

Anticipated acquisition by T&L Sugars Limited of certain assets of Tereos United Kingdom and Ireland Limited from Tereos SCA

Decision to impose a penalty on Tereos United Kingdom and Ireland Limited and Tereos SCA under section 110 of the Enterprise Act 2002

Decision

1. Following consideration of all relevant circumstances and having regard to its guidance on administrative penalties,¹ the Competition and Markets Authority (the **CMA**) gives notice to Tereos SCA and Tereos United Kingdom and Ireland Limited (**TUKI**) (together **Tereos**) that it has decided to impose a penalty on Tereos SCA and TUKI jointly and severally under section 110 of the Enterprise Act 2002 (the **Act**) because it finds that Tereos has, without reasonable excuse, failed to comply in full with the requirements imposed on it by the notice issued to Tereos under section 109 of the Act on 12 April 2024 (the **Notice**). The penalty is a fixed amount of £25,000.
2. On 29 August 2024 the CMA issued a provisional penalty notice to Tereos as it was of the preliminary view that Tereos had not complied in full with the Notice and that the CMA was considering imposing a penalty under section 110 of the Act.² Tereos' legal representatives, Squire Patton Boggs, responded by email on 10 September 2024 providing a small number of representations which were limited to confidentiality and accuracy considerations. Having considered Tereos' representations, the CMA has decided to issue this penalty notice to Tereos for the reasons set out below.

A. Executive summary

Failure to comply in full with the Notice

3. On 22 March 2024 the CMA referred the anticipated acquisition by T&L Sugars Limited (**TLS**) of certain assets of TUKI (the **Merger**) for an in-depth investigation, on the basis that, on the information currently available, it is or

¹ [Administrative penalties: Statement of Policy on the CMA's approach \(CMA4\)](#).

² In accordance with [CMA4](#), paragraph 5.2.

may be the case that the Merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

4. The CMA decided to issue the Notice for the purpose of its investigation of the Merger and deciding what, if any, action should be taken if, following its review, it decided that the Merger gave rise to a relevant merger situation that had resulted, or may be expected to result, in a substantial lessening of competition (**SLC**) within any market or markets in the UK. Among other things, it did so in order to obtain information enabling the CMA to ascertain whether Tereos was likely to exit the market absent the Merger, which was the key submission that Tereos had made during Phase 1.
5. Specifically, Questions 8 and 9 of the Notice required Tereos to provide certain minutes and internal documents in relation to its Board and corporate governance and required a response from Tereos by 11.59pm UK time on 26 April 2024 in respect of these two questions.
6. On 26 April 2024 Tereos responded to the Notice by providing 139 documents responsive to Question 8 and 103 documents responsive to Question 9³.
7. Following a main party hearing on 5 June 2024, the CMA asked Tereos, on 6 June 2024, to confirm the location of where certain extracts of Board meetings which had been provided originated from.⁴ Subsequently, on 11 June 2024 Tereos was requested to provide all outstanding information responsive to Question 9 of the Notice by 5pm on 12 June 2024.⁵ However, Tereos did not comply with this deadline and provided a further 34 documents responsive to Question 9 on 13 June 2024.⁶
8. In seeking to confirm whether Tereos had now complied in full with Questions 8 and 9 of the Notice, the CMA became aware that there might in fact be further material responsive to the Notice and not yet provided by Tereos and requested that all outstanding information be provided by 11.59 pm on 19 June 2024.
9. On 20 and 21 June 2024 Tereos provided a further 16 documents responsive to Question 8 and a further 25 documents responsive to Question 9, over seven weeks after the original deadline of 26 April 2024.⁷

³ Email from Tereos to CMA dated 26 April 2024 at 6:02pm.

⁴ Email from CMA to Tereos dated 6 June 2024 at 4:30pm.

⁵ Letter from CMA Inquiry Group Chair to Tereos dated 11 June 2024.

⁶ Email from Tereos to CMA dated 13 June 2024 at 11:28am.

⁷ Emails from Tereos to CMA dated 20 June 2024 at 5:36pm and dated 21 June 2024 at 10:35am.

10. The CMA finds that Tereos did not produce all responsive documents required by the Notice within the specified timeframe and therefore failed to comply in full with the requirements of the Notice.
11. This failure to produce all documents required to be produced by the Notice was serious. Tereos failed to provide Board minutes in response to the Notice until prompted to do so shortly after the main party hearing, which took place almost six weeks after the original deadline for compliance with the Notice. Tereos also failed to provide other responsive documents that were within the scope of the Notice relating to Finance Commission and shareholder meetings, which had been referred to in its own account of the corporate decision-making as to how to deal with TUKI's poor financial performance, and which formed the backdrop to the submissions it had made to the CMA.
12. The failure to comply was therefore capable of having an adverse impact on the CMA's investigation, in particular the ability to obtain evidence relevant to the determination of issues being investigated and the ability to meet statutory or administrative timetables.
13. Had the CMA not made further enquiries with Tereos following the main party hearing, a significant number of documents responsive to the Notice would never have been provided by Tereos.
14. The CMA considers that given the context, the failure to comply was flagrant because Tereos used an unjustifiably narrow definition when identifying responsive documents, which, on occasion, even contradicted how it had referred to those documents when making previous representations to the CMA,⁸ and which was untenable on any reasonable view when considering the background and purpose of the Merger inquiry.

