

## AGGREGATES, CEMENT AND READY-MIX CONCRETE MARKET INVESTIGATION

### CEMEX RESPONSE TO CC PROVISIONAL DECISION ON REMEDIES

#### 1 INTRODUCTION

- 1.1 In this response, CEMEX UK Operations Limited (“CEMEX”) sets out its views on the CC's Provisional Decision on Remedies (the “PDR”), dated 8 October 2013.
- 1.2 In CEMEX's view, the CC has been unable to demonstrate that there is any coordination or AEC in the GB cement market. This is particularly so in light of the errors in the CC's revised profitability and consumer detriment analysis. It is not therefore necessary to impose any remedies in the GB cement market.
- 1.3 CEMEX's response to the PDR is made without prejudice to its previous submissions and responses, which include, inter alia, responses to the CC's Working Papers, the CC's Notice of Possible Remedies and the CC's Provisional Findings. In addition, this response is without prejudice to CEMEX's right to appeal all or part of the CC's Final Report.
- 1.4 Section 2 sets out CEMEX's views on the erroneous finding of an AEC by the CC and, in particular, the errors in the CC's profitability and consumer detriment analysis.
- 1.5 If, notwithstanding the errors in the CC's analysis, the CC continues to maintain that there is an AEC in the GB cement market, Section 3 explains that the behavioural remedies proposed by the CC are adequate to remedy the AEC identified and the structural divestment remedies proposed by the CC are unnecessary and disproportionate.
- 1.6 If the CC continues to maintain that divestment remedies are appropriate, Section 4 sets out CEMEX's views on the cement divestment remedies proposed by the CC.
- 1.7 Section 5 sets out CEMEX's views on certain remedies not adopted by the CC.
- 1.8 For ease of reference, CEMEX's previous response (dated 25 June 2013) to the CC's profitability analysis is set out at **Annex 1**.
- 1.9 **Annex 2** sets out certain questions regarding the behavioural remedies proposed by the CC, which CEMEX requests the CC to clarify.

## 2 THE CC HAS FAILED TO DEMONSTRATE THAT THERE IS AN AEC IN THE GB CEMENT MARKET

2.1 For the reasons set out in CEMEX's response to the CC's Provisional Findings Report, it is clear that the CC has failed to demonstrate that there is an AEC in the GB market.

2.2 In this response, CEMEX does not seek to reiterate all of the reasons why the CC's finding of an AEC is erroneous and should not be maintained in its Final Report. However, CEMEX notes that in reaching its conclusions, the CC substantially revised and updated its analysis of the profitability of the major cement producers. It also produced a new estimate of consumer detriment of £30 million per year based on that profitability analysis. In the circumstances, CEMEX finds it necessary to comment further on the methodology adopted by the CC.

2.3 CEMEX's economic advisors, FTI Consulting LLP, have reviewed the CC's latest profitability analysis and continue to have a number of serious reservations about the methodology employed and the interpretation the CC places on the results of its analysis. These issues are explored below, focusing on three elements:

- (a) the CC's revised methodology continues to be flawed;
- (b) the CC's conclusions about excessive profitability are not justified by its analysis; and
- (c) CEMEX is not contributing to any excess profitability identified by the CC's analysis.

### ***The CC's revised methodology continues to be flawed***

2.4 CEMEX welcomes the CC's revisions to its methodology, which adopt many of the recommendations that its economic advisors made in response to the original profitability analysis. In particular, CEMEX welcome the CC's decision to:

- (a) adopt straight-line depreciation, which is preferable to the declining balance profile previously assumed; and
- (b) move away from an annual revaluation of assets based on the previous year's actual production, a method which led to significant impairments and revaluations of assets despite there being no change in the economic value of the underlying assets.

2.5 However, the approach continues to rely on a number of assumptions. Some of the erroneous aspects of the CC's revised methodology include:

- (a) assessing the value of a new asset at £192m based on a report by the CC's consultants ICC, taking into account financing costs. CEMEX does not agree with the method employed by the CC's consultants to estimate the value of a plant;
- (b) the assumption of an asset life of 50 years for all assets, including Tilbury. In CEMEX's view an asset life of at least 60 years is more appropriate (note that Ferriby is over 50 years old and is still working with expensive and disciplined maintenance);

- (c) assessing the capacity of each cement plant based on maximum clinker production during the 2006-12 period (inclusive), rather than on proved capacities (or other ways of measuring capacity);
- (d) a higher rate of 3% asset price inflation (up from 2.5% p.a.) has been assumed (effectively constant over several decades) based on the ICC report, but without presenting any empirical evidence to support this assumption and despite our previous suggestions that a lower rate of asset price inflation might be more appropriate (at least for the 2006-11 period); and
- (e) ascribing no value to intangible assets such as brand, patents, know-how and customer relationships. Ascribing some value to these assets will necessarily reduce the CC's estimate of ROCE.

2.6 CEMEX also notes that, in the absence of information about clinker production at each kiln at Ferriby, the CC's analysis of CEMEX's profitability assumes that the value of each kiln was the same (based on half of the total value ascribed to Ferriby). [§] the CC's analysis may slightly overstate ROCE as a result<sup>1</sup> Similar arbitrary assumptions have been made to derive asset values for some of the other cement producers e.g. where kilns have been replaced, but other parts of the cement works have not.

***The CC's conclusions about excessive profitability and consumer detriment are not justified by its analysis***

2.7 Notwithstanding that the CC has made some amendments to its profitability methodology, we continue to believe that the results of its analysis do not support a conclusion that profitability in the industry has been excessive or that this demonstrates consumer harm.

2.8 The CC finds that the industry's ROCE has been 12-13% over the period 2007-2012. This is not significantly higher than the estimated industry WACC, which lies in a range of 8.2-11.5% (with a midpoint of 10%). In our view, given that the CC's estimates of ROCE are this close to the estimated WACC, the CC's analysis does not establish the existence of excess profits or consumer detriment. A margin of less than one or two percentage points above the top of the WACC range is not sufficient to support such a finding, for the following reasons:

- (a) the CC's estimate of WACC, which does not appear to have been revisited by the CC as part of its revised analysis, suffers from a number of methodological issues which have been outlined previously (e.g. a mismatch between the time period over which the ERP and risk-free rate are assessed and basing an estimate of the risk-free rate on government bonds with maturities much shorter than the lives of the assets being considered). CEMEX's previous comments on the CC's profitability analysis is at

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<sup>1</sup> Sensitivity analysis indicates that if a larger share of the value of the Ferriby assets can be allocated to A3, built in [§] (decreasing the share allocated to A2, built [§]), then the estimates of CEMEX's ROCE decreases marginally. Further, CEMEX's view is that the A3 plant is [§].

