Neutral citation [2020] CAT 20

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1354/4/12/20

Salisbury Square House
Salisbury Square
London EC4Y 8AP

21 August 2020

Before:
PETER FREEMAN CBE QC (Hon)
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

JD SPORTS FASHION PLC

Applicant

- v –

COMPETITION AND MARKETS AUTHORITY

Respondent

RULING (SPECIFIC DISCLOSURE)

A. INTRODUCTION

1. On 31st July 2020 JD Sports Fashion plc ("JD Sports") filed an application for specific disclosure (the "Disclosure Application") in the context of its substantive application under section 120 of the Enterprise Act 2002 ("EA 02") for a review of the decision of the Competition and Markets Authority ("CMA") dated 6th May 2020 ("the Decision"). In that Decision, the CMA found that the completed merger between JD Sports and Footasylum plc ("Footasylum") ("the Merger") resulted, or may be expected to result, in a substantial lessening of competition ("SLC"); and required JD Sports to divest Footasylum in full to a suitable purchaser.

2. The Decision is contained in the CMA's Final Report of 6th May 2020 entitled *Completed merger on the acquisition of Footasylum by JD Sports plc* ("the Final Report" or "FR"). The Decision is summarised at paragraphs 1-41 of the Final Report. In summary, the CMA found that the Merger had resulted, or may be expected to result, in an SLC due to horizontal competition concerns. In particular, the CMA concluded that the merging parties were close competitors in the sports-inspired casual footwear and apparel markets (i.e. fashionable branded sportswear used primarily for leisure rather than sport) and that the Merger would result in the removal of a direct and significant constraint on each of them. The combined JD Sports / Footasylum group ("the Merged Entity") would have the ability and a strong incentive to deteriorate its offering to the detriment of customers. Only one other firm provided a strong constraint and the aggregate constraint provided by other retailers and suppliers such as Nike and adidas would not be sufficient to prevent the SLC.

3. JD Sports' grounds of review are contained in its Notice of Application dated 17th June 2020 ("the NoA").

4. A remote case management conference was held on 6th July 2020 ("the CMC") at which the Tribunal gave directions for the future conduct of the substantive

application which included directions for disclosure.[1] In accordance with the directions, the CMA filed its Defence and supporting witness evidence of Mr Kip Meek, Chair of the Inquiry Group that conducted the investigation into the Merger, on 16th July 2020. In the exhibit to Mr Meek's witness statement, the CMA disclosed a number of new documents including requests for information made by the CMA pursuant to s.109 EA 02 and sent to adidas, Nike and Frasers Group on 9th March 2020.

5. On 24th July 2020, in accordance with the Directions Order, the CMA disclosed into the confidentiality ring[2] a version of the Final Report that was unredacted as regards the paragraphs that the CMA stated that it considered to be relevant to the areas in dispute, based on its review of the NoA and Defence.

6. In summary, the Disclosure Application had two elements:

   (1) JD Sports submitted that the CMA had failed to comply with the Directions Order which required it to disclose into the confidentiality ring a version of the Final Report "*that is unredacted as regards the paragraphs that are relevant to the areas in dispute*". JD Sports sought disclosure of passages in the Final Report that remained subject to redactions in the version disclosed into the confidentiality ring on 24th July 2020 that were directly relevant to the areas in dispute.

   (2) JD Sports requested disclosure into the confidentiality ring of documents or categories of documents that it said were relevant, proportionate and necessary in order for the Tribunal to determine the issues before it fairly and justly. These included: (i) the responses of Nike and adidas to questionnaires; (ii) questions asked by the CMA of Nike about Nike's historic response to deterioration in price or quality by retailers and Nike(s) response(s); (iii) any other questions (and responses) to questions of Nike and adidas on how they would respond to a deterioration in price, quality, range and services ("PQRS") by the

[1] See paragraphs 4 – 6 of the Order of the Chairman made on 6 July 2020 ("the Directions Order").
[2] The confidentiality ring was established by the Order of the Chairman dated 8 July 2020.

Merged Entity; and (iv) the inquiries made by the CMA of Nike and adidas about how they would discipline JD Sports and Footasylum as a Merged Entity if there was a deterioration in PQRS.

7. In its written submissions in response to the Disclosure Application dated 7th August 2020, ("the Response") the CMA agreed to unredact further paragraphs in the Final Report within the confidentiality ring and it enclosed an updated version of the Final Report, reflecting these further unredactions. The CMA also provided JD Sports with a number of further documents. As a result of these further disclosures, the area of dispute was substantially reduced. In response to a request from the Tribunal, JD Sports clarified the extent of its outstanding requests for disclosure by letter of 12th August 2020 (the "12th August Letter"). The CMA submitted a letter of 14th August 2020 clarifying the extent of the remaining redactions in the Final Report (the "14th August Letter") .

