be included, are set out in the CMA's guidance on *Interim measures in merger investigations*, published on 28 June 2019 (the **IM Guidance**).[85]

Facts

95. The facts in relation to the July Meeting and the August Meeting are set out at paragraphs 68 to 83 above.

96. Below we set out JD Sports' internal guidance and policies in place at the time regarding compliance with the IO.

JD Sports' internal guidance and training documents regarding compliance with the IO

97. RFI10 asked JD Sports to provide copies of all of its communications and internal guidance and training documents in relation to the IO. The JD Sports RFI10 Response provided:

(a) A three-page document entitled JD/Footasylum – Guidance on CMA Interim Order (IO), dated May 2021 (**Senior Management Guidance**).[86]

(b) A one-page document entitled Guidance for Store Managers of JD Sports Fashion plc (JD) (**Store Managers Guidance**), dated May 2021.[87]

[85] *Interim measures in merger investigations*, published 28 June 2019 (the **IM Guidance**). The CMA updated its IM Guidance on 21 December 2021, however this was not in effect at the time of the events outlined in this decision.
[86] This document has Linklaters LLP branding on it and paragraph 64 of JD Sports' RFI10 Response states Linklaters were 'involved in the drafting and review of this internal guidance'; the CMA has been provided with four copies of the Senior Management Guidance, being annexes 783, 792, 798, and 805 to JD Sports RFI10 Response. This appears to track the 'bi-monthly reminders' referred to at paragraph 57 of JD Sports RFI10 Response.
[87] As with the Senior Management Guidance, the CMA has been provided with 6 copies of this guidance, being annexes 785, 787, 790, 794, 801, and 805 to JD Sports RFI10 Response.

(c) Various emails to senior management and store managers reminding them, on a bi-monthly basis, of their ongoing obligations to comply with the IO and attaching the guidance documents above.[88]

(d) Two emails from Ms Mawdsley, one dated 2 September 2021 and one dated 20 October 2021 to Mr Cowgill and various other senior staff at JD Sports asking that they 'have no contact with any Footasylum personnel, subject to prior approval by myself only, until further notice.'[89]

(e) An email from Ms Mawdsley on 2 September 2021 to [✂] asking them to 'ensure that, until further notice, no decisions regarding [✂] Peter Cowgill [✂] without prior JD Legal approval'.[90]

98. JD Sports also notes that it 'specifically instructed Linklaters LLP to provide ongoing advice regarding JD Sports' compliance with the IO and sought frequent advice, on an *ad hoc* basis…'.[91]

99. JD Sports describe its governance structure following the implementation of the IO to 'ensure it compliance with the IO'.[92] The governance structure in place was:

(a) The General Counsel coordinates JD Sports' compliance with the IO, along with Linklaters LLP.[93]

(b) The General Counsel, '[t]o the extent necessary' provides updates on JD Sports' compliance at board meetings.[94]

(c) JD Sports' legal team 'have been instructed to liaise with the [General Counsel] and/or external counsel, if necessary, in the event they became aware of any potential IO compliance issue'.[95]

(d) JD Sports 'Senior Management have been made aware of JD Sports' obligations… and are expected to monitor and ensure their department's compliance… Any issues that may engage the provisions of the IO are reported to JD Sports Legal Team…'.[96]

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[88] For example, annexes 782, 784, 786, 789, 791, 793, 797, and 802 to JD Sports RFI10 Response.
[89] Annexes 795 and 804 to JD Sports RFI10 Response.
[90] Annex 796 to JD Sports RFI10 Response.
[91] JD Sports RFI10 Response at paragraph 49.
[92] *Ibid* at paragraph 68.
[93] *Ibid* at paragraph 68(i).
[94] *Ibid* these meetings include Peter Cowgill.
[95] *Ibid* at paragraph 68(ii).
[96] *Ibid* at paragraph 68(iii).

(e) There is regular contact between the General Counsel and senior managers who oversee departments more likely to be impacted by the IO, such as property and HR.[97]

100. The JD Sports RFI10 Response specifically notes that, in drafting its internal guidance documents, JD Sports was aware of the IM Guidance, and in particular paragraph 2.16[98] and 3.12 of the IM Guidance.[99] JD Sports notes that its Senior Management Guidance captures the wording of paragraph 6(l) of the IO. JD Sports notes that paragraph 6(l), however, is focused on the content of an exchange rather than the form of communication and that the IO and the Guidance do 'not forbid any contact… between JD Sports and Footasylum employees…'.[100]

Failure to comply with paragraph 6(l) of the IO

101. Following consideration of the evidence provided to the CMA and careful assessment of JD Sports' Representations (discussed in detail below), the CMA has found that JD Sports failed to have in place adequate policies, procedures and safeguards to 'at all times… procure' that no CSI pass, directly or indirectly, between the Parties.

102. JD Sports was required, under the terms of the IO, to have proactive polices which adequately dealt with (ie preventing) the risks and prohibitions set out in the IO. In relation to paragraph 6(l) specifically the obligation to procure was a proactive one and required JD Sports to have in place policies which were fit for purpose by guarding against the very serious risk of CSI passing between the Parties without the CMA's consent.

103. The types of things that should be considered in compliance policies, procedures and safeguard are set out in the IM Guidance, which JD Sports should have had regard to, even if it chose to take a different route to the examples provided in the IM Guidance. The IM Guidance states that it is 'intended for merging parties and for legal advisers advising on a transaction where interim measures may be relevant'.[101] The IM Guidance further provides that it is:

> of the utmost importance that merging parties take steps to understand fully their compliance obligations (including seeing legal advice as needed) and

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[97] *Ibid* at paragraph 68(iv).
[98] *Ibid* at paragraph 61.
[99] *Ibid* at paragraph 53.
[100] *Ibid* at paragraph 52.
[101] IM Guidance at paragraph 1.1

consider carefully the consequences of any action which may be in breach of the Interim Measures.

104. Paragraphs 3.12 to 3.18 of the IM Guidance set out a non-exhaustive list of matters merging parties should consider to aid them in their self-assessment of whether information exchanges are compliant with relevant laws (such as the Competition Act 1998) or create the possibility of prejudice or impediment. These include:

(a) assessing, with assistance from their legal advisers, whether information exchange might amount to pre-emptive action, and apply for a derogation if it might;[102]

(b) that '[r]ecords should be kept of communications between the merging parties';[103]

(c) a list of examples of what the merging parties and their legal advisers should consider if CSI is to be exchanged, interim measures are in place and there is a competitive nexus between the parties (for example, where the merging parties are actual or potential competitors or upstream and downstream of one another), being:[104]

'(a) The purpose of exchanging confidential or proprietary information and why it is **strictly necessary** for this exchange to take place.

(b) The types of information which need to be shared… with reasons for believing that this information is **strictly limited** to that which is necessary to achieve the purpose…

(c) The safeguards (procedural or otherwise) that need be put in place to ensure that any confidential or proprietary information is only shared to the extent **strictly necessary**' (emphasis in original).

105. Procedural safeguards should be clearly set out in writing and may include that:[105]

(a) the information should be disclosed only to a set of named individuals (whose roles and functions should also be recorded) with a strict need to receive it;[106]

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[102] *Ibid* at paragraph 3.13.
[103] *Ibid* at paragraph 3.14.
[104] *Ibid* at paragraph 3.15(a) – (c).
[105] *Ibid* at paragraph 3.16.
[106] *Ibid* at paragraph 3.16(a).

(b) commercially sensitive information is not shared with, or used by, staff who have any control or influence over commercial strategy or decision-making, unless strictly necessary in which case the information should be sufficiently aggregated in nature to ensure that it is not commercially sensitive;[107]

(c) any individual in receipt of such information should enter into a non-disclosure agreement.[108]

106. The IM Guidance makes clear that 'the CMA may request a copy of documents setting out the safeguards which were put in place before information was exchanged'.[109]

107. JD Sports' guidance (as set out above in paragraphs 97 to 100), and its policies, procedures and safeguards do not appear to adequately provide for matters necessary for JD Sports to 'at all times… procure' compliance with paragraph 6(I) of the IO. In particular, there appears to be nothing in the Senior Management Guidance or Store Manager Guidance which deals with keeping records and notes of meetings between the Parties,[110] nor is there anything indicating that meetings between the Parties would be assessed for their compliance with the IO before the meetings took place, who would be appropriate to assess such meetings, and how they were to be contacted.

108. The only references to CSI were in the Store Managers Guidance and Senior Management Guidance. The Senior Management Guidance provided that JD Sports '**MUST NOT**' (emphasis in original):

> Share any competitively sensitive information (**CSI**) with the management team of Footasylum (including, for example, CSI relating to pricing/ranging decisions, which must be taken independently, marketing plans, terms with key suppliers/major brands and sales data).

109. It went on to provide that:

> CSI (including but not limited to non-public information relating to customers/sales, suppliers, closure plans or business strategy) **MUST NOT** be shared between the two businesses, except as set out below… (emphasis in original)

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[107] *Ibid* at paragraph 3.16(a).
[108] *Ibid* at paragraph 3.16 (b).
[109] *Ibid* at paragraph 3.16(c).
[110] As paragraph 3.14. of the IM Guidance indicated would be appropriate.

110. The exceptions provided for related to financial, accounting, and external reporting obligations and non-CSI which was defined as 'information which is in the public domain, or which is historical or sufficiently aggregated.'[111]

111. The Store Managers Guidance simply provided that, store managers '**MUST NOT** take any active steps to: … Discuss or share non-public and competitively sensitive information (including but not limited to information relating to customers/sales, suppliers, closure plans or business strategy) with Footasylum counterparts (and no such information should flow to JD from Footasylum)*'* (emphasis in original)*.*[112]

112. This guidance appears to provide that senior and store managers should never share CSI, however, it does not go on to provide any mechanism to 'at all times… procure' that no such CSI is shared by JD Sports employees or with JD Sports employees, whether directly or indirectly. In fact, the two guidance documents do not, in substance, provide for the need to be vigilant about the risks of CSI being shared with Footasylum and make almost no reference to the risk that CSI may be shared with JD Sports by Footasylum.[113] The CMA notes that there is no reference in the guidance documents to indirectly sharing or receiving CSI, ie those instances where it is not intentional to share such information. Although JD Sports re-circulated these same sets of guidance every two months or so, it does not appear that anything more was done. Specifically, in relation to the risk of CSI being shared or received and JD Sports' obligation to 'at all times… procure' that CSI did not pass between the parties, it does not appear that JD Sports took any continuous steps to ensure staff knew of their obligations, how to assess the risks of CSI passing between the parties, and what practical steps they could take to guard against that risk from coming to pass. JD Sports does not appear to have considered and made provision for the risk presented by the fact that Mr Cowgill and Mr Bown have a close personal relationship and are in frequent contact with each other.[114] Nor has JD Sports made provision for the risk presented by the fact that Mr Bown's [personal contact] was employed by JD Sports and was, apparently, a reason that the two CEOs would meet.[115]

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[111] Senior Management Guidance. See for example Annex 782
[112] Store Managers Guidance. See for example Annexes 794, 801 and 805
[113] The Senior Management Guidance does say that CSI must not be shared between the businesses, and the Store Managers Guidance makes a similar reference that 'no such information should flow to JD', however, the CMA considers these references to be extremely light touch in relation to an obligation to '**at all times… procure'** that no CSI pass between the Parties.
[114] There being a number of calls between the two CEOs (at least 4) in addition to the two meetings between 2 July and 4 August 2021, as well as a number of text messages, including one from Peter Cowgill setting up the potential location of the July Meeting which said 'Let's do Burger King at Heap Bridge. I have done a recycle and it seems fine Is that ok for 9:15?', JD Sports' RFI10 Response, Annex 771.
[115] JD Sports' RFI10 Response at 8(i).

113. As a result, JD Sports' policies, procedures and safeguards were extremely light touch in their approach to guarding against the very serious and potentially significantly damaging risk of CSI being shared between the parties. As a result, JD Sports' policies cannot properly be considered as satisfying their continuing obligations to guard against CSI passing between the Parties.

114. An example of these omissions from JD Sports' policies, procedures and safeguards, and relevant for the July and August Meetings, is that there was no process by which meetings of the kind that occurred in July and August were first determined to be for a legitimate purpose, no mention of keeping records of meetings between the Parties, and no process to follow to check with the legal team or external lawyers whether a meeting was legitimate.[116] JD Sports' General Counsel, Ms Mawdsley, was present at the July Meeting, however, appears not to have taken any steps, from the evidence the CMA has before it, to check, assess or confirm compliance with the terms of the IO, and paragraph 6(l) in particular before, during or after the meeting. Although the CMA notes that Ms Mawdsley, in the JD Sports RFI10 Response states that the meeting did not raise any concerns for her about IO compliance,[117] that statement was made some months after the meeting took place and the context of the CMA's specific probe into the July and August Meetings. [✂].[118] Ms Mawdsley's recollection that nothing during the meeting would have breached the IO, is not accompanied by any contemporaneous materials, or any note or record after the meetings took place to that effect. Given JD Sports' later submission that Ms Mawdsley was at the meeting to ensure compliance with the IO[119] the CMA considers it odd that her presence did not result in any kind of note or record being made and that instead, if she was in fact at this meeting to ensure compliance with the IO, that this was done on an ad hoc basis,[120] and did not result in any kind of formal monitoring. This is particularly so in the circumstances where it appears that Ms Mawdsley was not told why she was attending the meeting, and where there is no record (whether it be an email, phone record, text or instant message exchange) as to how she was invited to the meeting. Had JD Sports scrupulously complied with its obligation to 'at all times… procure' that no CSI pass between the Parties, it would be reasonable to assume that JD Sports

[116] Or in fact to check with the Monitoring Trustee before the meetings were held.
[117] JD Sports RFI10 Response at paragraph 12
[118] *Ibid* at paragraph 11.
[119] PL Representations at paragraph 9(d).
[120] This is confirmed by the fact that Ms Mawdsley was not present at the August Meeting and does not appear to have been informed about that meeting before it took place, or until some days (at least) after it had concluded.

would have had in place at least certain of these steps, particularly considering that it was its General Counsel who coordinated compliance.[121]

115. The JD Sports RFI10 Response states that JD Sports' legal team coordinates compliance with its external advisers, Linklaters.[122] This includes liaising with Linklaters, 'if necessary, in the event that they become aware of any potential IO compliance issues'[123] and members of the senior management team 'proactively seek legal advice whenever they have concerns that the IO may be engaged'.[124] However, without any way of assessing whether the IO was engaged before, for example, the July and August meetings, the CMA cannot understand whether advice was sought appropriately and in a timely manner. The August Meeting, which the JD Sports RFI10 Response states 'is evidence of its internal governance structure, ongoing oversight and reporting mechanisms',[125] does not appear to have been raised with inhouse advisers or external advisers before the meeting to ensure preventative steps were taken in relation to CSI, and was not reported to the CMA until 15 days after the telephone call had taken place. This is not, in the CMA's view, prompt or timely, or – as discussed below – itself compliant with the obligations under the IO (Breach 3). Again, there were no notes made of this call, nor was there an agenda circulated in advance setting out the topics to be discussed. Neither internal nor external legal advisers were involved in the planning of the call, or the call itself; in fact, it was 13 days after the call that JD Sports' General Counsel was made aware of it, and 14 days after the call that external advisers (being Linklaters and Eversheds Sutherland), working together were able to 'verify recollections'.[126] It was then 15 days later that the CMA was alerted to the August Meeting by way of joint email from Footasylum and JD Sports.

116. JD Sports submitted, in its PL Representations, that there is a 'well-known trade-off between imposing rigid rules (which can reduce errors but can also lead to individuals focusing on the letter of the rules and losing sight of the underlying principle) and using a principles-based approach (where individuals are briefed in detail on the IO obligations and their importance are required to exercise their judgment, taking advice as necessary)'.[127] While the CMA accepts that there may be a balance to strike between providing for rules to ensure compliance with the IO and encouraging individuals to use their judgment when armed with adequate guidance and understanding of the

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[121] JD Sports' RFI10 Response at paragraph 68(i)
[122] *Ibid.*
[123] *Ibid* at paragraph 68(ii).
[124] Footasylum RFI10 Response at paragraph 4.14.
[125] JD Sports RFI10 Response at paragraph 71.
[126] *Ibid* at paragraph 72.
[127] PL Representations at paragraph 8.

IO obligations, it does not consider JD Sports has achieved such a balance. JD Sports does not appear to have considered any specific features of its own business or its employees in drafting its compliance documents and appears to have been content to operate, as exemplified in the July and August Meetings, on the basis that situations that risked CSI passing, directly or indirectly between the Parties, could be managed by simply assuming no CSI would pass because JD Sports (and Mr Cowgill and Ms Mawdsley in particular) thought everyone knew their obligations and would comply with them. JD Sports was content not to put in place any measures itself, or in fact consider what sorts of measures would be appropriate, and instead passively wait for meetings on unknown topics with one of its competitors to conclude and the CMA to probe those meetings before gathering and recording what was discussed at such meeting. That is, JD Sports was content to take no active steps to procure that no CSI pass between the Parties.

