HANSON

COMPETITION COMMISSION MARKET INVESTIGATION INTO THE AGGREGATES, CEMENT AND RMX MARKETS

RESPONSE TO THE REMEDIES NOTICE

1. INTRODUCTION

1.1 On 21 May 2013, the Commission published its Provisional Findings ("**PFs**") and Notice of Possible Remedies ("**Remedies Notice**") in relation to its Market Investigation into the supply or acquisition of Aggregates, Cement and RMX ("**MIR**"). This document sets out Hanson's response to the Remedies Notice and the possible remedies suggested by the Commission.

1.2 In view of the limited time the Commission has made available for interested parties to respond to the Remedies Notice, despite the considerable length of the PFs and intrusive nature of many of the suggested remedies, this response is restricted to providing Hanson's general submissions on the possible remedies proposed in the Remedies Notice.

1.3 Hanson will also be submitting a separate response to the PFs (the "**PFs Response**"). In short, Hanson does not agree with the core findings of the PFs as far as they relate to cement and GGBS. In particular, it considers that the Commission has misinterpreted the evidence it has received, has omitted from consideration and ignored the evidence provided that undermines its theories of harm and that its analysis is incomplete and often speculative in crucial respects.

1.4 On this basis, Hanson believes that there is no adverse effect on competition ("**AEC**") to address in any of the relevant markets, and therefore no remedies are required.

1.5 Notwithstanding the above, Hanson has prepared this response on a without prejudice basis in order to engage with the Commission on the matters set out in the Remedies Notice. For this purpose only, it is theoretically assumed that the features set out in paragraph 9 and 10 of the Remedies Notice are hypothetically established in relation to historic market conditions. Therefore no statement herein can be construed as an acceptance of the PFs.

Overview of Response

1.6 This response first comments briefly on the legal test the Commission must apply in its assessment of any remedy or remedies package.

1.7 In particular, the divestment remedies (proposed remedies C1, C2 and C7) under consideration would be highly intrusive and involve interference with property rights which are protected as fundamental rights under the European Convention of Human Rights. Therefore, there exists:

1.7.1 A higher standard of proof and stronger requirements for procedural fairness for the Commission to make its case, before such severe remedies can be considered; and

1.7.2 A greater focus on the reasonableness or proportionality of such remedies. The Commission must show to a high standard that any intrusion in market structure and interference in property rights is warranted on the grounds of the harm being addressed.

1.8 The response also highlights the need to take into account relevant customer benefits ("**RCBs**"), which must be a factor considered by the Commission when analysing potential remedies.

1.9 Hanson considers that the Commission's analysis of perceived coordinated effects in cement or the perceived AEC in GGBS falls short of the standard required in a number of important respects. In addition, the procedure leading up to, and following, the issue of the PFs has not accorded with the standards of procedural fairness required. Whilst Hanson considers that the flaws in the Commission's analysis and procedures prevent the Commission from imposing any remedies, this is of the greatest concern in relation to the proposed divestment remedies given the level of interference in the structure of the markets concerned.

1.10 The response then highlights a number of factors which demonstrate that it would not be proportionate to impose any remedy designed to alter the structure of the cement, RMX or GGBS sectors. Particular factors which negate the need for such remedies include:

1.10.1 The highly damaging potential impact of any such remedies, for Hanson and also for customers and the public interest;

1.10.2 The lack of evidence of detrimental effects, i.e. the lack of evidence that the GB producers have been earning excessive profits and/or that customers have been paying higher prices than would otherwise have been the case; and

1.10.3 The dynamic market situation, i.e. the changing structure of Lafarge Tarmac, the entry of Mittal/Hope Construction Materials and the changing dynamic and ever increasing presence and footprint of the Irish importers.

1.11 Hanson provides further commentary on the remedies relating to RMX (C2) and GGBS (C7), in particular highlighting the inability of the Commission to impose these remedies and the lack of effectiveness, benefit, practicability and/or proportionality of such remedies.

1.12 Finally, the response turns to the question as to what remedies might be appropriate and proportionate (were the structural and conduct features in paragraph 9 and 10 of the Remedies Notice assumed, in theory, to exist).

1.13 The Commission needs to adopt the least intrusive package of remedies to address any perceived AEC.

1.14 In this respect, the Commission should consider, as a maximum, a package of behavioural remedies (for example, remedies C3, C4, C5 and C6). Hanson also suggests and volunteers a further remedy requiring external purchases of cement by GB cement producers to be subject to a tendering process to allow multiple quotations and less opportunity for reliance on reciprocal trades and the associated concerns such business raises for the Commission. Hanson contends that a package of behavioural remedies along the lines contemplated and set out would be sufficient to address any perceived AEC in cement and/or GGBS.

1.15 As Hanson does not agree that an AEC exists, it has not been possible for Hanson to follow the Commission's format of questions as set out in the Remedies Notice. However, Hanson has set out in the Annex to this response in which paragraphs Hanson has attempted to answer those questions where possible.

2. THE TEST TO BE APPLIED BY THE COMMISSION

2.1 The Commission has recently published revised market investigation guidelines (April 2013) (the "**Guidelines**")[1]. The Guidelines highlight the various tests to be applied by the Commission in its analysis of a remedies package. The Guidelines supplement the market investigation provisions under Part 4 of the Enterprise Act 2002[2], which have themselves been interpreted in various cases.

2.2 When proposing remedies the Commission must consider the need to achieve as ***comprehensive*** a solution as is ***reasonable*** and ***practicable***[3] to:

2.2.1 remedy, mitigate or prevent the adverse effect on competition; and

2.2.2 remedy, mitigate or prevent the detrimental effect on customers, as far as they have resulted from, or may be expected to result from, the adverse effect(s) on competition.[4]

2.3 In taking remedial action the Commission must also take into account any RCB that currently exists and may be affected by any remedy.[5]

2.4 This response considers below two of the requirements imposed on the Commission in respect of remedies.

Reasonableness

2.5 The balancing exercise between effectiveness, reasonableness and practicability has come to be known as the proportionality test[6]. As stated in the Guidelines, "*in considering the reasonableness of different remedy options the Commission will have regard to their proportionality*"[7].

2.6 This mirrors the CAT's statements in *Tesco*[8] that the Commission must consider the overarching nature of "*the proportionality of a particular remedy as part and parcel of answering the statutory questions of whether to recommend (or itself take) a measure to remedy, mitigate or prevent the AEC and its detrimental effects on customers, and if so what measure, having regard to the need to achieve as comprehensive a solution to the AEC and its effects as is reasonable and practicable*".

2.7 Moreover, the Commission must consider "*whether the adverse effect(s) or customer detriment(s) that it was designed to address are sufficiently serious for their removal or mitigation to justify whatever costs and disruption to businesses and others that will be involved in the implementation of that remedy*"[9]. [Emphasis added]

2.8 By way of further explanation the CAT states in *Tesco* that the main principles of proportionality are that the remedy: "(1) *must be effective to achieve the legitimate aim in question (appropriate), (2) must be no more onerous than is required to achieve that aim (necessary), (3) must be the least onerous, if there is a choice of equally effective measures, and (4) in any event must not produce adverse effects which are disproportionate to the aim pursued*"[10]. [Emphasis added]

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[1] Competition Commission 'Guidelines for market investigation: Their role, procedures, assessment and remedies', April 2013
[2] c.40
[3] Enterprise Act 2002 s.134(6)
[4] Enterprise Act 2002 s.134(4)
[5] Enterprise Act 2002 s.134(7)
[6] *Barclays Plc v Competition Commission* [2009] CAT 27 (Case 1109/6/8/09) paragraph 19
[7] Commission Guidance on market investigations paragraph 342
[8] *Tesco Plc v Competition Commission* [2009] CAT 26 (Case 1104/6/8/08) paragraph 135
[9] Enterprise Act 2002, Explanatory Note paragraph 313
[10] *Tesco Plc v Competition Commission* (Case 1104/6/8/08) paragraph 137, as cited from *R v Ministry of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa* [1990] ECR I-4023 (Case C-331/88)

2.9 The CAT continued "*it may well be sensible for the Commission to apply a "double proportionality approach": for example, the more important a particular factor seems likely to be in the overall proportionality assessment, or the more intrusive, uncertain in its effect, or wide-reaching a proposed remedy is likely to prove, the more detailed or deeper the investigation of the factor in question may need to be*"[11]. [Emphasis added].

2.10 The 'double proportionality approach' is a restatement of the 'common sense position' that "*the depth and sophistication of analysis called for...needs to be tailored to the importance or gravity of the issue*"[12].

2.11 The Remedies Notice suggests a number of extensive structural remedies (remedies C1, C2 and C7) that would deprive the Top 3 GB cement producers of major assets which they have invested in over a number of years and/or interfere in freely negotiated commercial agreements which have underpinned the development of the GB cement producers' business models and the investments they have made. Implementation of any of these remedies would be likely to lead to substantial impairment losses for those GB producers directly affected.

2.12 These are, in particular, options which should not be enforced without detailed and careful analysis which seeks appropriate levels of proof, and abides by appropriate standards of procedural fairness.

2.13 As discussed in detail below, several of the remedies (C1, C2, C7) are as intrusive, uncertain in effect and as wide-reaching as possible. However Hanson would like to highlight this principle as it is one that the Commission should bear in mind throughout the entirety of its decision-making process.

2.14 Furthermore, the proposed divestments would amount to a serious interference with a GB producer's property rights, engaging Article 1 of the First Protocol of the European Convention on Human Rights ("**ECHR**"). As a public authority, the Commission is obliged under section 6(1) of the Human Rights Act 1998 not to act incompatibly with a GB producer's ECHR rights.

2.15 The Commission must justify the interference with a GB cement producer's property rights as striking a fair balance between the interests of addressing any perceived AEC and the requirement to protect the Major's fundamental rights. The Commission must therefore:

2.15.1 Identify the legitimate aim which it is seeking to achieve; and

2.15.2 Demonstrate to a high standard of proof that the interference with a Major's property rights is a proportionate means of achieving that aim.

2.16 This is in addition to the proportionality test as set out in the *Tesco* case, as recognised by the Commission itself[13]. The GB cement producers have a legitimate expectation that the Commission will give sufficient consideration to their fundamental rights.

RCBs

2.17 The Commission must consider the impact of any remedy on RCBs that exist on the market. An RCB is defined as one that creates lower prices, higher quality, a wider

[11] *Tesco Plc v Competition Commission* paragraph 139
[12] *Barclays Bank Plc v Commission* (Case 1109/6/8/09) paragraph 21
[13] In *Tesco v. Competition Commission* (Case 1104/6/8/08), Counsel for the Commission stated at the hearing: "*The importance of all this is that the present case, unlike Pine Valley, is not concerned with proportionality in the context to an interference with fundamental rights when, on the authorities, a strict proportionality test applies. It applies because you have to justify an interference with the fundamental right, and that is a rather strong thing to do. It might have been different I can see if divestiture had been a remedy. There you would have an interference and you would get into Article 1 territory*". Transcript, Day 2, page 70, lines 3 -15

choice of goods or services or greater innovation in relation to goods or services in any UK market; and that such benefits are unlikely to arise in the absence of the market features concerned in the remedy decision[14].

2.18 RCBs will impact the Commission's analysis of whether a remedy is reasonable and proportionate and, in certain circumstances, the Commission may not impose a particular remedy even where an AEC is found, if the consequential loss to market of the RCB is too great[15].

2.19 The remedies currently under consideration by the Commission, in particular proposed remedies C1, C2 and C7, would merit consideration in light of the principles summarised above.

[14] The Guidelines paragraph 356-357, *Store Cards Credit Services* market investigation report, March 2006, paragraph 10.7
[15] *Barclays Bank Plc v Competition Commission* (Case 1109/6/8/09)

3. THE ABSENCE OF A CASE FOR STRUCTURAL REMEDIES – REMEDY C1 (CEMENT DIVESTITURE) AND OTHER DIVESTMENTS

3.1 As noted in the previous section, the principle of proportionality requires that the Commission must balance a remedy against the level of interference in business and/or property rights. The more intrusive the remedy, the more serious the AEC and/or the detrimental effects on customers. RCBs also need to be taken into account.

3.2 This section highlights a number of factors which show that structural remedies would not be proportionate or effective.

3.3 It is again worth noting the statement made by the CAT in *Tesco* that "*the more important a particular factor seems likely to be in the overall proportionality assessment, or the more intrusive, uncertain in its effect, or wide-reaching a proposed remedy is likely to prove, the more detailed or deeper the investigation of the factor in question may need to be*".[16]

3.4 In the assessment of proportionality, the Commission must perform the most detailed investigation possible of the factors highlighted below in consideration of all the evidence presented to it. Hanson considers that the factors highlighted below are critical. The Commission has not shown to the requisite standard of proof that structural remedies for Hanson would be proportionate in the light of these factors.

Illustrative Impact on Hanson

3.5 Mandatory divestment of a cement plant by Hanson to create a sixth GB cement producer would be catastrophic for the Hanson business. First, it would, as a minimum, suffer [✂] impairment costs. For example, Hanson estimates relating to a potential divestment of the [✂] plant suggest that, in order to continue to serve its current and expected future customer obligations with only two plants, it would need to incur additional costs in the region of £[✂]million, including impairment costs and additional costs required to adjust production. The Hanson business would need to reposition its production and model in the market, with several years of reinvestment and delay before restoration of its production model to service its current customer base.

3.6 In addition, such a divestment would more likely result in a collapse in Hanson's market share, causing its reduction in operation and footprint as GB cement major, resulting in a [✂] business that ultimately increased cost for customers and consumers. Hanson has operated its business model for many years based on the operation of three cement plants. A reduction in the number of plants to two would threaten Hanson's underlying business model, and could [✂], with Hanson then being unable to recover the fixed costs of its own production model. Hanson's market share in cement has already fallen in recent years from some [✂]% in the early 2000s to only [✂]% a year ago. [✂]

3.7 Without, for example, [✂] current clinker capacity of some [✂] tonnes a year, Hanson would not be able to service even its current level of customer demand. Given that the market, in terms of cement volume, is expected to grow at a rate of some 3% to 4% per annum for the next few years, the divestment of such a site would result in the shrinkage of the Hanson business as described above. The Commission has already labelled Hanson a "*medium sized producer*". The consequence of the divestment of Hanson's [✂] would be to reduce Hanson's capacity [✂]. This would be unduly punitive on Hanson and would remove from the competitive market an operator having a suitably strong production capacity and status as an effective competitive major.