Without reasonable excuse

15. The CMA finds that Tereos has no reasonable excuse for its failure to comply in full with the Notice. In particular, the CMA is not aware of any facts beyond the control of Tereos, or any significant and genuinely unforeseeable or unusual event,⁹ which led to non-compliance with the Notice.

⁸ Tereos itself had referred to the meeting being a meeting of 'Tereos' board members' and had, in its response to the Issues Letter of 19 February 2024 referred to the November 2022 meeting as a 'board meeting'.

⁹ CMA4, paragraph 4.4.

Decision to impose a penalty

16. The CMA finds that it is appropriate and proportionate to impose a fixed penalty on Tereos in the interests of deterrence.
17. The CMA finds that a penalty of £25,000 is an appropriate and proportionate penalty.

B. Factual background

Context

18. On 26 July 2023, TLS signed a business purchase agreement to acquire the UK packing and distribution site and business-to-consumer (B2C) business (the **Target**) of TUKI from Tereos.
19. On 2 November 2023 Tereos announced that it had agreed to sell the Target, and that the Merger was conditional on receiving merger control clearance from the CMA.
20. The CMA's mergers intelligence function identified the Merger as warranting an investigation and the CMA commenced its phase 1 investigation on 12 January 2024.
21. In February 2024 the CMA invited TLS and Tereos (the **Merger Parties**), to attend an issues meeting, and the Merger Parties submitted their views in writing. The CMA also gathered evidence from other market participants, such as customers and competitors of the Merger Parties.
22. On 8 March 2024 the CMA decided that it is or may be the case that the Merger may be expected to result in an SLC within a market or markets in the United Kingdom and that the transaction would be referred for a phase 2 investigation unless the Merger Parties offered acceptable undertakings to address these competition concerns.
23. On 22 March 2024 the CMA referred the Merger for an in-depth investigation.
24. On 3 April 2024 the CMA appointed the Inquiry Group and published the administrative timetable for the inquiry on the inquiry webpage on 10 April 2024.
25. On 5 June 2024 the main party hearings in the merger inquiry took place.
26. The CMA has subsequently cleared the Merger in its Final report published on 3 September 2024.

The Notice

27. Under section 109 of the Act, the CMA has the power to issue a notice requiring a person to provide documents and information for the purpose of assisting the CMA in carrying out any functions in connection with a matter that is, or has been, the subject of a reference under section 22 of the Act.
28. On 12 April 2024, the CMA issued the Notice to Tereos. The Notice included, *inter alia*, the following requirements:
- (i) *8. Please provide the minutes of, and all Internal Documents submitted by Tereos and/or TUKI to, each of the following meetings held between 1 January 2021 and 31 October 2022 inclusive, that contain any reference to TUKI and/or the Target:*
 - (a) *Tereos Board meetings;*
 - (b) *Meetings of the finance commission of the Tereos board;*¹⁰
 - (c) *Tereos shareholders' meetings.*
 - (ii) *9. Please provide a complete set of minutes of, and all Internal Documents submitted by, Tereos and/or TUKI to each of the following meetings held between 1 November 2022 to the date on which documents responsive to this request are provided:*
 - (a) *Tereos Board meetings.*
 - (b) *Meetings of the finance commission of the Tereos board.*
 - (c) *Tereos shareholders' meetings.*
29. On 26 April 2024 Tereos responded to the Notice by providing 139 documents responsive to Question 8 and 103 documents responsive to Question 9.¹¹
30. Following a main party hearing on 5 June 2024, the CMA asked Tereos, on 6 June 2024 at 4:30pm to confirm the location of where certain extracts of Board meetings which had been provided at Annex 162 of the Final Merger Notice (the **FMN**) originated from.¹²
31. Tereos responded on 7 June 2024 at 11:14am providing a copy of the 22 'November 2022 board minutes'.¹³ The CMA subsequently, on 7 June 2024 at 4:21pm, requested an explanation as to why the minutes were not provided in response to Question 9 of the Notice and to confirm that, notwithstanding the 22 November Board minutes, all information responsive to Question 9 of the

¹⁰ 'The finance commission of the Tereos board and Tereos shareholders' meetings are as described in paragraph 11.6 of the Final Merger Notice'.

¹¹ Email from Tereos to CMA dated 26 April 2024 at 6:02pm.

¹² Email from CMA to Tereos dated 6 June 2024 at 4.30pm.

¹³ Email from CMA to Tereos dated 7 June 2024 at 11.14am.

