# Completed acquisition by JD Sports Fashion plc of Footasylum plc

# Decision to impose a penalty on Footasylum Limited 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 Footasylum Limited, previously Footasylum plc (**Footasylum**) of the following:

   (a) that it has imposed a penalty on Footasylum under section 94A of the Enterprise Act (the **EA02**) because it considers that Footasylum 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 PLC (**JD Sports**), Footasylum and Pentland Group Holdings Limited and Pentland Group Limited (together, **Pentland**) (the **IO**); and

   (b) that it has imposed a penalty on Footasylum under section 110(1) of the EA02 because, Footasylum has, without reasonable excuse, failed to comply with the requirements of the section 109 EA02 notice sent to Footasylum on 10 August 2021 (**RFI7**).

2. The total penalty for the breaches of the IO is a fixed amount of £380,000, comprising the following:

   (a) £200,000 for Breach 1 (Failure to have measures in place to manage the exchange of CSI and the potential exchange of CSI);

   (b) £90,000 for Breach 2 (Exchange of CSI between Footasylum and JD Sports without the CMA's consent); and

   (c) £90,000 for Breach 3 (Failure to immediately report).

[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 Footasylum's failure to comply with RFI7 is £20,000.[2]

***Chronology***

4. On 12 November 2021, the CMA by letter to Footasylum set out its initial concerns in relation to the suspected failures to comply with the terms of the IO and Footasylum's conduct and approach to IO compliance. The CMA stated that it was considering imposing a penalty on Footasylum. Footasylum provided its representations by letter dated 30 November 2021 (the **PL Representations**).

5. On 7 January 2022, the CMA issued to Footasylum a decision to impose a penalty under sections 94A and 110(1) of the EA02 (the **Provisional Penalty Decision**). Footasylum 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 decision 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 £380,000 for the IO breaches is appropriate and proportionate in this case.

   (f) **Section F** sets out the factual background to the failure to comply with RFI7.

[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 Footasylum 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. Footasylum's external legal advisers, Eversheds, did not request the telephone call. Footasylum's external legal advisers then contacted the CMA on 19 January to request an extension to 28 January 2022 to respond to the Provisional Penalty Decision. On 19 January, the CMA approved an extension to 28 January 2022.

(g) **Section G** sets out the CMA's reasons for finding that a penalty of £20,000 for failure to comply with RFI7 is appropriate and proportionate in this case.

(h) **Section H** sets out next steps and Footasylum's 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 Footasylum 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 Footasylum, Barry Bown, and JD Sports, Peter Cowgill, 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 between them. 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 Footasylum 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. Footasylum 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**). Footasylum 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 Footasylum to CMA, dated 20 August

2021. Indeed, even in that case, the compliance statement appeared only after the CMA had prompted Footasylum to report on meetings held between the Parties, being after a section 109 EA02 notice was sent to both JD Sports (**RFI9**) and Footasylum (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 August Compliance Statement was submitted to the CMA by Footasylum referring to the August Meeting.

12. Footasylum's conduct shows serious failures to comply with the IO. One 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 or prejudice to the Remittal. 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 and/or prejudice to the Remittal. 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 subject to the interim measures 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 Footasylum 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 exchange of CSI, between JD Sports and Footasylum):** Footasylum 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

[4] See *Electro Rent Corporation v Competition and Markets Authority* [2019] CAT 4 (***Electro Rent***) at paragraphs 120, 200 and 206. The Competition Appeal 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."

CSI passes 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):** Footasylum 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 involving at least 4 categories of CSI; and

(c) **Breach 3 (Failure to immediately report):** Footasylum 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 Footasylum 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 and3 provide (non-exhaustive) examples of the types of issues that should have been captured were Footasylum's compliance mechanisms appropriate and fit for purpose. Similarly, the CMA is concerned that Breach 1 has led to a situation where Footasylum's 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 Footasylum has no reasonable excuse for its failures to comply with the IO. The CMA has carefully considered Footasylum's 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 Footasylum.[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 Footasylum's 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 Breaches 2 and 3 the CMA has considered the flagrant nature of these two breaches.

    (b) a penalty of:

        i. £200,000 for Breach 1 (Failure to have measures in place to manage the exchange of CSI and the potential exchange of CSI);

        ii. £90,000 for Breach 2 (Exchange of CSI between Footasylum and JD Sports without the CMA's consent); and

        iii. £90,000 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 deterring future failures to comply with both Footasylum and other persons who may be considering future non-compliance.

    (c) The penalty for Footasylum's failure to comply is proportionate, given the penalty for Breaches 1 to 3 represents only 0.15% of Footasylum's global turnover (substantially below the statutory maximum of 5% of Footasylum's global turnover), and in view of Footasylum's financial

[5] Penalties Guidance, paragraph 4.4.

resources, a penalty of the amount in this decision is not anomalous, nor would it affect Footasylum disproportionately at 1.1% of net assets.[6]

***Failure to comply with RFI7***

20. The CMA has found that Footasylum failed to comply with RFI7 when Footasylum's response to RFI7 stated that a meeting which took place on 22 December 2020 (**December Meeting**) between Mr Cowgill (Board Member and Executive Chairman of JD Sports) and Barry Bown (Executive Chairman and CEO of Footasylum) did not involve any documents being tabled and/or exchanged. Video footage of that meeting, which the CMA has shared with Footasylum, 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. RFI7 specifically required Footasylum to 'provide any documents that were tabled or exchanged during that meeting'.[7] 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 RFI7 and s 109 of the EA02.

***Decision to impose penalty for the failure to comply with RFI7***

21. The CMA has decided, having had regard to its statutory duties and the Penalties Guidance, as well as Footasylum's PD Representations and all the relevant circumstances of the case and Footasylum's Representations, to impose a penalty for the failure to comply with RFI7. The CMA considers that the failure to fully and properly respond to RFI7 is a flagrant and serious breach of Footasylum's 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 failures to comply by both Footasylum and other persons who may be considering future non-compliance.

[6] The CMA notes that Footasylum [✂] in the financial year ending February 2020 and recorded [✂]. However, the CMA has taken this into account when imposing the proposed penalty.
[7] Section 109 EA02 request dated 10 August 2021 (RFI7).

## 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.'[8]

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

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

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[8] 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.

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.[9]

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*[10] 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'.[11] In *Facebook v CMA*[12], 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'.[13]

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)[14]. 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.[15]

36. In *Stericycle International LLC & Anors v Competition Commission*[16] 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 expectation that the outcome of a reference might be impeded'.[17] 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-

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[9] Penalties Guidance.
[10] *Intercontinental Exchange, Inc v Competition and Markets Authority* [2017] CAT 6 (***Intercontinental Exchange***).
[11] *Ibid* at [220].
[12] [2020] CAT 23.
[13] *Facebook v CMA* [2020] CAT 23 at paragraph 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]).
[14] [2021] EWCA Civ 701.
[15] *Facebook v CMA* (CoA) at [56].
[16] *Stericycle International LLC, Stericycle International Limited and Sterile Technologies Group Limited v Competition Commission* [2006] CAT 21 (***Stericycle***).
[17] *Stericycle* at [129].

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.[18]

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'.[19] 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*…*'.[20]

***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.'[21]

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[22] 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.*'*[23]

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.[24] 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

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[18] *Ibid*. Affirmed in *Facebook v CMA* at [124].
[19] *Intercontinental Exchange* at [220].
[20] *Ibid* at [223].
[21] *Société Coopérative de Production SeaFrance SA (Respondent) v The Competition and Markets Authority and another (Appellants)* [2015] UKSC 75 at [4]; see also [35].
[22] 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.
[23] *Facebook v CMA* at [156].
[24] Section 80(10) of the EA02.

legitimate precautionary purpose'.[25] 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.[26] 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.[27]

41. More generally, in *Electro Rent*[28], 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.[29]

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).[30] The onus is on the merging parties to seek consent if their conduct creates the possibility of prejudice or impediment[31] and engage with the CMA by submitting a derogation request which is 'fully specified, reasoned and supported by relevant evidence'.[32]

44. Within that context, the provision of periodic compliance statements is an important obligation in the IO to ensure that businesses take seriously their

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[25] *Intercontinental Exchange* at [220].
[26] 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.
[27] *Facebook v CMA* at paragraph 21, upheld in *Facebook v CMA* (CoA) at [59].
[28] [2019] CAT 4.
[29] *Ibid* at paragraph 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.'*
[30] *Facebook v CMA* at [158]; see also *Electro Rent* at [206].
[31] *Intercontinental Exchange* at [220].
[32] *Facebook v CMA* at [156].

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.[33] 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:[34]

Paragraph 6

> 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:
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> …
>
> (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

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[33] 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).
[34] 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**), Pentland Group (Trading) Limited (**PGLT**) from that date. The Variation Order is available here.

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. Footasylum was informed on 1 October 2019 that the CMA's mergers intelligence committee had determined that a merger investigation was warranted.

50. Footasylum Limited has its headquarters in Rochdale, 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.[35]

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.[36]

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 contained hold separate obligations focussed on the divestment business[37] (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[38] 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[39]) addressed to JD Sports, Footasylum (together, the

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[35] 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.
[36] Directions dated 7 October 2019.
[37] 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.
[38] *JD Sports Fashion plc v Competition and Markets Authority* [2020] CAT 24.
[39] 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.

**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 have been granted in respect of the IO,[40] however, those derogations are not directly relevant to the matters that form the basis of the CMA's conclusion that Footasylum 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.[41] 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 set out below the CMA has decided that Footasylum has failed to comply with the IO in the following respects:

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

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

    (c) Breach 3 – Footasylum 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 the July Meeting

[40] 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.
[41] 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

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 Footasylum's 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 Footasylum's 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.[42]

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 section 109 of the 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, as defined above) 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.

[42] 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.

(d) The CMA received responses from JD Sports and Footasylum to RFI10 on 20 October 2021.[43]

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 or RFI7. Footasylum has subsequently claimed that the August Meeting was voluntarily notified in the 19 August Email.[44] As discussed below, the CMA does not accept this position. JD Sports, in its representations on the CMA's Preliminary Letter (**JD Sports' PL Representations**) accept that the August Meeting at least raised suspicions that CSI potentially passed between the Parties and that it had reason to suspect of breach of the IO.[45] The August Meeting was required to be notified 'immediately' following the meeting because it involved, at the very least, reason to suspect that the IO had been breached. The fact that the 19 August Email came some 15 days after the meeting, and in a context where the Parties sent a joint notification only after they had determined between themselves what to provide to the CMA, and after Mr Cowgill and Footasylum's Head of Legal [✂] had returned from their respective holidays all point away from the 19 August Email being a voluntary notification. The obligation on Footasylum was to 'immediately' notify any suspected breach of the IO; it was not to wait until JD Sports' CEO returned from a holiday and Footasylum's Head of Legal[46] to also return from her holiday, then to collaborate on the appropriate response. In any event, the 19 August Email must be viewed 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.

July Meeting

68. Footasylum has not explained for what purpose the July Meeting was convened, or who initiated the meeting. The evidence the CMA has seen, being Footasylum's response to RFIs 7 and 10 and JD Sports' response to RFIs 9 and 10, suggests that the July Meeting was initiated by text or instant message exchange between Mr Bown (Chairman and CEO of Footasylum) and Mr Cowgill (Chairman and CEO of JD Sports). However, the messages

[43] RFI10 required Footasylum to provide its response by 1 October 2021, however, Footasylum subsequently sought an extension to 20 October 2021 on the basis that the data collection was taking longer than anticipated.
[44] Footasylum's Representations on CMA's Preliminary Letter dated 30 November 2021 (**Footasylum PL Representations**) at paragraph 34.
[45] JD Sports' Representations on CMA's Preliminary Letter dated 26 November 2021 (**JD Sports PL Representations**) at paragraphs 2(b) and 19.
[46] The CMA notes that Footasylum had external legal advisers who presumably were available to Footasylum to discuss any concerns about the August Meeting while [✂] was on holiday.

disclosed to the CMA as part of each party's response to RFI10 do not disclose a purpose for the meeting. In any event, the records of those messages are incomplete because Footasylum was unable to retrieve Mr Bown's complete text/instant message and call logs.[47] The CMA understands that Mr Bown deletes these records on an 'ad hoc' basis.[48] Similarly, JD Sports' technical advisers were unable to transfer parts of Mr Cowgill's mobile phone call logs to the relevant review platform.[49] From the records the CMA was able to review it appears that Mr Bown and Mr Cowgill are in relatively frequent contact, with a number of calls being made between them, including one call on 2 July 2021 lasting approximately 3 minutes.[50] The record from that call came from JD Sports' RFI10 Response, however, the CMA notes that it has not been referred to in Footasylum's response.

