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AGGREGATE INDUSTRIES  
RESPONSE TO NOTICE OF POSSIBLE REMEDIES

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## 1. INTRODUCTION

1.1 Aggregate Industries (*AI*) is grateful for the opportunity to provide its views on the notice of possible remedies (the *Notice*) published by the Competition Commission (*CC*) on 21 May 2013.

1.2 As set out in our response to the *CC*'s provisional findings (the *PFs Response* and the *PFs*, respectively), we broadly welcome the findings of the *CC*. In particular, we welcome the *CC*'s findings that no features of the aggregates and/or ready-mixed concrete (*rmx*) markets in Great Britain (*GB*) lead to an adverse effect on competition (*AEC*).

1.3 In the *PFs Response*, we note the *CC*'s findings with respect to the *GB* cement markets that (i) “*there was a combination of structural and conduct features that gave rise to an AEC in the GB bulk and bagged cement markets*”; and (ii) “*Lafarge Tarmac’s exclusive agreements [...] for the production of [granulated blast furnace slag (GBS)], and Hanson’s exclusive long-term contract with Lafarge Tarmac for the production of [ground granulated blast furnace slag (GGBS)] [...] gave rise to an AEC in the GB cement markets*”.<sup>1</sup> As a cement importer and customer, rather than a *GB* cement producer, we have restricted our comments in the *PFs Response* to those limited instances where evidence involving *AI* has been cited. Similarly, in this response to the *Notice*, we limit our comments to those aspects of the remedies where we have sufficient market knowledge to comment meaningfully.

## 2. REMEDY C1: DIVESTITURE OF CEMENT PRODUCTION CAPACITY BY ONE OR MORE OF THE TOP 3 CEMENT PRODUCERS

2.1 In light of the *CC*'s findings that (i) there are high levels of market concentration in the *GB* cement markets, where all ten cement plants in *GB* are now owned by four companies, namely Lafarge Tarmac, Hanson, Cemex and Hope Construction Materials (*HCM*), and (ii) the top three (*Top 3*) cement producers – Lafarge Tarmac (four cement works), Hanson (three) and Cemex (two) – form a group that is engaged in maintaining a coordinated outcome in the *GB* cement markets, we consider that [REDACTED]

2.2 [REDACTED] we would need to understand in further detail the *CC*'s proposals for the divestiture of cement production capacity before we could comment meaningfully on whether the proposed remedy is capable of being effective and proportionate. In particular, we would be interested to understand the following issues:

- (a) *Capacity to be divested*: we note that the *CC* has indicated that the detriment arising from high cement prices is “*of the order of £180 million over the period 2007 to 2011*”.<sup>2</sup> It is, at present, unclear how much cement production capacity the *CC* considers would need to be divested in order to remedy this detriment (e.g. one cement plant or more).

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<sup>1</sup> *PFs*, paragraphs 12.3 and 12.8.

<sup>2</sup> *PFs*, paragraph 12.9.

- (b) *Composition risk:* as noted above, it is unclear how many cement plants the CC currently envisages would need to be divested under this remedy. We would have concerns as to the viability of the proposed remedy if the CC envisages a single purchaser acquiring multiple cement plants from multiple owners (similar to a “mix-and-match” divestiture in a merger scenario). These plants could be very different in performance, upkeep, and operability, giving rise to a challenge for the new acquirer in integrating its existing new purchases into its business.
- (c) *Asset risk:* the effectiveness of the proposed remedy will depend heavily on the precise assets that the CC is contemplating for divestiture. Once the CC has identified the assets, we would need to understand the profile of the relevant cement plants and their markets, including, *inter alia*, the performance of the relevant plants, their geographic location, the performance (especially the capacity) of the cement market at the relevant time, and the performance of local downstream rmx markets.
- (d) *Purchaser risk:* we are concerned that the purchase of any divested assets by a new market entrant, or a relatively small player with limited experience, [X] would face serious difficulties in acquiring a package of cement plants. This would be the case particularly for purchasers lacking the necessary infrastructure, supply agreements, customer relationships, technical support and other key business functions necessary to run a commercially viable operation.

