

Penalty notice under section 174A of the Enterprise Act 2002

Supply of road fuel in the United
Kingdom market study

Case: 51196
Addressed to:
Asda Group Limited

20 June 2023

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The Competition and Markets Authority has excluded from this published version of the penalty notice information which it considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [X].

Supply of road fuel in the United Kingdom market study

Notice of a penalty

The Competition and Markets Authority (the '**CMA**') gives notice under sections 174A and 112 of the Enterprise Act 2002 (the '**Act**')¹ of the following:

- a. On 20 June 2023 the CMA imposed a penalty on Asda Group Limited ('**Asda**') under section 174A(1) of the Act because it failed, without reasonable excuse, to comply with the requirements imposed on it by the notice issued to Asda under section 174(3) of the Act on 10 May 2023 (the '**May Notice**').
- b. The penalty is a fixed amount of **£30,000**.
- c. Asda is required to pay the penalty in a single payment, by cheque or bank transfer, to an account specified to Asda by the CMA, by close of banking business on the date which is 28 days from the date of service of this notice to Asda.
- d. Asda may pay the penalty earlier than the date by which it is required to be paid.
- e. Under section 112(3) of the Act, Asda has the right to apply to the CMA within 14 days of the date on which this notice is served on Asda for the CMA to specify a different date by which the penalty is to be paid.
- f. Under section 114 of the Act, Asda has the right to apply to the Competition Appeal Tribunal against any decision the CMA reaches in response to an application under section 112(3) of the Act, within the period of 28 days starting with the day on which Asda is notified of that decision.
- g. Under section 114 of the Act Asda has the right to apply to the Competition Appeal Tribunal within the period of 28 days starting with the day on which this penalty notice is served on Asda in relation to:
 - i. the imposition or nature of the penalty;
 - ii. the amount of the penalty; or
 - iii. the date by which the penalty is required to be paid.
- h. Under sections 113 and 115 of the Act, where a penalty, or any portion of such penalty, has not been paid before the date on which it is required to be paid and there is no pending appeal under section 114 of the Act, the CMA may recover the penalty and any interest which has not been paid; in England and Wales and Northern Ireland such penalty and interest may be recovered as a civil debt due to the CMA.

Structure of this document

This document is structured as follows:

- a. section A sets out an executive summary of this notice;
- b. section B sets out the factual background to this notice;
- c. section C sets out the legal assessment, considers the statutory requirements for imposing a penalty under section 174A of the Act, and sets out the reasons for the CMA's finding that Asda failed to comply with requirements of the May Notice without reasonable excuse; and
- d. section D sets out the CMA's reasons for finding that a fixed penalty of £30,000 is appropriate and proportionate in this case.

¹ References in this penalty notice to the Act are to the Act as amended by the Enterprise and Regulatory Reform Act 2013.

A. Executive summary

Failure to comply with the requirements of the May Notice

1. On 8 July 2022, the CMA launched a market study under section 5 of the Act into the supply of road fuel in the United Kingdom (the '**Market Study**') and on 10 May 2023 the CMA issued the May Notice to Asda in relation to the Market Study. The CMA finds that Asda failed to comply with requirements of the May Notice.
2. The May Notice stated that '*Asda is required to attend in person at the CMA's offices at The Cabot, 25 Cabot Square, London E14 4QZ on Wednesday 17 May 2023 at 2pm to give evidence to the CMA on the topics identified in Annex 1 of the Notice for the purpose of its road fuel market study*'. Annex 1 to the May Notice stated that the topics to be covered in the interview included:
 - a. '*How management involvement in setting road fuel prices has changed since 2020*'; and
 - b. '*Changes to Asda's business structure and targets since the acquisition by Bellis Acquisition Company 3 Limited, and how these have affected its road fuel prices*'.
3. The CMA shared a list of the documents it wished to discuss with Asda in advance of the interview. These were Asda's own documents which it had submitted to the CMA in the course of the Market Study.
4. The individual who attended the CMA's offices to give evidence on Wednesday 17 May 2023 was not able to answer questions on these topics or to explain statements in one of the relevant documents (Asda's [redacted] executive committee minutes) that were potentially material to those topics: referring to a '*potential opportunity in petrol pricing*'; '*An updated [redacted]*'; and to '*[125-175] [redacted] fuel sites*'.

Without reasonable excuse

5. The CMA finds that Asda had no reasonable excuse for its failure to comply with the requirements of the May Notice. The situation which led to non-compliance with requirements of the May Notice was not caused by an event beyond the control of Asda, or the result of a significant and genuinely unforeseeable or unusual event.²
6. The CMA sent Asda a draft of the May Notice and an agenda for the interview on 4 May 2023, giving Asda 13 days' notice of the topics to be covered at the interview. The agenda included the topics above and the CMA was clear that it required Asda to identify an individual able to explain the position of Asda's senior management on the matters set out in the agenda.

² *Administrative penalties: Statement of Policy on the CMA's Approach (CMA4)* (the '**Guidance**'), para. 4.4.

