Neutral citation [2020] CAT 17

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1354/4/12/20

Salisbury Square House
Salisbury Square
London EC4Y 8AP

10 July 2020

Before:
PETER FREEMAN CBE QC (Hon)
(Chairman)
PAUL DOLLMAN
TIM FRAZER

Sitting as a Tribunal in England and Wales

BETWEEN:

JD SPORTS FASHION PLC

Applicant

- v –

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard remotely on 6 July 2020

RULING (PERMISSION TO INTERVENE)

APPEARANCES

Mr Brian Kennelly QC and Mr Alistair Lindsay (instructed by Linklaters LLP) appeared for the Applicant.

Ms Marie Demetriou QC and Mr Ben Lask (instructed by the Competition and Markets Authority) appeared for the Respondent.

Mr Aidan Robertson QC (instructed by RPC LLP) appeared for the proposed Intervener, Frasers Group Plc.

A. INTRODUCTION

1. By a notice of application filed on 17 June 2020 (the "NoA") under section 120 of the Enterprise Act 2002 ("EA 02"), JD Sports Fashion plc ("JD Sports") challenges the decision of the Competition and Markets Authority ("CMA"), set out in the CMA's Final Report of 6 May 2020 (the "FR"), to prohibit JD Sports' completed acquisition of Footasylum plc ("Footasylum") (the "Transaction") and require JD Sports to divest Footasylum in its entirety (the "Decision").[1]

2. On 1 July 2020, Frasers Group Plc ("Frasers Group") filed a request under Rule 16 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the "Tribunal Rules") for permission to intervene in these proceedings in support of the CMA (the "Application"). The Application was opposed by JD Sports and the CMA took a neutral stance.

3. Having heard the parties and Frasers Group at a case management conference held remotely on 6 July 2020, the Application was refused by the Tribunal. This ruling sets out the Tribunal's reasons for refusing the Application.

B. BACKGROUND

4. We briefly describe the parties, the CMA's overall findings as regards the Transaction, and the grounds on which JD Sports challenges the Decision.

5. JD Sports is an international multi-brand and multi-channel retailer of sports, fashion and outdoor products. Footasylum is a retailer of fashionwear and sports casualwear.

6. In the FR, the CMA found that the Transaction would bring together two strong competitors and would result in a substantial lessening of competition in the

[1] On 2 June 2020 the Tribunal made an order extending time for JDSports to file its NoA by reason of the exceptional circumstances arising from the Covid-19 pandemic.

markets for sports-inspired casual footwear and apparel products sold both in stores and online (the "Products"). As a result, shoppers would be worse off.

7. By its NoA, JD Sports contends that the Decision was unlawful on a number of grounds, which may broadly be summarised as follows:

(1) **Ground 1**: The CMA erred in failing to apply the Merger Assessment Guidelines ("MAG")[2] in determining whether any lessening of competition caused by the Transaction was substantial and/or its reasons were inadequate. Further, the CMA erred in law and/or failed rationally to assess the aggregate constraints on the combined JD Sports / Footasylum group (the "Merged Entity") posed by suppliers and retail rivals currently and in the future and/or failed to provide sufficient reasons for its conclusion.

(2) **Ground 2**: The CMA erred in law and/or acted irrationally in excluding from the counterfactual the effects of Covid-19 on Footasylum and in finding that Covid-19 would not materially affect Footasylum's competitive constraint.

(3) **Ground 3**: The CMA failed first to provide adequate reasons, departed from the MAG and/or acted irrationally in finding that Frasers Group's "elevation strategy" would not significantly change the strength of the competitive constraint on the Merged Entity from Frasers Group in the next two years. Further, the CMA made irrational findings in concluding that the constraint posed by suppliers such as Nike and adidas was not so significant as to sufficiently discipline the Merged Entity; and it failed to provide adequate reasons and/or acted irrationally in finding that Nike's and adidas' own direct to consumer retail offer would not become a significantly stronger constraint on the Merged Entity.

[2] CC2 (Revised) / OFT 1254, published on 1 September 2010 by the Office of Fair Trading and Competition Commission and subsequently adopted by the CMA Board.

8. According to the NoA, Sports Direct, a large sports/fashion retailer that forms part of Frasers Group, had historically targeted the value end of sports/fashion retailing. However, it was now a strategic priority of Frasers Group to elevate the quality of its bricks-and-mortar and online stores and the customer experience of group brands such as Sports Direct. This is the "elevation strategy" referred to at paragraph 7(3) above.

