

COMPLETED ACQUISITION BY JD SPORTS FASHION PLC OF FOOTASYLUM PLC

Issues statement

24 October 2019

The reference

1. On 1 October 2019, the Competition and Markets Authority (CMA), in exercise of its duty under section 22(1) of the Enterprise Act 2002 (the Act), referred the completed acquisition by JD Sports Fashion Plc (JD Sports) of Footasylum Plc (Footasylum) (the Merger) for further investigation and report by a group of CMA panel members (the Group).
2. In exercise of its duty under section 35(1) of the Act, the CMA must decide:
 - (a) whether a relevant merger situation has been created; and
 - (b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition (SLC) within any market or markets in the UK for goods or services.
3. In this issues statement, the CMA sets out the main issues it is likely to consider in reaching its decision, having had regard to the evidence available to it to date, including the evidence referred to in the CMA's phase 1 decision (the Phase 1 Decision).¹ This does not preclude the consideration of any other issues which may be identified during the course of its investigation.
4. The CMA is publishing this issues statement to assist parties submitting evidence to its investigation. The issues statement sets out the issues the CMA currently envisages being relevant to its investigation and it invites parties to notify the CMA if there are any additional relevant issues which they believe it should consider.
5. The Phase 1 Decision contains much of the detail underpinning this issues statement and parties are encouraged to read both documents together. The CMA will draw upon the evidence gathered in Phase 1, however it will also be

¹ The Phase 1 Decision is available on the [CMA's case page](#).

gathering and considering further evidence on these and any other issues which may be identified during the course of the investigation.

Background

6. JD Sports is an international retailer of sports casual fashion. It offers sports, fashion and outdoor wear, operating across the UK in-store and online. JD Sports' sports and fashion divisions in the UK have a number of different store brands, its largest being JD (371 stores across the UK and online).² JD Sports also supplies its own brand sports casual fashion products on a wholesale basis and sells its own brand products both online and in its stores. The turnover of JD Sports in the financial year ended 2 February 2019 was [REDACTED] in the UK.
7. JD Sports is listed on the London Stock Exchange and is 57% owned by Pentland Group Plc (Pentland). Pentland is a privately-owned management holding company active in the sports, fashion and outdoor markets. Pentland and JD Sports operate at arm's length under a relationship agreement dated 30 October 2014. This agreement requires that Pentland does not take any action which precludes or inhibits any member of JD Sports from carrying on its business independently of any member of Pentland.
8. Pentland supplies branded casual fashion apparel and footwear products. However, the vast majority of the Pentland brands' sales are at a wholesale level.³
9. Footasylum is a UK-based retailer of sports casual fashion, which was founded in 2005 and admitted to the Alternative Investment Market (AIM) in 2017. Footasylum owns and operates 70 stores in the UK and operates online.⁴ Footasylum also supplies sports casual fashion of its own brand products on a wholesale basis, although these activities represent a small part of Footasylum's business.⁵ Footasylum sells its own brand products in-store and online. The turnover of Footasylum for the financial year ended 24 February 2018 was approximately £194.8 million in the UK.⁶

² It also includes Size? (25 stores across the UK and online); Footpatrol (one store in the UK and online); Tessuti (67 stores in the UK, including Scotts, Choice, Xile and Infinities, and online); Hip Store (two stores across the UK and online); Activinstinct (online only and operating on an arms' length basis). It also includes some more high-tier brands such as Armani Exchange, Choice and Hugo Boss.

³ The majority (more than [REDACTED]% except for [REDACTED], [REDACTED]% and [REDACTED]), [REDACTED]% of sales from Pentland's brands are made at the wholesale level.

⁴ Footasylum has one store under the Drome Men store brand and one under the Seven store brand.

⁵ Footasylum's wholesale operation was launched in 2017 and had a revenue of £2.6 million in FY18 (this is 2% of Footasylum's total turnover).

⁶ Final Merger Notice submitted on 23 July 2019 (FMN), paragraph 3.3 (a) and [Companies House](#).

The transaction

10. The Merger was effected by way of a public offer made by JD Sports for the issued ordinary share capital of Footasylum on 18 March 2019. The offer was announced on the same day. On 12 April 2019, the offer was declared wholly unconditional as to acceptances. Footasylum's shares were delisted from trading on AIM on 16 May 2019. The remaining shares were acquired on 5 June by way of compulsory acquisition. The Merger was not reviewed by any other competition authorities other than the CMA.
11. Throughout this document the CMA refers to JD Sports and Footasylum collectively as the Parties.

