



CEMEX UK OPERATIONS LIMITED

**Aggregates, Cement and Ready-Mix Concrete
Market Investigation**

**Non-Confidential Version of Response to the
Competition Commission's Statement of Issues**

24 April 2012

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EXECUTIVE SUMMARY

CEMEX UK Operation Limited (“**CEMEX**”) welcomes the opportunity to comment on the Competition Commission’s (“**CC**”) Statement of Issues. As the Market Investigation (“**MI**”) is still very much in its preliminary stages, CEMEX does not comment on every potential issue in this response, as the CC’s analysis will inevitably develop over time. However, in order to assist the CC to focus on what CEMEX believes to be the key issues, CEMEX sets out its views on the most important aspects, below.

Scope of the investigation

CEMEX agrees with the CC that it is appropriate for the MI to address the cement, aggregates and ready-mix concrete (“**RMX**”) markets in Great Britain. In addition, however, CEMEX also suggests that the CC may wish to assess the relative effect of different inputs into the asphalt market. In CEMEX’s view, the price of bitumen (unlike the price of cement) is inflated thereby squeezing asphalt producers.

Overlap with Anglo/Lafarge merger

CEMEX notes that, whilst it is helpful to review evidence submitted to the Anglo/Lafarge merger inquiry, that inquiry’s relevance is limited as it was a merger investigation and collated evidence provided principally by the merging parties. This makes it more difficult to derive a balanced picture of the industry. CEMEX welcomes the Inquiry Group’s stated intention to draw its own conclusions on the basis of the evidence it receives, and the analysis it undertakes, in the context of the current MI.

Market definition

CEMEX disagrees with the provisional market definitions in Anglo/Lafarge which it considers are unduly narrow.¹ Narrow market definitions make market concentration appear significantly higher than is in reality the case. CEMEX submits that whilst the CC is of course justified in assessing narrower market segments, the wider market, and additional competitive constraints outside that market, are equally, if not more, important.

Contrary to the CC’s findings in Anglo/Lafarge, there is a single market for the supply of most **aggregates**, including both primary, secondary and recycled for use in construction applications. On occasion, specialist industrial demand may require specific types of aggregates which are non-substitutable from a demand perspective. CEMEX does not contest that there are separate markets for rail ballast, high polished stone value (“**High PSV**”) aggregates and high purity limestone for flue gas desulphurisation. As a consequence of the low value of aggregates per tonne, transport costs are proportionately high, meaning that geographic markets tend to be local. CEMEX considers that geographic markets are increasing in size due to the impact of merchant hauliers, which are able to transport aggregates over longer distances as a result of the fuel economies of carrying return loads. In CEMEX’s view this means that geographic markets can be larger than the 30 mile radius typically adopted in previous decisions. Whilst this means geographic markets include an ever-wider range of competitors and need also to be considered in the light of supply-side constraints imposed by overlapping and neighbouring markets, it remains necessary to assess and define each geographic market on a case by case basis.

There is a single product market for grey **cement**, with all available grades and specifications forming a single continuum of customer demand. There is also extensive supply-side substitution,

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Competition Commission, “*Anticipated construction materials joint venture between Anglo American PLC and Lafarge S.A.: Provisional Findings Report*”, 23 February 2012, Section 5.

because most British cement production sites have the necessary milling, blending and storage facilities to be able to flex production between CEM I, II and III. Regardless of whether or not cement sold in bulk or bagged comprises either a single market or two separate markets, the majority of cement producers can produce and sell cement in either form after making a relatively inexpensive investment in bagging machinery. Like CEM I, II and III, switching between bulk and bagged cement requires only limited changes to the production process.

There is a single product market for the supply of **RMX**, including both mixer trucks and volumetric delivery methods. Whilst there are potentially thousands of products available, the grade required is produced using the same equipment to vary the proportions of the same ingredients of cement, water and aggregates. CEMEX considers there to be demand-side substitution between fixed and site plants.

RMX sets quickly and can only be transported for around one hour which therefore limits geographic markets to small areas, usually urban, to match patterns of demand. However, there may be overlaps in the areas served by different plants. Volumetric trucks also comprise a rapidly-growing section of the market and have allowed geographic markets to expand because they can operate over longer distances. This is because they do not need to mix the product until they arrive on site.

Observations on competition in the relevant markets

Aggregates

Barriers to entry for a new quarry are no higher than in other resource-intensive industries. Whilst set-up costs may be relatively high, the purchase of an existing site can prove significantly less expensive, particularly where the extraction infrastructure is already installed. However, even on local markets where barriers to new entry can be high, an existing competitor can exercise a significant competitive constraint by making use of the spare capacity that most operators currently have available to them. It could, for example easily extend its operating hours, operate machinery at a faster rate or install alternative machinery, in order to boost output relatively quickly, should customers choose to switch to it in response to a competitor price rise.

Barriers to entering the market through the production of secondary and recycled aggregates are especially low. Little up-front investment is required, as the necessary crushing, grading and sorting equipment can be leased or bought second-hand. Access to the necessary inputs such as demolition waste is also relatively easy. Moreover, transport costs are low as the product is often produced close to sources of demand. This is because development on brownfield sites by its very nature necessitates demolition before new construction can begin.

Competition from merchant hauliers is also strong. They collect aggregates by truck and deliver them to a customer's desired location. They are able to gain a competitive edge through strong customer relationships, combining the delivery of the aggregates with the removal of waste from the customer's site, arbitrating price differences between different types and grades of aggregates which they transport at different times.

Cement

Cement is both manufactured in, and imported to, Great Britain. Competition on the market is strong with incumbent cement producers regularly losing volume to importers or having to offer significant discounts to keep customers which threaten to switch. Customers are extremely price-sensitive and regular price re-negotiations are triggered when suppliers attempt to instigate price rises. ✕

The lack of market power of cement producers is also notable in the fact that cement suppliers are unable to get customers to commit to purchasing for a particular period, or to purchase particular

volumes. As such they do not have the same security of access to market as suppliers in many other comparable markets. Barriers to switching supplier are therefore very low. As a result of the absence of exclusivity or a minimum volume purchasing commitment, customers are free and able, and frequently do initiate a renegotiation process part-way through a year (having purchased only a proportion of the volumes they had previously indicated that they would purchase) to secure a better price.

Against this background of constrained prices, incumbent cement producers contend with high fixed costs and the requirement for extremely high levels of capital investment. Producers are also buckling under the increasingly onerous costs of environmental and other types of costly regulation. Consequently, returns on capital employed in the cement industry are very low and would quickly become negative, for example, were costs to rise and/or revenues to fall. The CC will discover from the evidence it collects that the cement industry does not provide producers with any opportunity to earn 'excess profits'. Far from it.

RMX

Barriers to entry into local RMX markets are extremely low, and in recent years this has led to a significant number of new entrants. Smaller operators with lower cost models can and often do secure significant shares of particular markets. In particular, competition from volumetric producers (of which there are over 200) is strong and growing. Customers are aware of their options, have significant buyer power and competition for orders is strong. Factors such as quality, a producer's relationship with its customers and service are important but price is the key **driver**.

✂

To keep assets close to full utilisation operators compete strongly for every potential sale. The more concrete sold, the lower the proportion of fixed costs attributable to each tonne. Competition and excess capacity have driven down prices to the point that CEMEX's RMX business is a loss-making enterprise. In recent years, on certain occasions where CEMEX has attempted to negotiate a price increase, purchasers have been able to force its prices to below where they had been at the outset of negotiations, and on other occasions CEMEX has only been able to secure modest rises. CEMEX believes that most operators are unlikely to be covering their cost of capital and are unable to make the investment necessary to stay in the market for the long term. This makes the RMX market unsustainable for CEMEX in its current form.

THEORIES OF HARM

1. High levels of concentration and barriers to entry

Aggregates

CEMEX does not consider that it has unilateral power in the supply of aggregates, either as a result of barriers to entry or because of a high degree of concentration. Barriers to entry for a new quarry are not significantly higher than for any other resource-intensive industry. All that is required for new entry is a truck with which to collect and to deliver the aggregates. An existing operator can increase output by increasing operating hours or operating machinery at a faster rate. Barriers to entry and expansion through the production of secondary and recycled aggregates are even lower.

Cement

New entry does not require the construction of a complete cement plant. Cement is reasonably straightforward to import and consequently actual volumes of imports have increased over the past five years² despite considerable contraction of the overall British market. New entry or expansion is particularly likely by importers able to source cement from EU locations where there is significant

excess capacity and significant incentives for importers to maintain production levels above the minimum required in order to avoid losing EU Emissions Trading Scheme Credits (e.g. Spain, Portugal and Ireland after the collapse of their construction booms). In addition, excess capacity amongst existing producers can be used to compete hard for additional customer volumes wherever possible. Non-EU producers based in nearby countries such as Egypt can also target Great Britain.

RMX

In relation to the fragmented RMX market, barriers to entry are extremely low and the significant number of new entrants that continue to join local RMX markets are a testament to this. CEMEX considers that volumetric operators compete as equals for most applications. Volumetric operators are able to enter the RMX market extremely cost-effectively because all that is required in addition to the specialist volumetric trucks themselves (which can be leased) is a single storage silo and accompanying water tank. The acquisition of cement is not a barrier because (as described below in relation to conditions of competition) there is a range of incumbent cement producers and importers who compete strongly for the opportunity to supply cement.

2. Co-ordination

CEMEX refutes strongly any suggestion that there is any form of coordination either tacit or otherwise, in relation to the supply of cement in Great Britain. In particular, it notes that the evidence the CC has gathered so far in relation to alleged coordination as part of the Anglo/Lafarge merger investigation is wholly unpersuasive. Market conditions simply do not support an allegation of coordinated effects.

In particular, it is impossible to reach or to sustain a tacit understanding on, e.g., price or market share because even if it were possible (for the sake of argument) to reach such an understanding external constraints prevent the firms that would be party to the alleged understanding from collectively exercising any degree of market power. In particular, imports exert a significant competitive constraint on cement produced within the UK.

3. Vertical integration and exclusionary behaviour

The CC in its SI expresses concern that some vertically-integrated suppliers may be raising the prices of cement relative to the prices of RMX with a view to squeezing the margins of non-integrated RMX suppliers. CEMEX considers that the structure and circumstances of the industry do not lend themselves to foreclosure of non-integrated (downstream) competitors by the vertically integrated majors, neither at the level of an individual vertically integrated firm (unilateral margin squeeze) nor indeed at a joint level (co-ordinated margin squeeze). This is not least because no conditions of co-ordination can be proven, as per Theory of harm 2.

4. Policy and regulation

CEMEX notes the CC's concerns as to whether any aspect of the regulation of the aggregates, cement and RMX industries, or the implementation of policies relevant to these industries, is detrimental to competition. CEMEX considers, as a general rule, that although environmental regulation affects all operators in the markets for aggregates, cement and RMX, it has a disproportionately greater effect on larger incumbent operators than smaller new entrants. As a result the regulatory barriers to entering the market(s) are often lower than the regulatory barriers to expansion for existing large players. Certainly, incumbents do not secure advantages as a result of regulatory burdens and the CC will be provided with evidence to support this.

CEMEX considers that there are a number of further expenses borne by all operators in the industry which it would be sensible for the CC to assess as part of its examination of barriers to

entry. In CEMEX's view if these regulatory costs were lower, conditions of competition would be enhanced to the benefit of competition and end consumers.

1 INTRODUCTION

- 1.1 CEMEX wishes to make clear in the strongest terms its opposition to the reference by the Office of Fair Trading of the aggregates, cement and ready-mix concrete markets to the Competition Commission for investigation. CEMEX is stunned by the accusation that operators may be making 'super returns'. To the contrary, CEMEX's experience is of a market that is extremely competitive with intense downward pressure on prices and overall returns.
- 1.2 The parlous state of the industry is clear from the drastic contraction of the market which has taken place in recent years. All this is evidenced by significant plant closures and redundancies, the deterioration in returns on capital and falling UK capacity. This is an industry in dire straits, if not in crisis. CEMEX's UK operations deliver the lowest returns across its portfolio of businesses. Further downward pressure on prices and returns calls into question the rationale for making further investments in the UK and the long term sustainability of UK operations.
- 1.3 This document comprises the response of CEMEX UK Operations Limited ("**CEMEX**") to the CC's Statement of Issues (the "**SI**") in relation to the CC's Market Investigation ("**MI**") into the supply of Aggregates, Cement and Ready-mix Concrete ("**RMX**") in Great Britain.³ CEMEX is the principal subsidiary of a global business headed by CEMEX S.A.B de C.V. (the "**CEMEX Group**"). It responds to this SI on behalf of the entire CEMEX Group.
- 1.4 The SI raises a number of issues across a range of different markets. Given timing, it has not been possible for CEMEX to comment in full on every topic or potential issue raised by the CC, nor has it been possible to assemble new evidence for the CC in support of every statement which CEMEX makes below. Where possible, CEMEX supports its comments with references to materials submitted in the course of the following other investigations:
- The OFT's merger investigation into the proposed joint venture between Anglo-American and Lafarge;⁴
 - The CC's merger inquiry into the proposed joint venture between Anglo-American and Lafarge;⁵
 - The European Commission's investigation into cement;⁶ and
 - The OFT's Market Study into aggregates (later extended to include cement and RMX).⁷
- 1.5 In the circumstances, in the event that CEMEX does not comment on a particular issue or provide the CC with evidence related to it should not be taken to mean that CEMEX has no view on a topic, or that it could not provide evidence to the CC, should the need arise. CEMEX anticipates that the MI will be a methodical and detailed process, and CEMEX will submit further evidence at appropriate times as the MI progresses.
- 1.6 CEMEX has followed the structure of the CC's SI in its response, as follows:
- Section 1 – Introduction
 - Section 2 – Preliminary issues
 - Section 3 – Relevance of market definition and CEMEX's preliminary comments in relation to candidate markets

³ Competition Commission, "*Aggregates, Cement and Ready-Mix Concrete Market Investigation: Statement of Issues*", 8 March 2012 ("SI").

⁴ Dated 8 March 2012.

⁵ Competition Commission, "*Anticipated construction materials joint venture between Anglo American PLC and Lafarge S.A.: Provisional Findings Report*", 23 February 2012 ("Provisional Findings").

⁶ European Commission Press Release, "*Commission opens antitrust proceedings against a number of cement manufacturers*", 10 December 2010.

⁷ "*Aggregates: The OFT's reason for making a market investigation reference to the Competition Commission*", January 2011, (OFT1358).

- Section 4 – CEMEX’s observations on competition in the relevant markets
- Section 5 – Theory of harm 1: high levels of concentration and barriers to entry
- Section 6 – Theory of harm 2: co-ordination
- Section 7 – Theory of harm 3: vertical integration and exclusionary behaviour
- Section 8 – Theory of harm 4: policy and regulation

1.7 CEMEX accepts the hypothetical nature of the SI at this early stage⁸ and appreciates therefore that the CC has much to do in order to reach any conclusions on whether these hypotheses apply. It is not too early, by contrast, for CEMEX to have formed its conclusions on the matters under investigation in view of its participation in the OFT’s Market Study and the Anglo-American/Lafarge investigations described above.

1.8 As will be clear from CEMEX’s submissions to date,⁹ including Sections 5-8 of this Response, CEMEX wholly refutes the theories of harm propounded by the CC in its SI based on alleged high levels of concentration and barriers to entry, co-ordination and/or vertical integration and exclusionary behaviour in the markets under review. Whilst the current policy and regulatory environment does not impede the competitive process CEMEX does however consider that certain policy and regulatory measures could be taken to improve even further the process in these markets, as described in more detail in Section 8 below. These regulatory measures do not however amount to adverse effects on competition (“**AECs**”). In summary, the CC is urged to conclude that there are AECs on competition within the meaning of Section 134(2) Enterprise Act 2002 (“**EA**”). The CC is further requested to conclude that no action needs to be taken and no recommendations need to be made pursuant to Section 134(4) EA.

⁸ SI, ¶11.

⁹ Including CEMEX’s response to the OFT questionnaire from November 2010 and its response to the OFT Market Study from September 2011 (in relation to the MI) and various putbacks in relation to the proposed merger between Anglo American and Lafarge including CEMEX’s comments on the CC’s Provisional Findings from March 2012.

2 PRELIMINARY COMMENTS

Introduction to CEMEX

- 2.1 This Section provides an introduction to CEMEX and describes how it differentiates itself from its competitors.¹⁰ It also comments on the OFT's Market Study, the decision to refer and the scope of the reference. The Section concludes with CEMEX's observations on the CC's on-going merger investigation of the Anglo-American/Lafarge joint venture.
- 2.2 CEMEX is incorporated in England and Wales with its registered address and main office in Thorpe, Surrey. It is a subsidiary of CEMEX S.A.B de C.V., a global building products operation headquartered in Monterrey, Mexico. The CEMEX Group is listed on the Mexico City and New York Stock Exchanges. ✗. This reflects the highly competitive nature of the UK markets in which it operates, set against the extremely high cost inherent in competing in those markets.
- 2.3 CEMEX's primary operations are split between three areas of operation, with a Vice-President for Operations responsible for each of Aggregates, Cement and RMX. Total UK assets comprise (at March 2012) two cement plants (Rugby and Ferriby), one grinding mill (Tilbury), ✗ RMX plants, ✗ quarries, ✗ wharves, ✗ depots, ✗ asphalt plants, ✗ production sites and five marine aggregates dredgers. CEMEX UK currently has 3,268 employees.
- 2.4 ✗
- 2.5 This ✗ was reflective of the very difficult trading environment that CEMEX experienced ✗. In response to this decrease in demand, CEMEX UK was forced to implement a strategy of rapid and substantial "downsizing". ✗
- 2.6 ✗
- 2.7 Fears of a "double-dip" recession, ✗ across all markets mean that CEMEX continues to face significant difficulties. Competition in each of its areas of operation is intense and CEMEX is constrained by other operators, both large and small across the board. Notably, enhanced competition from cement importers has made the UK cement market increasingly dynamic and importers continue to grow their market share. Likewise, strong customer buyer power and low barriers to switching between suppliers exert continuous pressure to price competitively and raise levels of service.

The OFT's Market Study and Decision to Refer

- 2.8 As the MI is an entirely fresh process where the CC will be gathering its own evidence and working from first principles, CEMEX appreciates that the CC will not *per se* be building on the OFT's analysis in order to progress its assessment of the reference markets. However, to the extent that the OFT's analysis has affected the drafting of the CC's SI, CEMEX wishes to reiterate its views on what were, in CEMEX's opinion, significant flaws in the OFT's approach which it would urge the CC not to follow. The CC is referred to CEMEX's comments on the OFT's provisional Decision to refer¹¹ but CEMEX summarises below the key points for ease of reference.
- 2.9 The OFT's Market Study Report¹² appeared to be based on very little real evidence. The OFT relied on a relatively small number of anecdotal complaints, meeting with just 19 companies (a slim and undoubtedly unrepresentative sample of industry participants) and receiving written submissions from around 50. Nevertheless, the OFT accepts that: the aggregates sector alone

¹⁰ This information was presented to the CC at the initial staff meeting of 19 March 2012 but not all of the CC's staff, and certainly not the Inquiry Group, were present.

¹¹ "CEMEX UK OPERATIONS LIMITED: Comments in response to the OFT's invitation to respond to its proposed decision to make a reference to the Competition Commission in relation to the supply of Aggregates, Cement and Ready-Mix Concrete in the UK", dated 30 September 2011.