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,[51] 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.[52] 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 each separately drove 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

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[47] Footasylum's response to RFI10 dated 24 October 2021 (**Footasylum's RFI10 Response**) at paragraphs 1.23 and 5.24.
[48] *Ibid* at paragraph 5.24.
[49] JD Sports' RFI10 Response at 24.
[50] *Ibid* at Annex 806.
[51] JD Sports RFI10 Response, 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.
[52] There is a text message exchange where Mr Cowgill sends a message to Mr Bown which says: '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

discovering that there was no café at B&Q, the three decided to conduct the meeting in a nearby car park.[53]

(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.[54]

(d) Mr Bown and Mr Cowgill also said they discussed Mr Bown's 'future role' should the Merger be approved.[55]

(e) Ms Mawdsley was present for a portion of the discussion, but cannot recall specific details, did not take any notes, [✂].[56]

71. It was initially not made clear to the CMA why Ms Mawdsley was present at this meeting.[57] 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.[58] However, as Ms Mawdsley did not take any notes, does not appear to have spoken at all during the meetings, 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].[59]

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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[53] JD Sports RFI10 Response at paragraph 15; Footasylum RFI10 Response at paragraph1.13.
[54] Footasylum RFI10 Response at paragraph 1.8; JD Sports RFI10 response, at 5 to 8.
[55] Footasylum RFI10 Response at paragraph 1.9.
[56] JD Sports RFI10 Response at paragraphs 11 to 13.
[57] 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.
[58] JD Sports Representations at paragraph 32(a).
[59] Again there is no contemporaneous evidence to support this claim that the two CEOs discussed a personal matter and Ms Mawdsley 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, conversely Footasylum's RFI 10 Response at paragraph 1.7 does indicate that Mr Bown asked Ms Mawdsley to leave so 'he could have a word in private with Mr Cowgill'. We note that this does not indicate that Ms Mawdsley was told the nature of the private conversation or that it related to a personal matter.

> 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 [✂].[60]

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. The Footasylum RFI10 Response also confirms that Mr Bown 'did not take any notes, minutes or other record of the discussion. This is consistent with Mr Bown's approach generally which is that he takes very few notes and would take any notes at an informal meeting of this nature'.[61] JD Sports RFI10 Response confirms that neither Mr Cowgill or Ms Mawdsley took any notes at this meeting or afterwards.[62] As a result there is no contemporaneous record of the content of the July Meeting. Footasylum's response also confirms that '[a]s this was an informal meeting, there was no meeting agenda'.[63] 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 RFI7, which required Footasylum 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 Footasylum on 10 August 2021 (ie six days after the meeting had taken place). The response to RFI7, received on 24 August 2021, does not mention the August Meeting or the 19 August Email.

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[60] JD Sports' RFI10 Response at paragraph 9.
[61] Footasylum RFI10 Response at paragraph 1.18.
[62] JD Sports RFI10 Response, at paragraph 22.
[63] Footasylum RFI10 Response at paragraph 1.17.

76. The 19 August Email describes the telephone call as being 'effectively bilateral; Mr Cowgill's executive assistant was also present but did not participate in or pay detailed attention to the discussion'.[64] 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. Footasylum has, in its PL Representations claimed that the 19 August Email was a voluntary disclosure of the August Meeting.[65] Footasylum repeat this claim in its PD Representations.[66] As above, and for

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[64] Email from JD Sports and Footasylum's legal advisers dated 19 August. (19 August Email).
[65] PL Representations at paragraphs 22 and 34.
[66] PD Representations at 41, although the CMA notes that the suggestion that this was a voluntary notification in compliance with paragraph 16 comes with the significant and conflicting caveat that Footasylum consider it had no reason to suspect the IO had been breached when it sent the 19 August Email more than two weeks after the August Meeting.

the reasons set out below, the CMA rejects this suggestion by Footasylum 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 Footasylum's RFI10 Response provides a brief description of Mr Bown's recollection of the August Meeting; it does not mention the 19 August Email. Mr Bown recalls:

(a) That Mr Bown had contacted Mr Cowgill to discuss a 'pressing post-merger integration planning issue relating to Footasylum's [✂] lease [✂]…'.[67] Mr Bown recalls that Footasylum had been in discussions with its landlord [✂] lease [✂].[68]

(b) Mr Bown wanted to discuss with Mr Cowgill whether, if the deal was cleared JD Sports '[✂]'.[69] However, Mr Bown ultimately decided without JD Sports' input [✂].[70]

(c) Mr Bown also discussed what was described as another 'post-merger integration planning issue', being another contract up for renewal with Footasylum's logistics and transport provider, [✂].[71] [✂].[72]

(d) Mr Bown then engaged in what is described (albeit without any details) as a 'general discussion about [✂].'[73] Mr Bown does not recall whether he named any of the stores, but if he did, '[✂]'.[74]

(e) Mr Bown also says that he discussed the fact that 'he would like to close a further [✂] stores that were coming up for lease breaks.'[75] Again, Mr Bown does not recall whether he named any of the stores, but if he did 'he would have been referring [✂]'.[76]

(f) Mr Bown thinks he may have also mentioned 'in passing that Footasylum were [✂] as just another bit of information but is uncertain as to whether he mentioned this or not.'[77]

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[67] Footasylum's RFI10 Response at paragraph 2.2.
[68] *Ibid* at paragraph 2.3.
[69] *Ibid* at paragraph 2.4.
[70] *Ibid* at paragraph 2.4.
[71] *Ibid* at paragraph 2.5.
[72] *Ibid*.
[73] *Ibid* at paragraph 2.8.
[74] *Ibid*
[75] *Ibid*.
[76] *Ibid*.
[77] *Ibid* at paragraph 2.9.

79. The JD Sports RFI10 Response does not indicate that Mr Cowgill recalls there being a discussion about Footasylum '[✂]'. This is, however, mentioned in the Footasylum RFI10 Response.[78]

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,[79] which has not been referred to or otherwise explained in Footasylum's RFI10 Response, PL Representations or PD Representations. There was also a missed call from Mr Bown to Mr Cowgill on 3 August,[80] and a missed call, at 17:38 on 4 August 2021.[81] Neither of these calls has been explained or referred to by Footasylum.

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 August Meeting 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'.[82] Again, there is no 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.[83] 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.[84] Similarly, Mr Bown did not mention the call internally until his Head of Legal returned from a holiday on 17 August 2021.[85]

83. According to both Footasylum and JD Sports, there was no meeting agenda or contemporaneous notes of the August Meeting.[86]

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[78] *Ibid*.
[79] JD Sports RFI10 Response, Annex 806.
[80] *Ibid*.
[81] *Ibid*.
[82] JD Sports RFI10 Response, at paragraph 35.
[83] Footasylum RFi10 Response at paragraph 1.26.
[84] JD Sports Representations at paragraph 26(b).
[85] 19 August Email.
[86] Footasylum RFI10 Response at paragraph 1.16; JD Sports RFI10 Response, at paragraphs 39 and 40.

***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 Footasylum '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(l)) 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 relationship with one and other.[87] As such, the importance that addressees of interim measures 'at all times… procure' that CSI does not pass between the parties is of paramount and requires preventative measures to be put in place.

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

[87] Footasylum RFI10 Response at paragraph 1.2.

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*[88] 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'.[89] 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*[90] held that the function of interim orders is 'to prevent conduct that might prejudice a reference or inhibit action required by the CMA'.[91] Again, the

[88] [2017] CAT 6.
[89] *Ibid* at [220].
[90] [2019] CAT 4.
[91] *Ibid* at [120].

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:[92]

> […] 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 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 situation described above in paragraph 85.

91. This obligation is abundantly clear from the words of the IO itself, which required Footasylum and JD Sports to 'at all times… procure' that no CSI passes between them. That proactive obligation ties in with the CAT's

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[92] [2006] CAT 21 at [129] and [130]; these passages were cited with approval in *Facebook v CMA* [2020] at [16].

jurisprudence where it 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,[93] 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,[94] and 3) any interpretation of the IO should 'give full effect to its legitimate precautionary purpose'.[95]

92. The obligation contained in paragraph 6(l) of the IO can, therefore, only be interpreted as creating a strict obligation on Footasylum and JD Sports 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)[96] or impediment, the onus is clearly on Footasylum and JD Sports 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.[97]

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**).[98]

*Fact*s

95. The facts in relation to the July Meeting and the August Meeting are set out at paragraphs 68 to 82 above.

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[93] *Intercontinental Exchange* at 220; *Stericycle* at [129]
[94] *Ibid* at [223].
[95] *Facebook v CMA* at [158]; *Electro Rent* at [206].
[96] *Facebook v CMA* (CoA) at [59].
[97] *Facebook v CMA* at [158]; *Electro Rent* at [206].
[98] *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.

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

Footasylum's internal guidance and training documents regarding compliance with the IO

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

(a) A three-page document entitled Guidance for Senior Management of Footasylum dated 15 June 2021 (**Senior Management Guidance**).[99]

(b) A one-page document entitled Guidance for Store Managers of Footasylum (**Store Managers Guidance**), dated 14 June 2021.[100]

(c) Two emails dated 14 and 15 June 2021 from Mr Bown: one to all UK store managers attaching the Store Managers Guidance, and the other to Footasylum's Senior Management team attaching the Senior Management Guidance.[101]

(d) Two emails dated 1 September 2021 from [✂] (Footasylum's Head of Legal): one to all senior managers reminding them of their obligations to comply with the IO, and one to Mr Bown specifically, reminding him not to initiate or engage in contact of any kind with Mr Cowgill or other JD Sports personnel.[102]

(e) A template checklist entitled Project Berry – Interim Order Compliance Checklist (**Checklist**).[103]

98. Footasylum's RFI10 response stated that it had in place an 'enhanced governance process for monitoring, reporting and ensuring oversight of compliance with the IO'. This comprised 'i): the circulation of a checklist of matters relating to the IO in advance of the senior management meetings… and (ii) a specific standalone standing agenda item at every senior management team meeting referring to the checklist'.[104] The CMA has not been provided with any copies of agendas for these meetings, the minutes, or a completed checklist for any meeting between 17 June and October 2021. It therefore only has the fact that Footasylum has said this was done, rather than evidence of it being done in practice. The CMA considers it should have

[99] Annex 5(2)(a) to Footasylum RFI10 Response.
[100] Annex 5(1)(a)to Footasylum RFI10 Response.
[101] Annexes 5(2) and Annex 5(1) to Footasylum RFI10 Response.
[102] Annex 5(3) and Annex 5(4) to Footasylum RFI10 Response.
[103] Annex 6 to Footasylum RFI10 Response.
[104] Footasylum RFI10 Response, at paragraph 4.4.

been easy to evidence these steps, and in fact was required that Footasylum do so in RFI10. This enhanced governance process was implemented on 17 June 2021, one month after the IO had come into force. It is not clear why Footasylum waited one month before circulating guidance on compliance with the IO, however, it appears the Footasylum spent the first month of the IO being in force without any IO compliance mechanisms in place. Footasylum has said, that it is wrong to say that there was a gap in its guidance here as the guidance was substantially the same as that which it had in place during the 2020 Final Undertakings.[105] That, however, does not explain the delay in recirculating the guidance it applied under the 2020 Final Undertakings in response to the IO. It is also not right to say that guidance under the 2020 Final Undertakings should be assumed, by the CMA, to have been adequate in relation to the IO, or, in fact appropriate to simply recycle previous guidance to comply with new obligations. At the very least, this does not indicate that Footasylum was 'at all times' taking steps to prevent CSI from passing between the Parties.

99. [✂], Footasylum's Head of Legal, is also said to have reminded those present at senior management team meetings of their legal obligations of complying with the IO and the consequences of not doing so.[106] Again, the CMA has not been provided with any records of these meetings noting the content of these reminders, or evidence that they were made.