[16] *Tesco Plc v Competition Commission* (Case 1104/6/8/08) paragraph 139.

3.8 The PFs suggest that the Commission has discounted the ability of HCM to be "*as the smallest GB producer sufficiently market disrupting on its own materially to reduce* [the Commission's] *concerns about coordination*"[17]. Whilst Hanson strongly disagrees with this, it would seem counter-intuitive and extraordinary for the Commission, having appeared to have rejected the ability of HCM to present a strong competitive constraint due to its *size (despite having a production capacity only some 2% less then Hanson's own market share as of one year ago), to* seek to reduce Hanson to a similar (or indeed smaller) size. If it were to impose a cement plant divestment remedy on Hanson, the logical conclusion (following the Commission's thinking) would be that the Commission were seeking to render Hanson ineffective as a competitive constraint. This would not solve any perceived competition problems, merely weaken a major competitive constraint to the market leader, create less competition and destroy benefits for the public interest and RCBs.

3.9 Therefore, such a remedy would be grossly disproportionate, disastrous for Hanson and ultimately damaging and costly to customers and the public interest, and thus completely ineffective. A loss of one of Hanson's plants would [✂]; leading to higher prices and adverse effects on RCBs, particularly as demand for cement volumes may grow for the next few years. [✂]. Rather than assisting the market, it would ultimately damage it, and Hanson suggests that where a market structure is based on a smaller number of operators, it is established that particular regard must be had to minimise adverse effects or overly onerous impacts on parties, since the risk / likelihood is that such adverse effects would directly increase pressure on costs and profitability, leading to higher prices that are in turn damaging to customers and the public interest.

Lack of Detrimental Effects - Profitability

3.10 The Commission has not shown that the perceived AEC has led to any adverse effects on direct, or indirect, customers.

3.11 The Commission places significant weight on its findings of excessive profitability, through which it forms its estimate of £180 million in customer detriment. This will be explored in detail in Hanson's PFs Response, but is summarised below.

3.12 Hanson's PFs Response explains how the Commission's approach to calculating industry profitability is fundamentally flawed. The series of errors in the approach invalidate any concerns about excessive profitability and customer detriment.

3.13 However, even if we assumed the Commission's profitability figures were hypothetically somehow correct (and to be clear they are not), they would not provide sufficient grounds on which to conclude that a divestment remedy is proportionate. They certainly do not show that any divestment remedy should be imposed on Hanson.

3.14 As noted, we deconstruct the Commission's approach in detail in our PFs Response. For example, some simple points (from a much longer list of concerns) include:

3.14.1 The Commission's main scenario finds industry average ROCE of 13.3% on 'a continuing costs of supply' basis (and of 11.6% on an all costs basis) over the 5 year reference period. The Commission concludes this is "excessive" given its assumed WACC (10%). This is an unprecedentedly narrow differential on which to conclude "excessive" profits and the need for divestment remedies (particularly when the upper bound of the WACC range is actually 11.5%).

3.14.2 [✂]

[17] PFs, paragraph 8.281

3.14.3 The Commission conducts only two sensitivity scenarios. In each case it varies only one of the several assumptions underpinning its analysis. Both sensitivities then show profits falling significantly[18]. This indicates how acutely sensitive and narrow the Commission's findings are to its input assumptions; assumptions the Commission itself notes at several points are imprecise, untested, and based on effectively subjective or speculative judgment over conflicting factors[19]. Given this extreme uncertainty and narrow assessment of detriment analysis, there can be no grounds for an invasive remedy.

3.14.4 The Commission excludes impairment charges to the Profit & Loss account from its estimate of continuing costs of supply. This omission is contrary to the Commission's own stated methodologies and there is no professional basis for such an omission and this presentation is therefore incorrect, biased, and unreasonable. Correcting the Commission's error in presentation (i.e. including the omitted impairment charges in assessing continuing costs) changes the picture fundamentally – industry profits fall below WACC on all scenarios (on the main scenario it would be at 9.3%). Hanson will explain in detail in its PFs Response the various ways in which this treatment of impairment charges is flawed. Just some of the reasons include:

(a) The Commission claims to use Financial Capital Maintenance where in fact this treatment would prevent companies achieving FCM;

(b) The Commission's calculation of ROCE is internally and inexplicably inconsistent because the denominator, capital employed, is calculated after impairments to the asset base, where the numerator is before the negative impairment charges to EBIT that occur simultaneously and as a direct result of impairing the assets, thus producing a distorted and erroneous calculation;

(c) Hanson notes that the Byatt Report (on which the Commission's analysis relies heavily) explains impairment charges should be included in continuing costs: *"The handling of changed expectations on factors affecting the value of assets to a business is central to ensuring that current accounting costs reflect the best estimate of continuing costs of supply...Most unexpected changes in the real value of assets, when they are recognised, will occur in the ordinary course of business and should be taken through the profit and loss account immediately. They form part of continuing costs...*" (Vol II, para 4.46-4.48); and,

(d) According to the Commission's approach: on the same day as demand for cement is so bad that investors take the painful

[18] Hanson notes that the Commission selects to not report the findings of these sensitivity scenarios in the main body of its PFs.

[19] Some examples in the PFs Appendix on cement profitability include*: "....Whether on balance such sophistication in the analysis is material in the light of necessarily imprecise assumptions concerning asset lives and use patterns is an empirical matter..." (para 109); "We do not have detailed insight into all the factors influencing decisions on economic useful lives and their associated depreciation profile for individual (groups of) cement assets. This detailed insight can only come from deep experience of commissioning and operating a portfolio of cement works ..." (para 111); "[W]e chose a declining balance 'convex' depreciation profile, declining at 3.5 per cent per year in perpetuity. Two of the four factors which taken together determine this profile (and asset lives), namely rising running costs and technical progress, predicate a convex profile, the third factor, expected output levels, predicates a straight-line depreciation profile and the final factor, the opportunity cost of capital, predicates a concave profile" (para 112); "We acknowledged that our chosen depreciation profile was based on empirical observation rather than a mathematical synthesis of all the factors likely to influence the loss in value over time of a cement plant. In particular we considered that emphasizing only one of these factors' influence on the depreciation profile, such as the time value of money, would not necessarily take account of the best information available taken all together. We are therefore considering developing a custom depreciation profile to refine our analysis of GB cement producers' profitability*" (para 118). [Emphasis added]

decision to impair assets (and so accept they will not be able to recover the costs of their investments), the company would then be declared super-profitable according to the Commission's claimed approach and methodology. In the Commission's world, impairing assets would then be cause for investor celebration; a completely unrealistic and extraordinary outcome.

3.14.5 Given that the assets are extremely long-lived (around 60 years), the five year reference period is clearly far too short to form a view on whether the returns are normal over the life-time.

3.15 Far greater rigour and certainty is required in the Commission's profitability analysis if this is to be used as any basis of evidence of customer detriment and therefore proportionality of remedy. Clearly the Commission's work to date with regard to outcomes and profitability has suffered from a significant number of errors, inconsistencies and changing methodologies contrary to both its own, as well as established best practice.

3.16 This has two particular implications:

3.16.1 There is a circularity to the PFs, where the analysis of certain features of the market (such as supposed 'tit-for-tat' behaviour) is expressly interpreted as evidence of coordinated effects (in the face of evidence of strong competition) dependent upon the supposed negative outcomes (of which the claim of excess profitability is key), whilst the outcomes are stated to result from coordination. As noted above, the lack of cogent evidence of negative outcomes (in particular, excess profitability) casts doubt on the existence of coordinated effects and the numerous findings of the Commission that depend upon it. As noted above, the imposition of structural remedies imposes a high burden of proof on the Commission in respect of the findings of an AEC. The lack of excess profitability casts significant doubt on the finding of an AEC due to coordinated effects.

3.16.2 There can be no case for the imposition of structural remedies in a market where there are no excess profits and/or proof that customers are paying supra-competitive prices. In the absence of detrimental effects, the AEC can not be said to be sufficiently serious to justify structural remedies.

3.17 Further, it should be noted that Hanson provided its own detailed analysis of its profitability. [✂]

3.18 [✂]

3.19 Therefore, there are no grounds to argue that Hanson should bear the significant costs of invasive remedies; [✂]

3.20 The Commission highlights that "*in a well-functioning market, faced with a demand slump, we would expect...returns at or below the cost of capital*"[20]. [✂] As detailed above, Hanson considers that there is insufficient evidence that 'the GB cement producers' are achieving returns above the cost of capital. [✂]

3.21 Set against this background, the implication of structural remedies (in particular, the requirement for the divestment of a cement plant) is that the Commission would expect to see some, or all, of the GB cement producers not recovering the cost of capital in a 'well-functioning' market during a downturn. As there can be no certainty that demand will recover to its 2007 levels in the foreseeable future[21], the

[20] For example, in the summary of the PFs, published together with the PFs, paragraph 35.

[21] The current demand downturn and its impact on Hanson's business, as well as the uncertain prognosis for future demand, was the subject of a letter to the Commission from Hanson of 28 November 2012. No account seems to have been taken of the contents of this letter by the Commission.

Commission's approach would suggest remedies leading to at least one (and potentially two) of the main industry participants [✂] returns below the cost of capital.

3.22 Not only would this be disproportionate, but there would be a risk of damage to the competitive market (i.e. removal of RCBs) through the weakening of the main industry participants and/or leading to exit and cessation of GB investment as described above.

3.23 In respect of outcomes, the Commission has highlighted strongly its concerns of detrimental effect with regard to increasing profitability and prices through the review period, with the Panel leader and Chairman, Professor Cave, announcing publicly that "*Strikingly, despite low demand for cement over recent years, prices and profitability for the GB producers have increased.*"

3.24 Hanson does not understand how this statement can be taken at face value as a proportionate, balanced or fair statement, when the Commission's own work on cement prices clearly shows that through most of the five year review period, prices have *fallen.*[22] Prices are shown to have fallen continuously from the end of 2008, right through 2009, continuously through 2010 and continuously right though until the end of 2011. The industry average price has fallen from £88 per tonne in 2009 to less than £80 at the end of 2011. This leaves prices, in real terms, at end of the review period in 2011 at almost the *same* level as the £77 per tonne as long ago as 2007, right at the beginning of the review period. This trend is even more marked in the case of Hanson's cement prices, where its average price per tonne (again using the Commission's own real terms calculations) reduces from £88 per tonne (2009), down to £80 (through 2010) and then further down to only £78 for 2011, thus as at the end of the review period in 2011 being exactly the same pricing as Hanson's average cement pricing of £78 for 2007 at the beginning of the review period. Accordingly, Hanson would suggest that such conclusions drawn by the Commission are questionable and (if the implication is that the general trend is of prices always increasing and unacceptably so) false, since the Commission's own work clearly shows the majority of the five years of the review period as experiencing a trend of *falling* prices, and 2011 prices at the end of the five year review period being the *same* (for Hanson) or very similar (for the industry) as the pricing as far back as the first year of the review period in 2007, despite the extraordinary costs inflation experienced during the review period. Hanson would suggest that such statements constitute unfair, partial and erroneous characterisations of cement pricing when one considers the continuing price reductions through the last three years of the five year review period.

3.25 In exactly the same way and as described above, the statement by Professor Cave, with regard to Hanson, that as a GB producer it has enjoyed 'increasing profitability' is, with respect, again contrary to the evidence and partial and erroneous. Hanson [✂], hardly the 'increasing profitability' suggested publicly by Professor Cave.

3.26 The significant question mark which can be placed over these statements, as well as the lack of cogent evidence on profitability, indicates a complete absence of a case for structural remedies.

Remedies not effective at addressing detrimental effect

3.27 If it is assumed that an AEC does exist, to date the Commission has not considered how a structural remedy and the consequential creation of a fifth or sixth GB cement producer would remedy any AEC. This is before any account is taken of the significant market presence and growth of Aggregates Industries and CRH. Also the role played by HCM on the cement market cannot be ignored.

[22] In real terms - see PF Appendix 7.8 Table 1

3.28 Case law has shown that, in nearly all of five-to-four merger cases, a 'well functioning market' has been maintained and the merger has been approved. As shown in these cases, the market conditions required for sustained coordination are highly unlikely to exist in a market with so many major participants.

3.29 It is, therefore, unclear what measure of a "well-functioning" market the Commission is aiming to achieve with the implementation of such remedies, in particular the cement divestment remedy (Remedy C1). Given the general acceptance of the fact that four major players would be sufficient to undermine any prospects for coordination, it would appear that the Commission is looking to create a theoretical position of "perfect competition". This is in spite of the Commission's statements to the contrary[23] and the fact that this is contrary to its own Guidelines[24]. Such an approach would clearly be disproportionate.

Dynamic Market Conditions

3.30 As discussed in detail in the PFs Response, the dynamic nature of the market is fundamental to any theory of harm relating to cement markets. However, it is also fundamental to any decision on remedies.

3.31 The Commission has not, at this stage, performed any form of cogent assessment or analysis of the very significant recent market developments highlighted in any of Hanson's responses to Working Papers[25]. Hanson submits that no reasonable decision-maker in the position of the Commission would reach the same findings if an adequate analysis of these factors was performed.[26] This represents a substantial procedural failure on the part of the Commission, but more specifically to this context would result in any proportionality analysis being fundamentally flawed.