117. Such an approach does not strike a balance between rigid rules and principles encouraging individual judgment; it is instead a light touch and deficient approach to continuously guarding against a serious risk that does not meet the standard of scrupulous compliance. JD Sports should have considered, amongst other things set out above, the specific nature and circumstances of its business that risked breaching the IO, and paragraph 6(l) in particular, and put in place preventative measures. Moreover, and to the extent that JD Sports' submission here is directed at the CMA's consideration that steps like proactively assessing meetings between the Parties, and particularly between senior people before those meetings took place, taking notes of the meeting and retaining records as to how meetings were set up and the purpose they were set up for, the CMA disagrees that these steps are rigid or would result in individuals losing sight of the underlying principles. These are common procedures in place in a number of businesses, and in the context of the IO and the Merger, a simple and obvious step to manage risks.

118. As a result of the above, the CMA has found that JD Sports' policies, procedures and safeguards did not ensure that, 'at all times', JD Sports was procuring that CSI did not pass, directly or indirectly, between the Parties, including by taking steps to ensure JD Sports did not receive CSI. In respect of certain risks specific to JD Sports, and set out above, it appears that JD Sports has taken no steps to prevent CSI from passing between the Parties at all, or only provided non-specific and very high-level advice that CSI should not be shared with Footasylum.

119. In coming to this conclusion, the CMA has considered the wording of paragraph 6(l) of the IO, and in particular the obligation that JD Sports 'shall at all times… procure' that no CSI passes directly or indirectly between the parties and measured this ongoing and proactive obligation against the

policies, procedures, safeguards, and communications JD Sports had in place to manage compliance with the IO as well as the actual instances of meetings between the Parties in July and August. In doing so the CMA considers that JD Sports' focus on assessing whether or not CSI was exchanged,[128] that being a retrospective assessment that can logically only take place after an exchange or risked exchange has occurred, and not considering how best to guard against such exchanges, as well as the fact that JD Sports was content to assume that it and others would at all times comply with the IO,[129] again without any specific reference to the obligations around CSI, was not scrupulous compliance with its obligations. Instead, the CMA considers this approach to be light touch and to show serious omissions in JD Sports' approach to compliance which ran the very real risk of, and in fact resulted in, CSI passing between the Parties.

Assessment of JD Sports' Representations

120. The CMA has carefully considered JD Sports' Representations by reference to the evidence and responds to these submissions below. For ease of presentation, JD Sports' Representations have been grouped into the following sections, which are addressed in turn:

    (a) Allegation in Breach 1 is not a breach of the IO paragraph 6(l);[130]

    (b) the CMA's assessment of two breaches from one set of facts is unlawful and unjustified.[131]

    (c) JD Sports had reasonable procedures and guidance in place;[132]

(a) Allegation in Breach 1 is not a breach of the IO paragraph 6(l)

121. JD Sports submits, in its PD Representations, that 'paragraph 6(l) does not admit of the interpretation that the CMA contends for it'.[133] JD Sports goes on to say that this cannot be read as requiring JD Sports to do any specific thing in relation to guarding against the passing of CSI.[134] Although the obligation in paragraph 6(l) is to 'procure', JD Sports contends that an obligation to procure cannot be breached unless the thing being procured fails (here a failure to

[128] PD Representations at paragraphs 37 to 43; PL Representations at paragraphs 11 to 15.
[129] PD Representations at paragraph 65.
[130] PD Representations at 44 to 60; PL Representations at 11 to 16.
[131] JD Sports PD Representations at 37 to 43; and PL Representations at 16.
[132] JD Sports PD Representations at 2.4, paragraphs 61 to 66; PL Representations at paragraphs 6 to 8 and 9 to.
[133] PD Representations at 44.
[134] *Ibid* at 45 to 49.

procure that CSI does not pass between the Parties).[135] JD Sports says that the adequacy of an interim measures addressee's policies, procedures and safeguards is not something the CMA can 1) assess absent CSI passing, and 2) find a breach in relation to.[136]

122. To support this position, JD Sports refers to Bennion, Bailey and Norbuy on Statutory Interpretation for the position that penalisation can only be imposed under clear law and that there is a presumption against 'doubtful' penalisation.[137] JD Sports then also refers to the fact that the CMA choose to impose an obligation in the 2022 Final Undertakings that the Parties maintain records of communications between themselves.[138] Finally, JD Sports notes that the Financial Conduct Authority (**FCA**) has, under s 206 of the Financial Services and Markets Act 2000, the power to impose a penalty where firms contravene a requirement imposed on it. The FCA can impose a penalty for a failure to report certain transactions in accordance with Article 26 of the Markets in Financial Instruments Regulations (MiFIR EU Regulation 600/2014) and for a failure to have in place adequate management systems under Principle 3 of the Principles for Business. However, JD Sports say, the FCA could not impose a penalty for a failure to have adequate systems in place on Article 26 alone; it would need to do so under Principle 3.[139] Where there exists a breach of both Article 26 and Principle 3, JD Sports notes that, in practice, the FCA only imposes a single penalty.[140] JD Sports raise these points as part of its submission that paragraph 6(l) of the IO cannot contain both an obligation to 'at all times procure' that no CSI passes between the Parties, and to penalise a party for allowing CSI to pass between the Parties. It is only, JD Sports submits, when CSI actually passes between the Parties that a breach of paragraph 6(l) can be found, at which point the adequacy of the measures in place go to a party's reasonable excuse.

123. The CMA disagrees that the obligation in paragraph 6(l) does not require JD Sports to take certain proactive steps to guard against the risk of CSI passing between the parties, nor does it agree that it is only upon CSI passing between the Parties that the adequacy of measures can be considered but only in the context of reasonable excuse.

124. The obligation imposed on JD Sports under paragraph 6(l) of the IO that JD Sports 'shall at all times… procure' that 'no CSI passes' between the Parties, 'directly or indirectly… except with the prior written consent of the CMA'. That

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[135] *Ibid* at 49 to 51.
[136] *Ibid*.
[137] 8th Ed. 2020, section 24.6.
[138] 2022 Final Undertakings paragraph 4.2.14
[139] PD Representations at 57.
[140] *Ibid*.

obligation is, by the words 'shall at all times… procure', clearly directed at JD Sports doing certain proactive things to prevent the risk or event from occurring. The obligation to prevent something which might risk pre-emptive action or impediment is then clearly articulated in the CAT's jurisprudence on interim measures.[141] The words 'shall at all times' make clear that the preventative measures a party puts in place need to be considered, adapted and deployed on an ongoing basis. That means that JD Sports is required to continuously procure that an outcome does not occur. As the obligation is proactive, ie designed to prevent an outcome from occurring, and not retrospective, ie triggered only upon CSI being shared, it is not correct to say that the CMA has no power to find against JD Sports as it has in Breach 1. A failure to take steps to procure will naturally give rise to a serious risk of CSI passing between the Parties. As the IO is directed at preventing that risk, the CMA must on a logical interpretation of the obligation read in the context of the IO, Merger, and Remittal, be able to take enforcement action where there is evidence the Parties have courted the risk they are obliged to prevent by having inadequate measures in place.

125. The CMA cannot monitor and control all CSI a business may disclose, so it is of paramount importance that the parties take appropriate steps to do this themselves by having policies, procedures and safeguards in place to 'at all times… procure' that it is not exchanged. This is particularly so because it will only be the addressees of an interim measures who are aware of the unique and particular risks within their business and therefore be able to implement appropriately tailored measures to guard against those risks. Similarly, the threshold for exchange or passing, and what needs to be guarded against is set very low in that it captures direct or indirect passing of CSI. As it is addresses of interim measures themselves who are best placed to know of situations where CSI might be exchanged or pass between them and to take steps to prevent it or report that a risk of impediment or pre-emptive action might have arisen to the CMA, the IO imposes the obligation on them to procure that outcome. The IO goes further, however, than simply requiring one off or blanket guidance being adopted by requiring that the parties 'at all times' procure that no CSI is exchanged.

126. As a result, there is an obligation to take preventative measures to guard against the risk of exchange or passing of CSI; and an obligation not to actually exchange, disclosure or otherwise see CSI pass between the Parties. If the preventative measures are inadequate, the CMA can find a breach of the IO and impose a penalty. In this case the CMA only became aware of the insufficient mechanisms JD Sports put in place to comply with paragraph 6(l)

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[141] *Intercontinental Exchange*; *Facebook v CMA* and *Facebook v CMA* (CoA), *Stericycle*, *Electro Rent*.

because a third party made it aware of meeting that had taken place between high-level employees of both Parties (including between the CEOs). Those instances raised the CMA's concern that: 1) the Parties did not have in place adequate measures to guard against CSI passing between the Parties, and 2) that CSI may have actually passed between the Parties (and as detailed in breach 2 did in fact pass between the Parties).

127. To say, as JD Sports does, that a party's compliance regime cannot, if it is inadequate, be found to be breach of paragraph 6(l) would result in perverse incentives and outcomes,[142] is incorrect. For example, it would mean that if a party were to have absolutely no compliance regime in place to ensure CSI was not exchanged (directly or indirectly) during a merger reference, the CMA would have no power to investigate and penalise that party so long as no CSI was actually exchanged. This must be incorrect for the following reasons:

(a) It would turn the words 'shall at all times… procure' in paragraph 6(l) into a retrospective obligation triggered only by CSI passing and focus only on the object of procurement (ie that no CSI pass between the parties), as opposed to a proactive obligation to prevent.

(b) The exchange, or lower threshold of passing,[143] of CSI is something that the CMA would not be aware of unless appropriate policies were in place that would draw that to its attention, for example by asking for the CMA's consent, or by checking that a meeting between merging parties was appropriate by first notifying the Monitoring Trustee. As such, if there were no adequate measures in place, the CMA may never become aware of CSI being exchanged.

(c) Where CSI is exchanged the CMA is at a significant evidentiary disadvantage because unless appropriate mechanisms are in place, there will be very limited information about the content of those exchanges. If the CMA could not find a breach of and penalise inadequate polices, addressees of interim measures are incentivised to take no, or only very light touch policies which result in these risks being obscured from the CMA's view.

(d) The interim measures regime relies on self-compliance. Compliance will either be appropriate or inappropriate (although the CMA recognises there may be a range of potentially appropriate compliance regimes). In order for the system to function, the CMA must be able to take a view on the adequacy of a party's compliance regimes, even absent any actual

[142] PD Representations at paragraph 41.
[143] Which is the threshold set in paragraph 6(l) of the IO.

breach. Absent such a power, the risks of pre-emption and SLC during the merger review would be significantly increased to the detriment of the UK's merger regime, UK markets, and consumers.

128. For those reasons the CMA does not agree that it has no power to find a beach in Breach 1. The fact that the CMA, in the 2022 Final Undertakings made its explicit that the Parties should make and maintain records of meetings between them (which the CMA notes is only one aspect of having appropriate compliance mechanisms in place) should be read as a result of JD Sports' and Footasylum's poor approach to compliance during the Remittal and not as the CMA choosing to impose a new obligation in the 2022 Final Undertakings.[144] JD Sports was not able to provide any record of the meetings in July and August 2021. Moreover, when asked to provide a record of certain meetings in December 2020 (and captured by the 2020 Final Undertakings), JD Sports was not able to accurately identify, disclose and then produce the documents that were exchanged between it and Footasylum at the December Meeting. It was therefore reasonable, on those facts, for the CMA to take an extremely cautious approach to JD Sports' approach to compliance with the 2022 Final Undertakings.

129. As for JD Sports' reference to the FCA powers, the CMA notes that those power are distinct from the situation here. The FCA's powers to penalise breaches of Article 26 and Principle 3 relate to firms' ongoing obligations to report certain transactions and have adequate systems in place. That is, firms are always, by virtue of their business, under those obligations. In the context of the IO, the merging parties are at a significantly increased risk of taking pre-emptive or prejudicial action for the period of the merger reference. To preserve a status quo in the market and ensure the merger reference can be determined without prejudice, the CMA has to impose certain obligations that are suitable for range of different merger situations. As a result, the obligations imposed in the IO are obligations to prevent certain outcomes from occurring. Without specific knowledge about a merging party's business the CMA cannot determine the appropriate steps to take to prevent that outcome or ensure those steps are being continuously taken, reviewed and adapted to fit circumstances which arise. That means that the obligations imposed must be read in the context of the Merger and interpreted accordingly. It is therefore not analogous to compare such short time high pressure obligations to more general and ongoing obligations in the highly regulated field of financial transactions.

[144] The fact that JD Sports and Footasylum could not produce certain documents in response to RFI10 and that both parties required additional time to respond to RFI10 in order to undertake the necessary searches for relevant material was one concern the CMA had when drafting the 2022 Final Undertakings.

(b) the CMA's assessment of two breaches from one set of facts

130. JD Sports submitted in its PL Representations that 'it is artificial and wrong to find two breaches from one set of facts'.[145] It says, at most, the CMA could find a 'single alleged wrong'.[146] In its PD Representations JD Sports has made a similar point, that it is not open to the CMA to 'conclude that the same set of facts leading to the passing of CSI can give rise to two separate breaches of paragraph 6(I).[147]

131. JD Sports submit that the 'natural language of paragraph 6(I) does not admit of the interpretation that the CMA contents for to the effect that the same set of facts can give rise to two separate breaches'.[148] In support of this position JD Sports refers to the fact that: 1) the penalty imposed on JD Sports is 'extremely severe' and it is a well-established principle of statutory interpretation that legal provisions imposing penal sanctions must be strictly construed and that a penalty should not be imposed except under clear law,[149] 2) that there is no basis to read two separate breaches on the basis that inadequate policies procedures and safeguards prevent monitoring of the IO,[150] and 3) that the CMA cannot read in a requirement that compliance mechanisms be fit for purpose.[151]

132. In many respects, JD Sports' submissions on this point are largely the same as their submissions dealt with above in paragraphs 123 to 129. Where JD Sports say above that it is not lawful to find that Breach 1 is a breach of the IO, here JD Sports say Breach 1 cannot be sustained in light of Breach 2, albeit for largely similar reasons. Regardless, the CMA considers that JD Sports' submission on this point is misguided.

133. As dealt with above, Breach 1 is directed at JD Sports' failure to put in place policies, procedures and safeguard which were fit for purpose. The July and August Meetings are examples of those poor policies, procedures and safeguards in practice and are relevant as they reflect the initial trigger for the CMA's enquiry into JD Sports' compliance mechanisms.

134. In respect of JD Sports' assertion that the natural language of paragraph 6(I) cannot admit the CMA finding a breach for of the IO in Breach 1, the CMA has dealt with this submission above at paragraph 123 to 129.

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[145] PL Representations at paragraph 16.
[146] *Ibid* at paragraph 16.
[147] PD Representations at 38.
[148] *Ibid* at paragraph 39.
[149] *Ibid* at paragraphs 40 to 41.
[150] *Ibid* at paragraph 42.
[151] *Ibid* at paragraph 43.

135. JD Sports cites *R v Rimmington*[152] for the position that the two guiding principles are that 1) no one should be punished under a law unless it is sufficiently clear and certain, and 2) no one should be punished for an act which was not clearly and ascertainably punishable when the act was committed.

136. The CMA notes that *R v Rimmington* is a criminal law case and that such cases involving civil liberties are distinct from one concerning administrative penalties as is the case here.[153] As such, the CMA considers that *R v Rimmington* is not relevant to the present case. Nonetheless, the CMA has considered whether the obligation under the IO to 'at all times' 'procure' compliance with paragraph 6(l) of the IO is a sufficiently clear obligation to justify the imposition of a penalty, and considers it to be, as set out further in paragraph 123 above.

137. For those reasons, the CMA does not agree that it is not open to the CMA to assess two breaches from one set of facts.

(c) JD Sports' policies, procedures and safeguards were reasonable and appropriate

138. JD Sports submitted that 'the tailored policies, procedures and safeguards that JD adopted very carefully were reasonable and appropriate to achieve compliance with JD's obligations under paragraph 6(l)'.[154] JD Sports points to the fact that: 1) the guidance it did have in place made clear that no CSI should pass to Footasylum, and that in the present case JD Sports did not share information with Footasylum; it only received it,[155] 2) external legal advisers assisted in preparing JD Sports' guidance and were available for ongoing advice,[156] 3) JD Sports' guidance made clear that in the event of doubt, advice should be sought from JD Sports' legal team,[157] 4) JD Sports took steps to make sure Footasylum had similar guidance in place,[158] and 5) JD attended the July and August Meeting in good faith and thought it

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[152] [2005] UKHL 63
[153] Moreover, the CMA notes that the judgment in *R v Rimmington* centred on the primacy of statute in the context of prosecutors opting to prosecute in relation to a common law offence where an equivalent statutory offence, with defined parameters as to the offence and penalties, already exists. The judgment states: 'Parliament has defined the ingredients of an offence, perhaps stipulating what shall and shall not be a defence and has prescribed a mode of trial and a maximum penalty, it must ordinarily be proper that conduct falling within that definition should be prosecuted for the statutory offence and not for a common law offence which may or may not provide the same defences and for which the potential penalty is unlimited' ([2005] UKHL 63, paragraph 30). In relation to the present case, The CMA notes that the CMA is obligated to impose penalties in line with statutory caps on penalties for failures to comply with interim measures, as set out in the EA02 and consistent with the statutory Penalties Guidance.
[154] PL Representations at paragraphs 6 to 8.
[155] PD Representations at 62.
[156] *Ibid* at paragraph 63.
[157] *Ibid* at paragraph 64.
[158] *Ibid* at paragraph 65.

reasonable to assume the meetings would take place for legitimate integration planning purposes.[159]

139. The CMA has not accepted JD Sports' characterisation of its policies as reasonable and appropriate for the reasons set out above at paragraphs 101 to 115. The onus of complying with the IO, including paragraph 6(I), is on JD Sports. JD Sports' measures did not deal with specific risks relevant to JD Sports' business. Paragraph 6(I) of the IO is framed as a proactive obligation for JD Sports to 'at all times… procure' that no CSI 'shall pass, directly or indirectly' (emphasis added) between the Parties. This required JD Sports to have in place policies which were fit for purpose and which actively guarded against the risk of prejudice or impediment to the CMA that the exchanges of CSI create. Moreover, and in any event, JD Sports cannot sustain its claim that its policies were reasonable and appropriate while making the admission at paragraph 22 of its PL Representations that CSI did in fact pass between the Parties during the August Meeting. That admission is maintained in its PD Representations.[160] The obligation was clear, 'no' CSI (emphasis added) was to pass between the parties, whether directly or indirectly. As JD Sports had no active steps in place to protect against such an outcome and as it is clear that JD Sports was not 'at all times' taking such steps, the CMA has found that JD Sports breached the IO on that basis.

