HERBERT SMITH FREEHILLS

**COMPLETED ACQUISITION BY BREEDON AGGREGATES LIMITED OF CERTAIN SCOTTISH ASSETS OF AGGREGATE INDUSTRIES UK LIMITED**

**RESPONSE TO STATEMENT OF ISSUES DATED 22 OCTOBER 2013 ("STATEMENT OF ISSUES")**

## 1. THE MARKETS IN WHICH THE PARTIES OPERATE

1.1 In respect of the CC's description of the products concerned, Breedon refers the CC to its submissions in response to the Market Questionnaire ("**MQ**"). In addition, Breedon comments as follows.

Aggregates

1.2 The production source of aggregates can be divided into two categories: (i) primary aggregates, and (ii) recycled/secondary aggregates. However, with respect to paragraphs 7 and 8 of the Statement of Issues, Breedon notes that in some cases there will not be a clear distinction between primary and recycled/secondary aggregates. This can make it difficult precisely to assess the proportion of aggregates consumption accounted for by each product type and, Breedon believes, is a source of underreporting of capacity and output volumes, particularly in respect of recycled/secondary material.

1.3 Breedon believes that some recycled/secondary aggregates are, in practice, virtually the same as primary aggregates in terms of their physical properties. In particular, as explained in Breedon's response to the MQ, Breedon uses the terms "recycled" and "secondary" aggregates to also refer to:

1.3.1 "site-won" aggregates (i.e. where a contractor processes excavated material from a site such as a housing development either to use on-site or to sell in the market)[1];

1.3.2 aggregates produced from small operations that are not registered as quarries; and

1.3.3 "borrow pit" aggregates i.e. aggregates produced from part of one project site (e.g. when carrying out excavation works in the development of a road) and utilised in another part of the same project site.

1.4 In common with primary aggregates, site-won aggregates, materials from unregistered sites, and borrow pit aggregates are virgin materials produced from naturally occurring mineral deposits which are extracted, processed and used for the first time. These materials therefore have the same physical properties as primary aggregates. However, these materials are not typically captured by the reporting data, hence Breedon's classification of them as recycled/secondary. Furthermore Breedon notes that in many cases, these materials are not, in practice, sold subject to the Aggregates Levy (£2/tonne)

[1] By way of example, Breedon refers the CC to the Jamieson site at Whitecairns, which was viewed during the CC's site visit. The works being carried out at this site include significant excavation and landscaping works to provide the basis for anticipated construction work. The material extracted as part of these works are categorised by Breedon as "recycled aggregates" but is likely to be practically identical to, and therefore highly substitutable with, primary aggregates, for both direct uses and value-added products (e.g. RMX).

such that they enjoy the significant cost advantage normally associated with true recycled/secondary aggregates:

1.4.1 Site-won aggregates are exempt from the Aggregates Levy where they do not leave the site and are used in work connected with the site from which they are produced. However, Breedon understands that, in many cases, excess material is transferred off-site and either sold in the market or used at other sites. In such circumstances, the material is substitutable with primary aggregates, and is used mainly for bulk fills, sub-bases and crusher run applications. Typically, Breedon has observed that in the majority of such cases, the producer does not register the production and therefore does not pay the Aggregates Levy which technically falls due. Such production is also not reported in any market statistics.

1.4.2 In the case of small producers, Breedon believes that there are a number of sites which produce aggregates without registering as such. The effect of non-registration is that the materials produced are not assessed for the purposes of calculating liability for the Aggregates Levy, notwithstanding that it should technically be applicable to such products. Again, these materials are substitutable with primary aggregates (used mainly for bulk fills, sub-bases and crusher run applications) but are not reported in any market statistics.

1.4.3 With regard to borrow pit aggregates, Breedon believes that such aggregates can be fully processed and are wholly substitutable with primary aggregates for all uses, including value added products such as asphalt and RMX. Such production may not attract the Aggregates Levy and are not reported in any market statistics. As an example, Breedon believes that the AWPR may result in a number of borrow pits being created which may well be used to produce aggregates for on-site asphalt and RMX plants.

1.5 As it has previously submitted, Breedon believes that, on a conservative basis, at least 25% of all aggregates consumption is made up of recycled/secondary aggregates. As previously noted, the Minerals Products Association ("**MPA**") estimates that 29% of UK aggregates demand is met by recycled/secondary aggregates [2]; and the Scottish Environment Protection Agency ("**SEPA**") estimates that in Scotland, recycled aggregates alone account for 20% of total aggregates used[3]. As regards site-won and unregistered aggregates production, given that the production of aggregates by these methods is not normally registered, Breedon believes that a significant proportion of such production is likely to be omitted from output data figures. Breedon believes the same to be true of "borrow pits", which are likely to be underreported due to their transient use patterns. Breedon submits that this further demonstrates that 25% is a conservative estimate for the proportion of recycled/secondary aggregates. Consequently, there is a large volume of supply which competes directly with Breedon's supply of mainly primary aggregates, but which is not reflected in any market statistics.

End-Uses

[2] See Competition Commission, Aggregates, cement and ready-mix concrete market investigation ("**MIR**"), Provisional Findings Report dated 23 May 2013 (the '**CC MIR Provisional Findings Report**"), paragraph 5.12.

[3] http://www.sepa.org.uk/waste/waste_regulation/idoc.ashx?docid=5d44d399-61e2-4914-ba61-61ae45ac8c01&version=-1.

1.6 While aggregates can be used to perform a number of different end-uses, Breedon believes these can be described in two broad categories: value-added products and general construction uses.

1.7 'Value added products' refer to the use of aggregates as an input into products such as asphalt, RMX and concrete products. Breedon acknowledges that the extent to which recycled and secondary aggregates may be used as a substitute for primary aggregates varies depending on the particular value added product being produced. With regard to the making of asphalt, aggregates are mixed with a binding agent, usually bitumen, which is then used in surfacing and maintenance activities. Breedon notes there is some degree of substitutability with primary aggregates for this end-use and that an increasing volume of recycled and secondary aggregates is being used[4]. With regard to RMX, aggregates are mixed with specific volumes of cement and water and supplied in a ready-mix form. Breedon notes that, as with asphalt, secondary and recycled aggregates may be used, but there is a more limited substitutability with primary aggregates for this end-use[5]. Typically, in both cases (i.e. RMX and asphalt production) high specification primary aggregates would be required (although Breedon notes that manufacturers of volumetric RMX trucks consider both primary and recycled aggregate to be of use in concrete production (please see document 10.01 provided with Breedon's response to the MQ). With regard to concrete products, the MPA estimates that these may use up to 20% of recycled materials.

1.8 In any event, consistent with the previous findings of the CC, Breedon believes that there is no separate product market for primary aggregates, despite the fact that secondary and recycled aggregates are an imperfect substitute for certain value added applications[6]. This is because, as acknowledged by the OFT in its Reference Decision, virtually all suppliers of primary aggregates are vertically integrated and therefore self-supply their internal demand for high-specification aggregates for use in the production of asphalt and RMX[7] [8]. Therefore, sales of aggregates for use in value-added applications are not relevant for the assessment of this transaction.

1.9 Breedon notes that, as set out in paragraph 3.4 of its submission to the OFT on 3 July 2013 and in its email to OFT of 9 July 2013, [✂]. In addition, Breedon sometimes supplies competitors with aggregates, asphalt or concrete, [✂]. A list of [✂] to which Breedon made supplies in 2012 has been provided to the CC in response to question 25 of the MQ. Breedon notes, however, that sales to these companies are [✂] of Breedon's sales of materials to external customers.

1.10 External demand for primary aggregates is therefore [✂] for lower specification aggregates used in the general construction, fills, etc. segment (i.e. general construction materials, fill materials and sub-bases), which make [✂][9]. As set out previously, this is illustrated by the

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4 CC MIR Provisional Findings Report, at 5.21 where the CC stated: "*Overall, the evidence shows that there has been a steady growth in the share of total aggregate sales account for by recycled and secondary aggregates over the past 20 years*."

5 CC MIR Provisional Findings Report, at 5.22.

6 CC MIR Provisional Findings Report, at 5.22.

7 The OFT's Reference Decision of 24 September ('**OFT Reference Decision**'), at 228.

8 Internal sales to its downstream operations account for 8% of Breedon's aggregates sales. Breedon would not increase prices to such operations as a result of the merger and therefore, such sales are not relevant to the competitive assessment.

9 Breedon notes that in 2011, approximately [✂] of Breedon's sales from [✂] were external. Importantly, [✂] of these were made to Aggregate Industries and these sales would not be affected by the transaction. Accordingly, these external sales to AI pre-transaction are not relevant to the competitive assessment.

split at [✂] in 2011, where [✂] of external sales were made to the general construction, fills, etc. sector and [✂] of sales were made to customers producing value added products[10]. Breedon has calculated these splits for other sites, and notes that they [✂] (e.g. sales to external customers from: (a) [✂]; (b) [✂]; and [✂]. The [✂] volume sold externally to value-added downstream operations again reflects the high degree of vertical integration observed in the industry.

1.11 Breedon also refers the CC to document 23.18 of its response to the MQ, which contains two of Breedon's Board Reports for North Scotland. From those reports it is evident that, in any given month, [✂] construction materials are delivered to customers operating in the general construction, fills etc. sector[11].

1.12 It is clear that [✂] of Breedon's external customers operate in the general construction, fills, etc. segment and this is, therefore, the relevant customer segment for the competitive assessment of the merger.

1.13 Breedon notes for the general construction, fills, etc. segment, recycled/secondary aggregates are wholly substitutable with primary aggregates. Indeed, there are significant cost advantages in using secondary and recycled aggregates given that such aggregates do not attract the Aggregates Levy. Therefore, Breedon has been, and will continue to be, constrained by the use of recycled/secondary aggregates in competing for the sale of aggregates in the overlap areas in which it operates. Breedon does not consider it appropriate to segment the market between primary and recycled/secondary aggregates. Moreover, Breedon refers the CC to Annex 1, a [✂], which [✂]. Breedon further submits that, where there is growth in construction activity, production of recycled/secondary aggregates will increase commensurately, reflecting the increased volume of demolition and preparatory works. Moreover, the proportion of aggregates use accounted for by recycled/secondary aggregates is likely to increase, as the use of these sources is more likely to be affected by variations in production capacity. Breedon therefore believes it likely that, as the market recovers from the economic slowdown experienced in recent years, the use of recycled/secondary aggregates will grow both in absolute terms and as a proportion of the market, and therefore increasingly constrain aggregates producers.