100. The CMA has not seen evidence that Footasylum has any other compliance or training materials in use regarding adherence to the provisions in the IO, or that it has otherwise taken any other steps to ensure compliance.[107]

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

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

102. Footasylum 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

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[105] PD Response at paragraph 23.
[106] *Ibid*, at paragraph 4.11.
[107]The Final Undertakings provided, at paragraph 4.2.13 that "no Confidential Information passes, directly or indirectly, from… Footasylum… to… JD Sports… or vice versa, except where strictly necessary in the ordinary course of business". This largely mirror the obligation at paragraph 6(l) of the IO. This was also reflected at paragraph 2(n) of the compliance statement in Annex 3 to the FU. It may therefore be expected that Footasylum should have already had in place appropriate compliance policies, procedures and safeguards required to comply with the Final Undertakings.

proactive one and required Footasylum 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 Footasylum 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'.[108] 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 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;[109]

(b) that '[r]ecords should be kept of communications between the merging parties';[110]

(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:[111]

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

[108] The IM **Guidance**, paragraph 1.1
[109] *Ibid*, paragraph 3.13.
[110] *Ibid*, paragraph 3.14.
[111] *Ibid*, paragraph 3.15(a) – (c).

(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:[112]

(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;[113]

(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;[114]

(c) any individual in receipt of such information should enter into a non-disclosure agreement.[115]

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'.[116]

107. Footasylum's guidance (as set out above in paragraphs 97 to 99 and its policies, procedures and safeguards do not appear to adequately provide for matters necessary for Footasylum 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,[117]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. As such there is no apparent mechanism in place to ensure that, where Footasylum employees – and particular senior employees – meet with JD Sports, CSI is not exchanged, nor apparently any mechanism for Footasylum

[112] *Ibid*, paragraph 3.16.
[113] *Ibid*, paragraph 3.16(a).
[114] *Ibid*, paragraph 3.16(a).
[115] *Ibid*, paragraph 3.16 (b).
[116] *Ibid*, paragraph 3.16(c).
[117] As paragraph 3.14. of the IM Guidance indicated would be appropriate.

to know and record what kinds of discussions are taking place between it and a competitor.

108. The only references to CSI were in the Store Managers Guidance and Senior Management Guidance. The Senior Management Guidance provided that Footasylum '**MUST NOT**' (emphasis in original):[118]

> 'Share any competitively sensitive information (**CSI**) with the management team of JD Sports (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)

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.'[119]

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 JD Sports counterparts (and no such information should flow to Footasylum from JD Sports)' (emphasis in original).[120]

112. Nothing in Footasylum's Senior Management Guidance or Checklist deals with keeping records and notes of meetings between the Parties, 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. In particular, the Checklist appears only to copy and paste certain parts of the IO itself into a table format without any further guidance or explanation of those obligations or how they are to be completed and checked off for compliance.[121]

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[118] Annex 5(2)(a) to Footasylum's RFI10 Response.
[119] *Ibid*.
[120] *Ibid,* Annex 5(1)(a)
[121] The CMA notes that it has not, at any time, been provided with a completed Checklist from Footasylum.

113. Footasylum's 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 JD Sports and make almost no reference to the risk that CSI may be shared with Footasylum by JD Sports.[122] 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. Specifically, in relation to the risk of CSI being shared or received and Footasylum's obligation to 'at all times… procure' that CSI did not pass between the parties, it does not appear that Footasylum 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. Although Footasylum says that 'the circulation of the checklist and a standing agenda item at monthly senior management meetings'[123] were part of its compliance programme, the CMA has not seen evidence that these steps were actually taken. For example, the CMA has not seen emails circulating the checklist to relevant people, or a completed checklist being returned to Footasylum's legal team, for example before or after either the July or August Meetings. Similarly, the CMA has not seen minutes of senior management meetings where IO compliance was discussed, nor any indication of how it was discussed.

114. As a result, Footasylum's 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. Footasylum 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.[124] Nor has Footasylum 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.[125] As a result, Footasylum's policies cannot properly be considered as satisfying their continuing obligations to guard against CSI passing between the Parties.

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[122] 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.
[123] PD Response at paragraph 20.
[124] There being a number of calls between the two CEOs (at least 4 between 2 July and 4 August 2021) in addition to the two meetings, as well as a number of text messages', JD Sports' RFI10 Response, Annex 771.
[125] Footasylum's RFI10 Response at paragraph 1.2.

115. There is, for example and relevant for the July and August Meetings, no process by which meetings of that kind are 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. Without first determining whether a meeting with a direct competitor is for a legitimate purpose, in the context of the Remittal and the IO, Footasylum cannot guard against the risk of CSI passing between the Parties. Instead, that risk is actively courted by taking no action to prevent it in those circumstances. The risk is, the CMA considers, greater because of the long-standing relationship between Mr Bown and Mr Cowgill, a relationship which increases the risk that CSI may pass indirectly. The CMA has found that the guidance JD Sports had in place was not sufficient to meet its obligations to scrupulously comply with the IO.

116. Footasylum say that Mr Bown and members of the senior management team 'proactively seek legal advice whenever they have concerns that the IO may be engaged'.[126] However, there is no indication in Footasylum's policies that any of Footasylum's staff, including Mr Bown, knew that they should first consider what would be discussed with JD Sports staff or how to consider the risk that JD Sports may share information with Footasylum, knew when to consider if the IO may be engaged, or knew that advice should be sought before contacting and holding meetings with a competitor. Footasylum had no way of assessing whether the provisions of the IO would be engaged before meetings, like those in July and August, took place. As such, the CMA does not consider that Footasylum was in a position to make an assessment of whether legal advice should first be sought. In turn, the CMA does not know whether any legal advice was sought or was sought appropriately. The existence of the July and August Meetings, in a context where it appears no legal advice was sought, would suggest that Footasylum was not appropriately considering its obligations under the IO and appropriately seeking legal advice before initiating and taking part in contact with a competitor. For example, the August Meeting was not reported to Footasylum's in-house legal team until two weeks after it took place, without the benefit of notes or some kind of agenda. No notes or records of the discussion have been provided to the CMA. As such, any legal advice Mr Bown or Footasylum sought would have been entirely dependent on Mr Bown's memory of the discussion, as Footasylum's response to RFI10 makes clear.[127] Moreover, no legal advice could have been sought as to whether the meeting had engaged the terms of the IO. At best, the legal advice sought

[126] Footasylum RFI10 Response at paragraph 4.14.
[127] *Ibid* at paragraph 1.1.

could only advice retrospectively on the legitimacy of the meeting, and without the benefit of a full account of that meeting.

117. As a result of the above, the CMA has found that Footasylum's policies, procedures and safeguards were not proactive and preventative in how they dealt with risks of CSI being exchanged or was otherwise managed and did not pay adequate, or any, attention to how the IO would in practice be complied with. Footasylum 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 to guard against those risks. Footasylum's policies, procedures and safeguards were not fit for the purpose required in paragraph 6(l) of the IO. The deficiencies in Footasylum's policies, procedures and safeguards are evidenced by the fact that in the context of the July Meeting and August Meeting, Footasylum, and Mr Bown in particular, does not appear to have considered whether the topics being discussed were appropriate in the context of the Merger and the IO, were being discussed with the appropriate counterparts, or were sufficiently recorded to demonstrate that Footasylum considered its obligations under the IO. In fact, it appears that Mr Bown never proactively turned his mind to his obligations under the IO, only being able to provide incomplete accounts of each of the July and August Meetings some time after they took place and only being able to say that he did not, in the context of those meetings being examined by the CMA, consider the IO to have been engaged. There is no record that Mr Bown raised these meetings internally before he proceeded to arrange them with JD Sports. The result of this approach is a divergence in views between Footasylum and JD Sports as to whether CSI was potentially exchanged at these meetings.[128]

118. It is not, in the CMA's view, sufficient for Footasylum to take such a light touch approach to compliance with IO which appears to be entirely based on Mr Bown's own view of the matters discussed at these meetings, without any input from internal or external advisers. In respect of certain risks specific to JD Sports, and set out above, it appears that Footasylum 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 JD Sports.

[128] In JD Sports' Representations at paragraph 19, JD Sports accepts that CSI was potentially exchanged during the August Meeting. In JD Sports' PD Representations, it goes further, accepting that CSI was in fact exchanged at that meeting; JD Sports' PD Representations at paragraph 71. Footasylum do not make a similar statement in its Representations, in fact Footasylum maintain that no CSI was passed during the August Meeting and that it had no reason to suspect CSI passed or that there was any other breach of the IO, PD Representations at paragraph 41.

119. Having sufficient policies, procedures and safeguards in place to ensure compliance with the terms of the IO is particularly important where CSI may be exchanged because, once it has been exchanged:

(a) the risk of harm is so great,

(b) the ability to trace and isolate the information and how it is used is nearly impossible, as once the information is known – and particularly once it is known by a senior person with decision making powers – it cannot be unknown, and

(c) the risk that the information is then used, either directly or indirectly, cannot easily or readily be controlled and ringfenced.

120. As a result of the above, the CMA has found that Footasylum's policies, procedures and safeguards did not ensure that 'at all times' Footasylum was procuring that CSI did not pass, directly or indirectly, between the Parties, including by taking steps to ensure Footasylum, and Mr Bown in particular did not allow CSI to pass to JD Sports. In coming to this conclusion, the CMA has considered the wording of paragraph 6(l) of the IO, and in particular the obligation that Footasylum '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 Footasylum 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 Footasylum's focus on assessing whether or not CSI was exchanged,[129] 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 was not scrupulous compliance with its obligations. Instead, the CMA considers this approach to be light touch and to show serious omissions in Footasylum's approach to compliance which ran the very real risk of, and in fact resulted in, CSI passing between the Parties.

*Assessment of Footasylum's Representations*

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

[129] PD Representations at paragraph 10.

(a) The IO does not impose procedural obligations on Footasylum /[130] there is no breach of any requirement in the IO;[131]

(b) The CMA is seeking to impose extensive and detailed requirements on Footasylum by implication and retrospectively;[132]

(c) The CMA is attempting to bypass the regime established by the CMA and penalise the same matters twice;[133]

(d) Footasylum had in place appropriate policies, procedures and safeguards;[134] and

(e) The CMA did not raise any concerns with Footasylum previously.[135]

*(a) The IO does not impose procedural obligations on Footasylum / there is no breach of any requirement in the IO*

122. Footasylum submits that the IO does not create any specific obligation as to the procedures or measures to be taken to achieve the outcome of preventing CSI passing between the Parties.[136] Footasylum is incorrect to assert, as it does, that the CMA is seeking to impose detailed and specific procedural requirements on how Footasylum complies with its obligations under the IO. The obligation under the IO, as set out above, was to 'at all times… procure' that no CSI pass between the Parties. That required active steps to be taken in advance of a situation, like the July and August Meetings, where CSI passed between the parties. Footasylum had no such proactive policy in place and, as such, has failed to comply with the IO.

123. The obligation imposed on Footasylum under paragraph 6(l) of the IO that Footasylum '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 obligation is, by the words 'shall at all times… procure', clearly directed at Footasylum 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.[137] 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

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[130] Footasylum's Representations at paragraph 8.
[131] PD Representations at paragraphs 8 and 9.
[132] Footasylum's Representations at paragraphs 9 to 12; PD Representations at paragraphs 13 to 18.
[133] PD Representations at paragraphs 10 to 12.
[134] Footasylum's Representations at paragraph 14; PD Representations at paragraphs 19 to 23.
[135] PD Representations at paragraphs 24 and 25.
[136] PD Representations at paragraph 9.
[137] See for example; *Intercontinental Exchange*; *Facebook v CMA* and *Facebook v CMA* (CoA), *Stericycle*, *Electro Rent*.

Footasylum is required to continuously procure that an outcome doesn't 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 Footasylum 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 same risk they are obliged to prevent by having inadequate measures in place.

124. Safeguards to prevent CSI passing between the Parties are particularly important because:

(a) the risk of harm in the event CSI does pass is so great,

(b) the ability to trace and isolate the information and how it is used is nearly impossible, as once the information is known – and particularly once it is known by a senior person with decision making powers – it cannot be unknown, and

(c) the risk that the information is then used, either directly or indirectly, cannot easily or readily be controlled and ringfenced.

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. Similarly, the threshold for exchange or passing, and what needs to be guarded against is set very low in that it direct or indirect exchanges which need to be prevented. As it is the parties 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 Footasylum put in place to comply with

paragraph 6(l) 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 Footasylum does, that 'the IO leaves [the] matter [of guarding against CSI passing between the parties] entirely to the addressee [and] has therefore not created any obligations which can be said to be breached by Footasylum's policies and procedures' cannot be correct.[138] That position 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,[139] 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 breach. Absent such a power, the risks of pre-emption and SLC during

[138] PD Representations at paragraph 9.
[139] Being the threshold established by paragraph 6(l) of the IO.