8. This is the Tribunal's ruling on the Disclosure Application having considered the written submissions from both parties and the further disclosures made by the CMA. Nothing in this ruling prejudges the issues to be determined by the Tribunal at the hearing of the substantive application.

B. GOVERNING PRINCIPLES

9. The Tribunal's power to order specific disclosure is set out in rule 19(1) and (2)(p) of the Competition Appeal Tribunal Rules 2015 ("the Tribunal Rules"), to be read in conjunction with the governing principles in rule 4 of the Tribunal Rules.

10. As set out in the Tribunal's recent ruling in *Sabre Corporation v CMA* [2020] CAT 19 ("*Sabre*"), the relevant principles governing the Tribunal's approach to specific disclosure in judicial review proceedings have been considered in two recent cases: *Tobii AB (Publ) v CMA* [2019] CAT 25 ("*Tobii*") and *Ecolab Inc v CMA* [2020] CAT 4 ("*Ecolab*").

11. In *Ecolab,* considering previous case law, the President set out the principles that govern the Tribunal's approach to specific disclosure in such cases at [17]:

> "(1) The principles to be applied are those appropriate to disclosure in applications for judicial review.
>
> (2) The decision maker in responding to the substantive application to challenge its decision is under a duty of candour. Where a particular document or documents are significant to a contested decision and relevant to the grounds of challenge, they should normally be disclosed at the outset rather than a deponent attempting to summarise them in a witness statement. But in particular where the decision is lengthy and detailed, the decision maker is not under a more general obligation to disclose all the material referred to in the decision or which it collected in the course of its investigation.
>
> (3) Disclosure in such cases is never automatic and an order for specific disclosure will usually be unnecessary. This is because the issue is usually the lawfulness of a body's decision-making process rather than the correctness of its substantive decision or because the decision-maker has complied with its duty of candour.
>
> (4) In every case, the Tribunal must be satisfied that the disclosure sought is relevant, proportionate and necessary in order to determine the issues before it fairly and justly.
>
> (5) The need for the requested disclosure must be examined in the light of the circumstances of each individual case. Prominent amongst those circumstances are likely to be: the nature of the decision challenged; the grounds upon which the challenge is being made; the degree of evidence already provided in the decision, in the course of the prior investigation and in the response to the substantive application before the Tribunal; and the nature and extent of the disclosure being sought.
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> (6) Even in cases involving issues of proportionality and Convention rights, orders for disclosure are "likely to remain exceptional"; and such disclosure should be "carefully limited to the issues which require it in the interests of justice". In that regard, the greater the alleged interference with Convention rights, the stronger the justification for scrutiny of the evidential basis relied upon.
>
> (7) Mere 'fishing expeditions' "for adventitious further grounds of challenge" will not be allowed.
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> (8) Where provision of the disclosure sought will be burdensome or the disclosure is voluminous, that is a factor to be weighed but is not in itself decisive." (Footnotes omitted).

12. In *Tobii*, the Tribunal ordered the disclosure of anonymised documents forming part of a survey conducted by the CMA on the grounds that this would assist the

Tribunal in judging the value of the survey. In *Sabre*, the Tribunal rejected an application for disclosure of redacted parts of the CMA's merger decision and elaborated on the principles set out in *Ecolab* as follows:

> "22. As regards the second part of principle (2) above, and disclosure of third party evidence contained within a CMA report, there is no general obligation to disclose this material or other material collected by the CMA in its investigation "so that a party can test for itself whether the evidence is reliable". Nor is there any requirement that the CMA is required to disclose "more than the gist of their case". Where the final report contains the gist of the competitor evidence, the starting point is that disclosure of the competitors' underlying responses is not necessary. In *Ecolab* the President stated at [10] that:
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> > "The decisions of the CMA which are subject to challenge by way of judicial review before the Tribunal are typically lengthy and detailed. They generally involve consideration of a very wide range of material received from, or obtained by interviewing, participants in the relevant market, whether as customers, suppliers or competitors. It has never been the case that all such documents must be disclosed in response to an application under s. 120 EA."
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> 23. Further, as regards principle (7) above, disclosure will not be ordered for the purpose of finding some unsuspected error. The error, or ground of challenge, must already have been identified by the applicant. Disclosure will be given to make good an arguable case which has *already* been set out and advanced.
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> 24. As regards consideration of the relationship between the grounds of challenge and the material sought (principles (2) and (5) above), in applying the principles to the facts in *Ecolab*, the President considered that it was not enough that the challenge was as to the CMA's interpretation of the evidence (when set against other evidence relied upon by the applicant) or that the evidence should not have been accepted or should have been more rigorously tested. On the other hand, disclosure will or might be granted if the ground of challenge is that the evidence is not reliable or robust or, perhaps, where there are grounds for thinking that the body of the report does not correctly summarise the underlying evidence. Further where specific material sought is "critical" to the CMA's particular findings which are the specific subject of the ground(s) of challenge, then disclosure is more likely to be granted. It is thus important to consider the way in which the applicant has pleaded its case in the notice of application." (Footnotes omitted).