¹² "Aggregates: Report on the market study and proposed decision to make a market investigation reference", August 2011, (OFT1358).

comprises around 235 primary aggregates operators and approximately 450 recycled operators; the RMX sector comprises over 200 ready-mix suppliers, and a further 200 volumetric mixer operators; and there are tens of thousands of customers. The OFT's evidence base is thin and this, together with its limited operator engagement, cannot credibly support the OFT's sweeping conclusions that there are *'endemic competition problems rooted in underlying features of the industry'*.

- 2.10 The OFT did not give CEMEX or other stakeholders an adequate opportunity to comment on the RMX and cement markets in particular, because the investigation was originally launched in relation to aggregates only. The effect of this is significant. It means that even the limited evidence that the OFT collected in support of its reference decision for these markets was inevitably weighted against the leading operators. The OFT placed significant weight on comments from small-sized and anonymous complainants, without giving CEMEX and its key competitors full sight of the details of those complaints nor sufficient opportunity to be heard. The first chance that CEMEX had to comment on these markets was after the OFT published its provisional Decision to refer,¹³ by which time the OFT's mind was all but made up.
- 2.11 Finally, the OFT has limited resources and has therefore not probed the relevant markets in anything like the same depth as will be possible under the CC's process. For all of these reasons, CEMEX is very strongly of the view that limited evidential value should be placed on any of the findings of the OFT for the purposes of the CC's current investigation.

Comments on scope of the CC's investigation

- 2.12 CEMEX essentially agrees that a broad assessment of the cement, aggregates and RMX markets in Great Britain ("**GB**") is the most appropriate approach for the CC to take in the first instance.
- 2.13 In addition, downstream from the production of aggregates, CEMEX notes that pricing in the market for asphalt, and in turn surfacing contracting services, is driven principally by the cost of its raw material inputs. Of these, the price of bitumen has a far more significant impact than the price of aggregates. CEMEX has serious concerns about a number of unreasonable price increases implemented in recent years by bitumen producers (for example CEMEX believes that prices of bitumen rose by over 20% in the UK in 2011 alone).¹⁴ The CC is therefore urged to seek an extension of this reference to consider the impact of the pricing of this input on local asphalt and surfacing markets, alongside any assessment that it may make on the effect of the price of aggregates.

Overlap with Anglo/Lafarge inquiry

- 2.14 The CC has stated that the current market investigation is separate to the inquiry into the Anglo/Lafarge merger investigation and that whilst it is aware of the Anglo/Lafarge findings, the CC Inquiry Group will draw its own conclusions in relation to the matters covered by the MI on the basis of the evidence it receives and the analysis it undertakes in the course of this MI.¹⁵
- 2.15 CEMEX fully supports this approach, and considers this to be the minimum precaution expected; given the very high risk that any conclusions (adverse or otherwise) reached under the Anglo/Lafarge investigation will prejudice the current investigation, particularly as the CC's final decision on Anglo/Lafarge will have been published at least three weeks before the CEMEX hearing on 25 May 2012 and well before the CC will have completed its own internal analysis of CEMEX's data. In practice, CEMEX cannot envisage how the CC could fail to be influenced by the CC's determination on Anglo/Lafarge. However, in order for the CC to reach an independent

¹³ "Aggregates: the OFT's reason for making a market investigation reference to the Competition Commission", January 2012 (OFT1358).

¹⁴ Source: CEMEX's own market research, November 2011.

¹⁵ SI, ¶46.

decision based on the evidence presented to it under this MI, it is essential that the CC implements a strict internal protocol.

- 2.16 In the first instance, the Anglo/Lafarge merger Decision would be based only on the work that the CC has been able to undertake in a 32-week merger process. This does not permit the same level or breadth of analysis as will be undertaken in the context of the two-year MI. CEMEX welcomes the fact that the CC will have the opportunity and resources to undertake a wider and more rigorous review on this occasion than was permitted in the Anglo/Lafarge merger inquiry.
- 2.17 In the Anglo/Lafarge inquiry, there has been no proper forum for a third party such as CEMEX to fully defend itself against any allegation of co-ordination in particular (although CEMEX has cooperated fully and submitted comments on those limited occasions where permitted to contribute). Just prior to the publication of the CC's Provisional Findings,¹⁶ CEMEX was asked to comment on a detailed and extensive coordinated effects theory of harm only partially revealed to CEMEX through the 'putback' of parts of various working papers. However, these papers framed the CC's analysis in an incomplete way, with no express indication of the CC's workings or the evidence under consideration. Furthermore, much of the evidence which the CC relied upon when reaching its conclusions was submitted by, or concerned, Anglo-American/Tarmac or Lafarge and has consequently been withheld from CEMEX on confidentiality grounds. A merger inquiry affords only the merging parties their full rights of defence, including the opportunity to be heard.¹⁷ By contrast, for the first time, the MI affords all the parties involved in the relevant markets, including CEMEX, the same procedural protections, including a proper opportunity for a full hearing and the ability to assess all evidence, on an equal footing.
- 2.18 Unless the CC properly implements a "clean slate" approach to this MI, in spirit and to the letter, then there is a significant risk that the CC (either consciously or unconsciously) will simply follow the same course as Anglo/Lafarge. Were this to happen, the conclusions drawn under a merger investigation, where CEMEX had no proper right of defence, could nevertheless influence or taint the outcome of this market investigation, thereby undermining in practice CEMEX's full rights of defence and prejudicing its position under the present investigation.
- 2.19 In recognition of these risks, the CC has appointed different members to the CC's Market Investigation Group than those in the Anglo/Lafarge case Group. Further, the recent publication of CC guidance on the need to avoid not only real bias, but also *apparent* bias,¹⁸ re-emphasises the need for the CC to take every necessary precaution in ensuring that its published Decisions avoid prejudicing the outcome of other investigations.
- 2.20 In terms of scope, whilst superficially, the Anglo/Lafarge merger considers many of the same issues as the MI, there are fundamental differences. A merger considers *ex ante* how competition might be harmed as a result of the merger; it does not give significant weight to all aspects of the market as it stands currently. Furthermore, the majority of evidence reviewed was unsurprisingly provided only by the two parties to the merger. As a result, the market view gained by the CC reflects to a significant extent the commercial focus of Anglo-American and Lafarge and not the views of other stakeholders such as CEMEX. CEMEX therefore expects the CC to adopt a different approach in the MI to that adopted under the Anglo/Lafarge Investigation.
- 2.21 The key findings in the Anglo/Lafarge investigation, so far as they impact on CEMEX, relate to the theory of co-ordination in relation to the supply of cement. CEMEX notes that the CC has not come to a conclusion in its Provisional Findings as to whether there is, or is not, any pre-existing co-ordination and CEMEX considers that the CC was right to do so. CEMEX does however

¹⁶ Provisional Findings.

¹⁷ As per *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531, at page 560.

¹⁸ Competition Commission publication: "Guidance on Outside Interests", 1 April 2011, ¶8.

strongly disagree that the evidence the CC has considered is consistent with a degree of pre-existing tacit co-ordination. CEMEX's views on this issue are set out further in Section 6 below.

3 MARKET DEFINITION

- 3.1 CEMEX notes that the CC intends to consider the scope of affected markets across product and geographic dimensions, in relation to aggregates, cement and RMX, together with their potential substitutes¹⁹ and CEMEX addresses these issues in relation to each of those potential reference markets in this Section 3.
- 3.2 The CC also requests comments on the relevance of the CC's Provisional Findings on market definition in the Anglo/Lafarge investigation (the "**Provisional Findings**").²⁰ CEMEX agrees with some of these findings, and disagrees with others. Where relevant, it also sets out below its comments on this question in relation to each of the aggregates, cement and RMX markets.

Preliminary points

- 3.3 CEMEX agrees with published CC guidance that market definition should not become too large a focus in any assessment of competition.²¹ As the CC has not updated its Guidelines on Market Investigation References (the "**Guidelines**") since 2003, CEMEX considers it instructive to refer to paragraph 5.2.2 of the Joint OFT and CC Merger Assessment Guidelines (the "**Merger Guidelines**") which state that:

"market definition is a useful tool, but not an end in itself, and identifying the relevant market involves an element of judgement. The boundaries of the market do not determine the outcome of the Authorities' analysis of the competitive effects of the merger in any mechanistic way. In assessing whether a merger may give rise to an SLC the Authorities may take into account constraints outside of the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others."

- 3.4 Moreover, the Guidelines make clear at paragraph 1.22 that:

"in practice the analysis of market definition and the assessment of competition will overlap significantly, with many of the factors affecting one being relevant to the other. For instance, in contemplating the extent of supply-side substitution for the purposes of identifying the relevant market, it is likely that the potential for entry and expansion, a key issue in the assessment of competition, will also need to be considered. Therefore market definition and competition assessment should not be viewed as two distinct chronological stages - rather they should be viewed as two overlapping analyses. Market definition can be thought of as a framework within which to analyse the effect of features of the market on competition."

- 3.5 CEMEX agrees entirely with this approach. Whilst it is helpful to explore market definition as a framework for competitive assessment, the competitive constraints exerted by products that fall outside the relevant market should also be examined. The CC's focus should be on how the markets actually operate.

¹⁹ SI, ¶¶14 to 17.

²⁰ SI, ¶18.

²¹ As noted in Section 4 below CEMEX also criticises the disproportionate level of reliance the OFT places upon the national shares of supply and levels of concentration in its decision to refer to the CC.

Standard aggregates

- 3.6 CEMEX considers that there is a single relevant market for the supply of most aggregates for use in construction applications. On occasion, specialist industrial demand may require specific types of aggregates which are non-substitutable from a demand perspective. In CEMEX's view, this is the case in relation to rail ballast (see paras 3.23 and 3.24 below); aggregates with a high polished stone value ("**High PSV**") (see paras 3.28 and 3.29 below) and high purity limestone ("**HPL**") which is used for flue gas desulphurisation ("**FGD**") (see paras 3.25 to 3.27 below). CEMEX notes that the CC has also asked for separate data on dolomite in its Market Questionnaire. CEMEX does not consider dolomite to comprise a separate market.
- 3.7 CEMEX considers that all other aggregate types form part of the same product market comprising at least sand & gravel and crushed rock of all grades; primary, secondary and recycled aggregates; plus both marine-dredged and land-won aggregates.
- 3.8 The possibility for supply-side substitution depends on the area where the aggregates are extracted. Generally hard rock is found in the North and West of Great Britain, sand & gravel in the South and East, and secondary aggregates such as china clay spoil in the West Country. Recycled aggregates are most abundant in urban locations where demolition of pre-existing development occurs.

Marine dredged vs land-won

- 3.9 The price of marine aggregates is competitive with land-won aggregates. CEMEX sells marine aggregates from wharves (which are treated as if they were quarries for internal purposes by CEMEX) which apply similar pricing to that for land-won aggregates. CEMEX considers that both land and marine products comprise a single market. As far as customers are concerned, there is no distinction, leading to full demand-side substitution between the sources. Previous competition cases have also drawn no distinction between land-won and marine-dredged aggregates.²²

Primary vs recycled and secondary aggregates

- 3.10 CEMEX considers there to be a single market for construction aggregates for construction application which includes primary, secondary and recycled aggregates. Although distinctions can potentially be drawn between types of aggregate, there is nevertheless a significant overlap in their uses so that they comprise part of a single continuum of alternative aggregates used for construction purposes. In many cases, specifications for particular uses can be met by one or more of sand & gravel, crushed rock, secondary aggregates or recycled aggregates. For example, secondary aggregates derived from china clay spoil can be used in substitution for primary aggregates across most applications. Once the customer has specified the grade and performance characteristics the supplier will offer suitable materials that match the price that the customer is prepared to pay; generally, whatever the origin of a product, those which are available more locally will be preferred as they are likely to be cheaper (due to lower transport costs).
- 3.11 By way of example, CEMEX notes that the share of all aggregates sold which is attributable to secondary and recycled aggregates has continued to grow, as these materials are generally cheaper than primary aggregates due to being derived from waste products (notably they are also not subject to the £2 per tonne Aggregates Levy applied to primary aggregates). As recycled and secondary aggregates have now grown to 28%²³ of total aggregates (from only 10% in 2000) the constraint they exercise on primary aggregates prices has likewise grown. Notably, the CC's own survey, undertaken as part of the Anglo/Lafarge investigation, confirmed that nearly half of the aggregates used for general construction applications are made up of secondary and recycled

²² For example in Case COMP/M.2596 *RMC/UMA/JV* (2003), ¶19.
²³ www.mineralproducts.org/sustainability/highlights.html.

aggregates.²⁴ This is supported by switching data, which illustrates that around half of customers have switched between primary and secondary/recycled aggregates, the majority on the basis of price.²⁵

- 3.12 Furthermore, the proportion of customers for specialist applications that *can* switch also indicates that secondary and recycled aggregates exercise a real competitive constraint on primary aggregates. Around half of RMX customers surveyed by the CC reported that they *could* switch from primary to secondary or recycled aggregates.²⁶ In relation to asphalt production, increasing substitution of recycled aggregates is encouraged by the Highways Agency requirement that material removed from roads before they are re-surfaced has to be re-used. Certain recycled and secondary aggregates can also be used for the production of concrete products; examples include the use of china clay waste for concrete, or crushing and adding of rejected blocks into the manufacture of new blocks.
- 3.13 At Annex G of its Provisional Findings, the CC has endeavoured to measure demand-side substitution with reference to survey data from customers who expressed a view on the likely volumes and particular grades they say they could switch. A large minority of aggregates users surveyed consider it '*fairly or very important*' whether they purchase primary, secondary or recycled aggregates.²⁷ This means that the majority did not consider this to be '*fairly or very important*'. However, CEMEX further submits that whilst this minority of customers (or indeed the customer's customer) may have expressed a preference, this is in fact no more than shorthand for the specific physical properties that they seek for an aggregate, and reflects the inevitable subjectivity inherent in the results of a survey of this nature. In most instances, if other alternatives were explored for the required specification, this could be met by a different category of aggregate at a similar price. CEMEX submits that despite survey data in which a number of respondents note that they had only been able to switch a quarter or less of their volumes, the proportion of volume that could, on an objective basis, have been switched is actually significantly higher.
- 3.14 CEMEX notes that concerns over the availability (both in geographic availability and quantity) of secondary and recycled aggregates have in the past influenced customer demand. CEMEX does not consider these concerns to be well founded for a number of reasons. First, because demand for recycled aggregates is concentrated in the urban areas where recycled aggregates are largely produced and available. Second, given that competition for aggregates operates on a local basis, CEMEX does not see how any lack of nationwide availability can be a legitimate barrier to including secondary or recycled aggregates in the overall market for aggregates. In local markets where secondary aggregates and/or recycled aggregates are available, these form an integral and vitally important part of the market. As a consequence, it would be misleading to place undue weight on survey evidence citing lack of availability from customers in markets where these sources are not present, especially given that recycled and secondary aggregates now comprise such a large share of aggregates used in Great Britain.
- 3.15 Overall, CEMEX considers that secondary and recycled aggregates can and do fully constrain the price of primary aggregates and are therefore part of the same relevant market, in particular because of their cost advantages, as explained at paragraph 3.11 above. Even if the CC is not minded to accept the persuasive evidence that this is the case, the CC is urged not to apply an overly mechanistic approach to market definition, and moreover to take full account of the significant competitive constraints that secondary and recycled aggregates impose on the supply of primary aggregates.

²⁴ Provisional Findings, Appendix G, ¶L.42(a).

²⁵ Provisional Findings, Appendix G, ¶L.42(b).

²⁶ Provisional Findings, Appendix G, ¶L.51.

²⁷ Provisional Findings, Appendix G, ¶L. 47.

Hard rock vs sand & gravel

- 3.16 CEMEX considers hard rock and sand & gravel to comprise part of the same relevant product market. As mentioned above, general construction customers do not need access to a particular type of aggregate in order to meet their needs; they simply need access to aggregates of a particular grade and are not concerned with the source of the material. Customers will buy the cheapest aggregates and these will generally be those which were extracted locally. Thus most aggregates used in the North West are local hard rock, whereas in the South East, most customers tend to use sand & gravel, but this is simply because high transport costs encourage the use of locally extracted aggregates and is not due to intrinsic differences in the products themselves. It is true that some hard rock is shipped by rail and sea to the South East but this forms only a minority of aggregates used in that area. The fact that different aggregate types can be used for identical applications provides clear evidence that these products can be used interchangeably in a wide range of aggregates applications, such as for fill, general construction uses, concrete products and RMX.
- 3.17 By way of example, crushed rock can achieve similar performance characteristics to natural sand & gravel if it is graded using screens, placed through additional crushing processes or blended with naturally-occurring sand & gravel. A crushed limestone dust can be used instead of naturally occurring sand in certain concretes. This is cost-effective because the dust is produced as a by-product of other hard rock crushing processes. In relation to asphalt production, certain sands can be a viable substitute for fine crushed rock.
- 3.18 From a supply-side perspective, crushed rock will substitute for most sand & gravel products as it can be crushed down to any particle size. Sand & gravel will also be naturally extracted in a range of grades which are substitutable with a range of hard rock products.

Different grades of aggregates

- 3.19 From a demand-side perspective, CEMEX agrees that customers will generally require a particular specification i.e. a specific grade,²⁸ which it will be difficult for them to substitute for another grade. Having said this, some RMX producers are able to switch between, for example, different coarse grades. Further, the same customers will often require multiple grades as part of the same supply relationship, rather than shop around grade by grade.
- 3.20 Varying grades of aggregates can however easily be manufactured by the same operators either by sourcing the grade from another site locally (a “supply-chain solution”) or using different machinery to crush product to different grades within the same site (a “machinery solution”). Supply-chain solutions are particularly effective near to urban areas where the high levels of demand can sustain production at multiple locations in the same area. In any event, several grades are produced at any one time from the same site. The product is simply graded, sized and separated after extraction. Due to this high degree of supply-side substitution across many grades, CEMEX considers that all grades comprise a single product market.

Geographic market

- 3.21 Due to the low value of aggregates on a tonne-per-tonne basis, transport costs are a very important factor in being able to supply aggregates to a customer at a competitive price. This means that markets will tend to be local to regional in scope. They are, however, steadily increasing in size, particularly due to the growing impact of merchant hauliers, who are able to transport aggregates more cost-effectively over longer distances. This is because they purchase aggregates from a variety of sources and are therefore much more likely to be able to take advantage of the costs savings of return loads.²⁹ CEMEX believes that many local aggregates

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For the avoidance of doubt, ‘grading’ is the classification of aggregates into approximate size fractions.

markets, particularly in the Midlands, will be considerably larger than the indicative 30 mile radius adopted as a proxy in previous decisions.

- 3.22 CEMEX considers that local markets will vary in scope and scale due to demographics. For example, demand for aggregates is less concentrated in rural than urban markets. As a result, urban markets are often objectively smaller than markets in more rural locations. Topographic features such as fast roads, or rivers, as well as features such as traffic congestion, also play their role in defining relevant geographic markets. The result is that each market must be defined on its own terms.

Rail ballast

- 3.23 Σ is almost the exclusive customer for this product, and there is no substitute for the particular grade of crushed rock required to meet the specific characteristics demanded by Σ to enhance railway safety. Rail ballast does however represent only part of the output of the quarries from which it is produced, meaning that it can exercise certain supply-side constraints on standard aggregates production and vice versa.
- 3.24 CEMEX agrees with previous OFT Decisions and the CC's Provisional Findings that the market is national in scope. Due to its use on the rail network, rail ballast is very easily and cost-effectively transported by rail for use anywhere in the country where it is needed.