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.

129. At footnote 2 of Footasylum's PL Representations, Footasylum suggests that the IM Guidance only applied once a decision had been taken to disclose CSI.[140] This, however, appears to miss the point, being that Footasylum needed to take steps to determine what information would be disclosed to JD Sports and determine whether those disclosures engaged the IO and therefore needed the CMA's prior consent. Moreover, the fact that IM Guidance offers assistance for instances where CSI is to be exchanged does not take away from the fact that that guidance should be reflected in Footasylum's policies, procedures and safeguards.

130. In the two CEO to CEO meetings in July and August, Footasylum does not appear to have turned its mind to topics to be discussed and what steps it needed to have in place to ensure it did not breach the IO. There is no record, contemporaneous or otherwise, which suggests Mr Bown considered his obligations under the IO. All Mr Bown can say is that he does not now consider the meetings to have covered anything that would breach the IO.[141] That is not a proactive consideration of his or Footasylum's obligations but a retrospective assessment some time after the meetings took place and given in the context of the CMA inquiring into the meetings. Footasylum had no policy in place that would have assisted it in taking such considerations and, as evident by the July and August Meetings left decisions of what to disclose and how to disclose it to JD Sports, entirely up to Mr Bown. As a result, Mr Bown has made disclosures to JD Sports orally and at informal meetings without records being taken.

131. The matters set out in the IM Guidance are important to consider incorporating into any policies, procedures and safeguards to avoid situations where, as here, a party to interim measures does not turn its mind to its obligations and does not have in place any mechanisms to ensure only the appropriate people are exchanging CSI, records are being kept, and the information exchanged is exchanged for a purpose and is strictly necessary to be exchanged for that purpose. Here Footasylum, and Mr Bown in particular, does not appear to have considered this at all. In fact, and for example, discussions about Footasylum's lease do not appear to have been strictly necessary for the purpose of integration planning, as claimed, because:

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[140] PL Representations at footnote 2, page 3.
[141] Footasylum's RFI10 Response at paragraph 24.

(a) Mr Bown had not considered whether he should be having those discussions with Mr Cowgill or, perhaps more appropriately [✂] (JD Sports' [✂] (JD Sports' [✂]), either of whom would have been in a good position by reason of their respective roles to assist Mr Bown with an urgent integration planning issue relating to Footasylum's [✂] lease;

(b) Footasylum's [✂] lease [✂] and Mr Bown is said to have wanted to 'hold off making a decision about this until he knew what the CMA would say in its Provisional Findings', suggesting that there was no urgent discussion to be had as any discussion would be hypothetical on the CMA's provisional findings;[142] and

(c) There is no evidence that, even if it were necessary to have had these discussions with Mr Cowgill (a matter which, the CMA has found that is not the case), that the information disclosed was strictly necessary and strictly limited for that purpose.

*(b) The CMA is seeking to impose extensive and detailed requirements on Footasylum by implication and retrospectively*

132. The obligation to comply with the terms of the IO was clear on the words of the IO, that being clearly set out above at paragraphs 123 to 127 in response to Footasylum's first submission. The obligation was to 'at all times… procure' that CSI did not pass between the Parties. Footasylum did not have in place mechanisms in its policies, procedures or safeguards to satisfy that obligation, as detailed above. The CMA has not implied more into those words than should be reasonably clear to the reader.

133. Similarly, the CMA is not retrospectively applying obligations on Footasylum; instead, the CMA has evaluated Footasylum's compliance mechanisms in place after becoming aware of a potential issue and has determined those mechanisms were not appropriate for Footasylum to ensure compliance with the IO.

134. Footasylum say that the CMA is seeking to impose detailed requirements on it to: 1) seek prior consent for meetings, 2) assess those meetings for compliance with the IO prior to the meetings taking place, 3) seek prior consent for lawful CSI disclosures, 4) keep records, and 5) have a level of detail in its guidance material that is not set out in the IO. Footasylum goes on to say that it is 'striking that, although the CMA is now able to articulate these requirements, it choose not to do so in the IO itself.'[143]

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[142] *Ibid* at paragraph 2.5.
[143] PD Representations at paragraph 14.

135. As the CMA has already detailed above, the requirements it says Footasylum should have had in place are necessary to give effect to the preventative nature of the IO and paragraph 6(l) in particular. Footasylum's objection as being too onerous that, in circumstances where it is under the obligations set out in the IO and with the Merger being considered, that it takes notes at meetings with its competitor is rejected. Taking notes is a common tool used across businesses for keeping records of meetings. It is a particularly simple and easy to apply tool for keeping records of meetings between competitors during the course of the Merger. Similarly, Footasylum's suggestion it could not possibly be required to assess a meeting for compliance with the IO before it occurred, shows a serious lack of understanding of the terms and purpose of the IO. If Footasylum does not turn its mind to compliance with the IO and take into consideration the fact that the CMA is reviewing the Merger before its CEO and JD Sports' CEO meet, then Footasylum cannot at all times procure compliance with paragraph 6(l). On Footasylum's submission it would be free to attend meetings with whomever it wanted at JD Sports, without consideration of the topics to be discussed, and without turning its mind to the risk of CSI passing between the Parties (including the lower threshold risk of it passing indirectly). It would then not engage the terms of the IO until such time as it had actually disclosed or received CSI. Such a reading is clearly deficient as it does not take into account the preventative requirement in paragraph 6(l) or the preventative requirements of the IO more generally. Footasylum's approach, as evidenced by the July and August Meetings, completely disregards the terms of the IO, raising the very real risk of CSI passing between the Parties (and in relation to Breach 2 actual instances of that outcome occurring).

136. It is similarly evident that in order to comply with the preventative obligation in paragraph 6(l) that there be some written record, including details, of how this will be done circulated among the relevant individuals at Footasylum. Requiring that Footasylum put in place measures to achieve the requirements of the IO is the purpose of the IO. The CAT's jurisprudence on interim measures makes clear that interim measures are preventative and need to be interpreted as such.[144]

137. As for Footasylum's suggestion that it should seek the CMA's prior consent for lawful CSI disclosures, this appears to be a reference to Footasylum's submission in relation to Breaches 2 and 3 that the disclosures made were not captured by the terms of the IO. This is dealt with below in relation to those breaches, however, the CMA notes that a lawful disclosure of CSI can only be where a derogation request has been made and granted. There is no

[144] See for example, *Intercontinental Exchange*; *Facebook v CMA* and *Facebook v CMA* (CoA), *Stericycle*, *Electro Rent*.

such request in relation to the information relevant to the July and August Meetings.

138. Footasylum note that the CMA has imposed a requirement that it create and maintain records of meetings with JD Sports as part of the 2022 Final Undertakings as an example of how the CMA could be clear if it chooses to be.[145] The fact that the CMA, in the 2022 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 Undertakings. Footasylum was not able to provide any record of the meetings in July and August 2021, including stating that Mr Bown periodically deletes his messages, meaning those records cannot be recovered and produced to the CMA in response to a s 109 notice.[146] 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 disclose and then provide 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.

*(c) The CMA is attempting to bypass the regime established by the CMA and penalise the same matters twice*

139. The CMA has, above, already set out that it is not correct to read the IO as providing that only 'actual exchange[s] of information [are] in breach of [paragraph] 6(l).[147] Similarly, at paragraphs 123 to 127 above, the CMA has already dealt with Footasylum's submission that it is being penalised for the same conduct twice.

140. Footasylum submit that the CMA is seeking to bypass the 'mechanism established by the CMA to ensure the adequacy of the Parties' procedures' being the appointment of monitoring trustee. While the CMA accepts that the Monitoring Trustee provides one mechanism for checking the adequacy of a party's compliance mechanisms, it is not the case that the Monitoring Trustee is the only mechanism by which these things can be checked and assessed. In any event, Footasylum do not submit, and the CMA has not seen, any

[145] PD Representations at paragraph 17.
[146] Footasylum RFI10 response at paragraph 5.24.
[147] A point Footasylum raise in its PD Representations at paragraph 10.

evidence to suggest that a question around Footasylum's approach to CSI was ever raised with the Monitoring Trustee.

*(d) Footasylum had in place appropriate policies, procedures, and safeguards*

141. Footasylum say that CMA has failed to undertake a proper assessment of the measures it actually put in pace, which it says were appropriate.[148] Footasylum points to its guidance, which the CMA deals with at paragraphs 97 to 120 above, and notes that it made a number of derogation requests during the Merger to the CMA.[149] The CMA does not agree that it has not undertaken a proper assessment of these measures. As explained above, Footasylum's policies, procedures and safeguards were severely lacking and did not include proactive compliance mechanisms in relation to CSI passing between the Parties. This is evidenced by the fact of the information having passed between the Parties at the July and August Meetings in circumstances where it appears Footasylum took no steps to prevent or safeguard against that occurrence, and in fact, in circumstances where Footasylum appears not to have considered its obligations under the IO at all.

142. In relation to the derogation requests, none of these were made in relation to the exchange of CSI between the Parties. The fact that Footasylum made derogation requests in relation to other matters is evidence of the fact that it knew it had to seek the CMA's consent in relation to various actions it proposed to take, but it is not evidence of the fact that Footasylum understood and was complying, at all times, with its obligation to procure that no CSI pass between the Parties. Although a derogation request would have been the appropriate means by which to seek CMA consent before disclosing CSI to JD Sports, the CMA does not consider there is anything relevant in the fact that Footasylum had previously made unrelated derogation requests to evidence Footasylum's submission that it had reasonable measures in place to comply with paragraph 6(l).

*(e) The CMA did not raise any concerns with Footasylum previously*

143. Footasylum say that the CMA did not raise any previous concerns with it regarding its procedures for ensuring compliance with the CMA's interim measures.[150] Footasylum say that in September 2020, the CMA was provided with copies of its then current interim measures.[151] First, September 2020 is seven months before the IO came into force. Any procedures provided at that point would have been in relation to the 2020 Final Undertakings, which have

[148] PD Representations at paragraph 19.
[149] *Ibid* at paragraph 22.
[150] PD Representations at paragraph 24.
[151] *Ibid*.

a different enforcement regime associated. Regardless, it is not the CMA's place to review a party's safeguarding measures. The CMA does not have specific knowledge of the risks unique or particular to Footasylum. Footasylum needs to identify those and take appropriate action to ensure its measures are fit for purpose. On that basis, the CMA does not accept that it: checked and confirmed appropriate Footasylum's IO compliance measures such that Footasylum could rely on that or that it was in a position to do so.

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

*The obligation under the IO*

144. Paragraph 6(l), in addition to requiring Footasylum 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 Footasylum to ensure that it does not (directly or indirectly) provide CSI to JD Sports, and that it does not (directly or indirectly) receive CSI from JD Sports. Where CSI does pass, in whatever form and however it is exchanged, there is a breach of paragraph 6(l).

*Facts*

145. As set out above, 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.

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

147. 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'.[152] In JD Sports' PD Representations it says that 'the disclosures [of the [✂] named stores] are specific enough information as to fall on the CSI side of the line'.[153] However, Footasylum remains of the view that the discussions at these two meetings, including discussions about named store closures, did not amount to CSI (discussed in more detail below),[154] and did not give it any reason to suspect otherwise.[155] The difference in views highlights the importance of first seeking the CMA's consent before discussions between two senior people from competing entities takes place where there is at least a potential for CSI is to be raised.

148. 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 regarding 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 knowable consequence that the CMA would, if it enquired about these meetings, be left somewhat in the dark about the detail of these discussions.

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

149. 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. Footasylum has not suggested

[152] JD Sports Representations at paragraph 19.
[153] JD Sports' PD Representations at paragraph 71.
[154] Footasylum Representations at paragraph 16.
[155] PD Representations at paragraphs 40 and 41.

that the matters discussed during the July or August Meeting were necessary in the ordinary course of business.[156] Footasylum's submission that discussions of its [✂] lease and logistics contract renewal terms and negotiations were necessary for integration planning[157] is not, in the CMA's view, accepted. As described above, in relation to the [✂] lease, Mr Bown does not appear to have needed to have these discussions with Mr Cowgill because: 1) it would have, if necessary, to discuss it, been more appropriate to have such a discussion with one of JD Sports senior managers who oversee property issues, 2) and was not pressing or urgent as Mr Bown did not want to make a decision until he had seen the CMA's phase 2 findings. The same can be said for Footasylum's logistics/transport contract. Regardless, JD Sports has consistently made clear that it did not offer guidance on these questions,[158] 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. This suggests that JD Sports did not consider these matters pressing or urgent, and the fact that they were not first raised through more formal channels meant JD Sports was not able to offer any kind of assistance to Footasylum. In any event Footasylum only raises the issue of integration planning in relation to the two contracts which were discussed, and does not raise the same in relation to the two other topics being Footasylum's store closures, and Footasylum's financial performance and stock allocations.