Approach to assessing the Merger

12. Below the CMA sets out some specific areas of assessment in order to help parties who wish to make representations to it. However, as noted above, the CMA invites parties to notify it if there are any additional relevant issues which they believe the CMA should consider.

Market definition

13. Market definition provides a framework for the analysis of the competitive effects of a merger. The CMA will define the market within which the merger may give rise to an SLC (the relevant market). The relevant market contains the most significant alternatives available to the customers of the merging parties and includes the most relevant constraints on the behaviour of the merging parties.⁷
14. Market definition is a useful analytical tool to focus much of the CMA's analysis, but it will not determine the outcome of the CMA's analysis of the competitive effects of the merger. In practice, the analysis underpinning the market definition and the assessment of competitive effects overlap, with many of the factors being relevant to both. In its assessment of whether a merger may give rise to an SLC, the CMA may take into account constraints outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others.⁸
15. On the basis of the information obtained to date (including during the CMA's initial Phase 1 investigation), the CMA's preliminary view is that the market definition descriptions set out below are useful starting points for its competitive assessment. However, the CMA will consider any new evidence it

⁷ CMA, *Merger Assessment Guidelines*, paragraph 5.2.1.

⁸ CMA, *Merger Assessment Guidelines*, paragraph 5.2.2.

receives in relation to the market definition and any constraints that may also be taken into account in the competitive effects assessment.

Product scope

16. The Parties overlap in the retail supply of sports casual fashion (including both apparel and footwear) which they supply both in-store and online.⁹ The CMA has set out below the different proposed market definitions within this.

Apparel and footwear

17. In line with previous cases and the Parties' submissions, the CMA's preliminary view is that there are separate product markets for apparel and footwear.

Sports-inspired casual fashion

18. Based on the evidence at Phase 1, the CMA's preliminary view is that the narrowest plausible candidate product market is the retail supply of sports-inspired casual apparel and separately, footwear. Sports-inspired casual fashion products refer to those athletic-inspired products¹⁰ primarily used for leisure purposes.¹¹ The CMA intends to consider the constraints from casual fashion in its competitive assessment.

In-store and online sales

19. The CMA will also consider whether the product scope is segmented by distribution channel, ie between in-store and online sales. The CMA's preliminary view is that there are separate markets for in-store sales and online sales. The CMA intends to take into account any constraint from online retailers as part of its in-store competitive assessment, and vice-versa.

Geographic scope

20. The CMA will also be considering the relevant geographic market for each of in-store footwear/apparel and online footwear/apparel.

⁹ The Parties also overlap at the wholesale level but given that both have a small wholesale presence and that no concerns were expressed about any possible vertical effect arising from the Merger, the CMA does not propose to assess this further unless it receives additional evidence on this point.

¹⁰ This is also sometimes referred to as 'athleisure' however the CMA has not used this term as it understands it is used in different ways.

¹¹ This excludes non-sports-inspired casual fashion products (such as jeans and chinos, boots, brown/black casual shoes) performance sport apparel/footwear, outdoor apparel/footwear and formal apparel/footwear and accessories.

21. In relation to in-store, the CMA notes that consumer demand is generally locally driven, in that consumers tend to choose among retailers in the local area where they live or work. On this basis the CMA's preliminary view is that the geographic market is local. However, the CMA understands that important elements of the Parties' competitive offering are set centrally and applied uniformly across all stores, nationally. The Parties and their potential competitors are also national operators, with nationally-recognised brands and centralised operations. Therefore in this case whilst the CMA's preliminary view is that the in-store geographic market is local, the CMA intends to assess the competitive effects of the Merger on a national basis. This is detailed further below in paragraphs 32 - 36.
22. In relation to the geographic scope of online, the CMA intends to assess the Merger at a national level, as the effects of online retailing apply equally in all local areas.

