

## Summary

### Overview of our findings

1. The Competition and Markets Authority (CMA) has found that the completed acquisition by JD Sports Fashion plc (JD Sports) of Footasylum plc (Footasylum) (together, the Parties) has resulted, or may be expected to result, in a substantial lessening of competition (SLC) in the retail supply of sports-inspired casual footwear and in the retail supply of sports-inspired casual apparel sold both in stores and online in the UK.

### Background to the Remittal

2. On 6 May 2020, the CMA announced its decision that the completed acquisition by JD Sports of Footasylum (the Merger) has resulted or may be expected to result, in an SLC.
3. On 17 June 2020, JD Sports submitted a Notice of Application (JD Sports' Application) to challenge certain of the CMA's findings in the Phase 2 report (the CMA's Phase 2 Final Report) to the Competition Appeal Tribunal (the Tribunal).
4. On 13 November 2020, the Tribunal issued its judgment (Judgment). The Judgment dismissed JD Sports' Application regarding several aspects of the CMA's competitive assessment and found that there was no error of law in the CMA's overarching analytical approach. However, the Tribunal upheld JD Sports' Application as regards the CMA's assessment of the possible effect of Coronavirus (COVID-19) on Footasylum under the counterfactual, and on the impact of Coronavirus (COVID-19) on the likely post-merger constraints from Nike's and adidas's own direct-to-consumer (DTC) retail offer.
3. The Tribunal quashed the CMA's Phase 2 Final Report insofar as its conclusions were based on the CMA's assessment of the likely effects of the Coronavirus (COVID-19) pandemic (i) on the relevant markets, (ii) on the Parties and/or the Merged Entity, and (iii) on the competitive constraints likely to apply to the Parties and/or the Merged Entity. The Tribunal further remarked that *'we consider that the assessment of these effects is sufficiently material to the CMA's overall conclusions as to require further examination of the FR [Final Report] as a whole and we therefore remit the case to the CMA for reconsideration in the light of this judgment'*.

5. In December 2020 the CMA sought permission to appeal the Tribunal's judgment at the Court of Appeal. In March 2021 the Court of Appeal decided not to grant leave for the CMA to appeal the judgment. Therefore, the CMA was required to investigate the Merger under remittal. We refer to our inquiry as 'the Remittal'.

## **The Merger Parties**

6. JD Sports is an international retailer and the UK's largest retailer of sports-inspired casual footwear and apparel. It sells via stores and online. Its UK revenue in 2020/21 was £2.5 billion.
7. Footasylum is a retailer of sports-inspired casual footwear and apparel. It sells via stores and online.

## **Our assessment**

### **How we have approached the Remittal**

8. We have assessed whether the Merger has resulted or may be expected to result in an SLC arising from horizontal unilateral effects in:
  - (a) the retail supply of sports-inspired casual footwear in-store and online in the UK; and
  - (b) the retail supply of sports-inspired casual apparel in-store and online in the UK.
9. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged entity to worsen its offering profitably or not improve that offering as much as it would otherwise have done across aspects of price, quality, range and service levels – collectively referred to as 'PQRS'. Horizontal unilateral effects are more likely when the merging parties are close competitors (ie their products are close substitutes).
10. Since the CMA's Phase 2 Final Report, the Coronavirus (COVID-19) pandemic has resulted in several national and local lockdowns in the UK as well as further restrictions that have affected how people shop, work and travel. For example, there have been times when shopping in-store was prohibited and times when shopping in-store was allowed but subjected to social distancing rules. Where they are able to, many UK workers have been working from home which has affected their shopping habits.

11. These factors have of course affected the retailers and consumers in our Remittal inquiry. For example, although we have seen growth in online shopping for sports-inspired casual footwear and apparel, that growth has not only come from JD Sports, Footasylum and Foot Locker (who were the main retailers in the CMA's Phase 2 Final Report) but also from Nike and adidas and some online only retailers. In the Remittal we have assessed the impact of the Coronavirus (COVID-19) pandemic to date on competition and taken into account the most recent evidence on other relevant factors impacting on competitive dynamics. We have considered whether the changes we have seen since the CMA's Phase 2 Final Report are enduring changes that are likely to affect competition in the future.

