

**REFERENCE RELATING TO THE COMPLETED ACQUISITION BY BREEDON
AGGREGATES LIMITED OF CERTAIN SCOTTISH ASSETS OF AGGREGATE
INDUSTRIES UK LIMITED**

**Notice of possible remedies under Rule 11 of the
Competition Commission Rules of Procedure**

Introduction

1. On 24 September 2013, the Office of Fair Trading (OFT) referred to the Competition Commission (CC) under section 22(1) of the Enterprise Act 2002 (the Act) the completed acquisition by Breedon Aggregates Limited (Breedon) of the Scottish assets (the acquired operations) of Aggregate Industries UK Limited (Aggregate Industries).
2. In its provisional findings on the reference notified to Breedon and Aggregate Industries (the main parties) on **6 February 2014**, the CC provisionally concluded that the acquisition had resulted in the creation of a relevant merger situation; and that the creation of that situation may be expected to result in a substantial lessening of competition (SLC) in the following product markets and local areas:
 - (a) asphalt in the Aberdeen area, extending to the north of Aberdeen;
 - (b) RMX in the Peterhead area; and
 - (c) asphalt in the Inverness area.
3. The CC expects that this will lead to higher prices than would otherwise be the case, absent the merger, in the product markets and local areas identified in paragraph 2 above.
4. This notice sets out the actions which the CC considers it might take for the purpose of remedying the SLCs and any resulting adverse effects identified in the provisional findings. The CC invites comments on possible remedies by **20 February 2014** (see note (i)).

Criteria

5. In choosing appropriate remedial action, the CC shall have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLCs and any adverse effects resulting from them.¹ When deciding on an appropriate remedy, the CC will consider the effectiveness of different possible remedies and their associated costs and will have regard to the principle of proportionality. Between two remedies that the CC considers equally effective, it will choose that which imposes the least cost or restriction. The CC will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. For completed mergers, the CC will not normally take account of the costs or losses that will be incurred by the merged parties as a result of a divestiture remedy.²

¹ Section 35(4) of the Act.

² *Merger Remedies: Competition Commission Guidelines*, CC8, November 2008, paragraphs 1.9 & 1.10.

Possible remedies on which views are sought

6. In merger inquiries, the CC will generally prefer structural remedies, such as divestiture or prohibition, rather than behavioural remedies because:
 - (a) structural remedies are likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;
 - (b) behavioural remedies may not have an effective impact on the SLC and its resulting adverse effects, and may create significant costly distortions in market outcomes; and
 - (c) structural remedies do not normally require monitoring and enforcement once implemented.³
7. The CC has provisionally identified two potential types of structural remedy:
 - (a) divestiture of all of the operations acquired by Breedon (full divestiture); or
 - (b) divestiture of certain operations in specific local areas to address the provisional SLCs set out in paragraph 2 (partial divestiture).
8. At this stage the CC considers that full divestiture would prevent an SLC from arising in any relevant market. The CC therefore takes the view that full divestiture would represent a comprehensive solution to all aspects of the SLCs it has provisionally found and that it has very few risks in terms of effectiveness.
9. The CC considers that partial divestiture of specific operations would also be effective and would be less costly and intrusive than full divestiture. The CC's current thinking on the divestiture of either the Aggregate Industries or Breedon operation or operations in each of the areas of concern is set out in paragraphs 12 to 14.
10. In the case of the asphalt market in the Inverness area the CC provisionally concluded that the SLC would be unlikely to continue beyond 2018 (at the latest). The CC will therefore consider whether behavioural remedies would also be effective in addressing this time-limited SLC.
11. In the case of the other two SLCs which it provisionally identified, the CC's current view is that a behavioural remedy by itself is unlikely to be an effective remedy. However, the CC will consider whether any behavioural remedies would be required in a supporting role to safeguard the effectiveness of any divestiture (for example, to secure supply of aggregates of the appropriate quality).
12. The CC invites views on these remedy options and will consider any other practicable remedies—structural or behavioural—that are proposed in order to address the provisional SLC and resulting adverse effects.