1.14 For both of these broad categories, Breedon notes that crushed rock and sand and gravel are wholly substitutable for most end-uses. As the CC found in its MIR Provisional Findings, demand for any one is driven by almost exclusively by geology and local availability[12]. In this regard, Breedon notes that both crushed rock and sand and gravel are available in the geology of the Aberdeenshire and Tayside regions (albeit crushed rock is more prevalent). In light of the above, Breedon does not consider it appropriate to segment the market between crushed rock and sand and gravel.

1.15 Breedon's views with regard to aggregates are also entirely consistent with approach adopted by the CC in its MIR Provisional Findings Report[13].

<u>The market for aggregates</u>

1.16 As noted above, [✂] of Breedon's competitors in the downstream products such as asphalt and RMX are vertically integrated with their own quarries[14]. Since nearly all manufacturers

10 Excluding sales to Aggregate Industries.
11 See for example the [✂] section of [✂].
12 CC MIR Provisional Findings Report, at 5.11.
13 CC MIR Provisional Findings Report, at 5.4 to 5.27.

of value-added products are vertically integrated, and therefore self-supply, the third party market for high-specification primary aggregates as an input for such uses is insignificant[15].

1.17 [✂] of the external demand for aggregates is therefore for use in general construction and fills etc. purposes. For these uses, recycled/secondary aggregates are entirely substitutable with primary aggregates. Indeed, recycled/secondary aggregates are in many ways preferable to primary aggregates for these uses, in particular from a cost perspective. Recycled/secondary aggregates do not attract the Aggregates Levy, and therefore have an immediate cost advantage of £2/tonne (out of a total ex works selling price of around [✂]).

1.18 Breedon notes that the CC survey, undertaken as part of the Anglo American / Lafarge merger inquiry, confirmed that just under half of the aggregates used for general construction applications (and not the production of RMX, concrete blocks and asphalt) were made up of recycled and secondary aggregates[16]. Similarly, the CC in its MIR Provisional Findings considered that recycled and secondary aggregates were substitutable for primary aggregates for non-specialist construction uses, accounting for approximately 40-50% of the total use of aggregates in the general construction sector[17].

Internal/external sales

1.19 Breedon considers that any assessment of the impact of the transaction on competition needs to take account of the structure of demand in the market, its influence on the nature of competition and, consequently, the scope for the transaction to affect competition. Therefore, given:

1.19.1 the lack of third party demand for aggregates for value-added applications;

1.19.2 the focus of external demand on aggregates for construction and fills purposes; and

1.19.3 the fact that there is relatively little overlap in the types of aggregates used for each of these purposes (e.g. it is extremely unlikely that High-PSV aggregates would ever be sold for construction and fills purposes),

Breedon submits that an assessment of the impact of the merger on competition should focus on the impact on sales of aggregates for construction and fills etc. uses only. This, in turn, means that, to the extent that market shares are probative, they should be considered on the basis of external sales only. In particular, inclusion of internal sales would distort the CC's consideration of the merger as it would draw in sales data that do not reflect the nature of competition in this market. Since [✂] such sales relate to transfers of products for which there is no true competitive market, they are largely irrelevant to the assessment of the impact of the transaction, and therefore their inclusion would likely cause the parties' market shares to be overstated.

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14 OFT Reference Decision at 228.

15 Breedon notes that, as previously explained to the OFT, in the areas of current overlap, as with Breedon and the Target, each of the competing producers of RMX, concrete blocks and asphalt are vertically integrated with their own source of aggregates. [✂]

16 See the CC's Final Report in *Anglo American PLC and Lafarge S.A.* dated 1 May 2012 ('**Anglo American/Lafarge (CC)**'), at Appendix G, paragraph 38.

17 See CC MIR Provisional Findings Report, at paragraph 5.23.

1.20 That total shares can be misleading can be demonstrated with a simple example. Consider a hypothetical competitor that: (i) only made internal sales; (ii) had a very large internal demand (and hence a large share of local production); and (iii) did not supply the external market at all (either because it had no capacity to do so or because it was a deliberate strategy to focus on internal sales). Inclusion of internal sales would suggest that competitor to be a material constraint due to its large share, yet it would not supply the external market at all. On the other hand, an approach that considered external shares would capture its limited constraint quite clearly.

1.21 Breedon also notes that in terms of performance monitoring, its Board Reports illustrate that [✂]. In this regard, Breedon refers the CC to the Board Reports contained in document 23.18 of its response to the MQ which refer to the [✂][18].

1.22 Breedon has previously provided the OFT with an analysis of the parties' market shares of aggregates overall (including recycled/secondary) based on external sales only[19]. A summary of the parties' combined market shares based on external sales only in the areas of overlap identified by the OFT is set out below:[20]

| **Grampian Aggregates (centred on the named site)** | **Estimated combined Breedon and Target share of external market – 25% secondary and recycled aggregates (30 mile radial)** |
|---|---|
| Tom's Forest (Target) | [✂] |
| Craigenlow (Breedon) | [✂] |
| Stirlinghill (Breedon) | [✂] |

| **Tayside Aggregates (centred on the named site)** | **Estimated combined Breedon and Target share of external market – 25% secondary and recycled aggregates (30 mile radial)** |
|---|---|
| Powmyre (Target) | [✂] |
| Ethiebeaton (Breedon) | [✂] |
| Edzell (Target) | [✂] |

18 See Breedon's Board Reports – [✂].

19 Please see Breedon's response of 3 July 2013 to the OFT's "List of Additional Questions", at Appendix 7 "Copy of Market share BDS data 2011 – External Sales". The methodology used to prepare the analysis is set out paragraph 3.5 of Breedon's response to question 3 of that response.

20 Whilst there are arguments that the percentage of the market represented by recycled/secondary aggregates in Scotland is lower than the UK average (on account of there being less demolition activity and greater availability of natural rock), Breedon believes the estimate it has generally used in its submissions to the OFT of approximately 25% of the market overall is conservative and not unreasonable. In addition to the points mentioned at paragraph 1.4 above, full data capture of recycled aggregates activity is difficult on account of the fact that many suppliers are small and do not belong to recognised associations. Further, it should be noted that relevant areas of overlap between Breedon and target are near urban areas where there will be more demolition activity than in more rural parts of Scotland. In any event, Breedon is adopting a conservative approach in relation to assessing market shares for external sales for general construction applications – whilst the CC has indicated that recycled/secondary aggregates may account for just under half of the market, Breedon is supplying market shares on the basis of a 25% recycled/secondary proportion.

| | |
|---|---|
| Capo (Breedon) | [✂] |
| Clatchard (Breedon) | [✂] |
| Balmullo (Breedon) | [✂] |

1.23 It is important to recognise that, as a consequence of the different requirements of the applications for which aggregates are used, there is relatively little scope for production to be "flexed" between internal and external supplies. As explained in more detail in Breedon's response to the MQ, value-added applications, such as RMX (which account for virtually all internal transfers of aggregates) typically utilise higher-value aggregates due to the need to meet stricter specifications than those which apply for general construction and fills purposes; conversely, general construction and fills uses do not require the additional expense of using high-value aggregates. Accordingly, whilst there is substitution across different grades of aggregates (as set out in Breedon's response to the MQ), in practice there is little scope for producers to redirect aggregates intended for value-added applications to general construction and fills (or vice versa). In addition, as set out in Breedon's response to the MQ, it is relatively difficult for producers to target production at different types of aggregates.

1.24 Therefore, it is not correct to suppose that a producer will be able to "flex" its production to change from production of aggregates for internal use (i.e. for value-added applications) to production for external sales (i.e. for general construction and fills), or vice-versa. In any event, Breedon notes that there is substantial spare capacity across the industry for the production of aggregates for both value-added and general construction and fills purposes. Accordingly, to the extent that there may be scope for producers to flex production between internal and external sales, there is in practice nothing to be gained from doing so as: (i) there is sufficient spare capacity to supply the external market in the event of an increase in demand or a reduction in output by the merging parties and; (ii) selling more externally would not require a reduction in internal sales. The potential for flexing between internal and external sales is, therefore, irrelevant and these two sales channels can be assessed separately.

The market for asphalt

1.25 Asphalt is used for surfacing of roads, car parks, footpaths, pavements and other surfaces. In Breedon's view, asphalt competes with RMX products that are produced to supply the same end use, as well as concrete block paving products that are currently favoured in many applications as they have a perceived aesthetic value. By way of example, a contract Breedon supplied [✂] incorporated a concrete road base which had been produced using a lean-mix RMX product rather than a base course asphalt product.

1.26 Asphalt is typically created using high specification aggregates (typically primary aggregates, but borrow pit aggregates, or Recycled Asphalt Planings ("**RAP**") are wholly substitutable). As set out above, however, in asphalt production there is some substitutability involving lower specification aggregates, including from typical recycled/secondary aggregates.

1.27 With the exception of the top surface of the road, asphalt for sub-surfaces increasingly use reclaimed asphalt, which can be comprised of millings, RAP, return loads and off cuts from bituminous layer joint preparation. Asphalt planings are defined as asphalt bound material reclaimed from roads under reconstruction or surplus asphalt material destined from bound

pavement layers, but unused, which has been granulated. Reclaimed asphalt can be used for a variety of uses, and Waste and Resources Action Program ('**WRAP**') estimates that approximately 5% of asphalt is recycled back into new asphalt, and the remaining 95% is used as fill material. WRAP indicates that 100% of recycled asphalt is substitutable for aggregates[21] (albeit the majority is substitutable for lower specification aggregates for general construction, fills etc).

