

Anticipated acquisition by Sports Direct International plc Of 19 Stores From JJB Sports plc (in administration)

ME/5765/12

The OFT's decision on reference under section 22(1) given on 21 December 2012. Full text of decision published 25 January 2013

Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

PARTIES

1. **Sports Direct International plc ('SDI')** is a UK listed sports goods retailer supplying sports and leisure equipment, clothing, footwear and accessories through 397 stores in the UK and online. SDI also owns a number of sports, fashion and lifestyle brands under which it licenses and sells products, including Dunlop, Slazenger (except Slazenger Golf), Karrimor, Lonsdale, Everlast, Donnay, Sondico, No Fear, Kangol, and Nevica. SDI also sells a variety of third party brands, including Nike, Adidas, Puma, Reebok and Umbro. For the financial year ending 29 April 2012, SDI's retail sales were £1.3 billion.
2. **JJB Sports plc (in administration) ('JJB')** was a UK multi-channel sports goods retailer prior to being put into administration. In addition to its retail activities, JJB owned a number of well-known sporting brands including Slazenger Golf. At the date of the merger, JJB operated out of 153 stores in the UK. JJB also had an online sales operation with delivery throughout the UK. JJB was a UK-based public limited company, listed in the UK and admitted to trading on the AIM market of the London Stock Exchange. JJB entered into administration on 1 October 2012.

3. The 'Target Stores' are 19 stores owned by JJB Sports.¹ The Target Stores' turnover in the last financial year to 29 January 2012 was £[] million.

BACKGROUND

4. The Target Stores formed part of JJB's portfolio of 153 stores across the UK until it went into administration on 1 October 2012.²
5. SDI previously purchased 31 JJB stores in 2009. This transaction was subject to an OFT investigation³ and subsequently a Competition Commission (CC) enquiry.⁴

THE TRANSACTION AND RATIONALE

6. On 1 October 2012, SDI entered into an agreement with JJB Sports and the Administrator⁵ via a pre-pack administration to acquire:
 - the Target Stores (including staff)
 - the freeholds to the Wigan head office site, including warehouses
 - the stock, fixtures and fittings located at the Target Stores; the stock and equipment at JJB's Wigan warehouses; the stock, fixtures and fittings located at all 153 JJB stores
 - all product brands and licenses (excluding the JJB brand itself)

¹ The Target Stores are located in Airdrie, Antrim, Cheshire, Cumbernauld, Dorchester, Dover, Elgin, Leamington Spa, Lisburn, Liverpool Aintree, Llandudno, Londonderry Strand Road, Rhyl, Rochdale, Winchester, Oldbury, West Bromwich, Brighton, Leeds Kirkstall, and Glasgow Silverburn.

² SDI entered into an agreement for the purchase of 20 JJB stores. In relation to the store at Liverpool Aintree which was subject to the final purchase agreement on 1 October 2012, SDI had taken occupation under the provisions of the Asset Purchase Agreement. However, the landlord of the premises subsequently served notice on JJB requiring the termination of the occupation by SDI. SDI vacated the Liverpool Aintree premises before 31 October 2012. As SDI did not acquire this store, it was not considered to form part of the Transaction.

³ Completed acquisition by Sports Direct International plc of a number of stores from JJB Sports plc, decision of 7 August 2009.

⁴ Sports Direct International plc and JJB Sports plc, A report on the acquisition by Sports Direct International plc of 31 stores from JJB Sports plc dated 16 March 2010.

⁵ KPMG advised JJB before it went into administration. Once JJB entered administration on 1 October 2012 it became the Administrator.

- the JJB domain names
- certain supply contracts.

7. SDI submits that the rationale for the acquisition is to expand into new geographic areas where it has no presence or where the Target Store offered a better trading location. It enables it to acquire additional warehouse and distribution space, and to acquire additional brands.
8. The OFT received a satisfactory informal submission from SDI on 30 October 2012. Pursuant to its published administrative procedures, the OFT's 40-day administrative timetable expires on 4 January 2013.