3.32 It is worth highlighting two particular changes which mean that it is impossible for the Commission to predict the market outlook and development of competition in future:

- The impact that the Lafarge/Tarmac joint venture and the establishment of Hope Construction Materials ("**HCM**") by Mittal Investment Sàrl ("**Mittal**") a new entrant with a sizeable 16% of the entire GB national cement capacity[27].
- The entry, and scaling up, of the FTSE 100 multinational CRH through its acquisition of Southern Cement from CPV and Dudman's various import terminals in Montrose (Scotland), Garston and Lowestoft.

HCM

3.33 The impact of Mittal/HCM's entry will be discussed in the PFs Response. For ease of reference a summary of the main points is outlined below:

3.33.1 HCM will bring the world leading skills, experience and resources of the Mittal group to the cementitious market. HCM's supply chain within the wider Mittal group will give it a significant competitive advantage. HCM will most likely utilise Mittal's international spread, financial resources, reputation for process improvement and R&D, and access to overseas clinker and GBS to grow market share and aggressively attract customers away from the other Majors.

[23] PFs paragraph 8.3
[24] Guidelines paragraph 30 and paragraph 320 - *Barclays Bank Plc v Competition Commission* (Case 1109/6/8/09) para 104 "*There is, in our view, a clear distinction between a properly functioning market unaffected by an AEC and an ideal market, in which every potential supplier of the relevant product competes on a precisely level playing field*".
[25] A summarised restatement of Hanson's Working Paper of the entry of Mittal in Appendix 7.15 of the PFs does not in Hanson's view constitute an evaluation of the relevant evidence presented to the Commission. The Commission's submission on the entry of Mittal has not changed in substance or quality of analysis since the Working Paper stage.
[26] *Barclays Bank Plc v Competition Commission* (Case 1109/6/8/09) paragraph 28
[27] The Commission acknowledges HCM's market entry as a 'key development'. HCM was created by divestments, which "*might result in a more competitive situation*" (Lafarge/Tarmac decision para 8.145).

3.33.2 HCM will have a sizeable 16% market share in cement capacity, a 60% increase in comparison to Tarmac's pre-JV share of 10%[28]. In effect this has halved the difference between the 'fourth market' player and Hanson and Cemex (with capacity shares of 23% and 24% respectively). Therefore HCM now sits alongside Hanson and Cemex as a leading, and one of the largest, cement and concrete companies in the UK. It should be borne in mind that Hanson's own sales market share fell to as low as 18.5% a year ago, only a couple of percentage points greater than HCM's capacity.

3.33.3 The advent of Mittal and Hope to the UK cement market brings not only a new entrant with as much as 16% of national capacity, but fundamentally changes the market dynamic, in that Tarmac's business model was one of focus on self-supply, whereas Hope's is the opposite with necessary reliance on external sales to achieve its share. Unlike Tarmac, HCM is 'long' in cement with very significant surplus to carry out external sales. A significant factor referred to by the Commission in relation to the external sustainability of any coordination was the capacity constraints and high degree of vertical integration to cement. The HCM entry already changes this dynamic materially. It is to be noted that HCM has 60% more cement production capacity than Tarmac previously had, but that HCM has only 2% more RMX plants[29]. As a consequence, HCM (which has stated publicly[30] that it seeks to run Hope cement plant at a high capacity utilisation) will produce a significant amount of additional cement which will be available for sales to independent RMX customers.

3.33.4 The impact of Hope has already been shown to shift competition for customers among independent RMX and concrete products producers. Even before the publication of the PFs, Hanson provided evidence that HCM is already aggressively competing for business, [✂] and has already been successful at gaining very significant contracts from key customers for large quantities of cement[31].

3.33.5 Therefore, the Commission has already provided, as a direct remedy in express response to its perceived concerns regarding possible coordination, the most fundamental and severe remedy that is possible, in the form of mandatory structural divestment to create a fourth major GB cement producer with significant excess capacity volume. To now refer to the possibility of creating a sixth (or a fifth) cement player by way mandatory divestment against Hanson would seem unnecessary, onerous *in extremis* and extraordinary when the Commission is still to see the full results of the remedy it has only just implemented at the beginning of this year.

3.34 These market developments are further augmented by the operation of the new Lafarge Tarmac joint venture, which has a different cement and RMX profile being extremely long in cement with the lowest VI ratio in the market and so being very much dependent on external sales.

3.35 The Commission has merely worked to discount the potential impact of HCM's entry (and the creation of the Lafarge Tarmac JV) on its coordinated effects theory of harm noting that the changes noted above "*were unlikely to be sufficiently market disrupting*

[28] PFs paragraph 7.216, Table 7.15 and Table 7.16
[29] See PFs Tables 3.10 and 3.12
[30] For example, see the article in Global Cement Magazine, page 39, in which Hope states that it is aiming to operate at above 80% capacity utilisation in respect of its 1.5 million tonnes annual capacity.
[31] For example, in its commentary on the Working Paper on Lafarge / Tarmac joint venture and the acquisition by Mittal of Hope Construction Materials submitted on 26 March, Hanson noted: "*Hope is already aggressively competing for business and* [✂] *to win one of its longest standing customers from it. This fact alone is significant, but Hope's gaining of the* [✂] *business from Hanson is all the more significant due to the volumes of business in question:* [✂]. *Another highly significant point to note is the way in which Hope won the customer* [✂]*"*

on its own materially to reduce our concerns about coordination in GB cement markets"[32]. This is in spite of:

3.35.1 the Commission's own acknowledgement that "*this development is too recent to observe any resulting effects in the evidence available to us*"[33]; and

3.35.2 the Commission's earlier and contrary express acknowledgement in the Commission's final report on the anticipated construction materials JV between Anglo American and Lafarge, (in relation to the then proposed divestment remedy) that *"it is also conceivable that such uncertainty* [i.e. uncertainty undermining the prospects for coordination] *might increase following divestiture...compared with the situation before the proposed JV"*[34]. The PFs also note that "[the fact that the Hope cement plant is larger than Tunstead]*, combined with the strategic uncertainty associated with the entry of a new player into the UK cement market, had some potential to undermine coordination*"[35].

3.36 Not only are the Commission's conclusions internally inconsistent, but the Commission has clearly concluded that the entry of Hope (and the creation of Lafarge Tarmac) represents a structural change which has scope to undermine any perceived coordination in GB cement markets. Indeed, such a purpose was the express objective of the Commission in creating Hope, and it would now seem extraordinary for the Commission to work immediately to levy further remedies, when it has only just implemented the most severe and fundamental remedy that is possible.

3.37 Inexplicably, the Commission has avoided all due consideration and conclusions with regard to the likely impact of Hope on the UK cement market. The Commission is under an obligation to give such a major development full consideration with a view to considering a moderation or tempering of its findings, as indeed it did recently in the Pay TV market investigation when the new entrant Netflix took only a 10% market share, which was judged by the Commission as so significant a share as to merit withdrawal of the entire market investigation. It remains unclear in this case as to why the Commission seeks to avoid all due consideration of the likely impact of Mittal on the GB cement market and proceed only to levy further remedies, despite Hope as a new entrant having a capacity share which is some 60% greater than the new entrant's share achieved by Netflix and despite Hope being the deliberate remedy already and only just levied by the Commission in countering any model of coordination.

CRH

3.38 The recent acquisitions by CRH introduce yet further structural change and uncertainty to the market. During the period of the Commission's review, CRH owned the importer Premier Cement. In February 2013, it acquired Southern Cement from Cementos Portland Valderrivas (CPV)[36]. More recently, it has also acquired numerous assets of the Dudman importer business. These include Dudman's import terminal in Garston; Hanson understands that it has also acquired Dudman's terminal in Montrose (Scotland) and Lowestoft.

3.39 In short, the significance of these developments is as follows:

3.39.1 CRH has continued to significantly scaled up its GB operations now having access to five import terminals (compared with one previously), allowing it to become a major player in the GB cement market. The Commission has

[32] PFs, paragraph 8.281
[33] PFs, paragraph 8.225
[34] A report on the anticipated construction materials JV between Anglo American PLC and Lafarge S.A, 1 May 2012, paragraph 8.113
[35] PFs, Appendix 7.15, paragraph 28
[36] PFs, Appendix 7.5 paragraph 2

already recognised the potential incentive on CRH to increase its production to avoid the loss of carbon credits under the partial cessation rule of EU ETS Phase III[37].

3.39.2 Whilst the majority of its newly acquired cement assets were operated by others during the Commission's review period, there are essential differences. The Dudman depots were operated by a company without its own internal access to cement (in effect, a wholesaler), whereas CRH has internal access to virtually unlimited quantities of locally produced cement (through Irish Cement's facilities Castlemungret, Limerick and Platin Co, Meath). The Commission has repeatedly made the alleged and perceived 'cost penalty' disadvantage faced by importers required to purchase cement a 'key factor' across its PFs as to the relative lack of constraint exercised by importers. This in no way applies in the case of the CRH businesses which can internalise cement purchases. There are no such 'cost penalties' for CRH (or, indeed, any of the other major importers, such as Paragon, CPV, Titan and Quinn).

3.39.3 Southern Cement will transfer from a Spanish cement group to an Irish one. A key contention of the Commission in relation to the influence of importers relates to transport costs.[38] Not only do such 'cost penalties' not apply to any of the major importers with their own cement production, whatever the costs are that are associated with imports, (which in any case do not constitute a significant proportion of total costs[39]) will be reduced further as a result of the proximity of CRH's plants in comparison to those of CPV, and the ability to further develop the growing practice of importing cement into the UK from Ireland by lorry.

3.40 More generally, the PFs demonstrate a fundamental misunderstanding of the competitive constraints imposed by importers of cement into GB. As will be discussed in more detail in the PFs Response, the Commission's analysis of the threat imposed by importers for the sale of cement in GB is solely based on the cost disadvantage suffered by importers compared to domestic cement producers.

3.41 The Commission finds this cost disadvantage in the fact that importers incur higher variable costs than domestic cement producers (i.e. the sum of - FOB cement costs, shipping and port dues is higher than domestic producers' ex works variable cement costs).

3.42 This analysis has several fundamental flaws:

3.42.1 The Commission completely disregards the fact that independent importers, which do not form part of a group which produces its own cement (in effect, wholesalers) are responsible for only a fraction of overall cement imports to GB. The vast majority of independent cement imports[40] currently take place through the trading arms of major foreign cement producers (such as CRH, CPV, Holcim and Titan). In fact, only two of eight cement importers are wholesalers[41]. It is apparent that the Commission has weighted the focus of its analysis on importer costs towards these minority wholesalers alone, and this has distorted the conclusions. The Commission aggregates importer's data and therefore does not recognise the significant difference between the market position of larger vertically integrated importers.

[37] PFs, Appendix 7.5, paragraph 149 – it should be noted that Hanson does not agree with the cost disadvantage argued by the Commission in relation to CRH-owned import operations. This is explored in more detail in Hanson's PFs Response
[38] PFs Appendix 7.5 paragraph 11
[39] PFs Appendix 7.5 paragraph 17
[40] I.e. excluding imports by GB majors.
[41] These are Sherburn and Thomas Armstrong.

3.42.2 Trading arms of major foreign cement producers do not need to achieve an independent (second) margin, as their cement production operation already makes the (first) margin through the sale of cement it produces[42]. Previously Hanson noted that the addition of a second margin inflates the costs of trading arms of major foreign cement producers. Just like domestic cement producers, foreign cement producers need only achieve one margin through the sale of cement. To also require the import trading arm of major foreign cement producers to make a (second) margin distorts the variable costs of and the cost disadvantage of importers.

3.42.3 Hanson also notes that the Commission does not compare like with like. The authority completely ignores the fixed costs of domestic cement producers (taking into account only ex-works variable costs). However, the Commission nevertheless includes all of these fixed costs when calculating the variable costs of importers[43] in that all fixed costs of the overseas cement production are already reflected in the transfer prices that are booked as 'variable' within the management accounts of the importers. Again, this flawed, inconsistent and partial comparison leads to the price for imports being further artificially inflated (further exacerbated by the fact that fixed costs of domestic cement producers are substantially higher than those of foreign cement producers).

3.43 Against the background of these market realities, the Commission's calculation of a cost disadvantage is plainly wrong. This will be explored in more detail in the PFs Response. In light of these market realities, cement importers do not suffer cost disadvantages compared to GB producers. As a direct consequence, cement importers can and do frequently undercut the prices offered by domestic GB producers and therefore constitute a major competitive constraint on pricing. This success is proven in the fact that their market shares have flourished in recent years, having moved from a share of close to zero at the end of 1980s to a position approaching 15% today (higher in terms of the purely bulk grey cement market). Hanson does not understand why the Commission is still working to avoid commenting on this and deny the successes of the importers and their capacities against the reducing capacity of the GB producer majors, in the same way as the Commission did recognise with regard to the successes of the independent producers in the RMX markets.

3.44 Not only does this mean that the Commission should revisit its analysis of the position of importers, but it also means that there is a real prospect of CRH now becoming a further major new player in the GB cement market in its own right.

3.45 The considerable uncertainty introduced by the entry of Mittal and CRH, both with the potential to undermine any external sustainability of any coordination must, as shown in *Tesco,* be considered in light of the intrusive nature of the remedies currently under consideration. As per *Tesco*, the factors indicating a dynamic market must be analysed very closely before such intrusive remedies can be considered. The Commission would need to establish with a high level of certainty that such factors will not alter the market structure and undermine any coordination. All indications are that the two developments highlighted above will materially increase competition in the GB cement market. To date, the Commission has withheld all express recognition of these developments in context of its findings.

3.46 In addition, the Commission cannot be certain of the impact a structural remedy would have on any AEC. As accepted by the Commission in the case of Mittal, a lot will depend on the business strategy of a purchaser, which is ultimately out of the

[42] In its PFs the Commission explicitly states that its reference to FOB costs for importers include the margins achieved by the foreign cement producers.
[43] The FOB costs for importers, as calculated by the Commission, already contain the cover for fixed costs of foreign cement producers.

