

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 section 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 of the Act on 1 March 2023 (the '**March 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 March 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 requirements of the March 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 1 March 2023 the CMA issued the March Notice to Asda in relation to the Market Study. The CMA finds that Asda failed to produce a complete response to the March Notice by the required deadline and therefore failed to comply with the requirements of the March Notice.
2. The initial deadline for Asda's response to the March Notice was 5pm on 22 March 2023. Following a request from Asda submitted at 4.35pm on 22 March 2023, the CMA agreed to extend the deadline for certain questions to 24 March 2023 and for the remainder to 28 March 2023.²
3. Asda submitted a partial response to the March Notice on 24 March 2023, and a further response on 28 March 2023. However, Asda failed to provide some of the information requested. After the CMA wrote to Asda on 3 April 2023 expressing concern about Asda's approach to complying with the March Notice and to complying with the CMA's information requests more generally, Asda provided relevant information on 6 April 2023: more than two weeks after the original deadline and nine days after the extended deadline. The relevant information was material to the issues in the Market Study.

Without reasonable excuse

4. The CMA finds that Asda had no reasonable excuse for its failure to comply with the March Notice. The situation which led to non-compliance with the March Notice was not caused by an event beyond the control of Asda, or the result of a significant and genuinely unforeseeable or unusual event.³ Asda did not provide any adequate or timely explanation for its failure to comply with the March Notice.

Decision to impose a penalty

5. The CMA finds that it is appropriate and proportionate to impose a penalty on Asda for non-compliance with the March Notice because the failure to comply adversely affected the conduct of the Market Study and it is in the interest of deterrence.
6. The CMA considers that Asda's approach to complying with the CMA's information requests in the course of the Market Study has been lacking in clarity, consistency and timeliness. This is relevant context to Asda's failure to comply with the specific

² Email from CMA to Asda dated 23 March 2023.

³ *Administrative penalties: Statement of Policy on the CMA's Approach (CMA4)* (the '**Guidance**'), para. 4.4.

questions in the March Notice. Ultimately, Asda's approach to providing the CMA with material information was a key factor in the CMA's decision to issue a brief spring update in the Market Study and embark on further information gathering, including through use of its formal interview power in the Act. Asda's approach therefore had material consequences for the Market Study.

7. In these circumstances, the CMA finds that a penalty of £30,000 (which is the statutory maximum for a penalty in a fixed amount) is an appropriate and proportionate penalty.

B. Factual background

Context

8. 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.
9. 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.⁴ The CMA 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.
10. The CMA decided to ask each of the supermarkets to explain the factors behind the 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.
11. Under section 174 of the Act the CMA has the power to issue a notice requiring a person to provide documents and information for the purposes of assisting the CMA in carrying out the Market Study.⁵
12. On 17 January 2023, the CMA issued Asda with a notice under section 174 of the Act (the '**January Notice**') which began by noting: '*we are seeking specific details*

⁴ 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.*'

⁵ For the permitted purpose of 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.

and information from you about the individual factors which have affected your fuel margins. Please bear this in mind in responding to the questions below.'

13. Question 5 of the January Notice required Asda to list and describe each of the factors that drove the increase in its fuel margins in each year from 2017 to 2022. Question 6 required Asda to rank each of those factors in terms of significance and contribution to margin growth. Question 8 asked Asda to explain whether the growth in its fuel margin reflected any change in Asda's business strategy.

14. Asda responded to questions 5, 6 and 8 of the January Notice on 31 January 2023. In response to question 5, Asda cited four factors driving the increase in its fuel margins between 1 January 2017 and 31 November 2022:

- a. A rapid decline in Asda's cost base in late 2022 and a slower than normal pass-on of this decline to consumers;
- b. An increase in its ppl rate from 2019 onwards;
- c. *'In the course of 2021 and 2022, some adjustments were made to increase the fuel contribution to Asda's overall business to cross-subsidize price reductions in Asda's groceries to counter inflationary pressures on food';* and
- d. Exceptional costs arising during 2022.

