This Opinion is being made available by Frasers Group plc to other shareholders of boohoo group plc in order to assist them with their consideration of certain points raised by the board of directors of boohoo. By making this Opinion available, Frasers Group plc does not waive legal privilege in any other document, communication or advice.

IN THE MATTER OF:
FRASERS GROUP PLC & BOOHOO GROUP PLC

OPINION

A. SUMMARY

1. We are asked to advise in relation to whether certain proposed management changes to Boohoo Group plc ("**Boohoo**") raise any issues under competition law, i.e., the Chapter I and II Prohibitions of the Competition Act 1998 ("**CA98**"), which prohibit anticompetitive "agreements" and an "abuse of a dominant position," respectively.

2. For the reasons set out in Section D below, we consider that there is no substance at all to these suggestions under UK competition law.[1] There is no competition law issue, nor even a realistically arguable one.

B. OVERVIEW OF ISSUES

3. The relevant background is set out in Section C below. In brief, however, the well-known British businessman, Mr. Mike Ashley, currently owns *circa* 73% of Frasers Group plc ("**Frasers**") via two companies he wholly owns. Mr. Ashley currently does not sit on the board of Frasers. Frasers owns various minority stakes in other retailers / retail groups, including notably for present purposes:

   (a) Frasers is the largest shareholder in Boohoo, with *circa* 28%. It currently does not have a seat on the board of Boohoo (the "**Board**") or any management role in Boohoo;

   (b) Frasers has an interest in *circa* 24% of ASOS. It is not the largest shareholder and has no board seat nor any management role in ASOS;

[1] Even if EU competition law applied (due, e.g., to certain non-UK retail assets/customers being implicated), this conclusion would be the same.

(c) Frasers owns various brands which are active in areas of fashion which are very different to the merchandise that Boohoo manufactures and sells (and therefore with a very different retail and customer base).

4. Certain commercial difficulties associated with Boohoo have been widely reported in the press in recent months. This has been confirmed by the half yearly results announcement by Boohoo on 13 November 2024 in which Boohoo reported revenues and profits down by 15% and 19% respectively, compared to the same period as last year. In this context, a proposal has been raised by Frasers that Mr. Ashley be appointed as a director and CEO of Boohoo, and that a new non-executive director ("**NED**"), Mr. Mike Lennon, also be appointed to the Board (the "**Proposed Changes**"). The purpose is to protect the value of Frasers' stake in Boohoo and seek to turn its fortunes around.

5. In response, there has been a suggestion by the Board that these appointments (particularly Mr. Ashley's) could raise competition law issues. As we understand it, the basic allegation is that if Mr. Ashley were made CEO of Boohoo, competition law issues could arise due to overlapping competitive activities of the brands/businesses that Frasers owns or in which it has invested – in particular ASOS. For example, it is suggested by the Board that information acquired by Mr. Ashley in his capacity as a Boohoo director, or decisions made by him as Boohoo CEO, could lead to anticompetitive consequences *vis-à-vis* those other brands, in particular ASOS.

C. DETAILED BACKGROUND

6. Mr. Ashley is a well-known retail entrepreneur, mainly in the UK but with some overseas interests as well. Mr. Ashley does not sit on the board of Frasers, albeit we understand that he has a consultancy agreement under which he provides certain services at the request of the board of Frasers or its CEO, but all decisions are taken by the board of Frasers.

7. Frasers has material interests in the following companies (in addition to its *circa* 28% in Boohoo): (i) *circa* 37% interest in Mulberry Group Plc; (ii) *circa* 32% of the voting rights and *circa* 26% of the issued share capital of XXL ASA; (iii) *circa* 24% interest in AO World Plc; (iv) *circa* 20% interest in N Brown Group Plc.; (v) *circa* 21% and *circa* 3% via the sale of put options in ASOS Plc; (vi) *circa* 9% interest in Hornby Plc; (vii) *circa* 15% interest in Accent Group Ltd; and (viii) *circa* 15% and *circa* 10% via the sale of put options in Hugo Boss AG.