**Annex 1.** These issues suggest that the estimated WACC may be too low. This implies that the observed ROCE may in fact be lower than the true value of the WACC;

- (b) sensitivity analysis (summarised in the Table 1 below) illustrates that the ROCE estimates can be reduced to within the CC's range of estimates of the WACC – and below the 10% midpoint of the range - with only minor changes to some of the input assumptions, in other words these results are not sufficiently robust to allow the CC to conclude that the GB cement industry is characterised by excess profitability; and
- (c) because of a survivorship bias, one would expect to see ROCE in excess of WACC even in a competitive market – the firms which are the most efficient and profitable are the ones that are most likely to survive and consequently be observed by the CC – meaning the gap between ROCE and WACC would need to be significant in order to support a conclusion of excess profits and consumer harm.<sup>2</sup>

**Table 1: Sensitivity Analysis**

Parameter	CC's Analysis	CC Estimate of ROCE on CCA Basis (%)	Sensitivity	Average ROCE on a CCA basis (%)	CC's Estimate of WACC (%)
Cost of new plant	£192m	12.44 – 12.85	£220m	10.90 – 11.41	8.2 – 11.5
Asset life	50 years	12.44 – 12.85	60 years	11.21 – 11.87	8.2 – 11.5
Asset price inflation rate	3.0%	12.44 – 12.85	2.5%	12.18 – 12.61	8.2 – 11.5
Combined adjustment		12.44 – 12.85		<b>9.50 – 10.32</b>	8.2 – 11.5

Notes: The cost of new plant assumed in the sensitivity analysis is £220.5752m, 15% above the £191.8m used by the CC in its analysis. We note that ICC used a +/-15% range in their analysis of new plant costs for the CC. The range of the "CC's Estimate of ROCE on a CCA basis" and "Average ROCE on a CCA basis" shown are the average ROCE values over the 2007-12 period for the industry as a whole both before and after the impact of impairment. The sum of the individual adjustments does not equal the combined adjustments because there are interactions between the individual adjustments.

2.9 Even if the CC's profitability analysis was robust (which it is not) the CC's assumption that excess profitability in cement production equates to consumer detriment is not justified. As CEMEX has previously pointed out, cement is an intermediate product used to produce final products such as

<sup>2</sup> CEMEX note that there are a number of examples of market exit which reinforce this point e.g. Barrington, Rochester, reduced kiln usage at Ferriby and across the industry. Lafarge closed Westbury and Northfleet in 2008-09. There have also been changes of ownership.

ready mix concrete (RMX). The impact of higher cement prices on consumers therefore depends on the extent to which any increase in cement prices is passed-on by these intermediate purchasers to final consumers.

- 2.10 At present it is not clear to CEMEX who the CC is including in its definition of consumers. On the one hand, the CC states: “given that RMX is a competitive market, we would expect high prices of cement to be passed through by RMX producers to their customers”.<sup>3</sup> In other words, if the focus is on final consumers, the CC seems to assume that 100% of any uplift in prices would be passed through to these final consumers. However, the CC provides no evidence or analysis to support this assertion. This is an extreme assumption. To the extent that pass-on is in fact less than 100% the CC has overestimated the impact on final consumers.
- 2.11 On the other hand, the CC also argues that it is estimating the impact on all customers, including those intermediate customers who purchase cement to manufacture RMX.<sup>4</sup> In other words, to the extent that higher cement prices are not passed on by RMX producers, the CC treats the resulting net loss to RMX producers as part of its consumer detriment calculation. Given that CEMEX is a vertically integrated business, the CC is therefore including in its estimate of consumer detriment any loss of profit that CEMEX itself, as an RMX producer, incurs from any uplift in cement prices. The CC is also similarly including the equivalent loss of profit by other vertically integrated cement and RMX producers. Given the extent of vertical integration in Great Britain, a significant part of the CC’s consumer detriment estimate in fact comprises losses by the GB cement producers’ own RMX businesses.<sup>5</sup> CEMEX submits that this approach clearly leads to an overestimate of consumer harm.<sup>6</sup>
- 2.12 From this it can be seen that the CC’s analysis:
- (a) does not make clear which category of consumer is allegedly suffering detriment;
  - (b) does not exclude vertically integrated RMX businesses owned by GB cement producers if it is cement users who are allegedly suffering detriment; and
  - (c) does not provide any evidence of pass through if it is end users who are allegedly suffering detriment.

***CEMEX is not contributing to any excess profitability or consumer detriment identified by the CC’s analysis***

- 2.13 Table 2 below shows CEMEX’s profitability – measured using return on capital employed (ROCE) – and the equivalent measure of industry profitability, as calculated by the CC.

**Table 2: CC’s estimates of Return on Capital Employed (ROCE) (%)**

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<sup>3</sup> PDR, Appendix 2, para. 76.

<sup>4</sup> *Ibid.*

<sup>5</sup> According to the CC: “approximately 41 per cent of all bulk cement purchased in the UK was purchased by the GB [cement] producers (either from their own plants or from the other GB producers)”, Provisional findings report, para 7.74.

<sup>6</sup> For example, assuming, for the sake of illustration, a 50% pass-through rate, around one-fifth the alleged consumer detriment would in fact be incurred by the vertically integrated GB cement producers themselves.

	2007	2008	2009	2010	2011	2012	Average
<b>Industry</b>							
Before impact of impairment	12	13	11	13	16	13	13
After impact of impairment	12	7	12	14	17	14	12
<b>CEMEX</b>							
Before impact of impairment	[REDACTED]						
After impact of impairment	[REDACTED]						

2.14 It is clear from this analysis that:

- (a) CEMEX's profitability is less than the industry's in all years; and
- (b) CEMEX's profitability is [REDACTED], the cost of capital (10%) estimated by the CC in each and every year, so it does not appear that CEMEX's profitability has been excessive in any year considered by the CC.

2.15 It is clear that it is other producers that have (according to the CC's analysis) achieved a rate of return in excess of the industry's cost of capital.

2.16 These conclusions are qualitatively unchanged from the CC's previous Provisional Findings on profitability.<sup>7</sup>

2.17 One of the ways that the CC measures customer detriment arising from the market power, which it provisionally concludes that the major cement producers have, is by trying to calculate the excess profit that the industry has earned across the relevant period (see Appendix 2 of the CC's Provisional Findings). It does this by comparing the industry ROCE estimates to the WACC. [REDACTED], it is clear that on the basis of the CC's analysis CEMEX has not contributed to this estimate of the customer detriment.