7. In response Asda identified its [Asda manager] as the individual appropriately placed to answer questions on the agenda.
8. In response to Asda's concern that certain matters might be outside the personal knowledge of its nominated individual, the CMA told Asda that it was content for an additional Asda staff member to attend who was close to the subject matter covered on the agenda. The CMA reiterated this when issuing the May Notice in final form; and again when sending the list of Asda documents it wished to discuss at the interview, which specifically listed the relevant page of Asda's [X] executive committee minutes that the CMA wished to discuss.
9. Nonetheless, Asda did not bring to the interview anyone qualified to speak to the topics in paragraph 2 above or the statements in paragraph 4 above and the individual that attended was not able to answer the CMA's questions on these matters.

Decision to impose a penalty

10. The CMA finds that it is appropriate and proportionate to impose a penalty on Asda for non-compliance with requirements of the May Notice because the failure to comply adversely affected the conduct of the Market Study and it is in the interests of deterrence.
11. In these circumstances, the CMA finds that a fixed penalty of £30,000 is an appropriate and proportionate penalty.

B. Factual background

Context

12. The purpose of the Market Study is to consider the extent to which a matter in relation to the supply of road fuel has or may have effects adverse to the interests of consumers, and to assess the extent to which steps can and should be taken to remedy, mitigate or prevent any such adverse effects.
13. On 6 December 2022, the CMA published an initial update report on its work in the Market Study. The CMA noted that the margins supermarkets were making from the sale of road fuel had increased significantly since 2017, and that it would be seeking evidence from supermarkets on the reasons for this increase.³ The CMA

³ See, e.g., paragraph 50 of the Executive Summary of the [Initial Update](#) published on 6 December: 'There are several potential explanations for why fuel margins have increased. Retailers could be facing increases in non-fuel operating costs, meaning that increasing fuel margins are not equating to increasing operating margins. It could be that retailers are making higher operating margins from fuel; if so, this could be offset by lower margins in other parts of their business (ie grocery sales), or be increasing their overall profitability. We will be investigating this further and are seeking evidence from supermarkets and other stakeholders on these points.'

stated its intention to publish a further report on its findings in spring 2023, on which it would invite comments before publishing its final report in the Market Study by the statutory deadline of 7 July 2023.

14. The CMA decided to ask each of the supermarkets to explain the factors behind their margin increase, in order to understand whether it indicated a softening of competition in the road fuel market that could lead to consumers paying higher prices at the pumps.
15. On 17 January and 1 March 2023, the CMA issued Asda with notices under section 174 of the Act, with the aim of obtaining evidence from Asda on the reasons for its increasing fuel margins.
16. The CMA was not satisfied that Asda was sufficiently forthcoming with the evidence it provided in response to those notices. In the subsequent weeks the CMA sent supplementary questions to Asda and on 28 March 2023 Asda provided information on its fuel margin targets for the years 2017-2023, showing a significant increase in the target rate from 2021 onwards.
17. On 3 April 2023 the CMA wrote to Asda expressing concerns about its approach to complying with the notices issued to it in January and March 2023. Asda responded on 6 April 2023.
18. Under section 174(3) of the Act the CMA has the power to issue a notice requiring any person to attend at a specified time and place and give evidence to the CMA for the purposes of the Market Study.⁴
19. On 4 May 2023 the CMA wrote to Asda stating that it intended to issue a notice under section 174(3) of the Act requiring a senior manager of Asda to give evidence at the CMA's offices in London for the purposes of the Market Study. The CMA enclosed an indicative outline of *'the topics that the CMA wishes the evidence provided to cover'*; and stated that *'The individual who gives evidence must be of sufficient seniority to explain the position of Asda's senior management on these matters and on Asda's road fuel retail business generally'*. The CMA asked Asda to identify *'an individual whom Asda considers capable and appropriate to give evidence on these matters'*, failing which the CMA intended to issue the section 174(3) notice to [Asda shareholder].
20. The topics identified in the indicative agenda attached to the CMA's letter of 4 May 2023 included:

⁴ Under section 174(1)(a), a permitted purpose includes assisting the CMA in carrying out its functions under section 5 of the Act in relation to a matter where it has published a market study notice. The CMA published such a notice in relation to the Market Study on 8 July 2022.

- a. 'How management involvement in setting road fuel prices has changed since 2020'; and
- b. 'Changes to Asda's business structure and targets since the acquisition by Bellis Acquisition Company 3 Limited, and how these have affected its road fuel prices.'

21. On 4 May 2023 Asda's in-house lawyer wrote to the CMA stating:

'we have consulted internally and, as your note suggests, [Asda shareholder] has limited involvement in Asda's fuel operations, so would not seem to be the right person for this interview.'

In order to make sure we address your questions effectively, we should be grateful for a short call with the team regarding the interview and scope'

22. On 5 May 2023 the CMA held a call with Asda's in-house lawyer and Asda's external solicitors. Asda's in-house lawyer indicated that [Asda shareholder] would not be the appropriate individual for the interview. The CMA explained that it required Asda to send a senior manager who made strategic decisions, rather than an employee who implemented those decisions. Asda's in-house lawyer indicated that Asda's [Asda manager], would be best placed to provide the evidence the CMA was seeking.