C. THE SUBSTANTIVE APPLICATION

13. Pursuant to s.120 EA 02, any application for a review of a decision of the CMA in respect of a merger is to be determined by the Tribunal applying the same principles as would be applied by a court on an application for judicial review (s.120(4)). Further, s.120 applications must set out the specific grounds on

which the decision is challenged: see rules 9(4)(d) and 26(1) of the Tribunal Rules.

14. The justification for an application for specific disclosure can only be assessed by reference to the challenge brought. It is therefore necessary to set out briefly the nature of JD Sports' challenge. The NoA contains three grounds of review. These are, in summary:

(1) **Ground 1:**

(i) The CMA erred in law in failing to apply the Merger Assessment Guidelines ("MAG") in determining whether any lessening of competition caused by the merger was "substantial" and/or its reasons were inadequate.

(ii) 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 (i) suppliers and (ii) retail rivals, currently and in the future and/or failed to provide sufficient reasons for its conclusion.

(2) **Ground 2:**

(i) The CMA erred in law and/or acted irrationally in excluding from the counterfactual the effect of COVID-19 on Footasylum.

(ii) The CMA erred in law and/or acted irrationally in finding that COVID-19 would not materially affect Footasylum's competitive constraint.

(3) **Ground 3:**

(i) The CMA failed to provide adequate reasons, departed from the MAG and/or acted irrationally in finding that Frasers Group's elevation strategy will not significantly change the strength of

the competitive constraint on the Merged Entity from Frasers Group in the next two years

(ii) The CMA made irrational findings in concluding that the constraint posed by suppliers (in particular, Nike and adidas) was not so significant as to sufficiently discipline the Merged Entity, which had the consequence that the contribution to the aggregate constraint posed by suppliers was wrongly understated.

(iii) The CMA failed to provide adequate reasons and/or acted irrationally in finding that Nike's and adidas's own direct to consumer ("DTC") retail offer will not become a significantly stronger constraint on the Merged Entity.

D. JD SPORTS' APPLICATION FOR DISCLOSURE

The original application

15. The matters of specific disclosure originally sought by JD Sports related to Ground 2(ii), (positive findings as to the effect of COVID-19), Ground 3(i) (measures that might be taken by Nike and adidas in response to the merger and the response of Frasers Group), Ground 3(ii) (constraints posed by Nike and adidas) and Ground 3(iii) (Nike's and adidas' own direct supply strategies)

16. The list of specific disclosures originally sought by JD Sports in its Disclosure Application was set out in Tables A and B of Annex 1 to the Application which is reproduced below:

Table A: Passages in the Decision that remain redacted in the version disclosed into the confidentiality ring on 24th July 2020 but are directly relevant to the areas in dispute.

No.	Passage in the Decision
A1	Footnotes 371 and 373
A2	Paragraphs 8.235 to 8.395, including ancillary footnotes

A3	Paragraphs 8.415-8.417, 8.419, 8.422, 8.423, 8.425, 8.426, 8.428, 8.429, 8.445, 8.446 Figure 8.1 and footnotes 813 and 814

Table B: Documents or categories of documents that are sought pursuant to the Tribunal's power to order specific disclosure.

No.	**Description of the document or categories of document**
B1	The responses of adidas and Nike to the questionnaires at the exhibit to Mr Meek's witness statement
B2	(i) Adidas's response to the questionnaire sent to it by the CMA dated 9th March 2020 at the exhibit to Mr Meek's witness statement; (ii) the questions asked by the CMA of Nike about Nike's historic responses to deterioration in price or quality by retailers and Nike's response(s); and (iii) any other questions (and responses) to questions of Nike and adidas on how they would respond to a deterioration in PQRS by the merged group
B3	Adidas's response to the questionnaire dated 9th March 2020 at the exhibit to Mr Meek's witness statement and the inquiries made by the CMA (whether written questions and responses, notes of hearings or telephone calls or otherwise) of Nike and adidas about how they would discipline JD Sports and Footasylum as a Merged Entity if there were a deterioration in PQRS

The CMA's Response and Disclosure

17. As set out at paragraph 7 above, on 7th August 2020 the CMA agreed to unredact the following further paragraphs in the Final Report within the confidentiality ring:

(1) Footnotes 371 and 373 (JD Table A1).