150. 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.

151. 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 has found that each of the four topics alone would amount to CSI, 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

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[156] Although the CMA notes that Footasylum has said that discussions about the [✂] lease for [✂] and logistics contract renewal were matters relevant to integrations planning (Footasylum RFI10 Response at paragraph 2.2; PL Representations at paragraph 17).
[157] PD Representations at paragraph 30a. and 30b; PL Representations at paragraph 17.
[158] For example, JD Sports' RFI10 Response at paragraphs 9 and 32.

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

152. **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.

153. **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.[159]

154. **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. Footasylum 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[160] 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

[159] 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).
[160] 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.

CEO, it is nearly impossible to adequately ringfence and take mitigating steps to prevent is further use or disclosure.

155. **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.

156. 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 extent of these discussions. 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.[161] However, any 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 JD Sports' 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, despite Footasylum's submission that these meetings were necessary to discuss pressing integration planning matters.[162] 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.

[161] JD Sports' RFI10 Response at annex 806, neither Mr Bown or Mr Cowgill can remember this call at all but assume it was to arrange the July Meeting. There is no other record apart from who the call was to and from and its duration (ie no note, not follow up email, and apparently no internal correspondence at either Footasylum or JD Sports about the upcoming July Meeting).
[162] Footasylum RFI10 Response at paragraph 24

*Assessment of Footasylum's Representations*

157. The CMA has considered Footasylum's Representations carefully by reference to the evidence and responds as set out below.

158. Footasylum denies Breach 2,[163] and made the following submissions:

(a) information which forms the basis of Breach 2 was not inherently commercially sensitive;[164]

(b) any information disclosed was limited in duration and scope and would not have materially prejudiced the CMA's investigation;

(c) The conflict between JD Sports' and Footasylum's accounts is not a conflict as the CMA suggests;[165]

(d) The CMA has incorrectly inferred certain things from the facts of the July and August Meetings.[166]

*(a) The information was not inherently commercially sensitive*

159. Footasylum's Representations go through each of the four categories of information and detail its reasons for considering why that information is not inherently commercially sensitive.[167]

160. In relation to the first two categories of information, being the long-term lease on Footasylum's [✂] and a transport and logistics contract, Footasylum states that:

(a) the statements were general and limited in nature[168] and:

i. the CMA does not have any details about what was actually discussed in relation to the logistics contract to find that it was CSI, both parties asserting that it was about a possible renewal of an existing contract only;[169]

ii. Mr Bown contends he never disclosed the store names and the CMA found in the Final Report that the parties do not flex their offerings in response to local competitive conditions;[170]

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[163] *Ibid* 15 to 29.
[164] PD Representations at paragraphs 30 to 31.
[165] *Ibid* at 32.
[166] *Ibid* at 33 to 36.
[167] PD Representations at paragraphs 30 to 31; and PL representations at paragraphs 16 to 29.
[168] *Ibid* at paragraphs 17 and 19.
[169] PD Representations at 30b.
[170] *Ibid* at 30c.

iii. ‘it is unlikely that the high level discussion [of stock allocations and financial performance] at the August Meeting advanced JD Sports’ understanding on this issue.[171]

(b) there is no prejudice to the CMA’s investigation;[172] and

(c) there is ‘material uncertainty’ as to whether either of these topics were discussed at the July Meeting.[173]

161. The CMA does not consider Footasylum’s representations above to alter its view that these two topics were CSI because:

(a) As Mr Bown cannot recall either the July or August Meetings in any detail, and as there is no contemporaneous record to support his account, it is not necessarily accepted that these topics were only generally discussed, and any disclosure was limited. In any event, 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.[174] In any event, and as set out above, the logistics contract was significant in the context of the Covid-19 pandemic and changing retail practices and knowing any information about a competitor’s stock allocations and financial performance goes to the heart of competition between parties.[175] These are not discussions in the ordinary course of business. Similarly, the store closures (dealt with below) cannot, even on the evidence available, be referred to as general in nature as store locations were named and any discussion of store closures (on Footasylum’s own guidance, as well as in the CMA’s view) amounts to CSI.

(b) The risk of pre-emptive action and impediment where CSI is exchanged between parties is so high that it is entirely reasonable for the CMA to conclude that prejudice has occurred. The reasons why CSI poses such a great risk are explained above.

(c) As with the CMA’s view above, the material uncertainty as to what was discussed and the extent to which it was discussed cannot in this case operate to benefit Footasylum in circumstances where it has taken a

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[171] *Ibid* at 30d.
[172] *Ibid*.
[173] *Ibid* at paragraphs 18 and 20.
[174] *Lexon v CMA* [2021] CAT 5 (***Lexon***) at [126].
[175] 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.

decision to not take any precautionary steps to ensure compliance with the IO. Any other view would, in the CMA's view, create a paradox where the CMA would never be able to enforce the terms of its interim measures because parties simply chose not to take appropriate steps to comply. Regardless, there is no dispute that these topics were discussed at the August Meeting, as set out in the 19 August Email.

162. In relation to Footasylum disclosing store closures to JD Sports, Footasylum states that:

(a) stores which had already closed was information in the public domain;[176]

(b) it is unclear whether Mr Cowgill recalls any stores being named or whether he may have obtained this information elsewhere;[177] and

(c) Footasylum made a 'voluntary' disclosure of this information in the 19 August Email.[178]

163. The CMA does not agree with Footasylum's representations in this regard because:

(a) As above, CSI captures 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.[179] The fact that a CEO of a competing business is disclosing that he has closed [✂] stores is not ordinary discussions between such senior level people and the disclosure is likely to reduce any uncertainty about these commercial decisions.

(b) Mr Cowgill's account about what was said is that at least [✂] stores were named. His account goes on to provide locations of those [✂] stores. The CMA considers Mr Cowgill's recollection of this information is accurate and has not come from another source, as Footasylum suggests.

(c) As set out in Breach 3 below, the CMA does not consider that Footasylum has made a voluntary disclosure of the August Meeting; instead, the CMA is of the view that disclosure, which was heavily caveated, came in the context of the CMA's probe into the meetings between the Parties and was not compliant with Footasylum's obligations to 'immediately' notify the CMA of any reason to suspect a breach. In any event, disclosure of a breach of the IO does not absolve the party making the disclosure of its

[176] PL Representations at paragraph 22.3.
[177] *Ibid* at paragraphs 22.2 and 22.4; PD Representations at paragraphs 30c and 38.
[178] *Ibid* at paragraph 22.
[179] *Lexon* at [165]

responsibility and potential consequences for breaching the IO in the first place.

164. Footasylum also made various representations in relation to its disclosure of financial performance and stock allocations to JD Sports,[180] Including that this information was disclosed at such a high level it was unlikely that JD Sports could gain any advantage from it.[181] However, as Footasylum's representations here essentially come down to Footasylum's assertion that this information has not impacted JD Sports competitive strategy and that the CMA, in its Final Report has alluded to similar information, the CMA considers it has already dealt with these above. That is, CSI is not limited to information which is not in the public domain and financial performance and stock allocations being discussed in a CEO to CEO discussion may provide a significant commercial advantage to the party receiving this information.[182] Where the CMA has alluded to reduced stock allocations it has done so in terms of its statutory obligations. Where a CEO discloses that information, earlier than reported by the CMA and to a competitor, it is entirely different and risks prejudicing the Merger, resulting in pre-emptive action, and potentially undermining competition in the market.

165. Footasylum object to the CMA drawing an analogy with some of the publicly available information that was disclosed in this case (ie the [✂] lease) being drawn with the publicly available information being disclosed in *Lexon v CMA*.[183] The CMA considers the parallel to be appropriate and that the reasons set out in paragraphs 163(a) and 164 above are correct.

*(b) Any information disclosed was limited in duration and scope and would not have materially prejudiced the CMA's investigation*

166. Footasylum's representations in this regard entirely miss the test the CMA applies when considering whether its interim measures have been breached. The test is not whether there has actually been material prejudice to the CMA's investigation, or actual pre-emptive action. Instead, the test whether the actions taken by the parties to the interim measures 'might prejudice the reference or… might impede action justified by the CMA's ultimate decision'.[184] Similarly, in *Facebook v CMA* the Tribunal (upheld by the Court of Appeal) confirmed that pre-emptive action includes 'action that has the potential to affect the competitive structure of the market during the CMA's investigation.'[185] It is therefore irrelevant that Footasylum considers the

[180] Footasylum Representations at paragraphs 26 to 29.
[181] PD Representations at paragraph 30d.
[182] *Lexon* at [126].
[183] PD Representations at paragraph 31.
[184] *Intercontinental Exchange* at [220].
[185] *Facebook v CMA* at [124].

disclosures to be limited in duration and scope or that they have not materially prejudiced the CMA's investigation. In any event the CMA does not consider the exchange of the CSI to be limited in scope or duration, for the reasons extensively set out above.

*(c) The conflict between JD Sports' and Footasylum's accounts is not a conflict as the CMA suggests*

167. Footasylum submit that it is unremarkable that the Parties recall different things and that there is no justification for the CMA to suggest that the conflict provides support from the fact that CSI was exchanged.[186] Footasylum go on to then say that because Mr Cowgill's account of the July Meeting (in JD Sports' RFI10 Response) referred to the fact that he 'thinks that BB mentioned [the logistics contract and [✂] lease]' that the CMA should have disregarded this point and assumed it unlikely that Mr Bown would raise these topics twice (once in July and then again in August).[187]

168. The CMA disagrees and considers, as it has set out above, that the fact that there are conflicts in the accounts emphasise the severity of Breach 1. The fact that there are conflicts in the two accounts about the July Meeting is an appropriate basis for the CMA to infer that the, considering the headline points discussed would be CSI, that any further discussions of those headline points at the meeting would also be CSI. In relation to the fact that Mr Cowgill says that that he 'thinks' the logistics contract and [✂] lease were discussed at the July Meeting, the CMA is content with its finding that they were in fact discussed at that meeting. Footasylum's suggestion that the CMA should consider the unlikelihood of these topics being discussed twice, is unpersuasive. The 19 August Email makes clear that Mr Cowgill did not feel he could offer a view on those topics when they were raised at the August Meeting, it is entirely possible that a similar response was received at the July Meeting. Regardless, the CMA has already noted above, that it will not provide the Parties with a more extensive benefit of their own poor record keeping (Breach 1) than is appropriate. As such, Footasylum can reasonably be expected to provide some basis in evidence to displace the CMA's provisional finding that [✂] lease and logistics contract were discussed at the July Meeting based on Mr Cowgill's account. Footasylum has not done this, instead it has simply reasserted the same position, the Mr Bown says the discussions did not occur. The CMA has read that in the context of Mr Bown and Mr Cowgill's incomplete memories of the meeting and from the fact that Footasylum has not produced any evidence to suggest, for example, that it

[186] PD Representations at paragraph 32.
[187] *Ibid* at paragraph 38.

was not considering the issue of its [✂] lease at the time of the July Meeting and therefore could not have raised it as an issue.

169. The CMA also notes that Footasylum appear to carefully pick the CMA's use of the word 'serious' in its PD and place it in the context to suggest the CMA made a finding that '"*serious*" CSI was exchanged'.[188] The CMA has made no such finding that 'serious CSI' was exchanged; that being a phrase which carries no meaning. The CMA has found that CSI was exchanged and that such an exchange represents a serious breach of the IO.

*(d) The CMA has incorrectly inferred certain things from the facts of the July and August Meetings*

170. Footasylum say that the lack of records from the meetings and the fact that the parties did not raise the meetings with, for example, the CMA or the Monitoring Trustee before holding them, cannot be used as a basis to infer that CSI was exchanged. The CMA disagrees that it has done this. The CMA has determined CSI was exchanged from the accounts provided by the Parties which include a series of topics discussed. The CMA then criticises JD Sports and Footasylum for the fact that no records were made of these meetings and that, if either or both Parties had been acting appropriately, they would have sought consent or clarification before holding the July and August Meeting (whether through the CMA or the Monitoring Trustee).