140. As a result, it is not sufficient to point to JD Sports' limited reference to the fact that CSI should not be exchanged (dealt with above at paragraph 108 to 109). The obligation was more onerous than simply saying that CSI should not be exchanged, but to actively and continuously ensure that CSI does not pass, directly or indirectly between the Parties. Similarly, the fact that legal advice was sought, whilst a positive step to ensuring compliance, is not itself a reason to point that JD Sports' policies, procedures and safeguards being reasonable and appropriate. Ultimately that is an assessment on substance, which the CMA has undertaken and determined that JD Sports' compliance mechanisms were not sufficient and were not fit for purpose. The CMA has already dealt with the fact that it cannot determine whether individuals at JD Sports were appropriately seeking legal advice, or even knew of the situations which should have caused them to do so (paragraph 115 above).[161] Regardless, the July and August Meetings were attended by Mr Cowgill and

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[159] *Ibid* at paragraph 66.
[160] JD Sports says, in relation to Breach 2, 'Other than the [✂] store names, JD Sports does not consider the material disclosed to be CSI…' (PD Representations at paragraph 67) The CMA has taken from that that JD Sports accepts that, in relation to the [✂] stores named, CSI was disclosed. JD Sports also says, in relation to Breach 2, 'that JD Sports has always accepted that, in principle, the [✂] store names are specific enough information as to fall on the CSI side of the line' (PD Representations at paragraph 71).
[161] In fact, it appears that JD Sports had not considered specific circumstances relevant to its employees that risked CSI passing, directly or indirectly, between the Parties.

Ms Mawdsley (July Meeting only), both of whom are described as being familiar with their obligations.[162] Despite that familiarity with their obligations, neither sought to confirm the purpose of the either meeting, take steps to record or monitor the meeting (Ms Mawdsley apparently not having done this at the July Meeting despite participating in the meeting itself), or to ensure that where a meeting was to be held for integration planning that it was with the appropriate individuals at the respective companies and that appropriate safeguards had been put in place in the context of the IO and Remittal, or if it was for planning for main party hearings, that Ms Mawdsley take notes and provide advice or comment (neither of which she did). In fact, JD Sports in its PD Representations make clear that it thought it was reasonable for Mr Cowgill to assume the July Meeting was for legitimate purposes. In making that assumption, and in JD Sports encouraging such assumptions to be made, JD Sports failed to 'at all times… procure' compliance with paragraph 6(l). The CMA notes that JD Sports has only pointed to certain limited circumstances leading to what it says was a reasonable assumption in relation to the July Meeting. JD Sports points to Footasylum's main party hearing being the next day, and attendance of General Counsel at the meeting.[163] JD Sports does not go that far in relation to the August Meeting, where a similar assumption was made about compliance, but where no similar context was present, no General Counsel was invited, and there was no main party hearing coming up. Moreover, on JD Sports' own admission, CSI was exchanged at that meeting.

141. JD Sports has also submitted that its policies, procedures and safeguards operated reasonably and effectively in respect of the July Meeting and the August Meeting.[164]

142. In respect of the July Meeting, JD Sports contends that there is no prohibition in the IO on meetings between JD and FA,[165] and that meetings may actually be required in order to comply with the obligation under paragraph 6(k) of the IO to take 'all reasonable steps' to encourage Key Staff of Footasylum to remain with the Footasylum business.[166]

143. Moreover, JD Sports says that its General Counsel, Siobhan Mawdsley attended the July Meeting to ensure compliance with the IO and that she was available, if necessary, to provide legal advice on the scope of CSI and any

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[162] PL Representations at paragraph 9(a) and 9(d).
[163] There is no evidence to suggest why Ms Mawdsley attended the July Meeting or that her presence led to a reasonable assumption the IO would be complied with, particularly as there appears to have been no mention of the IO at the meeting by anyone, but particularly by Ms Mawdsley.
[164] PL Representations at paragraphs 9 to 10; PD Representations at paragraphs 61 to 66.
[165] PL Representations at paragraphs 9(c); PD Representations at paragraph 54.
[166] The CMA noes that this was not the reason offered by the Parties for the July or August Meetings.

other issues related to compliance with the IO.[167] Ms Mawdsley's evidence is that she 'can say that no conversation took place while she was present that would have been in breach of the IO'.[168]

144. In respect of the August Meeting JD Sports says its compliance process worked effectively in flagging concerns about compliance and that it was properly reported to the CMA,[169] albeit, it acknowledges that the call was not reported immediately as required by paragraph 6(l).[170]

145. The CMA has found that JD Sports' policies did not operate effectively in relation to either the July or August Meeting, not least because that CSI was in fact exchanged at both of these meetings (see Breach 2) and because JD Sports does not appear to have considered, taken into account, or made provision for specific risks around Mr Bown and Mr Cowgill's relationship and the fact that Mr Bown's [personal contact] had worked for JD Sports.[171] However, JD Sports' submission here appears to conflate two distinct breaches: the first, a failure to have in place compliance safeguards fit for the purpose of ensuring CSI is not exchanged between the parties, and the second, the four instances where CSI did pass between the Parties.

146. In relation to JD Sports' policies, procedures, and safeguards, these did not operate effectively in respect of the July or August Meeting. Mr Cowgill did not know what was to be discussed at either meeting and has not been able to provide the CMA with a record or recollection of the purpose for which the meetings were set up. This makes clear that JD Sports was unable to proactively turn its mind to compliance with paragraph 6(l) of the IO in any substantive sense. Instead, JD Sports was content to assume everyone participating in the July and August Meetings knew of their obligations under the IO and would comply with those obligations. In turn this appears to have led to the assumption that the meetings would only cover legitimate matters allowed under the IO, without first assessing this was the case. This, in the CMA's view, is not an effective operation of a policy to procure that no CSI passes between the Parties.

147. The CMA also does not accept that Ms Mawdsley attending the meeting was in itself sufficient to ensure compliance with the IO. There is no record as to why Ms Mawdsley was invited to the meeting, and, in particular there is no

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[167] PL Representations at paragraphs 9(d).
[168] JD Sports RFI10 Response at paragraph 12.
[169] PL Representations at paragraph 10(a).
[170] *Ibid* at paragraph 26
[171] The CMA considers it likely that other risks specific to JD Sports would have existed but, as it only has these examples from the evidence it has it makes no other specific findings about things JD Sports should have considered when developing its tailored measures for comply with the IO.

indication that she was present at the meeting to ensure the IO was complied with. In any event, it does not appear that JD Sports knew why the meeting was being convened or what was to be discussed at it. Ms Mawdsley took no notes during the meeting and does not appear to have spoken at any stage about the IO or the obligations Mr Cowgill and Mr Bown should be conscious of, or in fact participated at all. [✂].[172] As she cannot remember the meeting in any detail and as she has no contemporaneous record of the meeting, the CMA attaches limited weight to her comment that the IO was complied with or JD Sports' representation that she was there as a safeguard against a breach of the IO. The CMA notes that although JD Sports says Ms Mawdsley attending the July Meeting to ensure compliance with the IO, the same process was not then replicated a month later at the August Meeting. This indicates that JD Sports' polices, if it was in fact an unwritten policy to have General Counsel attend meetings between CEOs of the Parties, were inconsistently applied and therefore were not capable of safeguarding against the passage of CSI between the Parties.

148. In relation to the August Meeting, the CMA has found that the JD Sports' policies did not operate effectively, if at all. As with the July Meeting, there was no indication prior to the meeting as to what was to be discussed or what the purpose of the meeting was. There appears to have been a phone call, lasting approximately six minutes, two days prior to the August Meeting which neither Mr Cowgill or Mr Bown can recall placing or recall the content of any discussion.[173] At the August Meeting itself, no notes were made, and Ms Mawdsley, or another person from JD Sports' legal team or other person generally, was not present to ensure compliance with the IO. Although JD Sports (jointly with Footasylum) did eventually notify the CMA about the August Meeting (in the 19 August Email), it:

(a) came more than two weeks after the information was exchanged, and only after Mr Cowgill had returned from his holiday;

(b) did not draw to the CMA's attention JD Sports' suspicion that CSI passed between the Parties;[174]

(c) did not contain any remedial steps JD Sports had taken to contain the information it had received;

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[172] *Ibid* at paragraph 9(d).
[173] JD Sports RFI10 Response at paragraph 43.
[174] The 19 August Email did state that Mr Cowgill recalled general reference being made to [✂] locations, [✂] (but with no relevant detail, e.g. CMA derogation status, closed/pipeline, illustrative/definitive candidates for store exit, and/or timing). The planned exit from the [✂] store locations mentioned was not public information at the time.

(d) was only an incomplete recollection of what was discussed as there were no notes taken at the meeting);

(e) came in the context of the CMA's RFI9 being served on JD Sports nine days earlier; and

(f) was not sufficient to show that JD Sports had in place compliance mechanisms fit for the purpose of guarding against the passage of CSI; only that JD Sports would, in certain circumstances, disclose meetings between its CEO and the CEO of Footasylum some time after the meetings had occurred.

Breach 2 – Exchange of CSI between Footasylum and JD Sports without the CMA's consent

The obligation under the IO

149. Paragraph 6(l), in addition to requiring JD Sports to 'at all times…procure' that no CSI pass between the Parties (detailed above) required that, regardless and in any event, CSI did not actually pass between the Parties. This obligation requires JD Sports to ensure that it does not (directly or indirectly) provide CSI to Footasylum, and that it does not (directly or indirectly) receive CSI from Footasylum. Where CSI does pass, in whatever form and however it is exchanged, there is a breach of paragraph 6(l).

Facts

150. As set out above, the CMA has been informed that, at the July and August Meetings the following information passed between the Parties:

(a) information regarding a [✂] lease of Footasylum's [✂];

(b) information regarding a contract with Footasylum's logistics/transport provider;

(c) information regarding Footasylum's closure of [✂] stores and the expected closure of [✂] other stores, including at least [✂] stores which were named, [✂]; and

(d) information about Footasylum's stock allocations and financial performance.

151. Neither the July Meeting or August Meeting were first notified to the CMA as a derogation or consent request.

152. JD Sports, in its PL Representations, accepts that 'the non-public information about FA's proposal to close [✂] named stores that JD believes was provided in the August [Meeting] was potentially CSI'.[175] In its PD Representations JD Sports says that 'the disclosures [of the [✂] named stores] are specific enough information as to fall on the CSI side of the line'.[176] In relation to Breach 3, JD Sports also says that the 19 August Email was sent to the CMA 'as the receipt of non-public information gave rise to a suspicion of a possible breach'.[177] The CMA has taken this to mean that JD Sports accepts that the information that passed between the Parties, at least during the August Meeting and corresponding to what Mr Cowgill recalls being the only [✂] named stores during that meeting, was potentially CSI.[178] JD Sports denies that the remaining categories of information amount to CSI.[179]

153. There are no contemporaneous records of the meetings in July and August, only the incomplete accounts provided by the Parties some time after the meetings took place and in the context of the CMA's probe into meetings between the Parties (as noted above under Breach 1). The absence of detail from these meetings makes it difficult to determine exactly the extent of the discussions. In the absence of that information the CMA has made some inferences from the topics the Parties acknowledge were raised, the conflicts in the accounts, and the context in which these topics were discussed to determine that CSI was exchanged during these two meetings and that the CSI exchanged was serious and at least raised the very real possibility of pre-emptive action, impediment to the Remittal, or prejudice to the competitive market structure. The CMA has inferred that the topics said to have been discussed were not simple briefly listed and mentioned in passing and that at least some discussions between the parties followed. In making this inference the CMA has considered the length of the July Meeting, that limited records have been provided about the August Meeting, and that there were text message exchanges and phone calls (the details of which neither party can recall) leading up to the meetings. The CMA has also considered that the Parties should not benefit from the lack of detail at these meetings as the fact no notes were taken and no appropriate records created or kept was a choice taken by the Parties and one made with the appreciable consequence that the CMA would, if it enquired about these meetings, be left somewhat in the dark about the detail of these discussions.

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[175] *Ibid* at paragraph 19.
[176] PD representations at paragraph 71; this comment came in the context of JD Sports saying that information it says did not include the names or specific locations of stores was not CSI, that is that the name and location information was what, in JD Sports' submission, pushed the information over the line into CSI.
[177] *Ibid* at paragraph 26(b).
[178] This is accepted by JD Sports, PD Representations at paragraphs 67 and 71.
[179] *Ibid* at paragraph 19.

Failure to comply with paragraph 6(l) of the IO

154. The CMA has found that the exchange of this information in the course of the July and August Meetings amount to exchanges of CSI which was not strictly necessary in the ordinary course of business. JD Sports has not suggested that the matters discussed during the July or August Meeting were necessary in the ordinary course of business, instead JD Sports has commented on the 'unremarkable' nature of some of the information disclosed.[180] There is only one reference – made in the JD Sports PL Representations – to the discussion about the lease and logistics contract being for integration planning purposes, that is then repeated in its PD Representations.[181] However, that reference is to the fact that Footasylum has said these discussions were necessary for integration planning, not that JD Sports considered them to be or that JD Sports knew that Footasylum wanted to discuss an integration planning issue (there being no records or recollections as to the purposes of either July or August Meeting from any individual in attendance).[182] In fact JD Sports has consistently made clear that it did not offer guidance on these questions,[183] and no reference that the matters discussed were necessary in the ordinary course of business is made in JD Sports' responses to RFI9 or RFI10.

155. The CMA is of the view that CSI should not have been exchanged unless and until a derogation or consent had been sought and obtained from the CMA.

156. On the evidence the CMA does have, four topics were discussed between these two meetings, with some topics at the July Meeting being raised again or repeated during the August Meeting. The CMA notes that JD Sports, in its PD Representations contends that finding that the topics discussed common to both meetings constitute separate instances of CSI being shared is penalising JD Sports twice 'in relation to the repeated disclosure'.[184] This appears to fundamentally misunderstand the IO and exchanges of CSI. The fact that CSI was exchanged at one meeting does not mean that information is no longer CSI, and it certainly does not give a party licence to make subsequent and repeated disclosures without incurring the consequences for breaching the terms of the IO. It should be axiomatic that CSI should not be

[180] PD Representations at 69.
[181] PD Representations at paragraph 72 where JD Sports says '[a]s has previously been explained, this information was disclosed by Footasylum in the context of a question as to integration planning in the event the merger were cleared…'
[182] PL Representations at paragraphs 19(a)(iii).
[183] For example, JD Sports' RFI10 Response at paragraphs 9 and 32.
[184] PD Representations at paragraph 83.

shared between the Parties whether or not the same topic has been discussed before.

157. The CMA has found that each of the four topics alone would amount to CSI (including the repeated disclosure of the same topics relating to the [✂]lease and the logistics contract), but that taken together it is clear that CSI was exchanged between the parties:

(a) information regarding a [✂] lease of Footasylum's [✂];

(b) information regarding a contract with Footasylum's logistics/transport provider;

(c) information regarding Footasylum's closure of [✂] stores and the expected closure of [✂] other stores, including at least [✂] stores which were named, [✂]; and

(d) information about Footasylum's stock allocations and financial performance.

158. **Information regarding a** [✂] **lease of Footasylum's** [✂] is CSI because it is not information generally in the public domain and may offer JD Sports a commercial advantage to know when Footasylum [✂] with its landlord. In turn such information may provide JD Sports with a commercial advantage it would not necessarily otherwise have.

159. **Information regarding a contract with Footasylum's logistics/transport provider** is CSI because, as with the [✂] lease, this is not information in the public domain. Knowing certain terms of a logistics contract, including that [✂] and that a competitor is engaged in commercial negotiations with a third party, may provide a commercial advantage to JD Sports which it would not necessarily otherwise have. This is particularly so in the context of July and August 2021 when this information was discussed as at this time the Covid-19 pandemic had significantly shifted how retailers were doing business, with a greater shift to online sales and home deliveries. A logistics/transport contract is therefore a potentially crucial contract which a competing retailer could have a significant interest in, and which may impact significantly on commercial strategy were details of it to become known. The possibility of price competition in terms of delivery charges and competition in terms of

speed of delivery and product returns were factors identified in the CMA's final report as forming part of the reason why the Merger would lead to an SLC.[185]

160. **Store closures** are inherently confidential and commercially sensitive, whether discussed specifically or indirectly without disclosing specific locations. Both Footasylum and JD Sports, in their internal guidance, state that store closures are particularly sensitive and must not be disclosed without first seeking legal advice. JD Sports knew, or at least ought to have known, that such information was commercially sensitive and that the CMA consent was needed before any discussion around store closures took place because there had been multiple requests for derogations[186] for permission to close certain stores from both JD Sports and Footasylum. When those derogation decisions were published the public versions redacted the names and locations of the stores to be closed. Knowing that a competitor is planning to close stores, and knowing some of those locations, provides a commercial advantage to JD Sports. Once that information is known, and known by its CEO, it is nearly impossible to adequately ringfence and take mitigating steps to prevent its further use or disclosure.