(2) Paragraphs 8.375, 8.383, 8.391; footnotes 713 (in part), 721, 735 (in part), 738, 741, 749, 753, 754, 760 and Table 8.9 with explanatory note (JD Table A2).

(3) Paragraphs 8.415-8.417, 8.419, 8.422, 8.423, 8.425, 8.426, 8.428, 8.429, 8.445, 8.446; figure 8.1; footnotes 813 and 814 (JD Table A3).

18. The CMA also agreed to disclose:

(1) part of adidas' response to the CMA's s.109 request dated 9th March 2020 (i.e. the response to Q1); JD Sports indicated it was content to accept the CMA's further assurance that this disclosure covered all material in the response relevant to this issue;[3]

(2) the questions that the CMA asked Nike about Nike's responses to deterioration in PQRS by retailers. Those questions were contained in the CMA's s.109 requests to Nike dated 11th December 2019 and 16th March 2020. (The corresponding questions to adidas were contained in the s.109 request of 9th March 2020, which was exhibited to Mr Meek's witness statement); and

(3) part of Nike's response to the CMA's s.109 request dated 16th March 2020 (i.e. the first part of the response to Q7).

Outstanding Issues

19. Accordingly, the CMA having provided a substantial part of the disclosure requested, the scope of the dispute before the Tribunal has narrowed considerably. In summary, the CMA has provided all of the material requested in A1 and A3 of Table A and parts of the material requested in B1, B2 and B3 of Table B. In terms of outstanding issues:

[3] See the August 12th letter, footnote 2.

(1) Item A2 is in part outstanding (disclosure of unredacted paragraphs 8.235 to 8.395 including ancillary footnotes).

(2) As to items B1, B2 and B3, there are the following three outstanding items:

(a) Nike's response to the CMA's questionnaire of 9th March 2020 (at page 125 of the exhibit to Mr Meek's witness statement) to the extent that it concerns the impact of COVID-19 on the competitive effects of the Merger.

(b) adidas's response to the CMA's questionnaire of 9th March 2020 (at page 118 of the exhibit to Mr Meek's witness statement) to the extent that it concerns possible responses by adidas to a deterioration in PQRS by the Merged Entity, namely Question 4.

(c) Nike's response to the CMA's questionnaire of 11th December 2019, Question 7 that concerns possible responses by Nike to a deterioration in PQRS by the Merged Entity.

E. THE TRIBUNAL'S ASSESSMENT

20. It is necessary to consider each of the outstanding requests for specific disclosure in the light of the ground of review to which they relate. In line with the principles set out in *Ecolab* (see paragraph 11 above) the concern is to assess, in the light of the disclosures already made by the CMA, whether the disclosure still sought is relevant, proportionate and necessary for the Tribunal to determine the issues before it fairly and justly.

21. As confirmed recently in *Sabre*, there is no general obligation on the CMA to disclose the evidence underlying its findings in a merger decision. It is normally enough for the applicant to have been given the gist of the CMA's reasoning and the evidential basis for it. It is for the applicant to justify further disclosure in any specific case by a clearly reasoned and focussed application.

Nevertheless, the position can be more nuanced when, as here, the CMA has, in correct fulfilment of its duty of candour, provided partial disclosure of certain underlying documents as well as providing the applicants with the gist of their findings on these and other aspects.

Items B1-3: Questionnaire responses

(i) Ground 2(ii): there was no evidence to support the CMA's positive findings about the impact of COVID-19 on the competitive effects of the merger

22. JD Sports seeks disclosure of Nike's response to the s.109 questionnaire of 9th March 2020 to the extent that it relates to the competitive impact of COVID-19.

23. JD Sports submits that the CMA made a positive finding about the impact of COVID-19. Paragraph 8.477 of the Final Report states:

> "While COVID-19 is clearly impacting the market, we have not seen evidence to suggest that either of the Parties is being more negatively impacted by COVID-19 relative to each other or relative to other retailers in this market. We also do not envisage that COVID-19 would increase the likelihood of success of any retailer's future plans, which involve substantive investment. Therefore, we do not consider that COVID-19 would reduce materially the extent to which the Parties are close competitors or increase materially the aggregate constraints posed by retailers on the Parties, now or in the foreseeable future…"

24. The CMA's reasoning was challenged in JD Sports' NoA at paragraph 89:

> "…it was certainly irrational for the CMA to proceed to make a positive finding that the COVID-19 would have no impact on competitive constraints. This finding was … completely unsupported by evidence."

