

AGGREGATES, CEMENT AND READY-MIX CONCRETE MARKET INVESTIGATION

CEMEX RESPONSE TO CC NOTICE OF POSSIBLE REMEDIES

1 INTRODUCTION

- 1.1 In this response, CEMEX UK Operations Limited (“CEMEX”) sets out its views on the notice of possible remedies (the “Notice”), dated 21 May 2013, and the remedies options that the CC considers may be necessary for the purposes of remedying the adverse effect on competition (“AEC”) identified in its Provisional Findings Report (the “PF”).
- 1.2 CEMEX notes that, while it agrees with the CC’s provisional findings insofar as they relate to the aggregates and RMX markets, it strongly disagrees with the CC’s provisional findings in respect of the cement market.
- 1.3 CEMEX will provide a separate response to the PF, taking account of material in the data room, setting out the reasons why the CC’s provisional findings are incorrect and there is no coordination, and hence why there is no AEC in the GB cement market.
- 1.4 CEMEX’s response to the Notice is therefore made without prejudice to its previous submissions and responses, which include, inter alia, responses to the CC’s Working Papers and to the CC’s Initial and Updated Issues Statements. In addition, this response is without prejudice to CEMEX’s response to the PF or any right to appeal all or part of the CC’s Final Report.¹
- 1.5 Section 2 summarises the key points of CEMEX’s response.
- 1.6 Section 3 summarises the points most relevant to the CC’s assessment of remedies.
- 1.7 Without prejudice to CEMEX’s view that no remedies are necessary, Section 4 sets out a remedy (or, in default, a package of remedies) that would address the alleged AEC identified by the CC, which is no more onerous than is required to achieve its aims.
- 1.8 Section 5 sets out CEMEX’s views on the effectiveness and proportionality of the possible remedies identified by the CC in the Notice. In particular, it explains why a divestiture of cement production capacity and/or RMX plants would be neither effective nor proportionate – particularly given that the remedies package set out in Section 4 would remedy the AEC completely and in a more proportionate manner.

¹ In particular, CEMEX has serious reservations regarding the CC’s profitability and margins analysis and its analysis on the impact of HCM and importers on the alleged coordination identified. CEMEX will be responding strongly on these points, and other errors in the CC’s analysis, in its response to the PF.

2 EXECUTIVE SUMMARY

2.1 The CC has not been able to demonstrate that there is an AEC in the GB cement market and that therefore no remedies are necessary. However, if notwithstanding CEMEX's arguments, the CC continues to maintain that it has found an AEC, this document sets out CEMEX's views on an appropriate package of remedies to address the alleged AEC (Section 4) and explains why a divestiture remedy would be disproportionate and, in the case of a divestiture by CEMEX, particularly unreasonable, ineffective and disproportionate (Section 5).

PROPORTIONALITY (see further Section 3)

2.2 There are a number of aspects of the CC's case which indicate that, if a remedy were to be imposed, a less onerous remedy, which does not impose significant costs or burdens on GB cement market participants, would be appropriate. In summary, these factors include:

- (a) ***Uncertainties inherent in the CC's profitability and margins analysis*** - Even if the CC does not accept that its model is flawed and that profitability in the industry is not excessive, it must acknowledge the possibility that the scope for misstatement arising out of its complex methodology is significant and must take the small size of the margin over cost of capital, and the sensitivity of its results to alternative assumptions, into account when considering the proportionality of any remedy.
- (b) ***Overstatement of the harm to consumers*** - CEMEX submits that, as a result of the errors in its profitability and margins analysis, it is likely that the CC has overstated the harm to consumers arising out of the AEC identified and this is again a relevant factor to be taken into account when considering the proportionality of any remedy.
- (c) ***The CC must take into account the impact of changes in the market*** - The CC must recognise that it is examining a market which is in flux. CEMEX has provided evidence to show that HCM is pursuing an aggressive volume strategy and as a result of this, and other changes in the market, CEMEX has had to [§]. Therefore, to the extent that any AEC exists, the market may self-correct as a result of the changes taking place. It is therefore not appropriate to require intrusive and irreversible remedies that impose unnecessary burdens and costs on the parties when the AEC identified by the CC may cease to exist in the near future.
- (d) ***It is likely that a divestiture remedy will lead to sales of assets below market price*** - CEMEX submits that, if the CC were to impose a divestiture remedy it would lead to the sale of cement and/or RMX assets at less than their fair market value. This is a relevant factor to be taken into account when considering the proportionality of any remedy.

2.3 In addition, CEMEX submits that the imposition of divestiture remedies on CEMEX is particularly disproportionate. In summary, this is for the following reasons:

- (a) ***CEMEX's profitability is not excessive*** - It is clear that even using the CC's own methodology, CEMEX's individual profitability is not excessive. CEMEX has not [§], and the CC is required by its own Guidance to give significant weight to the impact any

remedy would have on CEMEX's profits when assessing the proportionality of any remedy imposed on CEMEX.

- (b) **CEMEX has not contributed to consumer harm** - CEMEX did not contribute to the £180 million of consumer harm identified by the CC. [§]. It would be grossly disproportionate to impose any intrusive remedies on a market player like CEMEX, which has not contributed to the supposed consumer harm arising out of the alleged AEC.
- (c) **CEMEX's asset base** - CEMEX's asset base is particularly unsuited to divestiture remedies (especially as it has only 2 cement plants in GB) and forced divestment of any of its assets would have a particularly disproportionate impact on its business (and would not lead to the creation of an effective or efficient competitor).

CEMEX PROPOSAL FOR AN EFFECTIVE PACKAGE OF REMEDIES (Section 4)

- 2.4 Given the fundamental importance of transparency in reaching and monitoring a coordinated agreement, a remedy aimed at greatly reducing transparency in the market, would be effective in eliminating the ability to reach and monitor the terms of coordination, which would mean that no tacit coordination would be legally or factually possible. Such a remedy would be both effective and proportionate.
- 2.5 CEMEX considers that Measure 1 outlined below would be adequate in itself to remedy the AEC identified. However, if the CC does not consider that Measure 1 by itself will be effective in remedying the AEC identified, each of Measures 2 to 5 reinforce the effectiveness of Measure 1.
- 2.6 **Measure 1 - Restrictions on publication of cement sales and production data** - This measure is equivalent to Remedy C5 proposed by the CC in the Notice. Following the CC's own analysis, if GB cement producers are unable to calculate their shares of sales, they will not be able to monitor the terms of coordination, detect deviation, or undertake punishment without risking accidental punishment or, when necessary, tacitly revise the terms of the alleged agreement.
- 2.7 The CC's analysis indicates that while other features of the market contribute to transparency in some degree, in order to estimate shares of sales, GB cement producers require access to appropriate and recent data on GB cement production and sales. This transparency is only provided through the MPA (or equivalent) data. If the publication of this data is appropriately restricted, as envisaged by Measure 1, the alleged coordinated agreement could no longer be maintained. The implementation of Measure 1 will therefore, in itself, remedy the AEC identified.
- 2.8 **Measure 2 – Restrictions on publication of carbon emissions data** - This measure is equivalent to Remedy C6 proposed by the CC in the Notice. The CC states that this remedy option aims to reduce the ability of Lafarge, Hanson and CEMEX to use actual annual verified carbon emissions data published under the ETS to infer each cement plant's individual production and market shares on an annual basis.
- 2.9 From the analysis in the PF, it is clear that the CC views the emissions trading data as supplemental to the primary data facilitating coordination, which is the MPA data, and therefore implementation of Measure 2 would further reduce transparency.

- 2.10 **Measure 3 – Restrictions on price announcement letters to customers** - This measure is equivalent to Remedy C4 proposed by the CC in the Notice.
- 2.11 From the analysis in the PF, it is clear that, in the CC's view a prohibition on generalised price announcement letters would reduce transparency and address a number of the CC's concerns.
- 2.12 **Measure 4 – Information barriers between vertically integrated producers' cement and RMX divisions** - CEMEX considers that relatively simple and specific information barriers can be put in place between GB cement producers' cement and RMX divisions to reduce the transparency arising as a result of vertical integration. This would entail a prohibition on the following information being shared between a vertically integrated producer's cement and RMX divisions:
- the price paid for cement to competitors;
 - cement price announcement letters received from competitors (to the extent Measure 3 is not implemented);
 - information received from competitors on prices of cement charged to other RMX customers (for example, in the course of negotiations); and
 - the price charged to RMX competitors for cement.
- 2.13 CEMEX submits that the above remedy would not create any specification, circumvention, distortion or monitoring and enforcement risks.
- 2.14 **Measure 5 – Creation of cement buying groups ("CBGs")** - In addition to Measures 1 – 4 above, which are aimed at eliminating transparency in the market, CEMEX considers that, subject to certain modifications necessary to ensure that this measure does not distort the free market, the CC's proposed Remedy C6 would also contribute to addressing the AEC identified by increasing buyer power in the GB cement market. In addition, it would increase the incentives of cement producers to deviate from the alleged coordinated agreement.
- 2.15 In summary, the remedy package outlined above is an effective and proportionate package of remedies, which addresses the AEC identified in a comprehensive manner. If the CC were to reject this package of remedies in favour of more intrusive structural remedies, it would be in breach of its duty of proportionality.

COMMENTS ON REMEDIES PROPOSED BY CC (Section 5)

- 2.16 **Remedy C1 – Divestiture of GB cement capacity** - The reasons why an intrusive and irreversible remedy such as cement divestiture (by any market player) would be disproportionate have been outlined above. Notwithstanding CEMEX's view that no divestiture is necessary, CEMEX submits that, if the CC were to impose this draconian remedy, it should not require CEMEX to divest any cement capacity as this would (a) not be effective in remedying the AEC; and (b) have a very disproportionate impact on CEMEX's business.
- 2.17 **Divestiture of [X]** – The divestiture of [X] would not be an effective remedy as the [X] make it very unattractive for a new entrant.