8. As noted above, it is a matter of public record that Boohoo has faced certain commercial and trading difficulties in recent times.[2] Matters have further deteriorated, as the half year results announcement of 13 November 2024 confirms. In this context, Frasers has proposed that Mr. Ashley be appointed as a director and as CEO and that a new NED also be appointed, i.e., the Proposed Changes. In response, it has been suggested by Boohoo and its advisers that the Proposed Changes could raise competition law concerns. We have not seen the particular concerns set out anywhere in detail in writing[3] but we understand that they stem from a suggestion that Boohoo competes with ASOS – in which Frasers also has an interest – and certain other of Frasers' brands, and that the appointment of Mr. Ashley as Boohoo CEO could lead to anticompetitive consequences in such a context, such as him being privy to confidential information that might affect ASOS and/or commercial decision-making within Boohoo being affected by his/Frasers' interest in ASOS (and, potentially, likewise *vis-à-vis* other brands in which Frasers has ownership or interests).

D. ANALYSIS

9. We consider that there is no substance at all to the above-mentioned competition law arguments. It is important to consider the above-mentioned issues with reference to the specific provisions of competition law, and not in abstract or amorphous terms:

   (a) There are no merger control issues under competition law, since the Proposed Changes would not trigger any mandatory or even voluntary merger control notification(s). They are simply management or board appointment changes. Neither Frasers, nor Mr. Ashley (who would be one of at least 10 directors), would obtain "material influence" over Boohoo such that UK merger control is engaged.

   (b) We see no basis in which it could be said there is an alleged abuse of dominance, contrary to the Chapter II Prohibition of the CA98. We are prepared to assume for present purposes that: (i) Boohoo and ASOS, and (ii) House of Fraser and Debenhams,

[2] See, e.g., https://fashionunited.uk/news/business/when-boohoo-shareholders-lose-patience-is-a-split-the-only-way-out/2024100177869.

[3] The only concrete indication we have seen is a suggestion that "*Mike Ashley is conflicted and not a suitable appointment to the Board - Mike Ashley is the controller of Frasers, with a 73% shareholding, and is listed by Frasers as having a significant influence over its day-to-day decision making - The Board considers Frasers to be a competitor of all of boohoo's core brands across its own brands and investments - Frasers and Mike Ashley have history of exerting pressure on competitors and Shareholders should be concerned about the possibility of Mike Ashley joining our board*." See https://www.investegate.co.uk/announcement/rns/boohoo-group--boo/posting-of-circular-and-notice-of-general-meeting/8548441. We deal with these issues at paragraph 9 below.

could be considered retail competitors (but note that (i) the fashion retail market is highly competitive; (ii) no other brands that Frasers controls, or in which it has an interest, compete more closely with Boohoo than ASOS does; and (iii) Debenhams is an online marketplace with no bricks and mortar stores, cf. House of Fraser). But, based on public information,[4] even if one aggregated their market shares, they would be less than 10% - far below the level at which conventional dominance could begin to arise (usually 40%).[5] Furthermore, market shares do not tell the full story, since the UK retail clothing sector is highly fragmented and competitive, particularly in the pure play online fast fashion segment. Without dominance, there can be no abuse,[6] regardless of the nature of the conduct at issue.

(c) In terms of an alleged anticompetitive 'agreement' under the Chapter I Prohibition, we are unaware of <u>any</u> previous case under CA98 in which it has even been suggested that a senior management and/or board change could give rise to a competition law violation. In our view, the mere act of appointing senior management/a board member cannot <u>itself</u> give rise to an anticompetitive "agreement" under the CA98: it is simply a corporate / management change that itself has no necessary implications under the prohibition on anticompetitive agreements under the CA98. This view is fortified by two further points. In the first place, given the combined market share of Boohoo taken together with any brand owned by Frasers (or in which it has an interest) is less than 10%, the competition law requirement that any purported "agreement" should be "appreciable"[7] would not be met. Furthermore, as with all competition law cases, it would be necessary to consider the relevant factual and economic context. In particular, given the commercial circumstances in which Mr. Ashley would be appointed as CEO, there would be various pro-competitive benefits and efficiencies

[4] See, e.g., Global Data: UK Apparel Market Size and Trend Analysis by Category, Retail Channel, Supply Chain, Consumer Attitudes, Brands and Forecast to 2026; Mintel: UK Fashion Online Market Report 2022; Euromonitor International; Global Data: *United Kingdom (UK) Womenswear Market Size and Trend Analysis by Category, Segments, Region, Key Brands, and Forecast to 2028*; Mintel: *UK Womenswear Market Report 2023*; and Global Data: *United Kingdom (UK) Sportswear Market to 2023*.

