# Completed acquisition by JD Sports Fashion plc of Footasylum plc

## Decision to impose a penalty on Footasylum Limited[1] under sections 94A and 110 of the Enterprise Act 2002

### Summary of the decision

1. On 14 February 2022 the CMA gave notice to Footasylum that it has imposed a penalty of £380,000 because Footasylum has failed to comply, without reasonable excuse, with certain provisions of the interim order issued by the CMA on19 May 2021 under section 81 of the EA02 to JD Sports, Footasylum, and others (**IO**).

2. On at least two occasions since the IO was issued, the Executive Chairmen and Chief Executive Officers (the **CEOs**) of JD Sports, Peter Cowgill, and Footasylum, Barry Bown, have had meetings, one in person and one by telephone, where information amounting to business secrets, know-how, commercially sensitive information, intellectual property or any other information of a confidential or proprietary nature (collectively referred to as **CSI**) was exchanged. Neither of these meetings were reported to the CMA before or immediately reported afterwards, even when a reporting requirement was triggered by their content, or, in circumstances where there was some reason to suspect a breach of the IO.

3. The CMA found that Footasylum did not take steps to actively and at all times prevent the disclosure of CSI in breach of paragraph 6(l) of the IO, by having in place fit for purpose policies, procedures and safeguards which would capture meetings between senior members of management of the respective businesses before those meetings took place, assess or check those meetings for compliance with the IO and ensure appropriate records were maintained. The failure to do so amounted to a breach of the IO (**Breach 1**).

4. CSI passed between the Parties on at least two occasions, one in a meeting in a carpark and one over the telephone (**Breach 2**).

5. Footasylum also failed to notify the CMA following the meetings to alert the CMA that CSI was exchanged or that there was at least reason to suspect CSI may have been exchanged (**Breach 3**). JD Sports has partially admitted that CSI was exchanged and triggered its notification requirement, however, Footasylum has not made the same admission. Footasylum did not query with

[1] Formerly Footasylum plc.

the CMA whether the meetings were compliant with the IO. More than two weeks after the August Meeting, Footasylum, in collaboration with JD Sports, sent the CMA a high-level summary of the August Meeting. The email was caveated and provided an incomplete summary of the phone call between the two CEOs as neither CEO could recall any detail around what was discussed, took no notes during the call, and made no record of the call taking place. The email came only after the CMA had required Footasylum to report on meetings held between the Parties.

6. Footasylum's conduct shows serious failures to comply with the IO. One consequence of these failures is that the CMA has no contemporaneous information on which to assess whether the meetings between the CEOs of the Parties involved or risked pre-emptive action. The Parties have been unable to provide complete and accurate accounts of the July and August Meetings. The CMA has had to make some inferences that the Parties' conduct did in fact involve, or at least risked, pre-emptive action. Such failures to comply undermine the CMA's ability to properly monitor and enforce compliance with the IO.

7. If the CMA is unable properly to monitor compliance with its interim measures (such as the IO) because the parties to the IO do not adequately comply with their obligations (as happened in this case), this undermines a key aspect of the UK's voluntary, non-suspensory merger regime. The imposition of interim measures is essential to the CMA's role in regulating merger activity, and the CMA's ability to regulate mergers effectively is a matter of public importance.

***Risk of pre-emptive action***

8. The CMA's ability to adopt interim measures has a similar purpose to the suspensory effect of merger notifications in many mandatory merger control regimes (such as the European Union). Interim measures play a critical role in preventing pre-emptive action. Breaches of the IO undermine the CMA's ability to prevent, monitor and ultimately remedy any pre-emptive action taken by merger parties, eg action that might prejudice the outcome of the CMA's investigation or impede the taking of any remedial action that might ultimately be appropriate.

**No reasonable excuse**

9. The CMA has found that Footasylum has no reasonable excuse for its failures to comply with the IO. The CMA has carefully considered Footasylum's Representations in relation to these breaches and concluded that these explanations do not amount to a reasonable excuse.

10. These failures were not caused by a significant and genuinely unforeseeable or unusual event. Nor were they caused by events beyond the control of JD Sports.

**Decision to impose penalty for the IO breaches**

11. The CMA has decided, having had regard to its statutory duties and the Penalties Guidance, and to all the relevant circumstances of the case, that:

    (a) it is appropriate to impose a penalty in connection with Breaches 1 to 3, including the serious nature of Footasylum's failure to comply with the IO and the risks arising from it, and the fundamental undermining of the CMA's ability to prevent, monitor and ultimately remedy any pre-emptive action. In relation to Breaches 2 and 3 the CMA has considered the flagrant and serious nature of these two breaches.

    (b) that a penalty of:

        i. £200,000 for Breach 1;

        ii. £90,000 for Breach 2 and

        iii. £90,000 for Breach 3,

        is appropriate and proportionate in the round to achieve the CMA's policy objectives of incentivising compliance with interim measures and deterring future failures to comply with both Footasylum and other persons who may be considering future non-compliance.

    (c) The penalty for Footasylum's failure to comply is proportionate, given the penalty for Breaches 1 to 3 represents only 0.15% of Footasylum's global turnover (substantially below the statutory maximum of 5% of Footasylum's global turnover), and in view of Footasylum's financial resources, a penalty of the amount in this decision is not anomalous, nor would it affect Footasylum disproportionately at 1.1 % of net assets.

***Failure to comply with RFI9***

12. The CMA has found that Footasylum failed to comply with an information notice under section 109 of the EA02. Footasylum's response to an information notice stated that a meeting which took place on 22 December 2020 between Mr Cowgill and Mr Bown did not involve any documents being tabled and/or exchanged. Video footage of that meeting, which the CMA has shared with Footasylum, shows that during the meeting which took place in Mr Bown's black Porsche, Mr Cowgill and Mr Bown shared and discussed a

document, which appeared to be a spreadsheet. The CMA's information request specifically required Footasylum to 'provide any documents that were tabled or exchanged during that meeting'.

***Decision to impose penalty for the failure to comply with RFI9***

13. The CMA has decided, having had regard to its statutory duties and the Penalties Guidance, as well as to all the relevant circumstances of the case and Footasylum's Representations, to impose a penalty of £20,000 for the failure to comply with s 109 of the EA02. The CMA considers that the failure to fully and properly respond to an information request is a flagrant and serious breach of Footasylum's obligations to comply with its obligations under the EA02 which undermines the purpose of section 109 EA02 notices and the CMA's ability to accurately gather information about potential issues connected to the Merger.

14. A penalty of £20,000 is appropriate and proportionate in the round to achieve the CMA's policy objectives of incentivising compliance with section 109 EA02 notices and deterring future failures to comply by both Footasylum and other persons who may be considering future non-compliance.