25. The CMA issued s.109 requests to Nike and adidas (both dated 9th March 2020) and Frasers Group (dated 13th March 2020). JD Sports sought disclosure of adidas' and Nike's responses to the CMA's s.109 requests in order to support its ground of review concerning the impact of COVID-19.

26. According to JD Sports, these responses were essential to provide rational evidential support for the strong positive conclusions the CMA reached on the impact of COVID-19. JD Sports also criticised the CMA's selective approach.

In his witness statement, Mr Meek referred to the CMA's questionnaire to Frasers Group, summarised Frasers Group's response and exhibited both the questions and the response. He also referred to the questionnaires to Nike and adidas, summarised their responses and relied on those responses. As with Frasers Group, Mr Meek exhibited the questions to Nike and adidas but, for reasons that were not explained, Mr Meek did not exhibit the responses from Nike or adidas.

27. The CMA has since disclosed part of adidas' response to the s.109 request of 9th March and part of Nike's response to the s.109 request of 16th March 2020. The dispute now only relates to the Nike response to the questionnaire of 9th March 2020.

28. The CMA submitted that in line with its duty of candour, to the extent that Nike's responses otherwise addressed COVID-19 issues, they were quoted or summarised in the Final Report at paragraphs 8.90, 8.92(c), 8.406, 8.412 and footnotes 371 and 373. These summaries were sufficient for that Ground to be resolved fairly and justly. Paragraphs 8.90, 8.92(c), 8.406 and 8.412 had always been unredacted and footnotes 371 and 373 were unredacted in the updated version of the Final Report enclosed with the Response[4].

29. Further, the CMA noted that it had acknowledged, at paragraph 8.477 of the Final Report, that Covid-19 was *"clearly impacting"* the market, but explained that it had seen no evidence to justify a conclusion that the pandemic would materially reduce the extent to which the Parties were close competitors or materially increase the aggregate constraints on the Parties.

30. The outstanding issue is whether JD Sports should be entitled to see any further parts of the Nike s.109 questionnaire responses or whether they should be content with the disclosure already made and the summaries and statements in the Final Report. The request for further disclosure is clearly specified and focussed on JD Sports' claim (albeit contested by the CMA) that the CMA drew

[4] The CMA acknowledged that footnote 371 had previously contained redactions that were made in error.

strong positive conclusions about the impact of COVID-19 with insufficient evidence.

31. The dispute in this instance stems in some measure from the CMA having sought, in response to JD Sports' NoA, to explain how it had addressed the COVID-19 issue by the provision of a witness statement from the Inquiry Chair, Mr Meek. As described earlier, with this statement, Mr Meek provided the questionnaires sent by the CMA to Frasers Group, Nike and adidas together with the relevant response of Frasers Group, but not those of Nike and adidas. The CMA subsequently provided parts of the responses of adidas and Nike but still redacted substantial parts of them, maintaining that the responses were in any case summarised in the Final Report and in the Meek witness statement.

32. Whilst it is of course acceptable in principle for the CMA to summarise such responses, and it is not for JD Sports, without cause, to question the fairness of such summaries, the disclosure of one response but not, initially, the other two causes some uncertainty as to why it was thought necessary to provide both a summary and the company's response in the one case, but only a summary in the case of the other two companies. The CMA's response is that JD Sports has enough material to bring its claim, i.e. the gist of the case against it, but unfortunately the seeds of possible uncertainty have already been sown.

33. In these somewhat unusual circumstances, occasioned in part by the CMA's helpful further disclosure (in correct compliance with its duty of candour) of what it considered appropriate, and given that the further specific disclosure sought would clearly be relevant to JD Sports' claim and not place any disproportionate burden on the CMA, the question to be decided is whether the further disclosure is necessary, under the *Ecolab* principles, for the Tribunal to judge the claim fairly and justly.

34. It is clear that it is indeed so necessary. Whilst the CMA is not under any general obligation to justify the accuracy of its summaries by the provision of original documents, in this case uncertainty has been created, which needs to be set aside by the disclosure of the additional part of the Nike response requested. The

Tribunal will then be able to assess the responses of all three companies to this particular question on a similar basis, namely the CMA's summary and the original questionnaire response, and will in consequence be able to decide fairly and justly whether there was a sufficient evidence base for the CMA's conclusions as to the likely competitive impact of COVID-19.