The market for RMX

1.28 RMX is ready-mixed concrete which is a mixture of aggregates, cement (and/or cement substitutes, e.g. GGBS), water, additives and sometimes chemical additives. RMX can be batched at fixed or static plants and then transported to the customer's site using special delivery vehicles that rotate the RMX in drums during delivery to prevent it from setting. Alternatively mobile or site RMX plants can be assembled at the project site and this has the effect of shortening or eliminating the transport required. Mobile or site RMX plants are particularly common for jobs that require significant RMX volumes that are undertaken at remote locations. In and around the relevant areas of interest, such jobs often involve renewable energy projects such as wind farms, fish farms, large road projects, airports, docks and harbours. Finally, RMX can be produced from volumetric trucks that batch the concrete within the vehicle and supply the customer in the same way as a conventional mixer. In Breedon's view, volumetric trucks can and do travel further than trucks delivering from fixed or static RMX plants. This is mainly because when delivering from RMX plants the product is already mixed and therefore perishable while volumetric trucks carry the inputs in separate containers and mix them on-site. Breedon agrees with the CC's findings in the MIR that there is a degree of substitutability between RMX from volumetric trucks and RMX from either fixed/static or mobile/site plants, particularly for smaller jobs[22].

1.29 As with asphalt, RMX is typically created using high specification aggregates (typically primary aggregates). Again, however, in RMX production there is some substitutability involving lower specification aggregates, including from typical recycled/secondary aggregates. As identified in the document included at 10.01 of Breedon's response to the MQ, volumetric trucks have a number of advantages over fixed plants, including reduced waste and the ability to deliver over greater distances as the materials are mixed fresh at the customer's site.

## 2. PRODUCT MARKET DEFINITION

### Aggregates

2.1 For the reasons set out above, Breedon considers that the appropriate product market includes both: (a) crushed rock, and sand and gravel; and (b) primary and recycled/secondary aggregates. Breedon notes that this consistent with the most recent analysis of the market undertaken by the CC as part of the MIR[23].

Crushed Rock/Sand and Gravel

2.2 The use of crushed rock and sand and gravel is largely influenced by geology and local availability and is, therefore, interchangeable by end-use. These types of aggregates belong to the same product market.

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21 See http://aggregain.wrap.org.uk/specifier/materials/reclaimed_asphalt.html.
22 CC MIR Provisional Findings Report, at 5.29.
23 CC MIR Provisional Findings Report, at 21(a).

2.3 In its Reference Decision, the OFT noted that it did not receive any evidence to the contrary[24] and, as such, and in line with the CC's findings in Anglo American/Lafarge, the OFT did not consider it appropriate to segment the market on this basis[25]. In this respect, Breedon agrees with the OFT's and CC's various findings that there is a single aggregates market including both crushed rock and sand and gravel.

Recycled/secondary aggregates

2.4 As Breedon has set out above, recycled aggregates (in the sense that term is used by Breedon (i.e. recycled aggregates, site-won aggregates, aggregates from borrow pits and small operations)) are prevalent in the local areas currently under consideration by the CC.

2.5 In terms of CC precedent, the CC's working paper on market definition for aggregates, cement and RMX indicated that recycled/secondary aggregates have taken an increasing share of the UK aggregates market, reaching approximately 29% in 2011[26]. Importantly, this increase in the importance of recycled/secondary aggregates has occurred despite the significant drop in the total market size that resulted from the recessions experienced post-2007, thus suggesting that significant volumes of recycled/secondary aggregates have been used in place of primary aggregates. Breedon notes that part of the reason for the increased use of recycled/secondary aggregates is the price advantages which arise as a result of recycled/secondary aggregates not attracting the aggregates levy of £2/tonne (a significant advantage in light of the fact that the average price including the levy for primary aggregates is around [✂]). This makes recycled/secondary aggregates very competitive with quarried materials, particularly in the general construction and fills sector which accounts for [✂] of Breedon's external sales of aggregates.

2.6 As noted above, SEPA has estimated that 20% of all construction aggregates in Scotland were account for by recycled aggregates[27]. Breedon considers that this percentage has increased since that time and further notes that there has been a policy drive to promote the use of recycled aggregates in Scotland which has culminated in the development of an accreditation scheme launched in August 2012[28]. As set out above, Breedon's *conservative* estimate is that, currently, approximately 25% of construction aggregates in Scotland are made up of recycled or secondary aggregates.

2.7 The conservative nature of this estimate is obvious from the fact that Breedon has also included in this estimate aggregates that are not true "recycled" aggregates: it has included aggregates from borrow pits, site-won aggregates, and smaller, unregistered operations (e.g. farmers). As witnessed during the CC's site visit on 22 October 2013, such activity is very prevalent in the Aberdeen area. The widespread availability of recycled aggregates in Tayside/Fife is demonstrated by the monthly board reports from that region (summarised at Annex 2). As examples of the constraint faced by Breedon in the area, Breedon notes that the [✂].

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24 OFT Reference Decision, paragraphs 31 and 32.

25 Anglo American/Lafarge (CC), paragraphs 5.28 to 5.32.

26 CC, *Aggregates, cement and ready-mix concrete market investigation – Working paper on market definition for aggregates, cement and RMX*, dated 1 November 2012 ("**CC Market Definition Working Paper**"), at Figure 1.

27 Available at: www.sepa.org.uk/waste/waste_regulation/aggregates.aspx. SEPA states: "*In Scotland construction aggregate demand is around some 29 million tonnes of which in the region of 20% is met with recycled aggregates*".

28 See WRAP article "*New directory to boost confidence in recycled aggregate industry*", published 24 August 2012, available at http://www.wrap.org.uk/content/new-directory-boost-confidence-recycled-aggregate-industry .

2.8 In Breedon's response to the OFT's Issues Letter, Breedon identified several jobs that were lost by Breedon (primarily a supplier of primary aggregates) to suppliers of recycled aggregates. Such tenders were lost in the [✂] months leading to the submission of Breedon's Issues Letter response and constitute a significant volume:

| Winning supplier | Customer | Location | Est. Volume |
|---|---|---|---|
| [✂] | [✂] | [✂] | [✂] |
| [✂] | [✂] | [✂] | [✂] |
| [✂] | [✂] | [✂] | [✂] |
| [✂] | [✂] | [✂] | [✂] |
| [✂] | [✂] | [✂] | [✂] |
| [✂] | [✂] | [✂] | [✂] |
| [✂] | [✂] | [✂] | [✂] |
| [✂] | [✂] | [✂] | [✂] |
| [✂] | [✂] | [✂] | [✂] |
| [✂] | [✂] | [✂] | [✂] |
| [✂] | [✂] | [✂] | [✂] |
| [✂] | [✂] | [✂] | [✂] |
| [✂] | [✂] | [✂] | [✂] |

2.9 Subsequent to this table being prepared, Breedon notes that it has recently lost the following aggregates supply opportunities to the following producers who will supply recycled aggregates:

[✂]

2.10 Breedon notes that this approximate tonnage [✂], generated in a period of [✂], is [✂] in comparison to the [✂] output estimates for any of the Breedon, AI or third party sites identified in the overlap areas. Additionally, Breedon understands from the customer, [✂], that the recycling operation being run by [✂] has produced approximately [✂] of usable material, some of which is being used in the above projects. Breedon submits that it is unrealistic to dismiss the activity and constraint imposed by producers of recycled material and submits, again, that its estimate that such producers account for *at least* 25% of the market in the local areas under consideration is conservative.

2.11 Breedon notes that subsequent decisions (both at the OFT level and the CC level) have paid closer attention to the various end-uses of aggregates, and whether or not recycled/secondary aggregates provide a competitive constraint in relation to all or only some of those end uses. In practice, customers request a grade of aggregates and, in particular where those customers are in the general construction, fills, etc. segment[29], that grade can be equally met with primary aggregates or recycled/secondary aggregates.

2.12 This is consistent with the CC's Statement of Issues in the MIR, where it stated that "*recycled or secondary aggregates are likely to be a close substitute to primary aggregates for low-specification construction applications and possibly for asphalt production, but they*

[29] As noted at 1.10 above, these customers constitute the vast majority of Breedon's external sales customer base.

*are unlikely to be a close substitute for RMX and concrete block production*"[30]. However, the MPA estimates that up to 20% of the aggregates used in concrete products are recycled/secondary aggregates. In its Provisional Findings in the MIR, the CC found that there was "*significant scope for substitution between recycled and secondary aggregates and primary aggregates for about half of total aggregate sales and limited substitution for the remainder*". It further noted that "*[F]or general construction (which accounts for about 50 per cent of aggregates used in GB), the main aggregates used are crushed rock (45 to 50 per cent)* ***and recycled and secondary aggregates (40 to 50 per cent)****"* (emphasis added). As set out in paragraphs 1.10 to 1.15 above, sales to customers in this sector account for [✂] of Breedon's external sales and thus to the extent that differences in applications may impact on substitutability, these are less likely to be relevant in this case due to the nature of Breedon's external customer base.

2.13 By and large, usage is based on local availability and the conditions of competition in the local areas under consideration are such that recycled aggregates, in particular, are prevalent. This is evidenced by the primary aggregates supply opportunities lost to producers of recycled aggregates identified in the tables above, and by Breedon's internal documents. Breedon considers that the conditions of competition in the local overlap areas concerned in the present transaction warrant the wider market definition identified in the CC's MIR Provisional Findings[31] that includes both primary aggregates (crushed rock and sand and gravel) and recycled/secondary aggregates.

2.14 Breedon agrees that recycled/secondary aggregates are more likely to be used in respect of general construction and fills applications. However, in practice, a large proportion of aggregates users for which true recycled/secondary aggregates are less substitutable (i.e. RMX, and asphalt producers) are vertically integrated with primary aggregates production[32]. Accordingly, when assessing the substitutability of recycled/secondary aggregates, account should be taken of the fact that the proportion of the contestable market for which recycled/secondary aggregates are viable substitutes is greater than the total market share figures alone would suggest. This is particularly relevant in the context of this transaction because [✂] of Breedon's external sales of aggregates are accounted for by the general construction and fills sector, i.e. not for use in producing RMX or asphalt.