161. **Stock allocations and financial performance** will not be known to a competitor business. Importantly, knowing what allocations Footasylum gets or is likely to get, particularly from key suppliers during the Remittal and in the 12 to 36 months following the Final Report goes directly to Footasylum's ability to compete with JD Sports. Knowing this information will reduce commercial risk and potentially provide commercial advantages. This is particularly so where the information is disclosed by a CEO of a competing business.

162. By not first requesting the CMA's consent to disclose CSI in this context, and by not maintaining adequate records of the discussions (which is the subject of the first suspected breach above), the CMA is not in a position to investigate further the discussions and determine the extent to which CSI passed between the Parties in relation to these matters. However, the CMA is aware of the context surrounding both exchanges: both instances where exchanges took place were informal and oral between two CEOs of competing businesses. Despite the meetings being informal and oral it appears that there was some pre-planning to arrange the meetings, such as a three-minute call two days before the July Meeting. However, any formal

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[185] For example, see Completed Acquisition by JD Sports fashion plc of Footasylum plc, Final Report on the Case Remitted to the CMA by the Competition Appeal Tribunal (**Final Report**) at 13, 6.8, 6.45, 6.68, and 6.73. The Final Report available here Final report (publishing.service.gov.uk).
[186] See derogations of 19 October 2020, 26 November 2020, 18 January 2021. Although the derogations have been published, the store location has been redacted due to the highly sensitive nature of that information.

record of how or why the meetings were set up, if one ever existed, has not been provided. The July Meeting, where CSI exchanges took place, was held in a car park, away from either of the business premisses of Footasylum and JD Sports, no notes were taken at either meeting (despite General Counsel being present at the July Meeting, before leaving the meeting part way through, and a note taker, in Mr Cowgill's assistant, being available to take notes at the August Meeting), and no agenda was circulated prior to the meetings. Coupled with the topics discussed being provided to the CMA by JD Sports and Footasylum, the CMA has found that the fact these matters were discussed amounts to CSI passing between the Parties which was not strictly necessary in the ordinary course of business, and was in breach of paragraph 6(I) of the IO.

Assessment of JD Sports' Representations

The CMA has considered JD Sports' Representations carefully by reference to the evidence and responds as set out below:

(a) save for the non-public information about [✂] named stores, the other information which passed between Footasylum and JD Sports was not CSI;[187]

(b) there can be no breach of an obligation to 'procure' in hearing non-public information about [✂] planned store closures;[188]

(c) JD Sports had a reasonable excuse for the exchange of information;[189]

(d) JD Sports took appropriate steps to mitigate the consequences of its receipt of non-public information about the [✂] stores that Footasylum proposed to close;[190] and

(e) that the CMA is incorrect to take an 'in the round' consideration of the four topics discussed.[191]

(a) The information was not CSI

163. JD Sports submitted that discussions about Footasylum's [✂] lease and logistics contracts could not amount to CSI because it was 'generally known that Footasylum, like most retail businesses, neither owned its [✂] nor [✂].[192]

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[187] PL Representations at paragraph 19; PD Representations at paragraphs 67 to 83.
[188] *Ibid* at paragraphs 20 to 22.
[189] *Ibid* at paragraph 23.
[190] *Ibid* at paragraph 24.
[191] PD Representations at paragraph 3.2.
[192] *Ibid* at paragraph 19(a)(i).

In relation to the lease, JD Sports could have found out this information from the Land Registry Records,[193] which JD Sports contends makes this information 'generally in the public domain'.[194] In relation to the logistics contract, JD Sports says that the CMA is wrong to categorise it as sensitive because, like the [✂] lease, JD Sports say that it could not itself derive a commercial advantage from having the information.[195] The fact that these two contracts [✂] was also a generally knowable fact and not CSI.[196]

164. In any event these exchanges were within the permitted scope of 'integration planning' under the IO.[197]

165. In relation remaining topics discussed, JD Sports submitted:

(a) With the exception of the [✂] stores, the fact that Footasylum had closed or was about to close stores was not inherently commercially sensitive.[198] JD Sports support this by referring to the fact that the CMA has published various derogations granting permission to both Footasylum and JD Sports to close certain stores, the fact that JD Sports tracks future opening and closing of its competitors stores, and that the CMA's (publicly available) Final Report listed a number of instances of other retailers (ie the Parties' competitors) closing stores or reducing their store footprint.[199] JD Sports also say that the information about the [✂] named stores was of little to no use to JD Sports because [✂].[200]

(b) Reduced stock allocations is not CSI because it is 'widely known in the market' for example that Nike has reduced product allocations, particularly for retailers other than Nike's strategic partners.[201] In this regard, JD Sports noted that Footasylum's reduction in product allocations was mentioned in the non-confidential version of the parties opening submission on the remittal, as well as the non-confidential version of the CMA's Final Report.[202] JD Sports further contends that 'the brief duration of the August phone call indicates that any such information [about Footasylum's financial performance] would have been high level'.[203]

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[193] *Ibid* at paragraph 19(a)(ii).
[194] PD Representations at paragraph 74.
[195] *Ibid* at paragraph 77.
[196] PL Representations at paragraph 19(a)(ii).
[197] *Ibid* at paragraph 19(a)(iii); PD Representations at paragraph 72. The CMA rejects this submission as set out in paragraph 152 of this Decision.
[198] *Ibid* at paragraph 19(b).
[199] *Ibid* at paragraph 19(b)(ii).
[200] PD Representations at paragraph 71.
[201] *Ibid* at paragraph 79; PL Representations at paragraph 19(b)(iii).
[202] PL Representations at paragraph 19(b)(iii).
[203] PD Representations at paragraph 78.

166. The CMA does not accept that the information discussed does not amount to CSI. CSI covers more than just information that is not in the public domain and includes information, even publicly available information, that reduces commercial risks or market uncertainty or potentially provides an advantage to the party receiving it.[204]

167. In relation to the [✂] lease and logistics contracts, the fact that retailers do not tend [✂] or provide their own in-house logistics services misses the point about these topics being discussed between CEOs and about CSI passing between the Parties. In particular, and as set out above, the logistics contract was significant in the context of the Covid-19 pandemic and changing retail practices. Although JD Sports may generally know that retailers are unlikely to [✂] or have fully in-house logistics operations, it does not necessarily know this specifically about Footasylum, and, importantly, nor does it know when these contracts [✂].

168. JD Sports contends that because it says it did not know the identity of Footasylum's logistics/transport supplier[205] it could have gained no commercial advantage. However, the CMA does not agree. Commercial advantage can be gained in a myriad of ways from a CEO of a competing business disclosing [✂]. As the topic was said to be raised as part of Footasylum's need to know certain things to assist it with integration planning, it is not credible for JD Sports to say it did not know the 'who, what, when, and where' details about the contract. Absent these details, there would have been no point in Mr Bown raising the question about renewing or extending the contract.[206] The same considerations apply to the CMA's view of the [✂] lease.

169. In relation to reduced stock allocations and financial performance, the CMA also does not accept that this information was not CSI. Again, the fact that it is generally known that retailers were suffering from reduced stock allocations in the market does not mean it is known specifically in relation to Footasylum. Knowing any information about a competitor's stock allocations goes to the heart of competition between parties. It is equally unpersuasive to say that the discussion between the CEOs was relatively brief and therefore any discussion about Footasylum's financial performance would have been high level.[207] JD Sports and Footasylum have been unable to provide a record of the discussion, so the exact details provided cannot be assumed. In any

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[204] *Lexon v CMA* [2021] CAT 5 at [126].
[205] A point we note it is not clear as Footasylum in its RFI10 Response suggest that the name of the supplier may have been disclosed, further highlighting the importance in the CMA not offering a benefit to the parties for their own poor record keeping.
[206] PD Representations at paragraph 77.
[207] *Ibid* at paragraph 78.

event, a CEO providing financial performance details to a competitor, even at a high-level, amounts to CSI as it provides strategic insight into a competitor's performance, and, at least, amounts to CSI indirectly passing between the Parties.[208]

170. Finally, JD Sports already accepts that in relation to the [✂] named stores, information that was CSI passed between the Parties.[209] In relation to the other [✂] stores discussed the CMA notes that the JD Sports RFI10 Response and the 19 August Email state that 'at least' [✂] stores were named,[210] leaving open the possibility that other stores were also named and that Mr Cowgill only recalls those [✂] stores. As there are no records of the meeting and Mr Cowgill's recollection is incomplete, the CMA considers it entirely possible that other stores were also named. In any event, the fact that stores were being closed, even if disclosed only at a high level, is sufficient to meet the threshold for CSI and will not be information generally known in the public domain.

(b) there can be no breach of an obligation to 'procure' in hearing non-public information about [✂] planned store closures and (c) JD Sports had a reasonable excuse

171. JD Sports submitted that there can be no breach of an obligation to 'procure' that no CSI shall pass, directly or indirectly between Footasylum and JD Sports in circumstances where Mr Cowgill did not solicit the information from Mr Bown.[211] Further, JD Sports contend that 'an obligation to 'procure' a negative result when the result lies in the control of a third party is not an absolute obligation of guarantee…'.[212] The CMA notes that this representations was not carried through in JD Sports PD Representations.

172. In its Representations, JD Sports' view is that if a breach is found, JD Sports had a reasonable excuse because it did not solicit the information and it was not an absolute obligation of guarantee.[213]

173. The obligation to procure that no CSI directly or indirectly pass between the Parties, set out above in paragraph 149, includes an obligation to ensure that CSI is not received. This is not limited to active soliciting of information, nor is

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[208] The CMA notes that all it knows is that the topic of stock allocation and financial performance was discussed. The Parties have been unable to provide any details about that discussion. The topic alone is sufficient for the CMA to determine that CSI was discussed, however, it notes that parties to interim measures should not be able to benefit from a lack of record keeping where topics discussed at meetings between CEOs raise issues of CSI.
[209] PD Representations at paragraph 69.
[210] JD Sports RFI10 Response at paragraph 33; 19 August Email.
[211] PL Representations at paragraph 21.
[212] *Ibid* at paragraph 22.
[213] *Ibid* at paragraph 23; PD Representations at 110, 161 and 163.

it a question of whether JD Sports wanted the information. JD Sports could have taken steps to guard against such an exchange (as described in relation to Breach 1) but did not do so, and as such the CMA disagrees that the result lay exclusively, or even primarily, in the control of Footasylum, especially when they allowed themselves to receive such information multiple times.

174. Further, in *Balmoral Tanks Ltd & Anor v Competition and Markets Authority*[214] the Court of Appeal upheld the CMA's decision to impose a penalty on Balmoral Tanks Limited (**Balmoral Tanks**), a supplier of steel water tanks, for taking part in an exchange of competitively-sensitive information on prices and pricing intentions with three competitors, in circumstances where the exchange took place at a single meeting. The CMA's decision in Balmoral Tanks found that 'the mere receipt of information may be sufficient to give rise to a concerted practice.'[215] The decision also cited the judgment in *Aalborg Portland A/S v. Commission*[216] in which the CJ held *'*a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery [...] That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable…*'*(emphasis added).[217] Drawing an analogy from these authorities it is clear that JD Sports' argument that Mr Cowgill did not solicit the information from Mr Bown and therefore there can be no breach of paragraph 6(I) the IO, cannot be sustained.

175. For the same reason, the CMA finds that JD Sports' assertion that it had a reasonable excuse to be incorrect.

(d) JD took appropriate steps to mitigate the consequences of the exchange of CSI

176. JD Sports submitted that it took 'wide ranging' steps to contain the exchange of CSI relating to the closure of the [✂] stores and that the 19 August 2021 Email that it sent to the CMA disclosing the August Meeting demonstrates it acted appropriately to mitigate the impact of the exchange of CSI.[218]

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[214] [2019] EWCA Civ 162.
[215] Case CE/9691/12 Galvanised steel tanks for water storage information exchange infringement (19 December 2016) at paragraph 4.8.
[216] EU:C:2004:6.
[217] *Ibid* at paragraph 84.
[218] *Ibid* at paragraph 24.

177. According to JD Sports, it ensured that Mr Cowgill and [✂] (JD Sports' [✂], who assisted with preparation of the 19 August Email) were not involved in commercial decisions where this non-public information might be relevant.

178. JD Sports submitted that it considered it of 'paramount importance to avoid the risk of any repeat occurrence and took remedial steps',[219] including sending the 1 September 2021 email which introduced a blanket ban on contact between JD Sports key staff[220] and Footasylum without the prior consent of JD Sports' General Counsel.

179. JD Sports' remedial efforts do not appear to have been directed at the risk posed by the receipt of CSI. Instead, they appear to have been a consequence of the CMA probe into these meetings. In any event, these remedial steps were not taken until a month after JD Sports had received the CSI and were never reported to the CMA to check or determine whether they were appropriate. Those steps were never advised to the CMA or the Monitoring Trustee,[221] and the fact that the steps were taken appears to run contrary to JD Sports' position that the information it received was relatively benign.[222]

(e) *in the round consideration is a flawed consideration*

180. JD Sports submit that the CMA only reaches the conclusion that the four categories of information are CSI when considered together. This is simply incorrect and appears to be JD Sports' misreading of the CMA's Provisional Decision which clearly set out, as does this Decision, that 'each of the four topics discussed alone would amount to CSI'.[223] It should therefore be clear that the CMA, although able to determine that there were in fact at least six separate instances of CSI passing between the parties, and therefore consider six separate breaches, has determined to deal with all six instances under the heading of a single breach of the IO.

Breach 3 – Failure to immediately report

The IO

181. Paragraph 16 of the IO requires JD Sports to immediately notify the CMA and Monitoring Trustee if it has any reason to suspect the IO might have been

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[219] *Ibid* at paragraph 24.
[220] As defined by paragraph 20 of the IO.
[221] Which suggests JD Sports was not operating in a fully transparent manner when they sent the 19 August Email, or that any 'spirit of transparency' (19 August Email) continued after JD Sports and Footasylum sent the 19 August email.
[222] PD Representations at 69 to 77.
[223] Provisional Decision at 133.

breached. Paragraph 16 is expressed in mandatory terms, being that if there is 'any reason to suspect [that the IO] might have been breached [JD Sports] shall immediately notify the CMA…' (emphasis added). This leaves no room for doubt that the trigger for reporting is very low, being 'any reason to suspect', including incidents that ought to have raised suspicion, and that the obligation to report is immediate. Any delay in notification is a breach of this paragraph of the IO.

182. The low bar for reporting, 'any reason to suspect', is set because the risk of pre-emptive action and harm to competition where a breach occurs is extremely high. The requirement to immediately report such suspicions is equally important, but particularly so where there is a suspected exchange of CSI, because if any action by the CMA is to be taken and be effective, it must be swift. This is because, where CSI is exchanged – and particularly where it is exchanged between CEOs – how that CSI is then subsequently used, directly or indirectly, is very difficult, if not impossible, to control. Once the information is known to someone in the position to take key commercial decisions, it cannot be unknown. The requirement to immediately notify any suspected breaches is therefore of fundamental importance to the CMA being able to take appropriate action. These points are made clearly in the CMA's IM Guidance.[224]

183. In this case the CMA is of the view that CSI was exchanged at both the July and August Meetings. The July Meeting was never reported to the CMA, and the CMA was only given a delayed, being more than two weeks after the meeting took place, and incomplete account of the August Meeting (in the 19 August Email). As a result, the CMA has concluded that paragraph 16 of the IO was breached when JD Sports:

(a) did not report the July Meeting to the CMA and/or the Monitoring Trustee, and

(b) delayed reporting the August Meeting to the CMA and, when it was reported, only provided an incomplete and caveated account of the meeting and potential exchange CSI.

Facts

184. As set out in relation to Breach 2, CSI passed between the Parties in breach of the IO on at least two occasions. JD Sports accepts that some of that

[224] IM Guidance at 3.16.

information was potentially CSI and, importantly, that it suspected a breach of the IO occurred during the August Meeting.[225]

185. The CMA only became aware of the July Meeting via a voluntary disclosure of video material from a third party. JD Sports itself only disclosed the existence of the July Meeting to the CMA following receipt of RFI9, being almost 2 months after the meeting, and even then, it did not provide any details of the meeting that would assist the CMA in its statutory function of monitoring and enforcing the IO. At no stage did JD Sports proactively notify[226] the CMA of the fact of the July Meeting or the exchange of CSI that occurred during the July Meeting.