35. JD Sports' request on this point is therefore granted and the CMA is required to provide JD Sports with Nike's response to the CMA's questionnaire of 9th March 2020 to the extent that it concerns the impact of COVID-19 on the competitive effects of the Merger.

(ii) Ground 3(i) – possible reallocations of higher-tier product from the Merged Group to Sports Direct's elevated stores in response to a deterioration of PQRS by the Merged Entity

36. JD Sports seeks disclosure of adidas's response to question 4 of the s.109 questionnaire of 9th March 2020 and Nike's response to question 7 of the s.109 questionnaire of 11th December 2019.[5] This is to support its grounds of review concerning the way in which suppliers might respond to a deterioration in PQRS by the Merged Entity.

37. JD Sports refers to paragraph 8.353 of the Final Report where the CMA states that "*we have seen no evidence that Nike and adidas would favour allocating products to Frasers Group over other retailers*…" if the combined JD Sports / Footasylum group sought post-merger to reduce its PQRS.

38. Paragraph 119 of JD Sports' NoA contends that it was irrational for the CMA to dispose of the issue on the basis that it had "*seen no evidence*" unless it had made some reasonable and very basic efforts to gather evidence.

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[5] In its Disclosure Application, JD Sports also sought disclosure of *"any other questions (and responses) to questions of Nike and adidas on how they would respond to a deterioration in PQRS by the merged group"*. In the Response, the CMA confirmed that no such questions were asked beyond those contained in the s.109 requests of 11 December 2019 and 16 March 2020 (to Nike), and the s.109 request of 9 March 2020 (to adidas).

39. JD Sports' case is that the CMA irrationally failed to make adequate inquiries. Asking a supplier for examples of action taken in response to a deterioration in PQRS would not dispose of the issue and would be ambiguous if – as occurred here – the supplier produced no examples or a short list. It was not rational for the CMA to rely on an ambiguous answer to a single question. The CMA had to ask further questions in order to resolve the ambiguity and reach a rational decision. This error was compounded by its failure properly to explain the now unredacted observation in footnote 371 in relation to two retailers in other segments.

40. The CMA in response referred to paragraph 8.353 of the Final Report, where the CMA accepted that, if the Merged Entity sought to reduce its PQRS post-Merger, Nike and adidas may have an incentive to reallocate products to Frasers Group in light of its elevation strategy. It concluded, however, that it could not say with sufficient certainty what actions the suppliers may take or over what timeframe.

41. The CMA said that JD Sports' reliance on paragraph 119 of its NoA, where it contends that it was irrational for the CMA to reach this conclusion without making *"some reasonable and very basic efforts to gather probative evidence"* was misplaced. The CMA did ask Nike and adidas for any examples of action taken in response to a deterioration in PQRS in the last two years, and very few examples were provided. As noted earlier, the CMA also confirmed in its Response that no questions on this matter were asked of adidas and Nike other than those disclosed.

42. The CMA stated that the existing disclosure was sufficient for the fair and just determination of JD Sports' case on whether it had made adequate inquiries. JD Sports had the questions that were asked of adidas and Nike together with summaries of their responses or the responses themselves. To the extent that the responses were summarised in the Final Report, the underlying responses were not necessary in order for JD Sports to argue that the questions asked by the CMA were inadequate, or for the Tribunal to resolve that challenge.

43. Although the CMA is right to say that the matter in question, namely the possible response by key suppliers to a deterioration in service by the Merged Entity is discussed extensively in the Final Report, it is very unsatisfactory for the Tribunal to have to decide this issue on the basis of a patchwork of material to provide a complete picture of the evidence relied on where some items have been summarised and others are provided in the original form.

44. As with the previous request, the further material sought is specifically and clearly identified and focussed on an aspect of JD Sports' claim as to the adequacy or otherwise of the CMA's inquiries. It is clearly relevant to this claim and the additional disclosure sought is confined to questionnaire responses and accordingly places no disproportionate burden on the CMA to produce. The question is whether, in accordance with the *Ecolab* principles, the further disclosure is necessary to enable the Tribunal to decide the application fairly and justly.

45. In relation to the adidas response, it is a question of completing material that has already been provided, namely the questionnaire itself and the explanation of the response contained in the (now unredacted) Final Report. As with the previous request, given the sequence of disclosure, the Tribunal is faced with a mixture of questionnaires, responses to certain questions and summaries and explanations in the text and footnotes of the Final Report.

46. JD Sports contends that question 4 of the CMA's questionnaire of 9th March 2020, disclosed with Mr Meek's witness statement, asks for examples of action taken by adidas in response to a deterioration in retail quality or service. The CMA responds that the Final Report paragraphs 8.90 and 8.92 provides a sufficient summary of the suppliers' responses taken with footnotes 371 and 373. JD Sports in turn claims that the now unredacted footnote 371 raises the question of whether the CMA followed up the two case examples of "retailers in other segments" referred to there. It asks whether these examples were followed up and seeks the response to question 4 for this reason.