Notice had been provided to the CMA.¹⁴ The CMA sent two further emails on 10 June at 3:29pm and 7:36pm asking for the requested explanation and for a list of all Tereos Board Meetings falling within the scope of Question 9 of the Notice and corresponding annexes including minutes from those meetings.¹⁵

32. On 11 June at 7:13am, Tereos's legal representatives, Squire Patton Boggs, responded to the CMA's emails with the following information:¹⁶

The 18 [sic] November 2022¹⁷ meeting minutes were not disclosable under Q8-9 of the Section 109 of 12 April 2023. As noted in the title of this document, this meeting was NOT a board meeting (in French: "réunion du conseil d'administration" – in English "board of directors' meeting") but a "directors' information meeting" (in French: "réunion d'information des administrateurs"). Tereos' board members meet twice a month: the 1st Tuesday of each month is a board meeting while the 3rd Tuesday of each month is an information meeting (during which, save exceptions, no decisions are taken).

Tereos further confirms that, to the best of its knowledge, it provided a complete response to Q8-9 of said Section 109 – only one document was missing at the time but has been submitted in the meantime to the CMA as Annex 095 s109N3. This is due to a good faith oversight which can sometimes happen due to the manual search methodology followed to respond to these two questions.

We have asked Tereos to provide a list of all the Tereos Board Meetings falling within the scope of question 9 of the April 2024 s109 Notice and corresponding annexes including minutes from these meetings. We hope to be able to send you these by 2pm today – we will let you know if we need an extension.

33. The CMA's Inquiry Group Chair wrote to Tereos on 11 June 2024 following Tereos's legal representatives' response.¹⁸ The letter noted Tereos' explanation was not considered to be 'satisfactory' and considered that the November 2022 minutes fell within the scope of the Notice. It went on to explain that, in particular, Tereos itself had referred to the meeting being a meeting of

¹⁴ Email from CMA to Tereos dated 7 June 2024 at 4:21pm.

¹⁵ Emails from CMA to Tereos dated 10 June 2024 at 3:29pm and 7:36pm.

¹⁶ Email from Tereos to CMA dated 11 June 2024 at 7:13am.

¹⁷ The Board meeting took place on 22 November 2022 but Tereos erroneously referred to 18 November 2022 in their email correspondence.

¹⁸ Letter from CMA Inquiry Group Chair, Richard Feasey to Tereos dated 11 June 2024.

'Tereos' board members' and had, in its response to the Issues Letter referred to the November 2022 meeting as a 'board meeting'. The letter added:¹⁹

On plain reading of questions 8 and 9 of the Notice, there is no distinction drawn between a 'Board Meeting' and a 'Board Information Meeting'. Instead, these questions ask for minutes of all meetings of Tereos' Board, regardless of the specific purpose(s) for which each of those meetings may have been convened. Further, we note that a draft of the Notice was shared with Tereos for comment, which provided Tereos with an opportunity to clarify the proposed scope of the Notice. We consider that it was incumbent on Tereos to raise this with us at that time. For the avoidance of any doubt, if that issue had been raised with us, we would have rejected such a narrow and unjustified interpretation, particularly given that as Tereos will be aware, the November 2022 minutes (and potentially the minutes of other 'Board Information Meetings' attended by the Tereos Board) are clearly relevant to the inquiry, specifically in relation to our assessment of the counterfactual in this case. In this connection, we notice that Tereos had also failed to provide the minutes of the 'Tereos Board Meetings' of 18 April 2023 and 18 July 2023 described in Tereos' response to question 11(c) of the Notice.

34. The CMA's Inquiry Group Chair's letter requested all outstanding information responsive to question 9 of the Notice '**by 5pm on Wednesday 12 June 2024 at the very latest**' however this deadline was missed and Tereos provided the outstanding information on 13 June 2024 at 12:12pm.²⁰ The deadline in the Notice for a response to question 9 was **Friday 26 April 2024** i.e. the information was provided over 6 weeks after the deadline.
35. On 13 June 2024 at 3:51pm, the CMA asked, for completeness, if '*Tereos could confirm that it has now provided all information responsive to question 8 and question 9*' of the Notice.²¹ Tereos' legal representatives responded on 13 June 2024 at 4:46pm that '*[o]n behalf of Tereos, we confirm that, to the best of its knowledge, Tereos has complied with the [Notice]*'.²²
36. On 17 June 2024 at 3:50pm, the CMA explained to Tereos that:²³

We note that questions 8 and 9 of the Section 109 Notice of 12 April 2024 also included a requirement on Tereos to provide the minutes and

¹⁹ Tereos' Response to the Issues Letter dated 19 February 2024.

²⁰ Email from Tereos to CMA dated 13 June 2024 at 12:12am.

²¹ Email from CMA to Tereos dated 13 June 2024 at 3:51pm.

²² Email from Tereos to CMA dated 13 June 2024 at 5:46pm.