- 2.18 Above all, the divestiture of [X] would also not be a proportionate remedy as it accounts for approximately [X] percent of CEMEX's clinker production capacity and over [X] percent of CEMEX's cement production. As this [X], it would result in CEMEX becoming a much smaller [X] competitor, [X]. In addition, the sale of [X] would have to overcome significant legal obstacles.
- 2.19 **Divestiture of [X]** - The [X] make it very unattractive for a new entrant and thus divestiture of [X] would not be effective in remedying the AEC identified. The sale of latent capacity at [X] is also not feasible for logistical reasons.
- 2.20 Further, the sale of [X] is also disproportionate as without [X] CEMEX will [X]. This would lead to a [X].
- 2.21 [X], operating a grinding mill on a stand-alone basis would not be a viable strategy for any operator. As the CC has pointed out it is not easy to obtain clinker domestically and importing clinker faces the same alleged cost disadvantage as importing cement. If the CC is correct, the operator [X] will not be able to compete effectively in the GB cement market. On the other hand, [X] if it were to divest [X] and hence the divestment of [X] is also disproportionate.
- 2.22 Further, the sale of either [X] or [X] will [X] CEMEX significantly as, [X].
- 2.23 **Remedy C2 – Divestiture of RMX plants by one or more of the Top 3 cement producers** - CEMEX's primary objection to the CC's Remedy C2 is that it is unnecessary, will not be effective in achieving the aims set out in the Notice and it is disproportionate to aim to achieve these objectives through divestment of RMX plants. In summary, the sale of RMX plants will not achieve any of the CC's stated objectives for the following reasons:
- (a) **Increasing the size of the addressable market and reducing barriers to entry** - There is very little evidence from competitors/customers that the size of the addressable market constitutes a barrier to entry and expansion. Further, there are other significant barriers to entry into cement production and, in the CC's view, no expansion by importers is possible because of the cost disadvantage they face. In these circumstances, the divestment of RMX plants will not be effective in achieving the objective of increasing the size of the addressable market and reducing barriers to entry and expansion.
- (b) **Reduction in cross-sales** - In theory, a reduction in cross-sales will lead to lesser transparency. However, a divestiture of RMX plants sufficient to stop all cross-sales would clearly be disproportionate. In addition, cross-sales have greatly reduced in recent years and, given these market developments, it would be disproportionate to require divestment of RMX plants to achieve this objective. Further, imposing a RMX divestiture remedy on CEMEX would be particularly disproportionate as CEMEX [X].
- (c) **Countervailing buyer power** – The creation of countervailing buyer power would require the divestment of a large number of RMX plants to a single purchaser. However, as the CC has itself stated, most customers purchase at job-site level and a single job-site would not have any more buyer power than such sites have at present. In addition,

the creation of cement buying groups (see Measure 5 set out in Section 4 below) would be a less intrusive, and therefore more proportionate, method of achieving this objective.

- (d) ***Increasing focus on addressable market*** – GB cement producers already have a clear focus on competing for independent customers. The CC has not demonstrated, nor even suggested, that competition for independent cement customers has been affected by the presence of vertically integrated RMX divisions. Further, the focus on the addressable market can be increased by elimination of the alleged coordination, which can be achieved by implementing the Transparency Reduction Package set out in Section 4.

2.24 In addition, the imposition of an RMX divestiture on CEMEX would be particularly disproportionate for the reasons summarised in paragraph 2.3 above and explained in more detail in paragraph 5.42 below.

2.25 **Remedy C3 – The creation of cement buying groups** - If the CC does not accept that Measure 1 set out by CEMEX in Section 4 above would, by itself, be sufficient to address the AEC identified, CEMEX considers that the creation of CBGs would be an effective and proportionate measure, which would contribute towards eliminating the alleged coordination. However, this is subject to three qualifications: (a) there should be no requirement for GB cement producers to sell a proportion of their cement to CBGs; (b) every buyer should be given a choice of buying cement outside the CBG; and (c) there should not be any requirement for CEMEX, or any other GB cement producer, to administer or pay for the CBG(s).

2.26 **Remedy C4, C5, and C6** – As mentioned above, if the CC does not accept that Measure 1 outlined above by CEMEX would, by itself, be sufficient to address the AEC identified, CEMEX considers that the effectiveness of Measure 1 can be reinforced by any of the CC's proposed Remedies C4, C5 and C6.

2.27 **Remedy C7 – Structural measures to address the AEC in relation to GGBS/GBS production in GB** - [✂].

3 FACTORS RELEVANT TO THE CC'S ASSESSMENT OF REMEDIES

- 3.1 In view of the CC's inability to demonstrate an AEC in the GB cement market with any certainty, CEMEX considers that no remedies should be imposed on it or any other market participant.
- 3.2 However, to the extent that the CC's provisional findings are maintained in its Final Report, and the CC still considers that remedial action is necessary, the CC is required to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the AEC concerned.² In considering the reasonableness of different remedy options, the CC is required to consider their proportionality.
- 3.3 The CC's Guidance states that a proportionate remedy is one that:
- (a) is effective in achieving its legitimate aim;
 - (b) is no more onerous than needed to achieve its aim, i.e. it goes no further than necessary to achieve an effective remedy;
 - (c) is the least onerous if there is a choice between several effective measures; and
 - (d) does not produce disadvantages which are disproportionate to the aim.
- 3.4 CEMEX considers that there are a number of aspects of the CC's case which indicate that, if a remedy were to be imposed, a less onerous remedy, which does not impose significant costs or burdens on GB cement market participants, would be appropriate. For the reasons set out in paragraphs 3.39 to 3.51 below, this is particularly true for any remedies that may be imposed on CEMEX.
- 3.5 Each of the factors indicating that a less onerous remedy may be appropriate is discussed below and, in the context of specific remedy options proposed by the CC, in Sections 5.

A. UNCERTAINTIES INHERENT IN THE CC'S PROFITABILITY AND MARGINS ANALYSIS

- 3.6 One of the three market outcomes that the CC bases its provisional findings on is that profitability in the GB cement industry is excessive. CEMEX strongly disagrees with the CC's analysis and considers it flawed in many respects.
- 3.7 Before turning to the main uncertainties in the CC's analysis, CEMEX notes that even if the CC's analysis were correct, it is clear that, depending on the approach used, the CC concluded that the average industry return on capital during 2007-2011 was between 11.2% and 13.3%, compared to an estimated cost of capital of between 8.2% and 11.5% (with a central estimate of 9.9%). CEMEX notes that there is already an overlap between the average profitability and cost of capital ranges calculated by the CC, i.e. the CC's own ranges allow for the possibility that the average industry return on capital could be only 11.2% and below a possible cost of capital of 11.5%. Further, even looking at the mid points of the ranges (12.25% and 9.9%), the margin over the cost of capital is relatively small (2.35%) and CEMEX submits that it is too small a margin to draw any reliable

² Remedies Notice, para. 3.

conclusions of excess profitability. CEMEX submits that drawing such a conclusion is inappropriate for three main reasons.

- 3.8 First, any assessment of profitability is likely to be sensitive to certain assumptions and choices of approach. As set out in CEMEX's response to the CC's working paper on profitability on a CCA basis, this is particularly relevant in this case where the CC has used a novel and untested methodology, based on a number of unverifiable and complex assumptions. The level of complexity is greater than any encountered in previous market investigations and the excess profits found by the CC disappear under reasonable alternative assumptions.
- 3.9 Secondly, it is likely that the CC's assessment of profitability has been affected by the inclusion of internal sales in this analysis. As the CC has itself stated, GB producers' internal sales to their downstream RMX businesses were generally at a higher price than external sales during the period 2007 - 2011.³ This is likely to have increased the average cement price observed by the CC. This increased price should not have been taken into account by the CC in its profitability analysis as it does not affect external RMX customers and only affects GB producers' RMX profitability.⁴
- 3.10 Thirdly, the CC's analysis of industry profitability includes profits derived from the sale of EU ETS credits.⁵ As the CC has accepted, profits generated from the sale of EU ETS credits will reduce significantly⁶ (and will eventually cease to exist). On the contrary, [✂].
- 3.11 CEMEX also submits that there is no reason to expect that in a competitive industry firms will necessarily earn a return which is below or exactly equal to their cost of capital. Given the possibility of survivor bias (the fact that firms that fail to achieve their return on capital will in the long-term be forced to exit the industry and only those firms that earn positive economic profits will remain) it is likely that observed returns on capital in a competitive market will be higher than the cost of capital.
- 3.12 Even if the CC does not accept that its model is flawed and that profitability in the industry is not excessive, it must acknowledge the possibility that the scope for misstatement arising out of its complex methodology is large and must take the small size of the margin over cost of capital, and the sensitivity of its results to alternative assumptions, into account when considering the proportionality of any remedy.
- 3.13 Similarly, the CC's assessment of the costs and margins of importers is open to question. Given the evidence showing importers increasing market share at the cost of GB cement producers, there is a very real possibility that the CC has underestimated the real world ability of importers to compete with GB producers. The possibility of such understatement must, at the very least, be factored into the assessment of the proportionality of any remedy.

³ PF, Appendix 6.5, para. 61.

⁴ To the extent the CC does focus on the profitability of cement producers' sales to their own RMX plants, it would need to take account of the fact that these prices (being higher than those to independent RMX customers) inflate cement profits and suppress the profits of the vertically integrated producers' RMX businesses which the CC acknowledges are low.

⁵ CC Working Paper on CCA Profitability Assessment for Cement, para. 143.

⁶ CC Working Paper on CCA Profitability Assessment for Cement, para. 21.

B. OVERSTATEMENT OF THE HARM TO CONSUMERS

- 3.14 The CC states that the harm to consumers arising out of the AEC identified is estimated at £180 million. CEMEX submits that, as a result of the errors in its profitability and margins analysis, it is likely that the CC has overstated the harm to consumers arising out of the AEC identified and this is again a relevant factor to be taken into account when considering the proportionality of any remedy.⁷
- 3.15 Further, excess profitability of £180 million across five years of production amounts to an excess price of [REDACTED] £3.70 per tonne (assuming 50 million tonnes of cement were sold during this period), which amounts to approximately a 5 percent overcharge per tonne. Given the acknowledged sensitivities in the CC's profitability and margin analysis (referred to at para 3.8 to 3.10 above), this is well within the range of error and it is likely that in reality no consumer harm has arisen as a result of the AEC identified.

C. THE CC MUST TAKE INTO ACCOUNT THE IMPACT OF CHANGES IN THE MARKET

- 3.16 As set out in its response to the CC's working paper regarding the acquisition by Mittal Investments of Hope Construction Materials ("HCM"), CEMEX believes that the CC has not taken sufficient account of the impact that the entry of HCM, and the formation of LafargeTarmac, will have on any alleged coordination in the GB cement market.
- 3.17 In addition, there have been a number of other recent changes in the market since 2007, including a significant reduction in cross sales, a significant reduction in the number of joint ventures of which GB cement producers are a party and the sale of a considerable number of RMX plants by vertically integrated producers (CEMEX itself has divested [REDACTED] RMX plants since 2007, of which [REDACTED] were divested in 2012/2013⁸).
- 3.18 CEMEX considers that the entry of HCM and the formation of LafargeTarmac, in addition to the other changes in the market, has a very direct impact on the proportionality of any remedies in three respects, outlined below.
- 3.19 The CC must recognise that it is examining a **market which is in flux** and, to the extent that any AEC exists, the market may self-correct as a result of the changes taking place. It is therefore not appropriate to require intrusive and irreversible remedies that impose unnecessary burdens and costs on the parties when the AEC identified by the CC may cease to exist in the near future, particularly where other less intrusive remedies would remedy the alleged AEC (see Section 4 below).
- 3.20 CEMEX notes that there is significant precedence in the CC's own decisional practice to take a cautious approach when dealing with a changing market.