JURISDICTION

9. A relevant merger situation arises when two or more enterprises cease to be distinct and either the UK turnover test or the share of supply test set out in section 23 of the Act is met.
10. The OFT has considered carefully in this case whether it is or may be the case that enterprises would cease to be distinct under the arrangements in question, such that these arrangements would give rise to a relevant merger situation. Specifically, the OFT considered whether the Target Stores acquired by SDI should be considered to be 'enterprises' for the purposes of the Act.

Enterprises ceasing to be distinct

11. The purchase by SDI includes 19 leasehold retail outlets comprising properties (including fixtures and fittings) and staff.
12. The overall substance of the various arrangements in relation to the Target Stores is that they have changed from being JJB stores to being traded by SDI. In relation to each of the stores, SDI informed the OFT that it has acquired the stock, fixtures and fittings and has taken over responsibility for the staff in them. SDI will inherit any goodwill that attaches to the stores through their past trading under the JJB brand, although the JJB brand itself does not form part of the Transaction.

13. As a result, the OFT believes that it is or may be the case that each of the Target Stores constitutes an enterprise which has ceased to be distinct for the purposes of consideration under the Act.

Turnover and share of supply tests

14. As a result of this transaction JJB Sports and SDI have ceased to be distinct. The turnover test pursuant to section 23 of the Act is not met since the UK turnover of the Target Stores is below £70 million.
15. However, the OFT believes that it is or may be the case that the share of supply test in section 23(2)(a) of the Act is met and, therefore, that a relevant merger situation has been created. This is because SDI's share of supply of sports goods by national sports retailers (that is SDI, JJB and JD Sports) in the UK, by number of outlets, in 2012 was [40 to 45] per cent with the acquisition of 19 retail outlets from JJB representing an increment of approximately [0 to five] per cent.
16. For these reasons, the OFT believes that it is or may be the case that a relevant merger situation has been created.

THE COUNTERFACTUAL

17. The OFT's standard approach to the counterfactual is to adopt the pre-merger prevailing conditions of competition. In this case, that would revolve around the continuation of the pre-merger competition between JJB and SDI – which, as noted by the CC in Sports Direct/JJB, were the two closest national competitors in the retailing of sports goods.⁶
18. However, the OFT will assess a merger against a counterfactual different from the pre-merger conditions of competition where, based on the evidence available to it, it considers that the prospect of these conditions continuing is not realistic (or where there is a realistic counterfactual that is more competitive than the pre-merger conditions of competition). The OFT notes that where a merger raises concerns relative to the pre-merger

⁶ See paragraph 6.15 of the CC Report which states that this term best characterizes the area of overlap between the parties, given that both retailers have clear associations with sport through their product range, fascia names and store layouts (which typically feature pictures of sportsmen and women).

situation, the OFT is slow to clear the merger based on an alternative counterfactual and will only do so when it has sufficient compelling evidence.⁷ In forming a view on an 'existing firm' scenario, the OFT will consider:

- a) whether the firm would inevitably have exited the market, in particular whether the firm was unable to meet its financial obligations in the near future and to restructure itself successfully
- b) whether there would have been a substantially less anti-competitive alternative purchaser for the firm or its assets, and
- c) what would have happened to the firm's sales in the event of its exit.⁸

19. SDI submit that an alternative counterfactual to the prevailing conditions of competition should be adopted by the OFT in this case which would ultimately have the effect of clearing the merger. This is because, they submit, JJB would have inevitably exited the market absent the acquisition since the JJB business had entered into administration and, absent the merger, the whole of JJB including the Target Stores would have ceased to operate. SDI further submitted that there was no less anti-competitive purchaser available to acquire JJB or the Target Stores given the extensive marketing efforts of JJB's management, through KMPG, to sell the business in whole or in part pre-administration.

20. The OFT has carefully assessed all the available evidence on exiting firm given that SDI has purchased not only the Target Stores, but also fixtures and fittings and stock for the entire JJB business, as well as JJB's distribution warehouse facility and its domain name and has therefore taken JJB's core assets. As such, the OFT considers that there needs to be sufficiently compelling evidence in order to accept an alternative counterfactual given that JJB and SDI were each other's closest competitors on a national and local (where they overlapped) basis. The OFT's assessment against each limb of the exiting firm test is set out below.