High purity limestone ("HPL") for flue gas desulphurisation ("FGD")

- 3.25 CEMEX understands that the generally accepted technical specification of HPL is a rock with a calcium carbonate content of greater than 98%. Σ . HPL can be used for a number of general construction applications. In that respect, there is a high degree of general demand and supply-side substitution between HPL and other aggregates.³⁰
- 3.26 CEMEX does however agree with the CC's Provisional Findings in Anglo/Lafarge that FGD customers comprise a unique group,³¹ for whom the chemical composition of the aggregate, rather than its physical properties, is the most important property. By passing power station flue gas emissions through HPL slurry with a calcium carbonate content of 98%, it is possible to lower their sulphur content by up to 90%. Σ
- 3.27 Due to the specialist nature of FGD demand, customers will generally be prepared to purchase HPL over significantly longer distances than standard aggregates, in order to ensure that it meets their stringent technical specifications. CEMEX therefore considers that to the extent that a separate market may exist for HPL for FGD, this will be at least Great Britain-wide.

²⁹ It is also worth noting that as the return load need not necessarily be of the same aggregate grade or type, merchant hauliers' ability to compete is enhanced further by their ability to arbitrage prices between different grades and types of aggregates. The merchant may be able to undercut a producer in relation to one particular product, because they have secured a compensating more generous margin on a different product being transported as part of the return load.

³⁰ See CEMEX's responses of 9 January 2012 to the CC's questions on HPL for FGD, in the context of the Anglo/Lafarge investigation.

³¹ Provisional Findings, ¶L.5.42.

High PSV

- 3.28 High polished stone value (“**PSV**”) aggregates are used in a specific mix of asphalt which is produced to surface roads where skid resistance needs to be maintained. The largest customer base by some margin for High PSV is the UK public sector, in the form of the Highways Agency and local authority highways departments. The Highways Agency specifies in particular in its road design manual that a PSV of 65+³² is the only stone that can be used to surface particular types of road. On this basis, CEMEX agrees with the OFT in its decision to refer the Anglo/Lafarge merger to the CC, that PSV of 65+ is likely to comprise a separate market.³³ CEMEX would however note that only a minority of stone which is marketed and sold as High PSV is in fact used where a technical High PSV specification is required.
- 3.29 High PSV aggregates are only extracted from a relatively small number of quarries. This means that they are transported to customers over long distances. CEMEX therefore considers that any market the CC found for High PSV would be national. Imports from Northern Ireland, France and Benelux also impose a significant competitive constraint, however. For example, one particular export terminal at Belfast port is dedicated exclusively to the export of High PSV to Great Britain.

Cement

Product market - different grades of cement

- 3.30 CEMEX considers that all types of grey cement comprise part of a common product market.³⁴ CEMEX considers that the market includes the different grades of grey cement that can be produced, depending on the mix of ingredients used, as follows:
- (a) CEM I which comprises a mix of ground clinker and gypsum;
 - (b) CEM II which comprises a mix of 6-35% pulverised fly ash (“**PFA**”) in addition to ground clinker and gypsum; and
 - (c) CEM III which contains between 36% and 95% ground granulated blast furnace slag (“**GGBS**”) in addition to ground clinker and gypsum.
- 3.31 Each offers different setting and strength qualities, but they form part of a single chain of substitution. In practice customer demand varies even within the supply of the most widely-used product, CEM I, in particular according to the specific strength and setting time that each customer requires for their cement. \times ³⁵.
- 3.32 PFA and GGBS also pose a significant competitive constraint on grey cements, even though they cannot be used on a standalone basis as a direct substitute for cement. This is because many RMX and concrete product producers (\times), purchase PFA and GGBS directly. They then “self-blend” CEM II or III as required. \times ³⁶. This means that any assessment of the relevant market for cement would be misleading and incomplete without a full consideration of these products.
- 3.33 In terms of supply-side substitution, it is easy to switch production between CEM I, II and III. Most cement production sites in Great Britain have the necessary milling, blending and storage facilities for the necessary cementitious inputs and end products in order to be able to “flex” production between the three cement product categories.

³² The higher the PSV value, the more resistant to polishing the stone is, thus increasing skid resistance. High PSV (i.e. 65+) stone is therefore the most suitable for trunk roads and motorways which experience heavy traffic at high speeds.

³³ OFT, “Proposed Joint Venture between Anglo American Plc and Lafarge S.A.: Decision under Section 33 of the Enterprise Act 2002”, 2 November 2011, ¶68 (a), 72(a).

³⁴ White cement has a very different pricing structure and consequently has been found to comprise a separate product market in previous decisions (see for example COMP/M.3572 CEMEX/RMX, Commission Decision of 8 December 2004). \times

³⁵ See CEMEX’s response to the CC’s putback on product market (cement) under the Anglo/Lafarge investigation, dated 9 January 2012.

³⁶ Table 3 of CEMEX’s response to the CC’s putback on product market (cement) under the Anglo/Lafarge investigation, dated 9 January 2012.

Product market - bulk and bagged cement

- 3.34 Regardless of whether or not bulk and bagged cement are found to comprise separate markets, given that these products are produced in the same production facilities using the same techniques, there is a significant degree of supply-side substitution between them. They consequently constrain each other in a similar way to the constraints that exist between the production of CEM I, II and III. Any producer of bagged cement could switch to producing bulk cement simply by altering its production specification and not bagging the cement. Conversely, the addition of relatively inexpensive packing machinery provides the necessary functionality to switch from supplying bulk to bagged cement. Practically all cement producers (this can also include importers, such as 37) have the capacity to sell cement in both bulk and bagged format in any event.
- 3.35 As regards demand-side substitution, customers tend to be quite separate. For bagged cement these tend to be builders merchants and DIY outlets that sell the product to small and medium-sized building contractors as well as end consumers. Bulk cement tends to be used more by RMX and concrete product manufacturers. Merchants can purchase bulk cement, bag it themselves and then sell this as an “own brand” bagged cement.³⁷

Product market - imported and domestically-produced cement

- 3.36 CEMEX considers that it would be misconceived to exclude imports of cement from the market for the supply of cement, and notes that previous case-law³⁸ has consistently found there to be no product market distinction between imported and domestically-produced cement. Despite pre-conceptions by certain customers, there are no material differences in the quality of imported cement. As the majority of imported cement is produced in the EU, the cement must meet equivalent UK production standards. Security of supply of cement should not be of concern. Contractually, given the long-term deep economic problems in countries which have experienced building booms and busts (in particular Spain and Ireland), there is a steady source of supply available from these markets. CEMEX considers that producers would be perfectly prepared to enter into long-term supply contracts with UK customers, and further detail is provided at paragraph 4.37 below. On the ground, because of the rapid expansion of import terminal and storage facilities construction undertaken by cement importers across Britain in recent years, there is an excellent range of options to store imported cement and allow importers to offer a steady stream of supply, including:
- (a) Converted grain silos: Virtually any type of dry bulk powder silo can be used to store cement. 37
 - (b) Off the shelf and second hand silos: 50-500 tonne cement silos can be bought ‘off the shelf’ and typically have a life span of around 30 years. There is also a very active second hand market. For example an 80 tonne silo would cost only around £10-15,000. The rental of 30 tonne silos from manufacturers or logistics companies is common.
 - (c) Flat stores: Cement can also be stored in standard industrial sheds which have been converted for a one-off cost of around £100,000. Many cement flat stores are currently in operation in the UK, operated for example by Dudman (Liverpool); Titan (Hull); Sherburn Stone (Blyth); and Holcim (Plymouth and London). Their number continues to expand.
 - (d) Mother ships: These are vessels sized between 20 kilo tonnes to 50 kilo tonnes designed to store bulk powders, and for example are operated by Southern Cement. Mother ships

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For example, OFT, “Anticipated acquisition by Lafarge Cement UK of Portland Cement Company Limited”, October 2005, p.2, and OFT, “Anticipated acquisition by Lafarge Cement UK of the West Thurrock Cement Terminal from Castle Cement”, June 2005, p.2.

are typically semi-permanently moored at ports. They can be easily rented from shipping companies.

- 3.37 In addition, certain exporters, particularly from Ireland, are often able to ship cement direct to British customers. ✕
- 3.38 More generally, cement is also transported from Ireland both in bulk shipped loads and in bagged format on trucks via vehicle ferry, to be subsequently distributed by third parties.
- 3.39 The market share held by importers of cement continues to grow in Great Britain. Prices charged by importers are competitive with those charged by domestic producers and it is CEMEX's experience that customers frequently ask CEMEX to bid against quotes from importers. Even where customers threaten but ultimately decide not to purchase cement from importers, the fact that they can credibly switch exerts significant and sustained price competition on incumbent cement producers. CEMEX discusses the impact of importers on the market further in relation to conditions of competition, below.

Geographic market

- 3.40 CEMEX submits that the relevant geographic market for the supply of cement comprises at least Great Britain. CEMEX and its competitors are able to serve customers across this territory from only a few plants, from which cement is transported to wherever it is required. By way of example, CEMEX has only two full cement production facilities in the whole of Great Britain at Rugby (the Midlands); and Ferriby (in the North). It has a standalone clinker grinder at Tilbury (in the South East). Cement can be transported from these plants to customers anywhere in Britain by road. CEMEX also uses sea terminals to improve its offering to customers in more remote parts of Britain. ✕. Most British customers are within reach of at least one import terminal as no part of Great Britain is more than around 80 miles from the sea – there are no specific geographic markets defined by these terminals.

RMX

Product market

- 3.41 There is a single product market for the supply of RMX and any RMX production facility is able to produce virtually any required RMX specification. There are thousands of possible permutations of RMX which customers can purchase. Ultimately, however, these are produced from varying proportions of the same core ingredients of cement, water and aggregates, meaning that there is almost universal supply-side substitution between them. The actual specifications/grades of RMX produced at any plant will be driven by customer requirements at any given time and will vary from plant to plant depending on the nature of client requests. There are no significant additional costs involved in a plant producing a different specification or grade of RMX, aside from the potential effect on variable cost of altering the raw material inputs. In addition, certain additives, which are freely available from a range of third parties as well as concrete producers, can also be used in varying quantities to attain certain additional performance characteristics. ✕
- 3.42 In accordance with paragraph 3.31 above, no product market distinction should be drawn between CEM I, II and III. ✕. Beyond the cement market, as noted in 3.31 above, there is also considerable scope for RMX operators to switch to purchasing either PFA or GGBS to self-blend CEM II and/or CEM III. The British Standard for Concrete, BS 8500, recognises that factory made cements (CEM II and CEM III for example) and cementitious blends manufactured at a ready-mix plant using PFA and GGBS have equivalent performance. This means that PFA and GGBS pose a real competitive constraint on cement.
- 3.43 CEMEX submits that the market for RMX should not be further segmented by the mode of delivery of RMX. Firstly, there is no distinction between concrete from fixed plants (where an operator such

as CEMEX owns a plant from which it serves a number of customers) and site plants (where a plant is established specially for one large job). Even for large jobs, sufficient capacity exists in fixed plants to serve a single construction site, meaning that there is full demand-side substitution between fixed and site plants. Customers simply specify the volume of concrete, design or performance criteria that they will need. The RMX producer will offer the most cost-effective solution for this, based around the economics of the particular job in question.

- 3.44 Furthermore, RMX concrete supplied by volumetric trucks comprises an integral and ever expanding part of the market. Approximately 200 volumetric operators presently operating in Britain have claimed an estimated share of up to 10% of the British RMX market. CEMEX further notes that the survey commissioned by the CC from GfK in the context of the Anglo/Lafarge merger found that 55% of customers surveyed had purchased RMX from volumetric trucks in the past year.³⁹ This significant source of supply continues to grow because barriers to entry are very low. Volumetric operators provide good quality concrete and service and \propto .
- 3.45 Volumetric operators can produce a full range of RMX products, including for example mortar and screed, and can switch between grades. Whilst they do not tend to be used as often for work where QSRMC or BSI accreditation is required, all volumetric operators are eligible for this accreditation and CEMEX is aware of a number of volumetric suppliers who have become accredited, such as EasyMix of Cheltenham and DK Concrete in Northamptonshire. In addition, volumetric operators are also able to serve larger jobs if required. For example, on its website⁴⁰ DK Concrete lists large pours that it has undertaken such as 300m³ for the construction of a supermarket in Corby.

Geographic market

- 3.46 Due to the nature of RMX, which sets very quickly after production, the distance over which it can be transported is limited, and usually comprises around a one hour travel time from the place of production. Demand for RMX is more concentrated in urban markets, and as a result, these tend to be often objectively smaller than markets in more rural locations. Topographic features such as fast roads, or rivers, as well as features such as traffic congestion, also play their role in defining relevant markets. The result is that each market must be defined on its own terms. The picture is complicated further by the fact that plants will often serve more than one market. In particular, volumetric operations are able to serve larger distances, given that they do not start to mix the RMX until arrival on-site. This is leading to an expansion of geographic markets.

³⁹ GfK NOP customer research report: *Competition Commission: Anglo American/Lafarge Merger Inquiry*, December 2011, page 28.

⁴⁰ www.dkconcrete.co.uk.

4 ANALYSIS OF COMPETITION IN THE RELEVANT MARKETS

GENERAL COMMENTS

4.1 CEMEX notes that the CC will aim to understand the nature and extent of competition in the relevant markets, by observing behaviour in the market from both a supply and demand perspective, the factors influencing that behaviour and by analysing the structure of the relevant markets. It will seek to assess the extent of competition by reference to *inter alia* pricing and profitability.⁴¹ The CC will conduct its own analysis but CEMEX expects this assessment will conclude that the markets for the supply of aggregates, cement and RMX in Great Britain are not markets in which CEMEX and its competitors enjoy unilateral or collective market power, and that the conduct of operators can be explained through a better understanding of the ordinary competitive process prevailing in those markets, taking into account the nature of the respective products being supplied, rather than as a consequence of any features which prevent, restrict or distort competition. In order to assist the CC to reach a better understanding of the nature and extent of these markets, CEMEX sets out in this section its observations by reference to each market but would first note that the CC will observe the following common themes:

- (a) Despite there being a relatively concentrated competitor base at the national level this is not the case in many of the relevant local markets. In all markets new entry and expansion play a significant role in driving competitive conditions. CEMEX and its larger competitors must respond to smaller competitors' initiatives (and vice versa).
- (b) Customers have significant buyer power. They can switch suppliers easily and without penalty and this is a constant threat which keeps suppliers on their toes. Frequent shopping around is their simple *modus operandi*. Dual supply is also common and in particular with regard to cement some RMX customers use two sources of supply at the same time to leverage further competitive tension between their suppliers.
- (c) There is no co-ordination or leveraging of 'market power' on any market by suppliers. CEMEX in particular is not unfairly advantaged over smaller competitors due to its size or geographic spread; it is necessary to compete for every potential order and it has to work equally hard to retain customers threatening to switch.
- (d) The net result for suppliers is competitive pricing, \bowtie .

4.2 CEMEX welcomes the fact that the CC intends to consider the extent to which any aspects of the behaviour of customers and consumers in the relevant markets contributes to a possible reduction in competition.⁴² The construction industry has its own established practices, which influence purchasing decisions and the CC is urged to take these into account rather than focusing exclusively or disproportionately on supplier behaviour. Customers will not market test every supply decision and will not switch as often as they threaten. This may well be due to inertia or realistically because they are happy with the deal they have already and therefore perceive value in their known supplier. CEMEX would therefore urge the CC to hold customers to a high standard of proof in assessing any submission made or survey responses submitted. CEMEX notes, by way of one example, that there have been strides in technical specifications and quality protocols in the performance of secondary and recycled aggregates, making them even closer substitutes for primary aggregates than they may have been years ago. The CC should therefore in this instance carefully probe any on-going reluctance to switching from a customer perspective.

⁴¹ SI, ¶19 to 22.
⁴² SI, ¶19.

COMPETITION IN THE SUPPLY OF AGGREGATES

A range of competitors are active on the market

- 4.3 In considering the conditions of competition in the supply of aggregates and subsequently in its Decision to make a reference to the CC for a MI, the OFT gave prominence to the ‘top 10 primary aggregates firms in GB’, as set out in Table 1 below. As a consequence CEMEX considers that the OFT attached undue weight to the national market shares of supply of the majors. Furthermore, CEMEX would remind the CC that even on this method of assessment, its 2009 share of only 3% of British primary aggregates production is not significant and is materially lower than Aggregates Industries and Tarmac which held shares 3% in that year. When taken in the round it will be clear that aggregates markets in Great Britain are characterised by a high degree of fragmentation with important regional players and supply side inter-mediators whose presence is overlooked on a narrow focus of national shares of supply.

Table 1

Share of Supply of British Primary Aggregates Production in 2009

Company	Share of primary production (%) 2009
Tarmac	3
Aggregate Industries	3
Hanson	3
CEMEX	3
Lafarge	3
Breedon	3
Brett	3
Marshalls	3
Others	3

Source: BDS Marketing Research, ‘Estimated market shares of pits, quarries and marine wharves in Great Britain’ (2009) as referred to in ‘Aggregates, The OFT’s reason for making a market investigation reference to the Competition Commission’, January 2012 (OFT 1358)

- 4.4 Whilst national shares of supply are helpful to understand which operators are the largest aggregates suppliers in Great Britain, these shares do not convey the fact that competition between aggregates producers takes place at a local level (see paragraphs 3.21 – 3.22 above on geographic market definition). For example, those producers listed under ‘others’ often have a considerable share of the local markets in which they operate, which in many instances exceed the national shares of supply of the largest producers. 3
- 4.5 Second, a focus only on national share of supply for primary aggregates will ignore the significant competitive constraint on primary aggregates producers posed by secondary and recycled aggregates. There has been significant switching from primary to secondary and recycled aggregates, as evidenced by the decline in market share of primary relative to secondary/recycled aggregates. Measured by volume, the national share of supply accounted for by

secondary/recycled aggregates grew from 3% in 2000 to 3% in 2009, and this share has been maintained since then.⁴³

- 4.6 Third, merchant hauliers, who are also not represented in national data, represent a growing and important additional tier of competition. These operators purchase large volumes of aggregates from producers at low prices. They collect the product themselves from quarries, and use their specialist distribution networks to supply builders or end consumers at extremely competitive prices.
- 4.7 Merchant hauliers seek out the best prices from a range of producers over a given area and are therefore also able to arbitrage prices between different products and grades, as well as between different producers. Their key advantage is that they are able to keep transport costs low by utilising 'return loads' (i.e. their truck is often used in both directions on a journey to combine the delivery of aggregates with the removal of waste from the customer's site). These factors ensure they are well placed to compete with and undercut the prices offered by aggregates producers.
- 4.8 Finally, the data set out in Table 1 cannot properly reflect the impact of builders' merchants on competition. Producers sell aggregates both to small independent builders' merchants as well as national chains such as 3. Builders' merchants purchase large volumes at low cost and offer end consumers convenience and competitive pricing. They are often more accessible to smaller customers than quarries or wharves, because they are situated in convenient locations in urban areas.
- 4.9 In summary, even the smallest customer has a wide range of sellers of aggregates from which to choose, comprising direct sales from varying sizes of quarry operator, plus merchant hauliers and builders' merchants.

Key factors in competition to supply aggregates

- 4.10 The CC will consider the extent to which producers offer competing products in the same markets.⁴⁴ Any assessment of the conditions of competition in the supply of aggregates must accept that even though capable of being grouped according to various categories, aggregates are not differentiated products. They are relatively homogeneous, with commodity-like properties. Moreover, there is no discernible difference in quality between producers, and buyers consequently have no special preferences. This is especially the case in many markets where competitors work different parts of the same natural rock deposit on adjoining sites. The result is that the product they produce will be effectively ubiquitous in their local market.
- 4.11 For most purposes different categories of aggregates are substitutable and aggregates purchasers are generally able to switch very easily. Consequently, range is generally of limited importance to most customers. The only exception is a small minority of purchasers who require aggregates with particular specifications, including rail ballast, HPL for FGD and High PSV, as set out in sections 3.23 to 3.29 above on market definition.
- 4.12 The CC will consider prices, together with aspects of innovation and service.⁴⁵ In CEMEX's view, competition in aggregates operates primarily on price. Service is a secondary, but not unimportant, consideration for most customers, in particular those with very specific requirements in terms of security of supply, quantity, delivery arrangements or time frame.
- 4.13 3

⁴³ See ¶3.11 above.