⁷ As explained below, CEMEX notes in this regard that, even assuming that the CC's estimate of harm to consumers is correct, CEMEX's external bulk cement prices have [REDACTED] per tonne between January 2012 and May 2013. There is good reason to believe that this [REDACTED] will persist and, if that is the case, the £180 million of consumer harm alleged by the CC will be [REDACTED].

⁸ In addition CEMEX has also closed [REDACTED] RMX plants since 2007.

- 3.21 In the *Pay-TV Market Investigation* the CC stated in its revised provisional findings, “[w]e regard the launch of the OTT services of LOVEFiLM and Netflix as an important market development, which impacts directly on the significance of Sky Movies to subscribers’ choice of traditional pay-TV retailer.”⁹
- 3.22 The CC then went on to state, “[a]t the time of reaching our findings there was necessarily limited empirical evidence on the implications of some of the recent developments which we took into account. Overall, our findings were based largely on current market circumstances and a substantial part of our analysis was based on considerations other than those relating to the recent market developments but, where necessary, we formed expectations as to whether relevant circumstances were likely to persist. In particular, as the launch of new OTT services was relevant to our analysis, we could not ignore or attribute no weight to them simply because we had less evidence relating to them than in respect of the (now changed) circumstances before they were launched.”¹⁰
- 3.23 Similarly, in the *Classified Directory Advertising Services Market Investigation*, the CC emphasised the importance of taking into account the possibility of the market changing substantially in the near future when considering remedies: “...factors suggest that the competitive conditions could change substantially in the next few years, although we have no firm evidence on which to form a view as to the timing and speed of possible changes. In considering remedies, we have taken these points into consideration.”¹¹
- 3.24 CEMEX notes in this regard the CC’s Guidance states that, where an AEC is expected to be short lived and the timescale for implementation of a remedy would extend significantly into this period, the CC will consider whether alternative measures may be appropriate.¹²
- 3.25 Any intrusive and irreversible remedy and, in particular, divestment remedies, will take (in accordance with the CC’s Guidance) at least 12 -16 months to fully implement (assuming there are no delays due to appeals). HCM is already an aggressive competitor that is gaining market share from CEMEX and other majors.¹³ There is no reason to believe that HCM will not continue with its current aggressive strategy and by the stage any structural remedy is implemented it will have greatly disrupted and undermined the alleged coordination in the market.
- 3.26 As a result of the changes in the competitive landscape of the market including, but not restricted to, the recent entry of HCM, CEMEX has had to [§], with the result that its average prices for external sales of [§] per tonne between January 2012 and May 2013. [§] persist (and CEMEX has no reason to believe that they will not), they would [§] the £180 million consumer harm identified by the CC.

⁹ *Movies on Pay TV Market Investigation*, Provisional Findings Report (Revised), para. 6.115(a).

¹⁰ *Movies on Pay TV Market Investigation*, Final Report, para. 52.

¹¹ *Classified directory advertising services Market Investigation* Final Report, para.6.142.

¹² *CC Guidelines for Market Investigations*, April 2013, para. 339.

¹³ See table of [§], CEMEX response to the CC’s Working Paper regarding the Lafarge/Tarmac Joint Venture and the Acquisition by Mittal Investments of HCM, 25 March 2013 (the “HCM Working Paper”), page 6.

- 3.27 In addition, CEMEX notes that the [✂] over the past year has occurred in spite of CEMEX attempting to implement two price increases during this period. This clearly indicates that price increases are not “sticking” and, on the contrary, customers are demanding reductions in prices previously agreed.
- 3.28 These developments clearly indicate that, to the extent there was any coordination in the GB cement market (which CEMEX does not accept), this is clearly no longer effective. At the very least the CC should take this into account in considering what remedy(ies) might be proportionate in the current circumstances.
- 3.29 Secondly, in its PF the CC notes that at this stage it is not possible to say how the entry of HCM will affect alleged coordination in the GB cement market.¹⁴ Therefore the CC cannot rule out the possibility of Scenario B (as set out in its PF) being realised. That is, “*HCM might pursue a more proactive competitive strategy than Tarmac did prior to 2013. This might involve, for example, vigorous price competition, widespread attempts to encourage customer switching or investment in new capacity*”¹⁵ (“Scenario B”).
- 3.30 If Scenario B is realised (and there are good reasons to believe that it will be¹⁶) it would be grossly disproportionate for the CC to impose any intrusive remedies. In this regard, it is important to note that in the Lafarge/Tarmac merger inquiry the CC stated: “*the proposed divestiture would replace Tarmac with a competitor with different characteristics from Tarmac in terms of key competitive variables such as size of plant, prospects for future expansion and, to some degree, the extent of its vertical integration. Some of these factors — in particular the size of the cement plant — might increase, relative to Tarmac, the external constraint posed by the new competitor on any coordinating group*”.
- 3.31 While CEMEX recognises that the CC is not bound by its previous decisions, it would be absurd, and contrary to the principles of legal certainty, if the CC were to have no regard to the statements made in very recent inquiries concerning the same market.
- 3.32 Therefore the very real possibility of HCM disrupting alleged coordination in the GB cement market (and CEMEX’s evidence indicates that HCM is pursuing a very aggressive volume strategy) is a factor that the CC must take into account in assessing the proportionality of any remedy.
- 3.33 Thirdly, after having stated that it cannot say how the entry of HCM will affect alleged coordination in the GB cement market, the CC inexplicably goes on to state that HCM is likely to be “*insufficiently market-disrupting on its own*” to materially reduce its concerns about coordination in the GB cement markets.
- 3.34 While CEMEX does not agree with the CC’s statement that HCM will be “*insufficiently*” market-disrupting, it is clear from the CC’s statement that it does consider that HCM will introduce an

¹⁴ PF, para. 8.267.

¹⁵ PF, para. 8.266(b).

¹⁶ See CEMEX’s response to the HCM Working Paper.

element of “*market-disruption*” to the GB cement market (even though in the CC’s view, this may not be sufficient on its own to undermine coordination).

- 3.35 Given that in the CC’s own analysis an element of market disruption has already been introduced the CC must take this into account when assessing the proportionality of any remedy. It would be inappropriate to impose the same remedy on a market in which coordination has been disrupted to some extent as on a market in which coordination has not been disrupted at all.

D. IT IS LIKELY THAT A DIVESTITURE REMEDY WILL LEAD TO SALES OF ASSETS BELOW MARKET PRICE

- 3.36 CEMEX submits that, if the CC were to impose a divestiture remedy it would lead to the sale of cement and/or RMX assets at less than their fair market value. This is because the sale of these assets would be taking place in the midst of a severe economic downturn and, most likely, at the bottom of the economic cycle.
- 3.37 The sale of critical assets below fair market value would greatly undermine the financial viability of a company like CEMEX, the [X], and this is a relevant factor for the CC to consider in its assessment of proportionality.
- 3.38 In addition, given CEMEX’s [X], there is the real possibility that CEMEX’s [X] if there is a forced divestiture. This would unnecessarily [X] placed on CEMEX and restrict its ability to compete effectively in the market.

E. THE IMPOSITION OF REMEDIES ON CEMEX IS PARTICULARLY DISPROPORTIONATE

- 3.39 Factors A to D set out above explain why intrusive remedies are inappropriate in this case. For the reasons set out below, this is particularly true for any remedies imposed on CEMEX.

CEMEX's profitability is not excessive

- 3.40 As set out above, one of the three market outcomes on which the CC bases its case is that profitability in the GB cement market is excessive. 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.¹⁷
- 3.41 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]%.¹⁸ This is [X] than the average ROCE of the other GB cement producers of [X]% [X], which is [X]%.¹⁹
- 3.42 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.²⁰

¹⁷ [X]

¹⁸ CC Working Paper on CCA Profitability Assessment for Cement, Table 12(c), p.55.

¹⁹ CC Working Paper on CCA Profitability Assessment for Cement, Annex 1, para. 2.

²⁰ CC Working Paper on CCA Profitability Assessment for Cement, Table 1, page 6.

- 3.43 CEMEX notes that no downside sensitivities²¹ 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]% to [X]% on the application of reasonable downside sensitivities,²² 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.
- 3.44 Therefore, on the CC's own analysis, CEMEX's [X]. It has, in any case, [X] the GB cement producers. Given the emphasis placed by the CC on [X] in the PF, the CC is legally required to take into account [X] in assessing the proportionality of any remedies imposed on CEMEX.
- 3.45 In this regard, CEMEX notes that the CC's Guidance states that it will take into account the cost of remedial measures on established businesses. However, where businesses have been found to be "*earning profits persistently in excess of their costs of capital*" as a direct result of the feature of the market, and are likely to continue to do so in the absence of intervention, the CC will not usually give any significant weight to the anticipated reduction of such profits as a result of the remedy.²³
- 3.46 The necessary corollary of the CC's Guidance is that where businesses have [X] the CC will give significant weight to the anticipated reduction of profits as a result of the remedy. As CEMEX [X] to give significant weight to the impact any remedy would have on CEMEX's profits when assessing the proportionality of any remedy to be applied to CEMEX.

CEMEX has not contributed to consumer harm

- 3.47 Related to CEMEX's low profitability is the fact that its pricing policy has not contributed to consumer harm. As set out in [X], calculations carried out by CEMEX's external economic advisors (using the CC's own methodology) indicate that its profits were £[X] million [X]. A necessary implication of this is that [X] by at least £[X] million over the period 2007 - 2011.
- 3.48 It is therefore clear that CEMEX did not contribute to the £180 million of consumer harm identified by the CC. In fact, if CEMEX had not [X] its customers and had maintained prices at the [X], customers [X] million.²⁴ CEMEX's pricing policy has therefore served to benefit customers.
- 3.49 Given that consumer harm lies at the heart of any AEC, and it is the elimination of consumer harm that any remedy is ultimately aimed at, it would be grossly disproportionate to impose any intrusive and irreversible remedies on a market player like CEMEX, which has not contributed to the supposed consumer harm arising out of the alleged AEC.

CEMEX's asset base

²¹ As described in CC Working Paper on CCA Profitability Assessment for Cement, paras. 154 & 155 and Tables 13(a) & (b).

²² *Ibid.*

²³ CC *Guidelines for market investigations*, April 2013, para. 353.

²⁴ £[X]

- 3.50 CEMEX's asset base is particularly unsuited to divestiture remedies. CEMEX believes that a forced divestment of any of its assets would have a particularly disproportionate impact on its business and would not lead to the creation of an effective or efficient competitor.
- 3.51 The specific features of CEMEX's asset base (particularly the fact that unlike Lafarge and Hanson it has only two cement plants in GB) making it unsuitable for divestiture are set out in Sections 5 below.