2.18 In conclusion, while CEMEX welcomes the fact that the CC has adopted many of its recommendations to improve its profitability analysis, CEMEX (and its economic advisors) are concerned that the CC continues to draw conclusions that are not supported by the data. In particular:

- (a) the CC's analysis continues to be based on inappropriate assumptions, which result in (a) an overestimate of industry ROCE and (b) an underestimate in industry WACC;
- (b) moreover, the margin between the CC's estimate of industry ROCE and the industry WACC is very small (less than one or two percentage points above the top of the WACC

<sup>7</sup> We note that the CC's revised methodology produces estimates of ROCE that exhibit much less volatility and that the range of estimates across the producers is much narrower than previously.

range) which means that, given the sensitivity of these conclusions to certain assumptions, the CC has not demonstrated the existence of excess profits or consumer detriment and, even less so, drawn robust conclusions capable of supporting its provisional conclusions in this regard; and

- (c) in any case, even on the basis of the CC's own analysis, it is clear that CEMEX is [X] and is not therefore contributing to the CC's estimate of consumer detriment.

2.19 For these reasons, CEMEX believes that the CC's estimate of consumer detriment is seriously flawed and CEMEX does not consider that its results are capable of supporting its provisional conclusions regarding excess profitability, AEC or any consumer detriment in the GB cement market.

**3 BEHAVIORAL REMEDIES PROVISIONALLY DECIDED BY THE CC ARE ADEQUATE TO REMEDY THE ALLEGED AEC**

- 3.1 Notwithstanding CEMEX's strong objections, if the CC continues to maintain that there is an AEC in the GB cement market, CEMEX considers that the two 'transparency reduction' measures proposed by the CC (and, in particular, the remedy prohibiting the publication of MPA data before an appropriate time lag) are adequate to remedy the alleged AEC and the divestiture remedies proposed are unnecessary and disproportionate.
- 3.2 This section explains that, based on the CC's own analysis, as set out in its Provisional Findings, a prohibition on the publication of MPA data before an appropriate time lag would remedy the alleged AEC. This remedy is further strengthened by the prohibition on generic price announcement letters.
- 3.3 **Annex 2** sets out certain questions regarding the behavioural remedies proposed by the CC, which CEMEX requests the CC to clarify.

***Restrictions on publication of MPA data is adequate to remedy the AEC identified***

- 3.4 In its response to the Notice of Possible Remedies, CEMEX proposed a package of transparency reduction measures, which CEMEX considered remedied the AEC completely such that no further structural remedies were required. In CEMEX's view, even on the CC's own analysis, a prohibition on the publication of MPA data before an appropriate time lag ("Measure 1") would make it impossible for the CC's model of coordination to be implemented in the GB cement market. The other measures proposed by CEMEX reinforced the effectiveness of Measure 1 but were not strictly necessary to remedy the alleged coordination.
- 3.5 CEMEX notes that in the PDR the CC has responded to CEMEX's proposal of a 'transparency reduction package' in a cursory manner, arguing that it that it does not remedy the alleged coordination for three reasons:
- (a) the aspects of market transparency addressed by the CC through its 'transparency reduction' measures are not the only aspects of transparency that facilitate coordination. The CC notes that in paragraphs 8.162 to 8.164 of its Provisional Findings it identified a number of other aspects of market transparency that facilitated coordination, which related to the intrinsic characteristics of the market (e.g. the nature of customer-supplier relationships); the structure of the market (e.g. that it is easier to detect changes in rivals' behaviour if there are fewer rivals); or to aspects that cannot effectively be addressed for legal and/or practical reasons (e.g. the publication of emissions data under the ETS). Given this, it is the CC's view that it is not practical to eliminate transparency "to the extent necessary to undermine the coordination that [the CC] have provisionally found";
  - (b) coordination within the GB cement market has manifested itself in a particular way, as described in the CC's Provisional Findings. However, given the structural susceptibility of the market to coordination, there is a strong risk that coordination would re-establish

itself, even if certain market information were no longer available to GB cement producers; and

- (c) the transparency reduction package proposed by CEMEX (which, in effect, is Measure 1) would not address the CC's concerns in relation to the GGBS supply chain.

3.6 CEMEX submits that each of the above reasons do not adequately explain why implementing Measure 1 would not remedy the alleged coordination in the GB cement market and why it is necessary, in the CC's, view to impose a structural remedy. Each of the CC's three reasons outlined above are addressed below.

**A. There are other aspects of market transparency which facilitate coordination as set out in paragraphs 8.162 to 8.164 of the Provisional Findings and it is not practical to eliminate transparency to the extent required to undermine the coordination found by the CC**

3.7 CEMEX has reviewed the CC's Provisional Findings (including paragraphs 8.162 to 8.164) and it is not CEMEX's case that the CC's Provisional Findings outline no other elements of market transparency apart from the MPA data.

3.8 However, it is clear from the Provisional Findings that:

- (a) the CC's model of coordination is based on the ability of GB cement producers to calculate their own share of GB cement sales; and
- (b) the crucial element of transparency which allows GB cement producers to calculate their own share of GB cement sales is the MPA data.

3.9 The above is clear from the CC's Provisional Findings. For example, the CC states in paragraph 8.164, "*coordination is likely to evolve mainly around share of GB sales made by the GB producers (i.e. for each producer, the focal point is its own share of GB cement sales, as a proportion of total cement sales made by GB production but may be **supplemented** with the information on prices which can be gathered through discussions with customers and in the context of cross-sales, as well as through price announcement letters.*" (Emphasis added).

3.10 Similarly, in the CC's view, the monitoring of the terms of coordination are also based on the ability of each GB cement producer to monitor its own market share. This is clear from paragraph 8.169 of the Provisional Findings, which state, "*the **main metric** that is monitored in the strategy documents appears to the overall share of GB cement sales...*" (Emphasis added).

3.11 It is therefore clear that in the model of coordination outlined by the CC, both the terms of reference of coordination as well as the ability to monitor the terms of coordination are dependent on the ability of each GB cement producer to calculate its share of GB cement sales.

3.12 The question then arises as to how, in the CC's view, GB cement producers are able to calculate their own share of GB cement sales and monitor deviations from the alleged coordinated agreement. This is also clear from the CC's Provisional Findings. Paragraph 8.169 of the Provisional Findings states the "*the MPA publishes data on monthly GB cement production and sales of cement by GB cement producer, with a one-month lag. **Combined** with data on its own*

*sales and production, **this information enables each GB producer to calculate its own monthly share of GB production and monthly share of sales by GB producers.** However, this information does not enable the calculation of market shares including imports, and does not show to which other supplier(s) share has been lost in the event of a loss. Therefore in order to monitor deviations from the coordinated outcome by others, GB producers would need to **complement information on monthly share with other information. Monitoring of a producer's own wins and losses of customers, and of the supplier(s) to which these customers switched,** would enable a distinction to be made between a change in share of sales due to deviation by another specific cement producer, a change due to switching to the competitive fringe (ie suppliers outside the coordinating group of firms), and a change due to a customer simply requiring more or less cement overall in a given month (which would not represent a deviation from the coordinated outcome because another cement producer would not be responsible for the change in share)."*

3.13 In relation to monitoring of the coordinated agreement, we see that, in the CC's view, the MPA data plays a crucial part: in paragraph 8.218(e) of the Provisional Finding, the CC states that one of the key components of the mechanism for the alleged coordination is "*monitoring of adherence to the coordinated outcome through each member of the coordinating group monitoring its own share on a monthly basis, **using information from the MPA supplemented** by monitoring of customers won and lost and from whom they were won/lost, and also using information on prices of cement gathered from cement customers and through cross-sales.*" (Emphasis added).