2.15 Notwithstanding [✂], Breedon notes that, should customers require aggregates for value added products (such as RMX and asphalt), then as recognised by the CC, there is a degree of substitutability (for example, RAP). In addition, the virgin borrow pit aggregates are wholly substitutable.

2.16 In its MIR, the CC correctly recognises that market definition is not an end in itself, but that it provides a framework for competitive assessment[33]. As set out above, Breedon considers that recycled and secondary aggregates form part of the same market, and it notes that there is no need to find that such aggregates are wholly substitutable for all end uses and all applications. In any event, the uses for which recycled/secondary aggregates are wholly substitutable with primary aggregate (i.e. the general construction, fills, etc. segment) is the usage for which there is the most intense competition such that recycled

30 CC, *Aggregates, cement and ready-mix concrete market investigation – Updated Statement of Issues* dated 26 November 2012, at page 4 ("**Updated Statement of Issues**").
31 CC MIR Provisional Findings, at paragraph 5.24.
32 Breedon notes that concrete block customers could consider recycled/secondary aggregates to be non-substitutable for primary aggregates.
33 CC MIR Provisional Findings Report, at 5.1(b).

and secondary aggregates exercise a very effective competitive constraint on primary aggregates, particularly in the context of this transaction. Breedon considers that a consistent approach to the assessment of the market should be adopted: any assessment of the impact of the transaction on competition must take account of the fact that almost all manufacturers of value-added products are vertically integrated. As such, if internal sales are considered as part of the competitive assessment and calculation of market shares, it should be acknowledged that the merged entity's market shares are likely to be overstated because the internal volumes included relate to a segment for which there is no true market and no real competition.

2.17 Breedon agrees with the CC that aggregates for specialist applications constitute a separate market from aggregates used for general construction, fills, etc. and for value added products such as RMX, asphalt and concrete blocks. The parties' activities in specialist aggregates [✂] and the only overlap [✂] is immaterial).

**Asphalt**

2.18 Breedon considers that there should be a single, distinct product market for the production and supply of all grades of asphalt from fixed and mobile plants. In Breedon's view the CC should also include the competitive constraint imposed by RMX products that are produced to perform the same end-use, as well as concrete block paving products, which are favoured in many applications due to their perceived greater aesthetic appeal[34].

2.19 In its Customer Surveys and Customer Questionnaires the CC appears to be distinguishing between asphalt and "*special types of asphalt such as asphalt with polymer or other additives*"[35]. Breedon believes to segment the market in this way would be inappropriate and notes this would run counter to the previous findings of both the OFT and CC[36]. Such products, e.g. asphalt with the addition of styrene butadiene styrene ('**SBS**'), are substitutable with non-polymer asphalt from a demand side perspective, in that they can perform the same or similar end uses. They are also highly substitutable from the supply side, as producers could easily switch with little cost or risk in response to any increase in price. This supply side substitution was noted by the OFT in Anglo American/Lafarge where it stated "[a]*lthough there are different specifications of the product depending on the particular end use, production assets can be used flexibly to meet specification requirements"*[37]*.* Given this significant degree of substitutability, Breedon believes that the supply and production of all grades of asphalt is a single relevant product market in the overlap areas.

**RMX**

2.20 As noted above, RMX can be supplied by fixed/static plants, mobile/site plants or volumetric trucks. In addition, customers of RMX also have the option to purchase precast products which are then transported to the relevant site. Breedon believes that the product market for RMX should include volumetric trucks and concrete produced from fixed and mobile plants. Breedon also believes that consideration should also be given to the competitive constraint imposed by precast products.

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34 Breedon's Initial Submission to the CC, paragraph 4.31.

35 See e.g. the definition of asphalt product types in the MQ for Customers, page 1.

36 The OFT's findings in Anglo American/Lafarge (OFT), paragraph 86, Aggregate Industries/Foster Yeoman, paragraph 40 and Midland Quarry Products/Griff Quarry/Hanson Quarry Products, paragraph 9; and the CC's findings in its Final Report in Anglo American Lafarge, paragraph 5.45.

37 Anglo American/Lafarge (OFT) at paragraph 86.

2.21 With regard to volumetric trucks, Breedon notes that both the OFT and CC in Anglo American/Lafarge considered that they provide a competitive constraint on both fixed and mobile plants[38]. Moreover, the CC stated in its MIR Provisional Findings Report that volumetric trucks should be considered in the same relevant product market as fixed and mobile plants and went on to consider the strength of rivalry between volumetric trucks and mobile plants on one hand and fixed plants on the other[39]. Breedon agrees with the approach of the CC in its MIR Provisional Findings Report as there is a high degree of substitutability between RMX produced from volumetric trucks and fixed and mobile plants, particularly in smaller projects. For larger projects, while Breedon believes that volumetric trucks are substitutable to a lesser extent, Breedon notes that they are increasingly being used on some larger projects. Indeed in its MIR Provisional Findings Report the CC noted that internal documents from the Majors illustrated that volumetric trucks were perceived as a threat and that a survey had shown that 55% of RMX customers had also used volumetric trucks[40]. Breedon believes this is evidence of the significant degree of substitutability between volumetric trucks and fixed and mobile plants.

2.22 In relation to precast products, Breedon disagrees with the CC's provisional position in its Statement of Issues[41]. As Breedon noted in its Initial Submission, for certain products such as bridge decks, stairs and box culverts, customers have the option of either using plant produced RMX which is then cast at the location of the customer, or of purchasing precast products which are delivered on site[42]. For these uses, Breedon believes that precast products would be wholly substitutable with RMX produced at a plant and therefore it is clear that such products exercise a significant competitive constraint on each other for these uses.

2.23 In light of the above, Breedon believes it is appropriate that the relevant product market for RMX should be defined as one single market which includes fixed plants, mobile plants, and volumetric trucks, and that the CC should note the competitive constraint exercised by pre-cast products on RMX performing the same end-use. This, in Breedon's view, best encapsulates the competitive conditions faced by it in the overlap areas.

## 3. GEOGRAPHIC MARKET DEFINITION

### Aggregates

3.1 Previous cases have assessed aggregates mergers on the basis of a 30 mile radius around the target company locations, and Breedon believes this to be a reasonable basis for analysis of the geographic market for aggregates (other than decorative aggregates, for which Breedon considers the geographic scope to be far wider). This distance is also reflective of the commercial viability of transporting aggregates to customers.

3.2 Breedon notes that the OFT's Reference Decision focussed on the catchment areas around Breedon's sites. Whilst Breedon acknowledges that such an assessment might provide some insight into the competitive dynamics of a local area, in the particular local areas under consideration, the assessment is driven by the fact that the Breedon sites are located close to a source of demand. As such, for 80% of volumes, there is simply no

38 Anglo American/Lafarge (OFT), at paragraph 101, and Anglo American/Lafarge (CC) Final Report, at 5.48.
39 CC MIR Provisional Findings Report, at 5.50.
40 CC MIR Provisional Findings Report, at 5.49.
41 CC Statement of Issues, paragraph 16.
42 Breedon's Initial Submission to the CC, paragraph 4.25.

need to travel further than the [✂]. This does not mean, however, that it is not *economically viable* to deliver further away; indeed, this is supported by the fact that if the 80% threshold is changed to 90%, the average distance travelled is [✂]. Furthermore, it does not mean that competitors who are located further than [✂] from the source of demand will not travel that further distance and therefore compete with Breedon for that business.

3.3 Breedon considers the OFT's approach results in an unduly narrow view of aggregates markets. It also notes that the CC/OFT Merger Assessment Guidelines state that "*the geographic market identified using the hypothetical monopolist test will typically be wider than a catchment area"*[43]. Breedon submits that it is clear from the Guidelines that catchment areas are to be used not as a basis for full assessment, but rather as a filter to enable the CC to quickly identify areas which are unlikely to give rise to competition concerns[44]. Where the CC is unable to do this (because an assessment based on catchment areas does not offer a clear answer) the CC's full analysis should be based on the full competitive market, not merely on the same catchment area.

3.4 Breedon submits that the CC should apply a uniform 30 mile radius across all the sites in its assessment of the competitive conditions within the local area[45]. In the local areas under consideration, different actual delivery distances for different sites do not justify the application of different catchment areas. Actual delivery distances are affected by the relative locations between a site and the source of demand as opposed to some intrinsic difficulty in competing over greater distances. Further, short delivery distances do not imply that suppliers located further away from certain customers cannot exert a competitive constraint on suppliers located closer to those customers.

3.5 The conditions of competition in the local areas under consideration support Breedon's view, which is consistent with several OFT/CC aggregates merger cases. For example, and as set out in Breedon's Initial Submission, there are many instances of Breedon losing jobs in the Aberdeen area to a competitor from a quarry/site that is further from the job site than the Breedon quarry and Breedon refers the CC to paragraphs 4.19 and 4.21 of that submission for further details.

3.6 Thus in light of the substantial degree of spare capacity, provided that the additional delivery cost does not mean that no margin can be earned, a supplier would be willing to make a lower margin on a sale 30 miles away compared to [✂] away, provided that the margin was positive (and, given there is spare capacity, making such a sale will not prevent the supplier from making the more profitable sale over [✂]).

3.7 Finally, Breedon notes that [✂] of the costs involved in delivering aggregates to customers involve the initial loading and the use of the truck for the delivery. The incremental cost of delivery mile-on-mile [✂]. As set out in paragraph 4.20 of the Initial Submission, Breedon calculated that the delivery cost from Craigenlow at [✂] miles was [✂], and at 30 miles,

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43 OFT/CC Merger Assessment Guidelines (2010), at 5.2.25.

44 The Guidance states "*if the impact of the merger on concentration in this catchment area appears unproblematic, then the Authorities may exclude the local area from further analysis without concluding on the boundaries of that particular relevant geographic market*".