²³ Email from CMA to Tereos dated 17 June 2024 at 3:50pm.

materials from (i) meetings of the Finance Commission of the Tereos Board, and (ii) Tereos Shareholders' meetings (in addition to the minutes and materials from the Tereos Board meetings). For clarity and completeness, please provide the dates on which the meetings of the Finance Commission and Tereos Shareholders' meetings occurred since 1 January 2021 (ie the start date provided in question 8 of the S109 Notice), and the corresponding S109 Annex numbers. For example, the Final Merger Notice stated that the 'Finance Commission' met at least on 15 January 2021, in February 2022 and on 3 June 2022. The Final Merger Notice also referred to a 'Tereos' shareholders' meeting' on 2 February 2021.

If any relevant documents have still not been provided to the CMA, please provide as a matter of urgency such documents in your reply, together with an explanation as to why such materials were not previously provided despite the clear requirement on Tereos to do so.

*Please provide the above as a matter of urgency and in any event by **12pm UK time (midday) on Tuesday 18 June 2024 at the latest.***

37. Tereos' legal representatives responded on 18 June 2024 at 1:06pm explaining *inter alia* that:²⁴

...in Tereos' best knowledge, all relevant documents have been provided to the CMA – in particular, no minutes are made of the Commission Finance and Tereos' shareholders meetings.

In response to the queries raised in your email:

The Tereos' meeting held on 2 February 2021 was actually a general meeting of local councilors (in French: RGCR stands for "Réunion Générale des Conseillers de Régions") – i.e., not a shareholders' meeting

Tereos' Finance Commission meets on ad hoc basis and, in Tereos' best knowledge, the meetings at which TUKI have been discussed have been disclosed to the CMA – for these meetings, post-meeting information newsletters (called "en bref") are prepared (and any such newsletters referring to TUKI have been provided to the CMA)...

²⁴ Email from Tereos to CMA dated 18 June 2024 at 1:06pm.

38. The CMA responded on 18 June 2024 at 8:10pm stating in particular that:²⁵

(a) Finance Commission meetings

We do not accept Tereos' belated claim that 'no minutes' are produced for Finance Commission meetings. For example, Annex 148 of the Final Merger Notice records the discussions at a February 2022 Finance Commission meeting. These are, on any view, minutes of the Finance Commission. We also reject the distinction Tereos belatedly seeks to draw with 'post-meeting information newsletters', which also record items discussed at Finance Commission meetings. We note that a draft of the Notice was shared with Tereos for comment, which provided Tereos with an opportunity to clarify the proposed scope of the Notice. We consider that it was incumbent on Tereos to raise this with us at that time. For the avoidance of any doubt, if that issue had been raised with us, we would have rejected such a narrow and unjustified interpretation.

Further, contrary to Tereos' submission, question 9 did not limit the request to 'meetings at which TUKI have been discussed'. Accordingly, all meetings of the Finance Commission that took place since 1 November 2022 fall within the scope of the Notice.

(b) 'Shareholders' meetings

We note that Tereos itself referred to a 'Tereos shareholders' meeting' that took place on 2 February 2021 and stated that 'Tereos' shareholders are its cooperative farmers' in the Final Merger Notice (paragraph 11.6.7). The Notice specifically stated that '[t]he finance commission of the Tereos board and Tereos shareholders' meetings are as described in paragraph 11.6 of the Final Merger Notice' in footnote 2. It is not open to Tereos to now argue that those meetings are technically of some other persons that are not 'shareholders'. In light of Tereos' own references to 'Tereos shareholders' meetings', it is therefore clear from the language used and context what meetings the Notice referred to.

Again, if Tereos intended to adopt such a narrow interpretation, it should have raised this with us when a draft of the Notice was shared with Tereos for comment. Tereos failed to do so.

²⁵ Email from CMA to Tereos dated 18 June 2024 at 8:10pm.

In light of the above, we consider that the scope of the Notice is clear and Tereos has failed to provide the outstanding information without reasonable excuse. To clarify:

- In response to Question 8, Tereos should have provided all the minutes (however described, including for the avoidance of doubt what it now calls ‘post-meeting information newsletters’ and any other documents of a similar nature) of, and Internal Documents submitted to, Finance Commission meetings [held between 1 January 2021 and 31 October 2022 inclusive], that contain any reference to TUKI and/or the Target.*
- In response to Question 9, Tereos should have provided all the minutes (however described, including for the avoidance of doubt what it now calls ‘post-meeting information newsletters’ and any other documents of a similar nature) of, and Internal Documents submitted to, Finance Commission meetings from 1 November 2022.*
- In response to Questions 8 and 9, for Shareholders’ meetings, Tereos should have explained (i) why it referred to a ‘shareholders’ meeting’ in the Final Merger Notice (which it now claims was a meeting of some other persons) (ii) whether Tereos holds shareholders’, or members’, meetings, (iii) who attend these meetings and what are discussed in these meetings and (iv) why Tereos considers that it does not have to provide any documents to comply with the Notice in relation to these meetings. Alternatively, Tereos should have provided the minutes of and ‘all Internal Documents submitted by Tereos and/or TUKI to’ such meetings.*