186. In respect of the August Meeting, JD Sports disclosed the fact of the call to the CMA some 15 days after the call took place. That disclosure took place only after Mr Cowgill had returned from holiday and in the context of the CMA's probe in RFI9 into meetings held between the Parties. The 19 August Email, which disclosed the August Meeting, was an incomplete account of the meeting based on the memory of the two participants some weeks after the meeting and without the benefit of notes or agenda items, and was heavily caveated in terms of what was or was not potentially or actually discussed between the two CEOs. JD Sports now accepts that the notification of the August Meeting was not immediate as required by the IO.[227]

Failure to comply with paragraph 16 of the IO

187. The CMA has found that the discussions at the July Meeting and August Meeting involving the exchange of CSI should/ought to have caused JD Sports to suspect a potential breach of the IO.[228] For the reasons set out above at paragraphs 158 to 159, JD Sports ought to have known that lease and logistics/transport [✂] amounted to CSI, and therefore discussing these matters at the July Meeting ought to have raised suspicion that the IO may have been breached and triggered the immediate requirement to report those suspicions to the CMA and Monitoring Trustee.

188. The August Meeting raised similar topics to the July Meeting, but also included discussions about store closures, which JD Sports accepts amounted to CSI.[229] The CMA considers that the topics discussed at the

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[225] JD Sports Representations at paragraph 26(b).
[226] JD Sports and Footasylum did not report the July Meeting to the CMA in the relevant compliance statements, Monitoring Trustee report, or other mechanism under the IO. The CMA only became aware of the meeting following the third party providing the video material, and then confirmed that meeting in responses to its RFI7 and RFI10.
[227] JD Sports' Representations at paragraph 26.
[228] *Electro Rent,* at [172], where the CAT held the appropriate test was "ought" to have known or suspected.
[229] PD Representations at paragraph 71.

August Meeting amount to CSI and ought to have raised some reason for suspicion that the IO may have been breached and triggered the immediate requirement to report those suspicions to the CMA and Monitoring Trustee.

189. In relation to the August Meeting JD Sports admits that the August Meeting raised concerns about compliance with the IO[230], but then seeks to explain the delay in notifying the CMA as a result of Mr Cowgill being on holiday and not having an opportunity to speak to anyone internally until his return. As set out above, the CMA does not consider this to be a legitimate reason for the delay in complying with the terms of the IO, particularly in relation to the sensitive and potentially extremely damaging issue of CSI having been exchanged. Mr Cowgill could have reported his suspicion that a breach had occurred in a number of different ways while he was on holiday, for example by emailing or telephoning his General Counsel, or reporting the August Meeting immediately following the telephone call with Mr Bown and before he went on holiday. The requirement to report any reason to suspect a breach of the IO is not prefaced upon the convenience of the party reporting it. As such, the CMA concludes that:

(a) there was a delay in reporting a suspected breach, and

(b) that delay is not excusable for the reasons provided by JD Sports.

190. Without JD Sports immediately reporting suspected IO breaches of the type arising in the July and August Meeting, the CMA is deprived of the ability to take swift and appropriate action to prevent or mitigate against pre-emptive action. Any such suspected breaches should therefore have been notified to the CMA under paragraph 16 of the IO, and left to the CMA to judge whether the meetings or anything discussed at them amounted to pre-emptive action and/or have relevant implications for the Remittal.[231]

Assessment of JD Sports' Representations

191. The CMA has carefully considered JD Sports' Representations with reference to the evidence and responds as set out below.

192. JD Sports concedes that it did not 'immediately' report the August Meeting to the CMA [and Monitoring Trustee]'.[232] However, JD Sports says that the delay was not 'unreasonable' because:

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[230] JD Sports Representations at paragraph 10.
[231] *Electro Rent*, at [206].
[232] PD Representations at paragraph 4.4.

(a) When considered in context, JD Sports notified the CMA in compliance with paragraph 16 of the IO;[233]

(b) Mr Cowgill did not discuss the content or existence of the August Meeting with anyone prior to informing JD Sports' General Counsel;[234]

(c) JD Sports' General Counsel immediately instructed external counsel, Linklaters, to liaise with Footasylum's external counsel, Eversheds, to verify the information was accurate and complete prior to disclosing it to the CMA;[235]

(d) the content of the August Meeting was 'not responsive' to the CMA's request for information about 'meetings'.[236] JD Sports say that the call related to a 'discrete issue' and was 'a call, not a meeting';[237] And

(e) The CMA has never previously imposed a penalty for delayed disclosure.

193. JD Sports otherwise denies that it failed to immediately report to the CMA and the Monitoring Trustee.[238] In particular, JD Sports contends that there were no reasons to suspect the IO might have been breached by reason of the July Meeting.[239]

194. The CMA has already set out its finding that the July Meeting and the August Meeting involved CSI passing between the Parties.

195. The CMA disagrees with JD Sports' submission that it was reasonable to notify the CMA about the suspected breach of the IO during the August Meeting on 19 August. It is not reasonable for JD Sports to undertake its own calculation of the relevant days between the meeting taking place and the 19 August Email. JD Sports attempts to say that the delay was only 5 days, not the 15 days between 4 August and 19 August, and that 5 days is reasonable. The CMA disagrees. It is a straightforward piece of arithmetic to count the days that passed following the 4 August Meeting and the 19 August Email. The fact that there were weekends between those dates, and that Mr Cowgill was on holiday are wholly irrelevant to JD Sports' obligation to immediately report its suspicions that the IO had been breached. The importance of immediately notifying the CMA have been set out clearly above and it will not be an excuse for a delay in reporting CSI passing between the Parties that a

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[233] PL Representations at paragraph 26(b)(i).
[234] *Ibid* at paragraph 26(b)(ii).
[235] *Ibid* at paragraph 26(b)(iii).
[236] *Ibid* at paragraph 26(b)(iv).
[237] *Ibid* at footnote 14, page 8.
[238] *Ibid* at paragraph 26.
[239] *Ibid* at paragraph 26(a).

weekend happened to fall two days after the event occurred and then again 10 days later. Similarly, the trigger for notification is 'any reason to suspect'. That is a low bar, and one that would not require 5, 11, or 15 days to consider. JD Sports' own guidance say that discussion of store closures is highly sensitive,[240] it is also aware that Footasylum's guidance says the same because JD Sports ensured Footasylum had similar guidance to it. Mr Cowgill is also said to be very familiar with his obligations under the IO,[241] and that JD Sports' guidance made clear that any doubt over whether the IO was engaged should be sent to its legal team.[242] Needing 5, 11 or 15 days to consider whether the August Meeting raised suspicions is not a credible excuse for the delay. Moreover, JD Sports has not provided any evidence to show that it considered whether or not the August Meeting raised suspicions that CSI may have passed between the Parties.[243] In fact all that appears to have happened in the intervening period is that the CMA served JD Sports with RFI9 (dealt with below).

196. It is irrelevant who Mr Cowgill did or did not discuss the information he received with. The fact that CSI passed between the Parties is serious as once CSI is exchanged it is extremely difficult to manage how it is used and the CMA needs to be able to determine what appropriate measures should be put in place to mitigate those risks.

197. The CMA also disagrees that notifying General Counsel upon Mr Cowgill's return is sufficient to comply with his obligations under the IO. The obligation is to immediately notify the CMA.

198. As for JD Sports' submission that the call was not captured by the CMA's RFI9, this is not relevant to whether or not JD Sports complied with its obligations under the IO. However, the CMA notes the relevant wording in question 1 of RFI 9 stated 'Please list all meetings (both virtual and in person)…'. Virtual meetings encompass any meeting held in a form other than face to face, such as for example by way of video or telephone. JD Sports' narrow interpretation of the meaning of 'meeting' for the purposes of RFI 9, would exclude any meeting conducted by telephone. Such narrow interpretation is clearly not consistent with the wording of RFI 9. Further, JD Sports' response to RFI 9 listed 16 meetings, of which 11 were described as being 'virtual', either in whole or part. JD Sports has not particularised whether those virtual meetings were conducted by way of telephone or other medium.

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[240] Senior Management Guidance.
[241] PL Representations at 9(a).
[242] Senior Management Guidance.
[243] For example, an email or phone call form Mr Cowgill to his inhouse or external legal teams raising the issue of the August Meeting as would be expected for someone who knows of their obligations under the IO and who is familiar with their guidance which requires doubt to be raised with the legal team.

The CMA therefore rejects JD Sports' view that it considered the August Meeting did not fall within the scope of RFI9.

199. JD Sports point to the fact that the CMA has not, in previous interim measures cases, imposed a penalty for a delay in reporting a breach of those interim measures. The CMA does not consider past decisions and the CMA's prioritisation of breaches to be relevant to the current *sui generis* set of facts, nor that past cases set a precedent for future breaches.[244] The two cases JD Sports points to are *Electro Rent* and *Nicholls*. Neither case saw the CMA impose a penalty for the delays in reporting suspected breaches to it. However, equally, neither case involved CSI passing between the parties, or such insufficient records being kept that, without immediate and accurate reporting, would hamper or impede the CMA's proper fulfilment of statutory function in monitoring and enforcing interim measures. The CMA also notes that in both cases the parties were criticised for their delays in reporting. In *Nicholls* the delay in reporting was in relation to staff moving between the merging parties, the CMA found that there was ample opportunity for Nicholls to inform the CMA of these developments and that its failure to do so was a flagrant breach of the IO. Although this was not a stand-alone breach it was considered to be an aggravating factor going to penalty.[245] As the issues in this case relate to CSI passing between the parties, the immediacy requirement in paragraph 16 of the IO is extremely important. As described above, once CSI passes between the parties it is very difficult to ascertain and appropriately ring-fence and control its subsequent use. This is even more so where the CSI is passed between CEOs of competing businesses. It is therefore entirely appropriate for the CMA to find a standalone breach of the IO in relation to the obligation paragraph 16 to immediately report suspected breaches of the IO to the CMA.

Risk of prejudice to a reference or of impeding remedial action

200. JD Sports has not addressed the risk of prejudice to a reference or of impeding remedial action by the CMA in its Representations.

201. One effect of Breach 1 and Breach 2 as set out above was to leave the CMA (and the Monitoring Trustee) in the dark as to whether or not the IO is being fully complied with by JD Sports and to deprive the CMA of taking appropriate action in relation to the July and August Meeting. Similarly, Breach 3 related

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[244] The requirement to immediately report suspected breaches of the IO is clearly set out in the IO at paragraph 16, it is therefore not relevant whether the CMA has pursued penalties in relation to breaches of similar provisions in the past.
[245] Case ME/6762/18 *Completed Acquisition by Nicolls' (Fuel Oil) Limited of the oil distribution business of DCC Energy Limited of Northern Ireland*, Notice on Penalty pursuant to section 94A of the Enterprise Act 2002, at paragraph 196(c).

to a development within the scope of the IO that JD Sports failed to report to the CMA in a timely manner. These breaches had the effect of limiting the CMA's awareness of material developments within the businesses under investigation (including other potential breaches) and in turn prejudiced the CMA's ability to carry out an important statutory function under the merger regime, namely to monitor, and as the case may be enforce, compliance with interim measures in order to prevent pre-emptive action.

202. On that basis, the CMA finds that the above failures to comply with the IO risked prejudicing the reference (for example, by potentially affecting the competitive structure of the market) or impeding action justified by the CMA's decisions on the reference.

Failure to comply without reasonable excuse

203. Section 94A(1) of the EA02 provides that penalties can only be imposed if a failure to comply is '*without reasonable excuse*'. The CMA notes that the EA02 does not define 'reasonable excuse'.

204. The CMA's Penalties Guidance states:

> The circumstances that constitute a reasonable excuse are not fixed and the CMA will consider whether any reasons for failure to comply amount to a reasonable excuse on a case-by-case basis. However, the CMA will consider whether a significant and genuinely unforeseeable or unusual event and/or an event beyond [the person's] control has caused the failure and the failure would not otherwise have taken place.

205. More generally, once a breach of an IO has been established, the person who has committed the breach bears the evidential burden of setting out a case for reasonable excuse. Any excuse must be objectively reasonable. The CMA will consider any arguments put forward as to reasonable excuse on the facts of the case.

206. In *Electro Rent*, the Tribunal found that, in the context of assessing whether Electro Rent had a reasonable excuse for breaching the interim order by serving a break notice, it was irrelevant whether or not Electro Rent had good commercial reasons for having done so.[246] The Tribunal also rejected Electro Rent's argument that its engagement with the Monitoring Trustee pre-breach constituted a reasonable excuse. The Tribunal did so partly on the basis that Electro Rent had failed to properly brief the Monitoring Trustee and partly on the basis that, in circumstances in which only the CMA could decide what was

[246] *Electro Rent* at [114], [138] and [139].

a breach of the interim order requiring consent or derogation, it was insufficient to merely notify the Monitoring Trustee of a possible breach.[247]

207. JD Sports has submitted that it had a reasonable excuse not to comply with paragraph 6(l) of the IO (in respect of breach 2), outlined above at paragraphs 171 to 172, including that it had reasonable excuse for receiving CSI from Footasylum because:

(a) Mr Cowgill did not ask Mr Bown of Footasylum for the names or stores that Footasylum planned to close, nor did he expect or want to receive the information.[248]

(b) Paragraph 6(l) is an obligation to "procure" a negative result, which is in the control of a third party, namely, Mr Bown, and is therefore not an absolute obligation of guarantee.[249]

208. The CMA already set out why it does not agree this amounts to a reasonable excuse at paragraph 173 above.

209. The CMA finds that the reasons put forward are matters that do not amount to a reasonable excuse (individually or in aggregate). None of the reasons disclose a genuinely unforeseeable or unusual event and/or an event beyond JD Sports' control causing it to fail to comply with the IO, nor do they provide an alternative basis for finding a reasonable excuse.

210. Accordingly, the CMA may proceed to consider imposing a penalty of such fixed amount as it considers appropriate pursuant to section 94A of the EA02.

E. Appropriateness of imposing a penalty and of the amount of penalty imposed

Policy objectives of the penalty – preventing actions which might prejudice any reference and deterrence

211. The CMA considers that it is of utmost importance to the UK's voluntary, non-suspensory merger regime that interim measures should be effective by ensuring that compliance mechanisms addressees put in place are fit for purpose, particularly in the small number of completed mergers which the

[247] *Ibid* at [155] to [157] and [159] to [164].
[248] PL Representations at paragraph 21; PD Representations at paragraph 8.7.
[249] PL Representations at paragraph 22.

CMA identifies as warranting review.[250] Interim measures' function is to prevent conduct that might prejudice a reference or impede action justified by the CMA's final decision or otherwise lessen competition. The purpose of interim measures, as noted by the CAT, is precautionary, guarding against the possibility of pre-emptive action.[251] It is also incumbent on parties to provide full and accurate information to the CMA and any appointed Monitoring Trustee throughout the investigation particularly if they identify risks as to their activities pursuant to the interim measures and any related derogations.

212. It is important that parties take such obligations to comply seriously, recognising the importance of conducting their business within the parameters of any interim measures, including by identifying and protecting against risks of non-compliance and keeping compliance measures under regular review and at the forefront of a party's mind. Parties should exercise due care and attention over any activities that might be permitted under a derogation, to ensure they do not engage in a breach, whether inadvertently or otherwise.

213. The above is reflected in the policy objectives set out in the Penalties Guidance:[252]

> Use of the CMA's investigatory and interim measures powers is therefore intended to:
>
> (…)
>
> • prevent action which might prejudice any reference, impede the taking of action following a reference, or cause detrimental and irreversible changes to market dynamics, and
>
> • ensure that the threat of penalties will deter future non-compliance with relevant CMA powers, by those on whom penalties have been imposed and other persons who may be considering future non-compliance.

214. In *Electro Rent* the Tribunal held that 'it was appropriate to set the penalty at a level that would bring home to Electro Rent, and to other parties involved in a merger investigation, that it is of the utmost importance that interim orders be scrupulously complied with, and that a party should not itself form judgments or reach decisions that are properly for the CMA. This is so, whatever the

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[250] Completed mergers make integration more likely, which may need to be reversed or unwound in order to maintain the independence of the separate businesses. In addition, there is a higher risk that customers, competitors and suppliers perceive businesses under common ownership to be a single entity, rather than two separate entities that have not yet merged.
[251] *Intercontinental Exchange* at [220].
[252] Penalties Guidance, paragraph 3.1.

intentions or incentives of the party involved.'[253] The CMA subsequently issued revised guidance on interim measures, stating that 'given the importance of Interim Measures to the functioning of the regime, the CMA will not hesitate to make full use of its fining powers. The CMA will therefore impose proportionately larger penalties in future cases should this prove necessary in the interests of deterrence.[254]

215. Financial penalties perform an important function in signalling the unacceptability of commercial practices by merging parties that contravene the CMA's interim measures, and the serious potential consequences of engaging in such practices. It is therefore imperative that the CMA set the penalty at a level that reflects the seriousness of the failure to comply with interim measures and is effective in achieving deterrence.[255]

Appropriateness of imposing a penalty

Assessment of the factors relevant to imposing a penalty

216. Having had regard to its statutory duties and the Penalties Guidance, and having considered all relevant facts and submissions made by JD Sports, the CMA has decided that the imposition of penalties in the present case is appropriate.