3.14 It is therefore clear that the CC considers that the key element of transparency which allows GB cement producers to calculate their own share of GB cement sales is the MPA data. That is, but for the MPA data the CC's theory of coordination is not credible. All other elements of transparency are supplemental to the MPA data and cannot, in isolation or in combination with each other, allow for the CC's model of coordination to be implemented. This is true of the three examples of transparency cited by the CC in paragraph 6.63(a) of the PDR.

(a) Transparency arising out of the nature of the customer-supplier relationship – In the CC's view, the customer-supplier relationship allows GB cement producers to monitor its own wins and losses and the suppliers to which these customers switched. However, by the CC's own admission, this information must be "complemented" with the MPA data to allow a GB producer to calculate its own share of sales. The CC has failed to explain how information arising out of the customer-supplier relationship can, by itself, in the absence of MPA data, be used by a GB producer to calculate its own share of sales.

(b) Transparency arising out the structure of the market – The CC states that it is easier to detect changes in rivals' behaviour if there are fewer rivals. While this truism applies to all (coordinated and uncoordinated) markets it does not explain how the CC's model of coordination can be applied in the absence of MPA data. CEMEX submits that any additional transparency arising out of the smaller number of competitors (for example, being able to better understand which supplier a customer has been lost to) can only be used to facilitate the alleged coordination in conjunction with the MPA data and not on a standalone basis.

(c) Transparency arising out of the EU ETS data – The CC itself has admitted that the EU ETS data is not the "*primary source of information used for monitoring*" but rather acts as a "*cross-check*" for the primary source of information. For obvious reasons, a cross-check, by itself, is of no use without the primary data and it is therefore clear that even the CC acknowledges that the EU ETS data cannot aid coordination in the absence of the MPA data.

3.15 It is therefore not CEMEX's case that the CC has failed to outline any elements of transparency other than those addressed by the transparency reduction measures set out in the PDR. It is however CEMEX's case that **the CC has failed to outline a model of coordination that can be reached, implemented and monitored in the GB cement market in the absence of MPA data.** CEMEX therefore submits that requiring the publication of MPA data after an appropriate time lag, eliminates transparency *to the extent required to undermine the coordination found by the CC.*

**B. Given the structural susceptibility of the market to coordination, there is a risk that coordination will re-establish itself even in the absence of certain market information**

3.16 The CC has outlined a particular model of coordination which is based on the ability of GB cement producers to calculate their own share of GB sales (which is not possible without the MPA data). The logical remedy for this model of coordination is to eliminate the market information (i.e. the MPA data) which gives rise to the transparency permitting each GB producer to calculate its own share of GB sales.

3.17 However, the CC now wishes to 'shift the goalposts' and impose measures which not only remedy the coordination identified by the CC but any future (and hypothetical) model of coordination which may arise. The CC's view is that such extreme measures are necessary given the "structural susceptibility of the market to coordination". However, the CC's flawed logic would mean that structural remedies can be imposed even in markets in which there is no actual coordination but which are merely 'susceptible to coordination'.

3.18 CEMEX submits that such an approach is grossly disproportionate and has no basis in law. In this regard, CEMEX notes that in *Airtours* the Court of First Instance (now the General Court) explicitly stated that in making a finding of collective dominance, the Commission must carry out a "*prospective analysis*", which "*calls for **close examination** in particular of the circumstances which, in **each individual case**, are relevant for assessing the effects of the concentration on competition in the reference market.*"<sup>8</sup> (Emphasis added).

3.19 The requirement to find a specific and "plausible" model of coordination when assessing a reference market was further outlined by the European Court of Justice in *Impala v. Commission* where it found, "*it is essential that such an investigation [of a pre-existing dominant position] be carried out **with care** and, **above all**, that it should adopt an approach based on the analysis*

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<sup>8</sup> *Airtours v. Commission, Case T-342/99*, para. 63.

of **such plausible coordination strategies as may exist** in the circumstances.”<sup>9</sup> (Emphasis added).

3.20 The ECJ then went on to state that (the relevant part of) the CFI's judgment was vitiated as “...*the Court of First Instance...did not carry out its analysis of those parts by having regard to a **postulated monitoring mechanism forming part of a plausible theory of tacit coordination.***”<sup>10</sup> (Emphasis added).

3.21 It is therefore clear that in making its finding of coordination (and imposing measures to remedy the same) the CC must have reference to a specific and plausible theory of coordination, which must be closely examined and analysed with care. A merely hypothetical and speculative theory of coordination does not suffice. As such, the CC would be committing a serious reviewable error if it imposes non-behavioural remedies in a market merely on the basis that it is "susceptible to coordination" without evidence or analysis of such alternative (and hypothetical) models of coordination.

### **C. The transparency reduction measures do not address the CC's concerns regarding the GGBS supply chain**

3.22 CEMEX has not commented on the measures proposed by the CC in relation to the GGBS market but notes that the CC has failed to properly explain why a combination of the structural measures proposed in the GGBS market with the transparency reduction measures in the cement market would not address the CC's concerns in *both* the cement market and the GGBS supply chain.

3.23 The CC states that one of the reasons the transparency reduction measures are not adequate to remedy the AEC in the GB cement market is because it does not address concerns in the GGBS supply chain. The CC then argues that a GGBS structural remedy does not, by itself, address the concerns in the GB cement market. On this basis, the CC concludes that a divestment of a GB cement plant is required (supported by divestments of RMX plants).

3.24 With respect, this 'smoke and mirrors' approach by the CC misses the point: The transparency reduction measures are, by themselves, adequate to address the AEC identified in the GB cement market (and may or may not address concerns relating to the GGBS supply chain) and the measures proposed to increase competition in the GGBS supply chain remedy the concerns in relation to the GGBS market. It therefore follows that a combination of transparency reduction measures along with measures to increase competition in the GGBS supply chain, remedies concerns in *both* the cement and GGBS markets.

3.25 CEMEX therefore submits that the CC has not explained, to the required legal standard, why a remedy delaying the publication of MPA data after an appropriate time lag (and reinforced by a prohibition on generic price announcement letters) is not adequate to remedy the CC's concerns in the GB cement market.