C. THE TRIBUNAL RULES

9. Rule 16 of the Tribunal Rules concerns intervention and provides, so far as material, that:

> "(1) Any person with sufficient interest in the outcome may make a request to the Tribunal for permission to intervene in the proceedings.
>
> […]
>
> (6) If the Tribunal is satisfied, having taken into account the observations of the parties, that the intervening party has a sufficient interest, it may permit the intervention on such terms and conditions as it thinks fit."

10. Accordingly, in order to be granted permission to intervene, an applicant must show a "sufficient interest in the outcome" of the proceedings. This has been described as the "threshold question" which must be satisfied before the Tribunal may exercise its discretion to permit an intervention (see, for example, *Sabre Corporation v CMA* [2020] CAT 16 ("*Sabre*") at [8], citing *B&M European Value Retail S.A. v CMA* [2019] CAT 8 ("*B&M")* at [9], which itself cited *Flynn Pharma Limited and Others v CMA* [2017] CAT 7). The exercise of this discretion will be carried out in accordance with the Tribunal's governing principles set out in Rule 4 of the Tribunal Rules, by which the Tribunal shall seek to ensure that each case is dealt with "justly and at proportionate cost". This includes, so far as is practicable, saving expense and ensuring that the case is dealt with expeditiously and fairly. The Tribunal may ask itself whether the proposed intervener will provide "added value": *Sabre* at [14], citing *B&M* at [18] and *Phenytoin (Costs)* [2019] CAT 2 at [11].

D. THE APPLICATION

11. In support of the Application, Frasers Group contended as follows. There could be no serious doubt that it had a sufficient interest in the outcome of the proceedings, which was of direct importance to its commercial operations in the supply of the Products. Not only was Frasers Group a commercial competitor of JD Sports, and obviously interested in whether the proposed merger would be allowed to proceed, but Frasers Group had participated in both phases of the CMA's merger investigation, responding to information requests and attending hearings. It provided evidence, including in relation to the Products and its elevation strategy, which was referred to in the FR in relation to various findings by the CMA which JD Sports now seeks to challenge.

12. A party is likely to have sufficient interest if it had participated in the administrative procedure before the competition authority. This could be seen not only in merits appeals under the Competition Act 1998 (for example, Aquavitae's intervention in *Albion Water* and the British Retail Consortium's intervention in *Mastercard*), but in previous merger cases before the Tribunal, in which industry participants which took part in the merger investigation process had been granted permission to intervene in support of the CMA (for example, Nasdaq Stockholm AB in *Intercontinental Exchange v CMA*[3] and DFDS A/S in *Eurotunnel/SCOP v CMA*[4]).

13. Further, to the extent that Frasers Group's commercially sensitive information would form part of the proceedings, it had an interest in participating in order to explain and protect its confidential information. In addition, Frasers Group's knowledge of the industry might be of assistance to the Tribunal.

14. As to the exercise of the Tribunal's discretion, the purpose of Frasers Group's intervention would be to make submissions in support of the CMA on the CMA's interpretation of the evidence that was before it when it adopted the Decision. It was aware of the limits of judicial review proceedings and did not

[3] Cases 1271-1272/4/12/16.
[4] Cases 1233/4/12/14, 1235/4/12/14.

seek to intervene in order to adduce new evidence. The CMA's conclusion that Frasers Group posed a limited competitive constraint to the Merged Entity was clearly a central element of the Decision and JD Sports' challenge would inevitably involve at least in part a consideration of the evidence before the CMA including that provided by Frasers Group. Frasers Group might well be in a position to add further valuable submissions in support of the CMA.

15. Finally, to the extent JD Sports sought to limit the scope of any permitted intervention to the first part of Ground 3 only, or to the making of written submissions only, Frasers Group's intervention should not be so limited.

16. In opposing the Application, JD Sports contended that Frasers Group did not have a sufficient interest to intervene or, alternatively, that the Tribunal should exercise its discretion against permitting Frasers Group to intervene. The fact that the CMA's reasoning under challenge by JD Sports concerned Frasers Group and the CMA had gathered evidence from Frasers Group did not mean that Frasers Group had any interest in the outcome of the proceedings, namely whether the Decision was quashed in whole or in part, or upheld.

17. Frasers Group evidently supported the CMA's finding that Frasers Group provided a limited competitive constraint on the Merged Entity. However, Frasers Group's commercial operations would operate in exactly the same way even if the CMA had made diametrically opposed findings. The Tribunal would be assessing whether the CMA's decision was flawed applying judicial review principles, and the fact that Frasers Group had provided evidence to the CMA was not relevant to the questions of whether the CMA erred in failing to provide adequate reasons, departing from the MAG or reaching an irrational conclusion. The CMA was well placed to make all the submissions that needed to be made in opposition to JD Sports' case.