⁴⁴ SI, ¶21, bullet 4.

⁴⁵ SI, ¶21, bullet 1.

Willingness to supply

- 4.14 References in the past have been made to complaints of refusals to supply. For its part, CEMEX is willing to supply to any purchaser where it can make a profit. Should CEMEX refuse to supply to a particular customer it would do so only for objectively justifiable reasons such as creditworthiness, or a production shortage of a product. CEMEX is not aware of any allegations of unjustifiable refusal to supply aggregates where it had the inventory or the production capacity to meet customer needs

Customer attitudes to comparing suppliers and switching: new customers

- 4.15 ✂
- 4.16 Customers are often large, with experienced and sophisticated procurement teams. They multi-source and usually have good knowledge of prices across the country or region which they use to negotiate hard for the best prices. Each price is determined based on knowledge of market conditions in the relevant markets. Customers will often share details of prices that competitors have allegedly quoted, as part of negotiations to drive down a quote. ✂
- 4.17 ✂
- 4.18 ✂
- 4.19 ✂. The process of negotiating price reviews will generally be commenced by the issue of a price increase letter to each of its on-going customers. The process is very similar to that set out under paragraphs 4.42 to 4.46 below in relation to cement and therefore CEMEX does not set out full details here.

Willingness to switch to different products or sources of supply (such as imports)

- 4.20 The CC notes that it will consider the extent to which customers are willing to switch to new sources of supply of aggregates.⁴⁶ Due to the low relative value of aggregates to transport costs, only certain higher-value aggregates such as High PSV are imported. Please see paragraphs 3.29 above in relation to market definition for further comment on this. See also CEMEX's comments above at paragraphs 3.11 and 4.5 for its views on customer willingness to switch to secondary and recycled aggregates.

Information asymmetries

- 4.21 CEMEX does not consider that the aggregates market supports information asymmetries⁴⁷ between suppliers and customers such as to distort competition. Mineral resource planning and reserve information is publicly available to both competitors and customers alike.⁴⁸ Customers are able to secure quotations from a range of operators. Further, as noted at paragraphs 4.43 to 4.46 price change letters cannot be used as any form of 'signal' of pricing strategy between producers, especially when, in relation to aggregates, ∞.

Whether market shares and customers served change over time

- 4.22 The CC notes that it will consider the extent to which market shares and customers served change over time.⁴⁹ As set out in paragraphs 4.3 and 4.4 above, national shares of supply are not indicative of competition in local markets. The CC will need to assess this question on individual local markets. In any event, CEMEX considers that dynamic competition in local aggregates markets means the customers served by each aggregates producer will be seen to change over time.

Profitability in the supply of aggregates

- 4.23 CEMEX welcomes the fact that the CC will consider whether there is evidence of 'persistent high profits' in relation to aggregates production.⁵⁰ CEMEX considers that the CC's investigation will show that this is not a market in which operators make high profits and the information provided will confirm that returns have fallen during the period under review. This is largely because of the wide availability of competing products which holds down prices. The divergence of aggregates prices compared to the Retail Prices Index for the period June 1990 to August 2010 is shown at Figure 1 below. The top blue line represents the steady growth of RPI and the bottom green line shows the changes in average aggregate prices (excluding the Aggregates Levy, which was introduced part-way through the period covered by this data).

Figure 1

⁴⁶ SI, ¶20, bullet 3.

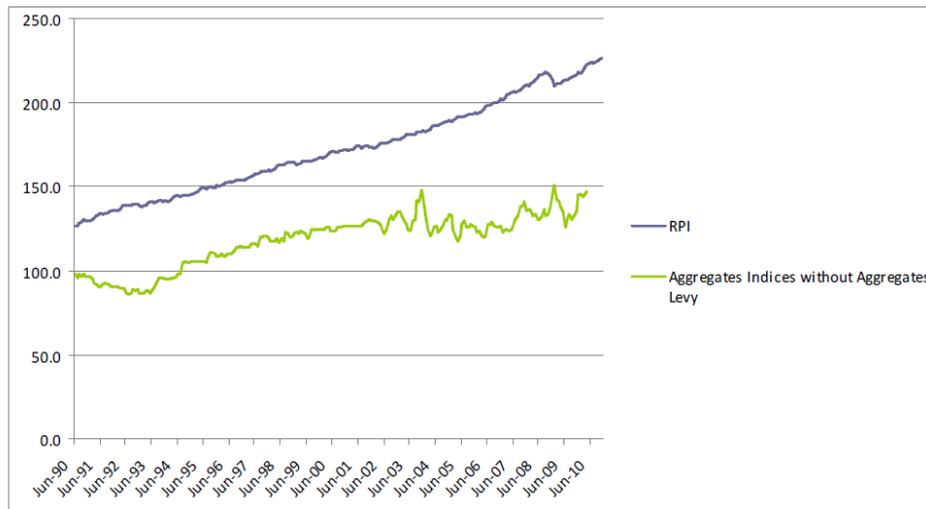
⁴⁷ SI, ¶20, bullet 4.

⁴⁸ See Section 8 where CEMEX sets out its comments on the importance and level of information published under the current system.

⁴⁹ SI, ¶21, bullet 5.

⁵⁰ SI, ¶22.

Comparison of rising aggregate prices against RPI



4.24 As will be seen from Figure 1, aggregates prices generally increased in line with the retail price index (“RPI”) but over the last 10 years or so they have not kept up with RPI. The slow growth (if any) and relative volatility in aggregate prices since that time has been supplemented with a recent requirement to cut capacity (incurring redundancy and closure costs) and to incur the costs of on-going spare capacity in quarries. This combination of factors means that returns on capital in the production of aggregates in Great Britain are low.

COMPETITION IN THE SUPPLY OF CEMENT

A range of competitors are active on the market

- 4.25 The CC will be aware that there are presently four operators which manufacture cement in Britain, namely CEMEX, Hanson, Lafarge and Tarmac. In addition, Aggregate Industries, which is owned by Holcim, imports significant quantities of cement from Holcim’s other European operations.
- 4.26 A significant number of operators also sell cement in Britain which has been manufactured elsewhere. Several of these importers sell their own cement which they have manufactured abroad, such as \times which means that they have flexibility to discount to marginal cost plus transportation in order to compete with British producers on price. \times . In addition, nimble importers based in Britain trade in cement by purchasing cement and cementitious products from a range of producers outside Britain then selling this cement on to British customers. \times
- 4.27 Finally, CEMEX also regards producers of GGBS or producers of PFA \times at Cottam (i.e. coal power plant operators) as capable of exercising a competitive constraint. This is because these operators are able to make direct supplies to the concrete product producers and RMX producers who self-blend CEM II and CEM III.
- 4.28 CEMEX sets out estimated market shares for the supply of cement in Great Britain at Table 2 below.

Table 2

Estimated Market Shares for Grey Cement in Great Britain in 2011

Supplier	Great Britain Market Share (%)
CEMEX	✂
Hanson	✂
Lafarge	✂
Tarmac	✂
Importers (including Holcim)	✂

Source: CEMEX internal estimates

- 4.29 CEMEX refers the CC to its comments set out at paragraphs 5.28 to 5.32 below in relation to Theory of harm 1 on potential entrants to the market, where it may be seen that imports (both those based in Great Britain and those importing into the UK) and the threat of imports, exercise significant and growing price constraints. This has a proportionally greater impact on prices than the shares of importers might suggest. This is because of the significant constraining effect of threats by customers to switch supplier.⁵¹

Key factors in competition for cement

- 4.30 The CC notes in its SI that it will be seeking to assess customers' willingness to compare cement suppliers and attitudes to switching, and further the extent to which customer demand is responsive to prices.⁵² Overall cement producers can differentiate their product on the basis of price, their relationship with the customer and service. However, as cement is a relatively homogeneous product, manufactured to industry-wide specification, quality levels are not a key point of differentiation. So long as a customer trusts the source of the relevant cement (which is nearly always the case for any EU-produced cement) any supply source will be considered. The following factors will however be taken into account:

- (a) Price: who will be able to provide the cement the customer needs at the most competitive price?
- (b) Service: who will be able to provide cement in the right quantities, to the right location and at the right time?
- (c) Relationship: is the supplier user-friendly and does the customer feel its business is important to the supplier?

- 4.31 Price is the customer's most important concern, by some margin, as this is proportionately the largest input cost for ready-mix and concrete products. Customers are extremely price-sensitive and will switch, or threaten to switch, frequently as a result. All customers have the opportunity to negotiate with CEMEX to secure its best prices. ✂

⁵¹ CEMEX notes that if the category of bulk external sales to non-major operators (i.e. operators other than the four British producers and Holcim) the share of importers is estimated to be over 18% (Source: Joint Anglo/Lafarge response to Provisional Findings, page 12).

⁵² SI, ¶120.

Customer attitudes to comparing suppliers and switching

- 4.32 CEMEX's experiences of customers' comparison of suppliers can be considered in relation to (i) when a customer approaches it for the first time; and (ii) when a customer considers switching their volumes away.
- 4.33 Due to customers' sensitivity to price, cement producers approach customers seeking to win new custom by offering to undercut their current supplier. ✕. Customers approach producers to seek the lowest price via one of the following routes:
- (a) Informal tenders: ✕
 - (b) Formal tenders: ✕
 - (c) Bilateral negotiation (no tender): ✕
- 4.34 As the *modus operandi* of customers is to compare suppliers and to threaten to switch or switch based on price, ✕.
- 4.35 ✕
- 4.36 In terms of aspects of innovation and service,⁵³ in order to maintain their custom, customers expect cement producers to make regular visits to discuss service and quality; to advise on adding value to products such as using different admixtures, cement types, aggregate types; to advise on achieving different end-use properties; and/or to advise on sustainability issues. CEMEX has been obliged to establish a formal customer relationship management scheme in order to continue to improve on this aspect of its service.
- 4.37 Similarly, customer expectations and their preferred *modus operandi* for purchasing (see paragraph 4.33 above) ✕.
- 4.38 Competition between British cement producers is strong. CEMEX has already provided the CC with win/loss data and additional information on customer threats to switch, in the context of the CC's Anglo/Lafarge investigation.⁵⁴ CEMEX will update this information in due course in response to the CC's current Market Questionnaire. ✕
- 4.39 To the extent a customer does not wish to purchase cement from an incumbent British producer, they can and do chose to purchase from importers, who approach CEMEX's customers constantly.⁵⁵ ✕. CEMEX has already provided win/loss and threat to switch data to the CC which shows the important role of imports,⁵⁶ and the CC will shortly have the opportunity to review an updated dataset. ✕

⁵³ SI ¶21, bullet 1.

⁵⁴ CEMEX response to the CC's Market Questionnaire under the Anglo/Lafarge investigation, submitted on 7 November 2011, as supplemented by CEMEX's response to the CC's putback on Cement Switching of 11 January 2011.

⁵⁵ See further ¶8.11 and 8.12 on producers based elsewhere in the EU who need to sell in Britain as a result of the EU Emissions Trading System and, in particular, the collapse of the building market in countries such as Spain, Portugal and Ireland.

⁵⁶ See footnote 55.

Table 3

✂

✂

4.40 Even in the heart of the country, however, importers exercise strong competitive pressure and CEMEX refers the CC to its comments on the impact of importers at paragraphs 3.37 to 3.39 above. ✂. CEMEX suggests that in particular the CC carries out further analysis of the potential sources and volumes of cement imported into the UK and the potential impact on the British market.

Customer attitudes to suppliers and switching: existing customers

4.41 The extent to which customers compare suppliers and are prepared to switch is again demonstrated when it is necessary for CEMEX to seek to renegotiate a price change due to changes in its costs.

4.42 Customers demand price foreseeability and price change letters are therefore generally sent to all customers in October, to take effect on 1 January of the next year. This process is intended to give customers sufficient notice of intended price changes to make consequential changes to their own conditions of supply and also significant time to shop around for alternative suppliers.⁵⁷ Changes to prices for all buildings materials tend to follow a similar timetable. Customers are therefore able to negotiate the prices of all of their input costs at the same time; this facilitates a degree of price arbitrage across all of their inputs. This also allows customers to give their own customers better foreseeability in turn. CEMEX believes that for these reasons customers are generally supportive of this price review mechanism.

4.43 ✂. The period from October to January is marked by negotiations between CEMEX and its customers. They may switch to a new supplier if agreement on price cannot be achieved. ✂

4.44 ✂

4.45 In summary, CEMEX does not consider that the issuance of price increase letters could under any circumstance be considered to be a 'signal' in a coordinated market, and refers the CC to its further comments on this at paragraph 6.18 in relation to Theory of harm 2 below.

4.46 ✂. Customers will also immediately start to negotiate to reduce prices back. ✂, customers will often initiate a renegotiation process part-way through a year (having purchased only a proportion of the volumes they had previously indicated that they would purchase) to secure a better price, under threat of a switch. ✂⁵⁸.

⁵⁷ The letters set out a proposed uniform price increase, expressed either as a cash or percentage increase and does not detail either current or future prices to customers. In light of the large number of customers, it would be highly inefficient and costly for CEMEX to send individualised price letters to each customer, particularly when the letter will be only the starting point for a set of individual bilateral price negotiations where the actual prices agreed will be nowhere near the initial announced or aspirational price increase proposed by CEMEX in its letters.

⁵⁸ See CEMEX's response dated 11 January 2011 to the CC's putback on Cement Switching under the Anglo/Lafarge investigation.

Willingness to supply

- 4.47 As set out above, CEMEX considers that the cement market is characterised by a strong competition both between incumbent cement producers and importers. However, CEMEX notes that one way in which the CC intends to measure this is by assessing cement producers' willingness to supply.⁵⁹ CEMEX's policy is that it will not refuse to quote or supply cement wherever profitable, without a valid objective justification such as creditworthiness. CEMEX may not always, however, be able to provide customers with a quotation in the range that they seek, dependent on its costs.

Margins and capacity utilisation

- 4.48 The CC notes in its SI that it will be assessing the margins and capacity utilisation of cement producers as part of its assessment.⁶⁰ CEMEX notes that in similar assessments undertaken in the context of the Anglo/Lafarge investigation, the CC made what CEMEX considers to be an incorrect assumption, that a competitive cement producer will always prioritise volume⁶¹ over price. CEMEX considers it very important to identify the reasons why margin and capacity utilisation can never have a straight line relationship in relation to cement.
- 4.49 Cement kilns need to be either operated at (or near) full capacity, or closed. Once operational, they must run continuously at a temperature of 1450 degrees celsius. As the CC will appreciate cement production costs are very high and the only cost-effective use of the asset, once operational, is to produce cement at as near-full capacity as possible. The costs of stopping and re-starting production⁶² assets are prohibitive. Where demand does not support this, running at full capacity is no more an option than operating a kiln at half capacity. This is because excess cement cannot be stored for more than 61 days under current regulations.
- 4.50 When existing production reaches capacity, a producer needs to judge whether there is sufficient untapped demand in the market to support the release of an additional stepped tranche of capacity. This would be by operating an additional kiln, or constructing a new plant to be operated at full capacity. At present, CEMEX considers there to be insufficient demand in the market to justify either approach.

Profitability in cement manufacture

- 4.51 High fixed costs, and high capital investment required to operate cement plants, combined with depressed demand and low on-going prices, \times . The CC will observe this for itself from the data CEMEX will submit in response to the CC's Financial Questionnaire.
- 4.52 \times .⁶³ This point is reinforced when it is recalled that under the EU Emissions Trading Scheme ("EU ETS") the cement industry is recognised to be at risk of "carbon leakage" because there is a risk that this industry could move production outside the EU.
- 4.53 Against this backdrop of the functioning of the industry, CEMEX comments on specific conditions in the market further below in order to entirely refute the CC's Theory of harm 2 on co-ordinated effects at Section 6, and Theory of harm 3 on margin squeeze at Section 7.

COMPETITION IN THE SUPPLY OF RMX

A range of competitors are active on the market

- 4.54 The CC will be aware that the suppliers of RMX operating in the largest number of markets in Great Britain include Aggregate Industries, CEMEX, Lafarge, Hanson and Tarmac. In addition, a

⁵⁹ SI ¶21, bullet 3.
⁶⁰ SI ¶21, bullet 2.
⁶¹ Provisional Findings, ¶6.109.
⁶² \times
⁶³ \times

number of volumetric and mixer-truck based competitors such as 3 compete strongly in selected local markets. There are also a large number of smaller local suppliers in this highly competitive market.

- 4.55 CEMEX sets out at Table 4 below the OFT's estimated national shares of supply for RMX as produced in the context of its Market Study. CEMEX would expect the share of the 'others' category below to have grown further since 2009.

Table 4
Shares of Supply of British RMX Production in 2009

Supplier	Great Britain share of supply (%)
CEMEX	3
Tarmac	3
Hanson	3
Aggregate Industries	3
Lafarge	3
Others	3

Source: BDS Marketing Research. 'Estimated market shares of ready mixed concrete companies in Great Britain' (2009)

- 4.56 However, as is the case in relation to aggregates, while national data is helpful to understand which are the largest players in the industry, these shares of supply are no proxy for market power and do not assist in understanding competition in local RMX markets. In a significant number of cases, producers listed under the 'others' category will have very strong, if not leading, positions with a share estimated at over 30% in their own localities. Examples in a range of locations across Britain include: 3.

- 4.57 Furthermore, national share of supply estimates also only account for the supply of RMX from mixer trucks. As set out above in Section 3 above, CEMEX considers there to be a wider market for RMX which also includes significant competition from over 200 volumetric producers. It notes that if volumetrics are rightly included in the product market definition, the proportion of sales made nationally by non-major producers is even higher, at around 34%.⁶⁴ Further, 55% of RMX customers in total are estimated to have purchased from volumetric operators in the last year.⁶⁵ Customers clearly can and do frequently switch to these competitors.

Willingness to switch to different products or sources of supply

- 4.58 In terms of potential entrants to this market, CEMEX refers the CC to its comments set out at paragraphs 5.40 to 5.43 below in relation to Theory of harm 1 on the low barriers to entry for the production of RMX. New entry is frequent. Recent examples of new mixer truck entrants include 3. In addition, 3, are just a few examples of new and expanding operators of volumetric trucks.

Key factors in competition to supply RMX

- 4.59 As with aggregates and cement, RMX producers aim to differentiate their products on the basis of factors such as quality, their relationship with the customer, price and service. 3. The capital

⁶⁴ Source: Anglo/Lafarge joint response to CC Provisional Findings.