Commission's control[44]. Furthermore, it appears likely that any AEC, insofar as one exists, will be short-lived due to the recent market changes. Structural remedies not capable of discontinuation would extend beyond the AEC's period of existence. In these circumstances the Commission has stated it will consider *"whether an alternative measure would be more appropriate"*[45]*.*

3.47 Accordingly, execution of remedy C1 (cement divestment), either with regard to the industry and/or with regard to Hanson, would not be merited or justifiable. It would be overly onerous and grossly disproportionate, and it would ultimately adversely affect and be damaging to customers, the public interest and the security of the GB cement industry. Such a remedy has only just been levied by the Commission in the deliberate creation of Hope as a result of the Lafarge Tarmac merger, with the express purpose of remedying any concerns regarding a model of possible coordination. When far less onerous but effective remedies are now available, it would seem extraordinary for the Commission to rush to levying further similar structural remedies, before it has even acknowledged the impact of what has only just established. For the same reasons, any form of mandatory divestment of RMX operations on the industry could not, with respect, be either justifiable or proportionate.

[44] See Commission's report on Anglo American PLC and Lafarge S.A. JV, 1 May 2012, paragraph 8.113
[45] Guidelines paragraph 338

4. REMEDIES C2 (RMX DIVESTMENT) AND C7 (GBS/GGBS STRUCTURAL REMEDIES): INTERFERENCE WITH LEGAL CERTAINTY REGARDING THE EC'S PREVIOUS DECISION

4.1 Two of the structural remedies (C2 - RMX and C7 - GBS/GGBS) under consideration would, if addressed to Hanson, seek to unwind an industry structure which has been expressly approved by the European Commission ("**EC**") in its *Heidelberg/Hanson* merger decision[46].

4.2 In consideration of this decision, Hanson has two principal concerns with remedies C2 and C7:

4.2.1 First, Hanson believes that as a result of the EC decision, it is now beyond the Commission's powers to order a structural remedy.

4.2.2 Second, at the very least, the decision of the EC should be considered by the Commission in its analysis of proportionality.

4.3 In 2007, Hanson (an aggregates and RMX/concrete block producer with no cement production) was acquired by HeidelbergCement AG (the owner of Castle Cement, active only in cement). The merger gave Hanson considerable cement production capacity in Great Britain and access to a complete vertical supply chain.[47] It was a major change in the extent of vertical integration in the industry (removing the last completely "independent" cement player). The merger also created a combination of the sole supplier of GB-produced GGBS (Hanson) and a major GB cement producer (Castle).

4.4 During the course of the investigation the EC undertook a detailed in-depth analysis of the potential for anti-competitive effects of vertical integration between cement and RMX cement and found that no such concerns existed in any manner.[48] The EC also specifically reviewed and discussed the potential for coordinated effects between cement and GGBS[49] and unconditionally granted clearance at a Phase I review. The EC found that coordination on this market is "*most unlikely*" due to the complete lack of homogeneity between GGBS and cement, lack of pricing transparency and the clear constraining role and influence of importers within a European/international market, upon which markets numerous operators depended. The EC found no other anti-competitive effects in relation to GGBS of any kind, despite Hanson then having the same position in GGBS as it does today.

Structural remedies are against fundamental EU principles

4.5 Pursuant to Regulation (EC) 139/2004 ("**EUMR**") "*in application of a 'one-stop shop' system and in compliance with the principle of subsidiarity*[50]*....The Member States should not be permitted to apply their national legislation on competition to concentrations with a Community dimension, unless this Regulation makes provision therefor...The Member States concerned must act promptly in such cases*"[51]. [Emphasis added].

4.6 This is reflected in Article 21(3): "*No Member State shall apply its national legislation on competition to any concentration that has a Community dimension*".

4.7 The OFT had the opportunity to request a reference back to the UK, if it considered at the time that the merger was either of significant importance to the UK[52], or that it had

[46] M.4719 *HeidelbergCement/Hanson*
[47] PFs paragraph 7.205
[48] M.4719 *HeidelbergCement/Hanson* paragraphs 90-117
[49] M.4719 *HeidelbergCement/Hanson* paragraphs 86-89
[50] EUMR Recital 8
[51] EUMR Recital 18
[52] EUMR Recital 15

some other 'legitimate interest' in doing so.[53] It is this referral mechanism that should "*operate as an effective corrective mechanism in the light of the principle of subsidiarity; these rules protect the competition interests of the Member States in an adequate manner and take due account of legal certainty and the 'one-stop shop principle"*.[54]

4.8 Furthermore the right of appeal to EC merger decisions is well established and has been successfully applied in numerous cases.[55] As the OFT did not use either of these options, or in any case 'act promptly', it can only be assumed that the OFT did not have any significant objections to the alterations to the degree of vertical integration on cement and GGBS markets.

4.9 The application of structural remedies at this time would in effect allow the Commission to apply national competition legislation to a concentration already expressly approved by the EC. Therefore it would be a perversion of the EUMR if a Member States could by-pass the one-stop-shop principle (and its underlying principles of subsidiarity and legal certainty) through the application of the market investigation regime. The Commission should not be permitted to apply a structural remedy that is identical in effect to the actions explicitly prohibited by the EU Merger Regulation.

4.10 The Commission could, in principle, seek to revisit the analysis if changes in market conditions warranted. The only changes the Commission could point to since the date of the *HeidelbergCement/Hanson* decision relate to changes which can reasonably be concluded to be reflective of an increase in competition and/or lower likelihood of coordinated effects and/or vertical integration concerns arising:

4.10.1 An increase in the relative share of independent RMX;

4.10.2 An increase in the relative share of non-vertically integrated importers (and recent CRH developments); and

4.10.3 The entry of Mittal replacing Tarmac (subject to significant VI) with a player long in cement and with greater incentives to increase competition in the market place.

4.11 Therefore, any action to remedy perceived concerns over vertical integration contributing to coordinated effects and an overlap in ownership between GGBS and cement, where the *HeidelbergCement/Hanson* combination fundamentally contributed to the industry structure under review by the Commission, would be prohibited under the 'one-stop-shop' principle of the EUMR.

Proportionality

4.12 Without prejudice to the above argument, even if it is accepted that the Commission does have the power to order remedies C2 and C7, Hanson believes that the Heidelberg/Hanson merger should at least be taken into consideration in the Commission's analysis of proportionality.

4.13 The Commission's theory of harm based on coordinated effects is linked to the Commission's submission that the relevant markets are (subject to some variation) relatively static.[56] It would be contradictory of the Commission to suggest otherwise in this context and that material changes have occurred that would result in the EC's decision no longer being accurate.

[53] EUMR Recital 19 and Article 9
[54] EUMR Recital 11
[55] Case T-229/08 *Impala v Commission*; Case T-3310/01 *Schneider Electric v Commission* [2002] ECR II-4071; Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381; Case T-342/99 *Airtours v Commission* [2002] ECR II-2585
[56] PFs paragraph 8.223

4.14 The Commission has not provided any sufficient explanation as to why it fundamentally disagrees with the EC on a number of key points including the impact of non-vertically integrated importers.

4.15 Furthermore, the EC cleared the alterations to both vertical integration and the cement/GGBS overlap unconditionally and at Phase I. To progress the review to Phase II, the EC only had to show that it had 'serious doubts' as to the concentrations compatibility with the common market. Despite this relatively low standard of proof, the EC still did not identify any factors that would give rise to such serious doubt.

4.16 On this basis, Hanson believes that the Commission must accept that diametrically opposite findings of a competent and experienced competition authority, at the very least, casts significant uncertainty as to efficacy of the Commission's theory of harm. In light of such uncertainty, a structural remedy would be entirely disproportionate.

4.17 The EC's decision has been expressly relied on by HeidelbergCement and Hanson. Hanson's business strategies and contractual arrangements have been based on the reasonable belief and legitimate expectation that the inter-relationship between Hanson's cement business with both RMX and GGBS did not have an anti-competitive effect. As there has been no material change in circumstance since the acquisition that is now being relied on by the Commission in the PFs, it would be disproportionately detrimental to HeidelbergCement and Hanson to order structural remedies.

4.18 In *BAA*, the Commission accepted that in its assessment of proportionality it may be minded to consider past acquisitions in certain circumstances. In *BAA* the Commission stated it was not willing to consider the recent acquisition of BAA by the Ferrovial in its assessment of proportionality because the OFT had already started a market study at the time of purchase. [57]

4.19 However in the present case, there was no suggestion that such proceeding would be initiated at the time when *HeidelbergCement/Hanson* was unconditionally cleared by the EC. Indeed, the requirement on HeidelbergCement and Hanson to notify the EC and the fact that it received clearance of a deal which effectively created the industry structure under review by the Commission (i.e. the pre-Lafarge Tarmac JV industry structure) after analysis by the EC of some of the features which the Commission objects to suggests very much the opposite.

4.20 Therefore, at least when considering the proportionality of any structural remedy on Hanson in relation to RMX and GGBS, the Commission should pay particular attention to:

4.20.1 The fact that the HeidelbergCement/Hanson involved a very significant investment in the GB market;

4.20.2 the merger in effect created the current industry structure in respect of the degree of vertical integration and the link between cement and GGBS – it is inconceivable that, if the EC had had the concerns which the Commission now expresses in relation to vertical integration and the link between cement and GGBS ownership that it would have cleared a merger involving such significant change;

4.20.3 the fact that the industry structure has not changed since the date (other than in 'pro-competitive respects'); and

[57] *BAA v Competition Commission* [2009] CAT 35 (Case 1110/6/8/09), paragraph 10.97: "as we commented in the Remedies Notice, that the Ferrovial consortium, Airport Development and Investment Ltd (ADI) which acquired BAA in 2006, chose to complete the acquisition of BAA after the OFT had announced a market study of BAA in which continuing common ownership of BAA's airports was flagged as an issue. In deciding to proceed with the acquisition of BAA, ADI took on the regulatory risk of potential divestiture and we are therefore not minded to place any significant weight on the one-off costs of divestiture in deciding upon the appropriateness of divestiture remedies."

4.20.4 *HeidelbergCement/Hanson* could legitimately have expected its clearance to have protected it from subsequent regulatory intervention into the very elements of its deal which had been cleared.

4.21 These factors militate strongly against the imposition of a structural remedy in Hanson in respect of RMX and/or GGBS.

5. DIVESTMENT OF RMX CAPACITY BY ONE OR MORE OF THE TOP THREE GB CEMENT PRODUCERS (REMEDY C2)

5.1 The Remedies Notice proposes the possibility of a divestment of RMX plants by the Top 3 GB cement producers as a remedy to perceived coordinated effects concerns. As will be explored further in the PFs Response, Hanson considers that no coordination exists and that, even if it were to exist, the vertical integration between cement and RMX/concrete products producers is not a factor materially facilitating that coordination.

5.2 This section therefore addresses the fact that the Commission's proposed RMX divestments would be inappropriate even if coordination were to be assumed.

The lack of need for a divestment remedy

5.3 The Commission suggests a number of aims of such divestments[58]:

5.3.1 **An increase in the size of the 'addressable' market.** The Commission's thinking on the size of the addressable market acting as a barrier to entry is, with respect, contrary to the balance of evidence, and appears to be based on no more than a comment received from a single importer ([✂]), whose submissions to date have already been shown by Hanson to be limited in reliability and possibly driven by self-interest alone. In particular:

- Based on the Commission's own figures, some 60% of GB bulk-cement demand is already represented by non-GB cement producers (RMX or concrete block). This is equivalent to several millions of tonnes of cement supply. The Commission has not explained how having access to such a significant market creates barriers to entry. The Commission has not argued that importers have high fixed costs and therefore require significant economies of scale. Indeed the evidence is that many importers have competed effectively on a small scale. In a market of such a size, increasing the size of the 'addressable' market by way of the remedy effected could not possibly make such an impact on the size of the market as to be effective enough to materially reduce barriers to entry by changing the prospects of success on a capital investment to establish a clinker production facility. Accordingly, such a remedy would not have any material effect on the perceived barriers to entry.

- In this context it should be noted that in its *Airtours* decision the Court of First Instance held that an addressable market which was 40% of the size of the overall market was held to be sufficient: "*40% of all package holidays sold are not sold in agencies controlled by the large tour operators, smaller operators are [therefore] likely to gain access to distribution on favourable enough conditions to enable them to expand their capacity significantly in order to take advantage of opportunities*."[59]

- The independent RMX sector has already been growing and flourishing (as acknowledged by the Commission) despite the downturn, so the trend of an increasing relative size of the 'addressable' market particularly against and in comparison with the continuing declining capacity of the GB cement producers in

[58] Remedies Notice, paragraph 31
[59] *Airtours v Commission* (T-342/99). paragraph 259

RMX, is already present and increasing the available market naturally[60].

- The same is true for the concrete products sector, a fact which has not yet been fully appreciated by the Commission. One example is Tarmac Building Products, previously supplied internally, but now in separate ownership to a cement player following the Lafarge Tarmac merger[61].

- The relative growth of importers, who have flourished along with independent RMX operators, and the ongoing investment by importers (such as CRH) in import facilities, suggests that the size of the addressable market is in no way a barrier to entry for such purposes.

5.3.2 **A reduction in the scope for cross-sales between the Top 3 GB cement producers**, thereby reducing transparency and scope for cross-sales to be used to rebalance shares of sales and/or signal that deviations from coordination have been detected. Again, Hanson invites the Commission to recognise the following:

- There are only very limited cross-sales of cement now that the various internalisation processes have completed in the market, led by moves in 2008/2009 to independence by Hanson as a direct result of the acquisition by HeidelbergCement. This has of course been recognised by the Commission in the PFs, in that the levels of cross supply are acknowledged by all to be purely efficiency driven and at an optimum level[62]. The Commission notes the possibility of an increase in cross-sales on an upturn in demand. However, it should be noted that there is no evidence of an improvement in demand in the foreseeable future that would necessitate any reliance on cross-supply, or a return to the arrangements between Hanson and Lafarge when Hanson did not have its own cement operation. Any assertion to the contrary would be purely speculative and contrary to recent moves in the market and the new market structure in place after the Hanson acquisition. Accordingly, a mandatory divestment of RMX sites to justify concerns regarding cross supply would therefore be overly onerous and disproportionate, and given the absence of cross supply in the new market would be both unnecessary and would do nothing of any effect in this respect.