15. In response to question 6, Asda ranked *'the increase in contribution from road fuel to Asda's overall financial results'* as [✂] factor contributing to Asda's margin growth over the period. In response to question 8 Asda stated:

'Asda's business strategy is predicated on being the lowest price fuel in any local area to support and promote its everyday low price brand proposition. Additionally, Asda's PFS network is designed with the strategic aim to offer the lowest prices to drive halo: the opening of an Asda PFS generally produces a positive sales halo on the adjacent Asda store. The fuel margin growth observed has not affected Asda's strategy of offering the lower fuel price in a given local area

...

within Asda's business a decision was made in Q4 2021 to increase the fuel plan delivery. This increase was executed without compromising Asda's pricing strategy.'

16. Question 9 of the January Notice required Asda to provide internal documents illustrating any change in Asda's business strategy in the period 1 January 2017 to 31 November 2022 that was reflected in Asda's fuel margin growth observed over this period. Question 23(c) asked Asda to explain the relative importance of each criterion used in its fuel pricing strategy.

17. The questions in the January Notice had been sent to Asda in draft on 16 December 2022 and the deadline for a response to questions 9 and 23 was 5pm on 7 February 2023. On 7 February, Asda asked for an extension to 10 February without giving any specific reasons why this was necessary. The CMA agreed to the extension.
18. On 10 February Asda responded to question 9, stating: *'Not applicable. Asda's pricing strategy for the supply of road fuel is long-established and implemented throughout the Asda estate. Asda has not changed its fuel pricing strategy for the supply of road fuel. As such, there are no documents responsive to this question.'* Asda also responded to question 23(c): *'Since 2021, the direction on pricing is given in the context of meeting margin targets. Prior to 2021, margin was more constant.'*
19. On 17 March 2023 the CMA asked Asda to provide the margin targets referred to in its response of 10 February by 5pm on 24 March 2023. On 22 March 2023 at 4.35pm Asda asked for an extension to its response to 29 March due to 'key colleague absences'. The CMA agreed to an extension to 28 March.
20. On 28 March 2023, Asda provided a table showing its *'margin targets set out as part of the annual plan process'*. The table showed a material increase in Asda's target margin on fuel from 2021 onwards.

The March Notice

21. On 1 March 2023 the CMA issued the March Notice to Asda. The March Notice began by noting that the CMA was continuing to assess Asda's response to the January Notice, and that the CMA's final conclusions *'will be based on the evidence available to us. It is therefore important that you provide sufficient evidence to support your explanations. To that end, the following questions seek clarification, further explanation and supporting documents in relation to your explanations'*.
22. The March Notice included the following questions:
- a. **Question 4(a)** required Asda to:
 - i. explain the quantity of adjustment made to Asda's fuel business to cross-subsidise price reductions in groceries in 2021 and 2022 (referred to in Asda's responses to questions 5 and 6 of the January Notice); and

- ii. provide all internal documents provided to Senior Management Committees⁶ since January 2020 in which this adjustment was quantified.

b. **Question 4(b)** required Asda to:

- i. quantify (in margin and absolute profitability terms) the impact of the investment in price reductions in Asda's grocery business in 2021 and 2022 (referred to in Asda's responses to questions 5 and 6 of the January Notice); and
- ii. provide all internal documents provided to Senior Management Committees since January 2020 in which the impact of this investment was quantified.

23. The March Notice also contained five other questions requiring Asda to produce internal documents provided to its Senior Management and/or Senior Management Committees.⁷

24. The deadline for Asda's response to the March Notice was 5pm on 22 March 2023.

25. On 22 March 2023 at 4.35pm Asda contacted the CMA to request an extension for responding to the March Notice until close of business on 29 March 2023 citing the absence of a key staff member whose input was essential to its response.