⁶⁵ Source: GfK NOP customer research report: *Competition Commission: Anglo American/Lafarge Merger Inquiry*, December 2011, page 28.

investment required in order for small, nimble competitors to operate in this market is low. As a result there are a number of varied competitors in most local markets, who drive RMX prices to very low levels. ✂

Customer attitudes to comparing suppliers and switching: new customers

- 4.60 Competition to win customer orders is strong. CEMEX is obliged to compete hard to win every order and employs a range of marketing techniques including customer visits and calls by sales representatives, CEMEX websites and third party channels such as yellow pages, advertising and mail shots, to target new customers.
- 4.61 Generally customers will obtain quotations from a number of RMX suppliers before placing an order. Many customers operate sophisticated procurement teams to assist with this. CEMEX receives a large number of straightforward verbal or written enquiries, through to requests to complete short tender sheets or a full formal tender process. In order to facilitate seeking the best possible price, the process for the setting of prices and supply of RMX is a two stage process. This reflects the downstream tender process for construction projects. The 'tender' stage is where a number of building/construction contractors tender for a particular job with an end client. Indicative RMX quotations are sought from RMX suppliers at this stage to help the contractor to provide a quotation to the end client. In principle, CEMEX would provide a quote to any of the tendering contractors that request one. In the second 'firm' stage, the end client would have determined a smaller number of building/construction contractors to continue to tender based on their own selection criteria. If a contractor to whom CEMEX has provided a quotation at tender stage remains in the process, CEMEX (alongside other RMX producers) is asked to re-submit a quotation.
- 4.62 If the contractor is successful and secures the job normally this would imply a confirmed order for the supplier of RMX which is deemed by the contractor to be the most competitive for the job requirements. If the contractor decides to subcontract some of the potential job, CEMEX would typically also provide a quotation to the subcontractor.

4.63 ✂

4.64 ✂

Customer attitudes to comparing suppliers and switching: existing customers

- 4.65 ✂ in relation to RMX, and certainly less so than in relation to cement and aggregates. This is because, as set out above, specific jobs tend to be of shorter duration. To the extent letters are sent, CEMEX would note that the same points set out above at paragraphs 4.42 to 4.46 in relation to cement are applicable. ✂.⁶⁶

Asymmetries of information

- 4.66 CEMEX does not consider there to be any material information asymmetries between suppliers and customers in relation to the supply of RMX.⁶⁷ Customers are well aware of the competitive options open to them and are easily able to secure quotations from a range of producers. Further, there is little transparency between competitors. As noted at paragraphs 4.42 to 4.46 price change letters cannot be used as any form of 'signal' of pricing strategy between producers, especially given that, in relation to RMX, letters are issued on a national basis but prices are determined wholly locally.

⁶⁶

✂

⁶⁷

SI, ¶120, bullet 4.

Willingness to supply

- 4.67 The CC notes that it will consider the extent to which RMX manufacturers are willing to supply customers.⁶⁸ It is CEMEX's policy to never refuse to bid/quote (although it may not always be able to profitably quote a price satisfactory to the customer) save for rare occasions where it has an objectively justifiable reason such as the fact that it considers a customer to be a credit risk. In any event, the customer would be informed of this. CEMEX believes that most, if not all, market participants will make every sale that they can in order to keep asset utilisation as high as possible. In fact, in the current low-growth environment set against a backdrop of an increasing number of competitors, this has led to a degree of 'panic' bidding to maintain volumes, from certain operators.

Margins and capacity utilisation

- 4.68 The CC notes that it will consider margins and capacity utilisation.⁶⁹ Much work will no doubt be undertaken by the CC in this context but suffice to say the more RMX that can be supplied from the same production assets, the lower the proportion of fixed costs attributable to each tonne sold, and thus the higher the margin. There is every incentive to work assets as hard as possible to operate at or close to capacity. As few markets presently allow RMX operators to do so, particularly in the current economic climate with low demand, competitors have strong incentives to lower prices in order to increase utilisation.

Whether market shares and customers served change over time

- 4.69 In paragraph 21 of the SI the CC indicates that it will consider the extent to which market shares and customers served change over time.⁷⁰ As set out in paragraphs 4.3 to 4.4 above, national shares of supply are not indicative of competition in local markets. The CC will need to assess this question on individual local markets. In any event, CEMEX considers that dynamic competition in local RMX markets and strong competition from neighbouring and overlapping markets mean local market shares can change considerably over time, especially given that a limited number of contracts in a small area can make shares naturally more volatile.

Profitability in the supply of RMX

- 4.70 In summary, there are a significant number of low cost operators contesting RMX volumes on all local markets. Often these suppliers face sophisticated procurement teams who negotiate very hard on price for jobs of any scale. Customers therefore have significant buyer power and given the significant spare capacity across the industry, prices have been driven down \times . More established competitors with more expensive asset bases, \times , are in particular likely to be obliged to neglect the capital investment necessary to maintain a long-term market presence, in order to compete with a growing number of competitors. \times

⁶⁸ SI, ¶21, bullet 3.

⁶⁹ SI, ¶21, bullet 2.

⁷⁰ SI, ¶21, bullet 5.

5 THEORY OF HARM 1: HIGH LEVELS OF CONCENTRATION AND BARRIERS TO ENTRY
MEAN THAT THE SUPPLIERS CAN EXERCISE UNILATERAL MARKET POWER

GENERAL COMMENTS

5.1 CEMEX refutes the CC's suggestion in its SI that "As a result of market concentration and barriers to entry, incumbent firms may have the ability to exercise market power for certain products and/or in certain geographic markets and the ability to set higher prices or reduce the quality of other aspects of their offer."⁷¹

5.2 It has been explained at paragraphs 4.3 to 4.4 above why relying on the national market shares of the majors is not an appropriate basis of assessment by itself, as it does not provide the full picture of how competition actually occurs on the markets concerned. In any event, measures of concentration and market definition are not ends in themselves, but rather a framework within which to analyse the effects of certain market features.⁷²

5.3 For its own part, CEMEX is firmly of the view that it lacks any unilateral market power on the reference markets.

AGGREGATES

5.4 The CC sets out in paras 30 and 31 of the SI its theory of harm in respect of aggregates. CEMEX comments on the CC's hypothesis below, addressing in turn: market concentration, barriers to entry and market power. In so doing, CEMEX demonstrates that the market conditions pertaining to aggregates are not conducive to an AEC finding.

Market concentration

5.5 As CEMEX has previously explained,⁷³ it disagrees with a number of the CC's Provisional Findings on market definition in the Anglo/Lafarge investigation.⁷⁴ CEMEX considers that there is a single relevant product market for aggregates used in construction applications regardless of whether they are primary, secondary or recycled.⁷⁵ The relevant geographic markets for aggregates are, in CEMEX's view, local due to the high cost of transporting aggregates.⁷⁶

5.6 CEMEX's national share of supply of aggregates of $\approx 1\%$ ⁷⁷ is below the level at which it might reasonably be suggested that it enjoys a degree of unilateral market power; it demonstrates that CEMEX is a significant operator nationally but no more than that. In many cases, producers listed under the 'others' category will have very strong positions in their own local markets.

Barriers to entry and expansion

5.7 The CC enumerates the possible barriers to entry for aggregates that it has identified at paragraph 31 of the SI.

5.8 Barriers to entry for a new quarry are not significantly higher than for any other resource-intensive industry. Public policy dictates that a number of other social and environmental interests are required to be weighed against customer demand for a new aggregates quarry, but rather than provide advantages to existing competitors such as CEMEX this can disadvantage them because a greater degree of environmental compliance will be expected from operators of larger sites such as CEMEX, (see paras 8.2 and 8.3 below).

⁷¹ SI, ¶27.

⁷² See ¶3.2 and 3.3 above.

⁷³ See ¶3.1 to 3.4 above.

⁷⁴ Provisional Findings, Section 5.

⁷⁵ See ¶3.5 to 3.20 above.

⁷⁶ See ¶3.21 and 3.22 above.

⁷⁷ In 2009, see Table 1 above.

- 5.9 Initial set-up costs for a new quarry on a greenfield site need not be high if a new site is developed where the necessary permissions have been secured by the landowner. Landowners with rock deposits will often be seeking to bring them to the market in partnership with another who can bring the expertise to develop and manage the quarry. This means the high cost of the land in which the relevant mineral deposits are found can be dealt with on a royalty basis thereby reducing the capital barrier to entry. On this basis, market entry could be achieved with an investment of as little as £1 million, which would enable the construction of a plant producing circa 250kt per year. Furthermore, it is open to a new entrant that does not have sufficient capital resources of its own to seek an investment partner. Purchase of an existing operational site, which already has the relevant extraction infrastructure installed, is a further option and can prove significantly less expensive.
- 5.10 The CC cites transport costs between suitable aggregates extraction sites and areas of demand as a putative barrier to entry. High transport costs are a result of the physical characteristics of aggregates; they are heavy and bulky. Accordingly, it is generally cheaper to purchase aggregates from a quarry (or wharf, in the case of marine aggregates) close to the point of use, hence a tendency for there to be local or regional markets. There are certain economies of scale which can be obtained from increasing production at individual quarries. However, almost uniquely, this local/regional nature of aggregates markets together with the very site-specific costs associated with operating a quarry mean that those with national operating footprints are not necessarily able to drive the cumulative economies of scale across their portfolio that are common for players with larger market shares, or bigger operating footprints, in other industries.
- 5.11 High transport costs also negate some of the expected benefits of vertical integration. Aggregates are often cheaper to transport from a nearby quarry operated by an aggregates competitor to the point of use by the customer, rather than to source intra-group, where the nearest group quarry may not be close enough to supply a requirement economically. This means that cross-supplies from one supplier of aggregates to another supplier's downstream operations are a common feature of the market. Furthermore, decisions by aggregates producers' downstream operations to purchase locally, provide many smaller local operators with a route to market for their product which they would be unlikely to enjoy otherwise, thereby facilitating new entry.
- 5.12 Turning to planning issues, ✂. This is because of the limitations on planning consents that a local authority will grant, or the size of sites which have been pre-allocated for quarrying in the local mineral plan. CEMEX comments on the costs of obtaining planning permission, control of mineral reserves, and the CC's concerns as to possible land banking in detail at paragraphs 8.14 to 8.28 below.
- 5.13 CEMEX does not consider that there are significant economies of scale in aggregates production which means that small-scale sites are unviable/disadvantaged in particular relative to the medium-sized sites operated by CEMEX. Production on a very large scale can sometimes offer cost advantages if the site in question targets a wider customer base over larger distances via, for example, the use of a rail terminal. However, even these advantages will rarely be consistently realised. For example, in an area where it is possible to develop a large site an equally efficient competitor will often be able to develop a site of a similar size nearby (and often on an adjacent plot) on the same mineral deposit and take advantage of the same reductions in marginal cost.
- 5.14 In any event, the continuing existence of a large number of smaller aggregates producers demonstrates that economies of scale relating to operating costs are a weak barrier, if a barrier at all, to entry, despite the excess capacity caused by the recent downturn in demand. A smaller, less complex quarry can often be operated for a number of years and offer strong competition in local markets with minimal on-going investment. ✂

- 5.15 CEMEX considers that new entry on the market for primary aggregates - by means of quarrying and/or marine dredging - is most likely to occur by way of the strategic acquisition of a portfolio of smaller operators and/or sites by an enterprise active on a related market, such as in the production of other building materials.
- 5.16 That said, new entry does not necessitate the actual extraction of aggregates by the new entrant itself. Merchant hauliers provide a very strong competitive constraint. They are able to enter the market with only a truck with which to collect and to transport aggregates from quarries and/or wharves to a customer's desired location. In addition, merchant hauliers are able to combine the delivery of aggregates with the removal of waste from a customer's site. As a result of their ability to spread transport costs over both outward and return trips, merchant hauliers enjoy a competitive advantage over operators that deliver a load but return empty.
- 5.17 Finally, and so far as primary aggregates are concerned, CEMEX considers that the significance of new entry should not be overstated particularly, in light of the ease with which existing operators are able to expand production.
- 5.18 On competitive local markets, given that there is significant spare capacity, an existing operator is able to increase its output relatively easily either by increasing operating hours or operating machinery at a faster rate. Fixed costs are unlikely to increase materially and may well remain the same. The cost of additional labour is not prohibitive and additional plant, where necessary, can be leased or purchased second-hand. Indeed, so-called "de-bottlenecking" of plants is normal if demand increases and is much more common than seeking to open a new quarry.
- 5.19 Barriers to new entry and expansion through the production of secondary and recycled aggregates are even lower than for primary aggregates. All that is necessary is a steady supply of industrial, slate or china clay quarrying by-products and/or demolition waste. Little significant up-front investment is required, as new or second-hand re-usable crushing, grading and sorting equipment can be bought or leased and can be brought onto the site and made operational very quickly, before it is moved to a new site.
- 5.20 Access to demolition waste is not difficult. For example, development on brownfield sites by its very nature necessitates demolition before new construction can begin. As the raw materials for recycled aggregates are found close to sources of demand this, taken together with the ease with which the necessary plant and equipment can be hired or leased on a short term basis, means that barriers to entry and expansion are especially low in this segment of the market for aggregates.⁷⁸

Market power

- 5.21 As set out in the preceding section, CEMEX considers that competition between aggregates producers occurs at a local level and that in the majority of cases such markets are simply 'not concentrated enough' to confer unilateral market power on any operator. Moreover, where a given market is more concentrated than is usually the case, barriers are as low as to make the threat of entry/expansion credible enough to constrain competitively a firm that, for the sake of argument might otherwise - based on its market share - be thought to enjoy a measure of market power.

CEMENT

- 5.22 The CC sets out in paras. 32 and 33 its theory of harm in respect of cement. CEMEX comments on the CC's hypothesis below, addressing in turn: market concentration, barriers to entry and market power. In so doing, CEMEX demonstrates that the market conditions pertaining to cement are not conducive to an AEC finding.

⁷⁸

See ¶3.5 to 3.20 above.

Market concentration

- 5.23 Regardless of whether bulk and bagged cement are found to comprise separate markets these products are produced in the same production facilities using the same techniques. Both bulk and bagged cement may be either imported or produced domestically.⁷⁹ CEMEX believes the relevant geographic market for cement to be at least Great Britain.
- 5.24 CEMEX's estimates that its share of the GB market for cement is around 3%,⁸⁰ far below the level at which it might reasonably be suggested that it enjoys a degree of unilateral market power. In any event, purchasers of cement enjoy countervailing buyer power. As a consequence, the market operates efficiently and operators must compete against each other for every sale.⁸¹

Barriers to entry and expansion

- 5.25 The CC identifies a number of possible barriers to entry for cement at paragraph 33 of its SI. CEMEX considers that there is a preponderance of evidence of new entry and expansion on the cement market. Further detail is provided in the following paragraphs.
- 5.26 CEMEX is not able to estimate the costs of construction of a new 'complete' cement plant as this would depend on a number of parameters, but notes that CEMEX's predecessor incurred costs of around £30 in constructing its plant at Rugby which opened in 2000. However, it is important to note that new entry does not necessarily require the construction of a complete cement plant (which includes a kiln and associated infrastructure).
- 5.27 One alternative is to open a grinding mill. A grinding mill, such as that opened by CEMEX at Tilbury (which commenced production in the third quarter of 2009) costs significantly less than a 'complete' cement plant. CEMEX incurred costs of approximately £30 to construct its Tilbury plant, 30. However, clinker and other cementitious materials are easily imported. They are commodities that are traded globally.
- 5.28 It is also straightforward and attractive to import cement. An average import terminal might cost no more than around £200,000 to construct. The extensive coastline, the existence of numerous ports and smaller wharves across Great Britain, combined with the fact that cement can be profitably transported over a considerable distance mean that new entry occurring by way of import is, in CEMEX's view, very likely. A large proportion of the most densely populated areas of GB, where demand for cement is greatest could be serviced from just one or two ports or wharves. Indeed, the OFT states in its Report⁸² that "...it can be economic to transport cement over large distances."
- 5.29 A further successful import model is to ship bagged cement to the UK via flatbed trucks. 30
- 5.30 CEMEX considers that new entry by way of import is all the more likely given the significant excess capacity internationally and in particular nearby EU Countries such as Spain and Ireland. The increasing competitive constraint posed by imported cement is reflected in the construction of new storage facilities close to import terminals across Great Britain.⁸³
- 5.31 The European Commission recognises that imports from outside the EU into EU markets such as Great Britain are a realistic prospect. It has designated cement as a market which is at risk of 'Carbon Leakage', that is a market in relation to which the relocation of production to low cost/low regulation countries is a real prospect.⁸⁴

⁷⁹ See ¶3.30 to 3.39 above.

⁸⁰ In 2011, see Table 2 above.

⁸¹ See ¶4.26 to 4.50 above.

⁸² "Aggregates: Report on the market study and proposed decision to make a market investigation reference", August 2011, (OFT1358).

⁸³ See ¶3.36 above.

⁸⁴ See ¶8.8 below.

5.32 In the case of new entry, related costs can be reduced and the alleged potential problems in accessing raw materials mitigated by using other cementitious materials. For example, GGBS or PFA can be used as a cement extender to reduce the quantity of clinker required by cement manufacturers. These products can also be used to reduce quantities of CEM II and III purchased (if required by a self-blending RMX producer). As mentioned above in relation to new entry, clinker and other cementitious materials are also easily imported.

Market power

5.33 In light of the foregoing on barriers to entry, CEMEX considers it reasonable to conclude that any barriers that may exist are not sufficiently high when taken together with its market share to confer on it even a modicum of market power.

RMX

5.34 The CC sets out in paras 34 and 35 its theory of harm in relation to RMX. CEMEX comments on the CC's hypothesis below, addressing in turn: market concentration, barriers to entry and market power. In so doing, CEMEX demonstrates that the market conditions pertaining to RMX are not conducive to an AEC finding; to the contrary, competition between RMX operators is strong.

Market concentration

5.35 CEMEX partially agrees with the CC's provisional market assessment in Anglo/Lafarge.⁸⁵ That is, that there is a single relevant product market for the supply of all RMX, (whether produced by fixed or by site plants),⁸⁶ however it also strongly considers that the relevant market also includes cement produced by volumetric trucks. Because RMX sets within circa one hour of its production the relevant geographic market is limited by the distance which can be travelled in this time, which itself depends on a number of diverse factors.⁸⁷

5.36 It is the case, however, that demand for cement comes mainly from urban areas which are frequently covered by more than one RMX plant and typically serviced by a number of operators of volumetric trucks.⁸⁸ As a consequence of this, the catchment areas of the various cement suppliers in a given urban location tend to overlap leading to lower concentration than might otherwise be expected.

5.37 In circumstances where there is no fixed area within which competition occurs, where catchment areas overlap and supply from adjoining 'markets' is feasible the extent and strength of competition respect to RMX can only be gauged on a case-by-case basis and at the local level.

5.38 CEMEX's national share of supply of cement of 3% is well below the level at which it might reasonably be suggested to indicate that it enjoys a degree of unilateral market power;⁸⁹ and demonstrates that CEMEX is a significant operator nationally but no more than that. In many cases, producers listed under the 'others' category will have very strong positions in their own local markets.

Barriers to entry and expansion

5.39 The CC enumerates at paragraph 35 of its SI the possible barriers to entry for RMX. In short, economies of scale, availability of cement and aggregates and supplier conduct, such as quantity rebates to purchasers.

⁸⁵ Provisional Findings, ¶5.47 to 5.51.

⁸⁶ See ¶3.41 to 3.44 above.

⁸⁷ See ¶3.45 above.

⁸⁸ See ¶3.46 above.

⁸⁹ In 2009, see Table 4 above.

- 5.40 CEMEX is firmly of the view that new entry is easy in relation to RMX and that it occurs frequently.⁹⁰ This is because the cost of new entry by setting up a concrete plant is relatively low. In circumstances where the geographic market is local in scope, CEMEX considers that a relatively small but efficient operator could compete effectively within any local market.
- 5.41 Additionally, appropriate volumetric mixer trucks are available to deliver product so that new entry may also be achieved with just one storage silo and an accompanying water tank. Such trucks can be purchased new or second hand and are widely available to lease, meaning no significant initial outlay is required. Expansion is similarly easy as a consequence of the excess capacity in the sector, with ready access to plant and machinery, as well as trucks and drivers.
- 5.42 CEMEX notes that the main barrier to new entry and expansion is said by the CC to be in sourcing cement. However, with excess capacity in both the aggregates and cement markets (both in the UK, Ireland and Europe) it is CEMEX's view that both raw materials are readily available to potential new entrants so that this barrier, if it exists, is a low one.