### **3. REMEDY C2: DIVESTITURE OF RMX PLANTS BY ONE OR MORE OF THE TOP 3 CEMENT PRODUCERS**

3.1 We note that the CC found no AEC in the rmx market and that the CC’s proposed rmx divestiture remedy is intended to address the AEC identified in the GB bulk and bagged cement market.

3.2 We note that the CC is considering divesting rmx assets as a way “to reduce the extent of the vertical integration between [each of the Top 3 cement producers] cement and downstream operations”.<sup>3</sup> We do not consider it necessary that any rmx plants divested by the Top 3 cement producers be divested as part of a package including cement plants. We note that, in applying remedies following its decision in the Anglo American / Lafarge joint venture merger inquiry, the CC linked the divestiture of cement and rmx plants, stating that “any divestiture package would need to contain substantial cement and RMX operations” in order “to enable the purchaser to operate effectively as an independent competitor in the UK cement market”.<sup>4</sup> We consider that the entry into the GB cement market by HCM and [X] would [X] be effective in increasing competition in this market. We do not therefore consider it necessary to divest rmx plants *as part of a package* with any cement plants [X]

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<sup>3</sup> Notice, paragraph 32.

<sup>4</sup> CC, *Notice of possible remedies in relation to the joint venture between Anglo American PLC and Lafarge S.A.* (21 February 2012), paragraph 16(a).

3.3 We understand that [REDACTED], but that the CC is currently considering divestitures only to independents (excluding AI).<sup>5</sup>

#### 4. REMEDY C3: THE CREATION OF A CEMENT BUYING GROUP OR GROUPS

4.1 Broadly speaking, our concerns about the effectiveness of the proposed cement buying group (**CBG**) remedy can be divided into two groups: (i) whether the remedy could in principle solve the AEC that the CC has identified; and (ii) the practicalities of implementing and monitoring the remedy. We believe that there is a risk that the proposed CBG remedy may have unintended, adverse consequences on the effectiveness of competition in the cement and rmx markets.

4.2 We understand that this remedy contemplates that, as a cement importer, AI may be required to sell the small amount of cement that it makes available to third parties through the CBG(s).<sup>6</sup> However, as the CC's AEC findings in cement do not relate to AI's behaviour, we believe that AI should not be included within the scope of the CBG remedy: AI is not a GB cement producer but instead a cement importer and customer, principally for its own consumption in its downstream businesses. AI supplies only very limited volumes of cement to third parties.<sup>7</sup> As such, we operate a very different business model to that of the GB cement producers, particularly in respect of AI's dealings with third-party cement customers. For these reasons, we oppose AI's mandatory inclusion in any CBG at this stage.

4.3 Moreover, we consider that the CBG will not be an effective remedy to the AEC identified by the CC in respect of the cement market and the existing GB cement producers for the reasons outlined below.

*The CBG is unlikely to remedy the AEC identified by the CC*

4.4 We are concerned that the CBG remedy, however implemented, would be unable to remedy the AEC identified by the CC:

- (a) *First*, the remedy does little to increase the negotiating power of the customers in the CBG in their dealings with cement suppliers. Buyer power is derived from the availability of a range of "outside options" to customers. To the extent that the number of distinct suppliers active in the GB cement market remains unchanged following the implementation of the CBG remedy, there is little reason to suspect that the CBG would lead to lower prices.<sup>8</sup>

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<sup>5</sup> See the CC's email to AI of 29 May 2013, clarifying AI's position in respect of certain possible remedies.

<sup>6</sup> *Ibid.*

<sup>7</sup> See AI's response to question 16 of its market questionnaire response (*MQ Response*). As explained at footnote 1 of the MQ Response, AI sells only a small volume of cement to third parties in the UK and a [REDACTED].