26. The CMA responded on the same day noting the importance of the timely receipt of information in order to progress the Market Study in accordance with the statutory timeframe and asking for clarification on the role of the relevant staff member. Following clarification, the CMA granted Asda an extension until 5pm on 24 March 2023 for the questions where it did not require input from the absent colleague; and an extension until 5pm on 28 March 2023 where such input was required.⁸

27. Asda submitted its partial response to the March Notice on 24 March 2023. In relation to each of questions 4(a) and 4(b), and in relation to each of the requests for internal documents in the other five questions, Asda stated that it would respond by 28 March 2023.

28. On 28 March 2023 Asda provided a further response. In relation to each of questions 4(a) and 4(b), Asda stated only: *'Asda has not identified responsive*

⁶ Defined as 'any committee whose membership includes any Senior Management individual'. 'Senior Management' was defined as 'the Board, senior executive team and the CEO (who are responsible for your combined business activities of groceries, general merchandising and fuel) and the senior management team responsible for your UK retail activity'.

⁷ Questions 3(a), 3(c), 4(c), 4(d) and 5(b).

⁸ Email from CMA to Asda dated 23 March 2023.

documents shared with Senior Management'. In relation to the other five questions requiring internal documents, Asda submitted (in total) a single document.⁹

29. Asda did not provide the quantifications required by questions 4(a) and 4(b) or any explanation as to why it did not respond to the request for these quantifications.

Subsequent interaction between the CMA and Asda

30. On 3 April 2023 the CMA wrote to Asda expressing concerns about its approach to complying with the January Notice and the March Notice and asking Asda to explain:

- a. How Asda's response to question 9 of the January Notice – that there had been no change in its fuel retailing strategy – was consistent with its responses to other questions (in particular its statements that Asda had increased its fuel margin targets and the subsidy its fuel business provided to its groceries business);
- b. Why Asda had identified only one document responsive to the CMA's questions in the January and March Notices; and
- c. Why Asda did not answer questions 4(a) and 4(b) of the March Notice.

31. The CMA requested a response by 6 April 2023, and stated that if, in the course of preparing its response, Asda became aware of further responsive documents it should provide them at the same time.

32. Asda responded on 6 April 2023 stating that its pricing strategy had not changed notwithstanding the material increase in its fuel margin targets; and that there were no further responsive documents because Asda's fuel pricing decisions were undocumented at the senior management level.

33. Asda did not provide any explanation of why it failed to provide the quantifications required by questions 4(a) and 4(b) of the March Notice by the (extended) deadline. It stated only that it *'did not identify any responsive internal documents to questions 4(a) and 4(b) of the 1 March Notice'*. Asda provided *'further explanation'* as follows:

- a. In relation to question 4(a), Asda's original *'fuel plan for 2022'*, when set in November 2021, aimed for fuel to contribute £[X] million for the year. This increased to £[X] million by January 2022; £[X] million by February 2022; and *'including another £[X] / month contribution from the second half of 2022'*, to £[X] million by November 2022.
- b. In relation to question 4(b), Asda stated that it could not quantify the impact of fuel specifically subsidising price reductions in groceries because the cross-subsidisation was done drawing on a range of areas of the business,

⁹ In response to question 3(a).

not just fuel alone. Asda provided some examples of *‘qualitative steps which these investments facilitated’*, such as investment in its *‘Asda Essentials’* own-label range.

34. On 10 May 2023 the CMA issued Asda with a notice under section 174(3) of the Act (the **‘May Notice’**) requiring Asda’s management to attend in person at the CMA’s offices in London to give evidence for the purposes of the Market Study.

35. On 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’.*¹⁰

36. The update further noted that *‘important information has only been received late in the day and after several rounds of information gathering’*.¹¹

37. 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’.*¹²

38. The CMA conducted an interview with an Asda manager pursuant to the May Notice on 17 May 2023, and a supplementary interview with Asda executives on 24 May 2023.