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<sup>9</sup> *Impala v Commission*, Case C-413/06 P, para. 129.

<sup>10</sup> *Impala v Commission*, Case C-413/06 P, para. 130.

3.26 In view of the above, the CC will be committing a serious reviewable error if it continues to maintain that an irreversible, intrusive and disproportionate structural remedy is required to remedy the alleged AEC in the GB cement market.

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## **CEMENT REMEDIES PROVISIONALLY DECIDED BY THE CC**

- 4.1 As set out above, it is CEMEX's view that an irreversible structural cement remedy is unnecessary and disproportionate in the circumstances and behavioural remedies are adequate to remedy the alleged AEC in the GB cement market.
- 4.2 However, if notwithstanding CEMEX's arguments, the CC continues to maintain that a cement divestiture is necessary, it is CEMEX's view that the CC's proposed structural remedies (intrusive as they are) are more than adequate to remedy any hypothetical coordination and should not be extended any further - particularly in light of the serious deficiencies in the CC's analysis (on which, see Section 2 above).
- 4.3 CEMEX further notes that its comments in this section are made specifically in the context of the GB cement market and are not applicable more widely in the context of other EU, or worldwide, cement markets.

### **1. CEMENT PLANT DIVESTITURE**

- 4.4 CEMEX notes that the PDR states that one of the Cauldron or Tunstead plants should be divested. CEMEX wishes to make a limited number of points in relation to this provisional remedy.

#### ***A. Cement plant selected for divestiture***

- 4.5 CEMEX notes that the CC has stated that the cement plants selected for divestiture should have the following characteristics:
- (a) the plant should be a modern dry – process cement plant;
  - (b) the plant should operate two active kilns;
  - (c) the plant should produce at least 1 MT of cement each year;<sup>11</sup>
  - (d) the geographic reach and distribution capabilities of the plant (whether rail linked or not) should be suitable; and
  - (e) the plant should be located on, or close to, its own natural source of limestone with sufficient permitted reserves.
- 4.6 While CEMEX is unable to comment on whether other cement producers' plants meet the criteria set out above, it wishes to reiterate that neither of its two cement plants meet these criteria and the provisional remedy should not be extended to CEMEX's cement plants in the Final Report (assuming the CC maintains its erroneous view that there is an AEC).
- 4.7 As set out in CEMEX's response to the Notice of Possible Remedies, and acknowledged by the CC in the PDR, CEMEX's Rugby plant follows a semi-wet process of cement production and is not rail-linked. Further, Rugby is not situated on its quarry and substantial costs are incurred in order to transport raw materials from CEMEX's quarry, some 60 miles, to the Rugby plant. Further, Rugby

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<sup>11</sup> CEMEX also notes that the OFT said that the CC should consider the minimum plant size required for sustainable operation.

is a technically demanding plant to operate. It is therefore clear that the Rugby plant fails to meet many of the key criteria set out by the CC for a suitable plant for divestiture.

4.8 In addition, as the CC has noted, the divestiture of Rugby would make CEMEX a smaller competitor such that it would not be able to compete effectively in the GB cement market. It would therefore be both ineffective and disproportionate to require CEMEX to divest the Rugby plant in the Final Report.

4.9 In relation to South Ferriby, CEMEX notes that its active capacity is [X] MT ([X] MT including the mothballed kiln) and this is significantly below the CC's desired capacity of 1 MT. In addition, South Ferriby follows only a semi-dry process of cement production and is not rail linked. It is therefore clear that South Ferriby fails to meet a number of the key criteria set out by the CC for a suitable plant divestiture.

4.10 CEMEX wishes to reiterate that, in its view, a cement plant divestiture is not necessary and is disproportionate. However, to the extent that the CC maintains that a cement plant divestiture is necessary, even on the CC's own criteria, neither of CEMEX's two cement plants would be suitable for divestiture, and it would be wholly disproportionate to require CEMEX to divest either of them.

#### ***B. Number of cement plants to be divested***

4.11 CEMEX notes that the CC has considered the possibility of divesting more than one cement plant in order to remedy the alleged coordination identified. CEMEX strongly agrees with the CC's conclusion that, if the CC considers it to be necessary to require a cement plant divestiture, not more than one plant should be divested.

4.12 First, CEMEX notes that the CC's calculations show that the divestiture of a single cement plant would give market participants outside the hypothetically coordinating group a market share of 35% – 45%. CEMEX's calculations indicate that this figure is likely to be towards the upper end of the range cited by the CC (i.e. greater than 40%). CEMEX would consider it grossly disproportionate to require divestment of further cement capacity in a market where there is such a significant constraint from outside of the hypothetically coordinating group. In this regard, for example, there have been cases where the European Commission has found that a non-coordinating group holding over 20% of the market could be sufficient to exert a competitive constraint on any alleged coordinating group".<sup>12</sup>

4.13 Second, the CC has to take into account the very disruptive impact the divestiture of a further cement plant would have on the existing cement producer required to divest the plant. In CEMEX's case, the divestiture of either of its two cement plants would very significantly weaken CEMEX as an effective competitor as without its entire network of assets (particularly one of only two CEMEX plants), CEMEX will not be able to offer cement purchasers security of supply.

4.14 Third, the CC must view the impact of the cement divestiture remedies in conjunction with the significant transparency reduction and GGBS/GBS remedies that it is seeking to impose. Viewed

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<sup>12</sup> See Frances Dethmers *Collective dominance under EC merger control - after Airtours and the introduction of unilateral effects is there still a future for collective dominance?* E.C.L.R. 2005, 26(11), 638-649.

as a package, the remedies proposed by the CC are, in CEMEX's view, already more than sufficient to remedy the alleged AEC and are extremely intrusive. In this context, to require the divestment of a second cement plant would be grossly disproportionate.

4.15 For the reasons set out above, CEMEX believes that the CC should not be considering the divestiture of more than one cement plant and will vigorously defend any requirement to divest any of its cement capacity.

#### ***C. Treatment of GB cement producers***

4.16 CEMEX notes that the CC has considered whether its decision to order cement plant divestitures from only one of the Top 3 results in the CC unduly penalizing one undertaking more than its rivals.

4.17 To the extent that the CC continues to maintain that a cement plant divestiture is necessary to remedy the hypothetical coordination identified, for the reasons set out above, it is CEMEX's view that such divestiture should be limited to a single suitable cement plant.

4.18 It is therefore inevitable that only one cement producer will be affected by the cement plant divestiture. CEMEX does not consider that further divestiture of cement capacity should be required from any GB cement producer solely to ensure that each producer is similarly affected by the CC's decision. Such an approach would not be effective in the addressing the AEC, would unnecessarily impose costs on CEMEX and other GB producers and be totally disproportionate in achieving the CC's aim of remedying the AEC identified.