4 CEMEX PROPOSAL FOR AN EFFECTIVE PACKAGE OF REMEDIES TO ADDRESS THE AEC IDENTIFIED

- 4.1 As set out in Section 3 above, the CC's Guidance states that a proportional remedy is one which is effective in achieving its legitimate aim but is no more onerous than needed to achieve its aim, i.e. it goes no further than necessary to achieve an effective remedy.
- 4.2 In this Section CEMEX proposes a package of remedies that would address the alleged AEC identified by the CC and which is **no more onerous** than is required to achieve its aims.
- 4.3 Before setting out the specific measures that would address the AEC identified in the GB cement market, CEMEX considers that it would be helpful to outline the specific AEC identified and how, in broad terms, that AEC can be addressed.
- 4.4 The CC found that coordination is likely to evolve mainly around shares of GB sales made by 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 producers) but may be supplemented with information on prices.²⁵
- 4.5 The CC is required to show, *inter alia*,²⁶ that it is possible to **reach the terms of coordination** without any need for express collusion. This requires that:
- (i) there is a **reference point** (or points) around which terms of coordination can be reached; and that
 - (ii) there is **sufficient transparency** so that all participants can identify the relevant reference point without any need for express collusion.
- 4.6 In addition, the coordinating firms must also be able to **monitor deviation**. That is, there must be **sufficient transparency** so that the coordinating firms can identify whether the terms of coordination are being complied with.
- 4.7 In its PF the CC has indicated that in its view there is sufficient transparency in the market for these conditions to be met. In particular, the CC has indicated:
- (a) *Reaching an understanding* - One of the factors that permit Lafarge, Hanson and CEMEX to reach an understanding is the high amount of transparency each GB producer has of its own market shares on a monthly basis (through MPA data) and on annual production by plant and yearly market shares by plant through EU ETS data.
 - (b) *Monitoring of the terms of coordination* – The CC noted that there is sufficient transparency to allow for monitoring of the terms of coordination as each GB producer is able to combine its own data on sales and production with the MPA data to calculate its own monthly share of GB production, which is then "*supplemented*" with other

²⁵ PF, para. 8.164.

²⁶ Additional to the requirements set out in paras. 4.5 and 4.6 above, the CC must also establish that there exists a credible deterrent mechanism and that the coordinated outcome would not be defeated by the action of outsiders.

information to allow for calculation of market shares of GB producers.²⁷ This information is also “supplemented” through information on prices, including that gathered through price announcement letters.²⁸

4.8 It is clear that the CC considers that it has established (as it is required to do under the case-law and its own Guidance) that there is sufficient transparency to reach and monitor the terms of coordination.

4.9 Given the fundamental importance of transparency to reaching and monitoring a coordinated agreement, CEMEX submits that the package of remedies set out below, largely aimed at greatly reducing transparency in the market, would be effective in eliminating completely the ability to reach and monitor the terms of coordination, which would mean that no tacit coordination would be possible. CEMEX considers that this package of remedies would be proportionate.

OUTLINE OF PROPOSED PACKAGE OF REMEDIES

4.10 CEMEX sets out below five measures which it considers would address the AEC concerned in an effective and proportionate manner.

4.11 CEMEX does not consider that *all* of the measures set out below are necessary to address the AEC identified. More specifically, on the basis of the CC’s own analysis in the PF, CEMEX considers that Measure 1 proposed below would be adequate in itself to remedy the AEC identified.

4.12 However, if the CC does not consider that Measure 1 by itself will be effective in remedying the AEC identified, each of Measures 2 to 5 reinforces the effectiveness of Measure 1 and any or all can be adopted by the CC in addition to Measure 1 to formulate a comprehensive solution to the AEC identified.

MEASURE 1 – RESTRICTIONS ON PUBLICATION OF CEMENT SALES AND PRODUCTION DATA

4.13 This measure is equivalent to Remedy C5 proposed by the CC in the Notice. The CC states that this remedy aims to reduce transparency between GB cement producers by restricting the publication of data showing monthly and quarterly total GB cement sales (**in tonnage**) and production volumes (**also in tonnage**), which currently enables GB cement producers to calculate their own monthly shares of sales by GB cement producers.²⁹

4.14 The CC states that it has identified two primary sources where monthly and quarterly GB cement sales (in tonnage) and production volume data (also in tonnage) is currently published.³⁰ In both cases, monthly data is published around one month in arrears and quarterly data is published around three months in arrears:

²⁷ PF, para.8.166.

²⁸ *Ibid.*

²⁹ Remedies Notice, para. 78.

³⁰ Remedies Notice, para. 79.

- (a) in a document titled ‘Monthly Statistics of Building Materials and Components’ published each month by the Department for Business Innovation and Skills (BIS) on its website. This document also contains a monthly cement price index as well as **monthly cement sales and production volumes**; and
- (b) on the website of the Mineral Products Association (MPA). The data published by the MPA also includes **monthly cement sales data by region and sales channel**, e.g. to RMX producers or builders’ merchants, as well as **quarterly GB sales data for cement and cementitious materials**.
- 4.15 Consistent with the CC’s analysis, CEMEX considers that publication of cement sales and production data after a time lag, such that it would no longer be of use to GB cement producers in monitoring their own shares of sales and production or those of its rivals, would be a particularly effective remedy to eliminate completely the alleged coordination in the GB cement market.
- 4.16 As set out above, CEMEX considers that if Measure 1 is implemented no further remedies are required in order to remedy the alleged coordination in the GB cement market: the CC’s PF makes it very clear that in the CC’s view, the ability of a GB cement producer to calculate its own monthly share of sales provides the focal point for coordination.³¹ A GB cement producer is only able to estimate its own monthly share of sales if it has access to information on cement production and sales by GB cement producers and this information (on an aggregated basis) is only available from these two sources (i.e. BIS statistics and MPA published data). It therefore necessarily follows that if the CC were to place appropriate restrictions on the publication of the BIS statistics and MPA data, GB cement producers would not be able to monitor, or (when required) reach, terms of coordination.
- 4.17 The ability of individual GB cement producers to access data that allows them to estimate their shares of production (and when supplemented with other information, estimate shares of production of other GB cement producers) is fundamental to the CC’s case on coordination. This is clear from the following passages in the PF.
- 4.18 Ability to monitor market shares forms the focal point for coordination - In paragraph 8.164 of the PF the CC states that “*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.*”)
- 4.19 Further, the CC has examined the internal documents of GB cement producers and considers that it has found an emphasis on monitoring market shares. This is summed up in paragraph 8.169 of the PF which states: “*the **main metric** that is monitored in the strategy documents appears to be the overall share of GB cement sales...*”

³¹ PF, para. 8.164.

- 4.20 It is therefore clear that the CC's case is that the ability of a GB cement producer to monitor its own share of GB cement sales as a proportion of total cement sales provides the focal point of coordination. Inability of GB cement producers to monitor their own share of sales would remove that focal point of coordination.
- 4.21 Monitoring the terms of coordination – In paragraph 8.166 of the PF the CC states that, “*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).*”
- 4.22 It is clear from the above passage that the CC considers the MPA data (and, by analogy, the BIS data) to be the main information on which the alleged coordination is based. The CC's provisional finding is that the MPA data not only allows for the **monitoring** of the terms of coordination but also permits the **detection** of deviations from the alleged coordinated agreement. The accurate detection of deviation from the alleged coordinated agreement in turn reduces the risk of accidental punishment, which can generate instability in coordination.³²
- 4.23 The CC considers that there are other sources of information that increase transparency in the market. These include price announcements, win/loss data, information from customers³³ and information obtained as cement buyers. However, the CC states clearly that each of these categories of data is “*supplemental*” to the main MPA data and, in the absence of MPA data, could not, on its own allow for a coordinated agreement to be reached and monitored and for deviations to be detected. This is acknowledged in relation to monitoring of the coordinated agreement in paragraph 8.218(e) of the PF, where 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*”

³² PF, para. 8.206.

³³ In addition to being supplemental to published data on cement production and sales, information received from customers is particularly unreliable given the incentive to exaggerate as a negotiating tool. This has been recognised by the European Commission in Case COMP/M.3333, *Sony/BMG* (see paras. 486, 545, 590 and 591). In its PF the CC recognises the supplemental nature of information received from customers and states “*In our view...customer information is only one element contributing to transparency in the GB cement markets.*” (See PF, footnote 81).

from whom they were won/lost, and also using information on prices of cement gathered from cement customers and through cross-sales.”

- 4.24 It is therefore clear that other categories of information are only **supplemental** to the main MPA data and cannot, on their own, permit monitoring of the alleged coordinated agreement.
- 4.25 The MPA data is required to reach a revised coordinated agreement - In addition to the MPA data being a necessary prerequisite for monitoring the coordinated agreement, CEMEX considers that it would also be necessary to reach the terms of any revised coordinated agreement.
- 4.26 As set out above, in order for coordination to be established the CC must show that a coordinated agreement can be reached (without overt collusion) and parties to the coordinated agreement can identify the reference point for coordination.
- 4.27 CEMEX notes that the CC “*has not found evidence to explain how the accepted shares of sales for each coordinating firm are initially arrived at*”.³⁴ The CC also does not consider that the accepted shares of sales were mechanistically derived from each firm’s capacity.³⁵ However, the CC has also stated that there is a strong link between each coordinating party’s share of sales and its capacity.³⁶ It necessarily follows that, if there are large changes in GB producers’ shares of capacity, the terms of coordination would have to be revised.
- 4.28 There have been significant changes to parties’ shares of capacity following the formation of HCM (which has significantly more capacity than Tarmac) and LafargeTarmac. This means that the terms of the alleged coordination based on shares of sales would require revision and, consistent with the CC’s analysis, this would not be possible in the absence of data showing GB cement production and sales (particularly as the shares of sales are not “mechanistically derived from shares of capacity”).³⁷ In these circumstances, the absence of recent MPA data would not only make monitoring of any coordinated agreement impossible, but it would also not be possible to reach a revised tacit agreement necessitated by changes in the capacity of each market participant.

Conclusion on Measure 1

- 4.29 It is clear from the above analysis that the CC considers that for each producer, the focal point of coordination is its own share of GB cement sales. Following the CC’s analysis, if GB cement producers are unable to calculate their shares of sales, they will not be able to monitor the terms of coordination, detect deviation, undertake punishment without risking accidental punishment or, when necessary, tacitly revise the terms of the alleged agreement.
- 4.30 While other features of the market contribute to transparency in some degree, in order to estimate shares of sales, GB cement producers require access to appropriate and recent data on GB cement production and sales. This transparency is only provided through the MPA (or equivalent)

³⁴ PF, para. 8.164, footnote 161.

³⁵ *Ibid.*

³⁶ PF, para. 8.238 and para. 8.239.