[5] There is a concept of collective dominance that has been very rarely applied in practice. We see no basis for this concept given the very low combined market shares and the minority stakes Frasers holds in Boohoo and ASOS.

[6] Case 322/81, *NV Nederlandsche Baden-Industrie Michelin v Commission* [1983] ECR 3461, [10] ("[A] *finding that an undertaking has a dominant position is not in itself a recrimination*.")

[7] See, *Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)* (2014/C 291/01), para. 8(a) which states "*The Commission holds the view that agreements between undertakings which may affect trade between Member States and which may have as their effect the prevention, restriction or distortion of competition within the internal market, do not appreciably restrict competition within the meaning of Article 101(1) of the Treaty if the aggregate market share held by the parties to the agreement does not exceed 10 % on any of the relevant markets affected by the agreement*".

that would need to be considered under competition law, such as his retail and management expertise, greater financial market confidence, and ease of access to capital, etc. In other words, looked at objectively, the purpose of the appointment would be to increase competition and competitiveness. In this context, one would also need to consider the 'counterfactual' – what might realistically occur in the absence of the appointment – which could realistically include a further weakening of Boohoo's retail position.[8]

(d) Chapter I Prohibition issues can also arise in relation to a 'concerted practice', which can include the disclosure of commercially-sensitive information by undertaking A to undertaking B – typically forward-looking pricing information. But we also do not consider that Mr. Ashley's appointment as CEO of Boohoo and his indirect interest in ASOS (via his interest in Frasers) would give rise to a competition law issue of this nature. To the extent this were relevant, this potential circumstance would be dealt with in the usual way, as follows:

i. Mr. Ashley would comply with all provisions in the company's articles and under Jersey law with regard to directors' interests and conflicts;

ii. Mr. Ashley would have fiduciary duties to Boohoo as a director and to act in the best interests of Boohoo;

iii. Mr. Ashley would be one of at least 10 directors, with decisions taken by majority;

iv. Frasers is not the largest shareholder in ASOS and no Frasers representative has a board seat or executive role at ASOS (and as a result receives no confidential information about ASOS, i.e., only receives the same information as any other shareholder, and at the same time); and

v. in any event, Mr. Ashley is willing to agree to the restrictions set out in Section E below.

[8] We note in this context that Boohoo's proposed CEO is from its Debenhams business, which saw revenues decline in the half-year to 31 August 2024 compared to the same period in the preceding year.

10. This means that not only does the appointment of Mr. Ashley as Boohoo CEO not in and of itself give rise to any CA98 issue, but the points above mean that, going forward, there is no prospect of the Chapter I Prohibition being engaged either.

E. CONFIRMATIONS FROM MR. ASHLEY

11. For so long as Mr. Ashley is on the Board, Mr. Ashley is willing to agree that he will not (without the consent of a simple majority of the rest of the Board):

    (a) provide any confidential information he receives in his capacity as a director of Boohoo to any employee, officer or director of Frasers. This restriction would continue to apply for a period of twelve months following Mr. Ashley ceasing to be on the Board;

    (b) take on any board position at Frasers;

    (c) participate in any discussions of the board of Frasers or Frasers' executives regarding Boohoo or its business; and

    (d) take on any board position at any competitor of Boohoo. This restriction would continue to apply for a period of six months following Mr. Ashley ceasing to be on the Board.

12. In addition, Mr. Ashley would be willing to confirm in writing to Boohoo his awareness of, and compliance with, his fiduciary duties, and in particular to act in the best interests of Boohoo.

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