Competitive effects of the Merger

Counterfactual

23. The CMA will consider the potential effects of the Merger on competition compared with the degree of competition in the counterfactual situation (that is, the situation that would have likely arisen in the short to medium term absent the Merger). For completed mergers the CMA generally adopts the pre-merger conditions of competition as the counterfactual against which to assess the impact of the merger.
24. On the basis of the information obtained to date (including during the Phase 1 investigation), the CMA's preliminary view is that the most likely counterfactual to the Merger is the prevailing conditions of competition. The CMA has not to date seen any evidence to suggest that the competitive dynamics of the industry are likely to change in the short term, substantially, such that it would be appropriate to depart from the pre-Merger conditions of competition.

Theories of harm

25. Theories of harm describe the possible ways in which an SLC may be expected to result from a merger and provide the framework for analysis of the competitive effects of a merger.
26. Set out below are the theories of harm that the CMA currently plans to investigate based on the evidence at Phase 1. However, these may be revised as the inquiry progresses and the CMA is not precluded from finding

an SLC on another basis, following further work by the CMA or on receipt of additional evidence.

27. The CMA intends to assess four ‘horizontal unilateral effects’ theories of harm. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged firm profitably to worsen its offering (increasing prices, and/or reducing quality, range or service levels - PQRS) on its own and without needing to coordinate with its rivals.¹² Horizontal unilateral effects are more likely when the merging parties are close competitors. After the merger, it is less costly for the merging company to worsen its offering because it will recoup the profit on recaptured sales from those customers that switch to the products offered by the other merging company.
28. The CMA plans to assess whether the Merger results or may be expected to result in an SLC as a result of horizontal unilateral effects in:
 - (a) the retail supply of sports-inspired casual apparel in-store, on a national basis (Theory of Harm 1);
 - (b) the retail supply of sports-inspired casual footwear in-store, on a national basis (Theory of Harm 2);
 - (c) the retail supply of sports-inspired casual apparel online, at a national level (Theory of Harm 3); and
 - (d) the retail supply of sports-inspired casual footwear online, at a national level (Theory of Harm 4).

Retail supply of sports-inspired casual apparel and footwear in-store (Theories of Harm 1 and 2)

29. The CMA will explore how closely the Parties compete with each other nationally by looking at for example switching between them, comparisons in the Parties’ respective propositions ie the similarity of product offering and customer targets, the scale of geographic overlaps between the Parties, evidence from internal documents (including how closely they track and monitor each other), shares of supply and views from interested parties about the closeness of competition. The CMA has also commissioned a survey of the Parties’ in-store customers to inform its assessment of competition on a national basis.

¹² CMA, *Merger Assessment Guidelines*, from paragraphs. 5.4.1.

30. Using the same approach as above, the CMA will also be considering whether there are alternative retailers which would provide a strong competitive constraint on the Parties post-Merger; based on the evidence at Phase 1, relevant potential constraints include Foot Locker in particular, as well as Sports Direct, Nike, adidas and TopShop/Topman. As part of this assessment of competitive constraints, the CMA will consider the extent to which potential competitor product offerings differ in range and type, and their access to limited/exclusive¹³ and/or high end/premium products.
31. The CMA will also look at the way that consumers search and purchase products across both in-store and online. This will help inform how physical stores compete with online sports-inspired casual apparel and footwear shopping, the strength of any constraint online channels impose on in-store, and the extent to which online-only retailers may constrain the Parties including for example ASOS, Shop Direct and Zalando.
32. The CMA's intended approach to the competitive assessment has taken into account the evidence and views received at Phase 1. As set out in the Phase 1 Decision, the CMA understands that most of the main elements of the Parties' competitive offering (in terms of PQRS) are set through central decision-making processes and applied uniformly across all stores on a national basis.¹⁴ Prices, quality of products, access to brands¹⁵ and service levels such as staff training, are set and agreed centrally. Store formats, opening hours¹⁶ and branding are also generally uniform across each store.
33. Some parameters may be varied locally (for example product range and staffing decisions). This may be driven by factors such as local demographics, local preferences, store size and local regulation, rather than in response to local competition. The CMA's preliminary view is that the Parties adjust the main parameters of competition on a national basis, as the evidence suggests that local flexing is limited in importance.
34. The CMA has also taken into consideration that the Parties and their potential competitors have a national presence and are nationally recognised brands. Other evidence on the closeness of the Parties' product offering and the overall extent of the Parties' geographic overlap is also informative. Furthermore, the potential closest competitors also have broadly similar national coverage.