Market power

- 5.43 In view of the low market concentration and barriers to entry to the RMX market set out in the previous section, together with the description of the conditions of competition,⁹¹ CEMEX refutes any suggestion, with regard to RMX, that it enjoys unilateral market power in any locality. Competition between RMX operators is strong. On the contrary CEMEX is a price taker; its RMX business runs at a loss.

CONCLUSION

- 5.44 Even if the CC were to conclude that any of the aggregates, cement and RMX markets were relatively concentrated, that would not be unusual in respect of capital intensive industries. Whilst it is a truism that a high market share is suggestive of market power, it is not determinative.
- 5.45 Concentrated markets are not inherently detrimental to consumer welfare *per se*.⁹² It has been demonstrated in the preceding paragraphs that CEMEX does not enjoy market power, let alone unilateral market power. CEMEX is simply unable to behave to an appreciable extent independently of its competitors and customers on any of the reference markets.⁹³ CEMEX refutes the CC's Theory of harm 1 in its entirety.

⁹⁰ See ¶4.56 above.

⁹¹ See ¶4.51 to 4.67 above.

⁹² U.S. Department of Justice and the Federal Trade Commission: "*Horizontal Merger Guidelines*", 19 August 2010, ¶4 and "*Commentary on the Horizontal Merger Guidelines*", 2006, Section 1.

⁹³ Case 85/76 *Hoffman-la-Roche v Commission* [1979] ECR 461.

6 THEORY OF HARM 2: CO-ORDINATION BETWEEN PRODUCERS REDUCES OR PREVENTS COMPETITION

INTRODUCTION

- 6.1 The SI notes that there are various ways in which co-ordination could occur, including for example agreeing to limit production or sales, serving only parts of a geographic market or group of customers, or colluding on prices. It also states that explicit collusion or agreement is not required to attain co-ordinated outcomes, but could also arise when suppliers deem tacitly abstaining from competition to be more profitable.⁹⁴
- 6.2 The CC recognises that co-ordination (either explicit or tacit) can occur only if firms are able to come to an understanding and decide on which terms they wish to co-ordinate (e.g., which prices and how they are set, which market shares to focus on and how to measure them etc.).⁹⁵ It also recognises that for a finding of co-ordination, it would have to demonstrate the internal and external sustainability of such an understanding. That is, there would have to be sufficient transparency for firms to be able to monitor the other firms' adherence to the understanding; firms must not have strong incentives to deviate, or a strong punishment mechanism must be in place to deter them from doing so; and outsiders to the collusive agreements (such as, e.g., a competitive fringe or imports) should not be able to undermine the collusive outcome.⁹⁶
- 6.3 Furthermore, according to the CC, collusive behaviour may not be confined to separate individual markets, but may in fact be implemented across multiple (geographic or product) markets. This would mean that responses to deviation from coordinated behaviour could take place in a market different from that in which the deviation has occurred.⁹⁷
- 6.4 The SI does not further develop any of those issues. However, they are very similar to the claims that the CC has previously made in the Provisional Findings report of 23 February 2012 on the inquiry into the planned joint venture between Anglo American and Lafarge ("**Provisional Findings**"). In that report, the CC put forward, *inter alia*, a theory of harm based on co-ordinated effects in the interaction between UK cement producers.
- 6.5 In that merger inquiry the CC was not able to conclude in its Provisional Findings that there was pre-existing co-ordination in the bulk cement market. However, in the Provisional Findings the CC claims to have found evidence of market outcomes that, when taken together, were consistent with a degree of pre-existing tacit co-ordination. In addition, the CC concluded that it was likely that UK cement producers currently had the ability to reach and monitor the terms of co-ordination, and that such co-ordination was at present sustainable both internally and externally.
- 6.6 CEMEX and its external advisers responded to a wide range of issues raised in the Provisional Findings.⁹⁸ That response supplemented a more detailed submission of 26 January 2012 by CEMEX and its external advisers ("**Assessment of co-ordinated effects**"), which critically reviewed several putbacks that the CC had prepared during its JV investigation.
- 6.7 In this section CEMEX reiterates points made in those submissions which are relevant to this market investigation. Those submissions suggested that the CC's analysis did not support a conclusion that co-ordinated behaviour currently takes place in the UK cement industry. In particular, the submissions argued that (i) the CC's evidence of alleged pre-existing co-ordination is unconvincing; and (ii) the CC's assessment of the conditions relevant to whether co-ordinated effects are likely did not raise any justifiable concerns.

⁹⁴ SI, ¶137.

⁹⁵ SI, ¶138.

⁹⁶ SI, ¶140.

⁹⁷ SI, ¶136 and ¶139.

⁹⁸ Compass Lexecon: "Response to the CC's Provisional Findings on co-ordinated effects", 13 March 2012.

ALLEGATIONS OF PRE-EXISTING CO-ORDINATION

6.8 In its Provisional Findings, the CC put forward two sets of observations as potential indicators of pre-existing co-ordination, namely the alleged stability of market shares and the alleged increase in cement margins despite depressed demand in recent years.

Market shares

6.9 The CC's Provisional Findings assert that market shares were stable,⁹⁹ concluding that '*[t]he degree of stability in shares of production at the time of large changes in demand, changes in ownership and, to a lesser extent, changes in capacity in the industry was consistent with the existence of a degree of tacit co-ordination between at least some of the UK producers over that time period.*'¹⁰⁰

6.10 CEMEX submits that the CC, in its Provisional Findings, failed to:

- (a) Provide a relevant metric to measure the 'degree of stability';
- (b) Indicate a critical threshold for such a metric, based on which the CC could support its conclusion that market shares are sufficiently stable to suggest tacit co-ordination; and
- (c) Take full account of, and draw appropriate conclusions from, the evidence before it, in particular that:
 - (i) the variations in cement market shares (especially relative to their levels) had in fact been significant; and
 - (ii) changes in market shares appeared to be more pronounced when focusing on relative market shares of total external sales and external sales to independents, respectively.
- (d) Give adequate consideration to the role of imports in determining market shares (and, in particular, the fact that the share of imports has increased in recent years), by focusing primarily on the share of the major UK cement suppliers relative to each other.

Cement margins

6.11 In its Provisional Findings, the CC pointed out that all four major UK producers' variable margins had increased during a period when demand was falling, and that this was contrary to what the CC would have expected to happen in a competitive market.¹⁰¹ In the light of the reduction in the demand for cement starting in 2008, the CC interpreted this increase in margins as '*being inconsistent with UK cement producers strongly competing for customers in a homogenous product market with excess capacity.*'¹⁰²

6.12 CEMEX disagrees with the CC on this point for several reasons:

- (a) A supplier's reduction in current output is a rational response to the low price realised in the past as a consequence of the negative demand shock. That is, CEMEX and other suppliers would be expected to respond unilaterally to the fall in prices and margins (resulting from the drop in demand between 2007 and 2008) by reducing output, so as to stabilise prices and margins. If this reaction occurs with some time lag it would explain why the CC has observed an increase in margins from 2008 to 2009;
- (b) In response to an input cost increase in 2008 (which is consistent with a narrowing of margins in 2008), <

⁹⁹ Provisional Findings, ¶6.107.

¹⁰⁰ Ibid.

¹⁰¹ Provisional findings, ¶6.108 and ¶6.109.

¹⁰² Provisional Findings, Appendix L, ¶L.41.

- (c) There is a significant and growing body of literature recognising that when companies are highly indebted or even financially distressed, \succ , they tend to decide unilaterally to increase margins in the face of decreasing demand,¹⁰³ and
- (d) The CC did not acknowledge the well-established literature according to which under capacity constraints, even if some spare capacity exists, competition does not lead to the stable dynamic Bertrand outcome in which price equals marginal costs.

CONDITIONS TO FACILITATE CO-ORDINATION

- 6.13 Adopting the framework set out in the Merger Guidelines, which is also reflected in the SI's section on co-ordination, the CC in its Provisional Findings reviewed the evidence in relation to the four factors that it must assess to determine whether the proposed JV is likely to facilitate co-ordinated effects: (i) Will firms be able to come to an understanding regarding the terms on which they seek to co-ordinate? (ii) Will the firms be able to monitor their rivals' adherence to those terms? (iii) What are the firms' incentives to deviate and what punishment mechanisms could and would rivals use to deter them from doing so? and (iv) to what extent could outsiders to the agreement undermine a collusive outcome?
- 6.14 In this section we discuss the shortcomings in the Provisional Findings with regard to each of those questions.

Reaching an understanding

- 6.15 The Provisional Findings conclude that UK cement producers had the ability to reach the terms of co-ordination.¹⁰⁴ In reaching this conclusion, the CC relied on two (alleged) features of the industry:
- (a) *Stable market shares.* Specifically, '*[t]he fact that shares of cement production had not changed much in the face of major changes in demand and when there has been significant excess capacity [...] suggested to us that the main variables on which cement producers could coordinate were likely to be shares of production and/or wins and losses of customers.*'¹⁰⁵
 - (b) *Price announcement letters.* Specifically, '*price announcement letters could assist the UK cement producers in coming to a common understanding on the timing and direction of price movements,*'¹⁰⁶ and '*[p]rice announcements provide information to cement producers as to the level of price increases from which each cement producer will start negotiating.*'¹⁰⁷
- 6.16 CEMEX rejects the idea that market shares act as a useful focal point in the present case and, as far as the alleged stability of market shares held by the majors is concerned, it refers to its observations made in paragraph 6.10.
- 6.17 One fundamental problem with the CC's notion of reaching an understanding in this manner is the fact that the parties would have to agree tacitly on which market share they should agree on, which appears very difficult to achieve. For example, would an agreement most likely be on shares with regard to the total GB market including imports or excluding exports? Or would the parties to the understanding focus instead on their share of the market including sales to majors and independents or on those to independents only? Each of those metrics poses serious theoretical and practical measurement/estimation problems, so that none of them can be considered as clearly superior to the others.

¹⁰³ See, e.g. M. Grinblatt and S. Titman, "*Financial Markets and Corporate Strategy*" (2nd Edition), McGraw-Hill (2002), p.610; and E. Friedman and M. Ottaviani (2010), "*Competition Policy and Financial Distress*", unpublished manuscript.

¹⁰⁴ Provisional Findings, ¶6.140.

¹⁰⁵ Provisional Findings, ¶6.127.

¹⁰⁶ Provisional Findings, ¶6.133.

¹⁰⁷ Provisional Findings, ¶6.134.

- 6.18 The CC's analysis regarding the role of the price announcement letters does not support the claim that those letters facilitated the reaching of an agreement for the following reasons:
- (a) There is in fact significant variation in the price increases that had been announced by the suppliers (for some types of cement more than for others);
 - (b) ✕;
 - (c) The CC's analysis has not shown parallelism with regard to actual price increases; and
 - (d) Contrary to the CC's assertions, Lafarge does not typically play the role of leader in announcing price increases (with the other majors following behind it), with other suppliers announcing first in half the relevant cases analysed by the CC.

(See further paras 4.42 to 4.46 above).

Monitoring

- 6.19 In order for co-ordination to be sustainable, firms need to be able to monitor each other's behaviour so that they can observe whether or not other firms adhere to the tacit agreement. In addition, if prices or market shares diverge from the tacitly agreed level, firms must be able to assess whether the deviation was voluntary or caused by external factors. In its Provisional Findings, the CC concluded that UK cement producers had such an ability to monitor the terms of co-ordination.¹⁰⁸
- 6.20 CEMEX does not agree with this conclusion, as the degree of transparency with regard to either quantities sold or prices set by competitors in the cement industry is very restricted. This lack of transparency, which is compounded by the considerable price dispersion prevalent throughout the industry, limits firms' ability to monitor rivals' adherence to a potential tacit understanding.
- 6.21 Regardless of the specific market-share measure that is thought to serve as a focal point, this measure is subject to a lack of precision.¹⁰⁹ Each of the candidate measures is exposed to many different types of 'noise'. This implies that the signals ultimately received by each of the majors are distorted and can, therefore, not be reliably used to monitor the compliance of a rival with the tacit understanding. For example, the information gathered by one major on, e.g., customer volumes stolen by a specific other competitor, is unlikely to be precise enough, and each major's customer base is likely to be too fragmented to track market shares with sufficient accuracy or timeliness.

Incentives to deviate and availability of a punishment mechanism

- 6.22 Even if an explicit or tacit agreement could be reached and monitored, it would not be sustainable without an effective and credible mechanism to deter parties from deviating from the tacit agreement and to punish them should they do so nevertheless.
- 6.23 The Provisional Findings claim that there is sufficient (average) spare cement capacity to enable punishment strategies to be effective, and that there were very few long-term contractual arrangements for cement purchasing which might undermine such strategies.¹¹⁰ The CC considered the feasibility of two punishment strategies in detail, namely (i) targeting the cement customers of the deviator; and (ii) repatriating cement volumes.¹¹¹
- 6.24 With regard to the first punishment strategy (targeting the cement customers of the deviator), CEMEX submits that the evidence put forward by the CC is not conclusive, as it cannot discriminate between non-co-ordinated and co-ordinated behaviour. For example, the CC argued

¹⁰⁸ Provisional Findings, ¶6.140.

¹⁰⁹ To provide an example, the value of the information obtained from MPA figures is limited, as due to the delay in receiving the aggregate data it is impossible for a firm to monitor its own market share in real time. Therefore, at any given point in time, the firm could not be sure that it or one of its competitors is acting in line with a hypothetical tacit agreement.

¹¹⁰ Provisional Findings, ¶6.154.

¹¹¹ Provisional Findings, ¶6.148.

that the allegedly low volumes won from and lost to other majors may indicate the existence of retaliatory behaviour. However, evidence of 'low levels' of switching may just as well be indicative of the absence of an incentive for customers to switch due to prices being set at a competitive level.

6.25 With regard to the second punishment strategy (repatriating cement volumes), we note that:

- (a) The 'repatriation' mechanism envisaged by the CC disregards that the incentive for 'repatriation' is limited, as CEMEX would have to find alternative buyers for repatriated volumes first and, once such buyers are found, the revenues that CEMEX could generate from those sales would likely be lower
- (b) The notion that CEMEX has had ample spare capacity over time is overstated and overly simplistic. The CC apparently seeks to argue that a high level of spare capacity is conducive to collusion, because sufficient spare capacity is a key element of an effective punishment mechanism. However, the CC should also take into account a countervailing effect of spare capacity, namely that it enables its holder to deviate from any collusive agreement that may have been reached (tacitly or otherwise). In other words, the net effect of spare capacity on the ability to co-ordinate is *a priori* ambiguous; and
- (c) Capacity adjustments are lumpy and there is a significant time lag in capacity adjustments. Capacity cannot accurately track demand but changes in large steps (as does the utilisation rate of capacity after an adjustment).¹¹²

6.26 Even if it were the case that a short-run expansion of output could be achieved by making use of excess capacity, the Provisional Findings in fact acknowledge that there are *'limitations to these punishment mechanisms that would make them logistically difficult and costly due to (a) a free-riding problem, in that each co-ordinating firm would prefer others to punish, to avoid incurring the costs of punishment itself; (b) there would be a lack of clarity in that non-punishing firms would not be able to monitor whether punishment had taken place; and (c) there would be a significant lag between the decision to increase capacity (to enable punishment) and when capacity became available.'*¹¹³

6.27 Furthermore, CEMEX does not believe that the fact that the majors compete in different markets at the same time provides opportunities to make use of some sort of cross-market punishment mechanism to sanction deviators. For example, CEMEX's day-to-day decisions on the setting of local prices for RMX are made by a business division that is separate from that entrusted with CEMEX's cement activities.

Outsiders

6.28 It is impossible to sustain a tacit understanding on, e.g., prices or keeping market shares stable if external constraints prevent the firms that are party to the understanding from collectively exercising a degree of market power, thereby keeping prices at supra-competitive levels.

6.29 It is CEMEX's view that imports exert such a competitive constraint on cement produced within the UK, and that this constraint is important. The fact that imported volumes have been significant and increasing over the last few years attests to this. In fact, the Provisional Findings acknowledge that imports have increased their share of cement sales,¹¹⁴ and note that the evidence reviewed 'shows that imports of cement into the UK were somewhat of a constraint in Great Britain.'¹¹⁵

¹¹²

✂.

¹¹³ Provisional Findings, ¶6.154, Footnote 154.

¹¹⁴ Provisional Findings, ¶6.173.

¹¹⁵ Provisional Findings, ¶6.172.

7 THEORY OF HARM 3: VERTICAL INTEGRATION AND EXCLUSIONARY BEHAVIOUR

- 7.1 The CC notes that some of the suppliers of aggregates and cement (notably the four cement producers present in Great Britain) are vertically integrated into the supply of RMX.¹¹⁶ Based on a number of allegations made by third parties to the OFT, the CC in its SI expresses concern that some vertically-integrated suppliers have been raising the prices of cement relative to the prices of RMX with a view to squeezing the margins of non-integrated RMX suppliers and eventually foreclosing some of them.¹¹⁷
- 7.2 The CC intends to consider whether there is evidence that prices have moved in this way (without being explained by, e.g., cost differences between cement and RMX markets), and that any resulting squeeze has led to the exclusion of non-integrated RMX producers from the market. The CC distinguishes between two hypothetical scenarios; in the first, the CC considers that a margin squeeze might be a viable tactic for an operator acting unilaterally, whereas in the second the conduct would only be viable if it were similarly adopted by other suppliers through co-ordination.¹¹⁸
- 7.3 CEMEX does not consider these concerns to be justified under either scenario. The reasons for rejecting concerns under each scenario are discussed in turn below. In summary:
- (a) CEMEX does not have the ability to engage in a unilateral margin squeeze since it lacks sufficient market power in both the supply of cement and the supply of aggregates – and it also lacks any incentive to exclude competing RMX businesses that are important customers of its cement business;
 - (b) CEMEX does not have the ability to engage in a co-ordinated margin squeeze since co-ordination over such a strategy is not feasible – and again CEMEX also lacks any incentive to do so; and
 - (c) CEMEX's RMX business makes losses not because of any anti-competitive strategy, but rather because RMX is a highly competitive market in which CEMEX faces fierce competition from a range of competitors (see paras 4.54 to 4.57 above).

UNILATERAL MARGIN SQUEEZE

Defining and establishing the existence of a margin squeeze

- 7.4 A margin squeeze is a situation in which a vertically-integrated firm (“VIF”) sets upstream and downstream prices in such a way that its downstream competitors (which rely on the VIF's upstream product as a key input) are not economically viable in the long run.
- 7.5 More specifically, the VIF sets two prices, namely (i) the upstream price (‘w’) it charges downstream competitors for the input and (ii) the price (‘p’) its own downstream arm charges its customers. A margin squeeze occurs when the VIF sets w and p so that downstream competitors cannot cover their own costs if they sell to end consumers at price p.¹¹⁹ As a result, competitors may be foreclosed from the downstream market.
- 7.6 In practice, the quantitative assessment as to whether there is a margin squeeze is typically carried out by conducting a price-cost test (or ‘imputation test’).¹²⁰ Following the European Commission's Article 102 TFEU Guidance¹²¹ and its case practice, this would require examining

¹¹⁶ SI, ¶42.

¹¹⁷ SI, ¶43.

¹¹⁸ SI, ¶45.