³⁷ PF, para. 8.164, footnote 161.

data. If the publication of this data is appropriately restricted, as envisaged by Measure 1, the alleged coordinated agreement could no longer be maintained. CEMEX therefore considers that the implementation of Measure 1 will, in itself, remedy the AEC identified.

MEASURE 2 – RESTRICTIONS ON PUBLICATION OF CARBON EMISSIONS DATA

- 4.31 This measure is equivalent to Remedy C6 proposed by the CC in the Notice. The CC states that this remedy option aims to reduce the ability of Lafarge, Hanson and CEMEX to use actual annual verified carbon emissions data published under the ETS, to infer each cement plant's individual production and market shares on an annual basis.
- 4.32 As such this remedy option is aimed at reinforcing the reduction of transparency envisaged by Measure 1 above.
- 4.33 The CC states that this remedy option would require a change in how the European Commission reports and presents its published data for GB. Implementation of this remedy option would take the form of recommendations to the European Commission and the UK Government and may include one or more of the following measures:
- (a) an increased delay in the publication of annual verified emissions data;
 - (b) the exclusion of GB cement plants from published verified carbon emissions data;
 - (c) the aggregation of all GB cement plants' verified carbon emissions data; and/or
 - (d) further aggregation of verified carbon emissions data for GB cement plants with those of other GB ETS sectors.
- 4.34 CEMEX considers that each of the proposed measures (a) – (d) above, individually or in combination with each other, would be effective in further reducing transparency in the GB cement market.
- 4.35 While CEMEX considers that Measure 1 by itself is adequate to address the AEC identified, Measure 2 provides a further layer of security if the CC considers that Measure 1 is not adequate in itself. This is consistent with the CC's view on the relevance of carbon emissions data in increasing transparency in the GB cement market. In this regard, CEMEX notes two passages from the CC's PF.
- 4.36 In footnote 160 of the PF, the CC states, "[w]e agreed [with CEMEX] that EU ETS data was unlikely to be the primary source of information used for monitoring.... However, we thought that the availability of EU ETS data would nonetheless be a **valuable cross-check** on the accuracy of other information used for monitoring purposes and would contribute to increased levels of transparency in the market on individual plants' production volumes and costs, particularly variable costs."
- 4.37 Similarly, in paragraph 8.162 of the PF the CC states, "[t]here is a high amount of transparency for each GB producer of its own market shares on a monthly basis (through MPA data...), and on annual production by plant and yearly market shares by plant through EU ETS data."

4.38 It is therefore clear that the CC views the emissions trading data as supplemental to the primary data facilitating coordination, which is the MPA data. It is therefore appropriate that the CC impose Measure 2 only if it believes that Measure 1 in itself would not be adequate to address the AEC identified.

MEASURE 3 – RESTRICTIONS ON PRICE ANNOUNCEMENT LETTERS TO CUSTOMERS

4.39 This measure is equivalent to Remedy C4 proposed by the CC in the Notice. The CC states that price announcement letters contributed to coordination in the GB cement markets by facilitating price leadership, price following and softening customer resistance to price increases.

4.40 CEMEX notes that the adverse effects of price announcement letters identified by the CC (i.e. price leadership, price following and softening customer resistance to price increases) are not the primary AEC's identified by the CC. The primary AEC identified by the CC is coordination around shares of sales and this AEC is supplemented by information on pricing. This is clear from paragraph 8.164 of the PF, which states, "*coordination is likely to evolve mainly around share of GB sales made by the GB producers (ie for each producer, the focal point is its own share of GB cement sales, as a proportion of total cement sales made by GB producers 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*").

4.41 Notwithstanding the secondary role of pricing information in the AEC identified, it is clear from the PF that the CC considers that price announcement letters significantly contribute to the AEC identified. This is evident from the paragraphs of the CC's PF set out below.

4.42 In paragraph 8.284(b) of the PF the CC lists price announcement behaviour as one of the conduct features of the market that gives rise to the AEC alleged.

4.43 In paragraph 8.218(b) of the PF, the CC states that, in its view, signalling of desired direction of prices of cement through price announcement letters forms part of the mechanism of coordination.

4.44 In paragraph 8.277 of the PF, the CC expresses the view that Lafarge, Hanson and CEMEX's price announcement behaviour was indicative of the fact that these players recognised the susceptibility of the market to coordination and took steps to exploit it. Price announcement behaviour is therefore one of the ways in which the CC considers that the alleged susceptibility of the market to coordination can be exploited.

4.45 The CC considers that the ability of the cement divisions of GB cement producers to receive price announcement letters from their competitors is one reason why vertical integration facilitates coordination. In paragraph 8.42 of the PF, the CC states that there is evidence to show that price announcement letters received by the RMX division of a vertically integrated cement producer are then passed on to the cement division. The CC consider that "*[this] level of pricing transparency in the market reduces uncertainty as to rivals' behaviour in a material way and facilitates coordination.*"³⁸

³⁸ PF, para. 8.43.

4.46 The CC also indicates that one of the primary means through which Lafarge exercises its leadership role in the alleged coordination is through price announcement letters.³⁹ The CC found that Lafarge is often the first to send out price announcements and this provides a means for Lafarge to signal the level of desired prices and implement price leadership.⁴⁰ The CC considers that Lafarge's leadership role further facilitated coordination in the GB cement market.

4.47 It is therefore clear that a prohibition on generalised price announcement letters would reduce transparency and address a number of the CC's concerns.⁴¹ In particular, if the CC's PF were correct, the prohibition on generalised price announcement letters would, on the CC's analysis, reduce:

- (a) the impact of price leadership, price following and softening of customers to price increases;
- (b) transparency on competitors' prices, which is a supplemental factor facilitating coordination; and
- (c) Lafarge's leadership role in coordination.

4.48 However, it is again noted that pricing information is not the primary basis of the AEC identified by the CC. Therefore CEMEX considers that Measure 1 by itself is adequate to address the AEC identified. Measure 3 should be implemented in combination with Measure 1 only if the CC is concerned that Measure 1 does not, on its own, remedy the AEC identified.

MEASURE 4 – INFORMATION BARRIERS BETWEEN VERTICALLY INTEGRATED PRODUCERS' CEMENT AND RMX DIVISIONS

4.49 The CC considers that vertical integration of GB producers into downstream markets for cement, especially RMX, gives them additional local information about these markets. The CC states that vertical integration increases considerably the amount of transparency in the market, in particular because it provides the opportunity and logistical justification for cross-sales of cement between the GB cement producers (thereby increasing price transparency both through price announcement letters and through the level of the price that is agreed).

4.50 CEMEX considers that relatively simple and specific information barriers can be put in place between GB cement producers' cement and RMX divisions to reduce the transparency arising as a result of vertical integration. This would entail a prohibition on the following information being shared between a vertically integrated producer's cement and RMX divisions:

- (a) the price paid for cement to competitors;
- (b) cement price announcement letters received from competitors (to the extent Measure 3 is not implemented);

³⁹ PF, para. 8.218(b).

⁴⁰ PF, paras. 8.247 and 8.218(b) and (c).

⁴¹ CEMEX wishes to clarify however that it would still need to communicate price increases to customers in writing. CEMEX proposes that GB cement producers be permitted to send individualized prices to customers in writing.

- (c) information received from competitors on prices of cement charged to other RMX customers (for example, in the course of negotiations); and
- (d) the price charged to RMX competitors for cement.

4.51 CEMEX notes that this Measure 4 is a variant of the CC's Remedy X3 set out in the Notice (a code of conduct governing behaviour of GB cement producers). The CC has not pursued this option further as it considers that it would be very difficult to specify, monitor and enforce an effective code of conduct without intrusive ongoing surveillance and supervision of the internal activities of Lafarge, Hanson and CEMEX. In this regard, CEMEX makes two points:

- (a) Specification – It is clear from paragraph 4.50 above that a code of conduct aimed at reducing transparency can be specified fairly easily. The four categories of information which cannot be shared between the cement and RMX divisions of vertically integrated producers have been identified, are unambiguous and do not require further clarification.
- (b) Monitoring and enforcement – CEMEX submits that the code of conduct proposed by this measure can be monitored and enforced relatively easily. CEMEX considers that the above information barriers could be enforced through self-monitoring in the first instance. This would be supported by undertakings provided to the CC, which would provide for penalties for breach and require the relevant parties to report any breaches of the code to the OFT. CEMEX considers that this would be a sufficient deterrent to ensure that the code of conduct is not breached.

However, if the CC considers that further monitoring of the code of conduct is necessary, it would be open to the CC to ask the OFT to monitor the enforcement of the Measure by requiring regular reports from vertically integrated producers. Although CEMEX strongly believes that no further monitoring of the code of conduct is necessary, the OFT could appoint a monitoring trustee to carry out the monitoring and enforcement function.⁴²

4.52 Notwithstanding CEMEX's view that Measure 4 would effectively reduce transparency in the GB cement market arising out of vertical integration, it maintains its position that Measure 1 by itself is adequate to address the AEC identified. Measure 4 should be implemented in combination with Measure 1 only if the CC is concerned that Measure 1 will not, on its own, remedy the AEC identified.

MEASURE 5 – CREATION OF CEMENT BUYING GROUPS (“CBGs”)

4.53 In addition to Measures 1 – 4 above, which are aimed at eliminating transparency in the market, CEMEX considers that, subject to certain modifications necessary to ensure that this measure does not distort the free market, the CC's proposed remedy C6 would also contribute to

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CEMEX notes that the CC's Guidance provides for such 'firewall measures' to be adopted as remedies and there is precedent in the CC's decisional practice whereby it has imposed similar codes of conduct. Most notably, in the *Groceries Market Investigation*, to address the AEC that the CC found in relation to supply chain practices, it decided to implement remedies establishing a Groceries Supply Code of Practice (GSCOP), based on the existing Supermarkets Code of Practice (SCOP). The GSCOP is to be monitored and enforced by an Ombudsman.

addressing the AEC identified by increasing buyer power in the GB cement market. Remedy C6 in the Notice aims at establishing regional or national CBG(s) representing independent cement purchasers. The CC states that the remit of any CBG may include the following:

- (a) designing and implementing an effective competitive process for purchasing cement: for example through a periodic tendering process covering each region, in which GB cement producers and importers would be invited to participate;
- (b) working with GB cement producers, importers and customers to devise a flexible and transparent pricing approach, which would enable a CBG to provide its members with prompt price quotations;
- (c) negotiating prices on behalf of members along with other aspects of the offer such as standards for the quality of customer service;
- (d) offering its members security of supply through multi-sourcing cement from a number of different producers;
- (e) ensuring that all centrally negotiated terms and conditions are honoured by the GB cement producer or cement importer concerned; and
- (f) implementing an appropriate credit scoring and payment system for its members.