⁷ *Merger Assessment Guidelines* (CC2 and OFT1254, September 2010), paragraph 4.3.5. See also for example *Kerry Foods Limited/Headland Foods Limited*, OFT decision of 12 July 2011, paragraph 10.

⁸ *Merger Assessment Guidelines*, paragraphs 4.3.8 to 4.3.18.

a) Inevitability of exit

JJB administration process

21. JJB entered into administration on 1 October 2012. However, the OFT considers that the fact that a firm has entered into administration does not conclusively demonstrate that the exiting firm criteria are met. This is, in part, because the firm (or a part of it, such as the Target Stores) may have been able to emerge from administration in a reorganised form and to continue to compete in the market.
22. The process of administration is governed by the Insolvency Act 1986 which sets out three objectives of administration: (a) to rescue the business as a going concern; (b) to achieve a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration); or (c) to realise property in order to make a distribution to one or more secured or preferential creditors.⁹
23. In this regard, the Administrator told the OFT that objective (a) could not be achieved given no credible offers for shares were received following the commencement of a formal sales process of JJB on 30 August 2012. As a result, the Administrator did not deem rescuing JJB as a going concern viable and pursued objective (b) which, in effect, meant seeking to dispose of JJB's business and assets to achieve the best possible result for creditors.
24. The OFT assessed two issues in connection with whether the Target Stores would inevitably or imminently have exited through financial failure or otherwise:
 - whether JJB was unable to meet its financial obligations in the near future and
 - whether JJB was unable to restructure itself successfully, taking into account the profile of assets and liabilities and the action the

⁹ Objective (a) should be pursued unless it is not reasonably practicable to do so or if objective (b) would achieve a better result for the company's creditors as a whole. Objective (c) may only be pursued if it is not reasonably practicable to achieve either objective (a) or (b) and can be pursued without unnecessarily harming the interests of the creditors of the company as a whole.

management has taken to address the firm's position.

The OFT also assessed whether JJB was incentivised to enter administration by the prospect of a sale to SDI. Each is considered below.

Assessment of JJB's financial position

25. The OFT's investigation has indicated that JJB's business had been experiencing significant losses for a number of years and that failure was a real possibility. The OFT has identified the key events leading up to the administration and sale as follows.
26. In October 2008 KPMG¹⁰ were instructed by JJB to undertake work on communication with stakeholders, assistance with cash management procedures, contingency planning and separation issues for the wider JJB Group. In January 2009 KPMG were instructed to prepare an information memorandum on behalf of management for the sale of two wholly owned subsidiaries of JJB, Original Shoe Company Ltd and Qubefootwear Ltd because these were loss-making. The offers received were not deemed to be of sufficient value and KPMG was appointed joint administrator of the firms on 19 February 2009 and the firms were subsequently placed into liquidation.
27. Then, in February 2009 KPMG were asked to consider the feasibility of JJB¹¹ proposing Company Voluntary Arrangements ('CVA'). KPMG acted as Nominees and Supervisors of the CVA. The preparatory work carried out by KPMG dealt with the specific issue of seeking to reduce each company's liabilities to landlords in respect of stores which had been closed. The CVA led to the closure of 140 of 414 JJB stores. The creditors and members of both companies approved the CVAs. The CVAs were successfully implemented and terminated on 16 June 2010. JJB sold its fitness chain for £83 million to former chairman Dave Whelan and a debt restructuring agreement was entered into with creditors that raised a further £100 million.
28. In November 2010, KPMG was asked to consider the feasibility of JJB and

¹⁰ JJB appears to have experienced difficulties even before this point.

¹¹ This included Blane Leisure Limited a wholly owned subsidiary of JJB also operating in sports retail.

Blane proposing second CVAs. KPMG assisted the companies in the preparation of CVA proposals which were issued in March 2011. As a result JJB closed a further 95 stores. At this point the Administrators' review identified just 150 of JJBs 245 stores as being core to the groups' future. At the same time it asked investors to support a £31.5m emergency fundraising.¹² At the time the management of JJB announced that it believed that if it did not achieve the support of its shareholders and landlords, the business would no longer be able to trade as a going concern. Indeed, they stated that a further fundraising would be required as the previous one would only raise enough to keep the company afloat for two months. The creditors and members of both companies approved the CVAs. The CVAs had been expected to conclude in April 2013.