- Indeed, Hanson even continues to further independence from risks of cross supply interdependency, for example as seen in its investment in [✂] – this internalisation has now taken place and Hanson is now more or less 100% internally supplied (subject to emergency back-up supplies to cover unforeseen production issues).

- There are also obstacles of course to transparency, as the Commission has now recognised that the price paid under cross-

[60] As recognised by the Commission in the PFs, for example paragraph 10.30 where the Commission notes the material growth in market share of the independent RMX producers since 2007.
[61] Whilst Anglo American is the current owner of Tarmac Building Products and a 50% owner of Lafarge Tarmac, it is well known that Anglo American's plan is to sell Tarmac Building Products as stated in the Competition Commission's summary of initial hearing with Tarmac, 11 May 2012, paragraph 1.
[62] PFs, paragraph 8.203

sales can be different from price negotiated by the independent RMX sector[63].

5.3.3 **An increase in the extent of countervailing buyer power** by increasing the volumes purchased by independent RMX operators. As noted above, with some [55-70%] of bulk-cement sold to the independent RMX and concrete products sectors (with RMX demand representing the majority of this), the RMX sector already has very significant buyer power, negotiating hard with all suppliers and playing producers and importers off against each other to minimise and reverse any annual attempts at price increases. Independent RMX customers have multiple choices of supplier, and the data presented by Hanson and the market as to the use of threats of switching by independent customers to achieve better terms shows that there is no need to improve the bargaining power of the independent RMX sector. Indeed the switching data is conclusive in that it shows that multi-sourcing is commonplace in the market, along with regular switching of suppliers among such customers. It is the strength of countervailing buyer power that has led to importers taking their strong and growing market share from nothing in recent times. Thus any mandatory RMX divestment would be disproportionate and without material effect, if it were carried out with the objective of increasing buyer power, since no material change would result from such a remedy with regard to such buyer power.

5.3.4 **A potential increase in the focus of the Top 3 cement producers on the 'addressable' market.** There is no evidence of lack of focus on independent sector. Rather, there is strong evidence to the contrary in that Hanson very much focuses and relies upon on its valued independent customer base. For example, Hanson relies on external customers for [55-70%] of its cement sales (the majority of which are RMX and concrete products customers). During 2006 and 2007, Hanson (Cement) was not vertically integrated and so relied solely on external cement sales, similar to the experience of Lafarge who have the smallest RMX footprint. Since the Commission is still expressing concerns regarding possible coordinated effects during such period and also more specifically in relation to Lafarge as the market leader, it would seem clear from the Commission's own analysis that increasing the Top 3 cement producers' focus in the manner suggested (i.e. by way of the suggested remedy C2) would be disproportionate and have no material effect in addressing perceived AECs.

5.4 For the reasons highlighted above, a proposed divestment of RMX plants would not be said to be necessary or in any manner effective to address any perceived AEC identified by the Commission. Hanson suggests that it is clear from the above statements that no divestment of RMX operations could be justified as a necessary, proportionate or appropriate remedy for the purpose of addressing the relevant concerns identified by the Commission.

Adverse Impact on Hanson and RCBs

5.5 Indeed, the mandatory divestment by Hanson of any RMX would be enormously disproportionate in the circumstances. Not only would such divestment be unnecessary and have no material effect on the perceived AECs as described above, but such sales would be extremely onerous with huge and disproportionate costs on various levels and would undermine RCBs in the aggregates market which derive from vertical integration.

5.6 **Pull though effect on local aggregates markets** - RMX sales cause very significant pull through in terms of driving the sales and successful operations in the Hanson

[63] For example, paragraph 7.131 (b) states: "*we acknowledge that, as prices for cement are agreed following confidential bilateral negotiations, the prices at which such cross-supplies are made do not provide precise information on prices paid by other cement customers*".

aggregates businesses. Every tonne of concrete sold and poured necessitates the sale of two tonnes of aggregates. Hanson has developed its strategy around strategically matching (where possible) its RMX sites to its aggregates sites. This has the impact of allowing it to continue to operate aggregates sites which might otherwise be uneconomic. Any divestment of RMX sites by Hanson would be harmful for Hanson's aggregates business, which is already recognised by the Commission as running on narrow margins in a competitive market.

5.7 Divestment of RMX would result in mothballing and closures of a commensurate proportion of Hanson's aggregates sites, creating less supply and reducing competition in local aggregates markets, with less choice and higher costs resulting for the aggregates consumers. Accordingly, this remedy would not only be ineffective in addressing perceived AECs and unnecessary as described above, it would prove wholly disproportionate for Hanson given the knock-on effects in the aggregates market, thus proving overly onerous for Hanson and ultimately closing supply sites in aggregates with the resulting likelihood of less choice and higher costs for market buyers of aggregates. In this respect, the remedy would undermine and negate RCBs.

5.8 **Loss of cement's most competitive route to market at the RMX level** - It should also be noted by the Commission (and indeed Hanson considers that this is a fundamental point as to market structure and market definition, which is yet to be either acknowledged or duly appreciated by the Commission) that some [30-45%] of Hanson's cement sales are in effect dependent on the successes and failures at the level of its own downstream RMX business. The RMX market is one of the most competitive and indeed efficient markets in any business sector: Hanson wins and loses business every day to and from a combination of GB cement producers, other majors and independent RMX operators. If Hanson's footprint in RMX were in any way reduced, that same amount of dependent cement business would cease to be determined at the extremely competitive downstream level of RMX; and instead revert to the cement sales market itself, with a much smaller number of competitors. In this respect, a RMX divestment by Hanson would be both misconceived and counterintuitive if it were intended to improve or increase competition, since the effect would be the opposite. It would damage benefits to the ultimate customer market as this extremely competitive indirect channel / outlet for cement sales would be removed or diminished.

5.9 **Creation of a new market leader and destruction of RMX competition** - Divestments in RMX at Hanson's (and presumably Cemex's) expense would also produce the unintended effect of leaving Hope as the new undisputed market leader in RMX, without the strong competition at the RMX level now afforded by the current market model. This could directly adversely affect what is now a very competitive and efficient RMX market operating on the lowest of margins, and so could prove damaging to customers at the RMX level and for the associated public interest were the current competitive market structures to be in any way diminished at the RMX level.

5.10 Even if the Commission considered that a remedy were required in relation to vertical integration, the uncertainty introduced by the factors noted above, and the highly intrusive and onerous nature of any divestment remedies, would indicate that the Commission should at most only consider behavioural remedies (a potential relevant behavioural remedy is noted below in Section 7). A focus on structural remedies would be clearly disproportionate, potentially disastrous for the local aggregates markets, and damaging to the consumer and competition in both the cement and RMX markets as cement's most competitive route to market was removed or diminished, as set out above. Numerous economic disadvantages would result from such an onerous remedy, with little or zero beneficial effects, clearly rendering the remedy disproportionate to its objective and less preferential than the behavioural remedies contemplated.

Problematic justification for the exclusion of HCM on the Commission's reasoning

5.11 In any case, if the key aim were to increase size of 'addressable' market and to enhance the bargaining power of the independent RMX sector (despite the comments noted above), it would be disproportionate for the burden of such a remedy to fall on one or more of the Top 3 cement producers and to exclude HCM from the scope of the remedy. HCM is vertically integrated, has a cement capacity which is only marginally smaller than that of Hanson and Cemex (around 16% share of GB clinker capacity compared with c.20% for each of Hanson and Cemex) and has a significant RMX share (12-14%, roughly the same or only marginally lower than each of Cemex and Hanson (14-16% each)).

5.12 It would in principle not be a logical approach to exclude HCM from the scope of any remedy. Whilst its reasoning is not clear, the Commission appears to justify the proposed exclusion of Hope from the remedy by reference to the assertion that: "*Hope is a new entrant that is not part of any group of coordinating firms*". Even if coordination were to exist between the Top 3 GB cement producers and HCM were to be outside any coordinating group, this would not be sufficient reason to exclude HCM from any remedies. The focus of the MIR is on the market as a whole, not the Top 3 Majors.

5.13 The Commission's duty is to adopt remedies designed to address the AEC identified. The Commission has identified vertical integration from cement into downstream operations as an AEC. Any remedy should seek to address the AEC in the market generally, and should not be targeted at individual companies. Targeting remedies at the Top 3 GB cement producers purely on the basis that they are within a perceived coordinating group (involving no allegation of illegality) would not be consistent with the Commission's duty to remedy the AEC in the most effective and proportionate manner.

The practicality of a Target VI Ratio

5.14 The proposal for a possible ideal or target VI ratio raises additional obstacles, complexities and difficulties with such a remedy.

5.15 The Commission will notice that there is enormous variance in the VI Ratios between the different GB majors. There is no pattern or ideal percentile within such a ratio. Each of the integrated producers has, over the years of working on their respective operational footprints, customer relationships and market strategies arrived at very different positions with regard to such a ratio. [✂]

5.16 Companies have also moved radically within the ratio: for example, Hanson Cement previously had no RMX footprint and thus had a ratio of zero prior to Hanson's acquisition by Heidelberg Cement. Today, Hanson possibly sits somewhere in the middle of the ratio, between Lafarge on the one hand and Hope on the other.

5.17 Accordingly, it is clear that, as the various producers have established themselves over the years with very different ratios and footprints, it would be artificial and incorrect to assume that there exists such a thing as an ideal VI ratio. Accordingly, given the enormous disparity between different players in the market, it would be impossible to apply such a ratio consistently or logically to remodel the market, since it could not provide a reliable measure or benchmark.

5.18 Also the target VI ratio would represent a formulaic approach, and would not necessarily be effective in removing the need for cross-supplies. The Commission has already identified that cross-supplies can create efficiencies, e.g. they can lead to logistics savings and/or be required due to the technical characteristics of the product. Furthermore, the financial efficiencies also carry strong environmental benefits, for example where lorry traffic in villages and rural communities is reduced as a result.

Using a precise VI ratio would not necessarily match a producer's cement assets with its downstream assets, meaning that, for logistic or technical reasons, it may often remain more efficient to purchase off another cement producer.

5.19 The net effect of this could be that:

5.19.1 There would still be scope for cross-sales, potentially undermining the perceived benefits of any remedy; and/or

5.19.2 Cement producers, with smaller downstream operations, might be incentivised to maximise their internal purchasing, with the result that they would be engaging in sub-optimal internal supplies. This would potentially create inefficiencies (in effect, negating the RCBs arising due to cross-supply arrangements[64]).

5.20 In order to address any concern, the behavioural remedy noted below in Section 7 in respect of tendering of external purchases would clearly be more effective in this respect.

Relevant Customer Benefits

5.21 A key concern with any undermining of VI relates to the efficiencies created by vertical integration – i.e. relevant customer benefits. It is well understood that vertical integration brings with it significant efficiencies that benefit customers - these have, in part, been highlighted above, for example in relation to aggregates in paragraphs 5.5 to 5.10. The Commission has not weighed its benefits into its decision.

Impractical Remedy

5.22 Finally, divestment of a package of RMX sites from a range of different companies, and indeed for the purposes of complementing a cement divestment from yet another company, would be an extremely burdensome and costly process. This would not merely be for any sellers in terms of arranging the necessary corporate and personnel structures and processes, but more significantly for the buyer, in terms of having to deal with a large number of separate assets and employees from several different sellers, causing problematic and costly integration hurdles.

[64] A point recognised by the Commission when rejecting consideration of a prohibition on cross-supplies (Remedy X2).

6. PROPOSED REMEDIES IN RESPECT OF GGBS (REMEDY C7)

Procedural Concerns

6.1 Hanson has raised fundamental concerns over the procedure leading up to, and following the publication of, the PFs in respect of the analysis of GGBS and PFA. These include:

6.1.1 The Commission's interest in GGBS and PFA was only indicated at a very late stage in the study, with concerns concluded (and indeed questionnaires issued) only at the same time as Hanson's main hearing (and a year into the MIR). Hanson had no opportunity to meaningfully discuss the Commission's potential concerns about GGBS at either of its Hearings to date;

6.1.2 The timing and lateness of the Commission's focus on GGBS has meant that its analysis of GGBS and PFA is extremely rudimentary and superficial and falls a long way short of the analytical standards required. For example, the Commission has identified the fact that prices may have risen during a fall in demand as conclusive evidence of competition problems, despite the very obvious fact of enormous rising inflationary costs (for example, for the essential fuel/energy costs used in the heating processes in drying GGBS etc) and has failed to analyse the impact of these;

6.1.3 Hanson's submissions on GGBS and PFA have, to a certain extent, been summarised in the PFs, but they have clearly not been in any manner considered or analysed and/or balanced against the evidence presented by the Commission, despite the fact that Hanson's relevant knowledge and evidence is fundamental to understanding the GGBS market data;

6.1.4 Hanson contends that the Commission formulated its key determinative thinking and principal conclusions on the matter of GGBS prior to any review of the market and its data, and prior to allowing Hanson to comment as the market expert– this is evidenced very simply by the sequence of the expedited drafting and publication of such conclusions in late 2012 at a time prior to completion of the principal exercise to collect and review the key market and financial data; and

6.1.5 Despite Hanson submitting requests for access to the Commission's GGBS data, workings and analysis in the Data Room, this has repeatedly been refused by the Commission[65]. This is in spite of the fact that a number of potentially key sections of the Commission's analysis have been redacted from the public version of the PFs (and any documents put back to Hanson)[66]. Hanson believes that the Commission's refusal to grant access to the GGBS data and workings is without foundation and merely suggests the Commission may be attempting to conceal the inadequacy and / or even the complete absence of suitable analysis on the matter.