23. Later on 5 May 2023 Asda wrote to the CMA stating:

*'As we discussed, [Asda manager] would be pleased **to answer questions in respect of the proposed agenda, and we believe will be appropriately placed to do so.** [Asda manager] is Asda's [Asda manager] and Asda's fuel activity falls within the area that [Asda manager] leads.'* [emphasis added]

24. Asda also asked that the CMA agree to hold the interview with [Asda manager] via Microsoft Teams so as to *'enable [Asda manager] to have his team available to him to address any points not within his personal knowledge, allowing us to be respectful of [Asda manager]'s time and to more efficiently secure for the CMA the information it requires'*.

25. On 9 May 2023 the CMA replied to Asda stating that it required [Asda manager] to attend the interview in person *'since we consider that this is a more appropriate way to conduct the meeting and reflects the seriousness which we attach to the matters concerned'* and noting that it was willing to pay [Asda manager]'s travelling expenses. The CMA also stated:

*'Having reflected on your comment about matters outside [Asda manager]'s personal knowledge, we are content for [Asda manager] to be accompanied by **one additional Asda staff member (in addition to a legal adviser) who***

is close to the subject matter covered on the indicative agenda and able to assist [Asda manager] in answering our questions' [emphasis added]

26. On 10 May 2023 the CMA issued the May Notice to Asda. The covering letter stated:

'An indicative agenda of the topics the evidence will cover is set out at Annex 1 to the Notice.

The CMA shared a draft notice and indicative agenda with Asda on 4 May 2023 and asked Asda to identify an individual of sufficient seniority to explain the position of Asda's senior management on the matters in that agenda and on Asda's road fuel business generally.

Further to your call with the case team on 5 May 2023 and email of the same date identifying [Asda manager], Asda's [Asda manager], as the appropriate individual, the CMA requires [Asda manager] to attend the interview.

*... as explained in the CMA's email of 9 May 2023, **the CMA is content for [Asda manager] to be accompanied by one additional staff member who is close to the subject matter covered in the indicative agenda and able to assist [Asda manager] in answering the CMA's questions on behalf of Asda.***

The CMA is willing to pay necessary and reasonable travelling expenses where this will require the relevant individual(s) to travel more than 10 miles from their place of residence.' [emphasis added]

27. The CMA asked Asda to confirm by 5pm on 12 May 2023 whether [Asda manager] would be accompanied by an additional staff member from Asda.

28. The May Notice stated that *'Asda is required to attend in person at the CMA's offices at The Cabot, 25 Cabot Square, London E14 4QZ on Wednesday 17 May 2023 at 2pm to give evidence to the CMA on the topics identified in Annex 1 of the Notice for the purpose of its road fuel market study' (emphasis added).*

29. Annex 1 to the May Notice stated that the topics to be covered in the interview included:

- a. *'How management involvement in setting road fuel prices has changed since 2020'; and*
- b. *'Changes to Asda's business structure and targets since the acquisition by Bellis Acquisition Company 3 Limited, and how these have affected its road fuel prices'.*

30. On Friday 12 May 2023 Asda's external solicitors wrote to the CMA confirming that [Asda manager] would attend the interview and stating that he would be accompanied by Asda's in-house lawyer and two partners from the firm of external solicitors advising Asda.

31. On Monday 15 May 2023 the CMA published an update in relation to its Market Study. The update explained that, while at the time of its initial update in December 2022 the CMA *'proposed to publish a further report in spring 2023'*:

'there are some important issues where further investigation is required. Given the concerns we have about a market of such importance for millions of UK consumers, it is vital that we get to the bottom of these issues and over the coming weeks we will be using the full range of our legal powers to do so. Rather than providing a further report at this stage, we are therefore prioritising completion of the market study with a view to publishing our final report by early July'.⁵

32. The update further noted that *'important information has only been received late in the day and after several rounds of information gathering'*.⁶

33. In the accompanying press notice, the CMA's Chief Executive stated:

'We are not satisfied that all the supermarkets have been sufficiently forthcoming with the evidence they have provided in our Road Fuel market study, so we will be calling them in for formal interviews to get to the bottom of what is going on'.⁷

34. On Monday 15 May 2023 the CMA replied to Asda's external solicitors' email of Friday 12 May 2023, stating:

'We note that, while the CMA has indicated that [Asda manager] may be accompanied by one additional staff member able to speak to the substance of the interview and a legal adviser, Asda wishes [Asda manager] to be accompanied by two external lawyers in addition to Asda's in-house lawyer.

*Asda's legal representation at the interview is a matter for Asda. However, we wish to emphasise that the purpose of the interview is to obtain evidence for the market study from Asda, not advocacy from Asda's lawyers. The CMA will direct its questions to [Asda manager] as **the senior manager Asda has nominated to explain its position on the matters in the agenda and on Asda's road fuel business generally.***

⁵ Action to help contain cost of living pressures (publishing.service.gov.uk), page 4.

⁶ Action to help contain cost of living pressures (publishing.service.gov.uk), page 9.

⁷ CMA update on action to help contain cost of living pressures - GOV.UK (www.gov.uk).