#### ***D. Divestiture of RMX plants to support cement divestiture***

4.19 CEMEX notes that the CC has provisionally decided that seven large scale RMX plants or 20 small scale RMX plants should be divested in order to support the new entrant purchasing the cement plant.

4.20 CEMEX reiterates that it is not necessary for a cement producer to be vertically integrated with RMX plants in order to be viable. There is significant evidence both within GB and in other jurisdictions that standalone cement plants, or cement plants with no or very low levels of vertical integration with RMX plants, are viable and effective competitors.

4.21 However, to the extent that the CC continues to maintain that RMX plant divestitures are necessary in order for the cement plant divestiture to be effective, CEMEX strongly agrees with the CC that such divestitures should only come from the party divesting the cement plant and not from other GB producers.

4.22 As the CC has noted, there are significant logistical advantages to an RMX plant being within the 'catchment area' of the cement plant it is supplied from and, further, a 'mix' and 'match' remedy requiring divestiture of cement plants and RMX plants from different operators would create significant complexity and uncertainty in the divestiture process, resulting in an unacceptable composition risk. In this regard, CEMEX notes that the CC's own merger remedies guidance states that it has a preference for avoiding 'mix and match' divestitures as "*divestiture of a mixture of assets from both merger parties...may create additional composition risks such that the divestiture*

*package will not function effectively. Therefore, if divestiture of a set of assets or parts of a business is proposed rather than a complete business, it will normally be preferable for all the assets to be provided by one of the merger parties...”<sup>13</sup>*

- 4.23 In relation to a ‘mix and match; divestiture creating further complexity, CEMEX is particularly concerned that, if the CC were to require cement and RMX divestitures to be from different GB producers, there is a risk that once the first divestiture (e.g. cement) is completed the purchaser, knowing that the RMX divesting party is bound to sell to it, will be able to negotiate a very low price for the RMX assets.
- 4.24 In addition, as set out by CEMEX in its ‘Issues for Comment Response’, RMX is [X] for CEMEX and divestiture of profitable RMX plants (which are used to cross-subsidise loss making plants) would have a severe financial impact on any vertically integrated producer. [X]
- 4.25 For the reasons set out above, CEMEX strongly believes that to the extent that the CC considers in its Final Report that RMX divestitures are necessary, these divestitures should not be required from CEMEX.
- 4.26 CEMEX also wishes to note that it agrees with the CC that a cement purchaser should be able to opt-out from acquiring any RMX plants.

#### ***E. Suitable Purchaser***

- 4.27 At this stage, CEMEX does not wish to make any comments on the CC's purchaser suitability assessment in relation to the cement divestiture. However, CEMEX reserves its right to comment in detail on the purchaser proposed by the CC at the appropriate consultation stage.
- 4.28 As a point of clarification, CEMEX notes that the PDR states at para. 3.165 that the cement plant purchaser should not have any financial or structural links with Lafarge Tarmac, CEMEX or Hanson. CEMEX considers that, in the interests of equal treatment, the purchaser should not be permitted to have any links with HCM and requests the CC to confirm this.

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<sup>13</sup> *Merger Remedies: Competition Commission Guidelines*, para. 3.12.

## **5 REMEDY MEASURES NOT INCLUDED IN THE CC'S PACKAGE OF PROPOSED REMEDIES**

5.1 In this section, CEMEX sets out its views on two of the remedies measures considered by the CC in the Notice of Possible Remedies but not proposed in the PDR. As the CC has rightly recognised, such remedies are not necessary and would be both ineffective and disproportionate .

### **1. Option X1 – RMX plant divestitures by one or more of the Top 3**

5.2 CEMEX strongly agrees with the CC that divestiture of standalone RMX plants from one of the Top 3 cement producers is not an appropriate remedy to address the AEC identified

5.3 CEMEX notes that the CC has stated that a remedy targeted solely at decreasing the level of vertical integration within GB cement producers would be unlikely to remedy the AEC identified. Further, the CC acknowledges that it would be disproportionate to require GB cement producers to divest RMX plants in addition to the remedies already proposed by the CC.

5.4 While CEMEX agrees with the CC's comments above, it notes that the CC has failed to acknowledge that a standalone RMX remedy (whether or not combined with other remedies proposed by the CC) would not only be disproportionate but also totally ineffective in achieving the aims identified by the CC in the Notice of Possible Remedies.

5.5 For the reasons set out in CEMEX's response to the Notice of Possible Remedies, a RMX remedy would not:

- (a) reduce barriers to entry;
- (b) result in a material increase in the size of the addressable market or a reduction in cross-sales (unless a large and disproportionate number of RMX plants are divested);
- (c) result in countervailing buyer power; or
- (d) materially increase the focus on the addressable market.

5.6 In addition, while the divestiture of RMX plants may, theoretically, lead to a reduction in transparency, this reduction in transparency will not be material and a significant reduction in transparency cannot be achieved without the sale of all RMX plants, which would be disproportionate.

5.7 For all of the reasons set out above, CEMEX agrees with the CC's decision not to adopt remedy option X1 and in CEMEX's view, in light of the CC's comments in the PDR, no further consideration should be given to this remedy option in the Final Report.

### **2. Divestiture of standalone grinding station**

5.8 CEMEX notes that the CC has rejected the divestiture of a standalone grinding station as a remedy, primarily due to the disadvantages faced by the operator of a standalone grinding station in sourcing clinker.

- 5.9 CEMEX strongly agrees with the CC that the operator of a standalone grinding station would not be an effective competitor. However, CEMEX would go further and add that the divestiture of its Tilbury grinding mill, even if sold to the same purchaser acquiring a cement plant (i.e. it is not standalone) would be ineffective and disproportionate to remedy the AEC identified.
- 5.10 A grinding mill would only be useful to an operator which already owns a cement plant, which produces excess clinker and requires extra grinding capacity. [✂]
- 5.11 [✂]
- 5.12 Finally, the sale of Tilbury would be disproportionate as it would weaken CEMEX significantly as, without its entire network of assets, CEMEX would be less able to offer cement purchasers the security of supply they demand.
- 5.13 In light of the above, in CEMEX's view, no further consideration should be given to possible sale of the Tilbury grinding mill, either on a standalone or vertically integrated basis.