***Breach 3 – Failure to immediately report***

*The IO*

171. Paragraph 16 of the IO requires Footasylum to immediately notify the CMA and Monitoring Trustee if it has any reason to suspect the IO might have been breached. Paragraph 16 is expressed in mandatory terms, being that if there is 'any reason to suspect [that the IO] might have been breached [Footasylum] 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.

172. 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

[188] *Ibid* at paragraph 32.

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.

173. 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 Footasylum:

(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*

174. 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 information was potentially CSI and, importantly, that it suspected a breach of the IO may have occurred during the August Meeting.[189] Footasylum, however, has not made similar representations, instead maintaining that no CSI passed between the Parties and that, in relation to the August Meeting, it acted appropriately.[190]

175. The CMA only became aware of the July Meeting via a voluntary disclosure of video material from a third party. Footasylum itself only disclosed the existence of the July Meeting to the CMA following receipt of RFI7, 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 Footasylum proactively

[189] JD Sports Representations at paragraph 26(b).
[190] Footasylum Representations at paragraph 23.

notify[191] the CMA of the fact of the July Meeting or the exchange of CSI that occurred during the July Meeting.

176. In respect of the August Meeting, Footasylum 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 apparently only after Footasylum's General Counsel also returned from her holiday at around the same time,[192] and in the context of the CMA's probe in RFI7 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.[193]

*Failure to comply with paragraph 16 of the IO*

177. The CMA is of the view that the discussions at the July Meeting and August Meeting involving the exchange of CSI should/ought to have caused Footasylum at least some reason to suspect a potential breach of the IO.[194] For the reasons set out above, Footasylum 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.

178. The August Meeting raised similar topics to the July Meeting, but also included discussions about store closures, which JD Sports accepts amounted to CSI.[195] The CMA considers that the topics discussed at the 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 for Footasylum to report those suspicions to the CMA and Monitoring Trustee.

179. Footasylum contends that the 19 August Email was a voluntary notification of the August Meeting,[196] which was made as soon as possible (being after Mr

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[191] 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.
[192] 19 August Email.
[193] JD Sports' Representations at paragraph 26.
[194] *Electro Rent Corporation* at [172] where the CAT held the appropriate test was "ought" to have known or suspected.
[195] Footasylum Representations at paragraph 34.
[196] *Ibid*.

Cowgill and Footasylum's General Counsel returned from their respective holidays, and after the Parties had conferred on the subsequent report to the CMA). However, Footasylum make clear that the report was not a notification of a suspected breach of the IO.[197] In this sense, Footasylum contend that the 19 August Email was simply a voluntary report to the CMA of a meeting between the two CEOs without cause for suspicions to be raised. The CMA does not find this position to be credible as it does not appear to:

(a) grapple with the type of information disclosed during the August Meeting that, at least ought to have, raised Footasylum's suspicions,

(b) engage with the fact that the meeting was the second CEO to CEO meeting in as many months,

(c) conflicts with JD Sports' own reasons for sending the 19 August Email,[198] and

(d) does not explain why, if there was no reason to consider the August Meeting raised any concern in relation to the IO, the email was necessary to send, particularly as Footasylum do not accept that the 19 August Email came in the context of the CMA's RFI7.[199]

180. The CMA's view is that the August Meeting ought to have raised at least some reason for suspicion that the IO might have been breached, therefore triggering Footasylum's obligation to immediately notify the CMA of the same. The CMA further considers that Footasylum cannot both contend that there was no reason for concern in relation to the August Meeting and assert that it voluntarily disclosed the Meeting, albeit not under paragraph 16 of the IO to absolve it of any liability. Either Footasylum considered there to be reason to suspect the IO had been breached by the August Meeting, but did not disclose those suspicions until 15 days after the meeting at a time convenient to it and only after conferring with JD Sports on the response, or did not consider there to be any issue at the August Meeting and sent the 19 August Email simply as an 'FYI' to the CMA after the CMA probed meetings between the CEOs. If the former is correct, then Footasylum breached paragraph 16 of the IO by not immediately notifying the CMA. If the latter is correct, then Footasylum breached paragraph 16 of the IO as it ought to have recognised the reasons to suspect the IO had been breached but failed to do so and then subsequently failed to notify the CMA.

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[197] *Ibid* at paragraphs 22 and 34.
[198] JD Sports Representations at paragraph 26(b).
[199] There being no mention of the fact that the 19 August Email was sent 9 days after RFI9 was sent and concerned a meeting that properly should have been disclosed as part of Footasylum's RFI9 response, in Footasylum's Representations or its RFI10 Response.

181. Without Footasylum 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 and/or impact on the competitive market during the Remittal.[200]

*Assessment of Footasylum's Representations*

182. The CMA has carefully considered Footasylum's Representations with reference to the evidence and responds as set out below.

183. Footasylum say that there is no basis for the 'implication that [it] had reason to suspect' either in relation to the July Meeting or the August Meeting, that the IO may have been breached.[201] The CMA considers that this matter has been dealt with above in that Footasylum, at least, ought to have had some reason to suspect that the July Meeting and August Meeting may have breached the IO. The CMA is not required to show that Footasylum had actual suspicions, only that it ought to have suspected. The topics discussed at these meetings and the fact that they were being discussed at the most senior levels of the two competing businesses should have raised Footasylum's suspicions. In turn those suspicions should then have been reported to the CMA in line with the terms of paragraph 16 of the IO.

184. It is not sufficient for Footasylum to simply say it did not consider there to be anything that raised its suspicions and so it did not need to report anything under the terms of the IO. If that were the case a perverse incentive would be created for merging parties to simply say that discussions between senior employees were above board and did not trigger the terms of any interim measure, without the CMA ever being able to test that position or draw conclusions based on the little information that is made available. The information asymmetry makes it entirely appropriate for the CMA to conclude that based on the topics discussed (albeit with few details being recalled by either CEO), the level at which those discussions were had, and context in which those discussions were held, that there was sufficient reasons to suspect the terms of the IO had been engaged and immediately report that to the CMA to allow it to determine the appropriateness of those engagements.

[200] *Electro Rent* at paragraph 206.
[201] PL Representations at paragraph 31 and 32; PD Representations at paragraph 40.

185. Footasylum make the same submission in relation to the August Meeting,[202] however, it adds that, even though it had no reason to suspect that during the August Meeting the IO may have been breached, it nevertheless told the CMA about the meeting in the 19 August Email.[203] Footasylum say that the requirement, in paragraph 16 is simply to notify the CMA, and then leave the CMA to make its own judgment on the facts.[204] This submission is wrong because:

(a) As with the July meeting Footasylum ought to have suspected the IO had been breached during the course of the August Meeting; and

(b) The 19 August Email was not an appropriate notification of Footasylum's suspicions because 1) Footasylum, as it has said, had no such suspicion and so cannot notify anyone of a suspicion it says it did not have, 2) the email came 15 days after the meetings, and so clearly falls short of the immediacy requirements in paragraph 16, 3) the email came as a collaborative piece of work with the party Footasylum shared CSI, and 4) the notification was incomplete and did not contain a full description of the meeting, instead it was caveated by the individual's poor recollections.

***Risk of prejudice to a reference or of impeding remedial action***

186. Footasylum contends that neither the July Meeting or August Meeting risked causing prejudice to the CMA's Merger investigation or to any action that the CMA might take as a result.[205] This is in addition to Footasylum's contention that, in relation to Breach 2 '[a]ny information disclosed was limited in duration and scope and would not have materially prejudiced the CMA's investigation'.[206]

187. These two statements conflict, as one suggests mere risk of prejudice would be enough for the CMA to take action, while the other suggests only material prejudice is sufficient. The latter, as the CMA has set out above, is incorrect. In relation to the former, it is not only actual risk of prejudice but also the possibility of prejudice which is caught by the IO. The CMA is of the view that Breaches 1 to 3 risked or created a possibility of prejudice and therefore warrant a finding that Footasylum has breached the IO and the imposition of a penalty.

188. As set out in paragraph 40 above, the precautionary purpose of the IO seeks to protect against the possibility or risk of prejudice to the reference or

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[202] *Ibid*.
[203] *Ibid*.
[204] *Ibid*.
[205] *Ibid* at paragraph 41.
[206] *Ibid* at heading (b), page 7.

potential remedies. It follows that the CMA need not show actual adverse effects on the competitive structure of the market or on its ability to take remedial action. The purpose of interim measures is to ensure merging parties seek the consent of the CMA before undertaking actions that *might* prejudice the reference or impede the taking of remedial action. A risk of adverse effects is therefore sufficient.[207] Moreover, it is not for Footasylum to decide or predict whether there may be any prejudice in circumstances where the Merger is still being investigated by the CMA. Even in circumstances where the CMA may eventually conclude that there was no actual adverse effect, it is not for Footasylum to unilaterally determine the appropriate scope of the IO, or whether its actions might prejudice the reference or impede the taking of remedial action.

189. 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 Footasylum and to deprive the CMA of taking appropriate action in relation to the July and August Meeting. Similarly, Breach 3 related to a development within the scope of the IO that Footasylum 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.

190. 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***

191. 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'.

192. 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

[207] *Electro Rent* at [200].

event beyond [the person's] control has caused the failure and the failure would not otherwise have taken place.

193. 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.

194. 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.[208] 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 a breach of the interim order requiring consent or derogation, it was insufficient to merely notify the Monitoring Trustee of a possible breach.[209]

195. Footasylum has not made representations that it had a reasonable excuse for failing to comply with the IO. Footasylum simply assert that the breaches alleged are not, in fact, breaches. As such the CMA has not assessed any reasonable excuse put forward by Footasylum, instead, it has dealt with Footasylum's contention that the IO was not breached on that basis only. Based on the evidence in the round, the CMA has found that Footasylum has no reasonable excuse for failing to comply with the IO.

## 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*

196. 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

[208] *ibid*, paragraphs 114, 138 and 139.
[209] *Ibid*, paragraphs 155 to 157 and 159 to 164.

CMA identifies as warranting review.[210] 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.[211] 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.

197. 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.

198. The above is reflected in the policy objectives set out in the Penalties Guidance:[212]

> 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.

199. 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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[210] 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.
[211] *Intercontinental Exchange* at paragraph 220.
[212] Penalties Guidance, paragraph 3.1.

intentions or incentives of the party involved.'[213] 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.[214]

200. 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.[215]

***Appropriateness of imposing a penalty***

*Assessment of the factors relevant to imposing a penalty*

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

202. 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.[216]

203. Footasylum submitted that any breaches of the IO then those breaches were 'of extremely limited duration and scope and did not materially prejudice the CMA's merger investigation; in addition, [any breach] arises in a context where Footasylum has made extensive efforts since 2019 to adopt and to implement appropriate systems and procures to achieve compliance with the CMA's requirements'.[217] Footasylum has not otherwise made any representation on the possibility of the CMA imposing a penalty, something which the CMA draws no inference from as this decision will set out the basis

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[213] *Electro Rent*, at paragraph 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.
[214] IM Guidance, at paragraph 7.6.
[215] 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.
[216] See paragraphs 4.2 and 4.3.
[217] PL Representations at paragraph 4; PD Representations at, for example, paragraphs 48(d), 53, and 54(b).

on which the CMA has imposed a penalty, the level of that penalty, and provide Footasylum with an opportunity to make further representations.

204. As set out below, the CMA is of the view 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 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 impediment 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.

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

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

206. Footasylum was under a clear obligation in paragraph 6(l) of the IO. Footasylum knew, or ought to have known that it needed to scrupulously comply with the IO[218] 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 Footasylum's 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.

[218] *Electro Rent* at [206].

207. As an IO also 'catches more than just actual prejudice or impediments' but also the risk or 'possibility of prejudice or an impediment',[219] it was, or should have been clear to Footasylum 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.

208. Footasylum's 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, at all times, 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.

209. As a result, Footasylum's 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.

210. In the CMA's view, Breach 1 is serious because the need for Footasylum to have in place policies, procedures and safeguards that were fit for the purpose of ensuring on going 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 Footasylum on the words of the IO, and Footasylum clearly knew its compliance measures had to be tailed to its specific circumstances.[220] In fact, Footasylum have sought to receive credit for its measures in place which provided 'advice tailored to the Footasylum business'.[221] The CMA has concluded that

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[219] *Ibid* at [118].
[220] PD Representations at paragraph 21.
[221] *Ibid*.

