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Abstract:

In this, our final submission to the Competition Commission in relation to its market investigation of the Aggregates, Cement and Ready-mix Concrete sector, we comment on the extent and adequacy of the Competition Commission's investigation with a view to highlighting aspects of the investigation / findings that we believe fall short and in the main, we attribute any short comings of the investigation to noted resource constraints. We then comment on the adequacy and effectiveness of the proposed remedies as detailed in the provisional decision on remedies. Finally we suggest that the remedies proposed be termed "Interim Remedies" in order to allow the Competition Commission monitor results and assess the outcome of the ongoing European Commission investigation into the European Cement industry. For ease of reference, we herewith reproduce the Terms of Reference of the market investigation.

TERMS OF REFERENCE

1. The OFT, in exercise of its powers under sections 131 and 133 of the Enterprise Act 2002 (the Act), hereby makes a reference to the Competition Commission for an investigation into the supply or acquisition of aggregates, cement and readymix concrete.

2. In accordance with section 133(2) and (3) (a) and (b) of the Act, the Competition Commission shall confine its investigation to the effects of features of such market or markets as exist in connection with the supply or acquisition of such goods or services in Great Britain.

3. The OFT has reasonable grounds for suspecting that a feature or combination of features of the market or markets for aggregates, cement and readymix concrete in Great Britain prevents, restricts or distorts competition in connection with their supply or acquisition in Great Britain.

4. For the purposes of this reference:

- Aggregates includes primary, secondary and recycled aggregates;
- Cement means grey cement;
- Ready-mix concrete includes on-site batching (volumetric trucks).

INTRODUCTION:

The Competition Commission and indeed the OFT are to be congratulated on a ground breaking analysis of the GB Aggregates, Cement and Ready-mix Concrete markets. The findings represent a sea-change in the UK's approach to Articles 101 / 102 TFEU and are a bold recognition that past policies / decisions created a burden on consumers and independent competitors alike. The Enterprise Act 2002 has become the corner stone of Competition Law and Enforcement in the UK dividing responsibility as it does between the OFT, Competition Commission [CC] and Competition Appeals Tribunal [CAT]. This has allowed the Competition Commission to focus on identifying and remedying competition issues.

Whilst hitherto, international findings in the cement sector have focused on the “horizontal” activities and effects of the international cement cartel, the CC has now examined the “vertical relationship” between cement and other sectors e.g. aggregates and ready-mix concrete [RMX]. While we will attempt to put forward some constructive criticism of the CC’s analysis, there is no doubt but that the analysis / findings provide a guiding template for other Competition Enforcement Agencies around the world in tackling anti-competitive structures and behavior in the construction materials sector.

EXTENT AND ADEQUACY OF THE COMPETITION COMMISSION’S MARKET INVESTIGATION:

1] Time and Resource Constraints:

Whilst the CC investigation has been conducted in a highly professional manner and in accordance with a tight administrative timetable, the scope and extent of the investigation has however been diminished by constraints on available time and resources¹. This in our view has led to a less than adequate analysis of the role and effect of vertical integration in the market for heavy construction materials.

In an ideal world, in which resources were not a constraining factor, the markets for bitumen and bituminous materials would form an integral part of any analysis of the market for heavy construction materials. We refer to confidential documentation relating to the behavior of the bituminous sector furnished by us to this inquiry on June 13th 2013. From our interaction with independent GB asphalt / blacktop producers and potential producers, we should point out that there is a widely held perception that a structure exists in GB for the supply of bitumen similar to that which operated in the Netherlands when the bitumen sector was fined €266.72m in September 2006. Like concrete production, asphalt / blacktop requires a steady supply of quality aggregates and this inquiry has found² that there are some structural features of aggregate supply in GB that may be conducive to coordination

¹ P 30 Summary of Provisional Findings and P 61 Provisional Findings Report

² P 71 Updated Statement of Issues

e.g. the five Majors collectively hold 74/75% of the aggregates market. Indeed the five Majors also dominate the asphalt / blacktop market throughout the UK.