29. In December 2011 KPMG was engaged to assist JJB in considering alternative sources of funding and contingency planning. This led to an instruction to run a process to seek to secure a strategic investment in JJB. During this process the management team presented their business plan to a number of potential strategic investors. In April 2012, additional finance was provided to JJB by Dicks Sporting Goods and Adidas, both of whom were separately professionally advised.
30. In July 2012 KPMG was instructed by JJB to carry out contingency planning work and assistance with communication with stakeholders. In August 2012 KPMG was instructed by JJB to carry out research on the UK sportswear market. The results of this research were presented to JJB for its internal use.
31. Further, in August 2012 KPMG was instructed to assist JJB with marketing JJB for sale. Trading remained difficult throughout the summer of 2012 due to very poor European Football Championship product sales, continued failure in the product range exacerbated by the poor spring and summer weather. Therefore, JJB entered into discussions with strategic partners regarding a further capital raising exercise and restructuring of its store portfolio to facilitate the turnaround of JJB's trading performance. However, JJB were unable to raise the level of funds required to implement the turnaround. As a result, the directors decided to commence a formal sales process of JJB on 30 August 2012.

¹² JJB raised £31.5m by issuing 630 million new shares at 5p each. The decision was supported by its two biggest shareholders, Harris Associates and Crystal Amber.

Financial position immediately preceding administration

32. With reference to the summary of events in paragraphs 25 to 31 above, the OFT investigation found that JJB endured several years of poor financial performance before deciding that the business was not financially sustainable and needed to be sold or enter administration. It made several efforts to restructure the business including several rounds of cost cutting and debt restructure. In spite of these efforts, losses were continuing and the capital of existing backers was being eroded. The losses after tax were £181 million in the year to January 2011 and £101m in the year to January 2012 and year on year sales declined by 13 per cent.¹³
33. This resulted in net assets falling from £224 million in 2010 to only £31 million in January 2012 despite an £86 million¹⁴ share issue. This level of capitalisation was low compared with the company's level of losses.
34. JJB received funding from Lloyds Banking Group who had provided working capital facilities of £25 million plus associated ancillary facilities totalling £13 million. These total borrowings and facilities of £38 million were subject to cross guarantees between JJB and the other subsidiary entities, which were secured by debentures. In addition, the Companies had recently received significant additional funding from Dicks Sporting Goods Inc and the Adidas Group totalling approximately £20 million. Furthermore, JJB had been supported financially by several shareholders.
35. The scale of the problem in financial and commercial terms was revealed when the 2011 accounts of JJB were only approved by KPMG after significant caveats were placed around the ongoing viability of the business. The directors' business review in the annual accounts also identified material uncertainties in the company's ability to implement its business recovery strategy, low level of stockholding and the limited cash headroom available to the company. At that time the board concluded only that there was a 'reasonable expectation' that they would 'have adequate resources to continue in operational existence for the foreseeable future'. It was clear that even in January, the reporting date, the company faced very significant problems that threatened its viability.

¹³ JJB annual accounts 2012, page 12.

¹⁴ JJB annual accounts 2012, page 35.

36. On the basis of the above evidence, JJB's business had been struggling financially for several years but significant efforts to restructure the business had kept the business trading in the past. In the summer of 2012 it became clear that exit was inevitable for financial reasons. As has been shown above, there were several attempts made in vain to restructure the business. The business continued to make losses and the cash reserves were used to support it on several occasions but there was no prospect that there was financial support for continued trading for the short to medium term sufficient for the directors to be confident that they could pay creditors. They had therefore sought to secure additional financing to ensure the business could trade for a reasonable period. By the summer of 2012, the financial situation of the business meant that lenders would no longer continue to provide further funding to keep the business afloat.