6.2 These procedural shortcomings mean that the GGBS/PFA sectors have not been properly understood or analysed by the Commission and that Hanson has not had a

[65] Access to GGBS information was refused on the grounds that, if access were to be granted to Hanson, it would have to be granted to other interested parties. This is not necessarily the case: the remedies suggested in relation to GGBS are directly prejudicial to Hanson and Lafarge Tarmac (and only these companies). Therefore, it is in the interests of the rights of defence of these companies to have access, and this creates an interest in access which distinguishes them from other companies. For similar reasons it seems, only Lafarge Tarmac had access to the unredacted Commission decision regarding its Joint Venture, which contains crucial (yet confidential) information underlying the Commission's assessment of the present market investigation.

[66] For example, PFs paragraphs 55 to 59 of Appendix 7.6 have been redacted without it being obvious as to why they have been redacted (these appear to relate to analysis of the German decision on GGBS).

proper opportunity to engage with the Commission on GGBS. It would be unsafe to consider such extensive and intrusive remedies as those suggested under Remedy C7, unless Hanson is able to review a proper assessment and analysis by the Commission of the market and any suggested detriment. It is therefore impossible for Hanson to be in a position to understand what the Commission is seeking to suggest with regard to either its findings or possible 'remedies'.

No Case for Remedies

6.3 Hanson considers that there is no case for remedies in relation to GGBS. As will be explored further in the PFs Response, the Commission has not established a credible, comprehensible or suitably detailed case or analysis that any AEC arises in relation to GGBS. In short, Hanson considers that the Commission has:

6.3.1 **Role and scope of PFA in the market** - Not yet appreciated and has very significantly underestimated and downplayed: a) the size and significance of the PFA market in cement (by as much as c.100%); and b) the considerable supply of PFA as an alternative to GGBS and that these products are clearly within the same cement substitute market, meaning that the Hanson share in this market has been incorrectly stated as very significantly greater than it is; the GGBS market is the same cement substitute market as PFA and there is a vast and limitless supply of PFA given the number and size of coal fired power stations; Hanson has fundamental concerns that the PFA market has been greatly understated by the Commission by omitting the huge volumes of PFA that are supplied within blended cement – Hanson estimates that adding the correct amount of such PFA sales would go so far as to double the Commission's statement of the market size, such that annual PFA volumes sold with or for cement purposes should be stated as approaching approximately 800,000 tonnes per annum;

6.3.2 **Imports role and boost from Mittal's HCM** - Underestimated and understated the role, scope and availability of both GBS and GGBS imports, in particular given the entry of HCM into the market (with its parent company's virtually unlimited access to the raw material granulate and also GGBS in Continental Europe) thereby creating a fundamental change in market dynamics which is inexplicably absent from all Commission considerations;

6.3.3 **Rushed conclusion on monopoly** - Rushed to assume dominant or even unilateral or monopoly market power for Hanson, despite the fact that GGBS is defined by its role as a substitute for cement (along with PFA), has no captive market and is by definition constrained in pricing by cement;

6.3.4 **No review of status or effect of exclusivity** - Rushed to state a conclusion of concern after merely highlighting the label of 'exclusivity' without a review of what the markets are in reality and whether in fact there is any detriment or not; indeed it is notable from the sequence of the Commission's own timetable that the Commission drafted and formed its conclusions during October / November 2012 before even issuing Hanson with the relevant market and financial questionnaires with regard to the GGBS market;

6.3.5 **No analysis or quantification** - Not undertaken any kind of analysis or quantification of the stated detriment or perceived harm to competition of either the steel producers' exclusive slag supply arrangements with Lafarge Tarmac or Lafarge Tarmac's exclusive GBS supply arrangements with Hanson. The Commission seems to have based the entirety of its stated financial concerns and conclusions with regard to GGBS solely by way of quick casual and passing reference only to excessive pricing and profitability in *cement*. This makes no sense as it ignores the fact that the Commission's own work concludes that there are no issues of any kind with regard to

Hanson's own pricing and profitability in cement. If the Commission raises issue with *Lafarge's* level of profitability, Hanson does not understand how it is possible or in any manner logical for the Commission to suggest inferences about *Hanson's* profitability in GGBS based purely on concerns about *Lafarge's* profitability in cement - there is no link;

6.3.6 **No review of UK determinative steel industry structure** - Not analysed the necessary efficiencies created by the exclusive supply arrangements between the GB steel producer and Lafarge Tarmac, and Lafarge Tarmac and Hanson, and the fact that the downstream market structure in GGBS is wholly and necessarily dictated by the particular structure of the UK steel industry; and

6.3.7 **No review of the investment returns against the special characteristics of the Hanson investment** - In particular, in the case of the latter, the Commission has done nothing to analyse the combination of the enormous level of investments undertaken by Hanson in the context of taking the highest level of pioneering risks to create a national industry for this product, in the face of completely unknown demand and uncertainty of supply of the raw material.

Reliance on Contrary Overseas Cases without any form of Review

6.4 The Commission's case for remedies appears to be based purely on the fact that the arrangements in question provide Hanson with a 'monopoly' over GB-produced GGBS, without appreciation that the market is known to be and operates as the cement substitution market. The approach seems to be based purely on some notional requirement that it must somehow be appropriate to copy as a regulatory precedent the ill-defined (but useful) decisions of two other European regulatory authorities who appear to expressed concerns about the supply of GGBS in their own particular jurisdictions[67]. There is no detailed analysis of any kind as to why the same conclusions should apply in the case of GB arrangements for the supply of GGBS in GB. The Commission's analysis even mentions some uncertainty as to whether the principles emanating from these decisions are sufficiently clear or applicable.[68] Indeed, the detail of such overseas decisions is wholly lacking from the Commission's analysis and it is not acceptable for a UK regulator to say it must somehow be obliged to follow such decisions blindly when it does not even know what they stated, what the background markets were or what the decisions were about or resulted in. [69]

6.5 Rather there are fundamental/structural differences between the GGBS exclusivity arrangements in GB in comparison to the two jurisdictions cited by the Commission as 'useful regulatory precedents' which the Commission suggests it may be bound to follow to review downstream GGBS in the UK, or at least use a solid regulatory precedent. The two jurisdictions cited for such purposes by the Commission are Germany and Bulgaria and Hanson explains below why the Commission has erred so fundamentally to look to the decisions in those two jurisdictions as requiring a review of the downstream model in the UK, when the detail of such overseas cases makes it clear that the exact opposite should apply to the UK.

[67] PFs paragraph 7.127

[68] For example, the Commission notes that the German decision involves limited detail and it is unclear from the Bulgarian decision whether GBS or GGBS supply agreements are involved (PFs Appendix 7.6, paragraphs 54 to 64). Any analysis of these agreements is inevitably speculative. Also, Hanson is not able to follow the Commission's understanding of the GGBS situation in Germany, as almost all relevant passages in the PFs are redacted (five out of six paragraphs are inaccessible, see paragraphs 54 to 59 in Appendix 7.6 of PFs). The Commission also refused Hanson 's external advisers access to an unredacted version of Appendix 7.6 (see e-mail of 3 June 2013 at 16:45 sent by David Fowlis).

[69] PFs Appendix 7.8 paragraph 55 "[t]here is very little in the public domain on how the German General Cartel Office (GCO) has intervened in the supply of GGBS in Germany". The Commission conceals its consideration of the situation in Germany by redacting five out of six paragraphs.

6.6 **UK Steel Industry Structure** - In GB, the whole national steel industry is effectively focused on one steel producer, Tata Steel Europe[70], as the eventual successor of British Steel. Given their ascendency and total domination in the GB steel market, it is natural for them to work to sign only one secure deal that addresses their core waste stream and allows it to be processed without cost and even provide some revenue to cover a typical asset life of at least thirty years. Hanson does not see how it is possible for the Commission to question the efficiency of such a model. Therefore, the underlying market structure of the 'sole producer' status of the UK steel industry is the determining efficiency factor with regard to all downstream production models for UK GBS / GGBS. The GB steel industry could not possibly be expected to have to deal with a multitude of enterprises to process such waste streams and have to renegotiate such contracts every year.

6.7 **Exact opposite of German Steel Industry Model** - Crucially, the GB model is the exact opposite of the determinative structure of the steel industry in Germany, where the steel industry is characterised not by single producer but rather by a number of steel 'majors' (such as Thyssen etc) and even a number of smaller / regional steel producers. Accordingly, it would be more natural for the regulator in that jurisdiction to question or review a downstream focus on a single exclusive purchaser, where the upstream production model is so very different from the UK and fragmented. In Germany there are numerous major steel producers that supply the principle material necessary to produce GGBS (iron slag as a bi-product of the steel production process). Accordingly, it may have been possible for the German regulator to terminate the exclusive supply agreements to mirror the overall industry structure and without significantly damaging the security of supply (due to the number of steel producers).

6.8 However, the UK steel industry (being focused on a sole producer with unilateral market power) is the exact opposite of the fragmented German steel model, and the respective steel industry models drive and determine what can occur at the downstream levels in GGBS by way of efficiencies.

6.9 Accordingly, Hanson submits that the experience and findings in the reported German case are the exact opposite of the situation in the UK, since they provided for a review of the downstream industry in GGBS *only where* this was facilitated by a fragmented steel industry upstream. Evidently, the GB steel industry is the exact opposite of Germany's situation, thus suggesting either that the GB downstream models have the opposite drivers, or at the very least that the German case was contrary and that it cannot be said to apply as a relevant 'precedent'. In the detail of that case and the underlying markets, the *opposite* circumstances apply when compared to the GB model.

6.10 Finally, the security of supply of GGBS in GB is reliant on the exclusive supply agreement across the whole market as an efficiency to the upstream model where a single steel producer dominates the national market. Neither Hanson nor a new GGBS entrant would have sufficient certainty as to the supply of GGBS to invest the significant sums of capital required to maintain the GGBS market[71]. A divestment of one or more GGBS plants would not be a practicable remedy for this reason.

6.11 **Lessons from the Bulgarian decision** - It would also be similarly dangerous for the Commission to seek to refer to the decision of the Bulgarian authorities as a useful precedent with regard to reviewing downstream GGBS arrangements, when again the detail of the Bulgarian case and its underlying steel industry suggest that it would neither be effective or beneficial to consider the structural remedies the Commission is now reviewing:

[70] Teesport steel plant is owned by SSI Steel. However, Hanson understands that it is managed by Tata
[71] As shown by the mothballing of the Teesside plant.

6.11.1 The Bulgarian steel industry worked on a very similar basis to the GB model, with a single dominant national steel producer, with serious financial issues in that jurisdiction. Hanson understands the natural impact of the Bulgarian authority's review of the GGBS arrangements in question would have been to fragment the downstream GGBS model. However, Hanson further understands that the decisions of the Bulgarian authorities proved both fruitless and ineffective: just like the GB steel industry, the Bulgarian steel industry was struggling financially. Hanson understands that the dominant producer ceased national operation, rendering wasteful, inappropriate and ineffective any decision of the Bulgarian regulator with regard to its apparent attempt to remodel the local GGBS industry. This inevitably caused Bulgaria to become dependent on imports given the cessation of production and closure of their national operator.

6.11.2 Hanson would suggest that rather than stating a need to follow this second overseas decision, the Commission should recognise from the detail of that decision and from the underlying markets of that jurisdiction that where a national steel producer is dominant and potentially considering closure[s], the decision of the Bulgarian authorities to intervene downstream at the GGBS level to attempt to produce a contrary model proved wasteful, ineffective and fruitless, and as such the Bulgarian decision clearly shows such an exercise to have been inappropriate.

6.12 In the circumstances of the two models above, it seems inexplicable as to why the Commission would seek to rely on the decisions of these two jurisdictions. For the Commission to casually suggest that these two jurisdictions offer useful precedents for GGBS, without even knowing the detail of those decision or the underlying market backgrounds, is both dangerous and unacceptable.

6.13 It is striking that what happened to the steel industry in Bulgaria is today a very real prospect for the steel industry in the UK, given its fragility and ever present risk of closure. That is the all determining efficiency as to why the Commission should not do anything to jeopardise the arrangements that serve the GB steel industry. The downstream operations and model for GBS / GGBS are a necessary efficiency for the GB steel industry that is already in an extremely fragile and perilous state, and any restructuring of these arrangements risks adverse effects for both steel and GGBS consumers and therefore also for the public interest, as occurred in Bulgaria, who found themselves nationally dependent upon imports as national production ceased.

Inability to impose GGBS remedy

6.14 It is similarly irrational for the Commission to seek to impose remedies on the basis of what it (incorrectly) considers to be 'parallel' overseas regulatory action (indeed, recognising that there may be differences justifying different treatment[72]), whilst ignoring the EC's own direct precedent and detailed analysis of the impact of a combination of a cement producer and Hanson's GGBS activities in the *HeidelbergCement/Hanson* decision. The precise impact of the *HeidelbergCement/Hanson* decision on the Commission's remedies considerations is considered above (in particular, Hanson's contention that the EC's decision effectively prevents the Commission from adopting remedies in relation to GGBS) and is not repeated here. However, it does show that it would be perverse to rely on such contrary non-UK cases where there has already been specific express regulatory consideration of the GB market at the highest level [73].

[72] PFs, Appendix 7.2, paragraph 31

[73] As noted in Hanson's previous responses, there has been regulatory scrutiny of exclusive GBS supply arrangements between the predecessor companies to Lafarge Tarmac and Hanson under the Restrictive Trade Practices Acts 1976 and 1977, and section 21(2) directions had been obtained, indicating a clearance on competition grounds of these agreements. In Appendix 7.6 paragraph 22 the Commission states that the OFT used a different legal framework and a significant period of time had elapsed. The Commission offers no analysis of these statements, but simply

6.15 The Commission claims that it has the power to impose remedies in relation to GBS and GGBS due to the fact that the suppliers of GBS and GGBS are undertakings involved in the supply of reference products (aggregates, cement and RMX). The Commission notes that:

"*Section 131(2)(b) of the* [Enterprise] *Act defines a feature of the relevant market as including 'any conduct (whether or not in the market concerned [ie the relevant market]) of one or more than one person who supplies or acquires goods or services in the market concerned'. Hanson and Tarmac are active in the supply of cement and are also active in the GGBS supply chain in GB. Therefore their conduct in relation to the supply of GGBS can be considered by the CC under its terms of reference of 18 January 2012.*"

6.16 This notes that the conduct of Tarmac and Hanson in relation to GGBS can constitute an AEC. The Commission would presumably seek to derive any power to impose a remedy in respect of GGBS from a need to remedy this particular AEC.