*Please provide the outstanding information by **11:59pm (UK time) on Wednesday 19 June 2024...***

39. On 20 June 2024 at 5:34PM, Tereos’ legal representatives explained that Tereos would be providing the information but stated:²⁶

...Tereos also would like to remind the CMA the significant cultural and linguistic differences between the UK and French legal systems – especially when it comes to the legal form of Tereos (SCA for “Société Coopérative Agricole”). As a matter of fact, the Case Team recognised during our call yesterday that they were not sure to understand what it is a shareholders’ meeting in the context of Tereos. As such Tereos does not accept the CMA’s sui generi construction of what constitutes

²⁶ Email from Tereos to CMA dated 20 June 2024 at 5:34pm.

“minutes” under French law – as it should be a matter of French legal interpretation only by a French authority or court only, in accordance with international conventions.

Tereos therefore does not accept that it did not comply with the section 109 notice of 12 April 2024 “without a reasonable excuse” in particular taking into account the factors mentioned above. Tereos would now invite the CMA to accept that Tereos has made all reasonable efforts to comply with the section 109 notice of 12 April 2024...

40. On 20 June 2024 at 5:36pm and 21 June 2024 at 10:35pm Tereos’ legal representatives provided further documents.²⁷ The deadline in the Notice for a response to questions 8 and 9 was Friday 26 April 2024 i.e. the information was provided over 7 weeks after the deadline.

C. Legal assessment

Relevant legislation

41. Section 110(1) 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 109 of the Act, it may impose a penalty of such amount as it considers appropriate (in accordance with section 111 of the Act).
42. The CMA concludes that the statutory requirements for imposing a penalty under section 110 of the Act are met, and that the imposition of a penalty in a fixed amount of £25,000 is appropriate and proportionate in this case.

Statutory requirements for imposing a penalty under section 110 of the Act

Failure to comply in full with the requirements of the Notice

43. The CMA finds that both Tereos SCA and TUKI have failed to comply in full with a requirement of the Notice, as set out below:
 - (a) Question 8 of the Notice required Tereos to produce all minutes of Tereos Board meetings; meetings of the Finance Commission of the Tereos Board; and Tereos shareholders’ meetings that referred to TUKI and/or the Target for meetings that took place during the period from 1 January 2021 until 31 October 2022.

²⁷ Emails from Tereos to CMA dated 20 June 2024 at 5:36pm and 10:35pm.

- (b) Question 9 of the Notice required Tereos to produce complete sets of minutes of Tereos Board meetings, Meetings of the Finance Commission of the Tereos Board and Tereos shareholders' meetings from 1 November 2022.
44. As outlined above, Tereos produced a total of 76 documents responsive to the Notice after the deadline to respond to the Notice. The CMA considers that the omitted documents were clearly responsive both on the plain reading of the Notice as drafted and also on a purposive interpretation of the Notice.
45. Tereos' interpretation of the Notice in their legal representatives' email of 11 June 2024,²⁸ quoted above at paragraph 31, is at odds with how Tereos had previously referred to minutes as being '*Tereos' board minutes*' in its response to the Issues Letter (the **Response**)²⁹ and in its email of 7 June 2024, which repeatedly refers to 'board minutes'.³⁰ Additionally, in the explanation provided on 11 June 2024 regarding the directors' information meetings, it is clear that the attendees are Tereos' Board members.³¹ Additionally, at paragraph 11.6.22 of the Final Merger Notice there is a reference to a decision of the Board in November 2022 to '*start the process of selling TUKI...*'. This statement runs counter to Tereos' explanation that this was not a meeting of the Board, but a Board Information Meeting where decisions were not usually taken. Therefore, on any view the information meetings are still meetings of the Tereos Board regardless of their stated purpose. The Notice was unequivocal in requesting the minutes of all Board meetings and the failure to provide the minutes is inexplicable and unjustifiable and relies on an unconvincing explanation that meetings comprised of Tereos Board members are not meetings of the Tereos Board.
46. In responding to Questions 8 and 9, Tereos asserted on 18 June 2024 that '*no minutes are made of the Commission Finance and Tereos' shareholders meetings*'.³² The plain meaning of minutes is a record or summary of what was discussed at a meeting. Tereos referred to post-meeting information newsletters (called '*en bref*'). It is clear that these newsletters perform the same function as minutes in that they are a record of what was discussed, which is circulated following a meeting.³³ These post-meeting information newsletters clearly fell within the scope of the Notice on any plain reading.

²⁸ Email from Tereos to CMA dated 11 June 2024 at 7:13am.

²⁹ Tereos' Response to the Issues Letter dated 19 February 2024.

³⁰ Email from Tereos to CMA dated 7 June 2024 at 11:14am.

³¹ Email from Tereos to CMA dated 11 June 2024 at 7:13am.

³² Email from Tereos to CMA dated 18 June 2024 at 1:06pm.