Divestiture of Breedon or Aggregate Industries operations in SLC areas

13. At this stage, the CC considers that the following types of divestiture would prevent an SLC arising in each area of concern:
 - (a) one or more RMX operations⁴ near Peterhead: Peterhead and/or Stirlinghill;

³ CC8, paragraph 2.14.

- (b) one or more asphalt operations near Aberdeen: Craigenlow, Tom's Forest and/or Stirlinghill; and
 - (c) one or more asphalt operations near Inverness: Daviot and/or Mid Lairgs.
14. The CC invites views on the effectiveness of these proposed remedies and in particular on:
- (a) *The scope of the divestiture package:*
 - (i) What criteria should be used to determine the scale and scope of each divestiture package, including whether divestiture of one operation in each area would be sufficient to address the SLC in that area and whether one divestiture may address more than one SLC.
 - (ii) What property, personnel, supply agreements, customer contracts, other assets (tangible or intangible) and all regulatory licences, permits, authorizations or consents necessary for the effective operation of the plant would need to be included with each plant (or plants) in order to make it a viable divestiture package (for example, arrangements may be needed in the event that the divested plant is located on a quarry that is not included in the divestiture package).
 - (iii) Whether a restriction would need to be placed on the quarry where the plant is located to prevent Breedon opening another RMX or asphalt plant at the same location.
 - (iv) Whether divestiture of each operation should be of a leasehold or freehold. This may depend on the local characteristics of the operation.
 - (v) Whether, and if so why, the CC should specify that the operation in each local area should be the Breedon operation(s) or the Aggregate Industries operation(s), or whether this should be left to Breedon to choose.
 - (b) *Identification of a suitable purchaser.* The CC will wish to satisfy itself that a prospective purchaser has no significant connection to the merger parties that may compromise the purchaser's incentives to compete; has access to appropriate financial resources, expertise and assets; has an appropriate business plan; and creates no competition concerns.⁵
 - (c) *Effective divestiture process.* The CC will consider the appropriate timescale for achieving a divestiture (the Divestiture Period) and what procedural safeguards would be needed to minimize the risk associated with these remedy options, including the use of a Divestiture Trustee to divest any operations not divested within the Divestiture Period.
15. The CC will consider whether, in relation to specific divestitures, there is a risk that a specific plant may rely on supply from another site, for example the supply of aggregates to an asphalt plant. Should this be a relevant consideration in relation to specific divestitures, the CC will consider whether the scope of the divestiture package should be widened (for example, to include an aggregates quarry) and/or

⁴ In this notice by operations we mean property, personnel, supply agreements, customer contracts, other assets (tangible or intangible) and all regulatory licences, permits, authorizations or consents necessary for the effective operation of the plant.

⁵ CC8, paragraph 3.15.

whether a behavioural remedy would be required in addition to any divestiture remedy (for example, to ensure ongoing supply of aggregates).

Relevant customer benefits

16. The CC will have regard to the effects of remedial action on any relevant customer benefits within the meaning of section 30 of the Act arising from the merger situation. Such benefits might comprise lower prices, higher quality or greater choice of goods or services or greater innovation in relation to such goods or services. A benefit is only a relevant customer benefit if the CC believes that: (a) the benefit has accrued as a result of the creation of the relevant merger situation concerned or may be expected to accrue within a reasonable period as a result of the creation of that situation; and (b) the benefit was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.
17. The CC welcomes submissions with supporting evidence on the nature of any relevant customer benefits and on the scale and likelihood of such benefits and the extent to which these are preserved by the different remedy options being considered.

Next steps

18. The main parties and interested third parties are requested to provide any views in writing, including any practical alternative remedies they wish the CC to consider, by **20 February 2014** (see note (i)).
19. A copy of this notice will be posted on the CC website.

(signed) SIMON POLITO
Deputy Chairman and Chairman of the Group
6 February 2014

Note:

- (i) This notice of possible actions to remedy the SLC and any resulting adverse effects is given having regard to the provisional findings announced on 6 February 2014. The main parties have until **27 February 2014** to respond to the provisional findings. The CC's findings may alter in response to comments it receives on its provisional findings, in which case the CC may consider other possible remedies, if appropriate.