When account is taken of the Majors dominance in the aggregates, cement and RMX markets coupled with the use of discriminatory pricing of inputs such as cement and bitumen, a framework for foreclosure and margin squeeze becomes apparent. In our experience, fear of retaliation or disciplinary action, on the part of independents is sufficient to deter them from entering certain concrete / asphalt / blacktop markets or of expanding existing small scale operations (more on this below).

2] Progress of the European Commission Cement Investigation:

Whilst we accept that the CC's investigation is separate to that of the European Commission's investigation into the European cement market (including GB cement market), nevertheless an outcome from the Brussels's investigation would clearly have benefited the CC's ongoing investigation in terms of market and behavioral analysis. This is one of the reasons we put forward for suggesting that the final decision on remedies be termed "Interim Final Decision on Remedies".

3] Cement Prices / Cost:

From our interaction with independent concrete producers and cement importers, we are of the view that the UK Construction Materials market is skewed with cement being sold at a) artificially high prices and b) discriminatory prices, both of which provide leverage for the Majors to manipulate markets. **The asset test for the effectiveness of the proposed remedies arising from this inquiry will be cement prices.** Will cement prices drop from the present artificially high level or will they merely stabilize? As it stands cement companies (at least Lafarge Tarmac) have sent letters signaling a 7% price increase from January 1st 2014. This is a worrying development for independents and final consumers alike. This inquiry has already found that three of the four producers are making large returns on capital employed and that these returns have persisted, and in some cases have grown, despite the significant downturn in demand since 2007³.

³ P 87 Updated Statement of Issues

Again resource constraints have limited the time period over which the CC has conducted its analysis. A wider time series reflecting historical developments in pricing and market shares of the Majors may well have produced a more robust outcome. Taking data from a single year only, is probably insufficient for the purposes of estimating overall damages brought about through overcharging for cement.

With most of the data in regard to cement pricing having been redacted, it is difficult to make constructive comment on the accuracy of the information provided by the Majors to the CC. However, we are not entirely convinced in relation to the benchmark price for cement for 2011 of £69.50 per tonne.

Evidence has recently come to light that suggests the CC's benchmark price for cement is set too high. ⁴ We believe the benchmark price may be as low as £50 per tonne. Basically there is a conflict of information that we believe warrants further investigation. We have not provided this information to the CC but are willing to further discuss the information that we have obtained.

4] Highlighting Foreclosure in the various markets:

In order to emphasize the “fear factor” and “deterrent effect” that we have previously written about⁵ we provide some quotes from a senior director of a Major integrated company (CRH Plc), which, though not made in the context of the UK market, nevertheless provide some clear indication of the mind-set of Major Integrated Companies.

Major: *Quite simply, as market leader we can clearly have a significant impact on prices up or down and at the end of the day your profitability is affected more by prices....In our situation we have aggs (aggregates) on site, most of our locations*

⁴ P 3 Estimating the Competitive Price of Cement from Cost and Demand Data

⁵ Draft Report for Office of Fair Trading on the Structures and Behaviour of the U.K. Cement Concrete and Aggregates Sector, September 2011 and ISBA submission to CC June 12th 2013.

are reasonably good locations so you know, we can if we want – we can decide that we will work at a lower margin on concrete for the next three years..... So to that extent given the size of the market share which we have, it is quite substantial, we can have an effect on how profitable the business is (that is the independent's business) if the prices go up then clearly the business is more profitable, if prices go down it is less profitable.....Depending on your reserves there is a lower limit which can be quite low.....

The Major then complained about the market share that the independent had captured saying: - *“You would be fairly clear, fairly confident that over a period of time prices won't stay stable at those sort of market volumes”*. A further discussion on low prices took place and the Major stated, in relation to selling below cost that: - *“I don't know what's coming up but that may happen”*.

On top of the numerous variants on foreclosure mentioned above, we should also draw the CC's attention to Section 9 of our report submitted to CC on June 6th 2013⁶ concerning cement shortages. We make a very strong case in suggesting that the shortages were contrived. The above, in our view is the reality of the position that independents find themselves in. We therefore take a somewhat different view than that put forward by the CC in relation to coordination / barriers to entry in the RMX and aggregates markets⁷.