¹¹⁹ In other words, the vertically-integrated firm ‘squeezes’ the margin between p and w so that downstream competitors cannot cover their own costs.

¹²⁰ The European Commission as well as national competition authorities has previously applied such a test in several margin squeeze cases, especially in the telecommunications sector. See, e.g., European Commission decision in Case COMP/38.784 – *Wanadoo Espana v Telefonica* [OJ 2008 C83/6].

¹²¹ OJ C 45, 24.2.2009, p. 7–20.

whether an 'equally efficient competitor' of CEMEX's downstream RMX arm would be capable of covering its Long Run Average Incremental Costs ("LRAIC") given the price that CEMEX charges for cement.¹²² An 'equally efficient competitor'¹²³ is a firm that has the same downstream costs as CEMEX. In other words it would have the same costs as CEMEX's RMX operations.

7.7 To carry out this test it is necessary, amongst other things, to determine the price that CEMEX charges competing RMX businesses for cement. In practice these prices vary reflecting factors such as the volumes purchased, with customers generally paying lower prices the larger the volume they purchase. Given the size of CEMEX's RMX operation we believe that the best available benchmark for the price of cement paid by an equally efficient competitor to CEMEX is the $\text{S}\<$.

Insufficient legal or economic grounds for a unilateral margin squeeze finding

7.8 We note that, as a matter of both law and economics, there cannot be a competition concern in the first scenario (unilateral margin squeeze) in this case, since CEMEX does not hold a dominant position or possess significant unilateral market power in the supply of cement.¹²⁴

7.9 Even if the results of the price-cost test described above were consistent with the existence of a margin squeeze, this would not raise any competition concerns in the absence of market power in the supply of cement. Put differently, for a unilateral margin squeeze to be capable of creating anti-competitive effects, it has to be the result of actions of a firm that has a dominant position or significant market power in the relevant market(s).

7.10 Even if the CC were able to demonstrate that one of the majors has significant market power in the market for, e.g., bulk cement, it is unlikely that the same major would satisfy other vital conditions that make the margin squeeze feasible and profitable, respectively:¹²⁵

- (a) essential input. The dominant VIF in question must provide an 'essential' input, or 'bottleneck' good, for which there is no effective substitute. Otherwise, downstream competitors could simply source the required input from competing upstream firms or importers. CEMEX does not consider cement supplied by any single major to be a 'bottleneck' input.
- (b) a degree of market power downstream. As a matter of law and economics, a degree of downstream market power is also required to allow the VIF in question to carry out the margin squeeze. Otherwise, the VIF may fail to capture a substantial share of the sales from the firms that are displaced or marginalised as a result of the squeeze, with downstream rivals reaping most of the benefits instead. This second condition is not satisfied because the downstream (RMX) market is too fragmented for any single player to have even a degree of market power.
- (c) barriers to entry and re-entry downstream. A successful margin squeeze strategy requires barriers to entry and re-entry in both upstream and downstream markets to be in place, so as to prevent entry of downstream competitors following the price increase initiating the 'recoupment phase' of an alleged margin squeeze. This condition is not fulfilled in the present context. The CC notes that there are 'a *great many small producers of [...] RMX*',¹²⁶ which is consistent with the OFT's finding that for RMX,

¹²² LRAIC are defined as long-run incremental costs of producing a number of additional output units divided by that number of outputs units. Long-run incremental costs are the costs that are incurred from when a firm starts supplying a new product and, as such, they consist of product-specific variable and fixed costs. As such, LRAIC tend to include costs that would be incurred by an undertaking entering the market, i.e., sunk costs that may have been incurred prior to the period under investigation. An important practical challenge for a multi-product firm such as CEMEX is to allocate capital costs in an appropriate manner to the downstream product in question.

¹²³ See for example Case IV/30.178 *Napier Brown-British Sugar* [1988] OJ L284/41.

¹²⁴ See for example Case 85/76 *Hoffman-la-Roche v Commission* [1979] ECR 461.

¹²⁵ See, e.g., Padilla and O'Donoghue (2006), "*The Law and Economics of Article 82 EC*", Hart Publishing, p.306.

¹²⁶ SI, ¶127.

'barriers to entry are much lower' [than for the other reference products] in that the financial resourcing needed is lower, the planning process is relatively straightforward¹²⁷ and that 'the independent ready-mix concrete sector has grown its market share and this may reflect lower barriers to entry'.¹²⁸ Under those circumstances, a VIF carrying out a margin squeeze would not be able to prevent the entry of a downstream firm; especially given the fact such an entrant can source cement or aggregates of the same quality from one of the VIF's upstream competitors.

CEMEX's price setting is not part of a margin squeeze strategy

7.11 According to the OFT's reference decision, a number of independent RMX operators have reported suffering from a consistently high price of cement and a consistently low price of RMX, alleging that the majors are willing to lose money in RMX knowing that they make profits in cement.¹²⁹ One possible implication of such an allegation is that CEMEX – as one of the majors – pursues a strategy of setting unduly low RMX prices and/or excessively high prices for cement. CEMEX rejects both limbs of such an allegation:

- (a) ✗;
- (b) ✗; and
- (c) ✗.

CEMEX has no incentives to foreclose

7.12 CEMEX submits that it has no incentive to foreclose downstream competitors in the RMX market. ✗

7.13 ✗

7.14 ✗

7.15 Given the fiercely competitive nature of the RMX market, there would be no gain for CEMEX from embarking on a strategy to eliminate other RMX suppliers with a view to favouring its own downstream RMX operation. ✗. CEMEX does not believe that this is the case, and the increase in independent RMX suppliers' market share over the past decade (see above) would not be consistent with this proposition.

7.16 In any event, if it was the case that independent RMX suppliers are relatively inefficient, implementation of a margin squeeze to foreclose them would be pro-competitive as keeping them viable would amount to a waste of economic resources.¹³⁰

CO-ORDINATED MARGIN SQUEEZE

Implementation of a co-ordinated margin squeeze is unlikely

7.17 The second scenario envisaged by the CC hinges on the notion that a margin squeeze strategy would be viable if it were pursued by several suppliers through (tacit) co-ordination. The underlying idea appears to be that, whilst individually none of the cement suppliers holds a dominant position, they could somehow have the ability to assume such a position collectively by

¹²⁷ OFT, "Aggregates: The OFT's reasons for making a market investigation reference to the Competition Commission", January 2012, ¶4.46.

¹²⁸ Ibid, ¶4.48.

¹²⁹ Ibid, ¶5.13.

¹³⁰ It is of some concern to note that, in contrast, the CC appears to be willing to entertain a theory of harm that could potentially be penalising the generation of cost efficiencies through vertical integration: 'We will consider whether vertical integration could impact on competition in any of these markets. For example, we will consider whether vertical integration itself impacts on producers' costs so that non-integrated producers are unlikely to be able to compete effectively with integrated producers'. (SI, ¶42).

tacitly agreeing on a margin squeeze vis-a-vis downstream competitors (through increasing cement prices whilst at the same time decreasing RMX prices).

7.18 As argued in the previous section on co-ordinated effects, CEMEX rejects any suggestion that there is tacit co-ordination in the UK cement industry or that its key features satisfy the essential conditions to conclude that co-ordinated effects are a likely outcome of the interaction between the majors.

7.19 Evidently, those considerations apply in equal measure to the question as to whether the majors are willing and able to collude towards an outcome amounting to a 'joint' margin squeeze. Given that there is no indication of a tacit agreement between players in the cement sector *per se*, there are a fortiori no grounds to assume that co-ordinated effects have led to augmented cement prices for the purpose of squeezing downstream margins.

The degree of asymmetry between the majors' vertical structures

7.20 As highlighted previously, there is considerable asymmetry between majors' vertical structures at present. For example, the OFT's decision to make a MIR has shown that there are considerable differences in any given major's market shares across different product categories.¹³¹ In addition, the CC itself has argued that the planned Anglo/Lafarge JV would lead to an increase in the symmetry of vertical structures,¹³² which implies that the vertical structures are not currently symmetric.

7.21 Whilst it would be very hard for firms to reach, monitor and sustain a tacit agreement on a single given level of the supply chain (e.g., in the provision of an input such as cement), it is even more difficult for firms to coordinate their behaviour on the margin between the prices at two distinct levels of the supply chain.

7.22 This is true in particular when significant asymmetries in firms' vertical structures exist. For example, if one VIF is a net buyer of cement (such as, for example, Tarmac) and another VIF a net seller (such as, for example, CEMEX) the two will have very different incentives with regard to how the upstream and the downstream price, respectively, should be 'set'. In the context of the supply of cement as an input to the production of RMX, the net seller is likely to favour a high cement price and the net buyer a relatively low cement price in relation to the price of RMX.

7.23 The Tarmac/Lafarge JV without divestiture would increase symmetry compared to the current position, as would a situation in which the CC requires Tarmac's cement operations to be sold to Aggregate Industries. However, either way, the CC would not be able to use an argument based on alleged competition concerns due to the higher degree of symmetry resulting from the JV, given that the CC itself would have allowed this concern to arise by approving the JV.

CONCLUSION

7.24 The arguments that CEMEX has put forward in this section demonstrate that the CC's third theory of harm has no support in the context of the present market investigation. The particular structure and circumstances of the industry at hand do not lend themselves to foreclosure of non-integrated (downstream) competitors of the vertically integrated majors, neither at the level of an individual VIF (unilateral margin squeeze) nor at the joint level (co-ordinated margin squeeze)

7.25 We also remind the CC that the OFT has previously noted that 'vertical integration is not, of itself, anti-competitive, and can be pro-competitive, as economies of scale and scope can lead to a direct reduction in costs where firms operate at more than one level of the supply chain.' The OFT emphasises the reduction in transactions and inventory costs as well as the potential elimination of

¹³¹ OFT, "Aggregates: The OFT's reasons for making a market investigation reference to the Competition Commission", January 2012, Figure 4.1.

¹³² CC, "Co-ordination in the supply of bulk cement", ¶94.

double marginalisation as further virtues of vertical integration, and that these virtues also have a role to play in the present context.⁴² For these reasons, CEMEX believes that the CC should abandon this line of investigation altogether.

⁴² OFT, "Aggregates. *The OFT's reasons for making a market investigation reference to the Competition Commission*", January 2012, ¶4.28.

8 THEORY OF HARM 4: POLICY AND REGULATION

GENERAL COMMENTS

8.1 CEMEX notes the CC's concerns about whether any aspect of regulation of the aggregates, cement and RMX industries, or the implementation of policies relevant to these industries, has the effect of preventing, restricting or distorting competition.¹³³ CEMEX also notes that the CC recognises the benefits of such measures and would highlight the key role that policy and regulation play in protecting human health and the environment.¹³⁴

8.2 CEMEX believes, as a general rule, that although environmental regulation affects all operators in the markets for aggregates, cement and RMX, it has a disproportionately greater effect on larger operators, meaning that these barriers to entry and expansion are significantly lower for new entrants than for existing larger competitors to expand. There are a number of examples of this, to which CEMEX wishes to draw to the CC's attention:

(a) The Carbon Reduction Commitment Energy Efficiency Scheme ("CRC"). CEMEX is a participant in the CRC, a UK-wide mandatory carbon trading scheme for large, non-energy intensive organisations which began operation in April 2010. Participants in the CRC are required to report on their carbon emissions annually (the first such report was submitted in July 2011) and buy sufficient allowances from the Government to cover their carbon emissions in the previous year. The first allowances must be bought in June/July 2012 in respect of emissions during the period April 2011 to March 2012.

Qualification for the CRC is based on half hourly metered electricity consumption. Any organisation whose consumption exceeded 6,000 megawatt hours in the relevant qualification period is caught by the scheme. To put this in context, only an operator extracting more than approximately 1,000,000 tonnes of aggregates annually would be likely to exceed this threshold. The CRC therefore has a disproportionate effect on larger operators, as smaller operators are unlikely to be caught by it. The additional cost of buying allowances for these larger operators such as CEMEX is considerable - CEMEX's measured CO₂ emissions in the first year of the CRC were 300,000 tonnes and, although there was no requirement to buy allowances in the first year of the scheme, if CEMEX had been required to buy allowances this would have cost £300,000 (based on the allowance price for the 2011/12 compliance year of £12 per tonne of CO₂) which is more than 3% of CEMEX's 2011 total operating income in GB of £7.9 million. CEMEX is anticipating that it will need to spend a similar amount on allowances in June/July 2012 for its emissions during the period from April 2011 to March 2012.

(b) The EU Environmental Impact Assessment Directive (2011/92/EU)¹³⁵ makes the carrying out of an environmental impact assessment mandatory as part of the process of obtaining planning permission for quarries where the surface of the site exceeds 25 hectares. For sites under this threshold environmental impact assessment is only required if the project is likely to have significant effects on the environment. Again, this creates additional administrative burdens and costs for operators with larger sites. Such sites are more likely to have the potential for having significant environmental impacts and are therefore a greater burden for larger operators in terms of net compliance costs.

¹³³ SI, ¶146.

¹³⁴ Ibid.

¹³⁵ Implemented in England by the Town and Country Planning (Environmental Impact Assessment) Regulations 2001, in Wales by the Town and Country Planning (Environment Impact Assessment) Regulations 1999 and in Scotland by the Town and Country Planning (Environment Impact Assessment) (Scotland) Regulations 2011.

- (c) The EU Habitats and Wild Birds Directives (92/43/EC and 2009/147/EC respectively)¹³⁶ also have a disproportionate effect on larger-scale operations. This is because such operations are more likely to have a significant effect on protected species and habitats, thereby triggering the need for “appropriate assessment” and, potentially, the provision of compensatory habitats. This is particularly true in the case of the periodic Review of Old Minerals Permissions (“**ROMP**”) process under the Environment Act 1995, where larger sites are more likely to be subject to a review and thus be subject to an ‘appropriate assessment’ which could result in constraints or mitigation measures being imposed.

8.3 Since these pieces of legislation only apply when certain criteria are triggered, they do not represent barriers to entry and have the potential to enhance competition between smaller operators (who are less likely to be subject to the requirements of the regulation) and larger operators (who are more likely to be subject to the requirements of the regulation).

8.4 The CC may be aware that there are a number of current Government initiatives to simplify and streamline environmental policy and regulation. These include:

- (a) The “Red Tape Challenge”: This is a review, launched in April 2011, of over 21,000 pieces of legislation - including 278 pieces of environmental legislation, with the intention of minimising unnecessary bureaucracy and legislation. The presumption of the review is that unless the continued existence of a particular piece of legislation is justified it should be repealed. In March 2012 the Secretary for Environment, Food and Rural Affairs announced that 135 pieces of environmental legislation will be simplified or merged, 70 will remain as they are and 53 will be repealed. Enforcement procedures will also be streamlined and implementation of the remaining legislation will be made simpler and cheaper.
- (b) The Habitats and Wild Birds Directives Implementation Review: In March 2012 the Government published its report on the implementation of the EU Habitats and Wild Birds Directives, addressing the burden that compliance with these Directives places on businesses and operators. In particular the Government has identified a number of areas where the implementation of these Directives needs to be improved, including reviewing guidance on the implementation of the Directives.
- (c) The Penfold Review of Non-Planning Consents: This review involved an assessment of the efficiency of the regimes for non-planning development consents, which include highways, environmental and heritage consents. These are often considered to be unnecessary, and the process of obtaining them costly and lengthy. The Penfold Review made 12 recommendations to Government as to how the non-planning development consent regimes could be simplified and streamlined. The Government has subsequently published an implementation report as to how these recommendations are being implemented.
- (d) The consultation published by the Department of Energy and Climate Change on 27 March 2012 on simplifying the CRC Energy Efficiency Scheme: In the 2012 Budget the Chancellor of the Exchequer announced that there was to be a consultation on the simplification of the CRC. If no significant simplification has been achieved by Autumn 2012 then the CRC will be scrapped and replaced with another form of environmental tax. The consultation published on 27 March 2012 proposes a number of simplifications to the CRC, including reducing the number of reported fuels, simplifying record-keeping

¹³⁶

Both implemented in England by the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2010, in Wales by the Conservation of Species and Habitats Regulations 2010, and in Scotland by the Conservation (Natural Habitats, &c.) Regulations 1994 and the Conservation of Habitats and Species Regulations 2010.

requirements and reducing overlap with other regulatory regimes such as the EU Emissions Trading System and Climate Change Agreements.

- 8.5 CEMEX believes that if the recommendations emerging from these reviews are properly implemented by the Government and planning authorities, the administrative and financial burdens associated with compliance with environmental legislation for all operators will be reduced, enhancing competition and further lowering barriers to entry for all operators. The changes proposed by these reviews should enhance a level playing field for all operators in the aggregates and cement industries to expand their operations. CEMEX supports all of these initiatives and urges the CC to express to Government its support for these initiatives.

THE EU EMISSIONS TRADING SYSTEM

- 8.6 CEMEX notes that the CC does not elaborate on why it considers that the EU Emissions Trading System (“**EU ETS**”) may have the effect of giving advantages to existing cement producers, distort patterns of production or tend to drive increased concentration. CEMEX also notes that there is no mention of the EU ETS in the OFT’s January 2012 Decision to Refer.¹³⁷
- 8.7 The EU ETS is currently in its second phase, which began on 1 January 2008 and ends on 31 December 2012. Installations for the production of clinker in rotary kilns with a production capacity of more than 500 tonnes per day have been included in the EU ETS since the beginning of the scheme in 2005. In a similar vein to the comments in the previous section, the EU ETS is another example of regulation which only applies to larger operators. Any installations with a production capacity of less than 500 tonnes per day will not be caught.
- 8.8 In both Phase 1 and Phase 2 of the EU ETS, allowances have been allocated to installations for free. In Phase 3, which will run from 1 January 2013 to 31 December 2020, installations will be required to buy their allowances, with the exception of installations operating in sectors which the European Commission considers to be at risk of “carbon leakage” (the relocation of the industry outside the EU in order to avoid the EU ETS). Cement manufacturing is one of the sectors that have been identified as being at risk of carbon leakage and, accordingly, cement plants will continue to receive free allocations of allowances in Phase 3.
- 8.9 ✂
- 8.10 In each phase of the EU ETS a proportion of allowances (known as the “New Entrant Reserve”) are held back for new installations which begin operating during that phase. These allowances are allocated on the same free basis as allowances for existing installations, so new entrants are not prejudiced in any way. The whole rationale of the EU ETS is that it is a market mechanism that allows participants to achieve reductions in their carbon emissions where it is most cost-efficient for them to do so. In the cement manufacturing sector this means that plants that can keep their carbon emissions within their allocation will have no need to pass on any additional costs to their customers (and may even be able to pass on to customers cost savings from the sale of surplus allowances), whereas less efficient plants whose emissions exceed their allocations, and which therefore need to buy additional allowances, will incur additional costs, that they may consider passing on to their customers. This therefore drives efficiencies in the sector and encourages, rather than distorts, competition. CEMEX sees no basis for the assertion that the EU ETS is advantageous to existing cement producers, distorting patterns of production and driving increased concentration, within the EU.
- 8.11 In fact, the EU ETS has encouraged expansion by importers into Britain. As referred to at paragraph 3.36 above, in countries which have been subject to significant building booms and busts, such as Ireland, Portugal and Spain in particular, large decreases in demand for cement

¹³⁷

“Aggregates: the OFT’s reason for making a market investigation reference to the Competition Commission”, January 2012 (OFT1358).

have meant that most operators are operating at well below the capacity for which they have been allocated EU ETS allowances. However, if their CO₂ emissions fall below 50% of their allocation, they start to automatically lose allowances, without compensation. In order to keep CO₂ emissions above 50% of their allocations, many are now aggressively targeting Britain, thus enhancing competition.