Conclusion on inevitability of JJB exit

37. The Administrator told the OFT that these attempts to restructure, sell or refinance the business ended with JJB's entry into insolvent administration. The OFT understands that the high level of debt already underpinning the business, including cash injections in the past financial year, and the fact that interest payments were being accrued influenced JJB's decision. In addition, a second CVA required an extension to existing lending facilities and a likely further funding requirement which appeared unlikely given the difficult retail environment which seriously threatened JJB's profitability. This situation was aggravated by the fact that no additional funding was available. JJB's management appointed KPMG to find a purchaser for the business on 30 August 2012.

38. The OFT considers that the exit of the overall JJB business (and the Target Stores) was inevitable on the basis of the evidence available to it. The financial issues faced by JJB appear to have been insurmountable and indicate that failure was likely to have been imminent.

39. On the basis of the above, the OFT believes that there is sufficient compelling evidence that the first limb of the failing firm criteria is met; that is, that the exit of the overall JJB business and consequently the Target (including the Overlap¹⁵) Stores absent the merger was inevitable and that there was no realistic prospect of their re-organization.

¹⁵ Five of the Target Stores identified where there were local overlaps.

b) No less anti-competitive purchaser

40. As stated in the Merger Assessment Guidelines, in assessing whether there was a realistic alternative purchaser for the firm or its assets, the OFT will take into account the prospects of alternative offers for the business above liquidation value. It is important to note that the possible unwillingness of alternative purchasers to pay the asking price to a seller does not rule out the fact that there is no less anti-competitive purchaser, especially if the OFT considers it realistic that an offer had been, or would be likely to have been made above liquidation value. The OFT has assessed whether any alternative bidders that would have maintained JJB as an effective competitor in the market for sportswear retail had shown an active interest in acquiring JJB (either in whole or the Target Stores)¹⁶ and, if so, whether they represented a substantially less anti-competitive alternative to SDI.
41. SDI submitted that although there were other indicative bidders before JJB entered into administration, these were not 'realistic bidders' in the sense that they would not have been likely to have proceeded to make a purchase of JJB or a significant part of it.
42. The OFT considered whether any company constituted a realistic alternative to a sale to SDI. In other words, whether they were genuinely interested in purchasing either the whole of JJB or part of it, and if so, whether a purchase by them would lead to a substantially less anti-competitive outcome than the proposed merger. In this context, the OFT has sought to identify whether there were realistic purchasers for the JJB business as a whole or a significant number of stores or the distribution facilities. The reason being that JJB was SDI's closest competitor in the supply of sports goods and therefore any credible interest in purchasing all or such part of JJB which would have maintained JJB as an effective competitor to SDI or would have provided for new entry or expansion is pertinent to this limb of the exiting firm scenario.

¹⁶ SDI acquired the use of the JJB central warehousing facilities, JJB domain name and all the stock, fixtures and fittings of the business. It was thus very difficult for any bidder to keep JJB operating once SDI had completed its acquisition. For this reason, the OFT has looked at whether any bidders would have acquired the whole or part of the JJB business and kept it operating in the market in the absence of the SDI transaction.

The process of marketing the JJB business

43. The OFT understands that the marketing of the JJB business for sale commenced on 30 August 2012. KPMG contacted 109 potential bidders inviting interest in JJB assets. Offers were sought either for the whole or part of the business.
44. Of the 109 potential bidders contacted, 27 signed non-disclosure agreements and were on this basis invited to carry out preliminary due diligence and provided with limited access to company information in a data room. The Administrator asked interested bidders to enter 'indicative bids' by 7 September 2012 if they wished to do so. The OFT's understanding from respondents and the Administrator was that indicative bids were based on a limited amount of information and were non-binding.
45. The OFT gathered evidence from a number of businesses who signed non-disclosure agreements. The vast majority indicated that even from the limited information they had access to it was clear that JJB was severely loss making. One third party expressed the view that the business was so severely loss making that only 19 stores made a store level contribution to central overheads in the first seven months of the this year and that they did not believe that JJB could be maintained as a going concern. None of the major sports retailers or other potential bidders that the OFT contacted outside of these 25 respondents showed any interest in acquiring JJB.
46. The OFT's investigation indicated that the following key events took place during the indicative bid stage:
 - Eight indicative bids were made (seven on or before 7 September and one shortly thereafter).
 - Each bid was considered by JJB directors, secured creditors (Lloyds and []) and KPMG with all offers above liquidation value being given serious consideration and those seeking to keep the business as a going concern accorded some preference.