217. In reaching this view, the CMA has had regard to the policy objectives set out above, and in particular the need to achieve deterrence, as well as the factors influencing a decision to impose a penalty set out in the Penalties Guidance.[256]

218. JD Sports submitted that if there were any breaches of the IO then those breaches would 'at most [be] a good faith oversight in relation to the outer boundaries of what constitutes CSI'[257] (in relation to what was Breach 4 in the Preliminary Letter)[258] and that although it accepts that 'non-public information about FA's proposals to close [✂] named stores'[259] was provided to JD

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[253] *Electro Rent* at [206]. In doing so, it rejected Electro Rent's submission that setting the penalty at such a level was not appropriate because the breach was inadvertent and because Electro Rent had approached the Monitoring Trustee in advance and had taken steps to rectify the breach.
[254] IM Guidance, paragraph 7.6.
[255] There are two aspects to deterrence: first, the need to deter the undertaking which is subject to the penalty decision from engaging in future contravention of interim measures (recidivism), and second, the need to deter other undertakings which might be involved in future merger investigations. Any penalty that is too low to deter an undertaking which has contravened interim measures is also unlikely to deter other undertakings.
[256] See Penalties Guidance, paragraphs 4.2 and 4.3.
[257] JD Sports PL Representations at paragraph 2(d). We note that this comment came in respect of Breach 4.
[258] Breach 4 no longer being a breach the CMA is finding in its decision.
[259] PL Representations at paragraph 19.

Sports in the August Meeting, it did not breach the IO because it did not solicit, expect or want the information imparted to it by Footasylum (in relation to Breach 2). In relation to Breaches 1 and 3 JD Sports denies any breach could be found.[260] On this basis, JD Sports appear to make the point that it would be inappropriate to impose a penalty in these circumstances because, for Breaches 2 and 3 it either has a reasonable excuse or the CMA is seeking to impose a penalty at the edges of its power, and in relation to Breaches 1 and 3 because no breach can be made out.

219. As set out above, JD Sports' statement that it did not want to know about Footasylum's store closures (Breach 2) meant that it was an innocent party to the breach it otherwise had no control over is not accepted and ignores the extent of the obligation under the IO on JD Sport.

220. As set out below, the CMA has found that imposing a penalty for Breaches 1, 2, and 3 is appropriate given:

(a) the seriousness of the breaches and, in particular, the severely deficient compliance mechanisms in place during the period of the IO (Breach 1) which go to the heart of the interim measures regime, the six known instances of CSI passing between the Parties between two meetings in circumstances that were wholly avoidable (Breach 2), and the failure to report, or delayed reporting of exchanges of CSI in circumstances where the risk of pre-emptive action and prejudice to the Remittal was significant (Breach 3);

(b) the adverse impact that these breaches had on the CMA's ability to monitor and enforce compliance with interim measures;

(c) the serious risk posed by these breaches, particularly the risk of pre-emptive action and impediment to the Remittal; and

(d) the need to specifically and generally deter such behaviour, particularly as such behaviour seriously undermines a core tenet of the UK's voluntary and non-suspensor merger regime which relies heavily on interim measures being effective and parties taking their obligations seriously.

221. Below we set out the basis on which the CMA considers it appropriate to impose a penalty for each of Breaches 1 – 3:

[260] Except as they relate to the [✂] named stores being closed disclosed by Footasylum.

Breach 1 – failure to have sufficient measures in place to manage the exchange and potential exchange of CSI

222. JD Sports was under a clear obligation in paragraph 6(l) of the IO. JD Sports knew, or ought to have known that it needed to scrupulously comply with the IO[261] and as such that its compliance with the IO had to be an ongoing project while the IO was in place. Consideration of compliance, and in these circumstances consideration of the risks of CSI passing between the Parties and the appropriate steps to prevent those risks coming to pass, should have been at the forefront of JD Sports' mind, particularly where the risk was heightened by the instances of the July and August Meetings, being informal and oral meetings between CEOs outside the ordinary course of business.

223. As an IO also 'catches more than just actual prejudice or impediments' but also the risk or 'possibility of prejudice or an impediment',[262] it was, or should have been clear to JD Sports that it was not sufficient for it to have policies, procedures and safeguards, which did not make provision for a number of basic steps, such as creating and maintaining records, which failed to identify and make provision for specific risks that ought to have been known, and which included steps which were not written down and which were only applied ad hoc by individuals retrospectively assessing whether or not CSI passed between the Parties.

224. JD Sports' conduct in relation to Breach 2 and 3 provides (non-exhaustive) examples of the types of things which should have been captured, in some manner, by compliance policies, procedures and safeguards. In the first instance such mechanisms should have operated to ensure that no CSI passed or risked passing between the Parties. However, in the event there was still a failure to procure such an outcome, such mechanisms should have operated to immediately advise the CMA of the contents of the meetings, including providing sufficiently accurate evidence of the content of such meetings (like agendas, meetings notes or minutes, and a record of how and why the meetings took place) to allow the CMA to determine for itself whether a breach occurred or risked occurring and then take appropriate action. This is important as it is exclusively for the CMA to determine whether a breach has or has not taken place and not for the Parties to make these assessments in circumstances where there is at least a risk of a breach of the IO.

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[261] *Electro Rent* at [206].
[262] *Ibid* at paragraph 118.

225. As a result, JD Sports' compliance mechanisms did not provide for the required scrupulous compliance with the IO and the CMA is of the view that Breach 1 is particularly serious.

226. The CMA has found that Breach 1 is very serious because the need for JD Sports to have in place policies, procedures and safeguards that were fit for the purpose of ensuring ongoing and constant compliance with the IO, and in particular paragraph 6(l) is fundamental to the operation of the UK's merger regime, which relies heavily on the effective operation of interim measures, and, in turn, those measures rely heavily on the parties' scrupulous (and largely self-assessed) compliance. This was reasonably clear to JD Sports on the words of the IO, and JD Sports clearly knew its compliance measures had to be tailored to its specific circumstances.[263] However, despite this, JD Sports failed to consider key risk factors about its own employees and instead provided only high-level and light touch guidance on complying with paragraph 6(l) of the IO.

227. As set out above, the CMA finds that JD Sports' failure created the very real risk that CSI would pass, undetected or detected, between the Parties and raise the risk of pre-emptive action, particularly in circumstances where the CMA's investigation was ongoing, and no final remedies had yet been decided (noting the breadth of the concept of pre-emptive action and the CMA's powers in remedying an SLC as set out below). JD Sports' conduct had an adverse impact at a fundamental level of the CMA's ability to monitor compliance, and enforce compliance, with the IO. The effect of JD Sports not considering and identifying risks specific to its business, undertaking no ongoing and active steps to prevent CSI from passing, and allowing and condoning an ad hoc policy of assessing whether CSI passed between the parties after any meetings had concluded: 1) deprived the CMA of full and necessary oversight of compliance, 2) meant no appropriate action could be taken to prevent CSI passing between the Parties, and 3) undermined the CMA's ability to properly probe and investigate instances of CSI passing between the Parties as no contemporaneous materials were created and retained.

228. The CMA has found that Breach 1 is serious, going to the heart of the proper functioning of the interim measures regime, and that the conduct involved is at least negligent and/or reckless and raised a real and significant risk of prejudice to the reference or potential remedies.

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[263] JD Sports' RFI10 Response at paragraph 62.

Breach 2 – failure to comply with paragraph 6(l) of the IO by allowing CSI to pass between the Parties without the CMA's prior consent

229. Breach 2 is concerned with the content of the discussions which took place at the July Meeting and August Meeting. There were four categories of information discussed by Footasylum and JD Sports at these two meetings, being:

(a) information regarding a [✂] lease of Footasylum's [✂],

(b) information regarding [✂] a contract with Footasylum's logistics/transport provider,

(c) information regarding the closure of [✂] stores, and the expected closure of [✂] other stores ([✂] stores Mr Cowgill recalls being named), and

(d) information about Footasylum's stock allocations and financial performance.

230. As set out above, the CMA has found that at both the July Meeting and August Meeting CSI passed between the Parties in relation to the above categories of information in breach of paragraph 6(l) of the IO.

231. JD Sports accepts that '[t]he non-public information about FA's proposals to close [✂] named stores that JD believes was provided in the August [Meeting] was potentially CSI'.[264] The CMA is of the view that the other categories of information also amounted to CSI and that JD Sports knew or ought to have known this.

232. The CMA has found that Breach 2 is serious and that the conduct involved is at least negligent and/or reckless and raised a real and significant risk of prejudice to the reference or potential remedies. Ensuring CSI does not pass between the parties, and that if it does it is immediately notified to the CMA (Breach 3 below), is a crucial element of the IO. Where CSI is, or risks, being shared between the Parties it creates a clear risk of prejudice or impediment to the reference or potential remedial action to the extent that the CMA was not able to assess, at the relevant time, whether any action by it was required in view of the information that was shared at the July Meeting and August Meeting (even if, with hindsight, no such action would have been required).

233. Once CSI passes between the Parties it is difficult to control how it is used and the extent to which it might directly or indirectly affect commercial decisions being taken at a senior level in respect of competitors and/or

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[264] PL Representations at paragraph 19.

customers. This is particularly true when, as here, the information is shared between the CEOs of the merging entities and not reported to the CMA. Although JD Sports has said that '[i]t took wide-ranging steps to contain the issue by ensuring that Mr Cowgill and [✂] … were not involved in any commercial decisions where this non-public information might be relevant',[265] such retrospective, and relatively minimal action taken (which we note was not taken until 2 September 2021, one month after the information was exchanged) is not sufficient to ringfence CSI. Moreover, it is not for JD Sports to determine for itself what remedial steps are sufficient. This is a decision that must be left to the CMA.

234. JD Sports' submission that it did not solicit or want the information (in relation to the [✂] named stores being closed)[266] does not, as explained above, absolve JD Sports of its obligations under the IO which requires it to do more than simply passively wait for CSI to be shared. The CMA has found that JD Sports could and should have taken steps to prevent CSI being provided to it by Footasylum, and that it failed to do so.

Breach 3 – failure to report that CSI was exchanged or was suspected of being exchanged

235. For the reasons set out above, the CMA has found that JD Sports had at least some reason to suspect, or ought to have suspected, that there was a breach of the IO before, during, and/or after the July Meeting and August Meeting. JD Sports accepts that it suspected CSI had potentially been exchanged during the August Meeting, however, despite those suspicions JD Sports did not notify the CMA of the same until more than two weeks after the meeting had taken place.

236. In respect of the July Meeting, the CMA was never notified of the meeting in the context of the IO. Instead, JD Sports only disclosed the existence of the meeting in response to RFI9 and only disclosed the few details that Mr Cowgill and Ms Mawdlsey could recall about the meeting in its response to RFI10, some two months after the meeting had taken place.

237. The CMA has considered JD Sports' submissions that '[s]ave in relation to the "immediacy" of the reporting of the August [Meeting], JD denies that it breached para[graph] 16 of the IO',[267] and that JD Sports denies that the July

[265] *Ibid* at paragraph 24.
[266] *Ibid* at paragraph 21; PD Representations at paragraph 8.7.
[267] *Ibid* at paragraph 26; a position JD Sports furthered in its PD Representations where it sought to explain that the delay was, in context, entirely reasonable.

Meeting involved an actual or suspected breach of the IO, and so has not made any submissions on its reporting requirements.[268]

238. However, and as set out at paragraph 148 above, the CMA does not consider that the 19 August Email amounts to compliance with paragraph 16 of the IO because:

(a) it came more than two weeks after the information was exchanged and after Mr Cowgill returned from his holiday, and was therefore not an immediate notification;

(b) it did not contain any remedial steps JD Sports had taken to contain the information it had received and check whether the CMA thought these appropriate;

(c) was only an incomplete recollection of what was discussed;

(d) came in the context of the CMA's RFI9 being served on JD Sports 9 days earlier, and therefore detracting for JD Sports' assertion that the disclosure was voluntary and a result of its policies operating effectively;

(e) was authorised in collaboration with Footasylum, the party who JD Sports suspected it received CSI from, and the party who JD Sports now says is the more culpable entity;[269] and

(f) the Parties themselves do not appear to agree on what the purpose of the 19 August Email was, with JD Sports suggesting it was intended to notify the CMA of a suspected breach and Footasylum appearing to reject this view by simply saying the 19 August Email was in the spirit of transparency; rather than because Footasylum had some reason to suspect a breach of the IO.[270]

239. In relation to the July Meeting, the CMA disagrees that no CSI passed between the Parties, as set out above, and disagrees that JD Sports was not obliged to report it. The information discussed at that meeting, and particularly the discussion of Footasylum's lease [✂] and contract with its logistics/transport supplier, were sufficient to at least give rise to a suspicion that the IO may have been breached (and in fact themselves amounted to CSI (Breach 2)).

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[268] *Ibid* at paragraph 26(a); PD Representations at paragraph 4.2.
[269] PD Representations at paragraph 110.
[270] Footasylum' PL Representations at paragraphs 22 and 34.

240. The CMA concludes that JD Sports knew, or ought to have known that the July and August Meetings triggered JD Sports' requirement to immediately report the meetings to the CMA. Mr Cowgill was present at both meetings and he is described as being aware of his obligations under the IO.[271] JD Sports' General Counsel was also present at the July Meeting and can reasonably be expected to have understood JD Sports' obligations under the IO and have known the importance of scrupulous compliance with the IO even where there may only appear, in her view, to be a possibility, however slight, of breach.

241. Breach 3 is serious and flagrant. Reporting actual and suspected breaches is the primary mechanism the CMA has of discovering breaches or potential breaches of its interim measures. As those present at the meetings knew or ought to have known their obligations and ought to have acted promptly and prudently in compliance with them, the CMA is of the view that the breach was committed intentionally, or at the very least negligently.

242. Interim measures rely significantly on a party's self-assessment of compliance and prompt and clear reporting of any reason to suspect a breach has occurred, potential breaches, and material developments to the CMA. Neither of the self-assessment or prompt reporting were performed by JD Sports in relation to the July Meeting and August Meeting. The fact that the July Meeting was never reported to the CMA (the CMA only became aware of it having taken place through a third party) and that the account of the meeting remains incomplete, highlights the needs for prompt and frank reporting of even suspected or potential breaches of the IO. The fact that the August Meeting was reported only after a significant delay, and not until Mr Cowgill returned from his holiday and JD Sports and Footasylum collaborated on the report to the CMA, and again without the benefit of clear and specific details, also highlights the importance of prompt and frank reporting to the CMA of any actual or potential breach of the IO.

243. Breach 3 has created a risk of prejudice to the reference or potential remedial action the CMA may have sought to take as the CMA was not able, for itself, to assess these meetings between the CEOs and, in the case of the July Meeting JD Sports' General Counsel, for itself to determine the risks they presented. As set out above, time is of the essence when dealing with actual or potential exchanges of CSI. Any delay and any inaccuracies or lack of detail in reporting such exchanges can be extremely damaging to the Remittal, and raises significant risks of pre-emptive action.

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[271] PL Representations at paragraph 32(b), presumably being aware of his obligations under the IO he was aware that, if he had any reason to suspect a breach of the IO that he had to report those suspicions immediately to the CMA.

Conclusion on the appropriateness of imposing a penalty

244. In view of the above, the CMA has found that it is appropriate to impose penalties in relation to Breaches 1, 2 and 3 on the basis of:

(a) the serious nature of these failures to comply with the IO (set out in paragraphs 226, 232, and 241 above), and particularly the seriousness of Breach 1 which goes to the heart of the interim measures and Merger regimes;

(b) the flagrant nature of Breach 3;

(c) the adverse impact these failures to comply on the CMA's ability to monitor, and (as the case may be) enforce, compliance with interim measures (set out in paragraphs 227, 232, and 242 to 243 above);

(d) the serious risk of prejudice to the Remittal and/or pre-emptive action; and

(e) the wider impact of these breaches on interim measures feature of the UK's merger regime.

245. The CMA considered that the other factors relevant to the appropriateness of imposing a penalty listed in the Penalties Guidance at paragraph 4.2[272] did not affect this conclusion.

Appropriateness of the amount of the penalty for each breach

246. Consistent with its statutory duties and the Penalties Guidance,[273] the CMA has assessed all relevant circumstances in the round to determine an appropriate level of penalty for each of the breaches.

Assessment of JD Sports' Representations on the CMA's approach to penalty

247. JD Sports submit that the CMA has not fairly consulted on the proposed level penalties because the CMA has not specifically and with a monetary or percentage figure set out how each step it has considered in imposing a penalty impacts on the total penalty for each breach.[274] JD Sports contends that 'it is not possible for [it] (or the Tribunal or the public) to understand by

[272] Namely the need to achieve swift compliance in the context of this investigation (the CMA considers that general and specific deterrence in relation to future cases are more relevant) or any benefit accrued to JD Sports (this consideration is taken into account for the determination of the penalty amounts).
[273] Penalties Guidance, paragraph 4.11.
[274] PD Representations at paragraphs 103 to 107.

how much the proposed penalties must be reduced if the CMA erred in its assessment of any of the relevant factors'.[275]

248. The CMA does not agree that it is required to specifically spell out under each aggravating and mitigating factor the monetary amount or percentage by which the penalty is to increase or decrease. The CMA instead considers these factors in the round as part of its step in determining the appropriateness of imposing and the proportionality in the relevant level of penalty it imposes. There is no such requirement that the CMA do what JD Sports is proposing and in similar decisions on interim measures, the CMA has not done that.