45 Breedon submits that such an approach (i.e. based on site specific catchments) will likely give rise to numerous, unjustifiable anomalies, such as the case where, due to different radial sizes, Site A will be said to constrain Site B but not vice versa, simply due to chance, i.e. the distribution of their deliveries in a given year. However, both sites will have the same ability to deliver product viably over a similar distance, i.e. 30 miles or more.

was [✂]. The additional [✂] incurred an increase of [✂] which is [✂] given that aggregates delivery trucks typically have a capacity of 10 to 30 tonnes. As set out in Breedon's response to question 18 of the MQ, Breedon's trucks typically have a capacity of [✂].

**Asphalt**

3.8 Previous cases have used a 30-mile radius around the acquired assets as representing the average supply distances in the UK[46]. Breedon considers this to be an appropriate basis for the geographic market and representative of the competitive constraints it faces. Breedon does not consider it appropriate in this case to apply differential catchment areas for different sites. However, it notes that asphalt in the Inverness area is likely to travel further than the 30 miles in light of the remote location of the market.

**RMX**

3.9 Breedon notes that previous findings of the OFT and CC have considered a radius of 10 miles from fixed RMX plants as being representative of the competitive constraints faced by suppliers of RMX in the UK, and thus the geographic market[47]. However, Breedon believes that, while this may represent the *average* supply distances in the UK, it is not representative of the conditions of competition in the local areas under consideration. Breedon believes a distance of [✂] miles would be more appropriate when considering the overlap areas.

3.10 There are a number of factors particular to the overlap areas which Breedon believes makes it appropriate for the geographic market to be drawn wider than 10 miles. First, in rural areas and/or where there is lower plant density such as the North of Scotland, RMX will typically travel greater distances to meet the source of demand. For example, in coastal areas where plant density is lower, it may be necessary to supply greater distances inland to compensate for the inability to supply from all directions. In this regard, as Breedon has previously stated in its Initial Submission, the incremental costs of travelling an additional [✂] (i.e from [✂] miles) are [✂] compared to the overall cost of RMX[48].

3.11 Second, there are also a number of competitors in the overlap markets with a single RMX plant and, in order to secure work, their trucks will typically travel more than 10 miles. Breedon believes these competitors are illustrative of the fact that it is economically viable for operators to travel further than 10 miles in the overlap areas.

3.12 Third, in areas where an RMX plant is located at a quarry, the input costs of aggregates are likely to be substantially lower. This will mean that RMX produced from such sites can and does travel greater distances and still remains competitively priced, compared to remote RMX plants where the costs of aggregates were higher. As Breedon has noted previously the average distance supplied by such quarry-based plants in Scotland for 80% of their deliveries by volume was [✂] in 2010 and [✂][49].

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46 Anglo American/Lafarge (OFT), at paragraph 95 and Midland Quarry products/Griff Quarry/Hanson Quarry Products, paragraph 12.

47 See e.g. Anglo American/Lafarge (OFT), paragraphs 102 to 105 and CC MIR Provisional Findings Report at 5.52.

48 Breedon's Initial Submission to the CC, at paragraph 4.26.

49 Ibid.

3.13 Finally, Breedon notes that in the local areas under consideration, fixed plant RMX operators are constrained by both mobile/site plants, which can be erected very close to the source of demand, and also by volumetric trucks, which can travel further than trucks delivering from fixed plant operations.

3.14 Overall, Breedon believes that in light of the particular competitive constraints it faces in the overlap area it is appropriate for the RMX market to be drawn greater than 10 miles. In Breedon's view [✂] mile radii centred on RMX plants would better represent the competitive conditions in the market.

## 4. EFFECT ON COMPETITION: COUNTERFACTUAL

4.1 The joint OFT/CC Merger Assessment Guidelines states that: "[t]*he application of the SLC test involves a comparison of the prospects for competition with the merger against the competitive situation without the merger"*, the latter being known as 'the counterfactual'[50]. In this regard, Breedon has set out below what it believes would have been the competitive situation in the market in the absence of it acquiring the Target assets.

4.2 As set out in its Initial Submission, Breedon believes that, if the present transaction had not taken place, it is most likely that Aggregate Industries would have retained the Target Assets and that [✂].

4.3 During the site visit on 22 October 2013, Breedon noted to the CC that post Holcim's acquisition of Aggregates Industries in 2005, [✂].

4.4 In the years preceding the acquisition by Breedon of the Target assets, [✂].

4.5 In early 2013, [✂][51].

4.6 Over time, therefore, Breedon believes that [✂].

Sale to a third party

4.7 For completeness, and as mentioned above, Breedon notes that it is conceivable that Aggregate Industries might have sought to sell the Target assets to an alternative third party purchaser. Breedon notes that, [✂].

4.8 Breedon does not consider [✂].

4.9 Breedon does not consider [✂]. As such Breedon does not consider this to be a relevant counterfactual.

4.10 Accordingly, Breedon submits that the present transaction does not result in a substantially less competitive outcome than the most likely counterfactual – that is, retention by Aggregate Industries. As such, there is no substantial lessening of competition on the basis of this counterfactual.

[✂]

4.11 As discussed in greater detail at paragraph 4.7, above, [✂]

4.12 [✂][52].

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50 OFT/CC Merger Assessment Guidelines (2010), at 4.3.1.

51 Please see the spreadsheet provided to the CC by email on 30 September 2013.

4.13 [✂][53]

## 5. EFFECT ON COMPETITION: THEORY OF HARM 1

5.1 Breedon submits that its acquisition neither results, nor may be expected to result, in a substantial lessening of competition or anti-competitive outcome within any market in the UK for goods or services. Breedon submits that on each of the markets affected by the acquisition there will remain effective and strong competition[54].

GENERAL: COMPETITION IN CONSTRUCTION MATERIALS

5.2 As regards competition in general, Breedon notes that, as the CC has recognised in its MIR, the five largest heavy building materials producers in Great Britain are: Aggregate Industries, Cemex, Hanson, HCM and Lafarge Tarmac (together, the "**Majors**")[55]. All of the Majors have significant RMX operations in Great Britain, and all except HCM have significant aggregates operations in Great Britain[56]. On the CC's figures, the Majors account for a combined 80 per cent share of supply of aggregates and 71 per cent share of supply of RMX[57]. By comparison, Breedon is a relatively minor player, accounting for (on the CC's figures) a share of supply of three per cent of aggregates and two per cent of RMX[58]. The CC has identified Breedon as being one of ten medium-tier independent firms[59]. Far from giving rise to competition issues, the acquisition reflects Breedon's strategy of growing its business both organically and through earnings enhancing acquisitions, with a view to establishing itself as a real competitor to the Majors throughout Great Britain.

5.3 In addition, Breedon remains subject to significant competitive constraint post-transaction at a local level[60] such that it is not, as a result of the merger, in a position to increase prices or reduce quality, including by closing or reducing the level of activity of sites. Outside of the Majors, construction materials markets in North Scotland are highly fragmented. These operators benefit from, among other factors, their local presence, knowledge, and their ability to adapt to local market conditions, and are therefore more effective competitors.

Customer switching

5.4 Breedon considers the availability of multiple competitors to be of particular importance in construction materials markets, as customers typically demonstrate very little if any, loyalty to any particular supplier, tending instead to use multiple suppliers. Customers are able to switch easily between suppliers, since most contracts are for individual projects.

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52 [✂]
53 [✂]
54 The OFT appears to have relied heavily on customer responses in its Reference Decision. Breedon notes that it was not provided with any information regarding the structure of the questionnaire, the size or type of customer providing comments, or with sufficient information regarding the nature of the responses to enable it to address any concerns with the OFT.
55 CC MIR Provisional Findings Report, at paragraph 17.
56 CC MIR Provisional Findings Report, at paragraph 19.
57 CC MIR Provisional Findings Report, at paragraph 3.1.
58 CC MIR Provisional Findings Report, at table 3.13. For completeness, the Majors also account for a combined 99 per cent share of supply of cement, in which Breedon is not active at all – MIR Provisional findings Report, at paragraph 3.1
59 CC MIR Provisional Findings Report, at paragraph 3.64.
60 With limited exceptions in the context of RMX.

5.5 Breedon believes that customers' choice of supplier is primarily based on [✂]. In some cases, the [✂] may also influence choice of supplier, particularly where a customer requires [✂]. [✂] remain the key features of competition, however, meaning that competition in the industry is fierce and constant.

Impact of site closures and mothballing

5.6 As explained in its response to question 29 of the MQ, when considering whether to close/mothball sites, or reopen sites, Breedon considers [✂]. Since sites are typically closed/mothballed due to [✂], the impact of site closures/mothballing is, in Breedon's view, [✂]: any site for which such actions are appropriate is [✂].

5.7 Breedon has provided the CC with details of its sites /plant opened, expanded, closed and reopened, and mothballed in the last five years in its response to question 29 of the MQ.