- Three of the offers were not considered credible as they were either below liquidation value or they required further investment by existing shareholders which would not have been available. One of the rejected bids was a joint bid from [] and []. This was rejected on the basis that this bid was considerably lower than the indicative bid placed by SDI [] and would have given a lower return than the [] SDI bid. [] was unable to bid alone.

47. Four bids were taken forward by the Administrator and provided with an opportunity to undertake further due diligence.

Second round bids

48. The remaining four bidders in the sale process were invited to make offers by 21 September for a firm offer. The OFT understands that four bidders remained in the process: SDI, [], the [] (which operates []) and []/[].
49. Both [] and the [] were put into contact with [] by the Administrator who explained to the OFT that it wanted to keep these parties in the process and there was a possibility that [] might be interested in bidding given it was a creditor who had recently invested in JJB and might have had an incentive in maintaining it as a going concern. No agreement for revised joint bids was reached with either [] or with [], although some discussion occurred with [] who were not interested in acquiring JJB on their own.
50. [] made an initial bid for £20 million for the brand, 60 or so stores, online business, all stock held by the acquired stores, goodwill and IP. It informed the OFT that it intended to keep JJB in sportswear. It reduced its offer substantially to £ [] million following due diligence. The administrator confirmed that this revised bid was well below liquidation value. Taking a cautious approach, the OFT asked [] whether it would have been interested in making a bid above liquidation value in any circumstance. [] explained to the OFT that it had decided following further due diligence involving discussions with suppliers and KPMG, that there were a number of significant concerns with the original offer relating to stock (retention of title issues, quality and age), brand support and supplier trading relationships which would impact the ability of a successful turnaround for JJB in competition with SDI. It therefore did not proceed with a higher bid

to remain in the process.

51. [] also made an indicative bid and was the only bidder involved in the sale of sportswear and clothing goods. It made an indicative offer on 7 September 2012 of £20 million which was around the higher estimate of the liquidation value by the Administrator. [] withdrew from the process a few days after the 7 September 2012. [] told the OFT that it was informed by the Administrator that its offer was too low and at that stage in the process it had received at least two higher offers. The OFT considers that it could not be reasonably confident that this offer was below liquidation value and it therefore asked [] whether or not it would have proceeded with its bid had it not been rejected by the Administrator at this stage.¹⁷ [] informed the OFT that its due diligence confirmed that the JJB business was a business in serious decline and that its current strategic aim was to grow its own business and integrate []. Moreover, [] stated that, even if it had moved forward, it would have only made a further offer at a [] lower value, which the OFT considers would have been below liquidation value. In summary, therefore, the OFT, taking a cautious approach, does not consider that [] was a credible and realistic alternative purchaser for the JJB business (or any of the Target Stores).
52. On the basis of the above evidence, the OFT does not consider that there would have been a less anti-competitive purchaser of JJB or any part of it given the extensive marketing exercise undertaken by KPMG and confirmed by the OFT's investigation and discussions with a range of bidders.

c) **What would have happened to the sales of JJB in the event of their exit?**

53. Lastly, the OFT has considered whether the exit of the Overlap Stores and the dispersal of their sales across firms remaining in the market would have been substantially less anticompetitive than their purchase by SDI.
54. The OFT considers that it is most likely that, given its status as the leading sports retailer, a certain proportion of the sales at the Overlap Stores would

¹⁷ The OFT notes that the Administrator submitted that it had not rejected [] and [] had remained in the process and had access to due diligence updates. The Administrator also explained that it had made attempt to contact [] later in the process to seek to obtain further offers from it. This was, in part, confirmed by [].

have, in any event, switched to SDI and thus the merger would have had an extremely limited effect. Moreover, the Overlap Stores represent only 19 of 153 JJB stores. The OFT is also aware that the presence of a store in a location is valuable to consumers and so given that the overlap between the parties is relatively limited in the context of the overall number of stores which were available for sale, the market may be better served having a store present than not given that in any event most of the sales would divert to SDI.