*We invite Asda to consider whether it is necessary for [Asda manager] to be accompanied by three lawyers, or **whether Asda's compliance with the s.174(3) notice would be better achieved by sending an additional businessperson.*** [emphasis added]

35. In the same email on 15 May 2023 the CMA sent Asda a list of the documents it intended to refer to in the interview on 17 May 2023. These were Asda's own documents submitted to the CMA in the course of the Market Study.

36. Of the 17 documents on the list, seven were documents created at the level of Asda's executive management, whose members include [Asda shareholder] and [Asda executive] but do not include [Asda manager]. They included Asda's executive committee minutes dated [REDACTED]. The CMA noted in particular that it wished to discuss page 4. Page 4 referred to:

'a potential opportunity in petrol pricing, specifically in locations where there is at least a [REDACTED] minute drive to a competitor. It was agreed this action would be moderate and would not prejudice the value proposition. It is expected this would be implemented as oil prices fall; the retail prices in those targeted areas would fall slower. It was agreed that if implemented, this would not be communicated widely to stores.

ACTION 040722: [Asda executive] to develop proposal further and share the output with [Asda shareholder] for approval.

...

Actions: [Asda executive].

Update on actions: An updated [REDACTED] has been applied to the [125-175] [REDACTED] fuel sites and the revised profit forecast put in the HY2 submission whilst still ensuring Asda are the cheapest in the market on fuel.'

37. On 16 May 2023 the CMA corresponded further with Asda's external solicitors to assist them with identifying the documents on the list as part of Asda's preparation for the interview.

38. The interview took place at 2pm on 17 May 2023. [Asda manager] attended for Asda. He was accompanied by Asda's in-house lawyer and one external solicitor. He was not accompanied by an additional person from the Asda business.

39. In the course of the interview, the CMA asked [Asda manager]:

- a. To explain the statements on page 4 of Asda's executive committee minutes dated [REDACTED].
- b. How (if at all) decision making in Asda's road fuel business had changed since Asda's acquisition by the Issa Brothers and TDR Capital (through Bellis Acquisition Company 3 Limited) in 2021.
- c. How (if at all) that acquisition, and the level of debt it added to Asda's balance sheet, had contributed to Asda's increased fuel margin targets from 2021 onwards.
- d. Whether Asda's owners the Issa brothers had made any changes to Asda's fuel business taking into account their portfolio of investments in fuel, including Euro Garages.

40. [Asda manager] was not able to answer these questions because:

- a. [Asda manager] joined Asda in July 2022 and did not take over responsibility for its fuel business until September 2022.
- b. [Asda manager] was not a member of Asda's executive committee or privy to the strategic decisions made by Asda's owners.

41. In relation to the statements on page 4 of Asda's executive committee minutes dated [REDACTED], [Asda manager] stated: *'this was prior to my time of taking over fuel'*. He could not explain the references to the *'potential opportunity in petrol pricing'*; *'An updated [REDACTED]'*; or to *'the [125-175] [REDACTED] fuel sites'*, stating *'I am unaware personally whether we have a radius that is deemed as a [REDACTED]'*.

42. In relation to changes to decision making since the Issa/TDR acquisition, [Asda manager]'s answer was that there had been none. However, this was not based on his personal knowledge.

43. In relation to the relationship between Asda's debt and its fuel margin targets, Asda's external solicitor noted: *'it is not something he [Asda manager] has visibility on at that level'*.

44. In relation to the relationship between Asda and Euro Garages, Asda's external solicitor stated: *'that is straying a little bit beyond'*.⁸

45. During the interview, the CMA emphasised that it had required Asda to put forward an individual of sufficient seniority to explain the position of Asda's senior management on the matters in the agenda and on Asda's road fuel retail business generally. The CMA asked whether Asda had considered bringing another

⁸ Asda submitted that the CMA officials conducting the interview had accepted that this question *'went beyond the scope of the s174(3) notice'* (letter from Asda to the CMA dated 26 May 2023). This is not correct: the CMA official's statement *'Maybe we are straying beyond...'* referred to straying beyond [Asda manager]'s experience and awareness, not the scope of the May Notice (*'I appreciate you are speaking from your own awareness. You are not aware for example ...? Maybe we are straying beyond...'*). This topic was clearly within the scope of the May Notice.

businessperson to the interview to assist [Asda manager] in answering the questions.