<sup>8</sup> To the best of our knowledge, at present there are no CBGs operating in the UK. If CBGs were able to achieve significant price reductions compared with directly contracting with cement providers, we would have expected them already to be a feature of the UK rmx market.

(b) *Second*, the remedy reduces the ability of cement suppliers to price discriminate, and hence their ability to discount selectively to customers willing to switch suppliers. Remedies that reduce the ability to price discriminate should be treated with caution – it does not necessarily follow that (a) by removing the ability of cement suppliers to offer certain customers lower prices than others, then (b) prices will fall throughout the market. In fact, there are cases where removing the ability of firms to price discriminate can lead to prices *rising* for all customers.<sup>9</sup>

(c) [✂]

4.5 We are therefore concerned that, in order for the CBG remedy to prove effective, the prices charged by cement suppliers to the CBG may need to be monitored by the CC. This would give rise to an impractical administrative burden on both cement suppliers and the CC.

*There are significant practical issues to be overcome in implementing the CBG remedy*

4.6 We are concerned that the proposed CBG remedy is unlikely to be workable in practice. In particular, in setting up the CBG, the CC would need to decide, *inter alia*:

- (a) how the administrative costs of the CBG would be split between its members;
- (b) how the costs of any bad debt associated with the CBG would be split between its members;
- (c) how the information (including competitively sensitive information) received by the CBG on its members' likely requirements would be protected from anticompetitive disclosure;
- (d) how the CBG would be able to ensure that it received the minimum volume guaranteed by cement suppliers;
- (e) how the CBG would design its tenders to avoid the risk of coordination in such an auction-type arrangement; and
- (f) what the CBG would do if it ended up with excess cement or too little cement.

4.7 We are concerned that these practical issues could not be feasibly overcome and, in any event, would need to understand how the CC would propose to address them before we could comment on the effectiveness of the remedy.

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<sup>9</sup> See, for example, section 3.3 of Armstrong (2006), "Recent developments in the economics of price discrimination" in Blundell, R. and Newey, W.K. and Persson, T., (eds.) *Advances in economics and econometrics: theory and applications: ninth world congress: volume II* (pp. 97-141). Cambridge University Press: Cambridge, UK.

*The CBG could give rise to adverse consequences at the customer level*

4.8 We are concerned that the CBG remedy may have a number of unintended, adverse consequences on the functioning of the rmx market. In particular, the remedy has the potential to facilitate coordination by customers in the CBG by:

- (a) aligning the cost of their principal input; and
- (b) creating a forum for the discussion of key commercial decisions, fully legitimised by the CC.

#### **5. REMEDY C4: PROHIBITION ON GB CEMENT PRODUCERS SENDING GENERALISED CEMENT PRICE ANNOUNCEMENT LETTERS TO THEIR CUSTOMERS**

5.1 For the very limited volumes of cement that AI sells to third-party customers, AI's policy is not to send price announcement letters (*PALs*). As such, we have no clear understanding of the present case for cement producers, and cannot therefore comment in detail on how the proposed remedy would affect producers' behaviour in the cement market.

5.2 That said, we consider that the use of PALs in general is an efficient way to communicate forecast increases in prices to customers. This allows customers to plan ahead for increases in prices and helps accommodate customers' budgeting processes. Customers also benefit from the use PALs as an important starting-point for price negotiations with their suppliers, reflecting increases in producers' key input costs and other drivers of price rises. We therefore consider that PALs give rise to significant relevant customer benefits (for the purposes of section 134(8)(a) of the Enterprise Act 2002)<sup>10</sup> in general and are likely to do so in the context of the UK cement market. We are not convinced therefore about the effectiveness and proportionality of this remedy and oppose the prohibition of PALs by the CC.

#### **6. REMEDY C5: RESTRICTIONS ON THE DISCLOSURE OF CEMENT MARKET DATA BY THE UK GOVERNMENT AND BY GB CEMENT PRODUCERS TO PRIVATE SECTOR ORGANISATIONS**

6.1 AI is not a GB cement producer but instead a cement importer and customer, principally for its own consumption in its downstream businesses. As such, we have no clear, practical understanding of the current market data disclosure arrangements, and cannot therefore comment on how the proposed remedy would affect behaviour in the market.