249. JD Sports also submits that JD Sports is being disproportionately penalised for its role in receiving CSI, rather than disclosing it (which Footasylum is being penalised for). JD Sports goes on to say it would make more 'sense' for the CMA to fine the party disclosing the CSI. This submission, however, has no basis in the IO which sets the obligation on JD Sports (in relation to Breaches 1 and 2) to 'at all times… procure' that 'no CSI pass, directly or indirectly' between the Parties. The CMA has set out in detail above the wide scope of this provision, that the use of the words 'pass' and 'directly and indirectly' sets a low threshold for breach and that there is no distinction between disclosing and receiving CSI, particularly in the context of a merger being reviewed by the CMA. Moreover, and as set out above, the CMA is concerned with the sharing and receiving of CSI because of the subsequent use and impact of a competitor having CSI it would not otherwise have had. JD Sports' submission in this regard, therefore, is not reasonable.[276]

250. Finally, JD Sports submits that the penalty imposed on it is far greater, in monetary terms, than the penalty imposed on Footasylum. JD Sports asserts that the only factor for this difference is that JD Sports is larger and that this reflects a disproportionate apportionment of culpability between the two parties.[277] The CMA disagrees. JD Sports was the purchasing party and controlled much of the process related to the Merger, including providing Footasylum with compliance guidance and policies. Where Footasylum attended the July and August Meetings and disclosed CSI, JD Sports attended those meeting without any consideration of the risks involved in doing so, and without any, even basis, precautionary measures being put in place. Following the July Meeting, JD Sports thought it appropriate to take a

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[275] *Ibid* at paragraph 106
[276] The CMA also note that JD Sports said that it ensured Footasylum put in place appropriate measures to comply with the IO. It was not a situation where Footasylum had independently put in place measures which JD Sports had no knowledge of, and where compliance was not expected to be undertaken equally and by both parties.
[277] PD Representations at paragraph 110.

phone call with Footasylum, again without consideration of the risks involved in doing so. When JD Sports received CSI it either did not report (the July Meeting) or only partially reported after a significant delay and without, at any time, telling the CMA it had subsequently taken mitigating steps in attempt to control the CSI it now had in its possession. Global turnover is a relevant consideration when setting a fine to ensure the CMA is acting proportionately. However, the amount of the fine is also set, *inter alia*, by reference to the factors set out in paragraph 215 above.

251. In any event, the CMA notes that JD Sports has said that, in reality, it will, in practice, be liable for Footasylum's penalty.[278]

Breach 1

252. In assessing the appropriate amount of the penalty in relation to Breach 1, the CMA has taken into account the considerations set out above, including:

(a) The fact that Breach 1 is serious going to the heart of the interim measures regime. Although the CMA cannot, on the evidence that it has, make any findings that Breach 1 was intentional, the CMA considers JD Sports' conduct is at least but potentially more than merely negligent. Breach 1 indicates that JD Sports' compliance since 19 May 2020 has been defective and that it has created an environment where CSI risks being exchanged in a plethora of contexts. Without appropriate policies, procedures and safeguards, it is impossible to know the real extent of non-compliance. JD Sports' approach to compliance undermines the very concept of interim measures as interim measures rely, to a significant extent, on the implementation and adherence to proactive and preventative measures updated and reassessed on a continuing basis.

(b) The adverse impact this failure to comply had on the CMA's ability to monitor, and, as the case may be, enforce and/or address compliance with interim measures.

(c) The risk of prejudice and pre-emptive action created by this failure.

253. In addition to the above considerations, the CMA has also taken account of other factors, including (but not limited to) relevant factors listed in the Penalties Guidance:

254. The CMA is of the view that the following factors listed in paragraph 4.11 of the Penalties Guidance support the imposition of a penalty:

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[278] *Ibid* at paragraph 2.

(a) Involvement of senior management or officers

255. It is axiomatic that JD Sports' conduct set out above involved senior personnel, being the CEO and General Counsel, the latter being said to be the person with oversight for coordinating IO compliance.[279] The implementation of measures to comply with the IO is, by its nature, required to be dealt with by senor level individuals.

(b) Impact on the merger process/other costs to the case

256. JD Sports' failures to comply with the IO have required detailed investigations by the CMA, diverting resources from other matters of public interest, including the substantive assessment of the Merger, at a cost to the public purse.

(c) Advantage to JD Sports

257. By failing to have in place appropriate compliance mechanisms JD Sports has derived an advantage as it reduced the burden for its business to comply with the IO.

(d) *Nature and gravity of the failure*

258. The failures involved in Breach 1 were significant and go to the heart of the UK's merger regime, which relies heavily on the effectiveness of interim measures. A failure to have in place mechanisms to continuously and proactively comply with the IO, and in particularly proactively protect against the risk of CSI being exchanged is extremely serious. Where CSI is exchanged the risk of pre-emptive action is real and significant as is the risk of impediment to the CMA's consideration of the Remittal. Once CSI is exchanged it is very difficult to mitigate against the impact it may have on the Remittal and the competitive structure of the market; that is why the IO requires preventative measures to be put in place and continually used, updated, and adapted to fit the risks of any given situation.

(e) *Continuation of the failure*

259. The failure here is a continuing one as the obligation to procure compliance was existent as soon as the IO came into force and JD Sports implemented its deficient guidance. The obligation in paragraph 6(l) was similarly expressed in the 2020 Final Undertakings and the IO, so should have been known to JD Sports. The fact that since the IO was in force JD Sports

[279] PD Representations at paragraphs 113 to 116.

engaged in two separate instances where it, at least should have, known that CSI had been exchanged and, after the July Meeting, did not take any steps to revisit its policies, procedures and safeguards; and that since December 2020 meetings between senior members of the Parties have occurred on at least four occasions without considering the mechanisms JD Sports has in place to procure compliance, leads the CMA to conclude that the failure is serious, and was continuous.

(f) *Other failures to comply with investigatory requirements*

260. As set out below, the CMA has found that JD Sports has not complied with its obligations to fully and accurately respond to RFI9. This was a failure to provide the CMA with the information requested and the statement that no documents had been tabled or exchanged at the December Meeting in circumstances where it appears at least one documents was tabled and/or exchanged. JD Sports has said that it is reasonable to assume Mr Cowgill simply did not recall a document had been exchanged because of the time that had elapsed since the December Meeting and RFI9. However, had JD Sports had adequate policies in place, including the creation and maintenance of records, the CMA does not consider such a failure could have occurred. As such, the underlying behaviour was substantially simply to Breach 1 and therefore it is reasonable for the CMA to consider it as a separate and related failure to comply with investigatory requirements when considering the appropriateness of imposing a penalty.

Steps in mitigation

261. The CMA notes that following its probe into the July Meeting and August Meeting, JD Sports took steps to impose a more stringent policy regarding contact with Footasylum. However, although such a policy prevented contact between JD Sports and Footasylum, it did not include simple steps such as taking notes in meetings and preparing meeting agendas or retaining records of how meetings were set up and for what purpose. While the CMA recognises that how compliance is particularly achieved is left to the parties to an IO, and that a blanket ban on contact (which JD has now put in place) prevents CSI passing between the Parties, it does not encourage a culture of compliance and instead responds to the CMA's probes into JD Sports' conduct. It also does not indicate that JD Sports now fully understands and appreciates its obligations under the IO. The CMA's view is, therefore, that such steps only partially go towards mitigation.

JD Sports' Representations

262. JD Sports has submitted that:

(a) The CMA is triple counting the same aggravating factor, being the advantage JD Sports received from receiving CSI from its competitor;[280]

(b) That Breach 4 should not be considered an aggravating factor because it does not go to recidivism because the breach occurred after Breaches 1 to 3 and therefore paragraph 4.11 of the CMA's Penalty Guidance does not apply;[281]

(c) That JD Sports should be given full credit for its ban on all meetings with Footasylum as a step in mitigation;[282] and

(d) That the penalty proposed is excessive.[283]

263. The CMA has considered JD Sports' Representations and it has removed consideration of the advantage JD Sports received from receiving CSI from its competitor as an aggravating factor in Breach 1. The CMA has also considered JD Sports' submission that the penalty proposed is excessive and that the CMA finding that JD Sports' conduct in relation to be 'serious and flagrant' is wrong.[284] The CMA considers the most important factor in relation to Breach 1 is that it is serious, and in fact extremely serious as it goes to the heart of the interim measures regime, albeit the CMA does not maintain that the conduct going to Breach 1 was flagrant.

264. In relation to JD Sports' submissions that Breach 4 should not be considered an aggravating factor and that JD Sports should be given full credit for banning all meetings with Footasylum, the CMA disagrees. The reasons why a full ban on all meetings with Footasylum only partially goes to mitigation is explained above in paragraph 261.

265. In relation to JD Sports' submission that Breach 4 is not an aggravating factor, the CMA considers that its failure to accurately respond to a s109 notice sent in relation to JD Sports' conduct shows a clear pattern of behaviour relevant to Breach 1. That is, Breach 4 highlights the serious impacts of having no record keeping polices, indicates that JD Sports did not take seriously the CMA's enquires into its conduct, and shows JD Sports poor policies, procedures and safeguards (this time in relation to compliance with the 2020 Final Undertakings) operating in practice to deprive the CMA of information JD Sports was required to provide to it. As the present set of facts presents a long running failure on JD Sports' part to comply with the IO, JD Sports'

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[280] *Ibid* at 117 to 133.
[281] *Ibid* at 134 to 141.
[282] *Ibid* at 142 to 146
[283] *Ibid* at paragraph 146.
[284] *Ibid*.

similar failures to properly comply with another order from the CMA, here the s 109 notice to produce information, falls within the CMA's consideration of other failures to comply with investigatory requirements.

Size and financial resources available to JD Sports

266. The CMA has also had regard to the size and financial resources available to JD Sports.[285] This is primarily because the CMA must ensure that administrative penalties achieve the deterrence required at a level which was fair, reasonable and proportionate in view of the circumstances of the case, including the size and financial resources available to parties. As set out in paragraph 4.11 of the Penalties Guidance, the CMA is likely to set higher penalties where it is necessary to do so having regard to the parties' size and financial position.

267. In determining the appropriate level of penalty, the CMA has therefore considered the last fully audited financial statement for JD Sports for the year preceding the imposition of the IO,[286] ie the financial year ended 31 December 2020. This statement shows that JD Sports is a profitable international retailer: its operating profit was 385 million, its profit after tax was 230 million, and its net assets were £1.5 billion. JD Sports' global turnover for the year ending February 2020 was over £6 billion.

268. The above information indicates that JD Sports had sufficient financial resources available to it to ensure compliance with the IO and to engage with the CMA's process.

Conclusions on the imposition of a penalty in relation to Breach 1

269. As set out in the Penalties Guidelines, the CMA must determine a penalty that is appropriate, taking into account all the relevant circumstances of the case to achieve the policy objectives set out in the Penalties Guidance, and in particular the need to deter JD Sports and other companies from contravening interim measures in the future, and to ensure that they scrupulously comply with interim measures imposed by the CMA (see paragraphs 216 to 227 above).

270. Having taken into account JD Sports' Representations as well as the factors set out above, the CMA has decided that the imposition of a penalty of £2.5 million is appropriate having considered the relevant factors and

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[285] Penalties Guidance, paragraph 4.11.
[286] Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014, Article 3.

circumstances of this case set out in this decision in the round, and in particular the seriousness of the failures to comply with the IO, including:

i. Procuring compliance with the IO by having in place adequate policies, procedures and safeguards is fundamental to the success of an interim measures regime based on self-assessment and where reporting potential issues largely comes for the entity subject to the interim measures. Where, as here, there is a failure to procure compliance, such a failure goes to the heart of the UK's non-suspensory merger regime by undermining the CMA's ability to monitor and enforce the terms of any interim measures.

ii. JD Sports took an unreasonably light touch approach to its policies, procedures, and safeguards which did little more than replicate the terms of the IO in different formatting. Where JD Sports drafted and circulated guidance on IO compliance it was of such high level as to be unhelpful to any individual, as happened here on two occasions, to understand their obligations and assess compliance before or during a meeting with the target entity (Footasylum).

iii. Without any mention of retaining and creating records, JD Sports has deprived the CMA of a crucial aspect of its monitoring function.

iv. JD Sports' size and financial position (above in paragraph 267).

271. The CMA considers that the proposed penalty for JD Sports' failure to comply would be sufficient and proportionate to achieve its objectives:

(a) the penalty represents only 0.04% of JD Sports' global turnover (see paragraph 267 above)

(b) the penalty would not be anomalous, nor would it affect JD Sports disproportionately, at 0.64% of operating profit, 1.12% of profit after tax, and 0.16% or net assets.

Breach 2

272. The CMA is of the view that the following factors listed in paragraph 4.11 of the Penalties Guidance support the imposition of a penalty:

(a) Involvement of senior management or officers

273. It is axiomatic that JD Sports' conduct set out above involved senior personnel, being the CEO and General Counsel. Similarly, the CMA has found that there was a pattern of behaviour as following the July Meeting, JD

Sports then took part in the August Meeting without considering the potential impact on compliance with the IO, or the context of the merger review and the risk of prejudice or impediment that these meetings presented.

(b) Impact on the merger process/other costs to the case

274. JD Sports failures to comply with the IO have required detailed investigations by the CMA, diverting resources from other matters of public interest, including the substantive assessment of the Merger, at a cost to the public purse.

(c) Advantage to JD Sports

275. JD Sports has potentially gained an advantage by receiving CSI from its competitor. Nevertheless, given the difficulties of knowing how CSI is subsequently used once it is exchanged, and the particular difficulty where the CSI is exchanged between CEOs of competition business, the CMA is of the view that the risk that it has or may be used to JD Sports' advantage is sufficiently great to consider it a relevant factor when imposing a penalty.

(d) *Nature and gravity of the failure*

276. The failures involved in Breach 2 were significant. Any exchange of CSI raises the real and serious risk of pre-emptive action and risks negatively impacting on competition in the market. The types of information exchanged in this case are sensitive and offer commercial advantages to JD Sports. Once exchanged, CSI is very difficult to subsequently control and ringfence as to how it is used.

(e) *Continuation of the failure*

277. CSI was exchanged at two meetings between the CEOs. Following the July Meeting JD Sports did not take any steps to seek to prevent any further exchanges of CSI. As a result, more CSI was exchanged during the August Meeting.

(f) *Other failures to comply with investigatory requirements*

278. As set out below, the CMA is of the view that JD Sports has not complied with its obligations to fully and accurately respond to RFI9. This was a failure to provide the CMA with the information required to be produced and the statement that no documents had been tabled or exchanged at the December Meeting in circumstances where it appears at least one documents was tabled and/or exchanged.

Steps in mitigation

279. As described above, following the CMA's probe JD Sports took steps to impose a more stringent policy regarding contact with Footasylum. However, similarly with Breach 1, although such a policy prevented contact between JD Sports and Footasylum, it does not encourage record keeping to allow the CMA to inspect compliance, nor does it indicate that JD Sports now fully understands and appreciates its obligations under the IO. The CMA's view is, therefore, that such steps partially go towards mitigation.

JD Sports' Representations

280. JD Sports has submitted that:

(a) Breach 4 should not be treated as an aggravating factor;

(b) The CMA has triple counted the advantage JD Sports received across all three breaches and the counted it again under the nature and seriousness of the offending;

(c) JD Sports' ban on meetings with Footasylum should receive full credit as step in mitigation;

(d) JD Sports actions on receiving the CSI should be treated as a mitigating and not an aggravating factor;

(e) The CMA should treat the fact that JD Sports did not want or solicit the CSI received as a mitigating factor;

(f) The CMA should treat the fact that JD Sports considers it received no advantage from the information a mitigating factor; and

(g) The proposed penalty is excessive, and the CMA should not consider the offending serious and flagrant.

281. The CMA will not repeat its position in relation to factors JD Sports has already raised in Breach 1, ie (a) and (c). The CMA's position on those points is the same for Breach 2.

282. The advantage JD Sports received from receiving CSI from one of its competitors ((b) above), however, is entirely appropriate to consider as in relation to Breach 2. The advantage JD Sports derived from having the CSI, and the fact that the disclosure of CSI risks pre-emptive action and lessening competition in a market during a merger review are different factors and have appropriately been treated as such. It is also wrong to say that the CMA has counted this again when describing the seriousness of Breach 2. The CMA

has determined that JD Sports has breached the IO in three separate ways (Breaches 1 to 3). Any single breach would stand in the absence of the others. While the description of advantage to JD Sports is the same, and while the advantage is gained in relation to the initial disclosure, it is appropriate to consider it under each Breach 2 and Breach 3 because: 1) in relation to Breach 2 the advantage comes from receiving the CSI, and 2) in relation to Breach 3 the advantage comes from having the CSI without scrutiny from the CMA.

283. Similarly, the CMA has determined that JD Sports gained an advantage from receiving the CSI from its competitor, on that basis it disagrees that JD Sports received no advantage from it ((f) above).

284. In relation JD Sports' submission that upon receiving the CSI it is said to have taken certain steps, the CMA does not consider this to be a mitigating factor. The steps JD Sports took were unilateral. It did not inform the CMA of the steps that it took or that it was taking them to ring-fence the fact that it had received CSI. Cutting the CMA out of those steps, and only raising them in response to the CMA's Preliminary Letter is not a step in mitigation. Instead, it shows that JD Sports was uninterested continuing the 'spirit of transparency' in seeks to rely on as demonstrating its compliance with paragraph 16,[287] and uninterested in working with the CMA to achieve compliance with the IO and to work with the CMA to prevent the risks of pre-emption and impediment. As for the suggestion that the CMA has counted this as an aggravating factor, the CMA has not and did not do so in the Provisional Decision.