### **How competition operates in these markets**

12. We have found that retailers compete on a wide range of parameters across a number of different aspects of PQRS. However, retailers do not have complete discretion over their PQRS offer to their customers. There are parameters of competition that Nike and adidas, the two most important suppliers, influence and, in some instances, actively monitor in order to ensure that their products are displayed, marketed and sold in the type of retail environment (whether in-store or online) that they consider benefits them. For example, these suppliers determine which retailers receive certain product ranges and the volumes that they receive. Suppliers set recommended retail prices (RRPs) which are generally followed by retailers. We have also found other aspects of PQRS that are influenced by suppliers.
13. However, we have also found that retailers are able to compete on aspects of PQRS that are not directly influenced by suppliers or retailers flex their offerings above suppliers' standards. Suppliers do not monitor and engage in all aspects of retail competition, and in some cases have little (if any) incentive to constrain relative deterioration in the retail offer. We have found that price competition takes place on discounts, delivery charges and product prices during sales, for example. Retailers may, in addition, compete on other factors that are important to consumers such as store locations and sizes, staffing levels, the mix of brands and own labels they offer, service levels of online shopping including website and app functionalities, speed of delivery and product returns policies. Although suppliers monitor some of these factors in order to evaluate which retailers give consumers the best shopping experience (eg service levels of online shopping) we have found that the suppliers' constraint on retailers is not so significant as to prevent a worsening of aspects of PQRS. We therefore think that there are a range of aspects of PQRS that could be worsened in the event of the Merger leading to an SLC.

14. We have found that suppliers allocate products to retailers via their selective distribution policies which places retailers into categories that determines for each retailer its range and volume of products and the timing of supply. We have found that JD Sports is a valued retailer in the eyes of suppliers. Footasylum is able to access product ranges and volumes that enable it to compete effectively. We have taken these distribution policies into account in our assessment.

## **The counterfactual – would Footasylum compete without the Merger?**

15. We have compared competition with the Merger against the competitive situation that we think would likely exist in the absence of the Merger. This situation, referred to as the ‘counterfactual’, is the benchmark against which we have assessed the competitive effects of the Merger.
16. The Parties have submitted that Footasylum like other retailers is vulnerable to progressive disintermediation: Nike’s and adidas’s clearly stated policies are to reduce the number of retailers. These brands are important suppliers to Footasylum and their products are an important part of the close competition between Footasylum and JD Sports. We have therefore sought evidence on this from Nike and adidas.
17. We have subjected the evidence supplied by the brands to close scrutiny. The large bulk of this evidence is confidential. We used our statutory information-gathering powers on multiple occasions to require production of a significant amount of information and have held a formal hearing with Nike and adidas. We have considered the evidence on whether Footasylum may continue to be supplied by Nike and/or adidas (whether in a reduced format or having its supply stopped).
18. We have considered evidence on the range and volume of products that Footasylum has received each quarter from 2019, examining annual changes and quarter-on-quarter comparisons. We have looked at the evidence regarding supply disruptions resulting from short-term production or supply issues and the evidence on longer term supply to Footasylum. We have also examined Nike and adidas internal documents about its supply to UK retailers including Footasylum (and JD Sports) which have been probative.
19. Having considered the evidence submitted by the Parties and by Nike and adidas we are satisfied on the basis of the facts available that the most likely scenario that would have occurred absent the Merger is that Footasylum would have continued to receive products by Nike and adidas so that it could

compete (in a similar way as it does today) in our counterfactual. Similarly, JD Sports would have exerted the same degree of competitive constraint as it does today.