³³ See for example Minutes of Tereos Finance Commission Meeting on 23 February 2022, on 19 January 2024 and on 16 February 2024.

47. In this same response Tereos also sought to explain that ‘the Tereos’ meeting held on 2 February 2021 was actually a general meeting of local councilors (in French: RGCR stands for “*Réunion Générale des Conseillers de Régions*”) – i.e., not a shareholders’ meeting’. This is contrary to Tereos’ earlier description of the event in the Merger Parties’ FMN, where the same meeting had been described by Tereos as a shareholders’ meeting. The Notice specifically stated that ‘[t]he finance commission of the Tereos board and Tereos shareholders’ meetings are as described in paragraph 11.6 of the Final Merger Notice’ in footnote 2. The CMA was clearly entitled to hold the view that material relating to this meeting was responsive to the Notice as drafted and ought to have been provided by Tereos. It was not open to Tereos to resile from its previous description of the meeting in order to claim that the material was not responsive to the Notice.
48. It would have been apparent to any reader from the phase 1 decision (the **Decision**) that the exiting firm counterfactual was a central part of the investigation. At paragraph 18, the Decision states that ‘*the CMA has considered whether there is compelling evidence that it is inevitable that, absent the Merger (1) the Target would exit the markets in which it is active...*’³⁴
49. The Merger Parties had submitted to the CMA that TUKI’s B2C business suffered from a lack of profitability and in the FMN went on to outline that Tereos’ Finance Commission had considered the Target’s performance and profitability on a number of occasions. The FMN also referred to a shareholders’ meeting on 2 February 2021 where a new strategy was presented to increase Tereos’ profitability and where TUKI was mentioned as a loss-making entity.
50. In Tereos’ response to the Issues Letter dated 19 February 2024 (the **Response**) it detailed the firm’s approach to the Target’s unprofitability and described the decision-making process undertaken by Tereos’ Board and senior management.³⁵
51. At paragraph 13 of the Response, Tereos relies on a number of internal documents as pieces of evidence to show the Target’s lack of profitability and referenced, *inter alia*, presentations and minutes of the Finance Commission and minutes of the Board from 20 September 2022.
52. At paragraph 10(c) of the Response, Tereos outlines in detail the contents of the Board meeting and its accompanying presentation from November 2022 as

³⁴ Phase 1 decision (ME 7074/23) dated 8 March 2024.

³⁵ Tereos’ Response to the Issues Letter dated 19 February 2024.

evidence relevant to submissions it had made to the CMA in connection with the exiting firm counterfactual.

53. In the Response, Tereos also referred to a decision of the Board on 13 February 2024 as being decisive in relation to submissions it put forward to the CMA in connection with the exiting firm counterfactual.
54. Within this context where Tereos has repeatedly referred to, and relied upon evidence from, various corporate decision-makers and stakeholders in making its case to the CMA, the CMA considers that it would have been obvious to any reasonable-minded observer the purpose of the CMA seeking the various documents outlined in Questions 8 and 9 of the Notice and their significance to the Merger inquiry. It is on this basis that the CMA finds that Tereos' interpretation of the scope of the Notice was unjustifiably narrow and untenable when viewed in the context of the object of the Merger inquiry.

Without reasonable excuse

55. Section 110 of the Act provides that penalties can be imposed if a failure to comply is '*without reasonable excuse*'. The Competition Appeal Tribunal (the **CAT**) considered this concept in *Electro Rent* and confirmed that an objective test should be applied as to whether any excuse put forward is reasonable.³⁶
56. In this context, CMA4 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 [a person's] control has caused the failure and the failure would not otherwise have taken place.*'³⁷
57. The CMA does not consider that the explanation provided by Tereos in its correspondence dated 20 June 2024³⁸ constitutes a reasonable excuse for Tereos's failure to produce all correspondence responsive to Questions 8 and 9 of the Notice. This is because:
 - (a) Tereos had ample opportunity to seek clarification of the interpretation of any aspect of the Notice. A draft notice was sent to Tereos' legal representatives on 8 April 2024 inviting comments.³⁹ Tereos raised a number of queries on 10 April 2024 on several of the draft questions,⁴⁰ but

³⁶ *Electro Rent Corporation v CMA* [2019] CAT4 (*Electro Rent*) at paragraph 69.

³⁷ CMA4, paragraph 4.4.

³⁸ Email from Tereos to CMA dated 20 June 2024 at 5:34pm.

³⁹ Email from CMA to Tereos dated 8 April 2024 at 4:57pm.