5] Future Calculation of Damages:

Our experience is that the Majors collectively apply the various tactics described above so as to create a barrier to entry / deterrent to expansion. The CC notes that the profitability of the Majors RMX operations has deteriorated a great deal since 2007⁸ but has established that no such deterioration occurred with regard to cement profits⁹. In effect, the Majors are controlling / guaranteeing cement profits through

⁶ Draft Report for Office of Fair Trading on the Structures and Behaviour of the U.K. Cement Concrete and Aggregates Sector, September 2011.

⁷ P 100, 113 Updated Statement of Issues and P 28 Summary of Provisional Findings

⁸ P 100 Updated Statement of Issues

⁹ P 87 Updated Statement of Issues

manipulation of downstream markets. Our views here are consistent with the Theory of Harm proffered by the CC in its summary of provisional findings¹⁰; - *“A variant on this hypothesis is that several integrated suppliers (acting collectively) may be squeezing the margins of non-integrated RMX suppliers”*.

This is a very important point and one that we would like to see greater clarification on because if / when independent producers are calculating damages to their business, it should not simply be a question of arriving at an overcharge per tonne of cement multiplied by the number of tonnes used. **There are actually three separate and distinct headings under which damages claims should be admissible under:-**

- Overcharge per tonne of cement purchased.
- Losses arising from margin squeeze in RMX markets
- Losses resulting from reduced volume of RMX sold due to discriminatory input prices.

6] Requirement to Examine the Role of Innovation in bringing down cement prices, particularly in the production of Green Cement:

Monopolies stifle innovation. The cement industry has barely moved in terms of innovation over hundreds of years. In fact, where new products / technology such as GGBS threaten the status quo, the cement industry has used all its power to suppress the introduction of the new product / technology. A recent decision of the Belgium Competition Council found that Heidelberg, Holcim and Italcementi, together with the Belgian Cement Association and the National Centre for Technical and Scientific Research for the Cement Industry had infringed Article 101TFEU by inter alia colluding with the aim of delaying the adoption of a licence and of standards making it impossible to use GGBS as a component of ready-mix concrete.

It is noteworthy that in parallel, incumbent GB cement companies were in the process of monopolising the production of GGBS in GB and of actively promoting the sale of the product.

¹⁰ P 22 (C) Summary of Provisional Findings

In remarkably similar circumstances, the use of revolutionary new technology¹¹ [EMC Technology] has been stifled in the EU. EMC technology can replace up to 70% of Portland cement usage, requires a fraction of the investment needed compared with Portland cement production, uses 90-95% less energy and produces a 90-95% lesser carbon footprint than Portland cement. EMC technology has been comprehensively proven in the U.S. and is set to make a major impact in China and the Far East with several new EMC facilities set to come on stream from 2014.

The introduction of EMC technology to the GB market has the potential to bring massive savings to the economy in terms of reduced Co2 emissions, significantly cheaper cement substitute and a breakup of (or alternative to) the vertical dominance currently at the heart of competition issues within the sector. Going forward, perhaps the CC would examine the role and /or suppression of innovation in the cement industry. We would urge the CC to further examine the revolutionary impact that EMC Technology can have on competition in the combined markets for aggregates, cement and RMX.

PROVISIONAL DECISION ON REMEDIES

The Competition Commission has provisionally decided on three key remedies as follows:-

- Divestiture of a Cement Plant.
- Reducing Transparency in Cement Markets.
- Divestiture along the GGBS supply chain.

1] Divestment of a Cement Plant:

Of the three proposed remedies, we view the divestiture of either Tunstead or Cauldron cement plant as the most effective. Whilst the Majors might view an order of this magnitude as unnecessary and draconian, especially following the divestment

¹¹ www.emccement.com

of Hope cement plant to Mittel Investments, we however tend to agree with the views put forward by F.E.Gilman¹² and Brett Group¹³ who both were of the view that decoupling ownership of cement from RMX would provide the most effective answer to the AEC. Clearly structural changes as well as behavioural changes are required in the GB market. However, in the interests of proportionality, we are prepared to accept the recommendation of the CC as part of an interim decision. It is our view that divestment of the Tunstead cement plant would contribute most to increasing competitiveness in the UK cement market because of its central location, availability of raw materials, rail link and additional approved production capacity. The fact that Lafarge Tarmac would need to enter a long term supply agreement with the purchaser of Tunstead to supply it with aggregate for its remaining operations should not give rise to concerns. Long term supply agreements are a common feature of the heavy construction materials sector internationally.