18. There was no authority for the proposition that participation in the administrative process established a sufficient interest for the purpose of Rule 16. Neither was there any need for every person who provided confidential information to the CMA to apply to intervene in applications under section 120

EA 02 to protect the confidentiality of that information. Further, Frasers Group's knowledge of the industry would not advance the matters that the Tribunal was tasked with deciding and it would not in any event be appropriate for Frasers Group to seek to adduce new evidence on such matters.

19. Finally, if the Tribunal were nonetheless minded to permit the intervention, it should only be on a limited basis, either confined to the issues raised in Ground 3, first part, of the NoA or limited to written submissions only.

20. The CMA adopted a neutral stance and offered no submissions on the Application.

E. REASONS FOR REFUSING THE APPLICATION

21. We emphasise first of all that this is an application for judicial review of the CMA's Decision contained in the FR, on the grounds, essentially, that the CMA's conclusions were based on inadequate reasoning and failure to apply its own guidelines, and that the CMA was irrational in its consideration of evidence and/or in its obtaining of evidence. There is very limited scope for the introduction of new evidence, whether by the parties or by an intervener.

22. We next consider the threshold question of whether Frasers Group has a sufficient interest in the outcome of the proceedings. We are not convinced that Frasers Group has established that it has such an interest. Mr Robertson QC submitted on behalf of Frasers Group that it has an obvious interest in the outcome of the proceedings essentially because it is a competitor of JD Sports, and that its interests would be thereby affected, and that it participated in the CMA's administrative process.

23. On the last point, we accept Mr Kennelly QC's submission on behalf of JD Sports that there is no authority for the proposition that participation in the administrative process in itself establishes a sufficient interest for the purpose of Rule 16 of the Tribunal Rules. The Competition Act authorities cited to us (*Albion Water*, *Mastercard)* by Mr Robertson at most suggest that such

participation *may* establish a sufficient interest. However, each case will turn on its own facts. Participation in the administrative process is a relevant factor, but not a decisive one.

24. On the relevance of being a competitor, we note that the position of the interveners as competitors in the *Intercontinental Exchange* and *Eurotunnel/SCOP* merger cases cited to us was markedly different from the position of Frasers Group in this case. Both interveners in those cases faced the risk of foreclosure if the mergers in question proceeded and that is not the case here. We accept Mr Kennelly's submissions on this point also.

25. Finally, we note that if, as it claims, Frasers Group supports the CMA's conclusion in the FR that it would offer only a limited competitive constraint to the Merged Entity, either now or within the next two years, this only tends to confirm the view that its interest in the outcome of the case is too remote to be sufficient to justify granting permission for an intervention.

26. We are, therefore, not convinced that the threshold question has been answered positively in this case. Moreover, even if Frasers Group had succeeded in convincing us that it had a sufficient interest in the outcome, we would not have been inclined to exercise our discretion in permitting the intervention, as we do not consider that Frasers Group's presence would add any value to the CMA's own defence of its conclusions as set out in the FR.

27. As we said at the start, these are judicial review proceedings, in which the CMA must defend its conclusions and methods on the basis of its assessment of the evidence before it. JD Sports's challenge is based largely on the CMA's allegedly faulty assessment of the evidence it had obtained, and/or its failure to obtain sufficient evidence. The focus is on the CMA's own assessment and it is not clear that the CMA's justification for, and defence of, this will be assisted by the arguments of one of the providers of evidence on which the CMA relied.

28. We have also considered Mr Robertson's argument that Frasers Group's intervention would enable it better to protect its confidential information but we

consider the CMA perfectly capable of taking all necessary steps to ensure that the confidentiality of this information, and that of other participants in the administrative process, is properly protected. Separately, a Tribunal confidentiality ring is being established for the purposes of these proceedings. We also do not believe that Frasers Group's submissions on general industry background will add to what the CMA has itself already ascertained.

29. In view of these conclusions, we do not have to consider whether it would be appropriate to permit intervention on a limited basis but we note that Frasers Group's participation, even if on a limited basis, would add complexity and cost to the proceedings, which is undesirable in the context of a merger review proceeding on a tight timetable.

30. Finally, we should add that we see no objection to Frasers Group collaborating with the CMA and assisting with the presentation of the CMA's case, should the CMA find that helpful.

F. CONCLUSION

31. For the reasons given above, our unanimous conclusion is that Frasers Group's application for permission to intervene be refused.

Peter Freeman CBE, QC (Hon) Chairman | Paul Dollman | Tim Frazer

Charles Dhanowa OBE, QC (Hon) Registrar | Date: 10 July 2020