Entry and expansion

5.8 In addition to existing competitors, Breedon is aware of several examples of new entry and expansion in the industry. The table below identifies new entry and expansion in the industry in the relevant areas since 2010. As will be seen from the table, activity has included both larger, established operators as well as smaller firms:

**Examples of market entry since 2010**

| Date | Name | Site/Activity | Type |
|---|---|---|---|
| 2010 | Leiths | New Asphalt Plant at Parkhill | Expansion |
| 2010 | Grampian Construction | New RMX plant at Rothiemay | New entrant |
| 2010 | Geddes | Opened new Balado quarry near Kinross, Fife | New entrant |
| 2010 | Robert Purvis | Langside Quarry Kennoway - started recycling operation | New entrant |
| 2010 | Tayside Contracts | New recycling centres in several sites in Perth, Dundee & Arbroath | New entrant |
| 2011 | James Jamieson | Purchased Ardlethen Quarry from Les Taylor | New entrant |
| 2011 | James Jamieson | Started recycling operation at Ardlethen | New entrant |
| 2011 | Harbro Foodstuffs (trading as Savoch Quarry and Recycling Limited) | Purchased Savoch Quarry, Peterhead from Les Taylor | New entrant |
| 2011 | Miller Plant | Purchased North Mains quarry from Les Taylor | Expansion |
| 2011 | Miller Plant | Purchased Drumlithie Quarry | New entrant |
| 2011 | Allan Munro Construction | Took over Broomhill Quarry, Dalnain from HQC | New entrant |
| 2011 | UB Civils | Took over Achnasheen and Gollan Field Quarries from HQC | New entrant |
| 2011 | Skene | Leslie Quarry, Added a new rock reserve to existing sand & gravel site | Expansion |
| 2011 | St Michaels Tippers | St Michaels - New recycling centre | New entrant |

| Date | Name | Site/Activity | Type |
|---|---|---|---|
| 2011 | Geddes | New Hard Rock Quarry at Wester Bleaton near Kirkmichael | New entrant |
| 2012 | James Jamieson | Opened new quarry at Balmedie | Expansion |
| 2012 | Leiths Quarries | New concrete plant at Mid Lairgs | Expansion |
| 2012 | Collier Quarry & Recycling | Opened new quarry at Goat Hill, Fife | New entrant |
| 2012 | Norman Jamieson | Carnoustie - Recycling & Washing facility with full product range | New entrant |
| 2013 | Gavin Tennant | Purchased Grampian Construction Volumetrics | Expansion |
| 2013 | Leiths Quarries | Planning Application for Asphalt at Mid Lairgs | Expansion |
| 2013 | Leiths Quarries | New concrete plant at Park Quarry, Dufftown | Expansion |
| 2013 | Alan Ross | New business at Wester Ury Sand & Gravel | New entrant |
| 2013 | Billy Miller | Acquired mothballed quarry at Clarky Hill, Burghead | New entrant |

Capacity for expansion

5.9 In addition to new entry, Breedon believes that there is substantial spare capacity among existing operators in all construction materials markets. As a result, there exists significant competitive constraint across these markets, as competitors have sufficient capacity to compete for large numbers of contracts and high product volumes.

5.10 By way of example, [✂]. If market conditions permitted, [✂]. To illustrate this, Breedon has assessed capacity in each of the segments by considering two quarries, two asphalt plants and two RMX plants:

| | PRIMARY CAPACITY TONNES PER HOUR | SECONDARY CAPACITY / PLANT THROUGHPUT TONNES/M3 PER HOUR | DAILY CAPACITY (9 HOUR DAY) | ANNUAL CAPACITY (5 DAY WEEK AND 46 WEEKS PER YEAR) | CURRENT OUTPUT | THEORETICAL SPARE CAPACITY |
|---|---|---|---|---|---|---|
| Craigenlow Quarry | [✂] | [✂] | [✂] | [✂] | [✂] | [✂] |
| Stirlinghill Quarry | [✂] | [✂] | [✂] | [✂] | [✂] | [✂] |
| Craigenlow Asphalt | [✂] | [✂] | [✂] | [✂] | [✂] | [✂] |
| Stirlinghill Asphalt | [✂] | [✂] | [✂] | [✂] | [✂] | [✂] |
| Craigenlow RMX | [✂] | [✂] | [✂] | [✂] | [✂] | [✂] |
| Stirlinghill | [✂] | [✂] | [✂] | [✂] | [✂] | [✂] |

| | | | | | | |
|---|---|---|---|---|---|---|
| RMX | | | | | | |

5.11 [✂], competitors in the overlap market areas (Grampian, Tayside and Inverness) such as Leiths, Lovie, Laird, Skene, Geddes and Pat Munro have all continued to invest in their downstream activities in RMX, asphalt and concrete products and Breedon believes they have available capacity to service any future market growth competitively. Breedon notes in particular the comments made by James Jamieson, (the operator of Ardlethen quarry) in the article submitted to the OFT on 27 August 2013 where he stated that: "*[t]here is land available for expansion [at Ardlethen quarry] and we have got planning permission for this… We have also prepared land that can be used as storage or in the future as a concrete plant. This is a realistic proposal".*

**AGGREGATES**

5.12 Breedon submits that it remains subject to significant competitive constraint in respect of aggregates production, both in Scotland as a whole and in the areas of overlap affected by the merger.

Basis of the CC's assessment

5.13 First, as set out in more detail above, Breedon considers that there is a single market for aggregates, including both (i) primary aggregates, and (ii) recycled/secondary aggregates.

5.14 Second, as regards the CC's assessment of the merger, Breedon submits that fascia count, rather than market share, is the more appropriate measure of competition in the aggregates sector. Focussing on market share undermines the impact of the significant number of independent competitors which remain within the relevant local markets would be unrealistic: market shares in particular fail to fully capture the extent of competition in the context of markets characterised by excess capacity, product homogeneity and procurement processes involving formal and informal job requests, as is the case with the aggregates industry. Breedon notes that a fascia-count approach has been widely accepted by the competition authorities in construction materials markets [61] and, in Breedon's view, provides a much clearer and accurate picture of competition in the market.

5.15 To the extent that the CC may consider it appropriate to consider market share, Breedon submits that, as set out above, market shares on an external sales basis are more relevant than market shares based on total sales. Breedon reiterates, in particular, that the potential to flex internal and external supply is not relevant for the competition assessment in the supply of aggregates in the overlap areas:

5.15.1 First, internal sales represent self-supply: the merged entity will not be in a position to harm the many aggregates customers that have their own source of aggregates. [✂], the vast majority of asphalt and RMX producers in Scotland are vertically integrated and self-supply aggregates [62]. Such self-supply typically relates to high specification, single sized aggregates. The more relevant question is, therefore, the impact of the merger on the external market, where the vast majority of sales involve fill materials and general materials (that compete more

61 See for example, Paragraph 6.18 of the CC MIR Provisional Findings Report and Anglo American/Lafarge at paragraphs 6.24 – 6.25.

62 See paragraph 228 of the Reference Decision.

closely with lower grade products and recycled aggregates) for general construction.

5.15.2 Second, the aggregates industry is characterised by substantial spare capacity: the parties' rivals have sufficient spare capacity to supply the external market in the event of an increase in demand or a reduction in output by the merging parties and, furthermore, selling more externally would not require a reduction in internal sales.

Strength of competition

5.16 On any measure, Breedon remains subject to significant competitive constraints in all overlap areas for aggregates.

5.17 When considered from customers' perspective, it is clear that customers will continue to have multiple supply options. Breedon is providing, at Annex 3 a demand-centred analysis showing the impact of the merger on competition when assessed on the basis of customers' locations, rather than the parties' sites. In respect of aggregates markets, this analysis shows that, taking into account all aggregates suppliers, nearly all customers facing a change in the number of independent fascia in their area [✂] would have at least [✂] alternative suppliers available post-merger, often many more (up to [✂] in certain cases). Although Breedon does not consider it appropriate in light of the conditions of competition in the local areas to restrict the analysis to competitors having at least a 5% market share, it has done so for the sake of completeness. Even if the analysis is restricted in this way, although the number of total remaining independent fascia is reduced, [✂] of customers would still face at least [✂] fascia post-merger, with some still having as many as [✂]. Specifically, [✂], customers accounting for [✂] volumes would have a choice of at least [✂] suppliers or would face no fascia change post-merger. The exception is in the area surrounding the [✂], at which customers accounting for over [✂] of volumes would have at least [✂] suppliers in 2012 on a [✂] basis (this rises to [✂] if including customers for whom there is no effective change in the number of fascia), rising to [✂] on a 30 mile basis (or [✂] including those not experiencing any decrease in fascia).

5.18 As regards market shares (notwithstanding Breedon's submissions above as to the relevance of market shares), Breedon has previously provided the CC with data demonstrating that the parties' combined external market shares[63] are less than [✂] in [✂] of the overlap areas identified by the OFT[64], the increment [✂] being [✂]. Where internal sales are included, the parties' combined share is [✂] in [✂] the overlap areas identified by the OFT, with the increment [✂] being [✂][65]. Even if the CC considers market shares to be probative, therefore, Breedon submits that these figures demonstrate that the parties' combined share is not so significant as to afford them any opportunity to raise prices or lower service standards.

Competitive constraint

5.19 Breedon submits that its competitors in aggregates markets represent a significant competitive constraint on the parties' conduct post-merger. In particular:

63 Allowing for 25% recycled/secondary aggregates.
64 Around [✂].
65 Again, allowing for 25% recycled/secondary aggregates.

5.19.1 Breedon believes that there is significant spare capacity throughout the industry, such that each independent producer of aggregates is able and willing to compete for work and thereby exert pressure on Breedon and on other competitors. Among other factors, Breedon notes that demand volumes have decreased significantly in recent years, without a commensurate reduction in production capacity, with the result that there now exists significant spare capacity over and above that which has existed during times of higher demand. Breedon has previously submitted data to the OFT demonstrating the extent of spare capacity in the market brought about by reductions in demand volumes[66].

5.19.2 Breedon submits that there is ample evidence demonstrating the effectiveness of these competitors in winning work which Breedon would have wanted to win for itself. In particular, Breedon's recent customer loss data referred to at paragraph 2.8, above, demonstrating the vibrancy of competition in the sector highlights several major projects which have been won by smaller competitors supplying both primary and recycled/secondary aggregates.

5.20 Breedon's competitors are very effective and often win contracts of significant volumes at the expense of Breedon. For example, the job won by [✂] referred to in paragraph 2.8 above was [✂]. This single tender (which will ultimately be fulfilled with recycled aggregates) is equivalent to [✂] of the tonnage sold to external customers at [✂], in 2011. Furthermore, in the [✂] months leading up to the OFT's Reference Decision, Breedon is aware of contracts representing some [✂] [67] of primary aggregates being lost to competitors in the Aberdeen area, *in addition to* the volumes of recycled aggregates referred to in paragraph 2.8 above. To put these figures into perspective, the *total full-year* output of [✂] was approximately [✂] tonnes in 2011, of which approximately [✂] tonnes was supplied externally.

5.21 Similarly, Breedon has previously provided details of strong competition from producers of recycled aggregates (please see Breedon's submissions to the OFT of 19 and 23 August 2013 in response to the OFT's Issues Statement of 15 August 2013, and Initial Submission to the CC dated 16 October 2013). This further demonstrates that Breedon is subject to competition from such producers, which benefit from costs and other advantages, and that customers will readily switch to recycled/secondary aggregates where they perceive the offering to be better.