## **Competition between the Parties**

### ***Footwear and apparel***

20. Competition between retailers drives good outcomes for shoppers (in terms of better deals, quality, service, range and other continuous improvements). It is therefore necessary to understand how each of the merging businesses competes against the other and how they compete against other retailers. If two closely competing retailers merge, each will be under less competitive pressure which means they will not work as hard to offer good deals to their customers or make improvements to their businesses as they otherwise would have done.
21. In our assessment, we have taken into account the nature of competition. In the retail of sports-inspired casual footwear and apparel, competition between retailers varies depending on an array of factors that include the products that they are able to stock, the customer groups that they are able to attract, the marketing they undertake, the in-store and online shopping experience that they offer and their branding and reputation.
22. We have therefore considered whether JD Sports competes closely with Footasylum and vice versa, and which other retailers are close competitors to them. Firms are close competitors if their customers view them as alternatives to each other – ie customers would be willing to switch between the two firms, and, as a result, the two firms compete to win and retain customers by offering a better product and service.
23. In assessing the Merger, we have looked at a wide range of evidence which we considered in the round to reach our decision.
24. The Parties are both large, national, multi-brand retailers of sports-inspired casual footwear. They each serve a large number of customers and have national reach both through their stores and their online deliveries. There is a high degree of geographic overlap of the Parties' physical stores. The Parties both target a similar demographic – 16-24-year-old males, although the focus on males is more pronounced for Footasylum.
25. To target this customer base, JD Sports and Footasylum stock a similar range of branded sports-inspired casual footwear and apparel, although we have

found some differences. For example, Footasylum has a low overlap with JD Sports on adidas footwear products and the Parties' product overlap is lower on apparel than footwear. JD Sports consistently stocks a high proportion of the Nike and adidas footwear and apparel products (ie the two most popular brands) that Footasylum sells.

26. We carried out a survey of online customers of the Parties in May 2021 (Remittal Online Survey). This survey found that for both footwear and apparel, JD Sports was by far and away the closest alternative for Footasylum's online customers. Over 40% of Footasylum customers for footwear and half of Footasylum customers for apparel said they would go to JD Sports in the event that they could not shop at Footasylum. These figures were substantially higher than for any other retailer.
27. The Remittal Online Survey results showed a much lower proportion of JD Sports customers considered Footasylum to be their best alternative. Only 9% of JD Sports' online footwear customers said they would go to Footasylum and 8% of its online apparel customers said they would go to Footasylum if they could no longer shop at JD Sports.
28. These survey results indicate that Footasylum has weakened relative to JD Sports since the CMA's Phase 2 Report. More JD Sports customers now consider Nike, Foot Locker and adidas as their alternatives than they do Footasylum. Previously Footasylum was the second-best alternative after Nike. Whilst in-store diversion between the Parties may still be higher than online diversion, we consider these changes in online diversion to be informative and consistent with other evidence on market developments.
29. Using the Remittal Online Survey results, we estimated the strength of the incentive to worsen some aspects of PQRS at the national level for both Parties using 'Gross Upward Pricing Pressure Indices' (GUPPIs), which is commonly used in the CMA's merger investigations. The online GUPPI results are very high for Footasylum in both the footwear and apparel markets, which suggests the Merged Entity would have a very strong incentive to worsen some aspects of PQRS at Footasylum, but considerably lower for JD Sports (indicating a weaker incentive to worsen PQRS at JD Sports).
30. Although for practical reasons relating to COVID-19 we did not carry out a survey of in-store shoppers during the Remittal, the CMA had carried out such a survey in its Phase 2 investigation (Phase 2 Exit Survey) and found a very high proportion of Footasylum's customers said that they would shop at JD Sports if they could no longer shop at Footasylum. Indeed the proportions of respondents from that survey were so high that we believe the proportion of

Footasylum customers today who would select JD Sports as their best alternative to Footasylum would still be sizeable even after taking into account that the proportion may have decreased in view of market developments. Any reasonable adjustment to the diversion would still see Footasylum customers diverting to JD Sports ahead of any other rival. This is because the physical proximity of many Footasylum stores to JD Sports stores has not changed, neither the Parties nor their rivals have been opening or closing large numbers of stores and the fact that they both sell similar products aimed at similar customers. Based on the evidence from the Phase 2 Exit Survey, we expect that in-store and combined in-store and online GUPPIs would be higher than the online ones, although they may be lower than at Phase 2 due to market developments.