Conclusion

55. Based on the evidence available to it, the OFT believes that all the JJB Stores would have imminently and inevitably exited the market absent the merger and that there would have been no substantially less anticompetitive alternative purchaser for the Overlap Stores to SDI. The exit of the Overlap Stores and the dispersal of their sales across the limited out of market competitors would not have been substantially less anticompetitive than their purchase by SDI. It has therefore not been necessary to undertake any detailed competitive assessment at local level in this case. The OFT considers that the merger will not lead to the realistic prospect of a substantial lessening of competition in any UK market.

COMPETITIVE ASSESSMENT

56. For the sake of completeness, the OFT sets out briefly its competitive assessment in relation to the acquisition of the Target Stores. However, it should be noted that given its approach to the counterfactual, its position is that the prospect of conditions continuing are not realistic absent the merger and that the exiting firm scenario is satisfied in this case. This indicates that the merger can be cleared.
57. In this case, the OFT considered whether the acquisition by SDI of the Target Stores raised *prima facie* competition concerns. On a cautious basis, and in line with the previous Sports Direct/JJB case considered by the OFT and the CC, the OFT considered an appropriate product frame of reference to be the supply of sports goods in the UK. The CC found that the appropriate product market definition only included SDI and JJB and the geographic market was local and likely to be a two- to five-mile radius

around any given store. The OFT did not find any evidence to rebut the CC's finding or show that these two firms were not close competitors in terms of their product offering pre-merger (although JJB was becoming a diminished threat to SDI over the years since the CC Report). Indeed, third parties indicated that they believed the parties competed with each other. The OFT has thus considered that these two firms were competing before the merger.

58. In line with previous retail merger cases, and the previous Sports Direct/JJB case, the OFT considers that there are local aspects to competition and has analysed the merger on a store by store basis.

Local and national issues

59. The OFT therefore considered whether on this cautious frame of reference the merger raised national and/or local concerns. On a national basis, *prima facie* issues arise since there are no other national retailers remaining in the market. In this case, the purchase of the JJB domain name, stock fixtures and fittings and the JJB central warehouse (Key National Assets) means that many major assets associated with carrying on a national sporting goods retail distribution business have been acquired by SDI. As such, the OFT notes that whilst, at first glance, this looks to be a merger of merely a few local stores, in reality, the merger involves much of the key architecture of the pre-merger JJB business. This alone indicates *prima facie* competition concerns on a realistic prospect basis.
60. As regards the local ambit, the OFT, on a cautious basis, used the filters previously used by the CC in Sport Direct/JJB to narrow down the areas of potential competition concern. These filters assessed whether the merger would lead to any fascia reduction within radii of two and five miles, centred on the Target Store, on the basis of a narrow candidate product market of only the national sports retailers, that is just Sports Direct and JJB.
61. In 14 cases (Airdrie, Antrim, Chorley, Cumbernauld, Dorchester, Dover, Elgin, Leamington Spa, Lisburn, Llandudno, Londonderry Strand Road, Rhyl, Rochdale and Winchester), there is no overlap at a local level applying the same criteria as the CC in its 2010 Report. Specifically, given that there is no SDI store within a conservatively applied five mile radius of the relevant Target Store, the Transaction does not give rise to any reduction in choice

or competition in respect of any of these 14 local areas. As such, there are no competition issues in respect of these areas.

62. In two further cases, overlaps are only marginal (Oldbury, where the nearest affected SDI store is four miles away, and West Bromwich, where the nearest affected SDI store is 4.3 miles away). In this respect, SDI referred to the CC's conclusion in its 2010 Report that, given average urban road speeds, a 15-minute journey time by car would correspond to a four-mile catchment area. As such, SDI considers that these stores are each located in discrete local catchments which do not overlap significantly, or at all, with trade from the nearest SDI outlets¹⁸.
63. In three further cases, SDI submitted that the Target Stores are located in discrete local catchments which do not overlap significantly with trade from the nearest SDI outlets (Brighton, Glasgow Silverburn and Leeds Kirkstall¹⁹). However, each of the Target Stores is within five miles from the nearest SDI store and could potentially cause *prima facie* concerns.