285. Similarly, the fact that JD Sports say that it did not want or solicit the CSI it received is not a mitigating factor, particularly as after attending the July Meeting where CSI was exchanged, Mr Cowgill proceeded to again attend a bilateral meeting with Footasylum's CEO, except this time without any other attendee being present. However, and in any event, the emphasis in the IO, and the CMA's concerns around CSI, is not simply the disclosure of CSI from one party to another, but in the passing of CSI itself; that being the instance of exchange and the consequences and risks surrounding its subsequent use.[288]

Size and financial resources available to JD Sports

286. The information set out in paragraphs 266 to 268 above indicates that JD Sports had sufficient financial resources available to it to ensure compliance with the IO and to engage with the CMA's process.

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[287] 19 August Email.
[288] Including the difficulties around detection and ring-fencing of that information.

Conclusions on the imposition of a penalty in relation to Breach 2

287. As set out in the Penalties Guidelines, the CMA must determine a penalty that is appropriate, taking into account all the relevant circumstances of the case to achieve the policy objectives set out in the Penalties Guidance, and in particular the need to deter JD Sports and other companies from contravening interim measures in the future, and to ensure that it scrupulously comply with interim measures imposed by the CMA (see paragraphs 217 to 221 above).

288. The CMA has decided that the imposition of a penalty of £800,000 is appropriate having considered the relevant factors and circumstances of this case set out in this decision in the round, and in particular the following important factors:

(a) The seriousness of the failures to comply with the IO:

i. Procuring that CSI does not pass between the Parties, directly or indirectly, is of crucial importance.

ii. Mr Cowgill and Ms Mawdsley are said to have known, and certainly should have known, their obligations under the IO, however, when CSI was exchanged or risked being exchanged in the July Meeting and August Meeting, no steps appear to have been taken (for example the meeting was not ended, JD Sports did not immediately distance itself from the information received). In fact, following the July Meeting, Mr Cowgill thought it appropriate to take part in another discussion, this time alone, with Mr Bown without any apparent idea as to what the meeting was about, and without making any reasonable enquiries to that effect. Where CSI was exchanged Mr Cowgill did not take any steps to bring the call to an end or otherwise make clear that it was inappropriate to discuss these matters.

iii. JD Sports' size and financial position (set out at paragraph 267 above).

289. The CMA considers that the proposed penalty for JD Sports' failure to comply would be sufficient and proportionate to achieve its objectives:

(a) the penalty represents only 0.01% of JD Sports' global turn over (see paragraph 267 above)

(b) the penalty would not be anomalous, nor would it affect JD Sports disproportionately, at 0.2% of operating profit, 0.35% of profit after tax, and 0.05% or net assets.

Breach 3

290. The CMA finds that the following factors listed in paragraph 4.11 of the Penalties Guidance support the imposition of a penalty:

(a) Involvement of senior management or officers

291. It is axiomatic that JD Sports' conduct set out above involved senior personal, being the CEO and General Counsel.

(b) Impact on the merger process/other costs to the case

292. JD Sports' failures to comply with the IO have required detailed investigations by the CMA, diverting resources from other matters of public interest, including the substantive assessment of the Merger, at a cost to the public purse.

(c) Advantage to JD Sports

293. JD Sports has gained an advantage in not reporting actual or suspected exchanges of CSI by:

i. reduced the burden for its business to comply with the IO; and

ii. gaining CSI from a competitor in circumstances where the CMA is not given the opportunity to investigate and take enforcement action if necessary, thereby allowing JD Sports to continue to have CSI in its possession without the scrutiny and control of the CMA.

(d) *Nature and gravity of the failure*

294. The failures involved in Breach 3 were significant. Any exchange of CSI raises the real and serious risk of pre-emptive action and risks negatively impacting on competition in the market. immediate reporting to the CMA is necessary to ensure any steps that need to be taken to control that exchange and protect against pre-emptive action, are taken and are effective.

(e) *Continuation of the failure*

295. CSI was exchanged at two meetings between the CEOs. The July Meeting was not reported to the CMA at all, and the August Meeting was not notified: 1) promptly, in fact the August Meeting was not notified until Mr Cowgill returned from his holiday, 2) with a complete and un-caveated record of the meeting, and 3) with any reference to mitigating steps being taken in relation to the suspected potential exchange of CSI. The CMA note that when the

August Meeting was eventually reported that reporting came in the context of the CMA's probe into meeting between the Parties (RFI9) and that despite the 19 August Email being prefaced as being in the spirit of transparency, JD Sports did not subsequently inform the CMA that it felt it necessary to implement measures to control the use of the CSI it had received. That meant the CMA could not review those measures or take steps to understand the full nature and extent of the CSI disclosed.

(f) *Other failures to comply with investigatory requirements*

296. As set out below, the CMA is of the view that JD Sports has not complied with its obligations to fully and accurately respond to RFI9. This was a failure to provide the CMA with the information required to be produced and the statement that no documents had been tabled or exchanged at the December Meeting in circumstances where it appears at least one documents was tabled and/or exchanged.

Steps in mitigation

297. JD Sports has not taken any steps to make clear that reporting of actual or suspected breaches of the IO require immediate notification to the CMA. It has therefore, in the CMA's view, not taken any steps in mitigation.

JD Sports' Representations

298. JD Sports submitted that the CMA should take into account the fact that the August Meeting was reported 'voluntarily by JD Sports to the CMA and that JD Sports believed that no report was required in respect of the July Meeting'.[289] JD Sports also submit that as no penalty has been imposed for delays in previous cases JD Sports should not be penalised for what it says was the quickest reporting of a suspected breach.[290]

299. The CMA disagrees and has provided its reasons for why above in paragraph 66 above and in paragraph 250 above.

300. JD Sports has also submitted that its offending was not flagrant and or intentional. However, the CMA has made clear that JD Sports' conduct was at least negligent and potentially intentional in this regard, not that the conduct was in fact intentional. In the context of the facts relating to this breach, and in the context of JD Sports itself recognising that CSI passed between the Parties during the August phone call, the delay and questionable

[289] PD Representations at paragraph 171.
[290] *Ibid* at paragraph 172.

circumstances ultimately prompting reporting, coupled with a complete failure to report the July Meeting do lead to a reasonable finding that JD Sports' conduct was flagrant.

Size and financial resources available to JD Sports

301. The information set out in paragraphs 266 to 268 above indicates that JD Sports had sufficient financial resources available to it to ensure compliance with the IO and to engage with the CMA's process.

Conclusions on the imposition of a penalty in relation to Breach 3

302. As set out in the Penalties Guidelines, the CMA must determine a penalty that is appropriate, taking into account all the relevant circumstances of the case to achieve the policy objectives set out in the Penalties Guidance, and in particular the need to deter JD Sports and other companies from contravening interim measures in the future, and to ensure that it scrupulously comply with interim measures imposed by the CMA (see paragraphs 216 to 227 above).

303. The CMA has decided that the imposition of a penalty of £1 million is appropriate having considered the relevant factors and circumstances of this case set out in this decision in the round, and in particular the seriousness of the failures to comply with the IO, including that:

    i. Reporting any breach or suspect breach of the IO is one primary way the CMA has to monitor and enforce compliance with the IO; and

    ii. Taking unilateral action to allegedly mitigate the impact of the CSI received without consulting the CMA undermines the very purpose of IO enforcement and the CMA's statutory function.

304. The CMA considers that the proposed penalty for JD Sports' failure to comply would be sufficient and proportionate to achieve its objectives:

    (a) the penalty represents only 0.01% of JD Sports' global turn over (see paragraph 267 above)

    (b) the penalty would not be anomalous, nor would it affect JD Sports disproportionately, at 0.25% of operating profit, 0.43% of profit after tax, and 0.06% or net assets.

F. Factual Background to failure to comply with RFI9

305. As described above, the CMA received video footage of three meetings, two in December 2020 and one in July 2021 (the **July Meeting**), from a third party

on 28 July 2021. The CMA issued RFI9 to JD Sports (and separately issued RFI7 to Footasylum) requiring it to:

(a) List all meetings (both virtual and in person) that have taken place between members of JD Sports senior management[291] and any members of the Footasylum senior management since 13 July 2020; and

(b) For each meeting listed, provide a description of what was discussed and provide any documents that were tabled at or exchanged during the meeting.

306. JD Sports provided its response to RFI9 on 24 August 2021, after receiving an extension for its response (initially required to be provided on 17 August 2021).

307. Schedule 1 of the JD Sports' RFI9 response included a table setting out the dates on which meetings took place, the attendees, a very brief description of what was discussed, and whether any documents were tabled or exchanged during those meetings. JD Sports listed the December Meeting as taking place in person between Mr Cowgill and Mr Bown (but not disclosing that it took place in a carpark and in Mr Bown's car). The meeting was said to be about Mr Bown's retention bonus.[292] No further details were provided about the meeting. JD Sports said that no documents were tabled or exchanged during this meeting.

308. The video footage of the December Meeting appears to show that the meeting lasted for approximately 10 minutes and that at least one document was shared at the meeting and the two men then discussing the document and passing it between themselves. The fact that this was not discussed in response to RFI9 appears to show a failure to comply with the terms and requirements of that notice.

309. JD Sports provided only minimal representations on this breach. JD Sports submitted that it considers its response to RFI9 was in accordance with the 'relevant individuals' best recollection'.[293] JD Sports then goes on to say that between the meeting and RFI9 there was an eight-month intervening period which affected Mr Cowgill's memory of the meeting.

310. The CMA does not consider the representations to be credible. Mr Cowgill appears to have recalled what the meeting was about, and with whom he had

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[291] The term senior management included (but was not limited to) the CEO, CFO, General Counsel, other executive directors, and board members.
[292] JD Sports RFI9 Response at page 4.
[293] PD Representations at paragraph 99.

it. The CMA assumes that Mr Cowgill recalls that the meeting took place in Mr Bown's car in a carpark, as well as the date of the meeting. Based on the video footage, the discussion of the document exchanged took up a substantial portion of the meeting.

311. However, even if Mr Cowgill did not immediately recall that a document was exchanged, in the context of a s109 notice all efforts should have been taken by him and JD Sports to determine what was discussed at that meeting. Records should have been checked to determine that no documents were discussed and if JD Sports retained a copy of any document. It does not appear that these steps were taken.

G. Appropriateness of imposing a penalty for the failure to comply with RFI9 and of the amount of the penalty imposed

Appropriateness of imposing a penalty

312. Having had regard to its statutory duties and the Penalties Guidance, the CMA has decided that the imposition of penalties in the present case is appropriate.

313. In reaching this view, the CMA has had regard to the policy objectives set out above, and in particular the need to achieve deterrence, as well as the factors influencing a decision to impose a penalty set out in the Penalties Guidance.[294]

314. JD Sports' failure to fully and accurately respond to RFI9 is serious and flagrant. The information required to be produced in response to RFI9 was clear and unambiguous. JD Sports knew and understood that it had to disclose the existence of the December Meeting, provide a description of what was discussed (although the CMA notes that this description was incredibly high level) and set out and produce any documents tabled and/or exchanged at the meeting. It appears that JD Sports did not do this as the document shown in the video footage was not subsequently produced to the CMA or referred to in the JD Sports RFI9 response.

315. Section 109 EA02 notices, like RFI9, are a key evidence gathering tool available to the CMA. Compliance with those notices when sent is of the utmost importance, as evidenced by the potentially serious criminal consequences of failing to comply. Where the CMA receives incomplete,

[294] See paragraphs 4.2 and 4.3.

misleading, or inaccurate responses to its section 109 EA02 notices, or where the response omits crucial or potentially crucial details, this undermines the CMA's ability to take appropriate action and investigate issues relating to merger references.

316. For the reasons set out above, the CMA is of the view that JD Sports' failure to detail and produce the document(s) tabled and/or exchanged at the December Meeting was intentional or, at the very least, negligent.

317. Consistent with its statutory duties and the Penalties Guidance,[295] the CMA has assessed all relevant circumstances in the round to determine an appropriate level of penalty for each of the breaches.

318. In assessing the appropriate amount of the penalty in relation to JD Sports' failure to comply with RFI9, the CMA has taken into account the considerations set out above, including:

(a) the fact that the failure to comply with RFI9 is serious and flagrant. JD Sports knew, or ought to have known, that compliance with RFI9 was extremely important and that non-compliance could lead to obvious and serious consequences for the CMA's consideration of the Merger;

(b) JD Sports knew of its obligations to comply with RFI9 and knew the consequences of non-compliance, these being clearly set out in the section 109 EA02 notice itself. JD Sports knew that at least one document was tabled and/or exchanged at the December Meeting, as Mr Cowgill was present at the meeting. JD Sports therefore knew or ought to have known that it had not provided an accurate and complete answer to RFI9.

(c) The adverse impact this failure to comply had on the CMA's ability to properly gather evidence which may be relevant to any monitoring or enforcement action the CMA may then choose to take.

319. In addition to the above considerations, the CMA has also taken account of other factors, including (but not limited to) relevant factors listed in the Penalties Guidance.

320. The CMA is finds that the following factors listed in paragraph 4.11 of the Penalties Guidance support the imposition of a penalty:

[295] Penalties Guidance, paragraph 4.11.

(a) Involvement of senior management or officers

321. It is axiomatic that JD Sports' conduct set out above involved senior personnel, being the CEO Mr Cowgill.

(b) Impact on the merger process/other costs to the case

322. JD Sports' failure to comply with RFI9 has required detailed investigations by the CMA, diverting resources from other matters of public interest, including the substantive assessment of the Merger, at a cost to the public purse.

(c) Advantage to JD Sports

323. By failing to fully comply with the requirements of RFI9 JD Sports may have received an advantage by diverting and/or delaying scrutiny over its actions during the period in which the 2020 Final Undertakings were in place and, in the context of RFI9, diverting and/or delaying the CMA's scrutiny of JD Sports' actions during the period the IO was in force.

(d) Deterrence

324. The CMA considers it appropriate to seek to generally deter conduct which sees undertakings provide inaccurate or incomplete section 109 EA02 responses and to specially deter such conduct in relation to JD Sports in this case.

(e) nature and gravity of the failure

325. Information notices are one of the key means the CMA has of gathering information during a merger inquiry. It is of the upmost importance that recipients provide accurate and complete information and do not mislead the CMA in their responses. Where information is not complete and accurate this can have significant impacts on the CMA's ability to perform its statutory functions. The failure to provide accurate and complete information here is therefore serious and intentional or at the very least negligent. The fact that the statement that no documents were exchanged or tabled was misleading is similarly serious and intentional, or at the very least negligent.

Steps in mitigation

326. JD Sports has raised no steps in mitigation in relation to this breach.

Size and financial resources available to JD Sports

327. The information set out in paragraphs 266 to 268 above indicates that JD Sports had sufficient financial resources available to it to ensure compliance with the IO and to engage with the CMA's process.

328. The CMA considers that the proposed penalty of £20,000 under s 110(1) of the EA02 for JD Sports' failure to comply would be sufficient and proportionate to achieve its objectives and that such a penalty would represent a tiny portion of JD Sports' global turnover, operating profit, profit after tax and net assets.

H. Next steps

329. JD Sports has the following rights in relation to the final penalty which the CMA has imposed:

(a) JD Sports is required to pay the penalty in a single payment, by cheque or bank transfer to an account specified to JD Sports by the CMA, by close of banking business on the date which is 28 days from the date of service of this notice on JD Sports.

(b) JD Sports may pay the penalty or different portions of it earlier than the date by which it is required to be paid.

(c) Pursuant to section 112(3) of the EA02, JD Sports has the right to apply to the CMA within 14 days of the date on which this final notice is served on them for the CMA to specify different dates by which the penalty or different portions of it, are to be paid.

(d) Pursuant to section 114 of the EA02, JD Sports has the right to apply to the Tribunal against any decision the CMA reaches in response to an application under section 112(3) of the EA02, within the period of 28 days starting with the day on which JD Sports is notified of the CMA's decision.

(e) Pursuant to section 114 of the EA02, JD Sports has the right to apply to the Tribunal within the period of 28 days starting with the day on which this notice is served on JD Sports in relation to:

i. the imposition or nature of the penalty;

ii. the amount of the penalty; or

iii. the date by which the penalty is required to be paid or (as the case may be) the different dates by which portions of the penalty are required to be paid.

(f) If JD Sports applies to the CMA pursuant to section 112(3) of the EA02 for the CMA to specify a different date by which the penalty is to be paid, then the period of 28 days referred to in relation to (e)(iii) above shall start with the day on which they are notified of the CMA's decision on the section 112(3) application.

(g) Where a penalty, or any portion of such penalty, has not been paid by the date on which it is required to be paid and there is no pending appeal under section 114 of the EA02, the CMA may recover any of the penalty and any interest which has not been paid; in England and Wales such penalty and interest may be recovered as a civil debt due to the CMA.[296]

Signed:

[✂]
Kip Meek
CMA Panel Inquiry Chair

[✂]
Paul Hughes
Panel Member

[✂]
Claire Whyley
Panel Member
[✂]

Paul Muysert
Panel Member

[296] Section 115 of the EA02. Section 113 of the EA02 covers (among other matters) the interest payable if the whole or any portion of a penalty is not paid by the date by which it is required to be paid.

14 February 2022

Competition and Markets Authority