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<sup>10</sup> Section 134(8)(a) of the Enterprise Act 2002 defines a relevant customer benefit as “*a benefit to customers or future customers in the form of (i) lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom (whether or not the market to which the feature or features concerned relate); or (ii) greater innovation in relation to such goods or services*”.

**7. REMEDY C6: RECOMMENDATIONS TO THE UK GOVERNMENT / EUROPEAN COMMISSION ON THE PUBLICATION OF GB CEMENT PRODUCERS' VERIFIED EMISSIONS DATA UNDER THE EU ETS**

7.1 For the same reasons outlined with respect to remedy C5, we have no clear, practical understanding of the current arrangements, and cannot therefore comment on how the proposed remedy would affect behaviour in the market.

**8. REMEDY C7: STRUCTURAL MEASURES TO ADDRESS THE AEC IN RELATION TO GGBS / GBS PRODUCTION IN GB**

8.1 We consider that the CC's provisional findings with respect to GGBS / GBS are very specific to the operation of the cement market in GB, principally because these products are dependent on UK domestic steel production.

*Divestiture of GGBS / GBS plants*

8.2 AI is not active in the production of GGBS or GBS in GB. On this basis, we do not consider that we are well placed to comment on the effectiveness and/or proportionality of the possible divestiture remedies.

*Prohibition on exclusive GGBS / GBS arrangements*

8.3 We have also previously explained that [§] On this basis, we do not consider that we are well placed to comment on the effectiveness and/or proportionality of the proposed prohibition of exclusivity agreements between operators of GBS plants and of GGBS plants in GB. Suffice it to say, however, that we have found it possible to make satisfactory alternative arrangements.

**9. REMEDY X1: MARKET-OPENING MEASURES IN RELATION TO CEMENT IMPORTS**

9.1 We note that the CC found no AEC relating to the import of cement and that the proposed remedy X1 is intended to address the AECs in the GB cement markets by intensifying the competitive constraint provided by cement imports.<sup>11</sup>

9.2 The CC currently considers that the divestiture of cement import terminals by the Top 3 cement producers is “*unlikely to be effective in addressing*” the provisional AECs, a sentiment with which we agree. It is unclear how the divestiture of a cement import terminal would address the CC's chief concern in the area of cement imports, namely that the strength of the competitive constraint from imported cement is limited because of significant cost differentials.

9.3 We have not been able to identify any other measures that would address effectively and proportionately the concerns raised by the CC in respect of the cost differentials in cement imports.

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<sup>11</sup> Notice, paragraph 101.

## **10. OTHER REMEDIES CONSIDERED BY THE CC (REMEDIES X2 AND X3)**

10.1 We have no comments on the other two remedies set out in the Notice and which the CC is not currently minded to consider further.

## **11. CONCLUSION**

11.1 We have restricted our comments in this response to the Notice to those aspects of the remedies which are likely to impact AI and where we have sufficient market knowledge to comment meaningfully.

11.2 As explained in the PFs Response, the CC should ensure that any regulatory measures, which it considers necessary to impose on the industry, take proper account of the continuing and difficult operating conditions that the industry finds itself in and remain proportionate to the level of the detriment that the CC has identified.

11.3 Subject to the concerns outlined in sections 2 and 3 above, we consider that [X] no need to tie the divestiture of rmx plants to the divestiture of cement capacity. However, for the reasons set out above, we oppose the proposed implementation of a CBG and the prohibition of PALs. We do not currently consider these proposals to be effective remedies to the AECs identified by the CC and, in the case of the prohibition of PALs, have serious concerns about the loss of relevant customer benefits.

11.4 As explained above, we are not in a position to comment meaningfully on the other remedies proposed in the Notice.