

## JD SPORTS/FOOTASYLUM

### SUMMARY OF COMPANY H's COMMENTS TO THE CMA'S PROVISIONAL FINDINGS

#### 1. INTRODUCTION

- (1) Company H welcomes the CMA's Provisional Findings ("**PFs**") and in particular the CMA's conclusion that the completed acquisition by JD Sports Fashion plc ("**JD Sports**") of Footasylum Limited ("**Footasylum**") (the "**Merger**") has resulted in, or may be expected to result in, a substantial lessening of competition ("**SLC**") in the retail supply of sports-inspired casual footwear (in-store and online) and an SLC in the retail supply of sports-inspired casual apparel (in-store and online) to consumers in the UK (the "**Relevant Markets**").
- (2) While Company H agrees with the CMA's findings that unilateral effects arise as a result of the Merger, in Company H's view the CMA should:
  - (a) consider a narrower market comprising only certain special make-up/exclusive and high-end/premium products that are currently supplied only to a limited number of large-scale, multi-brand retailers in the UK ("**Restricted Products**"); and
  - (b) continue to explore a coordinated effects theory of harm.

#### 2. MARKET DEFINITION

- (3) In relation to coordinated effects, the analysis must be undertaken at a narrower level comprising only the Restricted Products.
- (4) It is access to the Restricted Products that drives: the significant product overlaps between the Parties, and the more limited product overlaps between the Parties and other retailers; <sup>1</sup> the closeness of competition between the Parties (including the high diversion ratio between them); and the lack of material competition from (and diversion to) other retailers:
  - (a) From a demand-side perspective, the Restricted Products are materially and noticeably distinct from other products. Restricted Products are

---

<sup>1</sup> PFs, paragraph 8: "*Each of the Parties has access to some of the higher-tier footwear products that are not available to all retailers*".

available in both JD Sports and Footasylum but are not available in certain other retailers.

- (b) Furthermore, Company H believes that the CMA's survey would have captured consumers' attitudes towards Restricted Products and the lack of substitutability with other products had the CMA tailored the questions to the exact product model purchased.
  - (c) The CMA concludes that its survey results "*might imply that few consumers have strong preferences for products that have limited availability*". Company H questions this conclusion given that in the 'athleisure' industry suppliers and retailers major on the differentiation, prestige, and exclusivity of their products and devote considerable resources accordingly.
- (5) From a supply-side perspective, the CMA notes that, because suppliers' distribution arrangements and segmentation policies can change unilaterally, a particular product could change from being 'restricted' to 'non-restricted' at any time and hence there is no stable basis on which to define a market. However, Company H submits that:
- (a) Market definition is not a static concept – changes from season to season are not evidence that there is no separate, relevant market. It is important to remember that, at any given point in time, there is a distinct set of Restricted Products.
  - (b) The core of the Restricted Products remains more or less constant and any changes are at the margins.

### **3. COORDINATED EFFECTS**

- (6) Company H urges the CMA to deepen its investigation into coordinated effects and notes that there is already a wealth of evidence at the CMA's disposal that robustly supports a coordinated effects theory of harm. Amongst other things:
- (a) **The market is conducive to coordination**
    - (i) **There is no complexity in identifying a focal point**, as there are a limited number of Restricted Products with distinct characteristics. These are clearly distinguishable in terms of quality, design, marketing, and distribution network.
    - (ii) **There is no lack of transparency around product access.** Lack of transparency may affect only highly differentiated retailers who may only receive limited volumes.

- (b) **Coordination would be externally sustainable.** The CMA has already demonstrated all of the relevant components of external sustainability of coordination indirectly as part of its unilateral effects analysis. In particular, through its conclusion that there are very limited competitive constraints on JD Sports and Footasylum in both footwear and apparel.
- (c) **There is evidence of merger-specific effects.** The Merger lessens the complexity of the market dynamics, improving the conditions for coordination.