⁴⁰ Email from Tereos to CMA dated 10 April 2024 at 11:01am.

not Questions 8 or 9. The CMA also held a call with the Parties on 11 April 2024 to discuss their comments on the draft Notice. On 17 April 2024, a few days after the Notice was first served, Tereos' legal representatives emailed the CMA seeking clarification on the interpretation of Question 7 of the Notice, '*we would be grateful if the CMA could clarify whether the scope of Question 7 is limited to the provision of Tereos' and TUKI's management information in relation to the supply of sugar regarding the profit/loss made across each of the channels listed (we assume that it is limited to the supply of sugar) as Tereos is also active in other markets (e.g., starch)?*'.⁴¹ The CMA considers that it would have been reasonable for Tereos to seek clarification of Questions 8 and 9 on the same or another occasion, particularly given Tereos' asserted '*cultural and linguistic differences*' that prevented compliance.

- (b) The CMA also does not accept Tereos' assertion that the construction or interpretation of the Notice 'should be a matter of French legal interpretation only by a French authority or court only, in accordance with international conventions'. The Notice was issued by a UK competition authority using its powers granted by the UK Parliament as applicable to this Merger so English legal concepts and plain English language naturally apply. Further, Tereos was represented by a global law firm who would have been well-placed to advise on the nature of the CMA's requests and what documents were likely to be responsive to the Notice with reference to both UK law and French law.
- (c) Further, in responding to the Notice and despite the asserted '*cultural and linguistic differences*' Tereos did not flag the interpretation it was adopting when responding to the Notice even though it had described the documents using the same terminology used in the Notice in its own submissions. Tereos had ample opportunity to explain that it was not providing certain documents and the reasons why but did not do so.

58. The CMA is not aware of any facts beyond the control of Tereos, or the result of a significant and genuinely unforeseeable or unusual event⁴² which led to non-compliance with the Notice.

59. The categories of reasonable excuse that are explicitly referred to in CMA4 are non-exhaustive, however after considering all the relevant circumstances, the CMA is not aware of any further facts that are capable of amounting to a reasonable excuse.

⁴¹ Email from Tereos to CMA dated 17 April 2024 at 6:21pm.

⁴² CMA4, paragraph 4.4.

60. The CMA therefore finds that Tereos has no reasonable excuse for its failure to comply in full with the Notice.

D. Appropriateness of imposing a penalty at the level proposed

61. The CMA considers that Tereos did not take compliance with the Notice sufficiently seriously. The CMA therefore considers that it is appropriate to impose a fixed penalty of £25,000.

Appropriateness of imposing a penalty

62. Having had regard to its statutory duties and CMA4, 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 Tereos's failure to comply with the Notice in full and the need to achieve deterrence.
63. Requests for information and documents are a key tool for the CMA to collect the information it needs to carry out its functions in merger control investigations. The failure in this case was significant and serious. The timely availability and receipt of complete and accurate information is crucial to enable the CMA to make evidence-based decisions in this respect and, more generally, for the quality and effectiveness of its work.
64. Tereos's failure to comply in full with the Notice led to a diversion of CMA resources as it required the case team to expend time and effort making clarificatory follow-up requests, leading to a risk that the inquiry would be delayed. By providing responsive material in a piecemeal fashion, and only in response to follow-up requests, Tereos further hampered the progress of the inquiry and created a risk that the inquiry would proceed without relevant information.
65. The CMA considers that it is of utmost importance to the CMA's ability to conduct effective investigations that parties have due regard to the requirements imposed on them by, among other things, section 109 of the Act. The CMA considers that the imposition of an administrative penalty under section 110 of the Act is critical to achieve deterrence; to impress both on Tereos in this specific case, and more widely on those who may be subject to investigatory requirements in future, the seriousness of a failure, without a reasonable excuse, to comply with a notice issued under section 109 of the Act.
66. In particular, the CMA would specifically seek to deter undertakings from applying their own narrow and artificial interpretation of the scope of section

109 notices issued by the CMA to their advantage to avoid having to produce documents that are properly responsive to a notice.

67. The CMA has had regard to the fact that the Inquiry Group cleared the Merger on 3 September 2024, however it does not consider that this impacts on the seriousness of the breach. It is necessary to deter undertakings in the future from failing to provide responsive documents, which in another case may be highly relevant or even determinative of a merger investigation. Further, the CMA as a public authority exercising a statutory function must be assured that it has carried out effective information gathering so that it, third parties and the general public can be satisfied that it has carried out a thorough investigation and has reached an accurate and evidence-based conclusion. The documents related to a key aspect of the case, the counterfactual, which formed the basis on which the merger has been cleared. Failure to comply with statutory notices is capable of decreasing not only the effectiveness of, but also confidence in, the investigative process.
68. Consistent with its statutory duties and CMA4, the CMA has assessed all relevant circumstances to determine the appropriate level of penalty in this case.