- 8.12 Cement manufacturers from outside the EU also enjoy increasing advantages due to carbon pricing. As mentioned in paragraph 8.9 above, allocations of free allowances to cement producers in Phase 3 are unlikely to be sufficient to cover all emissions, so cement manufacturers (✗) are likely to need to buy additional allowances. Because they are outside the scope of the EU ETS, importers of cement from outside the EU into the EU will not incur the cost of buying these additional allowances and therefore, in combination with other advantages such as cheaper electricity (Egypt in particular benefits from this), are at a significant competitive advantage compared with those manufacturers within the EU who are subject to the EU ETS. CEMEX notes that the European Commission is of the view that imports from outside the EU into EU markets such as Britain is a realistic possibility, because it has designated cement as a market which is at risk of 'carbon leakage' (see paragraph 8.8 above).
- 8.13 The position of cement producers exporting to the UK will be further strengthened by the introduction of the Carbon Floor Price in the UK in April 2013. This will allow the UK Government to increase the taxation facing power companies on their generation of electricity using fossil fuels when the price under the EU Emissions Trading Scheme is below a certain specified level. The UK Government will effect this by reversing the exemptions in the Climate Change Levy and Fuel Duty that power companies receive. This rise will be passed on to customers (including CEMEX). Given that CEMEX operates in an industry with typically low profit margins, it is concerned that the added cost of the Carbon Floor Price (which is unlikely to be adopted beyond the UK) would increase electricity costs by 1-4% per annum over inflation by 2020. ✗. In addition, in what is a globally consolidated cement industry, this rise in UK production costs increases the prospect of carbon leakage beyond the EU, as referred to at paragraph 8.8 above.
- 8.14 CEMEX considers that the UK Government should adopt the option given in the EU ETS Directive Article 10a(6) that allows for the compensation of customers such as CEMEX who are subject to increases in electricity prices due to EU ETS, but concedes that this is unlikely. CEMEX's British operations will therefore be disadvantaged against competitors from outside the UK in countries such as France, Germany, Spain and Egypt, who benefit from more benign electricity price regimes.
- 8.15 ✗. The UK has some of the most expensive wholesale commodity prices in Europe. In addition to proposed low carbon taxes as above, there are additional levies to pay for Renewal Obligations and Feed in Tariffs. In addition, the Common Charging Methodology is to pay towards reinforcement of the network to accommodate renewable intermittent generation (predominantly wind). This was implemented in April 2010 for low and High Voltage users, with the full effect being felt by intensive users from April 2012 when Extra High Voltage Charging Methodology is introduced.

THE AGGREGATES TAX

- 8.16 At present, the 'Aggregates Tax' (or Aggregates Levy) imposes a cost of around £2 per tonne of Primary aggregates extracted, but exempts secondary and recycled aggregates. This exemption is currently under review following a negative decision by the EU General Court but for the moment the levy boosts further the considerable cost advantage enjoyed by secondary and recycled aggregates in the market.

THE PLANNING REGIME AND/OR POLICY ON THE DEVELOPMENT AND USE OF MINERAL RESERVES

- 8.17 The CC will be aware that the OFT has provided its analysis of the planning system as it applies to aggregates at Annex B of its August 2011 report and in its January 2012 Decision to Refer¹³⁸ (in Chapter 6 of that document). The CC has also set out its own analysis in its February 2012 Provisional Findings Report on the Anglo-American/Lafarge Joint Venture Inquiry (in Appendix S of that report). CEMEX provided its own views to the OFT on the planning system in its responses to the market study and wishes generally to repeat those views in this response, as well as making some observations on recent developments, in particular the adoption of the National Planning Policy Framework (“**NPPF**”) and the replacement of the majority of Minerals Planning Guidance (“**MPG**”) and Minerals Policy Statements (“**MPSs**”) with the NPPF.

The operation of the current planning system

- 8.18 As the CC will be aware, the purpose of the planning system is to manage the development and use of land to meet the needs of society by balancing and resolving competing demands for land use. It seeks to permit development in the right place, at the right time, while taking into account the need to protect the environment and amenity. The NPPF specifically states that the purpose of the planning system is to contribute to the achievement of sustainable development and that to achieve the objectives of sustainable development, economic, social and environmental gains should be sought jointly and simultaneously through the planning system.
- 8.19 The current planning system is a “plan led” system and this is one of the ‘core principles’. As part of this local planning authorities (including mineral planning authorities) are required to prepare spatial land use plans for their area which set out policies to guide the spatial distribution of development. These provide the framework - typically a series of site specific allocations - to guide developers to areas where planning permission for development may be granted and for decisions to be made by local planning authorities on individual planning applications. The preparation of these plans is subject to extensive public consultation and independent review and approval by the Planning Inspectorate before they can be adopted by the planning authorities. When a planning application is made it should be determined by the relevant local planning authority in accordance with the adopted plan(s) unless material considerations indicate otherwise; any appeal against a local planning authority’s decision is made to the Secretary of State (in practice the Planning Inspectorate from which an independent inspector will be appointed to hear the appeal). These plans include mineral and waste development frameworks (“**MWDFs**”) which, among other things, make provision for mineral extraction.
- 8.20 In order to provide for an adequate and steady supply of aggregates to the construction industry, mineral planning authorities in England are obliged to identify in their MWDFs sufficient land for future mineral extraction during the plan period (and to keep this under review) in accordance with an overall level of provision set by the Government. This overall provision is known as the Managed Aggregates Supply System (“**MASS**”), the operation of which is described in some detail in Chapter 6 of the OFT’s January 2012 Decision Document.
- 8.21 The Scottish and Welsh administrations have their own form of national planning which differs slightly from that of England, but the principle of a ‘plan led’ system and control of land use is the same.

Important benefits of the planning system to the market

- 8.22 CEMEX takes the view that the current planning system assists the operation of the market in several important respects, for example:

¹³⁸ “Aggregates: the OFT’s reason for making a market investigation reference to the Competition Commission”, January 2012 (OFT1358).

- (a) The MASS, and the national and local guidelines for aggregate provision which compel mineral planning authorities to identify sufficient land for extraction, negate debates that might otherwise be had inconsistently from region to region about the need for new sites and the extraction of aggregates. In principle, although this outcome is by no means assured for the reasons explained below, this provides a strategic overview which is necessary for resources that can only be worked where they are found and are an essential component for Britain's substantial construction sector. Since MASS was introduced in the late 1970s it has prevented scarcity of supply, offers a long term vision for the planning system and provides greater certainty and more predictability for planning applications, to the benefit of producers, customers, public administration and local communities.
- (b) The plan led system means that once an aggregates extraction site is identified in a MWDF, the prospects of obtaining planning permission become more certain, facilitating a decision by aggregate producers to invest in the process of applying for planning permission.

Site allocation vs area of search approach

- 8.23 One of the potential causes of cost and delay in bringing forward new mineral extraction sites is the common practice adopted by planning authorities of identifying specific sites in MWDFs for future aggregates production ("site allocation") and in doing so, rigidly applying the MASS. Typically this results in mineral planning authorities identifying only a bare minimum of sites to satisfy their allocation of aggregates production capacity. This places a constraint on the supply of sites and means that the owners of these sites can demand very high royalties. It also means that producers have to have a significant involvement in the plan-making process (the preparation of the MWDF) in order to ensure the continuity of their business across new sites.
- 8.24 The site allocation approach means that mineral planning authorities require a significant amount of site-specific information to justify a site allocation. There is a very significant cost to producers in meeting these front-loaded requirements, including the cost associated with detailed hydrological, archaeological, ecological and other environmental assessments, before there is any assurance of a site allocation, let alone planning permission. Given that following the MWDF site allocation process, producers will still have to make an application for planning permission for extraction, there is a further significant delay in bringing forward a site from the moment it is identified as a business opportunity. From a competition perspective, a site allocation approach restricts the availability of sites allocated for minerals extraction where these sites have been allocated for other uses in other markets and it restricts the ability of operators to obtain planning permission for sites that may be suitable geologically for minerals extraction, but which have not yet been allocated in the relevant MWDF. This can inhibit competition within the market and is a potential regulatory barrier to entry and expansion. Current examples of this restrictive approach by mineral planning authorities include Essex County Council's current Minerals Local Plan, in which it has adopted only eight "preferred sites" for future sand & gravel extraction. The Plan contains a presumption against mineral extraction outside these preferred sites.
- 8.25 To address the issues highlighted above, CEMEX suggests that the CC recommends to the Department for Communities and Local Government an alternative approach involving a "hybrid" site allocation/area of search approach, whereby individual sites are allocated, but there is also a wide area of site search. CEMEX notes that some mineral planning authorities have already adopted such an approach – for example, Cambridgeshire County Council, whose Cambridgeshire and Peterborough Minerals and Waste Site Specific Proposals Development Plan Document adopted on 22 February 2012 allocates specific minerals extraction sites, but also adopts area of search allocations for other sites. Similarly Buckinghamshire in its Minerals and Waste Local Plan has adopted this 'hybrid' approach, by identifying tightly-defined "Preferred Areas" and a broader

“Area of Search” for future mineral working. CEMEX believes that such an approach would be more flexible than a pure site allocation approach and would address concerns that a pure site allocation approach can create barriers to entry by restricting the grant of planning permission for the development of unallocated sites. The way such a hybrid system could work is that if a specific site that is allocated is not brought forward in a reasonable timescale (for example, five years), then it would be possible for other sites in the areas of search to be granted planning permission.

Other costs associated with the planning system

- 8.26 As indicated above, the plan led nature of the current planning system, the site allocation approach and the rigid application of the MASS by some mineral planning authorities can give rise to significant up-front costs due to the front-loading of information requirements, the allocation of a limited number of sites in a given area and the ability of landowners subsequently to demand higher royalties.
- 8.27 Other costs associated with the planning system arise more directly from its operation. They include:
- (a) Planning fees: because quarrying is a large scale form of development, application fees calculated on the basis of site area frequently reach the current maximum fee of £65,000 where there is a major extraction proposal. There has been an on-going consultation since November 2010 on changing the planning application fees in England, with a proposal to give local and mineral planning authorities control over setting the fees on the basis that they should establish a charging regime which represents full cost recovery. In the case of major extraction facilities this is likely to result in an *increase* in application fees and therefore additional cost to the industry as well as inconsistencies across the country. CEMEX has made comment to Government opposing this proposal. As yet, no decision has been made on the outcome of this consultation.
 - (b) Pre-application consultation fees: increasingly, significant fees, running to thousands of pounds, are being charged by mineral planning authorities for meetings with officers and advice prior to preparation of a planning application. For example, Northumberland County Council charges £250 per meeting. There are often several meetings and possible site visits in relation to each planning application.
 - (c) Planning application documentation: there is an ever increasing amount of information, including environmental impact assessments, that is required to support a planning application for aggregates extraction, some of which is required to undergo several iterations at significant cost.
 - (d) Planning monitoring fees: aggregates producers are one of the few industries typically to be charged fees (approximately £260 per visit, often for in excess of six visits) by mineral planning authorities for site visits to monitor compliance with conditions attached to planning permissions, particularly in relation to ecology and archaeology.
 - (e) Planning gain: the requirement for an aggregates producer to enter into planning obligations or other agreements in association with a planning application should only be necessitated by what is reasonably required as a result of the specific extraction proposal e.g. mitigation works to the highway network or compensatory conservation and nature management measures. ✂
 - (f) Review of Old Mineral Permissions: pursuant to the Environment Act 1995 planning permissions for active mineral extraction sites are subject to periodic review on a 15 year rolling cycle. The purpose of the review is to update the planning conditions to ensure that they impose modern requirements for the operation, restoration and aftercare of sites. This is unique in planning terms to the minerals (aggregates) industry and means

that producers are exposed to an increasing cost burden with potentially significant commercial implications and questionable necessity.

- (g) Duplicated compliance costs: when granting planning permission, mineral planning authorities frequently impose conditions requiring the submission of information and schemes before commencement of development where such information or schemes have either been submitted already as part of the original planning application or will be dealt with as part of other (non-planning) regulatory compliance. This is an unnecessary duplication of a significant cost to the aggregates producer concerned.
- (h) Cost of compliance with pre-development conditions: mineral planning authorities will usually impose a range of planning conditions and mitigation measures on any planning permission for aggregates extraction. These conditions and measures relate to matters such as archaeology, ecology and site restoration and are required as part of the planning authorities' performance of their planning functions as well as to satisfy the requirements of other statutory bodies such as the Environment Agency and Natural England. Compliance with these conditions and measures can give rise to considerable costs even before extraction operations can begin.

8.28 These costs can add up to a considerable amount and could raise barriers to entry to smaller operators. CEMEX therefore suggests that the CC recommends to the Department for Communities and Local Government that it looks at ways to reduce the cost of making planning applications. This would be consistent with the Government's general desire to reduce bureaucracy and administrative burdens on business. CEMEX is pleased to note that the Government is already looking at some of these. For example, the Penfold Review referred to in paragraph 8.4(c) above is addressing some of the issues associated with duplicated compliance costs highlighted in paragraph 8.27(g) above.

Delays caused by the planning system

8.29 As indicated above, the operation of the plan led system on the basis of a site allocation approach can be a source of delay and additional cost to new extraction sites coming forward and new entrants coming into a local market. This is because:

- (a) The process of producing and adopting MWDFs is bureaucratic and time-consuming. Since 2004 only approximately 12 MWDFs have actually been adopted.
- (b) In some cases mineral planning authorities apply the national and local guidelines from the MASS too rigidly, leaving no headroom or flexibility for additional or alternative sites, to cover unpredicted local shortfalls in aggregates provision at particular times or allocated sites failing to come forward in the plan period as envisaged - for example, where mineral reserves at a specific site are subsequently found to be inadequate to justify development and operational costs.
- (c) Producers still have to apply for planning permission for extraction following site allocation, which is itself a process that needs to be supported by yet more site specific documentation, requires extensive public participation and consultation and often takes several months or years.

8.30 The CC will no doubt be aware of the reforms to the planning system recently introduced by the Government in the shape of the Localism Act 2011 and the National Planning Policy Framework ("NPPF"). The latter replaces over 1,000 pages of guidance with a much shorter 59 page document. Chapter 13 of the NPPF is titled "*Facilitating the sustainable use of minerals*" and essentially condenses the contents of the former Minerals Planning Guidance ("MPG") and Minerals Policy Statements ("MPSs") (the majority of which are replaced by the NPPF) into only four pages of guidance. The NPPF is also accompanied by a short technical guidance document

that focuses on flooding and minerals planning. This expands on a number of the policies set out in the NPPF in respect of minerals planning. CEMEX welcomes the adoption of the NPPF, which is a much simpler document than the previous body of guidance. At the core of the NPPF is a presumption in favour of sustainable development and CEMEX believes that this presumption will make it easier to argue the sustainable development benefits of aggregates extraction. The NPPF also emphasises that it is “*important that there is a sufficient supply of material to provide the infrastructure, buildings, energy and goods that the country needs*”. CEMEX also wishes to draw to the CC’s attention paragraph 145 of the NPPF, which states that “*Minerals planning authorities should plan for a steady and adequate supply of aggregates by: ensuring that large land banks bound up in very few sites do not stifle competition*”. The NPPF therefore appears to recognise (and addresses) the potential for the planning system to contribute to land banking, although for the reasons highlighted in section E. below CEMEX does not believe that land banking is an issue in practice.

- 8.31 The NPPF also states that, when determining planning applications for minerals extraction, local planning authorities should “*give great weight to the benefits of minerals extraction, including to the economy*”, reinforcing the first statement of Chapter 13 which states that “*Minerals are essential to support sustainable economic growth and our quality of life*”. By simplifying the planning system and stating on its face the importance of minerals extraction to a sustainable economy the NPPF will encourage greater ease in the planning system for operators, resulting in increased competition. To the extent that the CC thinks there are still issues in this area CEMEX would suggest that the CC recommends to the Department for Communities and Local Government that it considers further ways to reduce the delays and consequential costs inherent in the planning process.

Incentives created by the planning system

- 8.32 In its SI the CC states that it will also consider whether these schemes create incentives for companies to seek permissions for aggregates extraction which are not then developed. If so, whether companies holding undeveloped sites in a land bank (and/or mothballing previously active sites) has the effect of restricting supply to the market or making entry by rivals more difficult. CEMEX strongly refutes the suggestion that the planning system might create incentives for operators to obtain planning permissions for aggregates extraction which are not then developed. While holding undeveloped sites in a land bank and/or mothballing previously active sites may appear possible in theory, in practice it is extremely difficult and, in any event, makes no commercial sense for a number of reasons:

- (a) As discussed above, obtaining planning permission for aggregates extraction can be an expensive and time-consuming process. CEMEX agrees in particular with Lafarge’s comment in paragraph 38 of Appendix S to the CC’s Provisional Findings Report on the Anglo American/Lafarge Joint Venture Inquiry that obtaining planning permission on a new primary aggregates site could take up to eight years and Hanson’s comment in paragraph 40 of the same document that getting planning permission for a new quarry could take 10 years. Once planning permission is obtained, therefore, there is a clear commercial imperative for implementing it as soon as possible in order to recoup the costs of obtaining it.
- (b) Under the Planning and Compulsory Purchase Act 2004¹³⁹ all planning permissions contain an implied condition that they must be implemented within three years. To implement a mineral permission and thus ‘preserve’ it requires all pre-development conditions to be complied with AND mineral to actually be extracted. This is usually a costly exercise and one that a company would not usually embark upon unless it every

intention of completing the development. Once implemented, all minerals extraction permissions will require operations to cease after a certain number of years (which may be as few as 15 years). Modern minerals extraction permissions will also typically contain conditions prohibiting further extraction operations and triggering site restoration obligations if no extraction operations have taken place for a particular period (which may be as short as six months). Such conditions have the effect of severely restricting the ability of operators to land bank or mothball sites.

- (c) For any older sites with planning permissions which do not contain conditions such as those outlined in (b) above, the Review of Old Mineral Permissions system limits the ability of operators to land bank and mothball sites by enabling planning authorities to require the cessation of extraction operations and the implementation of site restoration measures at dormant sites.
- (d) Where sites are leased, landowners will usually charge a fixed rent, commonly referred to as a “dead rent” which is payable whether or not extraction operations take place, as well as a royalty payable on each tonne of aggregates extracted. These fixed rents can run into hundreds of thousands of pounds annually. These rents are specifically designed to prevent an operator from land banking a permission and creates a very clear commercial incentive for operators to implement planning permissions as soon as possible and carry out extraction operations in as short a time frame as possible in order to maximise returns.

Whether any aspects of these schemes provide a degree of transparency that facilitates co-ordinated behaviours

- 8.33 CEMEX assumes that the CC’s concerns about whether the planning system provides a degree of transparency that facilitates co-ordinated behaviour stem from the OFT’s comments in Chapter 6 of its January 2012 Decision Document (paragraphs 6.42 to 6.54). CEMEX considers that these concerns are unfounded. The MASS is essential to the aggregates sector given the long lead-in times for the development of new quarries. Without the supply of aggregates being managed by the MASS, the system would be likely to deteriorate into one in which “planning by appeal” would become the norm, further increasing the time and costs involved in obtaining planning permission and deterring existing operators and new entrants alike from seeking to develop new sources of supply.
- 8.34 If the CC has concerns about the composition of the Aggregate Working Parties (“AWPs”) it should raise with the Department for Communities and Local Government the issue of how smaller operators could be given greater representation on the AWP’s. This could involve simply raising awareness of AWP’s among smaller operators and encouraging their participation, or the reservation of places on AWP’s for smaller operators.

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