46. Asda's in-house lawyer responded that Asda had not considered this necessary following the call with the CMA on 5 April 2023 during which Asda had identified [Asda manager] as the appropriate individual. The CMA observed in response that it had encouraged Asda in subsequent correspondence to bring a further individual from the business to speak to the matters on the agenda.
47. On 19 May 2023 the CMA issued Asda with a provisional decision to impose a fixed penalty of £30,000 and a daily penalty of £15,000 for failure to comply with the requirements of the May Notice (the '**Provisional Decision**'). The CMA informed Asda that its senior management were required to attend the CMA's offices in London and provide evidence on the outstanding topics in order for Asda to comply with the requirements of the May Notice.
48. On 23 May 2023 Asda wrote to the CMA in relation to the statements on page 4 of the [redacted] executive committee minutes, stating that they referred to '*Asda's decision to take additional margin in some sites while seeking to remain the cheapest in fuel overall. The reference to "an updated" [redacted] is not to any formalised '[redacted]' but is rather a reference to a strategy to retain margin in some local areas where competitor pricing makes this feasible*'.
49. On 24 May 2023 [Asda shareholder] and [Asda executive], Asda's [Asda executive], attended the CMA's office in London and provided further evidence pursuant to the May Notice. [Asda shareholder] and [Asda executive] were able to speak from an informed perspective on the outstanding topics and to clarify the references in the [redacted] executive committee minutes that [Asda manager] had not been able to explain. For example:
- a. [Asda shareholder] and [Asda executive] were able to explain how management involvement in setting road fuel prices had changed since the Bellis acquisition in 2021:
 - i. When asked how he brought his considerable experience in fuel retail to bear on Asda's fuel business specifically, [Asda shareholder] replied: '*we had an existing management team in Asda that was working in that [fuel], and then, obviously, we looked at the quality of that management team and looked at who we had, and subsequently made some changes ... [I] went in just to evaluate and operate the business until we came to a point where we could appoint a CEO*'.
 - ii. When asked whether there had been a change in the process by which strategic decisions on fuel were made, or how these were reported upwards, [Asda shareholder] replied: '*any decision or any*

strategy change, or you want to pivot somewhere else, would come to the ExCo. ExCo would discuss that and sort of agree between ourselves if that is the right strategy or not, and then, on the back of that decision, we would implement or not implement any decisions that we make.'

- iii. [Asda executive] explained that he had brought in an additional director above Asda's senior buyer with responsibility for fuel, because *'from a control, a process and strategy basis, it felt more structured and a better view to have those respective layers'* and to create greater accountability.
- b. [Asda shareholder] and [Asda executive] were also able to explain changes to Asda's business structure and targets since the Bellis acquisition and how these had affected its road fuel prices:
- i. [Asda shareholder] was able to explain the nature of the relationship between Asda's fuel business and the Euro Garages business – and in particular the reasons why their common owners had not pursued a proposal to transfer control of Asda's fuel business to Euro Garages. Like [Asda manager], he stated that Asda's owners had not made any changes to its fuel business to take into account their investments in fuel at a portfolio level – but [Asda shareholder], unlike [Asda manager], spoke from personal knowledge.
 - ii. [Asda executive] was able to explain how Asda's ppl fuel margin targets were set taking into account margins across its whole food business (only [redacted]% of which was overseen by [Asda manager], one of his direct reports). [Asda shareholder] explained the context provided by Asda's total business portfolio.
 - iii. [Asda shareholder] explained that if Asda appeared unlikely to meet its targets, it had various [redacted].
 - iv. [Asda executive] was able to explain the interaction between Asda's ppl margin targets and its gross profit targets.
 - v. [Asda executive] explained that a decision on whether to invest an unexpected profit position in fuel or in cross-subsidising other parts of the business would be made by *'[Asda shareholder], myself and the rest of the exec'*. He went on to explain that *'The opportunity with TDR, with private ownership versus plc and FTSE 100 and everything else like that, is actually you could take a different view. So why wouldn't you?'*
- c. [Asda executive] was able to explain the references on page 4 of Asda's [redacted] executive committee minutes to *'a potential opportunity in petrol pricing'*; *'an updated [redacted]'*; and to *'[125-175] [redacted] fuel sites'*. In particular, [Asda executive]

explained the drive-time radius to a competitor that Asda applied to define sites as [redacted]. [Asda executive] further explained that this ‘proposal’ had been implemented at the [125-175] [redacted] sites:

‘We talked about food, because we look at it in the round, and I said, “The forward forecast on fuel looks like the cost prices at this moment in time are trending down”. From my two weeks in the organisation, this is what I could see, and therefore we had a choice at Asda, “What would we want to do?” We could, on these [125-175] stores, like I say, greater than a [redacted]-mile - so about a [redacted]-minute drive time - away from a competitor, we could flow through the decreases in the cost prices a bit slower. That could yield a number which we would probably see in future profit forecasts ... and that was an option taken.’

50. On 26 May 2023 Asda submitted its written representations on the Provisional Decision.

C. Legal Assessment

Relevant legislation

51. Section 174A of the Act provides that where the CMA considers that a person has, without reasonable excuse, failed to comply with any requirement of a notice under section 174 of the Act, it may impose a penalty of such amount as it considers appropriate (in accordance with section 174D of the Act).

52. The CMA concludes that the statutory requirements for imposing a penalty under section 174D of the Act are met and that the imposition of a penalty of a fixed amount of £30,000 is appropriate and proportionate in this case.

Statutory requirements for imposing a penalty under section 174A

Failure to comply with the requirements of the May Notice

53. The CMA finds that Asda failed to comply with requirements of the May Notice.

54. The May Notice required Asda to attend and give evidence on the topics identified in Annex 1 to the Notice. Those topics included:

- a. ‘How management involvement in setting road fuel prices has changed since 2020’; and
- b. ‘Changes to Asda’s business structure and targets since the acquisition by Bellis Acquisition Company 3 Limited, and how these have affected its road fuel prices’.