**CEMEX UK OPERATIONS LIMITED**

**1 November 2013**

**ANNEX 1 (previously submitted and published as part of response to the Provisional Findings report)**

**CEMEX'S OBSERVATIONS ON THE CC'S ANALYSIS OF GB PRODUCERS' PROFITABILITY**

**1 Industry profits are not higher than would be expected in a competitive market**

1.1 The Competition Commission (CC) concludes that pricing has been excessive, partly on the basis of its analysis of the profitability of the cement producers. Here we comment on the CC's findings in relation to profitability. In particular:

1.2 We do not agree with CC's approach to measuring profitability for reasons discussed below. Further, even if the CC's analysis was reasonable, it does not support a conclusion that profits are excessive. Finally, we note that CEMEX's profitability is much lower than for the industry as a whole, suggesting that it is other producers that are driving the conclusions reached by the CC.

**2 The CC's profitability analysis is novel, complex and sensitive to assumptions and methodological approaches used.**

2.1 In our response to the CC's earlier "Current cost accounting profitability assessment for cement" working paper we commented at length on the methodology adopted by the CC for estimating profitability. Our comments focused on the unusual and untried approach the CC has adopted for calculating the CCA asset values and ROCE, noting that a number of the assumptions that the CC had made in the course of its analysis had not been robustly justified. In particular, we questioned:

- (a) the CC's calculation of CCA asset values and its use of a declining balance depreciation curve;
- (b) the CC's evaluation of EBIT;
- (c) the CC's estimate of WACC; and
- (d) the failure of the CC to apply further downside sensitivities to the ROCE based on CCA.

2.2 We note that in the Provisional Findings the CC acknowledges some of the uncertainties around its analysis and methodology. However, ultimately, the CC has adopted exactly the same approach as in its original working paper.

2.3 We do not repeat our critique of the CC's method again at length here, but we remain of the opinion that the CC's methodology is not robust enough for robust conclusions about excess profitability to be drawn on the basis of it. We do, however, reiterate some of the key points we made previously and where appropriate address updated comments and analysis presented by the CC.

- 2.4 Our principal overall concern with the CC's approach is that the CC's method is extraordinarily complex and depends on a large number of assumptions. The level of complexity is greater than any we have encountered in these types of market investigations and is far beyond the complexity of the method adopted by the CC for the concurrent investigation into the private healthcare market. Given this complexity, the CC should take great care in interpreting its results, because the notional adjustments it makes to derive ROCE have a high potential for error.
- 2.5 We have a number of other concerns with the CC's approach, which are set out below.
- 2.6 The CC's rationale for assuming the new asset costs of £170m for a 1 Mt plant (2007 prices) is still not clear based on the evidence presented. For example, the specification of the plant is not in line with the characteristics of the plant used by CEMEX. Further, as noted previously, some of the evidence presented by the CC for justifying its assumption actually points to a higher cost for new assets. This may be why the CC has considered a sensitivity analysis where new assets are assumed to have a value of £200m (2007 prices) and which reduces average industry ROCE substantially to 11.4% from 13.3%.
- 2.7 The CC continues to assume a declining balance depreciation profile (with an annual diminution rate of 3.5%), but this approach is still not better justified than the use of a straight line depreciation profile. In this respect we note that the CC is considering "developing a custom depreciation profile to refine our analysis of GB cement producers' profitability" (Appendix 7.7, paragraph 118). If the CC does develop a bespoke depreciation profile we believe it should take into account that the value of a cement plant does not decrease rapidly with age:
- (a) Because technology in the industry is not advancing rapidly there is no reason to assume that new plant should rapidly decrease in value.
  - (b) As the characteristics of plant currently (and recently) in use indicates, plant may have very long asset lives and can potentially continue to be operational even where the technology used has been superseded. This suggests that the value of older plant should only decrease slowly.
- 2.8 These factors point, in our view, to the possibility that the bespoke depreciation profile could make use of a straight line depreciation profile (assuming a 50 year asset life, assuming the CC retains this assumption) for the initial years of an asset's life before transitioning to a profile closer to the declining balance profile already used by the CC. We would suggest that the point where the two profiles cross would be an appropriate point to transition from one to the other in order to avoid step changes in asset lives.
- 2.9 The CC also continues to assume that expectations about production for a given year – which the CC uses to calculate annual asset revaluations - would be formed solely on the basis of the previous year's outturn production. However, factors such as expected

economic and market conditions, asset condition and performance and the behaviour of competitors (which are amongst the factors considered by CEMEX when undertaking its annual planning) are all likely to feed into expected production levels. The CC needs to take these factors into account in its methodology.

2.10 The CC may have continued to overstate asset price inflation in its calculations. As we noted in our previous response the CC's assumed asset price inflation rate does not appear to be based on any particular evidence, but our analysis of Output Price Index for New Construction data from the Office of National Statistics (ONS) suggests that asset price inflation was closer to 0.7% p.a. over the five year period. As we noted in our previous response, reducing the assumed asset price inflation rate to 1.5% p.a. (roughly half-way between the CC's assumption and the rate suggested by the ONS data cited above) reduces industry ROCE by around 70 bps (i.e. from [X]), indicating that the results of the analysis are sensitive to this assumption and that the CC needs to justify its choice of assumed inflation more robustly.

2.11 The CC has retained its assumption that intangible assets have no value in the CCA calculation. While it might be anticipated that the magnitude of any intangible assets is small, there is likely to be some value attached to intangible assets like [X]. The inclusion of these assets would increase the overall asset valuation, reducing the calculated ROCE. Whilst it might be difficult to value these costs, the CC must accept (under its CCA approach) that a new entrant is likely to incur additional costs to build its brand, to develop know how and processes. Hence, this factor must be considered when interpreting the gap between ROCE and WACC.

### **3 The CC's analysis does not support a conclusion of excessive profits**

3.1 Noting all of the comments above it is clear that the CC's method is of questionable robustness – most of the assumptions made can be challenged on a variety of grounds. In addition, there are a number of methodological issues with the CC's approach to WACC that suggest a higher WACC range would be appropriate.

3.2 It should also be noted that even on the CC's own analysis the estimate of ROCE (13.3% on average for the industry over the 2007-11 period) is not significantly higher than the estimated WACC (8.2 – 11.5%). Sensitivity analysis illustrates the precariousness of the CC's conclusions - our analysis shows that the CC's results are sensitive to many of the assumptions that have been made and that under a range of plausible alternative assumptions the estimated ROCE does not exceed WACC. In this regard we note that the CC's own limited sensitivity analysis suggested that ROCE could be as low as 11.4%, inside the CC's WACC range.

3.3 In addition, on the application of further sensitivities described above and in CEMEX's response to the working paper on profitability on a CCA basis, we find that the estimate of ROCE falls even further.