47. The Tribunal can only properly assess this aspect of JD Sports' claim if it sees the particular questionnaire response as well as the CMA's summary of it and the question to which it responds. To that extent therefore, the disclosure of the response by adidas to question 4 is necessary within the *Ecolab* principles.

48. In relation to the requested Nike response to question 7 of the CMA's questionnaire of 11th December 2019, this is more straightforward. The response is referred to in a Nike response already provided (and therefore by implication acknowledged to be relevant, necessary and proportionate) and the disclosure of this response is relevant, necessary, and proportionate also.

49. Accordingly, JD Sports' request succeeds on these points also and the CMA is required to disclose:

    (a) adidas's response to Question 4 of the CMA's questionnaire of 9th March 2020; and

    (b) Nike's response to Question 7 of the CMA's questionnaire of 11th December 2019.

Item A2: Redactions in the Final Report

50. JD Sports also seeks disclosure under Ground 3(i) of the fully unredacted text of paragraphs 8.235 to 8.395, including tables and footnotes, of the Final Report.

51. Paragraph 115 of JD Sports' NoA stated in summary that it was "utterly unrealistic" to suppose that the implementation by Frasers Group/Sports Direct of its elevation strategy would not materially increase the strength of the competitive constraints imposed on the Merged Entity over the next two years.

52. JD Sports submitted that paragraph 115 was a challenge to the CMA's overall conclusions on the future strength of the competitive constraint posed by Fraser's Group's elevated Sports Direct's stores. It was also a challenge to the rationality of the CMA's finding that the ongoing implementation of Frasers Group's Sports Direct elevation strategy would not materially increase the

competitive constraint imposed on the Merged Entity over the next two years. The paragraphs of the Decision that were relevant to this challenge were paragraphs 8.235 to 8.395. JD Sports maintained its request even after the CMA's provision of the version of the Decision disclosed into the confidentiality ring on 7th August 2020.

53. JD Sports contended originally that the making of the redactions breached paragraph 4 of the Directions Order and prevented the Tribunal from reaching a conclusion on NoA, paragraph 115 that was based on the actual reasoning taken by the CMA in the Decision under challenge. According to JD Sports, the Tribunal could not fairly and justly make a determination on this challenge without understanding the decision the CMA made, which required disclosure of the Decision without redactions on these points.

54. The CMA responded that JD Sports' position was misconceived. In particular, its original request was a blanket request for all remaining redactions to be lifted without any attempt to explain why any specific redacted passage may be necessary or relevant for the determination of its challenge. Simply to assert, as JD Sports did, that all of the passages were relevant was wholly inadequate in circumstances where disclosure is never automatic, and it is for the applicant to satisfy the Tribunal that the disclosure sought is *"relevant, proportionate and necessary in order to determine the issues before it fairly and justly"*.

55. In its Response the CMA further argued that:

(a) many of the earlier paragraphs that were said by JD Sports to be *"relevant to this challenge"* in fact concerned matters other than Frasers Group's elevation strategy;

(b) the version of the Final Report that was disclosed to JD Sports on 24th July already contained a significant number of unredactions as compared to the version that had been provided to it previously; and

(c) having considered the matter again the CMA had agreed to unredact a number of further passages in this part of the Final Report, as was reflected in the updated version enclosed with the CMA's Response to the Disclosure Application. As explained in the 14th August Letter, the remaining few redactions were insignificant and concerned passages or text that the CMA did not consider to be necessary or relevant for the determination of the challenge.

56. This request for disclosure raises a different issue from those so far considered as it relates to the Final Report itself rather than to supporting materials. Here it is worth recalling some general aspects of the Tribunal's approach.

57. In proceedings for judicial review, in keeping with the *Ecolab* principles previously mentioned, the Tribunal's concern is with the lawfulness, reasonableness and fairness of the authority's decision rather than the correctness or otherwise of its conclusions. The Tribunal takes the authority's decision as it finds it and the authority is expected to defend its conclusions and the evidence on which they are based by reference to the decision itself.

58. It would therefore in principle be a matter of concern if significant material were to be redacted from a decision that was challenged. Where this is necessary on grounds of commercial confidentiality, which is a common feature of merger cases, in particular, where rivals' strategies may be very relevant to the authority's consideration, then the Tribunal is scrupulous to apply stringent conditions of confidentiality, normally involving a confidentiality ring as in this case. Disclosure is therefore to a select and controlled group of professional advisers only. The issue here is not redaction on grounds of confidentiality but on grounds of proportionality, relevance, and necessity for deciding a challenge fairly and justly.