4.54 Although CEMEX does not agree with certain aspects of the CC's proposal on CBGs⁴³ it considers that if a CBG were to carry out some or all of the functions in the list above, this would significantly increase buyer power in the GB cement market.

4.55 The CC's Guidelines state that the external stability of coordination may be undermined by countervailing buyer power.⁴⁴ The CC has found in its PF that large customers have obtained favourable terms for the purchase of cement⁴⁵ and, as a result, a proportion of cement sales have been protected from the effects of alleged coordination.⁴⁶

4.56 In addition to resulting in countervailing buyer power, the creation of CBGs would create a number of large buyers and thereby undermine the alleged coordinated agreement by increasing incentives for cement producers to deviate. This is clear from paragraph 8.186(b) of the CC's PF which states, "[i]f...there are some **very large customers**, this will make demand for cement lumpier. Inducing one of these large customers to switch may be **sufficient to generate high one-off gains from deviation.**"

4.57 Presently, the CC considers that the situation is finely balanced, stating that "*the customer base [is] relatively concentrated (making monitoring of customer-supplier relationships covering the*

⁴³ See Section 5 below at paras. [5.48 to 5.50] . In summary, CEMEX considers it would be market distorting and disproportionate if: (a) there was a requirement to sell a specific proportion of cement to CBGs; (b) if any buyers were not given a choice of buying cement outside the CBG; and (c) any requirement for CEMEX, or any other GB cement producer, to administer or pay for the CBG(s).

⁴⁴ CC *Guidelines for market investigations*, April 2013, para. 255(d).

⁴⁵ PF, para. 8.214.

⁴⁶ PF, para. 8.215.

majority of cement volumes easier), but not so concentrated that the loss of a single customer would have a severe impact on profits (with the exception of Major customers and a few larger customers)". If the CC's assessment is correct, the introduction of large CBGs would tip the balance and create incentives to deviate, as being able to supply to a large customer would have a large positive impact on profits.

- 4.58 It is therefore CEMEX's view that the creation of CBGs would go some way towards addressing the CC's concerns, by creating large buyers which will be able to exercise buyer power to drive down price and increase the incentives of cement producers to deviate from the alleged coordinated agreement.
- 4.59 Notwithstanding CEMEX's view that Measure 5 would be effective in addressing the CC's concerns, it's clear from the CC's own analysis that Measure 1 by itself would be adequate to address the AEC identified. This is on the basis that Measure 1 will reduce transparency to such an extent that it will no longer be possible to maintain the alleged coordinated agreement. In the absence of coordination there is no AEC and hence there is no need to increase buyer power.
- 4.60 Measure 5 should be implemented in combination with Measure 1 only if the CC is concerned that Measure 1 does not, on its own, remedy the AEC identified.

CONCLUSION ON PACKAGE OF REMEDIES PROPOSED

- 4.61 It is clear from the CC's own analysis that Measure 1 outlined above adequately addresses the AEC identified by greatly reducing transparency in the GB cement market. However, if the CC does not consider that Measure 1 is sufficient by itself to reduce transparency, the CC should consider combining Measure 1 with any, or all, of Measures 2 - 4 (the "Transparency Reduction Package"). CEMEX submits that the Transparency Reduction Package would be more than adequate to reduce transparency in the GB cement market and ensure that coordination is no longer feasible.
- 4.62 In this regard, CEMEX wishes to remind the CC of the fundamental importance of transparency to coordination. In *Exxon/Mobil* the European Commission stated that "*[m]arket transparency is...one of the basic conditions characterising markets conducive to oligopoly. [Such] transparency allows the players on the market to converge...with no need of explicit coordination.*"⁴⁷ Similarly, in *Airtours* the General Court emphasised that "*the fact that a market is sufficiently transparent to enable each member of the oligopoly to be aware of the conduct of the others is conducive to the creation of a collective dominant position.*"⁴⁸
- 4.63 Further, the European Commission has found that it is irrelevant that the market is transparent in other aspects if it is not transparent in relation to the reference point for coordination.⁴⁹ Therefore, in the present case it is irrelevant if transparency persists in relation to a variable such as customers of competitors, if through Measure 1 (or through Measures 1 – 4) transparency can be

⁴⁷ Case No. IV/M.1383 – *Exxon/Mobil*.

⁴⁸ Case T-342/99.

⁴⁹ Case T-342/99.

removed in respect of shares of sales of GB cement, which the CC considers is the reference point for coordination.

- 4.64 In view of the above, CEMEX considers that if the CC were to reject the Transparency Reduction Package, it would be in breach of its own guidance and case-law, which state that without transparency there cannot be any tacit coordination.
- 4.65 CEMEX considers that there is no legitimate reason for the CC to reject the Transparency Reduction Package. However, as an added layer of protection, CEMEX has also proposed that Measure 5 be considered, which will increase buyer power and undermine coordination by greatly increasing the incentives to deviate.
- 4.66 CEMEX also notes that Measures 1 – 5 are behavioural remedies. CEMEX considers that none of Measures 1 – 3 or Measure 5 suffers from any specification, circumvention, distortion or monitoring and enforcement risks. In relation to Measure 4, the CC considered that its own Remedy X3 raised specification and monitoring/enforcement risks. However, these objections do not apply to Measure 4 and have been addressed above. In any case, CEMEX does not consider that Measure 4 is essential to remedy the AEC identified, as this can be done by implementing Measure 1 itself or, if necessary, Measure 1 combined with any or all of Measures 2, 3 and 5.
- 4.67 CEMEX considers that behavioural remedies should be preferred to structural remedies in this case. Although CEMEX considers that the entry of HCM fully undermines any alleged coordination in the GB cement market, it is clear that the CC does not entirely share its view. The CC's stance on HCM indicates that there is a risk that structural remedies may not address the coordination identified.⁵⁰ Further, there is a risk that improperly designed structural remedies may strengthen coordination.⁵¹ On the other hand, the Measures proposed by CEMEX, particularly the Transparency Reduction Package, fully undermine the alleged coordination by removing entirely one of the fundamental elements required to monitor any coordinated agreement and detect deviation - i.e. transparency (without which there cannot, as a matter of law, be any tacit coordination).
- 4.68 In its decisional practice the CC has shown an admirable reluctance to accept remedies which it fears may be too intrusive and disproportionate, even where it has not been certain of the effectiveness of less intrusive (and more proportionate) behavioural remedies. For example, in the *Extended warranties Market Investigation* a minority in the CC Group favoured a more intrusive remedy whereas the majority favoured a more proportionate remedy.⁵² The majority view was

⁵⁰ The fact that structural remedies are not necessarily as effective as behavioural remedies is clear from the CC's Final Report in the *Local Bus Services Market Investigation*, where the CC stated, "there are risks to the potential effectiveness of any divestiture remedies in addressing the AEC that we have found, including the risk that the scope for potential competition does not translate into an increased competitive constraint, unless the other barriers to competition that we have identified are also effectively addressed." (Para. 76, Final Report).

⁵¹ Sophie Papon, European Competition Law Review 2009, *Structural v behavioural remedies in merger control: a case to case analysis*, page 11.

⁵² *Extended warranties Market Investigation*, (Conclusion), para. 2.379.

recommended to the Secretary of State, who accepted the more proportionate package of remedies but asked the OFT to reinvestigate the market in two years' time.⁵³

4.69 CEMEX submits that by accepting the Transparency Reduction Package rather than imposing a more intrusive remedy, the CC will address the cause of the AEC identified rather than its results. This is in line with the CC's expressed preference in the *Local bus services Market Investigation*, where it stated, "[t]he CC generally prefers remedies that deal with the causes of the AEC, rather than its resulting detrimental effects."⁵⁴

4.70 In sum, CEMEX believes that it has proposed an effective and proportionate package of remedies, which addresses the AEC identified in a comprehensive manner. If the CC was to reject this package of remedies in favour of more intrusive structural remedies, it would be in breach of its duty of proportionality.

⁵³ PLC, *Competition Commission Report on Extended Warranties*, Published 18 December, 2003.

⁵⁴ *Local Bus Services Market Investigation*, para. 78.

5 CEMEX COMMENTS ON POSSIBLE REMEDIES CONSIDERED BY CC

5.1 In this Section CEMEX sets out its views on the effectiveness and proportionality of the possible remedies proposed by the CC in the Notice.

REMEDY C1 – DIVESTITURE OF CEMENT PRODUCTION CAPACITY BY ONE OR MORE OF THE TOP 3 CEMENT PRODUCERS

5.2 CEMEX submits that divestiture of cement production capacity would be a disproportionate remedy. The Competition Commission has recognized that divestiture represents a very significant intervention in property rights. This is particularly true in the context of a market investigation as opposed to a merger investigation. In a merger, parties completing a transaction prior to regulatory clearance do so at their own risk. This is not the case in market investigations (see paragraph 11.268 of the CC's Final Report in the *Groceries Market Investigation*).

5.3 Therefore, for an irreversible and intrusive remedy such as divestiture to be imposed, it must be justified by the gravity and prevalence of the CC's AEC finding.⁵⁵ CEMEX submits that this condition has not been satisfied by the CC in the present case. The reasons why **an intrusive and irreversible remedy such as cement divestiture would be disproportionate** have been set out in Section 3 above. For ease of reference these are summarised below.

- (a) Uncertainties inherent in the CC's profitability and margins analysis – One of the central planks on which the CC bases its coordination theory is that there is excess profitability in the GB cement market. This conclusion is arrived at using a novel and questionable methodology, is very sensitive to a number of reasonable assumptions, and the CC accepts that the range of possible outcomes is broad. The CC should take this into account when considering an intrusive divestiture remedy (see paragraphs 3.6 to 3.13 above).
- (b) Overstatement of consumer harm – The CC estimates consumer harm arising from the AEC to be £180 million. Given the possible methodological flaws and uncertainties in the CC's profitability analysis, the CC should accept that this may be an overstatement. In any case, even if this figure was correct, consumers would have been overcharged by about 5% (which is well within the range of possible error/sensitivities acknowledged by the CC in its own analysis). A divestiture remedy is not justified by the (lack of) gravity of the level of consumer harm alleged by the CC itself. (See paragraphs 3.14 to 3.15 above).
- (c) The CC has not taken into account the impact of changes in the market – The CC must recognise that it is examining a market which is undergoing significant change and, to the extent that any coordination exists, the market may self-correct. In the circumstances, it would be disproportionate to impose intrusive and irreversible divestiture remedies.

⁵⁵

Groceries Market Investigation, Final Report, para. 11.268.

In addition, the CC has acknowledged that the entry of HCM has disrupted the market to some extent and this is a relevant factor to be taken into account in assessing the proportionality of a divestiture remedy. (See paragraphs 3.16 to 3.35 above).

(d) *It is likely that a divestiture remedy will lead to sales of assets below market price* - CEMEX submits that, if the CC were to impose a cement divestiture remedy it would lead to the sale of cement assets at less than their fair market value. This is a relevant factor to be taken into account when considering the proportionality of any remedy. (See paragraphs 3.36 to 3.39 above).