Footasylum cannot say that its compliance measures were specifically tailored to its business because there were severe gaps in identifying the risks presented by Footasylum's business and unique to it and relevant to the terms of the IO, and particularly paragraph 6(l). Ultimately the measures Footasylum had in place were not particularly tailored to anything specific about Footasylum.

211. As set out above, the CMA finds that Footasylum's 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). Footasylum's 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 Footasylum 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 leaving assessment of whether or not CSI was to be discussed entirely to individuals engaging in discussions with the CEO of a competition business and then 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.

212. 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.

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

213. 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.

214. As set out above, the CMA has determined 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.

215. 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'.[222] JD Sports, in its PD Representations, wholly accept that the named stores Footasylum planned to close amounted to CSI.[223] However, Footasylum does not provide the same partial acceptance, and instead rejects that any CSI passed between the Parties and that there was any reason to think or suspect that CSI passed between the Parties. The CMA has concluded that all four categories of information amounted to CSI and that Footasylum knew or ought to have known this.

216. The CMA is of the view that Breach 2 is serious 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). Footasylum, and Mr Bown in particular, was content to have ad hoc meetings with Mr Cowgill about a range of topics that he ought to have known were not appropriate to share with JD Sports, and, even if they were following a derogation requires, not appropriate for him to raise with Mr Cowgill. As a result, the CMA considers the conduct in relation to Breach 2 to be flagrant.

217. 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 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. Footasylum does not appear to have taken any steps to attempt to control or

[222] JD Sports Representations at paragraph 19.
[223] JD Sports PD Representations at 71.

mitigate the disclosure of CSI, even after the CMA started to probe the issue in August, then again in September 2021.

218. Footasylum has maintained that, in relation to its lease and logistics contract, these were necessary for integration planning. However, on the facts that does not appear to be correct and, in any event, it does not appear that Footasylum ever turned its mind to who within JD Sports was appropriate to discuss these matters with to ensure that, if it was necessary for integration planning, disclosures were made only to those strictly necessary to assist with that purpose. One obvious example would be to JD Sports senior managers with responsibility for dealing with property and logistics issues.

219. In relation to the other two categories of CSI exchanged, Footasylum simply rejects that these amounted to CSI. The CMA, above, has rejected that position and set out why Footasylum ought to have known this information was CSI.

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

220. For the reasons set out above, the CMA is of the view that Footasylum had, or ought to have had, at least some reason to suspect that there was a breach of the IO before, during, and/or after the July Meeting and August Meetings. JD Sports accepts that it suspected CSI was exchanged during the August Meeting. Footasylum, however, does not accept the same and maintains that it did not have any reason to suspect a breach of the IO and so had no obligation to report those matters to the CMA. This is despite Footasylum making what it says was a voluntary (and presumably unrelated disclosure) of the August Meeting, in the interests of transparency.[224]

221. In respect of the July Meeting, the CMA was never notified of the meeting in the context of the IO. Instead, Footasylum only disclosed the existence of the meeting in response to RFI7 and only disclosed the few details Mr Bown could recall about the meeting in its response to RFI10, some two months after the meeting had taken place.

222. The CMA has considered Footasylum's submission that it made a voluntary disclosure of the August Meeting, but denies any CSI was exchanged or that it suspect any breach of the IO occurred.[225] However, and as set out above, the CMA does not consider this submission to be persuasive, and instead considers that Footasylum either had reason to suspect a breach had occurred at the August Meeting but delayed reporting that to the CMA, or it

[224] Footasylum Representations at paragraph 22.
[225] *Ibid* at paragraph 24.

did not suspect, but ought to have, and did not report it to the CMA sending the 19 August Email only after being prompted following RFI7.

223. In relation to the July Meeting, the CMA disagrees that no CSI passed between the Parties, as set out above, and disagrees that Footasylum 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 give rise to a suspicion that the IO may have been breached (and in fact themselves amounted to CSI (Breach 2)).

224. The CMA concludes that Footasylum 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 Bown was present at both meetings, and is described as being aware of his obligations under the IO.[226]

225. 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.

226. Interim measures rely significantly on a party's self-assessment of compliance and prompt and clear reporting of any reason to suspect a breach, potential breaches, and material developments to the CMA. Neither of the self-assessment or prompt reporting were performed by Footasylum 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 and Footasylum's General Counsel had returned from their respective holiday, 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. The CMA has also considered the fact that Footasylum maintains that it had no reason to suspect a breach of the IO but nevertheless considers the 19 August Email to reflect compliance with paragraph 16 of the IO.[227]

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[226] *Ibid* at paragraph 38.
[227] Paragraph 16 of the IO only being triggered where a party has some reason to suspect a breach of the IO has taken place.

227. 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 the risks they presented. It also raised the very real risk of pre-emptive action and lessen competition in the market. 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.

*Conclusion on the appropriateness of imposing a penalty*

228. 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 196 to 227 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 Breaches 2 and 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 204, 210, 211, 216 and 225 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.

229. The CMA considered that the other factors relevant to the appropriateness of imposing a penalty listed in the Penalties Guidance at paragraph 4.2[228] did not affect this conclusion.

***Appropriateness of the amount of the penalty for each breach***

230. Consistent with its statutory duties and the Penalties Guidance,[229] the CMA has assessed all relevant circumstances in the round to determine an appropriate level of penalty for each of the breaches.

*Assessment of Footasylum's Representations on the CMA's approach to penalty*

[228] 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).
[229] Penalties Guidance, paragraph 4.11.

231. Footasylum make only one submission on this front; that the CMA did not appropriately consider: 1) whether the failure to comply was likely to have an adverse impact on the CMA's investigation, 2) whether the failure was significant or flagrant, and 3) whether the party concerned sought to obtain an advantage or derive a benefit from the failure.[230]

232. The CMA disagrees with Footasylum's assertion that it has not considered its Penalties Guidance and the three points above specifically. The CMA has set out in detail its considerations and conclusions on these steps below. As for the seriousness and flagrant nature of the offending, the CMA has also made these points throughout this Penalty Decision. Similar considerations have been made as to the adverse impact on the CMA's investigation, both in relation to the Merger and the Remittal, and the CMA's investigation into these breaches.

233. Footasylum separately make the submission that the total amount of the penalty the CMA is imposing, £380,000 (£470,000 in the Provisional Decision), reflects the highest penalty in terms of global turnover ever imposed.[231] While this is correct in terms of percentage of global turnover, it is misguided to suggest that global turnover is the only consideration the CMA has when imposing a penalty. In fact, the CMA determines the appropriate penalty amount to impose and then, in accordance with its obligations under the EA02, ensures that amount is proportionate considering the maximum penalty it can impose can only ever amount to 5% of an entitles global turnover. The CMA is satisfied, having considered these points below, a total penalty of £380,000 is appropriate, reflects only 0.15% of Footasylum's 2020 global turnover, and achieves the CMA's policy objectives of specific and general deterrence.

234. Footasylum submit that deterrence is not properly explained in the CMA's decision.[232] The CMA disagrees, noting that deterrence is the effect of its decision and the penalty imposed. Compliance with interim measures is high priority for the CMA as they underpin and make functional the UK's non-suspensory and voluntary merger regime. As set out in detail below, the CMA reviews only a small portion of completed mergers, and even fewer make it to phase two. The need for compliance with the interim meatus is of paramount importance and the breaches in this case are serious and go to the heart of the interim measures regime. In order to achieve deterrence, both specifically

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[230] PD Representations at paragraph 45.
[231] PD Representations at 60; Footasylum also content that the correct percentage of its global turnover is 0.20% and not as the CMA proposed in the Provisional Decision 0.17%. That is correct and was an error in the CMA's Provisional Decision. The penalty, of 396,000, the CMA has determined to impose however reflects 0.16% of Footasylum's global turnover.
[232] *Ibid* at paragraph 61.

and generally the CMA has considered the penalty it imposes to be apocopate for that end.

235. The CMA rejects, as it has above, and does again below, Footasylum's attempt to relitigate the CMA's factual findings in relation to Breaches 1 to 3.[233]

***Breach 1***

236. 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, on the evidence it has, cannot make any findings that Breach 1 was intentional, it considers that Footasylum's conduct is at least, but potentially more than merely negligent. Breach 1 indicates that Footasylum's 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. Footasylum's 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.

237. 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:

238. 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*

239. It is axiomatic that Footasylum's conduct set out above involved senior personnel, being the CEO and their General Counsel who was significantly

[233] *Ibid* at paragraph 63.

involved in the compliance measures adopted. The implementation of measures to comply with the IO is, by its nature, required to be dealt with by senior level individuals.

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

240. Footasylum's 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 Footasylum

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

(d) *Nature and gravity of the failure*

242. 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*

243. The failure here is a continuing one as the obligation to procure compliance was existent as soon as the IO came into force and required continuous consideration and compliance. Footasylum, however, only implement IO compliance guidance one month after the IO took effect, relying instead on guidance Footasylum had used in respect of the 2020 Final Undertakings, which had not been recirculated in relation to the IO. Footasylum then implemented severely deficient and inadequate guidance which did not comply with paragraph (I) of the IO. As the paragraph 6(I) obligation was similarly expressed in the 2020 Final Undertakings and the IO, it should have been known to Footasylum and included in its earlier guidance, however, it was not. The fact that since the IO was in force Footasylum 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 Footasylum has in place to procure compliance, leads the CMA to the view that the failure is serious and was continuous.

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

244. As set out below, the CMA is of the view that Footasylum 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.

*Steps in mitigation*

245. The CMA notes that following its probe into the July Meeting and August Meeting, Footasylum took steps to impose a more stringent policy regarding contact with JD Sports.[234] However, although such a policy prevented contact between Footasylum and JD Sports, and particularly between the two CEOs, it: was applied only after a series of meetings between the two CEOs had already taken place, and 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 Footasylum now put in place) prevents CSI passing between the Parties, it does not encourage record keeping to allow the CMA to inspect compliance, nor does it indicate that Footasylum now fully understands and appreciates its obligations under the IO. The CMA's view is, therefore, that such steps only partially go towards mitigation.

*Footasylum's Representations*

246. Footasylum say that the CMA's decision to impose a penalty for Breach 1 relies on the fact that the behaviour was particularly serious and flagrant and that it created a risk of pre-emptive action by impacting the CMA's ability to monitor and enforce compliance with the IO.[235]Footasylum go on to set out why it considers these two factors to be wrong.[236]

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[234] Footasylum RFI10 Response at paragraph 3.2.
[235] PD Representations at 47.
[236] *Ibid* at paragraphs 48 and 49.

247. First, the CMA has removed the word 'flagrant' as a descriptor of Breach 1 following its consideration of Footasylum's PD Representations. 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 that the CMA does not maintain that the conduct going to Breach 1 was flagrant.

248. Second, however, the CMA considers that Footasylum is wrong to summarise the CMA's position that pre-emptive action was risked because the CMA could not monitor and enforce compliance with the IO. As set out above, at paragraph 121, Footasylum's severe failures in the meatus it adopted to comply with paragraph 6(l) courted the very risk it was required to prevent. Footasylum did not have adequate measures in place to guard against the exchange of CSI and instead approached the issue as one which would only arise if CSI were to actually pass between the Parties. It is that light touch and flawed approach to compliance with the IO that leads to the very real risk that CSI will (as it did) pass between the Parties. The fact that the measures Footasylum did have in place meant that the CMA's view into the event was obscured by a lack of record keeping, a failure to show any attempt to assess the legitimacy and purpose of a meeting with a competitor, and an inaccurate and incomplete response to RFI7, meant that the CMA's ability to monitor and enforce the IO was hampered is an additional and relevant consideration to the level of penalty the CMA imposes. That consideration goes to the CMA's ability to investigate the breaches of the IO.

*Size and financial resources available to Footasylum*

249. The CMA has also had regard to the size and financial resources available to Footasylum.[237] 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.

250. In determining the appropriate level of penalty, the CMA has therefore considered the last fully audited financial statement for Footasylum for the year preceding the imposition of the IO,[238] ie the financial year ended 31 December 2020. This statement shows that Footasylum is had total global turnover of £248.71 million and net assets of £34.36 million in the financial

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

year ending February 2020. The CMA notes that Footasylum [✂] in terms of profit and operating profit in the 2020 year and has taken this into account in setting the penalty appropriately.