55. The documents the CMA identified to Asda in advance of the interview included statements of material potential relevance to these topics (an apparent reference at the level of Asda's executive management to a '*potential opportunity*' to adopt 'feathering' of price decreases in certain areas, and a reference to '*An updated [redacted]*' being applied '*to the [125-175] fuel sites*').
56. Asda did not attend and give evidence on these matters at the time and place specified in the May Notice. The individual it sent to give evidence on 17 May 2023 was not able to speak to these topics or to explain these statements.
57. In response to the Provisional Decision, Asda submitted that it had complied with the requirements of the May Notice.⁹
58. Asda first submitted that the May Notice could not compel [Asda manager] to speak to matters outside his personal knowledge.¹⁰ This submission is irrelevant since the May Notice was addressed to Asda¹¹ and (as explained in paragraphs 24-27 and 34 above) the CMA repeatedly told Asda that if the topics on the agenda were outside [Asda manager]'s knowledge, Asda should bring someone else from the business who was able to speak to them.¹² Asda submitted that it chose not to take this opportunity because it believed it could take appropriate steps to ensure [Asda manager] was briefed on '*the potential topics raised by the CMA*'.¹³ However, [Asda manager] was not able to speak to the relevant topics or to the references in the [redacted] executive committee minutes.¹⁴
59. Secondly (and in contradiction to its first submission), Asda submitted that [Asda manager] had provided evidence on the relevant topics at the interview.¹⁵ Asda based this submission on the fact that [Asda manager] stated that there had been no changes to Asda's pricing strategy or targets over time. However, as the CMA observed during the course of the interview, [Asda manager] was not qualified to make these statements since he took over responsibility for Asda's fuel business in September 2022. Nor was [Asda manager] a member of Asda's executive management and therefore sufficiently senior to speak to these matters from his own personal knowledge.

⁹ Letter from Asda to the CMA dated 26 May 2023

¹⁰ Letter from Asda to the CMA dated 26 May 2023

¹¹ Asda submitted that '*It is not possible for a legal entity to attend an interview*' (letter from Asda to the CMA dated 26 May 2023). However, Asda did not seek to argue that the May Notice was not binding on Asda as a legal person. The obligation was on Asda to comply and to provide the right individuals to achieve compliance on its behalf.

¹² Asda's submission that '*Large corporate organisations cannot be expected to have one individual with all necessary knowledge*' (letter from Asda to the CMA dated 26 May 2023) is therefore also irrelevant.

¹³ Letter from Asda to the CMA dated 26 May 2023.

¹⁴ Asda's suggestion that the statement in Annex 1 to the May Notice that '*The interview may cover other topics in addition to those listed*' meant the interview could cover '*more, or less, than the listed areas*' (letter from Asda to the CMA dated 26 May 2023) is not a credible reading of the statement.

¹⁵ Letter from Asda to the CMA dated 26 May 2023.

60. More broadly, that Asda failed to comply with the requirements of the May Notice during [Asda manager]’s interview on 17 May 2023 is demonstrated by the fact that [Asda shareholder] and [Asda executive], who gave the supplementary interview on behalf of Asda on 24 May 2023, provided evidence that [Asda manager] was not able to provide on the relevant topics and statements: see paragraph 49 above.¹⁶

Without reasonable excuse

61. Section 174A of the Act provides that a penalty can be imposed if a failure to comply is ‘*without reasonable excuse*’. The Competition Appeal Tribunal considered this concept in the *Electro Rent* judgment, confirming that an objective test should be applied as to whether any excuse put forward is reasonable.¹⁷

62. The Guidance provides that ‘*(t)he circumstances that constitute a reasonable excuse are not fixed and the CMA will consider whether any reasons for failure to comply amount to a reasonable excuse on a case-by-case basis. However, the CMA will consider whether a significant and genuinely unforeseeable or unusual event and/or an event beyond [the party’s] control has caused the failure and the failure would not otherwise have taken place*’.¹⁸

63. In the CMA’s view, there were no circumstances leading to Asda’s non-compliance with the May Notice that were ‘*significant and genuinely unforeseeable or unusual*’, or ‘*beyond [Asda’s] control*’.

64. The CMA notes that:

- a) The CMA was clear from the outset, in its letter to Asda of 4 May 2023, that it required Asda to identify an individual of sufficient seniority to explain the position of Asda’s senior management on the matters set out in the agenda. The agenda attached to that letter included the topics on which [Asda manager] was not able to give evidence.
- b) The CMA’s intention at the time of its letter of 4 May 2023 was to issue the May Notice to [Asda shareholder]. However, the CMA held a call with Asda’s legal advisers at Asda’s request ‘*to make sure we [Asda] address your questions effectively*’. On that call, Asda identified [Asda manager] as the appropriate individual to give evidence. Asda subsequently wrote to the CMA stating that [Asda manager] would be ‘*appropriately placed*’ to ‘*answer questions in respect of the proposed agenda*’.