Aggravating/mitigating factors

69. The CMA considers that an aggravating factor in this matter was the fact that the CMA had to engage in lengthy and repeated correspondence with Tereos' legal representatives in order to obtain the outstanding documents despite the CMA first requesting the November 2022 Board minutes on 6 June 2024.⁴³ It took a further two weeks after that date for Tereos to provide all responsive documents. Tereos confirmed that it had complied with the notice on 13 June 2024 but on 17 June 2024 the CMA found that the response remained incomplete.⁴⁴ Therefore, despite two written assurances of compliance on 26 April 2024 in respect of the initial response to the Notice and on 13 June 2024, the Notice still had not been responded to in full despite the CMA having brought Tereos' original failure to its attention. It was reasonable to expect that before providing a second specific assurance of compliance to the CMA that Tereos would have assessed more broadly that its response was now fully compliant.
70. A further aggravating factor is the involvement of senior management at Tereos in the failure to comply with the Notice. Tereos' Compliance Statement dated

⁴³ Email from CMA to Tereos dated 6 June 2024 at 4:30pm.

⁴⁴ Email from CMA to Tereos dated 17 June 2024 dated 3:50pm.

26 April 2024 is signed by a member of senior management of Tereos.⁴⁵ Furthermore, the Notice confirms that the member of senior management specifically identified and collated the material deemed responsive to Questions 8 and 9 of the Notice.

71. The CMA is not aware of any mitigating factors relevant to Tereos's failure to comply in full with the Notice.

Financial resources available to Tereos

72. The CMA has had regard to the financial resources available to Tereos.
73. In determining the appropriate level of penalty, the CMA has considered Tereos' published annual report and accounts. This information shows that:
- (a) The worldwide consolidated revenues of the Tereos group of companies in the financial year ended 2023/24 were approximately €7,143 m⁴⁶;
 - (b) In the same period, the worldwide net income of the Tereos group of companies was approximately €448 m⁴⁷.
74. These indicators show that Tereos has significant resources available in respect of the imposition of a fixed penalty of £25,000 for the failure to comply in full with the Notice. In addition, the CMA considers that it is appropriate and proportionate to impose a penalty at this level, having regard to Tereos's size and financial position.

Conclusion on the imposition of a penalty

75. The current statutory maximum for a fixed penalty is £30,000 and it is considered appropriate to impose a penalty towards the higher end of the statutory maximum because of the seriousness of the failure and the identification of a number of aggravating factors as outlined at paragraphs 69 to 70. In particular, there was repeated and long-lasting non-compliance which was capable of having a significant impact on the investigation and the non-compliance concerned documents that were highly pertinent to the inquiry. The CMA is not aware of any countervailing mitigating factors.

⁴⁵ Compliance Statement dated 26 April 2024.

⁴⁶ [Tereos Group consolidated financial statements for year ending 31 March 2024](#).

⁴⁷ [Tereos Group consolidated financial statements for year ending 31 March 2024](#).

76. As outlined above at paragraphs 65 to 67, as well as reflecting the seriousness of a breach, the purpose of imposing a penalty is also to ensure a sufficient deterrent effect in light of a low statutory cap.
77. Therefore, in all the circumstances, the CMA considers that the imposition of a fixed penalty of £25,000 is appropriate on the basis that it: (i) would reflect the seriousness of Tereos's failure to comply in full with the Notice, (ii) would act as a deterrent to Tereos and other persons in the future, and (iii) is not disproportionate in this case with reference to the financial resources available to Tereos.

E. Next steps

78. The CMA has decided to issue this penalty notice for the reasons set out above.
79. Tereos is required to pay the penalty in a single payment, by cheque or bank transfer to an account specified to Tereos by the CMA, by close of banking business on the date which is 28 days from the date of service of this penalty notice on Tereos.
80. Tereos has the following rights in relation to any final penalty the CMA may decide to impose:
 - a. Tereos may pay the penalty or different portions of it earlier than the date by which it is required to be paid.
 - b. Pursuant to section 112(3) of the Act, Tereos has the right to apply to the CMA within 14 days of the date on which any final notice is served on Tereos for the CMA to specify different dates by which the penalty or different portions of it, are to be paid.
 - c. Pursuant to section 114 of the Act, Tereos has the right to apply to the CAT against any decision the CMA reaches in response to an application as described in the preceding paragraph, within the period of 28 days starting with the day on which Tereos is notified of the CMA's decision.
 - d. Pursuant to section 114 of the Act, Tereos has the right to apply to the CAT within the period of 28 days starting with the day on which this notice is served on Tereos 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 or (as the case may be) the different dates by which portions of the penalty are required to be paid.
- e. If Tereos applies to the CMA pursuant to section 112(3) of the Act for the CMA to specify a different date by which the penalty is to be paid, then the period of 28 days referred to in relation to (d)(iii) above shall start with the day on which Tereos is notified of the CMA's decision on the section 112(3) application.
- f. Where a penalty, or any portion of such penalty, has not been paid by 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 any of the penalty and any interest which has not been paid; in England and Wales such penalty and interest may be recovered as a civil debt due to the CMA.⁴⁸

Signature:

Richard Feasey, CMA Inquiry Chair

Date: 25 September 2024

Competition and Markets Authority

⁴⁸ Section 115 of the Act. Section 113 of the Act covers (among other matters) the interest payable if the whole or any portion of a penalty is not paid by the date by which it is required to be paid.