251. However, the above information indicates that Footasylum 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*

252. 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 Footasylum and other companies from contravening interim measures in the future, and to ensure that they scrupulously comply with interim measures imposed by the CMA.

253. The CMA has decided that the imposition of a penalty of £200,000 is appropriate having considered the relevant factors and circumstances of this case set out in this decision in the round, and in particular the 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. Footasylum 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 Footasylum 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 acquiring entity (JD Sports).

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

    iv. Footasylum's size and financial position (above in paragraph 250).

254. The CMA considers that the Proposed Penalty for Footasylum's failure to comply would be sufficient and proportionate to achieve its objectives:

(a) the penalty represents only 0.08% of Footasylum global turnover (see paragraph 250 above)

(b) the penalty would not be anomalous, nor would it affect Footasylum disproportionately, at 0.58% or net assets.

*Breach 2*

255. 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*

256. It is axiomatic that Footasylum's conduct set out above involved senior personnel, being the CEO. Similarly, the CMA has found that there was a pattern of behaviour as following the July Meeting, Footasylum 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*

257. Footasylum's 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 Footasylum and advantage provided to JD Sports*

258. Footasylum has potentially provided an advantage to JD Sports by disclosing CSI to it about its competitor (Footasylum). 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 an aggravating factor.

(d) *Nature and gravity of the failure*

259. 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*

260. CSI was exchanged at two meetings between the CEOs. Following the July Meeting Footasylum 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*

261. As set out below, the CMA is of the view that Footasylum 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.

(g) *Intention and Negligence*

262. Footasylum, and Mr Bown in particular, appears to have arranged and attended the July and August Meeting with the intention of disclosing the four categories of information referred to above to Mr Cowgill and JD Sports. Mr Bown ought to have known that such information was CSI and therefore should not be disclosed. This appears to have been done, at the very least, without proper and reasonable regard to the IO, the Merger and the Remittal and potentially with the intention to subvert or ignore those requirements.

*Steps in mitigation*

263. As described above, following the CMA's probe Footasylum took steps to impose a more stringent policy regarding contact with JD Sports. 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 Footasylum now fully understands and appreciates its obligations under the IO. The CMA's view is, therefore, that such steps only partially go towards mitigation.

*Footasylum's Representations*

264. Footasylum make broadly similar submissions to those it made in relation to the penalty for Breach 1, being that the CMA has not detailed why the breach was serious and flagrant and why it raised the real and significant risk of prejudice.[239] Footasylum expand this submission in relation to the penalty for Breach 2 by saying:

[239] PD Representations at 50.

(a) There is no indication of the relative seriousness of the breach here, just a restatement of the findings in the decision;

(b) There is no real assessment of the actual impact Breach 2 had on the Merger or Remittal; and

(c) There are various factual errors, such as the CMA not considering that Footasylum had polices and sent emails to senior employees reminding them of their obligations under the IO.

265. The CMA has already set out above why point (c) is rejected and will not repeat those reasons here.

266. The CMA otherwise rejects Footasylum's submissions that it has not set out the relative seriousness of its behaviour. The CMA has found that Footasylum's behaviour in actually disclosing CSI to its competitor is extremely serious and flagrant. The CMA has set out why the disclosure of CSI creates a unique problem in identifying its use and ring-fences it so that it does not impact the Remittal, the Merger, or the market. The fact that Footasylum has said it did not consider the information to be of much consequence has been considered and rejected above.

267. Similar considerations apply to (b) as the disclosure of CSI is a difficult issue to track and determine the impact of, made more so when the party making the disclosure has no record of what was disclosed. In any event, and as the CAT's jurisprudence on this point makes abundantly clear, the threshold is a consideration of whether a breach might impede the CMA's action or result in pre-emptive action,[240] not whether in actual fact it has. The CMA is content that the disclosure of the CSI described is extremely serious and could have, or had (the breach occurring during the course of the Remittal and therefore the risk being appropriately considered at that time) extremely damaging effects on the Remittal and competition in the relevant markets.

268. It appears that in making these submissions, Footasylum is under the mistaken impression that because the Remittal has now been determined that only actual effects should properly be considered. That is not the case as breaches of the IO is focused on potential risks. At the time Footasylum disclosed CSI (on two occasions) to JD Sports the Remittal was still being considered and the potential impact of those disclosures was significant.

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*Size and financial resources available to* Footasylum

269. The information set out in paragraph 250 above indicates that Footasylum 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 2

270. 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 Footasylum and other companies from contravening interim measures in the future, and to ensure that it scrupulously comply with interim measures imposed by the CMA.

271. The CMA has decided that the imposition of a penalty of £90,000 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 Bown is said to have known, and certainly should have known, his 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). In fact, following the July Meeting, Mr Bown thought it appropriate to take part in another discussion, this time alone, with Mr Cowgill without providing any details about what was to be discussed at that meeting and without keeping any records of what was discussed. On that basis, it would appear that Mr Bown wanted and intended to disclose the information to Mr Cowgill irrespective of his obligations under the IO.

iii. Footasylum's size and financial position (above in paragraph 250).

272. The CMA considers that the Proposed Penalty for Footasylum's failure to comply would be sufficient and proportionate to achieve its objectives:

(a) the penalty represents only 0.036% of Footasylum's global turnover (see paragraph 250 above)

(b) the penalty would not be anomalous, nor would it affect Footasylum disproportionately, at 0.26% of net assets.

***Breach 3***

273. 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*

274. It is axiomatic that Footasylum's conduct set out above involved senior personal, being the CEO.

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

275. Footasylum's 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 Footasylum

276. Footasylum 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. providing CSI to 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 either Footasylum or JD Sports facing the scrutiny and control of the CMA.

(d) *Nature and gravity of the failure*

277. 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*

278. 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 [✂] and Mr

Cowgill returned from their respective holidays, 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 (RFI7). Ultimately the notification was provided jointly with JD Sports in circumstances where the 19 August Email's purpose is not agreed between the Parties.[241]

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

279. As set out below, the CMA is of the view that Footasylum 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*

280. Footasylum 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.

*Footasylum's Representations*

281. Footasylum has made the same submissions in relation to Breach 3 as it did with Breaches 1 and 2. The CMA has already dealt with these submissions. Insofar as Footasylum repeat the point that the CMA has not considered its submissions on the factual findings as to the relevant seriousness of the CSI disclosed, Footasylum's contention that it did not suspect any breach of the IO, and that it made what it considers to be a voluntary notification in the 19 August Email; these have also been dealt with above and rejected.

*Size and financial resources available to* Footasylum

282. The information set out in paragraph 250 above indicates that Footasylum had sufficient financial resources available to it to ensure compliance with the IO and to engage with the CMA's process.

[241] JD Sports having said that the 19 August Email was sent because it had reason to suspect the IO was breached by a potential exchange of CSI.

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

283. 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 Footasylum and other companies from contravening interim measures in the future, and to ensure that it scrupulously comply with interim measures imposed by the CMA.

284. The CMA has decided that the imposition of a penalty of £90,000 is appropriate having considered the relevant factors and circumstances of this case set out in this decision in the round, and in particular the 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.

285. The CMA considers that the proposed penalty for Footasylum's failure to comply would be sufficient and proportionate to achieve its objectives:

    (a) the penalty represents only 0.036% of Footasylum's global turnover (see paragraph 250 above)

    (b) the penalty would not be anomalous, nor would it affect Footasylum disproportionately, at 0.26% of net assets.

## F. Factual Background to failure to comply with RFI7

286. As described above, the CMA received video footage of three meetings, two in December 2020 and one in July 2021 (the July Meeting, as defined above), from a third party on 28 July 2021. The CMA issued RFI7 to Footasylum (and RFI9 separately to JD Sports) requiring it to:

    (a) List all meetings (both virtual and in person) that have taken place between members of JD Sports senior management 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.

287. Footasylum provided its response to RFI7 on 24 August 2021, after receiving an extension for its response (initially required to be provided on 17 August 2021).

288. Table 1 of the Footasylum's RFI7 response set 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. Footasylum listed the December Meeting as taking place in person between Mr Cowgill and Mr Bown (but not disclosing that it took place in a car park and in Mr Bown's car). The meeting was said to have been for Mr Bown to ask for Mr Cowgill's agreement in relation to a bonus payment.[242] Footasylum was unable to provide the date of this meeting.[243] Footasylum said that no documents were tabled or exchanged during this meeting.[244]

289. 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 RFI7 appears to show a failure to comply with the terms and requirements of that notice.

290. Footasylum provide only limited submissions on this breach, not only that it objects to the CMA's use of the word intentional. The CMA, however, has not found that the breach was in fact intentional, only that the CMA considers it intentional or at least negligent. The CMA is content that this accurately describes a failure to produce the document exchanged at the December Meeting when required to in response to a s109 notice.

291. CMA has concluded that the failure to disclose that the document was tabled and/or exchanged during that meeting, and that the document was not then subsequently disclosed to the CMA in Footasylum's RFI7 response is a breach of the terms of RFI7 and of section 109 of the EA02.

## G. Appropriateness of imposing a penalty for the failure to comply with RFI7 and of the amount of penalty imposed

### *Appropriateness of imposing a penalty*

[242] Footasylum RFI7 Response at paragraph 2.12.
[243] *Ibid*
[244] *Ibid* at paragraph 2.15.

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

293. 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.[245]

294. Footasylum's failure to fully and accurately respond to RFI7 is serious and flagrant. The information required to be produced in response to RFI7 was clear and unambiguous. Footasylum 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 Footasylum did not do this as the document shown in the video footage was not subsequently produced to the CMA or referred to in Footasylum's RFI7 response.

295. Section 109 EA02 notices, like RFI7, are a key evidence gathering took 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, 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.

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

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

298. In assessing the appropriate amount of the penalty in relation to Footasylum's failure to comply with RFI7, the CMA has taken into account the considerations set out above, including:

    (a) The fact that the failure to comply with RFI7 is serious and flagrant. Footasylum knew, or ought to have known, that compliance with RFI7

[245] See paragraphs 4.2 and 4.3.
[246] Penalties Guidance, paragraph 4.11.

was extremely important and that non-compliance could lead to obvious and serious consequences for the CMA's consideration of the Merger.

(b) Footasylum knew of its obligations to comply with RFI7 and knew the consequences of non-compliance, these being clearly set out in the section 109 EA02 notice itself. Footasylum knew that at least one document was tabled and/or exchanged at the December Meeting, as Mr Bown was present at the meeting. Footasylum therefore knew or ought to have known that it had not provided an accurate and complete answer to RFI7.

(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.

299. 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:

300. 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*

301. It is axiomatic that Footasylum's conduct set out above involved senior personnel, being its CEO, Mr Bown.

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

302. Footasylum's failure to comply with RFI7 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* Footasylum

303. By failing to fully comply with the requirements of RFI7 Footasylum 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 RFI7, diverting and/or delaying the CMA's scrutiny of Footasylum's actions during the period the IO was in force.

*(d) Deterrence*

304. 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 Footasylum in this case.

*(e) nature and gravity of the failure*

305. 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*

306. Footasylum has made no submissions on mitigating steps it has taken in relation to this breach other raised any other relevant mitigating factors.

*Size and financial resources available to* Footasylum

307. The information set out in paragraph 250 above indicates that Footasylum had sufficient financial resources available to it to ensure compliance with the IO and to engage with the CMA's process.

308. The CMA considers that the proposed penalty of £20,000 for Footasylum's failure to comply would be sufficient and proportionate to achieve its objectives:

(a) the penalty represents only 0.008% of Footasylum's global turnover (see paragraph 250 above)

(b) the penalty would not be anomalous, nor would it affect Footasylum disproportionately, at and 0.058% of net assets.

## H. Next steps

309. Footasylum has the following rights in relation to the final penalty which the CMA has imposed:

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

(b) Footasylum 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, Footasylum the right to apply to the CMA within 14 days of the date on which this final notice is served on Footasylum 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, Footasylum 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 Footasylum is notified of the CMA's decision.

(e) Pursuant to section 114 of the EA02, Footasylum has the right to apply to the Tribunal within the period of 28 days starting with the day on which this final notice is served on Footasylum 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 Footasylum 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.[247]

[247] 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.

Signed:

[Signature]

Kip Meek
*CMA Panel Inquiry Chair*

[Signature]

Paul Hughes
*Panel Member*

[Signature]

Claire Whyley
*Panel Member*

[Signature]

Paul Muysert
*Panel Member*

**14 February 2022**
**Competition and Markets Authority**