39. On 30 May 2023 the CMA issued Asda with a provisional decision to impose a fixed penalty of £30,000 for failure to comply without reasonable excuse with the requirements of the March Notice (the **‘Provisional Decision’**).

40. Asda submitted written representations on the Provisional Decision on 6 June 2023.

¹⁰ Action to help contain cost of living pressures (publishing.service.gov.uk), page 4.

¹¹ Action to help contain cost of living pressures (publishing.service.gov.uk), page 9.

¹² CMA update on action to help contain cost of living pressures - GOV.UK (www.gov.uk).

C. Legal Assessment

Relevant legislation

41. 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).
42. 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 £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 March Notice

43. The CMA finds that Asda failed to comply with requirements of the March Notice.
44. The March Notice required Asda to provide information for the purposes of assisting the CMA in carrying out the Market Study by an (extended) deadline of 28 March 2023. Asda did not supply some of this information by the deadline.
45. Specifically:
- a. **Question 4(a)** of the March Notice required Asda to quantify the adjustment made to its fuel business to cross-subsidise its groceries business in 2021 and 2022 (referred to in Asda's responses to questions 5 and 6 of the January Notice). Asda:
 - i. provided no response by the (extended) deadline of 28 March 2023;
 - ii. provided the quantification on 6 April 2023 – three days after the CMA wrote to Asda asking for an explanation of why it had not provided the quantification and nine days after the extended deadline; and
 - iii. did not acknowledge that it had failed to provide the quantification by the deadline, instead stating only that it had not identified responsive documents.
 - b. **Question 4(b)** of the March Notice required Asda to quantify the impact of the investment in price reductions in its grocery business in 2021 and 2022 (referred to in Asda's responses to questions 5 and 6 of the January Notice). Asda:
 - i. provided no response by the (extended) deadline of 28 March 2023; and
 - ii. stated on 6 April 2023, after the CMA wrote to Asda asking for an explanation of why it had not provided the quantification and nine days

after the extended deadline, that it was unable to provide the quantification.

Without reasonable excuse

46. 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.¹³

47. 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*'.¹⁴

48. In the CMA's view, there were no circumstances leading to Asda's non-compliance with requirements of the March Notice that were '*significant and genuinely unforeseeable or unusual*', or '*beyond [Asda's] control*'.

49. The CMA notes in relation to the March Notice that:

- a) The CMA provided Asda from the outset with the context and rationale for each of its questions; and Asda had ample opportunity to contact the CMA and discuss anything that it considered unclear.
- b) Asda was initially given three weeks to respond to the March Notice and submitted no response in that time, citing the unavailability of a key staff member. Asda is well resourced and was supported by a major City law firm in preparing its response: irrespective of the leave arrangements of its staff, it had no shortage of suitable staff able to respond to the CMA's requests for information within the original timeframe. Nonetheless, Asda was also granted an additional four working days to respond to the March Notice following a request for an extension which Asda sought less than half an hour before the original deadline;
- c) Asda did not offer any excuse for its failure to comply with questions 4(a) and 4(b) of the March Notice when providing its response on the extended deadline of 28 March 2023; and

¹³ *Electro Rent Corporation v CMA* [2019] CAT 4 at 69.

¹⁴ Guidance, para. 4.4.

- d) Asda did not offer any excuse for its failure to comply with question 4(a) of the March Notice when responding to the CMA's letter on 6 April 2023, instead stating only that it had not identified responsive internal documents. However, Asda was able to provide the relevant quantification within three days of the CMA's letter of 3 April 2023 – indicating that it would have had no difficulty complying with question 4(a) by the deadline for the March Notice, even had it not been extended.