6.17 As the Commission has defined the reference markets to exclude GGBS (and PFA), but has rather treated GGBS as an input into cement and an input into RMX, the Commission can not, therefore, now identify the structure of GGBS supply as giving rise to an AEC (and requiring a remedy). It must identify the conduct of Tarmac or Hanson as giving rise to an AEC. However, the Commission's concerns in relation to GGBS are expressed as relating to the market structure of GGBS; the Commission has not identified any conduct of either Tarmac or Hanson giving rise to an AEC in relation to GGBS.

6.18 Therefore, the Commission is not empowered under the Enterprise Act to impose a remedy in relation to GGBS.

Lack of detriment

6.19 The Commission has <u>not</u> shown or quantified that the GGBS arrangements have led to any <u>detriment</u> to customers.

6.20 There is no cogent evidence presented in the PFs or data room that customers have paid higher prices for GGBS than would have been the case, other than casual references to what in effect is *Lafarge's* profitability in cement. The Commission identifies only three features which it appears to consider provide evidence that customers pay higher prices:

6.20.1 It identifies an increase in average GGBS selling prices despite the demand downturn in 2009. As noted above, this takes no account of the huge inflationary rising costs across all business sectors around the globe for essentials such as fuel/energy, critical in the heating/drying process for GGBS.

6.20.2 [✂] The Commission cannot use overall margins for cement as a benchmark to assess the appropriateness of margins in another, separate product market[74]. In light of the Commission's market definition, it has to assess margins for the sale of GGBS on the basis of a robust and economically sound profitability analysis (and by reference to underlying economic data).

6.20.3 However even if the Commission's unsound benchmarking could be accepted, this would not represent evidence of detriment to customers. As has been noted already and will be explored in the PFs Response, [✂].

acknowledges their existence. Hanson does not accept that either factor negates the fact that a competent competition authority has already scrutinised the arrangements and awarded a section 21(2) direction.

[74] It is noted that the Commission has not defined the relevant market within which GGBS falls. It merely held that GGBS does not form part of the relevant product market for cement, see PFs paragraph 5.38.

Therefore, no conclusion as to customer detriment in GGBS can sensibly be drawn from the comparative analysis of cement and GGBS pricing/margins.

6.21 The PFs also suggest that the GGBS arrangements resulted in higher prices for cement than would otherwise have been the case. The Commission merely refers to its own analysis of the profitability of cement as evidence of this. This can be discounted on two grounds:

6.21.1 As summarised above, there is no evidence of excess profitability in cement, Hanson's own numbers (and possibly those of Cemex as well, although Hanson has not been allowed access to such results) showing the exact opposite beyond all doubt; and

6.21.2 The Commission has not presented any evidence to show how the GGBS arrangements have contributed to higher prices in cement.

6.22 Indeed, the lack of customer detriment is supported by customer feedback. From a review of the PFs (and the public version of the submissions to the Commission), there appears to be no complaint over the supply of GGBS, and even express support from the market for the proposition that there are no competition problems in GGBS.

6.23 Breedon's views are reported as follows:

"*Breedon Aggregates also told us that it bought GGBS from Hanson, and it believed that it got a competitive price for GGBS from Hanson. An indicator of this was that the price of GGBS had come down recently, and that the difference between the price of GGBS was reasonable in Breedon Aggregates' view*"[75].

Role of GGBS as a Substitute or Input to Cement

6.24 The role of GGBS within the wider cementitious products sector further militates against the imposition of remedies in relation to GGBS. CEM 1 and PFA are substitutable for GGBS in nearly all downstream applications (i.e. RMX and concrete products). GGBS has no material 'captive' market (i.e. category of applications for which only GGBS is technically suitable). Its market presence is dependent on it being a cheaper alternative to CEM 1. PFA also represents a cheaper alternative to cement which competes across applications with GGBS. The scope for CEM 1 pricing to influence GGBS pricing is very significant, whereas there is limited scope for GGBS pricing to influence cement pricing.

6.25 Any analysis of proportionality should take the limited role for GGBS in the cementitious substitutes sector into account. This fact alone indicates that it would clearly not be proportionate to impose a remedy on Hanson's GGBS business:

6.25.1 It would be counter-intuitive for the Commission to impose a remedy in relation to GGBS to address what it perceives to be wider problems in the cement market given the highly intrusive nature of such a remedy for Hanson;

6.25.2 It would be questionable for the Commission to seek to impose a remedy on GGBS for the purposes of restraining prices in cement – as stated above, Hanson cannot accept the Commission's findings on cement pricing and views its stated conclusions (regarding unacceptable increasing pricing over recent years) to be erroneous, partial and false in the context of the reducing prices across the last three years of the five year review period; and

6.25.3 The CAT in *Tesco* made it clear that the Commission is required, in its assessment of proportionality, to undertake a proper assessment of the

[75] PFs Appendix 7.6, paragraph 10

likely effectiveness of any remedy. It is not sufficient merely to present an approximate estimate of customer detriment and speculate that the remedy may reduce that detriment[76]. Hanson recognises that a remedy does not need to be 'fully effective' and that the Commission should analyse the effectiveness of any remedies package as a whole[77]. However in this respect, estimating the impact of any GGBS remedy on the cement market is likely to be speculative, given the limited role played by GGBS in that market and the fact that GGBS prices follow those of cement (and have limited scope to influence them). The inclusion of a GGBS remedy in isolation, or as part of a package of remedies, therefore, would not be as effective remedy as is 'reasonable and practicable.'

6.26 It is notable that, if the GBS supply agreements were to be analysed under Article 101 (or 102) TFEU, the analysis would take into account the position of GGBS within the wider cementitious products sector. According to Commission estimates, GGBS production is equivalent to only about 12.5% of total cementitious production in GB[78].. When assessing any likely impact on competition, the limited role played by a product representing a small part of the wider market in competition in the wider cementitious products market would generally be critical to the assessment[79]. This would suggest no scope for intervention under the TFEU. It would be perverse for the Commission to intervene in the same arrangements, ostensibly applying similar principles of competition analysis.

Proportionality

6.27 Despite the fundamental concerns raised by any attempt to impose any GGBS remedies, this response now turns, for the sake of completeness, to consideration of the proposed GGBS remedies within the Enterprise Act principles. The focus is largely on the remedies proposed in relation to Hanson (the proposed divestment of GGBS grinding plant(s) and/or intervention in the exclusivity arrangements with Lafarge Tarmac)[80].

6.28 Even assuming that the Commission were entitled to consider GGBS remedies, a key consideration for any potential remedies in relation to GGBS in the MIR would be the proportionality of such remedies.

6.29 The remedies proposed would, if implemented, be highly intrusive and costly for Hanson. A divestment of one or more grinders would clearly involve [✂] impairment losses, and interference in Hanson's Article 1 rights.

6.30 Any intervention in the exclusive GBS supply arrangements would involve interference in freely negotiated trading and commercial arrangements between willing parties with equal bargaining power. It would also fundamentally undermine the rationale for the very high level of investment and risk taken by Hanson in the GGBS business[81].

6.31 Any such remedy would be disproportionate on either of two (related) grounds. First, such a remedy would be disproportionate in the light of the investments made, and risks taken, by Civil & Marine (and Hanson) in the GGBS business. Second, it would impair and remove Hanson's ability to make any return on the investment it made in the Civil & Marine business in 2006.

[76] *Tesco Plc v Competition Commission* (Case 1104/6/8/08) paragraph 131 " A measure will be considered not to be proportionate if it is ineffective with respect to its aim, or if its "costs" are disproportionately large in comparison with the mischief at which it is aimed"
[77] *Barclays Bank Plc v Competition Commission* (Case 1109/6/8/09) paragraph 101 to 108
[78] See GGBS/PFA Working Paper Table 1 and Table 5.
[79] The limited scope for impact on the wider cementitious products market would be balanced against the efficiencies created by the GBS supply agreements (highlighted above).
[80] It is possible that, in certain respects, similar principles could apply to any remedies "upstream", i.e. impacting on Lafarge Tarmac's ownership of granulators.
[81] References in this Section to Hanson should be interpreted as references to Civil & Marine (which Hanson acquired in 2006, but was previously under separate ownership) where relevant.

6.32 Hanson has developed, and invested very heavily in, the GGBS business over a number of years. Its investment has included very significant capital investment in the establishment and construction of GGBS grinding operations (located close to the sources of supply and effectively dedicated to the grinding of GBS). GGBS grinders represent significant sunk costs, in part, due to the high level of integration of the heaters within the grinder. Hanson has also made substantial market investment in promoting GGBS as an alternative to cement in the concrete production process (at the time of the investment, GGBS had gained limited traction as an alternative to cement).

6.33 This investment by Hanson was on the basis of the long exclusivity granted under the GBS supply arrangements, in order to provide a basic security of supply for entering the cement substitution market and competing with PFA. The exclusivity provided Hanson with the essential security that it could recover its investment, and the long term period was both required and appropriate in order for Hanson to make the huge investment, given the very long wait before returns could be made against the following risks:

6.33.1 The significant raw material supply side risks caused by considerable/ever-present operational uncertainty in the UK steel industry are well known. The closure of the Llanwern steelworks (and the consequent mothballing of Hanson's Llanwern grinding plant) and the temporary closure of the Teesside steelworks (leading to the mothballing of Hanson's Teesside grinding plant - [✂]) demonstrate this. The continued uncertainty of the UK national steel industry[82] further demonstrates the uncertain environment in which Hanson continues to operate. Producers and downstream sellers or steel in this country now find themselves in crisis as they consider which operations, national offices and sites to close given the collapse in GB and also global steel demand;

6.33.2 The commitment to the market needed by Hanson and the demand-side risks faced in trying to promote an substitute/alternative to cement given the relatively low acceptance of GGBS at the time of the investments; and

6.33.3 Without the risk of other producers 'free-riding' on the back of the efforts of Hanson in promoting GGBS and gaining acceptance of it as a viable alternative to CEM I.

6.34 The rationale for the exclusivity is covered in more detail in the PFs Response. The exclusivity granted under the GBS supply agreements formed the basis for Hanson's extremely high investments (totalling hundreds of millions of pounds) and the high/pioneering risks undertaken in offering a product to the market on such a national scale. Without the grant of long exclusivity, Hanson would not have made these investments and/or undertaken the commitments/risks it did. Any interference in or early termination of the exclusivity at only the mid-stage of the duration of the contracts would sever Hanson's investment returns prior to maturity and deny Hanson in its ability to make any return on its investment.

6.35 By way of indication of the value ascribed to Hanson's investment in the GGBS business, the acquisition of the GGBS operations by Hanson in 2006 was for a consideration of some £[✂][83] (i.e. the purchase price for Civil & Marine). Hanson has not yet made a full (or even near a full) return on this investment to date – it will take several more years of trading (assuming current levels of profitability are maintained) towards 2020 before Hanson even breaks even on its investment, and it would then take several further years before Hanson makes a return on its investment, let alone a level of return that is commensurate with the very high levels of investment and risk

[82] http://www.thesundaytimes.co.uk/sto/business/Industry/article1261379.ece

[83] Around £[✂] of this consideration was attributable to Civil & Marine's fledgling US business, with the balance amounting to £[✂]

that Hanson undertook, or that is appropriate given the very long period of commitment prior to realising any return.

6.36 [✂]

6.37 A significant proportion of this investment and value will be alienated through any form of interference in the GGBS business, through required divestments of grinding plants or a removal of any exclusivity in respect of the GBS supply agreements, before Hanson has had an opportunity to make a return on its investment, creating disproportionate and overly onerous costs for Hanson, despite previous review and approval of the arrangements by the EC.

RCBs

6.38 There are numerous RCBs that the GGBS supply structure allows. In its analysis of a remedy the Commission must give due consideration of the adverse consequences caused.[84]

6.39 The supply structure in relation to GGBS in GB gives rise to considerable benefits:

6.39.1 [✂] A single supplier of GB-produced GGBS is required in order to undertake the investment and make the commitment necessary to promote the benefits of GGBS.

6.39.2 [✂] This militates towards Hanson retaining a portfolio of plants in order to retain this benefit.

6.39.3 Hanson's firm commitment to the promotion of GGBS in GB as a cement replacement with a lower environmental burden would inherently be undermined by any divestment of its capabilities. The same commitment could not be guaranteed in a new entrant.

6.39.4 The steel industry has benefitted and continues to benefit from the guaranteed off-take of its waste slag. GGBS not only provides an economically efficient use for this bi-product, but significantly reduces the financial and environmental burden of otherwise disposing of it. The GB steel industry is currently suffering from severe instability and uncertainty as shown by the recent financial losses made by Tata[85]. No other company possesses the necessary expertise and commitment to GGBS required to continue alleviating the pressure on the UK steel industry.

6.39.5 Furthermore it is Hanson's unique experience gained from years of investment that makes GGBS a viable product and substitute for cement. Hanson's quality and reliability and security of supply are key determinants for its use by customers [✂]

6.40 In the context of RCBs, and the possible impact any divestment of GGBS operations might have on the public interest, given the [✂], a break-up of GGBS operations would be likely to risk the adverse effects of higher prices as the efficiencies of scale and supply security were lost and buyers then relied on smaller, less secure and less efficient operators.