59. The conditions for challenging a CMA decision by way of judicial review are well known and precisely specified. In relation to applications for specific disclosure, much will turn on the grounds of review advanced and the way in which any claim for disclosure of redacted material is related to the ground of

review in question. Generalised applications and speculative or "fishing" requests are not to be allowed. Each case depends on its own facts and the principles previously described must be applied to those facts.

60. In the present case, according to the CMA's explanation in its 14th August Letter, what remains are nine (out of 160) paragraphs with redactions; of these, four are third party names; two are source documents; and three are considered irrelevant and/or insignificant. None is lengthy. The Tribunal has no reason to doubt the veracity of the CMA's description. Leaving aside any consideration of relevance and proportionality, it is very hard to see how, in the light of the extensive disclosures made by the CMA, admittedly not all at the same time or even for the same reason, the outstanding redactions in this case, being few in number and confined to third party identities and source materials, can be said to be necessary for the Tribunal to assess this ground of review justly and fairly.

61. JD Sports' claim is that withholding even these minor matters breaches the Tribunal's Directions Order to unredact all that was relevant in the Final Report. Whether or not that is literally the case, it has no significance for the fair and just disposal of the application and the Tribunal will therefore not require the CMA to unredact these remaining parts of the Final Report.

62. That is not to say that in a case where a challenge was brought against a decision where the redactions were more extensive than they are here it would necessarily be for the CMA alone to decide whether their disclosure would be relevant, necessary or proportionate. That judgment is for the Tribunal to make. Even then, as in the recent *Sabre* case, the decision may not be in favour of disclosure, but each case is different and must be judged on its own particular facts.

(iv) Ground 3(ii): the constraints posed by Nike and adidas

63. JD Sports seeks disclosure of adidas's response to question 4 of the s.109 Questionnaire of 9th March 2020 under this Ground also.

64. At paragraph 8.92 of the Final Report, the CMA considered further how suppliers might react if the Merged Entity sought to reduce its PQRS post-Merger. It found *inter alia* that, even if suppliers identified and responded to a deterioration by one of the Merged Entity's fascia (e.g. if Nike reduced product access to Footasylum), some customers were likely to react by diverting to the Merged Entity's other fascia. The CMA assumed for this purpose that both the deterioration and any supplier response was fascia-specific.

65. JD Sports claimed in its Disclosure Application that, in view of the evidence previously provided by adidas (as recorded in question 4 of the s.109 request of 9th March 2020), that assumption was irrational. In particular, the only rational step, given this evidence from adidas that it would pick up any deterioration in post-merger quality or service and would carry out a re-auditing process, was to ask adidas how the re-auditing process would operate when Footasylum was part of the Merged Entity. There was no reference to such a question having been asked either in the Decision or Mr Meek's evidence and JD Sports said that adidas' response to question 4 of the s.109 request of 9th March 2020 would explain this.

66. In its Response, the CMA said that JD Sports failed to explain how adidas' response to the s.109 request could be relevant to JD Sports' argument. If JD Sports wished to argue that the CMA's assumption was irrational, or that the questions asked in the s.109 request were inadequate, it was perfectly able to do so based on the existing material. That material includes the s.109 request itself and the passages in the Final Report that the CMA relies on to demonstrate the rationality of its assumption. Disclosure of adidas' response was not required and that response was in any event summarised in the now unredacted footnotes 371 and 373.

67. The CMA may or may not be correct to argue that disclosure of a response is unlikely to shed light on whether the CMA's enquiries were adequate for the purpose set. Nevertheless, the Tribunal has already required the CMA (see paragraph 49(a) above) to disclose adidas's response to the question 4 of the

s.109 questionnaire of 9th March 2020. Compliance with that requirement should satisfy this request also and no further order is needed.

(v) Ground 3(iii): the CMA acted irrationally in finding that Nike's and adidas's own DTC offer will not become a significantly stronger constraint on the Merged Entity

68. In the light of the CMA's Response, the further disclosures made and the 12th August Letter, this request for disclosure is no longer in issue.

F. CONCLUSION

69. For the reasons given it is therefore ordered that the CMA make the specific further disclosures outlined at paragraphs 35 and 49 of this Ruling as soon as is possible and in any event no later than **4pm** on **Friday 28th August 2020**.

Peter Freeman CBE, QC (Hon)
Chairman

Charles Dhanowa OBE, QC (Hon)
Registrar

Date: 21 August 2020