¹⁶ Asda’s submission that because the May Notice was addressed to Asda rather than to TDR Capital or the Issa brothers, ‘*it would not be appropriate for [Asda manager] to comment ... [on] the strategies or motives of other companies or individuals*’ (letter from Asda to the CMA dated 26 May 2023) overlooks the fact that [Asda shareholder] is a director of Asda and was identified as the CMA’s preferred candidate to give evidence when the draft notice was shared with Asda on 4 May 2023, before Asda indicated that [Asda manager] would be better placed.

¹⁷ *Electro Rent Corporation v CMA* [2019] CAT 4 at 69.

¹⁸ Guidance, para. 4.4.

- c) In response to Asda’s concern that certain matters might be outside [Asda manager]’s personal knowledge, the CMA told Asda that it was content for [Asda manager] to be accompanied by one additional Asda staff member (in addition to a legal adviser) who was close to the subject matter covered on the agenda and able to assist him in answering the CMA’s questions.
- d) The CMA repeated that offer in its letter of 10 May 2023 attaching the May Notice, which again included the relevant topics in the annexed agenda.
- e) In its email of 15 May 2023 attaching the list of documents it wished to discuss in the interview, the CMA noted that [Asda manager] had been identified as *‘the senior manager Asda has nominated to explain its position on the matters in the agenda’* and again invited Asda to consider bringing an additional businessperson. The CMA specifically invited Asda to consider whether this might mean *‘Asda’s compliance with the s.174(3) notice would be better achieved’*.
- f) Nonetheless, Asda did not bring to the interview anyone qualified to speak to the relevant topics on the agenda or to the relevant statements in the [REDACTED] executive committee minutes.

65. Asda submitted that the question of reasonable excuse did not arise as there had been no failure to comply with the requirements of the May Notice. Asda further submitted that it had given careful consideration to the appropriate individual to send to the interview and that *‘In any event, [Asda manager] took all appropriate steps to prepare himself for interview. There was no better placed senior executive with fuel responsibilities to answer the CMA’s questions’*.¹⁹

66. Whatever the extent of [Asda manager]’s preparations for the interview,²⁰ the fact remains that [Asda manager] was clearly not of sufficient seniority to explain the position of Asda’s senior management on all the topics identified in the agenda or the documents identified in advance for discussion, as was illustrated by the more informed evidence provided on those topics and documents by [Asda shareholder] and [Asda executive] in the supplementary interview on 24 May 2023.²¹ The CMA

¹⁹ Email from Asda to CMA dated 19 May 2023; statements of Asda’s in-house lawyer at the end of the supplementary interview with [Asda shareholder] and [Asda executive]. Letter from Asda to the CMA dated 26 May 2023..

²⁰ Asda noted that there were 17 documents totalling approximately 300 pages on the document list shared by the CMA in advance of the interview (letter to the CMA dated 26 May 2023). This is a factor that should have given Asda further cause to consider sending an additional businessperson to the interview. In any event, these were Asda’s own documents submitted to the CMA in the course of the Market Study. Moreover, the document list was sent to Asda in order to assist with preparations for the interview and the CMA provided specific document titles and page references upon request.

²¹ Asda’s submission that [Asda executive] was *‘not differently placed to [Asda manager] in terms of his tenure or knowledge’* (letter from Asda to the CMA dated 26 May 2023) is not supported by [Asda executive]’s evidence, which covered topics and documents [Asda manager] was not able to speak to. For example, [Asda manager] was not able to explain a reference to a [REDACTED] contributing £[REDACTED] over a six-month period, in [REDACTED]. [Asda executive] explained that this referred to the ‘opportunity’ identified in the [REDACTED] relating to the [125-175] [REDACTED] sites.

told Asda on three occasions that it could send an additional businessperson with [Asda manager] to speak to matters outside [Asda manager]'s personal knowledge; but Asda chose not to take that opportunity.²²

67. The CMA therefore finds that Asda has no reasonable excuse for its failure to comply with the requirements of the May Notice.

D. Appropriateness of imposing a penalty and the amount of that penalty

68. The CMA considers that Asda did not approach compliance with the May Notice with sufficient care – and its failure to comply had material consequences for the conduct of the Market Study. The CMA therefore considers that it is appropriate to impose a penalty at the statutory maximum level.

Appropriateness of imposing a penalty

69. Having regard to its statutory duties and the Guidance, and having considered all relevant facts, the CMA finds that the imposition of a fixed penalty is appropriate.²³ In reaching this view, the CMA has considered the seriousness of Asda's failure to comply with the May Notice, including the adverse impact of the failure on the Market Study, as well as having regard to the need to achieve general deterrence.²⁴

70. Asda's failure was serious. The reasons for the significant increase in Asda's fuel margin and margin targets were highly material to the Market Study. By the time the May Notice was issued Asda could have been under no misapprehension as to the topics the CMA wished to cover at the interview or the seriousness with which the CMA was treating this process of evidence-gathering.