50. In response to the Provisional Decision, Asda submitted that its non-compliance with the requirements of the March Notice was due to '*a misunderstanding as to the types of information the project team believed should be available to Asda: 'the nature of our retail operations is such that we did not have the documents or information sought by the project team as they did not exist'*'. Asda submitted that '*Where we do not have specific information items, it is reasonable for us not to provide them*'.¹⁵

51. Each of questions 4(a) and 4(b) had two parts:

- a. The questions first required Asda to quantify the 'cross-subsidising' adjustment it made to its fuel business in 2021 and 2022 (referred to in its responses to questions 5 and 6 of the January Notice) and its impact on the groceries business.
- b. The questions secondly required Asda to '*also provide all internal documents provided to Senior Management Committees since January 2020*' in which the adjustment and its impact were quantified (emphasis added).

52. Asda's primary submission in response to the Provisional Decision – '*On the basis that the documents requested did not exist, Asda responded that there were no responsive documents*'¹⁶ – accounts for its failure to provide any documents in response to the second part of each question. However, the CMA has not sought to fine Asda for non-compliance with that part.

53. Asda's submissions in response to the Provisional Decision engaged only tangentially with the first part of each question, which is the basis for the fine on Asda. Asda submitted that it could not be compelled to produce the quantifications required by questions 4(a) and 4(b) because it does not track information in the manner described by those questions: '*our problem was the March 2023 questions sought documents (and information using precise metrics of calculation tracking*

¹⁵ Letter from Asda to the CMA dated 6 June 2023, page 2. Asda further submitted that it had not clarified these matters at the supplementary interview attended by its senior management on 24 May 2023 because '*we had not understood this to still be a matter where the CMA had residual doubts when we met, so we did not have the opportunity*'. This is incorrect: that supplementary interview was arranged following the issuance on 19 May 2023 of a provisional decision to impose a penalty on Asda for non-compliance with the May Notice. That provisional decision expressly stated that the CMA was considering taking enforcement action against Asda for non-compliance with the March Notice.

¹⁶ Asda letter to the CMA dated 6 June 2023.

*margin taken from fuel and invested in food) which did not exist and therefore were not available to Asda’.*¹⁷

54. As explained in paragraphs 13-15 above, the 2021/2022 adjustment to Asda’s fuel business to cross-subsidise groceries was an historic business decision that Asda had cited in response to questions 5 and 6 of the January Notice as [X] contributor to its increasing fuel retail margin over the period 1 January 2017 to 31 November 2022.

55. Asda could not have made that assessment – which entailed comparing the materiality of the four factors Asda cited as driving its margin growth over the period – without some understanding of the quantum of that adjustment. Indeed, Asda was able to provide the relevant quantification required by question 4(a) within three days of the CMA’s letter of 3 April 2023.

56. In any event, Asda’s response to questions 4(a) and 4(b) by the extended deadline of 28 March 2023 – ‘*Asda has not identified responsive documents shared with Senior Management*’ – was clearly inadequate and provided no indication that it was unable to provide the required quantifications. While Asda did not provide any excuse for its failure to comply with questions 4(a) and 4(b) before the extended deadline, it did provide an excuse in relation to question 4(b) when responding to the CMA’s letter on 6 April 2023, nine days after that extended deadline – that Asda was unable to provide the required quantification because it could not isolate the individual impact of the subsidy from fuel to groceries. It was not reasonable for Asda to explain this so late, and only when prompted by the CMA. Asda was well aware that the increase in retail margins was the core area of interest for the CMA at this stage of the Market Study. The CMA had repeatedly emphasised the importance it placed on getting to the bottom of the factors driving that increase. In the circumstances Asda should have given this explanation without any delay, and in any case well before the deadline.¹⁸

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

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

58. The CMA considers that Asda did not approach compliance with the March 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 of £30,000.

¹⁷ Asda letter to the CMA dated 6 June 2023

¹⁸ In response to the Provisional Decision, Asda simply repeated the statements in its letter of 6 April 2023 to the effect that it was unable to quantify the impact of its margin adjustment from fuel to food. Asda letter to the CMA dated 6 June 2023.