6.40.1 [✂]

6.40.2 [✂]

6.40.3 [✂]

[84] *Barclays Bank Plc v Competition Commission* (Case 1109/6/8/09) paragraph 140
[85] http://www.thesundaytimes.co.uk/sto/business/Industry/article1261379.ece

6.40.4 [✂]

[✂]

6.41 [✂]

6.42 [✂]

6.42.1 [✂]

6.42.2 [✂]

6.42.3 [✂]

6.42.4 [✂]

6.43 Notwithstanding the very significant disproportionality to Hanson caused by divesting a GGBS plant and depriving it of any return, it would be an entirely impracticable remedy [✂]

7. PACKAGE OF BEHAVIOURAL REMEDIES

7.1 As noted above in Section 2 above, a well established element of the principle of proportionality is the obligation that "*when there is a choice between several appropriate measures, recourse must be had to the least onerous*"[86]. The lack of proportionality and effect concerned with structural remedies, all as described above, indicates that the Commission should consider application of a package of behavioural remedies to address any perceived AEC.

7.2 Therefore, when considering individual remedies and the package of remedies likely to be effective in addressing any perceived AEC, the Commission should only consider those behavioural remedies which have the potential to undermine the conditions claimed to be facilitating coordination and the potential for the behaviours which the Commission perceives contribute to coordinated effects.

7.3 Whilst Hanson does not consider that an AEC arises, it comments as follows on the proposed behavioural remedies proposed in the Remedies Notice on a without prejudice basis, in the interests of working together with the Commission with a view to implementing a package, which although in Hanson's view could be called into question with regard to both applicable economics and lawful requirements, would be likely to be effective in addressing the Commission's stated perceived concerns on such matters.

Remedies to address transparency on sales and production shares (Remedy C5)

7.4 The Commission has proposed a number of remedies which are designed to address perceived transparency in sales and production shares (Remedy C5):

7.4.1 A recommendation to BIS and other UK public bodies that monthly cement market data only be published after a certain time lag (subject to limited exceptions); and

7.4.2 A requirement that cement producers not provide sensitive sales or production data to the MPA, CEMBUREAU or equivalents (including market research organisations).

7.5 When considering these proposed remedies, the Commission would need to consider:

7.5.1 A suitable time lag for the publication of monthly cement market data. Hanson considers that a time lag of three months would be suitable. This would balance the perceived requirement to undermine transparency in market shares against the benefits of the publication of such data. A three-month time lag would very much reduce the level of any transparency which could in theory contribute to coordination. If a producer could not detect any changes in its own market share for three months, this could have the inevitable effect of reducing the alleged focus on market shares (as each party's own market share changes would be very much difficult to track and detect in a timely manner).

7.5.2 A suitable exceptions regime being put in place to allow for the provision of date where required by law or for other justified reasons.

7.5.3 Ensuring that any restrictions imposed on the GB cement producers as regards the provision of data to bodies such as the MPA, CEMBUREAU etc are no more restrictive than necessary to achieve the general objective of the three month time lag for the publication of industry statistics. The data is

[86] Case C-331/88 R v Ministry of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa [1990] ECR I-4023, paragraph 13

genuinely public. Therefore, not only does the provision of industry data through these bodies have multiple industry benefits for members (which include a substantial number of SMEs), potentially reducing barriers to entry, but they are of wider utility to the construction industry in their planning processes.

7.6 The Commission has also proposed a remedy to address the publication of market data by the EC. Hanson notes that this would require careful consideration and discussion with the EC, environmental regulation is a complex and developing area of law.

7.7 The Commission is concerned over a perceived focus by the GB cement producers on market shares. These remedies would make it more difficult for a GB cement producer to monitor its market shares on a current up to date basis, and would introduce a considerable degree of further uncertainty into the market.

Measures to limit pricing transparency (Remedy C4)

7.8 The Commission has proposed a remedy concerning price increase proposal letters (Remedy C4) in order to address its perceived concerns over these letters facilitating price leadership and price following, and softening customer resistance to price increases.

7.9 Hanson does not agree that the price increase proposal letters have this effect. This has already been explored in depth in previous submissions, and will be explored in more detail in the PFs Response. In short, Hanson considers that the Commission has misinterpreted patterns, has overstated the extent to which any proposed price increases have been recovered and has misunderstood the context of rapidly increasing costs during the period under review. The Commission has not shown that the practice of sending price increase proposal letters is inconsistent with a well-functioning market.

7.10 However, any concerns which the Commission continues to hold would, in theory, be addressed by a prohibition on the issue these of generalised price increase proposal letters, since the opportunity to attempt to read national target increases would be reduced. When considering such a remedy, the Commission should:

7.10.1 acknowledge the need for cement producers to recover increased costs through price increases to current customers;

7.10.2 recognise the need for customers to have suitable advance notice of any price increases for business planning purposes (and that the current practice of sending out letters in advance to customers has arisen due to customer requirements); and

7.10.3 preserve the benefits to customers of a price proposal from a cement producer in advance which allows the customer to negotiate, seek other offers and, as the Commission has seen from its own analysis, secure a considerably more favourable deal for itself than that proposed.

7.11 This would point to a remedy preventing generalised price increase proposal letters with the same national percentage or amount increase included. The remedy should not prevent individualised proposals being sent to customers by cement producers (i.e. identifying only the new price to be paid by the customer) in order to commence a process of negotiation and preserve the benefits highlighted above. For example, Hanson would envisage that price increase letters were then restricted to informing individual customers of their new price per tonne, as opposed to a national increase.

Measures to increase customer bargaining power

7.12 The remedy proposed by the Commission in respect of cement buying groups would aim to increase customer bargaining power and limit the scope for perceived 'tit-for-tat' behaviour and increase opportunities for importers of cement.

7.13 As the Commission notes, such buying group arrangements already exist with considerable effect in the builders' merchants sector and they represent an opportunity for smaller merchants to exercise buying power.

7.14 When considering this remedy, the Commission should take into account:

7.14.1 The advantages which independent RMX operators can achieve through individual negotiation. Individual RMX companies have a large choice of suppliers, and Hanson has provided numerous examples of RMX companies using quasi-tender processes and/or the threat of switching to secure better terms. This points to the need for the maintenance of flexibility in any remedy, i.e. an 'opt-in' system.

7.14.2 The potential shortcomings of imposing a requirement on GB producers to sell a significant proportion of their cement production to any such buying group(s). This would undermine the freedom and flexibility of cement producers, and the ability of independent RMX companies outside the buying group(s) to negotiate the best possible terms on an individualised basis where appropriate. In any event, the concentration of demand within one or more buying groups would make it highly unlikely that cement producers would not compete strongly for supply to that/those buying group(s).

Additional Remedies to be Considered/Volunteered: Tender Requirement for Cross-Sales

7.15 Whilst the Commission has rejected the potential for a remedy prohibiting cross-suppliers between the Top 3 cement producers (Remedy X2) on the grounds that an absolute ban on cross-sales would potentially remove efficiencies (such as logistics efficiencies associated with cross-sales) and that a more limited remedy would, therefore, be required, which would be difficult to enforce. The Commission considers that divestment of RMX plant by the Top 3 GB cement producers (Remedy C2) would be a "more effective remedy".

7.16 Hanson disagrees with the Commission's theory of harm based on vertical integration. The reasons for this as well as the very clear limits as to the effectiveness of such a remedy are explored above (and in more detail in the PFs Response).

7.17 However, if the Commission persists in seeking a remedy to such perceived concerns, it should bear in mind its established duty to select the least onerous remedy which would be effective.

7.18 In this respect, the following potential remedy volunteered by Hanson, on a without prejudice basis, would merit consideration as an effective means of addressing many of the Commission's stated and perceived concerns: A requirement on those GB cement producers which are vertically integrated into RMX to conduct a tendering process (either by way of website invitation to tender, obtaining at least three quotations or by way of annual tender request) for the external supply of cement for RMX requirements.

7.19 A number of safeguards could be put in place to ensure that any remedy is practicable and effective. These could include:

7.19.1 A requirement on the business concerned to generally choose a supplier on the basis of the most economically advantageous tender (including price, ability to deliver, and maintain service, credit terms, technical characteristics etc). In certain respects, the substantive test would reflect that applied under the public procurement rules.

7.19.2 There could be a requirement to obtain a minimum number of quotes (if available) or for suitable publication of requirements (for example, on the website of a producer).

7.19.3 There could be a restriction on the delivery of information received from tendering suppliers within such process to eliminate transparency concerns by limiting the supplier's delivery of such quotations to the relevant named procurement or RMX staff.

7.19.4 There should be a carve-out to allow for temporary/short-term back-up supplies where a major requires cement due to unforeseen capacity/production issues.

7.19.5 The process could be enforced by an ability on those failing to win a contract to request a review by the buyer and a written explanation if they felt their tender had been unfairly excluded, and a requirement for the GB cement producers who have engaged such tenders to submit an annual written summary report to the OFT for the record.

7.20 Such a remedy would, in theory, have the advantage of dealing with all the perceived aims of the RMX divestment remedy (Remedy C2):

7.20.1 Following the Commission's own thinking, it would clearly increase the size of the 'addressable' market. Whilst the Commission has noted the relative lack of cross-supplies currently, it has highlighted the potential for an increase in cross-supplies on any improvement in market conditions as a key element of its concerns. In such circumstances, the remedy would enhance the size of the 'addressable' market, and facilitate expansion by producers outside the Top 3 GB cement producers.

7.20.2 It would reduce perceived transparency between the Top 3 cement producers by way of automatic price increase letters.

7.20.3 It would eliminate the scope for cross-sales to be used to rebalance shares of sales.

7.20.4 It would restrict the opportunity to use such sales for the purposes of retaliatory or punishment actions with regard to any deviation from perceived coordination that may have been detected.

7.21 Such a remedy would also retain the efficiencies associated with vertical integration (to be explored further in the PFs Response) and would represent a more proportionate and indeed effective solution (assuming that any AEC had been proven) than a divestment remedy, less harmful to the market and the public interest. Hanson hopes that the Commission will be able to review this additional proposed remedy in the stated context and view it as a positive and effective measure in addressing a significant number of the stated concerns, but without the unintended damaging effects on the public interest as described earlier in this response.

Annex

This Annex is supplementary to Hanson's response to the Remedies Notice. This Annex specifies which paragraphs in the response address the questions set out in the Remedies Notice, and if Hanson has not addressed any of the Commission's questions in the response, why Hanson has not done so.

1. **REMEDY C1: DIVESTURE OF CEMENT PRODUCTION CAPACITY BY ONE OR MORE OF THE TOP 3 CEMENT PRODUCERS**

1.1 Hanson has not specifically addressed the questions in paragraph 30 of the Remedies Notice. For the reasons set out in Section 3 of the response, Hanson does not agree that there is an AEC to address, nor insofar as an AEC does exist, that any remedy under C1 would be proportionate.

1.2 In Section 3 Hanson describes the costs involved in implementing such a remedy (Question 'h') and urges that the Commission gives full consideration of these costs in its analysis.

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

2.1 Hanson has not specifically addressed the questions in paragraph 35 of the Remedies Notice. For the reasons set out in Section 4 and 5 of the response, Hanson does not agree that there is an AEC to address, nor insofar as an AEC does exist, that any remedy under C2 would be effective or proportionate.

2.2 In Section 4 and 5 Hanson describes the costs involved in implementing such a remedy (Question 'f') and urges that the Commission gives full consideration of these costs in its analysis.

3. **REMEDY C3: THE CREATION OF A CEMENT BUYING GROUP OR GROUPS**

3.1 Hanson addresses Remedy C3 in paragraphs 7.12 to 7.14. Hanson does not agree that there is an AEC to address, however insofar as an AEC does exist, Remedy C3 would be effective and proportionate in doing so.

3.2 Paragraph 7.14 described the considerations the Commission should take into account in evaluating and implementing this remedy (Question 'h').

4. **REMEDY C4: PROHIBITION ON GB CEMENT PRODUCERS SENDING GENERALISED CEMENT PRICE ANNOUNCEMENT LETTER TO THEIR CUSTOMERS**

4.1 Hanson addresses Remedy C4 in paragraphs 7.8 to 7.11 of the response. Hanson does not agree that there is an AEC to address, however insofar as an AEC does exist, Remedy C4 would be effective and proportionate in doing so.

4.2 Paragraph 7.10 describes the considerations the Commission should take into account in evaluating and implementing this remedy (Question 'e').

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

5.1 Hanson addresses Remedy C5 in paragraphs 7.4 to 7.7 of the response. Hanson does not agree that there is an AEC to address, however insofar as an AEC does exist, Remedy C5 would be effective and proportionate in doing so.

5.2 Hanson highlights an appropriate time lag for this remedy (Question 'a') in paragraph 7.5.1, and what other considerations the Commission should take into account (Question 'e') in paragraph 7.5.

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

6.1 Hanson notes Remedy C6 in paragraph 7.6. Hanson does not agree that there is an AEC to address, however insofar as an AEC does exist, subject to the approval of the European Commission, Remedy C6 would be effective and proportionate in doing so.

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

7.1 Hanson has not specifically addressed the questions in paragraph 89 of the Remedies Notice. For the reasons set out in Section 4 and 6 of the response, Hanson does not agree that there is an AEC to address, nor insofar as an AEC does exist, that any remedy under C7 would be effective or proportionate.

7.2 In Section 4 and 6 Hanson describes the costs involved in implementing such a remedy (Question 'g') and urges that the Commission gives full consideration of these costs in its analysis.

8. ADDITIONAL REMEDIES CONSIDERED (X1,X2 AND X3) AND VOLUNTEERED

8.1 In paragraphs 7.15 to 7.22, Hanson discusses those remedies the Commission is not minded to pursue, and suggests a potential tendering remedy.

9. PACKAGE OF REMEDIES

10. Throughout the response, Hanson discusses the Commission's responsibility to ensure that any remedies package, if required, is the least onerous as possible to remedy any AEC.

11. Hanson believes that the behavioural remedies proposed by the Commission would be mutually reinforcing. The package of behavioural remedies is discussed in Section 7.