On the issue of including downstream RMX operations in a divestiture package, our view is that this will be necessary in order to attract a purchaser but that this reflects the skewed market for cement / RMX and will facilitate the arrival or birth of yet another vertically integrated Major in the UK market. However, independent producers are largely of the view that the standalone divestment of a cement plant would best benefit competition. We will deal with the practicalities of coordination below viz a viz coordinating producers v non coordinating producers.

2] Restrictions on the disclosure of GB cement market data and price announcement letters remedy:

Our views on the impact of these proposed measures largely differ from those of the CC. Our experience suggests that in the eyes of the majors, the more fragmented the cement industry becomes the greater the need for coordination. For example, it was a badly fragmented European cement industry that found it necessary to form Cembureau which in turn was the catalyst for the Cembureau non transshipment agreement (or principle) that led to the European Commission investigation and

¹² P 3.18 Provisional Decision on Remedies

¹³ P 3.19 and 3.90 Provisional Decision on Remedies

decision of 1994. The Commission found that 42 undertakings had coordinated their activities in an elaborate scheme to partition national cement markets throughout Europe. Among those fined were:-

- Heidelberg (GB market participants, formerly Castle Cement)
- Holcim (Holderbank) (GB market participants through Aggregate Industries)
- Lafarge (GB market participants, formerly Blue Circle)
- Titan Cement (GB market participants through Hull cement importation facility)
- CRH – Irish Cement (GB market participants through the former Morrissey cement import terminal at Swansea, Southern Cement import facility based at Ipswich and a further five import terminals acquired from the Dudman Group.
- British Cement Association
- Blue Circle (now Lafarge)
- Castle Cement (now Heidelberg)
- The Rugby Group (now CEMEX)

Coordination back in 1994 was crude, typically consisting of meetings of the various undertakings at locations throughout Europe, where infringements of European Law were openly planned, recorded and implemented. CRH was found to have played a leading role in the formation of the European Cartel¹⁴. A Cembureau Task Force was set up to police the non transshipment rule and a host of actions that infringed European Competition Law were devised in order to protect and maximize the profits of cement producers including penalizing of (*ready-mix*) costumers purchasing imported cement.

Nowadays, coordination / collusion is carried out in a much more sophisticated manner. Gone are the days when representatives from several companies hire hotel rooms and conduct illicit cartel meetings, taking notes and filing them back at the office. The more common form of coordination / collusion / cartel nowadays is structured so that one person from the “lead firm” (usually CEO or close associate) keeps contact on a one to one basis with each or the other market participants. The

¹⁴ Page No. L 343/36 Commission Decision Number IV/33.126 and 33.322 November 30th 1994

ground rules have long been in place. It is only necessary to swap very basic information for coordination to work, i.e. market shares, price increases etc.

For this reason, we do not share the view of the CC¹⁵ that a new entrant/s in the GB cement market would lead to an enlarged group of non-coordinating producers at the expense of the coordinating group. If the new structure is such that profits can be maximized through coordination, then the incentive for non-coordinated producers to join with coordinated producers becomes greater. We stated earlier that the asset test for the effectiveness of the proposed remedies arising from this inquiry will be cement prices. It is our view that the package of remedies proposed by the CC will not lead to a reduction in cement prices from the present artificially high levels.

In summary, while we welcome the proposed restrictions on the disclosure of GB cement market data and price announcement letters and believe that the remedy is both relevant and necessary, we are not convinced that the ability of Majors to coordinate will be effectively restricted by these measures.