¹⁸ SDI submitted that the Oldbury is a marginal no overlap store because:

(a) It is located in a discrete regional shopping centre which

SDI submitted serves, a separate commercial market from the affected SDI store. (b) In any event, the store in Oldbury is making a negative contribution to JJB's central costs. In this respect, SDI notes the CC's conclusion in 2010 that JJB would be better off closing or transferring any stores that do not contribute any profit to cover fixed central costs. SDI submitted that the West Bromwich is a marginal no overlap store because:

(a) The nearest affected SDI store is more than 4 miles away (the CC's conclusion in its 2010 Report established that given average urban road speeds, a 15-minute journey time by car would correspond to a four-mile catchment area); and

(b) The West Bromich store is located in a discrete regional shopping centre which, in SDI's view, serves a separate commercial market from the affected SDI store. In any event, the store in West Bromwich is making a negative contribution to JJB's central costs. In this respect, SDI notes the CC's conclusion in 2010 that JJB would be better off closing or transferring any stores that do not contribute any profit to cover fixed central costs.

¹⁹ The store in Brighton is located in a retail park on the edge of Brighton. The nearest affected SDI store is located in a town centre locality (1.7 miles away) serving in SDI's view, a distinct commercial market from the Target Store. The store in Glasgow Silverburn is located within a large regional shopping centre. The nearest affected SDI store is 2.4 miles away, and in SDI's view, that store serves a separate commercial market from the Target Store. The store in Leeds Kirkstall serves a discrete local market, separate from that served by the SDI stores in Leeds city centre, Bradford and Dewsbury.

64. In line with its approach in *HMV/Zavvi* and the particular circumstances of this case, the OFT decided that it would not be appropriate to conduct an in-depth analysis in relation to the national competition concerns raised by the acquisition of the Key National Assets of its closest competing national retail sporting goods competitor (that is, central warehouse, fixtures and fittings and online business) or the local competition in each of the five Overlap Stores if there was compelling evidence showing that an individual store would have exited the market in any event. That is, if an alternative counterfactual applied. In this case, as set out above, the OFT has been able to reach a requisite level of belief to enable it to decide that the whole of JJB including the five Overlap Stores and the other Key National Assets would have exited the market absent the merger.

ASSESSMENT

65. The OFT believes that it is or may be the case that the share of supply test in section 23(2)(b) of the Act is met and, therefore, that a relevant merger situation has been created. This is because SDI's share of supply of sports goods by national sports retailers (that is SDI, JJB and JD Sports) in the UK, by number of outlets, in 2012 was [40 to 45] per cent with the acquisition of 19 retail outlets from JJB representing an increment of approximately [0 to five] per cent.

66. Based on the evidence available to it, the OFT believes that all the Target Stores and indeed the whole of JJB would have imminently and inevitably exited the market absent the merger and that there would have been no substantially less anticompetitive alternative purchaser for them. In addition, the OFT has concluded that the exit of the JJB and the dispersal of their sales across the sports goods market would have not been substantially less anticompetitive than their purchase by JJB. It is not therefore necessary to undertake a detailed competitive assessment at local level in this case. Accordingly, the merger itself cannot be regarded as the cause of any lessening of competition in those areas.

67. On a cautious basis and in line with CC precedent, the OFT has considered an appropriate frame of reference to be the retailing of sports goods. The CC has found that the only effective competitor to Sports Direct in this market is JJB. Also, as in previous retail merger cases, the OFT considers that the ambit of retailing can be national and local.

68. On a national basis, competition issues may arise due to the combination of SDI with key assets (including the JJB domain name, warehouse and all stock) from its closest competitor JJB. At local level, the OFT has assessed whether the merger would lead to any fascia reduction within radii of two and five miles or within a 20-minute drive-time isochrone, all centred on the JJB's Target Store. On this basis, this merger does not raise any competition concerns in relation to 14 Target Stores. The remaining five Target Stores give rise to horizontal overlaps (Overlap Stores).
69. Consequently, for the reasons set out above, the OFT does not believe that it is or may be the case that the acquisition of the Target Stores by JJB may be expected to result in a substantial lessening of competition within a market or markets in the UK.

DECISION

This merger will therefore not be referred to the Competition Commission under section 22(1) of the Act.