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QUICK LINKS

JD Sports ordered to sell Footasylum for second time

On 4 November 2021 the Competition and Markets Authority (CMA) announced its decision to prohibit the completed acquisition by JD Sports Fashion plc of Footasylum plc for the second time, following an in-depth Phase 2 investigation. In a press release the CMA said that in its view "*requiring JD Sports to sell Footasylum is the only way to address its competition concerns and protect consumers*".

THE PARTIES

JD Sports is an international retailer of sports, fashion and outdoor wear, selling a range of branded sports-inspired footwear and apparel, and some own-brand apparel. It operates online and in 375 stores across the UK. Footasylum is a UK-based retailer of sports and fashion wear which operates online and in 70 stores across the UK. On 12 April 2019 JD Sports acquired Footasylum for £90.1 million.

BACKGROUND

On 6 May 2020, following an in-depth Phase 2 investigation, the CMA announced its decision to prohibit the merger. The CMA concluded that that the merger resulted, or could be expected to result, in a substantial lessening of competition (SLC) within the supply of sports-inspired casual footwear and apparel products sold in stores and online. The regulator noted that while Covid-19 created uncertainty for retailers, it would not materially reduce the extent to which the parties were close competitors, or increase materially the aggregate constraints posed by other retailers on the parties. The CMA therefore required JD Sports to sell the Footasylum business in its entirety to a suitable buyer (for further details, see a previous edition of the newsletter).

JD Sports subsequently challenged the CMA's decision before the Competition Appeal Tribunal (CAT). JD Sports criticised the CMA for what it alleged was a failure to properly consider the impact of Covid-19 on the market conditions relevant to the transaction. In its judgment of 13 October 2020, the CAT quashed the CMA's decision in so far as its conclusions were based on the CMA's assessment of the likely effects of the Covid-19 pandemic on: (i) the relevant markets; (ii) the parties and/or the merged entity; and (iii) the competitive constraints likely to apply to the parties and/or the merged entity. In light of the material effects of this on the CMA's overall conclusions, the CAT remitted the case to the CMA for reconsideration. The CMA sought permission to appeal to the Court of Appeal on the basis that the CAT had misapplied the law and that the CMA is not in a position to provide evidence on the medium and long term effects of Covid-19 on the retail sector. However, permission to appeal was denied, noting that although the CMA has a wide margin of appreciation to obtain the necessary evidence, this does not negate the obligation to "*not act irrationally in its obtaining and assessment of evidence*".

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THE CMA'S REMITTAL INVESTIGATION

Following the Court of Appeal's refusal to grant leave to appeal, the CMA proceeded with the remittal investigation and the gathering of additional evidence on the impact of Covid-19. Following its remittal investigation, the CMA again concluded that the merger may be expected to result in an SLC in: (i) the retail supply of sports-inspired casual footwear in-store and online in the UK; and (ii) the retail supply of sports-inspired casual apparel in-store and online in the UK. The CMA has therefore confirmed its decision that the full divestiture of Footasylum is the only effective and proportionate remedy to the SLCs and the resulting adverse effects found.

In its May 2020 final report, the CMA had concluded that investigating the impact of Covid-19 would have been "*generalised*" and "*speculative*" because it was in relation to a time period (April 2020) in which the UK had only recently entered into a lockdown. (For further details, see a previous edition of the newsletter.) Taking into account market developments since May 2020, the CMA this time notes that the SLC found in its remittal decision differs from its May 2020 final report in that whilst there is a loss of constraint from Footasylum on JD Sports as a result of the merger, the SLC is based primarily on the removal of the constraint imposed by JD Sports on Footasylum.

The CMA states that this reflects the findings on market developments since the May 2020 final report which have resulted in Footasylum becoming a weaker competitive constraint and other competitors (such as Nike, Foot Locker, and Adidas) becoming stronger competitive constraints on JD Sports. However, the CMA finds that these market developments have not weakened Footasylum to such an extent that the merger does not result in a SLC. The acquisition would still present a loss of competitive constraint by JD Sports on Footasylum.

In its press release the CMA further elaborated on JD Sports being the closest alternative to Footasylum, and the CMA expecting this to continue being the case despite the growth of online shopping. Further, the CMA also found that Footasylum remains financially healthy despite the impact of Covid-19 and therefore any merger would also result in less competition for JD Sports, customers having fewer options, and potentially facing higher prices, fewer discounts, and less in-store choice.

Kip Meek, the chair of the CMA inquiry group also added that "*We strongly believe shoppers could suffer if Footasylum stopped having to compete with JD Sports. It is likely they would pay more for less choice, worse service and lower quality*". In response to the CMA decision, JD Sports chairman Peter Cowgill was in particular disappointed by the fact that the CMA had correctly observed that JD Sports' primary competitors are no longer high-street stores like Footasylum and are instead international brands like Adidas and Nike, but nevertheless reached a conclusion that JD Sports' ownership of Footasylum could have anti-competitive impacts.