¹³ Also referred to as Special Make-up Products (SMUs).

¹⁴ The evidence and CMA's assessment on parameter flexing at Phase 1 is set out in paragraphs 95 - 110 of the Phase 1 Decision.

¹⁵ The CMA considers there is a distinction between product range (the number of products and their differentiation) and access to specific special products such as premium/high-end products, exclusives/SMUs or limited editions.

¹⁶ Opening hours may vary but this is due to local regulation rather than competition.

35. Overall this suggests that the incentives of the merged entity to improve or worsen its competitive offering will be determined by the aggregation of the level of competition in each of the local areas in which one or both of the Parties operate. This view of how the Parties set their competitive offering appears to be supported by evidence from the Parties' internal documents and the views of third parties. The CMA proposes, however, to consider the costs and benefits of changing to more local flexing to inform an assessment of the Parties' incentives to do so.
36. On the basis of each of the above, the CMA therefore intends to focus its competitive assessment of the Merger on a national basis. This national assessment takes account of local effects in aggregation but the CMA is not planning to undertake separate analyses in each local area, such as drawing local catchment areas or calculating local diversion ratios.

Retail supply of sports-inspired casual apparel and footwear online (Theories of Harm 3 and 4)

37. The CMA's approach to these theories of harm will be similar to its approach to Theories of Harm 1 and 2. The CMA will explore how closely the Parties compete with each other for customers purchasing sports-inspired casual apparel and footwear online at a national level. The CMA will also consider the competition the Parties face from alternative sports-inspired casual fashion retailers who offer online sports-inspired casual apparel and/or footwear; based on the evidence at Phase 1 this would include potential constraints from online-only retailers such as ASOS in particular, as well as Zalando and Shop Direct. In addition, the CMA will also consider the potential constraint from retailers such as Foot Locker, Sports Direct, Nike, adidas, TopShop/Topman, Office and Schuh (the latter two only in relation to footwear). As part of this assessment of competitive constraints, the CMA will consider the extent to which potential competitor product offerings differ in range and type, and their access to limited/exclusive and/or high end/premium products.
38. Similarly to Theories of Harm 1 and 2, the CMA will also examine evidence from internal documents, shares of supply and views from interested parties about the closeness of competition. The CMA has commissioned a survey of the Parties' online customers which will also inform its assessment. The CMA will also consider the constraints and interplay between online and in-store retailers and how they compete.
39. The CMA welcomes views and evidence relating to the theories of harm described above and any other issues interested parties consider should be explored in its competitive assessment.

Countervailing factors

40. For all the theories of harm described above, the CMA will consider whether there are countervailing factors which are likely to prevent or mitigate any SLC that it may find.

Entry and expansion

41. The CMA will consider whether entry or expansion by effective competitors in sports-inspired casual fashion with sufficient national presence would be timely, likely and sufficient to prevent any SLC that it may find. To do this, the CMA will assess barriers to entry and expansion, and more specifically evidence relating to:
- (a) whether entry or expansion by rivals is likely to occur in a timely manner, which may include an assessment of the costs and time necessary to enter and/or expand, and any other factors affecting likelihood of successful entry or expansion, such as supplier relationships, regulatory or licensing requirements;
 - (b) whether entry or expansion by rivals is likely, including any plans and the certainty of those plans at a national level; and
 - (c) whether entry or expansion is likely to be sufficient to prevent an SLC from arising.

Efficiencies

42. The CMA will examine any evidence put to it in relation to efficiencies arising from the Merger. In particular, it will consider whether there are Merger-specific rivalry-enhancing efficiencies such that the Merger may not be expected to result in an SLC.

Possible remedies and relevant customer benefits

43. Should the CMA decide that the Merger may be expected to result in an SLC in any market(s), it will consider whether, and if so what, remedies might be appropriate, and will issue a further statement.
44. In any consideration of possible remedies, the CMA may have regard to their effect on any relevant customer benefits in relation to the Merger and, if so, what these benefits are likely to be, and which customers would benefit.

Responses to the issues statement

45. Any party wishing to respond to this issues statement should do so in writing, by **no later than 4pm on 14 November 2019**. Please email jdsports.footasylum@cma.gov.uk or write to:

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