31. The Parties agreed that any reasonable adjustment to the Phase 2 Exit Survey results would still yield large diversions from Footasylum to JD Sports and a high GUPPI. However, the Parties argued that GUPPI analysis is a static analysis and we ought to take account of relevant market developments such as the shift to online shopping, the growth of Nike's and adidas's DTC sales and possible changes to Footasylum's product allocations. We took these factors into account in our findings.
32. We also found that the Parties' internal documents imply that they view each other as competitors.
33. We therefore consider that the evidence shows a consistent picture that JD Sports is an especially close competitor and strong competitive constraint on Footasylum in the retail supply of sports-inspired casual footwear in-store and online in the UK, and in the retail supply of sports-inspired casual apparel in-store and online in the UK. It is by far the closest competitor to Footasylum. The Merged Entity will have a strong incentive to worsen Footasylum's offering.
34. However, the evidence does not indicate that Footasylum is a strong competitive constraint on JD Sports in either footwear or apparel.

## **Competition with rivals**

### ***Footwear***

35. We have used a range of evidence to assess what competition the Parties face from rivals in the relevant markets. The evidence we have used includes survey evidence in which customers identified which retailer they consider to be their best alternative retailer, the degree of product overlap with the

Parties, the sales performance of the retailer since the CMA's Phase 2 Final Report, Nike's and adidas's product allocation category for the retailer, the extent to which Parties monitor particular rivals in their internal documents, and views of third parties.

36. We also looked at evidence relating to the retailer's future performance, whether through a supplier's product allocation category (eg a Strategic Partner to Nike or adidas), the retailer's own growth forecasts or recent changes to the business or investment.
37. We have found that Nike, adidas and Foot Locker exert a competitive constraint on both Parties in footwear. We consider that the other retailers are weak competitive constraints on the Parties.
38. The evidence indicates that Nike's DTC sales channels have grown strongly over the past year and are expected to grow further in footwear. In our Remittal Online Survey, online customers of Footasylum and JD Sports responded that Nike is a popular alternative for online footwear shoppers. Indeed, for Footasylum's customers Nike was ranked second only to JD Sports as their best alternative to Footasylum. The other evidence that we looked at, including the CMA's Phase 2 Exit Survey of in-store shoppers, Parties' internal documents and other retailers' views, also indicates that Nike exerts a competitive constraint on both Parties in footwear. In terms of constraints for online consumers, Nike is a stronger constraint on JD Sports than Footasylum is, but is a much weaker constraint on Footasylum than JD Sports is. Put another way, the evidence indicates that JD Sports imposes a very significant constraint on Footasylum and that, while Nike also imposes some constraint on Footasylum, it is considerably less than the constraint from JD Sports. We consider that Nike is likely to become a stronger constraint to both Parties in the future as a result of growth in its DTC offering.
39. adidas too has seen its sales through its DTC channels grow strongly over the past year. We consider that adidas exerts some competitive constraint on both Parties in footwear although less than Nike. In terms of constraints for online consumers, adidas is a more important constraint on JD Sports than it is on Footasylum and it is a much weaker constraint on Footasylum than JD Sports is. adidas is likely to become a stronger constraint to both in the future, particularly in the online segment, as a result of growth in its DTC offering.
40. In regard to Foot Locker, the evidence that we looked at, including survey results, evidence on product overlaps with the Parties, evidence from suppliers on allocation of products to retailers, the Parties' internal documents, and market shares indicates that Foot Locker exerts a



competitive constraint on both Parties in footwear. However, Foot Locker poses a weaker constraint on Footasylum than JD Sports does.

41. We have found that numerous other retailers offer sports-inspired casual footwear but taken in the round the evidence indicates that these other retailers, individually and collectively, impose only a weak competitive constraint on the Parties.
42. Taking the current constraints in aggregate, we have found they pose a much smaller constraint on Footasylum than JD Sports does. Given how closely JD Sports competes with Footasylum, and the size of the gap to the next closest competitor, we do not consider the current aggregate horizontal constraints to be sufficient to offset the incentive to deteriorate PQRS at Footasylum as indicated by the GUPPI and other evidence.
43. We have looked at the evidence from suppliers on their future product allocation strategies (this evidence is also relevant to our consideration of apparel). We expect some retailers will become stronger (Nike DTC and adidas DTC) and Foot Locker will maintain its position. However, we do not expect future growth of these rivals will be sufficient to counter the loss of competition from the Merger.
44. We have found that the aggregate constraints from rival retailers, combined with the constraints that suppliers impart on the retailers (in terms of how retailers can flex PQRS or in product allocation), would not be sufficient to offset the substantial loss of constraint from JD Sports on Footasylum in the retail supply of sports-inspired casual footwear. Specifically, the SLC that we have found is driven by the competitive constraint that JD Sports imparts on Footasylum. Therefore, the Merger is more likely than not to give rise to an incentive to deteriorate PQRS at Footasylum post-Merger even taking into account the constraints that suppliers impart on retailers.