5.22 Additionally, particularly relevant to any market share-based assessment, Breedon notes that in some instances the BDS data materially underestimates aggregates output.

5.22.1 Breedon has identified specific examples where BDS estimates understate output volumes and therefore do not fully reflect competitors' market shares. In the case of Ardlethen Aggregates, for example, BDS estimates its quarry in the Grampians as having output of 15,000 tonnes but, as evidenced by recent news articles, Ardlethen claims to be processing 140,000 tonnes from the quarry[68]. The output data submitted by Breedon to the OFT contains several further examples where Breedon believes the BDS data underestimates output volumes, in respect of [✂].[69]

66 See section 15 of Breedon's submission to the OFT dated 13 June 2013.
67 [✂].
68 Article submitted to OFT on 4 September 2013.
69 See Breedon's response to question 19 of the MQ.

5.22.2 As explained above, Breedon believes that there are a large number of producers of site-won aggregates and aggregates from unregistered sites. To all intents and purposes, aggregates produced from these sources are fully substitutable with primary aggregates. Given the nature of these producers it is difficult to get accurate figures as to output or the number of producers, but Breedon believes that such producers are particularly likely to be significant in Scotland, since the geography in most areas means that usable sources of material are more widespread. Breedon has provided data to the CC incorporating estimated revisions to BDS figures, and submits that the CC should use these figures when assessing the merger.

New entry/expansion

5.23 In addition to existing competitors, Breedon submits that there is realistic scope for new entry/expansion in aggregates markets, thus providing an additional competitive constraint on the parties post-merger.

5.24 Barriers to entry/expansion are relatively low. Initial set-up costs can be minimised through the use of mobile crushing and screening equipment, which can be obtained through contract hire or leasing arrangements. Breedon considers the main limitation on new entry to be planning permission, which can in some cases take more than a year. However, Breedon notes that planning consent is typically less difficult to obtain in northern Scotland than in other, more densely populated parts of the country. Moreover, an additional benefit of mobile plant is that it is considerably quicker and less onerous to obtain planning consent for use of such equipment, thereby facilitating new entry and expansion.

5.25 As noted above, Breedon believes there is significant spare capacity in the market, driven in part by lower demand volumes. In the period since 2007 there have been some quarry closures in the Grampian area, notably Les Taylor's quarries at Ardlethen, North Mains, Savoch, and Haddo. However, the North Mains quarry has been taken over by Miller Plant; Ardlethen has been taken over by Jamieson; and Savoch has been taken over by Savoch Quarry and Recycling Limited, and all are now operational again. Breedon notes that the quarries at North Mains and Ardlethen have exercised a significant and increasing competitive constraint on Breedon's operations since reopening. During this period Bruce Plant also opened their quarry operation at Ury. Breedon believes that capacity available in the Aberdeenshire market remains around the level of demand of five years ago, while demand has declined by approximately 34%[70], resulting in significant spare capacity. Breedon considers that this is likely to be adequate for any general market recovery. Breedon believes that opportunities will exist for competitors to increase installed capacity should market demand support this.

5.26 In Tayside, Aggregate Industries opened the Powmyre quarry and Laird opened their Blairgowrie operation in 2008. Similar levels of capacity exist in that market as exhausted quarries have been replaced with new operations. Breedon has calculated that demand in this region fell by approximately 30% between 2007 and 2011[71], which implies that there is significant capacity available today for competitors to expand their operations.

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70 Calculated on the basis of a comparison of 2007 output volumes with 2011 output volumes. Breedon notes that there is likely to be additional spare capacity available, as it is unlikely that all sites were operating at maximum capacity in 2007.

71 See footnote 66.

Profitability

5.27 Breedon submits that the margins generated in respect of aggregates are not high and do not evidence any market power, and believes that margins on external sales are significantly lower than on internal sales.

5.28 Aggregates production is a capital intensive business characterised by high fixed costs and, therefore, margins on variable costs obtained in the production of aggregates are required to cover these high fixed costs, including operational fixed costs as well as initial capital investment incurred. For this reason, Breedon considers that [✂]. The more standard measure of margin within the business is [✂].

5.29 Breedon submits that the margins it achieves are in the normal range for the business and are not high. The average [✂] for the six Breedon operations in the overlap areas was [✂] in 2011 before any overhead allocations or charge for cost of capital. To the extent that some sites achieve higher margins than others, this reflects greater efficiencies as a result of the plant configuration and utilisation and availability of work. An industry average or target [✂] for aggregates would be [✂] with a range of between [✂] and therefore margins achieved by Breedon are [✂].

5.30 Further, overall Breedon Group return on capital employed remains below the cost of capital.

**ASPHALT**

5.31 Breedon submits that, in each of the relevant overlap areas, it remains subject to strong competition from third parties, each of which has excess capacity.

Grampians

5.32 As regards the Grampian region, in keeping with the OFT/CC's guidance and previous decisions[72], Breedon submits that the transaction does not give rise to a lessening of competition given Breedon's market share will remain [✂][73] and given that it will remain subject to strong competition from remaining players (each of which has excess capacity). There is no reasonable justification identified in the Reference Decision for departing from the guidance and Breedon submits that no such reason exists.

5.33 Moreover, and as with all of the areas of potential concern identified in the Reference Decision, insufficient weight has been given to the competitive constraint that remains post-transaction. As regards the Grampian overlap areas in particular, insufficient weight has been attributed to the presence of competitors holding significant market shares comparable to that of the merged party. Here, [✂] each holding shares of production of [✂] on a 30-mile radius[74].

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72 See OFT decision of 2 November 2011 in Case ME/5007/11, *Proposed Joint Venture between Anglo American PLC and Lafarge S.A.*, at paragraphs 167 to 171; CC2/OFT1254, *Merger Assessment Guidelines*, September 2010, at paragraph 5.3.5; see also the CC's approach to its consideration of Breedon's suitability as a potential purchaser of the Midland Quarry Products assets divested at part of the undertakings package in Anglo American/Lafarge, in which it stated that, having first identified the 30-mile catchment area around each of the parties' sites (i.e. the divestiture assets and Breedon's existing sites), it calculated each party's share of production within each radial and applied a 40% filter rule to identify potential areas of concern.

73 Table 4, OFT Reference Decision.

74 *Ibid.*

Inverness/Highlands

5.34 Similarly, in each of the Highlands areas (i.e. centred on Midlairgs and Daviot), there will remain [✂], each holding shares of production of [✂] on a 30-mile radius. In addition, there is significant spare capacity in these areas due to a recent drop in demand of up to 40%[75]. Accordingly, notwithstanding the market shares identified in this area in the Reference Decision, given the market conditions, Breedon submits that it simply would not be in a position to increase prices post-merger as any attempt to do so would be very likely to result in loss of customers to competitors.

[✂]

5.35 [✂]

New entry/expansion

5.36 New entrants can entry the market for asphalt relatively easily. Breedon estimates that second-hand asphalt plant can be acquired for approximately £1 million, and there are no particular technical or intellectual property requirements which would limit entry. Breedon believes, in particular, that it would be relatively easy for existing aggregates producers to enter, by locating asphalt plant on or near their existing quarries, which would then provide a vertically integrated supply of aggregates inputs (in common with many of Breedon's existing competitors). Breedon is aware, however, of numerous non-integrated RMX producers, demonstrating that vertical integration is not required for new entry.

5.37 Furthermore, as discussed at Breedon's response to question 13 of the MQ, mobile asphalt plants can easily be used to enter a market. Breedon considers it likely that such equipment will be used in the upcoming AWPR project and also notes the recent example of a plant being utilised at Inverness Airport. This contract was won by Colas, a contracting company based in England which, Breedon understands, are using a mobile asphalt plant with aggregates supplied by Lafarge-Tarmac. Breedon competed extremely hard for this project but did not manage to secure it notwithstanding its very close proximity to the project site.

Profitability

5.38 In light of the context of overall profitability and the more relevant [✂] measurement on which Breedon relies for its business strategy, Breedon submits that its margins in asphalt are [✂] and do not support concerns regarding potential unilateral effects in asphalt markets. As with aggregates, Breedon submits that any assessment of margins should consider the parties' overall profitability.

5.39 The [✂] margins across the three Breedon plants in the overlap areas averaged [✂] in 2011, with a range of [✂]. Breedon notes also that its asphalt plant fixed costs are [✂]. As regards overall profitability, overall Breedon Group return on capital employed is [✂]. This demonstrates that, notwithstanding variable profit margins, Breedon's financial position in respect of asphalt should not raise concerns of a reasonable prospect of unilateral effects.

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75 Calculated on the basis of a comparison of 2007 output volumes with 2011 output volumes. Breedon notes that there is likely to be additional spare capacity available, as it is unlikely that all sites were operating at maximum capacity in 2007.

5.40 Breedon believes that the variable margins achieved by the parties are [✂]. Breedon does not consider that its variable profit margins [✂], and considers that an internal target [✂] represents a reasonable aspiration. Breedon notes that to some extent it [✂].

**RMX**

5.41 At a regional level, the parties' combined share of supply in RMX ranges from [✂]. At a local level, Breedon does not have access to market share data based on volume output, and in any case believes that fascia count is a more relevant measure of competition. Breedon acknowledges the basis of assessment, its share of sites in some of the overlap areas identified by the OFT [✂][76]. However, in most areas (albeit with some potential exceptions), notwithstanding the parties' relatively high market share in some local overlap areas, there remain a number of independent competitors in most areas. These competitors continue to exert competitive constraint on the parties post-transaction.

Competitive constraints

5.42 Breedon considers that RMX supplies from the parties' fixed plants are subject to competitive constraint not only from other fixed plants, but also from suppliers using volumetric trucks and from mobile plants. Such suppliers compete for and supply a significant proportion of the market and exert competitive constraint on operators such as Breedon for a large proportion of demand. Breedon is aware of 13 volumetric trucks currently operating in the local areas being examined by the CC, in addition to seven mobile RMX plants. Breedon estimates that these suppliers account for [✂], respectively, of RMX supplies in North Scotland[77]. These competitors therefore supply a not inconsiderable proportion of the market and continue to exert a competitive constraint on the parties post-transaction.

