COMPETITION APPEAL TRIBUNAL

NOTICE OF APPLICATION UNDER SECTION 179 OF THE ENTERPRISE ACT 2002

CASE No. 1224/6/8/14

Pursuant to rules 15 and 25 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003) (the "Rules"), the Registrar gives notice of the receipt on 12 March 2014 of an application for review under section 179 of the Enterprise Act 2002 (the "Act"), by Lafarge Tarmac Holdings Limited (the "Applicant") of certain decisions of the Competition Commission (the "Commission") contained in a report published on 14 January 2014 entitled "Aggregates, cement and ready-mix concrete market investigation: Final report" (the "Final Report"). The Applicant is represented by Slaughter and May of One Bunhill Row, London EC1Y 8YY (ref.: Michael Rowe/ Lisa Wright).

The Applicant is a joint venture company, which is the result of a merger (approved by the Commission in 2012) between the UK construction materials businesses of Lafarge SA and the UK operations of the Tarmac Group (owned by Anglo American plc).

According to the Notice of Application, the Commission found, in the Final Report, that: (i) there was a combination of structural and conduct features in the cement markets in Great Britain ("GB") that gave rise to an adverse effect on competition ("AEC"); (ii) that there were further features of the GB cement markets, which combined to give rise to an AEC in the GB market for the supply of ground granulated blast furnace slag ("GGBS")[1], as well as an additional AEC in the GB cement markets; and (iii) that the likely effect of these features was higher prices for cement in GB than would otherwise be the case for all GB cement users, and higher prices for GGBS than would otherwise be the case. The Commission imposed a remedies package which includes, among other things, requiring the Applicant to divest one of its four cement plants in GB (either its Cauldon or Tunstead plant), along with a number of ready-mix concrete ("RMX") plants (should the purchaser of the cement plant also wish to acquire RMX plants).

The Notice of Application sets out cumulative or alternative grounds, on which the Applicant challenges the Commission's Final Report, which can be summarised under the following heads:

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[1] GBBS can be used as a partial substitute for cement.

(1) Procedural unfairness: The Applicant was deprived of the opportunity meaningfully to respond to the Commission's theory of harm, namely the existence of alleged "coordination", because many of the documents upon which the Commission based its conclusions were not shown to the Applicant at all, but rather only to external advisers in a data room set up by the Commission, and on terms which rendered impossible the taking of meaningful instructions and the mounting of a proper defence. In addition, the Commission failed to disclose critical evidence to the Applicant's external advisers even when in the data room. Further, the Commission's findings are vitiated by an appearance of bias or pre-determination by reason of the publication of a press release by the Commission, at the time of the Provisional Decision on Remedies on 8 October 2013, which would have led the fair-minded and informed observer to conclude that the Commission no longer had an open mind.

(2) The putative "Coordination AEC": The Commission's finding that there was an AEC in the GB cement markets "…through coordination" was inadequately particularised and reasoned. The Commission thereby failed in its duty to state the case it was making, to make clear findings and to give adequate and intelligible reasons for those findings. In the alternative, the Commission's finding, if there was such a finding, is irrational because it lacks any, or any adequate, evidential foundation.

(3) The profitability analysis: The Commission's profitability analysis, on which the existence of any measurable detriment from the alleged AEC depends, is contrary to the Commission's own Market Investigation Guidelines and is, in any event, flawed because the results are too marginal to support a finding of excess industry profitability and are not robust to reasonable sensitivity testing.

(4) The cement divestment remedy: The imposition of a requirement upon the Applicant to divest one of its four cement plants, plus RMX plants (if required by the purchaser), was disproportionate. The Commission failed to: (i) apply correctly the relevant limbs of the applicable proportionality test in its consideration of whether the proposed divestment was necessary to eliminate the AEC and whether less onerous measures would be likely to suffice; (ii) take into account, in evaluating the projected benefits, that its cement plant divestment remedy might not be effective or, alternatively, might not be fully effective or necessary; and (iii) take into account, when estimating the benefit to be achieved from the divestment, that the remedy it is imposing in GGBS will alone suffice to eliminate at least a significant part of the putative consumer detriment in cement. It therefore overstated the necessity for (and/or potential benefit from) the cement divestment remedy.

When estimating the likely cost of the proposed divestment to the Applicant, the Commission: (i) irrationally assumed that the Applicant would obtain fair value for the divested plant, despite the Commission's decision to exclude all existing GB cement producers from the pool of suitable buyers; and (ii) failed to take into account important cost categories and failed to give adequate reasons to support its low estimate of costs. In addition, the Commission's exclusion of Mittal Investments S.á.r.l. from the pool of potential buyers was irrational given that its subsidiary, Hope Construction Materials, is recognised by the Commission as being outside the alleged coordinating group and unlikely to join it. Further, the Commission's imposition of the RMX divestments was disproportionate and/or premised upon an irrational failure to weigh the cost of such divestments against their alleged benefits.

Relief sought: By way of relief, the Applicant asks the Tribunal to quash certain paragraphs of the Final Report in so far as they relate to:

1. the finding of a 'Coordination AEC' in cement;

2. the divestment by the Applicant of either the Cauldon or Tunstead plant; and/or

3. the divestment of RMX plants by the Applicant.

The Applicant also asks the Tribunal to order (i) such further or other relief as the Tribunal deems fit; and (ii) that the CC pay the Applicant the costs it has reasonably incurred in bringing its application.

Any person who considers that he has sufficient interest in the outcome of proceedings may make a request for permission to intervene in the proceedings in accordance with rule 16 of the Rules. Any request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London WC1A 2EB, so that it is received within three weeks of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribinal.org.uk. Alternatively, the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar

Published 14 March 2014