### ***Apparel***

45. We have used the same types of evidence in assessing competitors in apparel as we did in footwear.
46. In apparel we note that Nike and adidas account for a much smaller proportion of Footasylum's sales than they do in footwear (owing to Footasylum's strong own brand offering and the inclusion of other brands such as North Face and Under Armour).
47. We consider that Nike exerts a competitive constraint on JD Sports for online customers for apparel but is a much weaker constraint on Footasylum than JD

Sports' constraint. This is particularly pronounced given the lower importance of Nike products for Footasylum's apparel sales. Our Remittal Online Survey showed that Nike was second only to JD Sports when customers were asked where they would shop for apparel if Footasylum was not available. The evidence also shows that Nike's constraint is likely to be less important for in-store customers given its more limited store presence and its lower diversions for in-stores customers from the CMA's Phase 2 Exit Survey. While Nike's constraint is likely to grow stronger in the future it is considerably weaker than the constraint JD Sports places on Footasylum.

48. In addition, adidas and the online only retailer, ASOS, both exert some constraint on JD Sports and Footasylum, although not to the same extent as Nike. For online shoppers specifically, where both of these retailers are stronger, they are stronger constraints on JD Sports than Footasylum is but are much weaker constraints on Footasylum than JD Sports. All three competitors are stronger constraints on the Parties for online customers than in-store customers. We also expect that the constraint from adidas and ASOS may increase slightly in the future (although, in the case of ASOS, not to the extent of Nike given its starting position is much weaker and has a different consumer focus).
49. Other retailers, such as Sports Direct and Foot Locker provide a smaller constraint in apparel, and we have not identified any other retailer who is likely to act as a strong competitive constraint on the Merged Entity.
50. Taking these constraints in aggregate, we found that the aggregate constraint on Footasylum relative to JD Sports to be only moderate at best. To give an example, our Remittal Online Survey of Footasylum shoppers of apparel showed small minorities of shoppers listed Nike (9%), ASOS (6%) and Foot Locker (5%) as close substitutes to Footasylum but this is set in the context of 50% of respondents listing JD Sports as their best alternative.
51. We have found that the aggregate constraints from rival retailers, combined with the constraints that suppliers impart on the retailers (in terms of how retailers can flex PQRS or in product allocation), would not be sufficient to offset the very substantial loss of constraint from JD Sports on Footasylum in the retail supply of sports-inspired casual apparel. The SLC that we have found is driven by the competitive constraint that JD Sports imparts on Footasylum. Therefore, the Merger is more likely than not to give rise to an incentive to deteriorate PQRS at Footasylum post-Merger.

## ***Entry or expansion***

52. For both footwear and apparel, we looked at whether entry or expansion would prevent an SLC from arising. We do not consider that entry and/or expansion would be timely, likely and sufficient to prevent the SLCs we have found.

## **Conclusion**

53. This Merger would bring together two close competitors which would lead to worse outcomes for Footasylum's shoppers. On the basis of a significant amount of evidence, we have concluded that the Merger has resulted or may be expected to result in a substantial lessening of competition in:
- (a) the retail supply of sports-inspired casual footwear in-store and online in the UK; and
  - (b) the retail supply of sports-inspired casual apparel in-store and online in the UK.
54. The SLC that we have found in our Remittal differs from the CMA's Phase 2 Final Report in that whilst there is a loss of constraint from Footasylum on JD as a result of the Merger, the SLC is based primarily on the removal of the constraint imposed by JD Sports on Footasylum. This reflects our findings on market developments since the CMA's Phase 2 Final Report which have resulted in Footasylum becoming a weaker constraint and other competitors becoming stronger constraints on JD Sports. However, these market developments have not weakened Footasylum to such an extent that the merger does not result in an SLC in the market.
55. We have decided that the sale of the entirety of Footasylum to a purchaser approved by the CMA is an effective and proportionate remedy.