3] Divestment of GGBS and GBS facilities:

We wholly support the implementation of this proposed remedy and refer to our comments on the Heidelberg / Hanson Merger in Section 14 of our report submitted to CC on June 6th 2013¹⁶. We submit that allowing the entire UK GGBS capacity to fall into the hands of the cement sector was a fundamental flaw on the part of the E.U. Commission, leading to the present findings of an AEC in the GGBS market. Bearing in mind the points made by the CC in relation to the role of Lafarge Tarmac and Hanson¹⁷ in relation to the distortion of competition in both the GGBS and cement markets, it is worth considering a complete divestment of GGBS capacity in GB to enterprise/s that do not manufacture cement in the UK and do not have a track record in competition law offences.

¹⁵ P 3.32 Provisional Decision on Remedies

¹⁶ Draft Report for Office of Fair Trading on the Structures and Behaviour of the U.K. Cement Concrete and Aggregates Sector, September 2011.

¹⁷ P 85 (C) Addendum to the Provisional Findings: further analysis on GGBS and GBS and Provisional Findings

Purchaser Suitability Criteria

Two of the three remedies devised by the CC involve divestment of either cement production capacity (with associated RMX plants) or GGBS production capacity. The CC's aim is to remove an AEC, namely coordination in the cement and GGBS markets or both.

We also note from the terms of reference that *"in accordance with section 133(2) and (3) (a) and (b) of the Act, the Competition Commission shall confine its investigation to the effects of features of such market or markets as exist in connection with the supply or acquisition of such goods or services in Great Britain"*.

We agree that when the CC is making a determination on purchaser suitability, the setting of criteria that merely prevents an existing GB cement manufacturer from purchasing divested assets would be grossly deficient. It is clear from the views expressed by several of the Majors that an existing cement manufacturer would be favoured by them to acquire assets to be divested. This is hardly surprising as most European cement producers are well known to each other and most have fallen foul of European competition regulators at some stage.

Allowing Mittal Investments¹⁸ to purchase any of the assets to be divested would run counter to the theory espoused by this inquiry and thus could not sit comfortably with the aims and objectives in removing the AEC. Allowing Mittal Investments to double in size, literally overnight, would only serve to ramp up incentives for coordination among cement producers.

We thought Hanson made a very telling contribution in questioning potential purchaser's appetite for the cement plant to be divested owing to the level of interest from competition regulators in the cement market.¹⁹

¹⁸ P 3.150 Provisional Decision on Remedies

¹⁹ P 3.151 Provisional Decision on Remedies

CRH has expressed an interest in purchasing a cement plant²⁰. However, CRH has been involved in multiple infringements of competition law along with existing participants in the GB aggregates, cement and RMX markets, Lafarge, CEMEX, Heidelberg and Holcim. In addition, CRH has been fined €530k for destroying evidence and obstructing the Polish Competition and Consumer Commission during a dawn raid on its premises. CRH also has considerable excess capacity in Ireland and has recently taken over a host of cement importation facilities around the GB coast. Former CEO of the OFT Dr. John Fingleton, in his then capacity as head of the Irish Competition Authority stated that CRH had used small concrete producers “as proxies for the consumer”. Further, CRH is embroiled in competition litigation with a number of plaintiffs in the Republic of Ireland²¹.

Similarly, we believe that Holcim should not be considered a suitable purchaser for either cement or GGBS plants to be divested. Allowing further and unnecessary vertical integration to take place in the UK market would only further exacerbate the core competition problem- vertical integration. Holcim also has a history of competition law infringements.

The CC lists in its guidance criteria for suitable buyers, that a suitable buyer will have *“the appropriate expertise, commitment and financial resources to operate and develop the divestiture business as an effective competitor”*. Several of the majors also suggest that an incoming purchaser should have the necessary expertise and knowledge of the cement market. However, it should be noted that Mittal Investments had no previous involvement in the cement, concrete or aggregates markets before its £272m investment in the GB heavy construction materials market through Hope Construction Materials

It must be assumed that any party making such a substantial investment in the sector will be fully committed to its new role and have the ability to procure the necessary expertise required to efficiently run a cement or GGBS operation.

²⁰ P 3.155 Provisional Decision on Remedies

²¹ See published articles on CRH in Ireland’s Village Magazine

ISBA is available to further discuss these issues or to provide any additional information or clarifications that the Competition Commission may from time to time require.

Ends.