Appropriateness of imposing a penalty

59. 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. In reaching this view, the CMA has considered the seriousness of Asda's failure to comply with the March Notice, including the adverse impact of the failure on the Market Study, as well as having regard to the need to achieve general deterrence.
60. The CMA had made it clear in both the January and March Notices as well as in its initial update published in December 2022 that the supermarkets' increased margins were an area of particular focus. Nevertheless, Asda failed to provide key data until a very late stage in the Market Study. Asda made no attempt to comply with questions 4(a) and 4(b) of the March Notice by the (extended) deadline and provided no explanation for this until prompted.¹⁹
61. Asda's failure was serious and had material consequences for the Market Study. Asda's responses to the relevant questions in the March Notice, provided after the extended deadline for responding to the March Notice had passed and only after further prompting by the CMA, contained information material to the Market Study. Although the CMA was aware that Asda's road fuel margins had increased, it was not aware of the extent of the increased contribution of its road fuel business to its overall gross profits.²⁰ Asda's belated response to question 4(a) showed that Asda increased its target profit from fuel by [X]% during the course of just over a year.
62. This is a material piece of evidence. It indicates that the increase in the prices Asda charged consumers for road fuel over the corresponding period cannot be attributed solely to factors such as global volatility in crude oil and/or refined petrol and diesel wholesale prices. This goes to the root of the Market Study.²¹
63. The CMA requires a wide range of information to discharge its functions. The availability and receipt of complete and accurate information is crucial to enable it to make evidence-based and timely decisions and, more generally, for the quality and effectiveness of its work. Requests for information and documents are a key tool for the CMA to collect the information it needs to carry out the Market Study.
64. The CMA therefore considers that it is of utmost importance to its ability to discharge its statutory functions that parties have due regard to the requirements

¹⁹ In response to the Provisional Decision, Asda repeated that although it had been unable to provide the quantification requested by question 4(b) of the March Notice, it had provided 'qualitative' illustrations of the kind of investments it makes in food pricing, in its letter dated 6 April 2023 (Asda letter to the CMA dated 6 June 2023). This is irrelevant to Asda's failure to comply with the March Notice by the extended deadline of 28 March 2023.

²⁰ In response to the Provisional Decision, Asda submitted that it had been '*fully transparent about the fact of the cross subsidy*' (Asda letter to the CMA dated 6 June 2023). The quantum, however, was not known to the CMA until this late stage.

²¹ Asda characterised the 'qualitative' examples it provided in response to question 4(b) in its letter of 6 April 2023 as the material evidence (letter to the CMA dated 6 June 2023). This is a mischaracterisation: it was the quantification Asda belatedly provided in relation to question 4(a) that was material.

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

65. 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

66. Taking into account the facts set out in paragraphs 8-37 above, the CMA considers that Asda's approach to responding to the March Notice lacked due care and is illustrative of a broader insufficient regard for compliance with CMA information requests and deadlines in the Market Study which must be considered an aggravating factor.²²

67. The CMA had to devote significant resources to interpreting the information provided by Asda in the Market Study and to following up to ensure Asda's position was clear. Ultimately, Asda's approach to providing information to the CMA in the course of the Market Study was a key factor in the CMA's decision to issue a brief spring update and to engage in further information gathering, including by way of its compulsory interview power in section 174(3) of the Act, at a late stage in the Market Study in order to get to the bottom of the issues. This would not have been necessary had Asda been more forthcoming.

Financial resources available to Asda

68. 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.²³

²² Asda submitted that '*the project team has not raised issues with regards to our level of cooperation*' (letter from Asda to the CMA dated 6 June 2023). This is not correct: the CMA wrote to Asda to express its concerns on 3 April 2023.

²³ 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 \(company-information.service.gov.uk\)](#).

69. These indicators show that Asda has significant resources available in respect of the imposition of a 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.

Conclusion on the imposition of a penalty

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

Signature: David Stewart

Executive Director, Markets and Mergers

Date: 20 June 2023

Competition & Markets Authority