5.4 In addition, CEMEX has proposed a comprehensive package of remedies, which would effectively address the AEC identified (see Section 4 above). This package of remedies is less onerous than any divestiture remedy and, if the CC were to impose a divestiture remedy when a less onerous, effective remedy exists, it would be in breach of its duty of proportionality.

5.5 In relation to the effectiveness of a cement divestiture, CEMEX acknowledges that this would depend on the identity of the plants to be divested. As set out below, CEMEX strongly believes that the divestiture of any CEMEX cement plants would be ineffective in addressing any AEC. However, more generally, if the CC's view on the impact (or lack thereof) of the entry of HCM on coordination were correct, there is a real risk that a cement divestiture may similarly not be effective in addressing the AEC identified.

DIVESTITURE OF CEMEX CEMENT PLANTS WOULD BE INEFFECTIVE AND PARTICULARLY DISPROPORTIONATE

5.6 Notwithstanding CEMEX's view that no cement divestiture is necessary, CEMEX submits that, if the CC were to impose this draconian remedy, it should not require CEMEX to divest any cement capacity as this would (a) not be effective in remedying the AEC; and (b) would have a very disproportionate impact on CEMEX's business. The imposition of a cement divestiture remedy on CEMEX will also be counter-productive as it would make CEMEX a less effective competitor.

A. EFFECTIVENESS

5.7 The CC's Guidance states that in assessing the effectiveness of any remedy the CC will favour those remedies which have a higher likelihood of achieving their intended effect of remedying the AEC identified. CEMEX submits that divestiture of any of its cement production assets will not allow for the creation of an efficient competitor and will therefore not be effective in remedying the AEC identified. [X]. In the Notice, the CC states that six factors are particularly relevant in relation to the scope of any divestiture package. Using these factors as a frame of reference, CEMEX explains why a divestiture of either of its cement plants would be ineffective.

Divestiture of [X]

5.8 CEMEX's cement plant at [REDACTED] is the larger of its two cement plants. However, [REDACTED] is a [REDACTED] and would not allow a competitor to compete efficiently.

(a) *The production capacity of the facilities to be divested and hence the potential market position of any competitor* – While the production capacity of [REDACTED] is large, and a competitor acquiring it would acquire a large market share in cement, this has to be balanced against the impact of the sale on CEMEX, which would be left with [REDACTED]. This is explained in more detail in the section on proportionality below. Further, even though the acquisition of [REDACTED] would give the new competitor a large market share, this would not necessarily make it an effective competitor for the reasons below.

(b) *The geographic reach of the cement plant based on the quality and availability of its transport infrastructure (e.g. whether it has rail-linked depots)* – The [REDACTED] cement plant is [REDACTED] and therefore [REDACTED] compared to [REDACTED]. The lack of [REDACTED] of CEMEX's cement plants is a significant factor affecting its [REDACTED] and goes some way towards explaining why its [REDACTED] other GB cement producers.

(c) *Cement plant's raw material reserves, its economic access to such reserves and the time period for which permitted reserves are available* – The [REDACTED] cement plant is [REDACTED]. This is, as far as CEMEX is aware, [REDACTED]. The CC has recognised that this imposes a [REDACTED] on cement production at [REDACTED].⁵⁶ The physical separation of [REDACTED] from [REDACTED]:

(i) [REDACTED] This is extremely [REDACTED] for CEMEX. It is estimated that this results in £[REDACTED] costs per year.

(ii) given the amount of chalk slurry that is [REDACTED]. These costs are estimated as follows:

(A) [REDACTED]. This is an ongoing exercise;

(B) [REDACTED] per year;

(C) [REDACTED] per year; and

(D) [REDACTED] per year.

(iii) as [REDACTED] is not [REDACTED], it has to follow a [REDACTED] process of cement manufacture. That is, [REDACTED]. It is estimated that the [REDACTED].

In addition to the disadvantages associated with [REDACTED]. Ideally a cement plant should operate along a straight line with the feed of raw materials through one end, production in the middle and output at the other end. [REDACTED]

(d) *Cement plant's financial and productions key performance indicators* – [REDACTED] of CEMEX running [REDACTED] very efficiently, [REDACTED]. In CEMEX's view, the significant [REDACTED] that are associated with the running of [REDACTED] would be very difficult to for a new competitor to overcome and compete effectively.

⁵⁶

PF, Appendix 7.7, para. 194.

- (e) *Cement plant's annual allocation of free carbon allowances (EUAs) during ETS Phase III (i.e. until the end of 2020), and its equivalence in terms of clinker production volumes based on its carbon emissions efficiency* – Please refer to Table 1 of the CC's Working Paper on Policy and Regulation, which sets out [REDACTED] EU ETS allowances and usage.
- (f) *The viability of potential divestiture packages on a stand-alone basis, as well as their attractiveness to potential purchasers* – For the reasons described in (b), (c) and (d) above, it is not viable to divest [REDACTED] on a stand-alone basis. In particular, if [REDACTED] is the only cement plant operated by a competitor [REDACTED]. In addition, a competitor would [REDACTED]. For these reasons, [REDACTED]

5.9 In summary, [REDACTED] would not be effective in remedying the AEC identified.

Divestiture of [REDACTED]

5.10 CEMEX's cement plant at [REDACTED]. In addition to [REDACTED]. These factors will result in a [REDACTED].

- (a) *The production capacity of the facilities to be divested and hence the potential market position of any competitor* – The production capacity of the [REDACTED] cement plant is [REDACTED] CEMEX considers that the [REDACTED], combined with the other factors below, [REDACTED].

In this regard, CEMEX notes that in the Lafarge/Tarmac merger inquiry the CC stated, *“the proposed divestiture would replace Tarmac with a competitor with different characteristics...Some of these factors — in particular the size of the cement plant — might increase, relative to Tarmac, the external constraint posed by the new competitor on any coordinating group”*. It is therefore clear that the size of the cement plant to be divested is a significant consideration in whether the remedy will be effective in addressing the AEC identified.

- (b) *The geographic reach of the cement plant based on the quality and availability of its transport infrastructure (e.g. whether it has rail-linked depots)* – The [REDACTED] cement plant is [REDACTED] and therefore [REDACTED] significant factor affecting its [REDACTED] and goes some way towards explaining why its [REDACTED].
- (c) *Cement plant's raw material reserves, its economic access to such reserves and the time period for which permitted reserves are available* – [REDACTED] is [REDACTED] like all other GB cement plants.

However, [REDACTED] uses a [REDACTED] to manufacture cement, which [REDACTED]

- (d) *Cement plants financial and productions key performance indicators* – CEMEX's estimates indicate that [REDACTED] has [REDACTED].
- (e) *Cement plant's annual allocation of free carbon allowances (EUAs) during ETS Phase III (i.e. until the end of 2020), and its equivalence in terms of clinker production volumes*

based on its carbon emissions efficiency – Please refer to Table 1 of the CC’s Working Paper on Policy and Regulation, which sets out [REDACTED] EU ETS allowances and usage.

(f) *The viability of potential divestiture packages on a stand-alone basis, as well as their attractiveness to potential purchasers* – CEMEX considers that divestment of [REDACTED]:

(i) [REDACTED]

(ii) [REDACTED]

5.11 In summary, the [REDACTED]

5.12 *Latent capacity* – [REDACTED]

Divestiture of [REDACTED]

5.13 Finally, CEMEX does not consider that a divestiture of its [REDACTED] grinding mill would contribute to the creation of an effective competitor. This is for the following reasons:

(a) [REDACTED]

(b) [REDACTED]

(c) [REDACTED].

5.14 In summary, [REDACTED]

B. PROPORTIONALITY

5.15 As set out in Section 3 above, CEMEX considers that it would be particularly unreasonable and disproportionate to require a divestment of CEMEX’s cement capacity. This is for the following reasons:

(a) *Profitability* – As set out in paragraphs 3.40 to 3.46 above, [REDACTED]. As such CEMEX has not contributed to the alleged excess profitability identified by the CC in the GB cement market. In these circumstances, it would be unreasonable and disproportionate to require CEMEX to divest cement capacity, [REDACTED]

(b) *CEMEX has not contributed to consumer harm* - As set out in paragraphs 3.14 to 3.15 above, CEMEX has not contributed to the £180 million of consumer harm which the CC considers has arisen out of the AEC identified. On the contrary, CEMEX has [REDACTED] customers by at least £[REDACTED] million over the period 2007 - 2011. If CEMEX had not [REDACTED] its customers and had [REDACTED], customers would have [REDACTED]. CEMEX's pricing policy has therefore served to benefit customers.

In these circumstances, where CEMEX has not contributed to customer detriment, it would be highly unreasonable for the CC to impose an intrusive and irreversible divestiture remedy on CEMEX.

(c) *CEMEX has only two cement plants* - In addition, unlike Lafarge, which has four cement plants, and Hanson, which has three cement plants, CEMEX owns only two cement

plants in GB [REDACTED] and one grinding mill. If the CC were to require CEMEX to divest one of its two cement plants, CEMEX would no longer be able to compete effectively in the GB cement market. Further details are set out below.

- 5.16 Rugby accounts for approximately [REDACTED] of CEMEX's clinker production capacity and over [REDACTED] of CEMEX's cement production. The sale of Rugby would result in [REDACTED]. As this production capacity could [REDACTED].
- 5.17 In addition, [REDACTED]
- 5.18 The sale of [REDACTED] would mean that [REDACTED]. Unlike many other GB cement plants, [REDACTED].
- 5.19 As stated above, the sale of [REDACTED].
- 5.20 In addition, as explained above, the sale of [REDACTED] would not be effective in remedying the AEC identified as CEMEX is not aware of any other [REDACTED] and the CC's analysis (i.e. that importing clinker faces the same cost disadvantage as importing cement) implies that [REDACTED], if the CC is of the view that the sale of [REDACTED] would be effective as it could grind imported cement, CEMEX notes that [REDACTED]. In these circumstances it would be disproportionate to require CEMEX to divest [REDACTED].
- 5.21 Further, the sale of either [REDACTED] will [REDACTED].
- 5.22 It is clear that CEMEX is organised to maintain its service and quality levels to its customer base as a result of its network of assets in the UK and it would be disproportionate to require it to divest any of its cement production assets.

Conclusion on Remedy C1

- 5.23 CEMEX considers that the forced divestiture of any GB cement production capacity is disproportionate and may not be effective in remedying the AEC identified. The CC would therefore commit a reviewable error if it were to impose a cement divestiture.
- 5.24 In relation to requiring CEMEX to divest any of its GB cement capacity, this would:
- (a) be unreasonable, given that on the logic of the CC's own analysis, it has not contributed to the alleged consumer harm;
 - (b) be ineffective in addressing the AEC identified;
 - (c) have a disproportionate impact on CEMEX's cement business; and
 - (d) create unintended consequences leading to a reduction in competition in the GB cement market.
- 5.25 A remedy requiring the forced divestiture of CEMEX's GB cement capacity therefore fails the balancing tests of effectiveness and proportionality and should not be considered by the CC.