OTHER DEVELOPMENTS

ANTITRUST

AIRLINES SEE CARTEL LIABILITY EXPANDED BY EUROPEAN COURT OF JUSTICE

On 11 November 2021 the European Court of Justice (CJ) ruled that air cargo cartel damages claimants can seek damages for conduct which occurred before 2004, when the current EU competition laws came into effect.

In 2010 11 airlines were fined almost €800 million by the European Commission for fixing fuel and security costs for air freight between 1999 and 2006. The decision was readopted in 2017 after the European General Court found procedural errors in the initial infringement decision. In respect of flights between EU airports and third countries, EEA airports and third countries and EU airports and Switzerland, the Commission found that the applicable regulations did not give it competence to enforce the prohibition of anticompetitive agreements in respect of facts occurring before May 2004, May 2005 and June 2002 respectively.

Following a reference from the Rechtbank Amsterdam, the CJ has now held that national courts are able to rule on damages claims in respect of conduct occurring before the current competition rules entered into force. Indeed, the CJ held that Article 81 TEC (predecessor to Article 101 TFEU) has direct effect in relations between individuals and creates rights for individuals that must be protected by national courts. This is the case even where there is no decision

concerning the behaviour in question, so long as the conduct in question is likely to affect the trade between member states and between EEA countries.

COMMISSION LETTER TO CARMAKERS PROVIDES GUIDANCE ON LINE BETWEEN PERMISSIBLE TECHNICAL TALKS AND ILLEGAL COLLUSION

On 12 November 2021 the European Commission published a letter advising car manufacturers Daimler, BMW and Volkswagen that certain talks on developing a software platform and minimum standards for clean energy technology did not give rise to antitrust concerns. The letter relates to the Commission's decision earlier this year to fine these car manufacturers €875 million for restricting competition in emission cleaning technologies in diesel cars – the first time the Commission had imposed a fine solely for collusion to restrict a technical development (as covered in a previous edition of this newsletter).

The letter clarifies the areas of cooperation between the manufacturers which did not raise antitrust concerns, including:

- The joint development of a software platform for AdBlue dosing which each carmaker "*implements individually*";
- A decision to focus on liquid Selective Catalytic Reduction (SCR) systems, as the car manufacturers remained free to develop other types of systems;
- Standardisation of the shape of AdBlue bottles to allow uniform filling, as this led to "*considerable efficiency enhancements and cost savings*", and any "*negative impact*" was "*not apparent*";
- The joint preparation of charge sheets for parts of SCR systems, as these set minimum quality requirements and the car manufacturers remained "*free to define further-reaching requirements*" and it did not seem that these "*determine or restrict*" the effectiveness of the SCR systems;
- Discussions on quality standards, warning strategies aimed at ensuring the timely refill of AdBlue and the setting up of appropriate infrastructure for AdBlue supply – provided data is shared in aggregate and anonymised form; and
- Lobbying on future legislation, so long as it is not used to "*coordinate market conduct*".

These clarifications will be welcomed by those concerned that the Commission's decision would have a chilling effect on permissible collaboration in furtherance of legitimate objectives. Nevertheless, companies will no doubt be hoping that further clarification is provided as part of the Commission's update of its rules on horizontal cooperation.

HONG KONG COMPETITION COMMISSION PUBLISHES COMMITMENTS POLICY

On 10 November 2021 the Hong Kong Competition Commission (HKCC) published a new policy setting out its practices and procedures regarding addressing possible breaches of competition law in Hong Kong through commitments under section 60 of the Competition Ordinance. The policy sets out the factors the HKCC will consider in determining if commitments are appropriate, the commitments process and the consequences of parties failing to comply with commitments.

It also details the factors the HKCC will consider in assessing whether commitments are appropriate in a particular case. First, it will examine whether commitments are a proportionate resolution given the seriousness of the conduct (noting they are "*very unlikely*" to be accepted in cartel cases), as well as whether commitments can sufficiently address the HKCC's concerns. The HKCC will also take into account whether the commitments can be effectively implemented and monitored within a reasonable period of time and whether there are any particular severity factors that should be considered, in addition to the good faith of the party offering the commitments and the timing in the administrative process. The policy states the HKCC is "*unlikely*" to accept commitments if sufficient information has not yet been gathered or if the process is very advanced.

In terms of process and content, the HKCC clarified that it will usually be willing to accept commitments without an admission of a breach but will generally not accept statements which minimise the seriousness of the alleged conduct.

If a party fails to comply with a commitment, the HKCC may withdraw its acceptance of the commitment and may also take the case to the Competition Tribunal, which could result in the party being ordered to pay a fine or potential follow-on damages claims.

The HKCC said that commitments can be more efficient than bringing cases to court and that it hopes the policy will bring clarity as to how the process works. To date, the HKCC has accepted section 60 commitments in the Hong Kong Seaport Alliance case and the online travel agents case, both of which did not include an admission of a breach.

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