**Table 1: Sensitivity Analysis**

<b>Parameter</b>	<b>Original</b>	<b>Sensitivity</b>	<b>Average ROCE on a CCA basis</b>
Cost of new plant	[X]	[X]	[X]
Diminution Rate	[X]	[X]	[X]
Asset price inflation rate	[X]	[X]	[X]
Combined adjustments			[X]

- 3.4 Overall, the sensitivity analysis illustrates that the estimated ROCE range is materially impacted by relatively minor changes in parameter values. For example, assuming asset price inflation of [X]% p.a. instead of [X]% p.a. reduces the average ROCE by around [X] ppts to [X]%.
- 3.5 If each of the reasonable downside sensitivities presented in the table above were combined (i.e. asset values of £[X], diminution rate of [X]% p.a., and asset price inflation of [X]%) then the estimated ROCE falls to [X]%, well below the CC's central estimate of the WACC ([X]%) and only slightly above the bottom end of the range – both of which we would say is likely to be too low for the reasons given earlier. In addition, we consider that further downside sensitivities could be modelled such as ascribing a value to intangible assets (see paragraph 2.11 above) and taking into account the uncertainties regarding cement production (see paragraph 2.9 above). This would further reduce the ROCE calculated by the CC.
- 3.6 There is further reason to be cautious about interpreting the CC's analysis: the gap between ROCE and WACC is too small to draw robust conclusions from. This is because in a competitive market we would expect to see observed returns in excess of WACC due to a survivor bias: the firms which are most efficient and profitable are the ones that are most likely to survive and consequently the most likely to be observed by the CC.
- 3.7 Overall, there is so much uncertainty around the estimates of ROCE and WACC presented (especially ROCE) that in our view it is not possible for the CC to draw a robust conclusion of high ('excess') profitability. In fact, the evidence suggests profitability has not been excessive. This is especially the case because of the CC uses an unusual and assumption-sensitive methodology to estimate CCA values which we have demonstrated can produce estimates of ROCE much lower than the CC's own estimates and lower than the estimated WACC under a range of plausible alternative assumptions. In these novel circumstances we

think the results would need to have produced a much wider gap between ROCE and WACC before any reasonably firm conclusions about excessive profitability could be inferred – in our opinion there is no obvious preponderance of evidence pointing in that direction.

#### **4 CEMEX's contribution to industry profitability**

- 4.1 Notwithstanding CEMEX's serious objections to the methodology used by the CC to arrive at this conclusion, it is clear that even using the CC's own methodology, CEMEX's individual profitability is not excessive.
- 4.2 In this regard CEMEX notes from Table 12c of the CC's working paper on CCA profitability that its ROCE on a CCA basis across 2007 – 2011 is, on average, [X]%.<sup>1</sup> This is significantly lower than the average ROCE of the other GB cement producers of [X]% and below even the bottom end of the CC's WACC range, which is 8.2%.<sup>2</sup>
- 4.3 Further, Table 12c indicates that, even using the CC's ROCE figure reflecting all costs incurred, CEMEX's ROCE on this measure across 2007 – 2011 is [X]% compared to the [X]% average for GB cement producers.<sup>3</sup> This return on capital is within the range of the CC's estimate of the WACC (8.2%-11.5%) and is not materially different to the CC's midpoint WACC estimate.
- 4.4 CEMEX notes that no downside sensitivities<sup>4</sup> have been applied to the [X]% figure of ROCE (the CC's CCA estimate) and [X]% figure of ROCE (the CC's estimate reflecting all costs incurred). Keeping in mind that the GB cement producers' average ROCE on a CCA basis reduced from [X] on the application of reasonable downside sensitivities,<sup>5</sup> it is reasonable to assume that both the [X]% and the [X]% CEMEX ROCE figures cited above would be considerably reduced on the application of these reasonable downside sensitivities.
- 4.5 Therefore, on the CC's own analysis, CEMEX's profitability is not higher than its cost of capital and may well be below its cost of capital. It is, in any case, the lowest profitability of all the GB cement producers.

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<sup>1</sup> CC Working Paper on CCA Profitability Assessment for Cement, Table 12(c), p.55.

<sup>2</sup> CC Working Paper on CCA Profitability Assessment for Cement, Annex 1, para 2.

<sup>3</sup> CC Working Paper on CCA Profitability Assessment for Cement, Table 1, p.6.

<sup>4</sup> CC Provisional Findings Report, at Table 7.12.

<sup>5</sup> See Section 3 above.

## ANNEX 2

### QUESTIONS IN RELATION TO PROPOSED TRANSPARENCY REDUCTION MEASURES

#### 1 RESTRICTIONS ON DISCLOSURE OF GB CEMENT MARKET DATA

- 1.1 CEMEX notes that the CC has provisionally decided that for each set of monthly, quarterly and annual GB cement market data that is currently published by the MPA and BIS there should be a time lag of no less than three months before the data can be made public.
- 1.2 CEMEX wishes to request a limited number of clarifications in relation to the remedy proposed:
- (a) first, CEMEX notes that GB cement producers are permitted to provide its data to third parties so long as the third party does not receive data from any other GB cement producer and the output is only used for internal consumption by the GB cement producer which had engaged the third party. However, the same third party consultant can be used for a variety of different projects by different cement producers which would require GB cement producers to provide data to the same third party. CEMEX assumes that the CC Order will not prohibit GB producers from providing individualised data to the same third party at different times and for different projects. In these circumstances, rather than requiring GB cement producers to ensure that the relevant third party has not received data from another GB producers, it would be more appropriate for the relevant Order to require third parties receiving such data to put in place appropriate confidentiality measures and ensure that the output for a particular project is only provided to the party instructing the consultant on that project;
  - (b) secondly, the PDR states that the release of individual firm data should be prohibited even after 3 months. CEMEX requests the CC to clarify after what time lag the release of individual firm data would be permitted. CEMEX considers that it should be permitted to release such data after a 12 month time lag, in line with the European Commission's decisional practice.<sup>1</sup>
- 1.3 CEMEX agrees with the CC that this remedy should be implemented by Order, which should, as explained above, cover third party consultant conduct.

#### 2 PRICE ANNOUNCEMENT LETTERS REMEDY

- 2.1 CEMEX notes that the CC has provisionally decided that GB cement producers should be prohibited from sending generic price announcement letters to all their customers for all forms of cementitious materials.
- 2.2 CEMEX requests the CC to clarify two points in this regard in its Final Report or the relevant Order:
- (a) first, CEMEX notes that the prohibition applies to all forms of written communication. CEMEX expects that the prohibition on generic announcements relates only to price and not to other generic announcements (e.g. relating to a product launch) and requests the CC to confirm this; and

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<sup>1</sup> See Case IV/31.370, *UK Agricultural Tractor Exchange*.

(b) second, as the CC is aware, CEMEX already has a policy of sending customised price announcement letters. CEMEX's price announcement letters not only contain a separate element for fuel surcharge (as suggested by the CC) but also separate charges for [✂]

2.3 CEMEX agrees with the CC that no mandatory format should be used for price announcement letters and that this remedy should be adopted by Order.