REMEDY C2 – DIVESTITURE OF RMX PLANTS BY ONE OR MORE OF THE TOP 3 CEMENT PRODUCERS

- 5.26 CEMEX submits that divestiture of RMX plants would be a disproportionate and ineffective remedy in addressing the AEC identified. In addition, in a scenario where the CC has found no AEC in the RMX market, the forced divestment of RMX plants is unnecessary, particularly given that CEMEX and other vertically integrated cement producers continue to divest numerous RMX plants to independents.
- 5.27 CEMEX's primary objection to the CC's Remedy C2 is that it will not be effective in achieving the aims set out in the Notice and it is disproportionate to aim to achieve these objectives through divestment of RMX plants. Each of these is addressed in turn below.
- 5.28 ***Increasing the size of the 'addressable market' and thereby reducing barriers to entry and expansion*** – The current size of the addressable market is a massive 4.5 million tonnes. This accounts for approximately 50 percent of GB cement production. CEMEX considers that an addressable market of this size already provides a sufficient incentive to enter and expand in the GB cement market.
- 5.29 Accordingly, there has been little indication from customers or competitors that the size of the addressable market constitutes a barrier to entry.
- 5.30 In addition, there is no evidence to show that an increase in the size of the addressable market would result in more cement producers entering the market or existing cement independents (i.e. importers) expanding their operations.
- 5.31 As regards importers, if the CC's argument that importers face a marginal cost disadvantage were correct, increasing the size of the addressable market would not permit importers to expand their operations as they would still face the same cost disadvantage.
- 5.32 It is therefore clear that there is very little evidence from competitors/customers that the size of the addressable market constitutes a barrier to entry and expansion. Further, there are other significant barriers to entry into cement production and, in the CC's view, no expansion by importers is possible because of the cost disadvantage they face. In these circumstances, the divestment of RMX plants will not be effective in achieving the objective of increasing the size of the addressable market and reducing barriers to entry and expansion.
- 5.33 ***Reduction in cross-sales*** – In theory, a reduction in cross-sales will lead to less transparency. However, a divestiture of RMX plants sufficient to stop all cross-sales would clearly be disproportionate.
- 5.34 In addition, as the CC has acknowledged, cross-sales have greatly reduced in recent years and, given these market developments, it would be disproportionate to require divestment of RMX plants to achieve this objective. That is, the imposition of an intrusive and irreversible remedy such as divestment would be unreasonable when the feature of the market it attempts to address has been greatly reduced in any case. CEMEX notes in this regard that there is a general trend in the market to reduce or divest RMX capacity and CEMEX itself has divested [X] RMX plants since

2007, of which [X] were divested in 2012/2013. In addition, CEMEX has closed a further [X] plants since 2007.

5.35 Further, insofar as the CC is considering imposing RMX divestiture remedies on CEMEX, this would be particularly disproportionate as [X]. In these circumstances, it would be disproportionate to require CEMEX to divest RMX capacity.

5.36 **Countervailing buyer power** – The creation of countervailing buyer power would require the divestment of a large number of RMX plants to a single purchaser. However, even if this were the case, it is unlikely that this would lead to creation of countervailing buyer power because, as the CC has itself stated, most customers purchase at job-site level and not at customer level⁵⁷ and a single job-site would not have any more buyer power than such sites have at present.

5.37 In addition, even assuming adequate countervailing buyer power is created through an RMX divestment (which CEMEX accepts would address the AEC identified by the CC), CEMEX submits that the creation of cement buying groups (see Measure 5 set out in Section 4) would be a less intrusive, and therefore more proportionate, method of achieving this objective rather than forced and irreversible divestments.

5.38 **Increasing focus on addressable market** – CEMEX fails to understand how the forced divestiture of RMX plants would somehow lead to an “increased focus” on the addressable market such that the coordination identified would be undermined.

5.39 GB cement producers already have a clear focus on competing for independent customers. The CC has not demonstrated, nor even suggested, that competition for independent cement customers has been affected by the presence of vertically integrated RMX divisions. This is also clearly demonstrated by the internal documents reviewed by the CC.

5.40 Even if the focus on the addressable market needed to be increased, CEMEX submits that this will be a necessary consequence of an elimination of the alleged coordination, which can be achieved by greatly reducing transparency (i.e. by implementing the Transparency Reduction Package set out in Section 4 above).

5.41 In view of the above, CEMEX considers it would be both ineffective and disproportionate to require divestment of RMX plants in order to achieve the CC's objectives.

Divestiture of CEMEX's RMX plants would be particularly disproportionate and ineffective

5.42 In addition to a RMX divestiture being ineffective and disproportionate in achieving the CC's stated aims, this remedy is particularly inappropriate, if it is applied to CEMEX, for the following reasons:

(a) **Profitability** – As set out in paragraphs to 3.40 to 3.46 above, [X]. As such CEMEX has not contributed to the allegedly [X] identified by the CC in the GB cement market. In these circumstances, it would be unreasonable and disproportionate to require CEMEX to divest RMX plants.

⁵⁷ PF, para. 8.168.

- (b) CEMEX has not contributed to consumer harm - As set out in paragraphs 3.47 to 3.49 above, CEMEX has not contributed to the £180 million of consumer harm which the CC considers has arisen out of the AEC identified. On the contrary, CEMEX has [X] customers by at least £[X] million over the period 2007 - 2011. If CEMEX had not [X] its customers and had maintained prices at the competitive level, customers would have [X]. CEMEX's pricing policy has therefore served to benefit customers.
- (c) It is likely that a divestiture remedy will lead to sales of assets below market price - As set out in paragraphs 3.36 to 3.38 above, CEMEX submits that, if the CC were to impose a RMX divestiture remedy it would lead to the sale of cement assets at less than their fair market value. The sale of critical assets below fair market value would greatly undermine the financial viability of a company like CEMEX, the [X], and this is a relevant factor for the CC to consider in its assessment of proportionality.

In these circumstances, where CEMEX has not contributed to customer detriment, it would be highly unreasonable for the CC to impose an intrusive divestiture remedy on CEMEX.

Conclusion on Remedy C2

- 5.43 CEMEX considers that the forced divestiture of any GB RMX production capacity is disproportionate and will not be effective in remedying the AEC identified. As set out above, each of the objectives that the CC is aiming to achieve through the divestiture of RMX plants is either: (i) not necessary in view of the current market structure and conduct; or (ii) can be achieved more effectively through less onerous measures.
- 5.44 The CC would therefore be in breach of its duty of proportionality and commit a reviewable error if it imposed any RMX divestiture remedies.
- 5.45 In addition, requiring CEMEX to divest any RMX plants would be particularly ineffective and disproportionate.

REMEDY C3 – THE CREATION OF CEMENT BUYING GROUPS

- 5.46 As explained in paragraphs 4.53 to 4.60 above, if the CC does not accept that Measure 1 set out by CEMEX in Section 4 above would, by itself, be sufficient to address the AEC identified, CEMEX considers that the creation of CBGs would be an effective and proportionate measure, which would contribute towards eliminating the alleged coordination.
- 5.47 However, CEMEX wishes to make three points in regard to the CC's proposal to create CBGs.
- 5.48 First, the CC's proposal that there be a requirement to sell a specific proportion of cement to CBGs is disproportionate and interferes with GB cement producers' freedom to contract. The imposition of such a condition would result in CBGs holding GB cement producers to ransom, in the knowledge that GB cement producers are required to sell a certain amount of cement to CBGs. This will result in cement being sold below the competitive price unless the CC imposes a minimum price and acts as a price regulator, which the CC has indicated (quite rightly) that it is

reluctant to do. CEMEX therefore considers that the CC would be in breach of its duty of proportionality if it were to require GB cement producers to sell a proportion of their cement to CBGs.

5.49 Secondly, while CEMEX does not object to large cement customers being required to be part of the CBG(s) formed, it would be disproportionate and market distorting if these buyers were not given a choice of buying cement outside the CBG if they wished to do so.

5.50 Thirdly, although the Notice does not suggest this in any way, CEMEX wishes to clarify, for the avoidance of doubt, that it opposes any requirement for CEMEX, or any other GB cement producer, to be required to administer or pay for the CBG(s).

5.51 Subject to the above qualifications, and if the CC does not agree that Measure 1 set out in Section 4 above is adequate to eliminate coordination, CEMEX agrees with the CC's proposal to create CBGs.

REMEDY C4 – PROHIBITION OF GB CEMENT PRODUCERS SENDING GENERALIZED CEMENT PRICE ANNOUNCEMENT LETTERS

5.52 As explained in paragraphs 4.39 to 4.38 above, if the CC does not accept that Measure 1 set out by CEMEX in Section 4 above would, by itself, be sufficient to address the AEC identified, CEMEX considers that a prohibition on GB cement producers sending generalized price announcement letters would be an effective and proportionate measure, which would contribute towards eliminating the alleged coordination.

5.53 CEMEX wishes to clarify however that it would still need to communicate price increases to customers in writing. CEMEX proposes that GB cement producers be permitted to send individualized prices to customers in writing.

5.54 Subject to the above qualification, and if the CC does not agree that Measure 1 is adequate to eliminate coordination, CEMEX agrees with the CC's proposal to prohibit generalized price announcement letters.

REMEDY C5 – Restrictions on the disclosure of cement market data by the UK Government and by GB cement producers to private sector organizations

5.55 As explained in paragraphs 4.13 to 4.30 above, CEMEX considers that appropriate restrictions on the disclosure of cement market data by the UK Government and by GB cement producers to private sector organizations would, on its own, be an effective and proportionate measure to eliminate the alleged coordination and the AEC identified.

5.56 CEMEX therefore agrees that Remedy C5 would be an effective and proportionate remedy to address the AEC identified.

REMEDY C6 – Recommendations to the UK Government/European Commission on the publication of GB cement producers' verified emissions data under the EU ETS

5.57 As explained in paragraphs 4.31 to 4.38 above, if the CC does not accept that Measure 1 set out by CEMEX in Section 4 above would, by itself, be sufficient to address the AEC identified, CEMEX considers that appropriate restrictions on the publication of carbon emissions data would be an effective and proportionate measure, which would contribute towards eliminating the alleged coordination.

5.58 **REMEDY C7 – Structural measures to address the AEC in relation to GGBS/GBS production in GB**

As the CC is aware, CEMEX is not active in GGBS/GBS production. [✂]

CEMEX UK OPERATIONS LIMITED

12 JUNE 2013