71. The CMA's Chief Executive specifically identified in the 15 May 2023 press notice that the CMA was not satisfied that all supermarkets had been sufficiently forthcoming with the evidence they had provided in the Market Study and that this was the reason for the CMA holding formal interviews with their senior management 'to get to the bottom of what is going on'. Asda knew that the CMA had concerns about its approach to compliance with statutory information requests because the CMA wrote to Asda expressing those concerns on 3 April 2023.²⁵

²² Asda's submissions that 'Section 174(3) does not enable the CMA to require that a witness with knowledge of all company documents attend an interview' and that 'a witness cannot anticipate all questions the CMA may ask or be precluded from offering to respond to questions by way of follow up if they consider in good faith they cannot provide the information sought' (letter to the CMA dated 26 May 2023) have no force in the circumstances of this case, where the CMA 1) told Asda on three occasions that it could bring an additional businessperson; and 2) identified in advance the specific documents and even the specific pages of those documents that it wished to discuss.

²³ The CMA is not imposing a daily penalty as Asda complied with the requirements of the May Notice on 24 May 2023.

²⁴ Asda submitted that 'The circumstances are not those in which it might be said any fine could be appropriate nor that the nature of an breach [sic] is serious' (letter from Asda to the CMA dated 26 May 2023). The CMA disagrees for the reasons set out in this penalty notice.

²⁵ Asda submitted that 'The project team has not raised issues with regards to our level of cooperation' (letter from Asda to the CMA dated 26 May 2023). This is not correct: the CMA wrote to Asda to express its concerns on 3 April 2023.

72. Asda's failure to comply with requirements of the May Notice had material consequences for the Market Study. It meant that the CMA had to conduct a further interview with Asda executives in order to obtain evidence on the relevant matters – incurring further resource costs and placing further pressure on the team preparing the final report for the Market Study by the statutory deadline of 7 July 2023.²⁶

73. The CMA considers that it is of utmost importance to its ability to discharge its statutory functions that parties have due regard to the requirements imposed on them by, among other things, section 174 of the Act. The imposition of an administrative penalty under section 174A of the Act is critical to achieve deterrence, to impress on both Asda in this specific case and more widely on those who may be subject to investigatory requirements in future the seriousness of a failure to comply with a notice under section 174 of the Act without reasonable excuse.

Appropriateness of the amount of the penalty imposed

74. Consistent with its statutory duties and the Guidance, the CMA has assessed all relevant circumstances to determine the appropriate level of penalty in this case.

Aggravating/mitigating factors

75. Not only did the CMA specifically identify the topics it wished to discuss at the interview and initially identify [Asda shareholder] as its preferred candidate to speak to those topics, the CMA specifically identified the documents it wished to discuss at the interview in advance (including the specific page of the [redacted] executive committee minutes), and engaged in further correspondence with Asda's advisers to assist Asda's preparation for the interview. Nonetheless [Asda manager] was not able to speak to the [redacted] executive committee minutes and Asda did not attend the interview with another individual who could, such that it was then necessary for the CMA to conduct a supplementary interview with [Asda shareholder] and [Asda executive]. This must be considered an aggravating factor.

²⁶ Asda submitted that any non-compliance had not adversely affected the conduct of the Market Study, because Asda had already provided evidence on the relevant topics in written responses to s.174 notices; and because it made [Asda shareholder] and [Asda executive] available to provide further witness evidence soon after [Asda manager]'s interview (letter from Asda to the CMA dated 26 May 2023). However, the CMA embarked on the process of conducting formal interviews with Asda and other supermarkets in large part because of Asda's less than forthcoming approach to providing information in response to written requests; and had to devote further resources to preparing the Provisional Decision and for this supplementary interview in order to obtain the evidence that should have been provided in the first interview, during a period of significant time pressure for the case team. Asda's written follow-up of 23 May 2023 in relation to the [redacted] executive committee minutes (see paragraph 48 above) did not 'cure' [Asda manager]'s failure to explain the statements in those minutes: it was necessary for the CMA to test them with their author, [Asda executive].

Financial resources available to Asda

76. Consistent with the Guidance, the CMA has had regard to certain key indicators relating to the financial resources available to Asda. The financial resources available to Asda are significant:

- a. Revenue - £23,488.5m;
- b. Net assets - £8,290.3m;
- c. Cash and cash equivalents - £504.3m;
- d. Profit for the year - 1,010.5m; and
- e. Operating profit - £693.1m.²⁷

77. These indicators show that Asda has significant resources available in respect of the imposition of a fixed penalty of £30,000 for the failure to comply in question in this case. The CMA has decided that it is appropriate to impose a penalty at this level, having regard to Asda's size and financial position.²⁸

Conclusion on the imposition of a penalty

78. In all the circumstances, the CMA considers that the imposition of a penalty of a fixed amount of £30,000 is appropriate on the basis that it: (i) would reflect the seriousness of the breach and the adverse impact on the CMA's Market Study; and (ii) would act as a deterrent to Asda and other persons in the future.

Signature: David Stewart

Executive Director, Markets and Mergers

Date: 20 June 2023

Competition & Markets Authority

²⁷ From Asda Group Limited's 'Group of companies' accounts made up to 31 December 2021', available at: [ASDA GROUP LIMITED filing history - Find and update company information - GOV.UK \(company-information.service.gov.uk\)](#).

²⁸ Asda did not make submissions on the level of the proposed penalty in the Provisional Decision, beyond its submission that no penalty should be imposed.