New entry/expansion

5.43 As with asphalt, Breedon believes that a competitor could easily enter the RMX market through the acquisition of second-hand plant, for approximately £200,000. Again, existing aggregates producers in particular would be able to utilise their own products as input materials, and could achieve significant cost reductions as regards haulage by locating RMX plant at or near existing aggregates production. Breedon is aware, however, of various non-integrated RMX producers (some of these plants sit on a quarry owned by a third party), demonstrating that vertical integration is not required for new entry.

5.44 Entry is also possible by the use of volumetric trucks. Breedon believes that a new volumetric truck can be acquired for around £165,000, or hired at a rate of £950 per week. Alternatively, mobile plant can be acquired for as little as £150,000 (new), or more cheaply second-hand. Accordingly, both of these options provide a means of entry into the market for new competitors, or for expansion by existing competitors.

5.45 Indeed, Breedon's view is entirely consistent with the CC in its Final Report in the MIR ("**CC MIR Final Report**") where it states: "*[b]arriers to entry and expansion in RMX-production are low*"[78]. This view is also shared by other producers[79].

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76 Breedon refers the CC to its initial submission for further details or market shares and site shares.
77 Please see Breedon's response to question 10 of the MQ.
78 CC MIR Final Report, at 3.98.
79 See Appendix 3 of the CC MIR Final Report at paragraphs 21 (Lafarge Tarmac), 100 (Hanson), 159 (Mittal/HCM), 191 (Aggregate Industries), and 214 (CRH).

Profitability

5.46 Again, Breedon submits that the CC's consideration of margins should consider the parties' overall profitability. Breedon notes the comments received by the CC in the course of its market investigation as to the relevance of variable profit margins, in that difficult market conditions make it unlikely that a producer would keep plants open unless they expect realised prices to exceed average avoidable costs i.e. including labour, repair and maintenance, as well as semi-variable costs[80]. In considering RMX markets, the CC combined its assessment of variable profit margins with consideration of wider profitability measures[81], and also considered EBITDA measures as an alternative to variable profit margins, on the grounds that this would "*ensure greater comparability between the relevant companies' margins*"[82].

5.47 Breedon submits that the variable margins achieved are [✂]. Many Breedon plants in the overlap areas [✂]. The more standard measure of margin within the business is [✂]. The range across the 10 Breedon plants in the overlap areas identified by the OFT is [✂] with an average of [✂], with the higher margin sites reflecting operational efficiencies and relatively strong performance compared to an average across Breedon Scotland of [✂]. As regards overall profitability, Breedon's overall Group return on capital employed [✂]. Breedon's financial position in respect of RMX should not raise concerns of a reasonable prospect of unilateral effects.

**CONTRACT SURFACING**

5.48 Breedon does not consider the present transaction to give rise to any competition concerns in respect of contract surfacing, and notes that, in its consideration of contract surfacing, the OFT did not identify any competition concerns arising from the merger.

5.49 Breedon notes in particular that the assets acquired (namely, a few gangs of employees, some low-value equipment and some existing contracts) are not such as could give rise to a material change in the market. Moreover, the merger gives rise to very limited overlap between the parties, particularly given the wide geographic scope of the market (which Breedon considers to be at least national).

Competitive constraint

5.50 Breedon considers that competition in this sector is strong, reflecting the broader geographic scope of the market and strong incentives for competitors to use surfacing activities as a route to market for road surfacing materials, such as asphalt and RMX. Most asphalt producers in the UK undertake contract surfacing activities, the largest operator being Lafarge Tarmac (one of the Majors).

5.51 Breedon is not aware of any published data regarding market shares in respect of contract surfacing. Breedon has, however, previously supplied the CC with estimated market shares, based on asphalt production figures. On that analysis, Breedon estimates its share in contract surfacing to be [✂] in the Highlands region, and [✂] in Grampian. Breedon

80 See the Provisional Findings Report, Appendix 6.4, at paragraph 65. Although the comments in the report refer to cement production, Breedon considers that the same approach would be applied by RMX producers.

81 See the Provisional Findings Report, at paragraphs 9.54 to 9.56.

82 Provisional Findings Report, Appendix 6.4, at paragraph 63(b).

submits that these market shares do not demonstrate any ability to raise prices or decrease service quality.

New entry/expansion

5.52 Barriers to entry in contract surfacing are low. The business comprises people, including operatives and support staff such as estimators and quantity surveyors, together with relatively inexpensive equipment (a new paving machine, for example, costs less than £200,000). Equipment such as compressors, tractors and rollers can be hired from most major plant hire companies. There is considerable overlap with civil engineering and groundwork contracts. Some larger civil engineering companies do their own surfacing and there are many smaller contractors.

## 6. EFFECT ON COMPETITION: THEORY OF HARM 2

6.1 Breedon submits that the merger neither results, nor may be expected to result, in the loss of a potential competitor in any region or local overlap area.

6.2 Breedon notes the CC's view that adverse effects may arise if, prior to the merger, the behaviour of either party was influenced by the threat of the other expanding and entering into direct competition with it. Breedon submits that, pre-merger, this was not the case for either party.

Aggregate Industries as a constraint on Breedon

6.3 Breedon submits that the relevant counterfactual is of particular relevance to this theory of harm. As set out above, Breedon considers that the most likely counterfactual in the present case is one where Aggregate Industries would have retained the Target Assets [✂].

6.4 Given [✂], Breedon submits that [✂].

Breedon as a competitive constraint on Aggregate Industries

6.5 As regards any potential loss of competitive constraint which might have been exerted by Breedon on the acquired assets, Breedon notes [✂].

6.6 Accordingly, Breedon submits that the most likely response from Aggregate Industries to any expansion or new entry by Breedon (or, indeed, any other party) would have been [✂]. This in turn means that there is no loss of competition potential as a result of the merger.

Impact of site closures and mothballing

6.7 As set out above, and in Breedon's response to question 29 of the MQ, when considering whether to close/mothball sites, or reopen sites, Breedon considers [✂]. Accordingly, the risk of entry/expansion by Aggregate Industries [✂].

6.8 As also explained in Breedon's response to question 29 of the MQ, Breedon [✂].

6.9 Breedon has provided the CC with details of its sites/plant opened, expanded, closed and reopened, and mothballed in the last five years in its response to question 29 of the MQ.

## 7. NO VERTICAL CONCERNS OR COORDINATED EFFECTS

7.1 Breedon notes that the CC does not intend to investigate theories of harm relating to possible vertical effects or coordinated effects. Breedon notes that the OFT also did not identify any concerns arising from the merger in respect of these considerations. For the reasons set out in its submissions to the OFT, Breedon agrees with this approach and submits, for completeness, that the merger neither results, nor may be expected to result, in any potential impact on competition arising out or vertical effects or coordination as a result of the transaction.

## 8. EFFECT ON COMPETITION – COUNTERVAILING FACTORS

8.1 Breedon's customers range from large multi-national companies like Balfour Beatty to small, local operators, as well as subsidiaries of larger companies. They include major contractors, house builders, builders' merchants, small businesses, local authorities, utilities companies, railway operators and Transport Scotland.

8.2 Although Breedon's [✂][83]. Breedon considers that these customers are able to exert buyer power as a constraint on Breedon's pricing and service. As set out in more detail in Breedon's response to question 26 of the MQ, customers [✂]. In addition, [✂]. There is therefore a strong commercial incentive on producers to compete for contracts with these customers, which in turn enables them to exert buyer power.

8.3 For the customers themselves, there is clear incentive and ability to exert buyer power to obtain better prices and better customer service. Given the relative homogeneity of the products concerned, and the availability of excess production capacity across the industry, customers are able easily to switch between suppliers (and do so), as well as using bid tender processes to put pressure on producers to offer their best available terms. In its response to the MQ, Breedon provided the CC with examples of bid decision letters, from which it will be seen that there are regularly as many as [✂] bidders for most contracts, with customers regularly selecting successful bids based on [✂][84]. For example, Breedon refers the CC to an email dated 04 October 2012 contained at document 23.06 of Breedon's Response to the MQ. This email shows that [✂] differences (in this case [✂])[✂] can be significant in the award of a tender. Breedon believes this illustrates the importance of [✂] competition in the construction materials sector.

8.4 Breedon has previously provided the CC with examples of customers which have used buyer power to obtain [✂] (please see Breedon's response to question 26 of the MQ). In particular, it notes that [✂] customers such as [✂] are [✂] in leveraging their [✂] to obtain [✂].

8.5 Breedon notes however that given the nature of competition in the market even [✂] customers are able to exert their buyer power. This is due to the fact there is often little customer loyalty and a significant number of alternative suppliers of what is, essentially, a homogenous product. These customers frequently exert pressure on Breedon to [✂].

8.6 For example, Breedon has supplied the CC with emails relating to [✂], a [✂], which illustrates this point. In a series of emails all dated [✂] it can be seen that [✂] is

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83 Breedon refers the CC to its response to question 25 of the MQ and the customer information provided in response to the CC's First Day Letter.

84 See for example the letters from [✂] and [✂] contained in document 23.15 of the Breedon's Response to the MQ.

attempting to gain a [✂][85]. In addition, in an email dated [✂], internal approval is sought for supply to [✂], even though [✂]. Moreover, it is noted that [✂][86].

8.7 Other examples of smaller customers exercising their buyer power have also been supplied to the CC in Breedon's Response to the MQ. In an email dated [✂] from [✂], Breedon is asked to [✂][87]. In addition, in an email from [✂] dated [✂], Breedon's [✂].

8.8 Finally, Breedon notes that the effect of [✂] customers effectively [✂] produces expectations of [✂] and thus provides a benefit to smaller, creditworthy, customers also.

**HERBERT SMITH FREEHILLS LLP**

**5 NOVEMBER 2013**

85 Document 23.02 of Breedon's response to the MQ.
86 Document 23.12 of Breedon's response to the MQ.
87 Document 23.05 of Breedon's response to the MQ.