



## Aggregates, cement and ready-mix markets referred to the Competition Commission for in-depth investigation of possible competition concerns

The Office of Fair Trading (“OFT”) considers that competition is not working properly in the markets for aggregates, cement and ready-mix concrete in Great Britain<sup>1</sup>. Therefore, on 18 January, the OFT referred these markets to the Competition Commission (“CC”) for an in-depth investigation.

The CC will investigate whether there are any features of these markets that prevent, restrict or distort competition and, if so, how these features can be remedied in order to improve competition and thereby protect the interests of consumers, for example by increasing choice and reducing prices.

The CC has two years to conduct its investigation and must adopt its final report by no later than 17 January 2014, although it has stated that it will aim to report before then.

Whilst the OFT has identified a number of potential competition problems arising from the structure of these markets (which we summarise below), it is notable that the OFT had relatively little, and then mostly anecdotal, evidence for some of these concerns. In addition, it has not undertaken detailed data analysis.

This means that the CC will need to conduct a very detailed investigation into all aspects of the structure of these markets. This will include demanding large quantities of data and internal documents from industry players. It will also hold hearings with a number of suppliers, customers, trade associations and other interested parties. This will put a considerable burden on these parties.

### What is a market investigation?

Under the Enterprise Act 2002, the OFT can undertake a “market study” into a particular market to assess whether the structure of that market and/or practices are restricting competition to the detriment of consumers, for example in terms of higher prices or reduced choice. The OFT has investigated many markets in recent years.

If the OFT has reasonable grounds for suspecting that a feature or features of a market may prevent, restrict or distort competition to the detriment of consumers, it may refer that market to the CC for a full investigation. The CC must then

investigate if there is in fact an adverse effect on competition and, if so, whether this is to the detriment of consumers. If it identifies a detrimental effect on consumers, the CC must identify remedies to resolve this adverse effect.

### Why did the OFT refer the aggregates, cement and ready-mix markets to the CC?

In September 2010, the OFT conducted a study into the aggregates sector, which it then expanded to cover also the cement and ready-mix concrete sectors, which are vertically integrated with aggregates and in which competition concerns could also be identified as a result of limited competition in the upstream aggregates market. It has also, separately, investigated the proposed merger of the UK businesses of Tarmac and Lafarge in these markets, which is now being reviewed by the CC.

In August 2011, the OFT consulted on the findings of its market study. Having considered representations from industry players and others, it has now concluded that competition in these markets is not working properly, possibly leading to higher prices for key inputs for the construction sector.

The aggregates, cement and ready-mix industries are of significant economic importance, with total annual sales of over £3.3 billion. The OFT is concerned by the following features of these sectors:

- *A high degree of market concentration and vertical integration:* all three markets are dominated by five vertically-integrated multi-national “majors”, Aggregate Industries (owned by Holcim), Cemex, Lafarge, Hanson (part of Heidelberg Cement) and Tarmac (owned by Anglo-American), with no significant independent producers of any of these products.
- *Possible coordination of the conduct of the “majors”:* the OFT claims to have uncovered evidence of coordinated announcements of price increases by the “majors”. In addition, the vertically-integrated and concentrated structure of these markets may facilitate the coordination

<sup>1</sup>In the aggregates sector, the investigation covers primary, secondary and recycled aggregates, although the OFT’s principal focus of concern is limited competition in the supply of primary aggregates. The OFT has not referred the aggregates, cement and ready-mix concrete markets in Northern Ireland. However, it is keeping these markets under review and it is possible that a further reference to the CC could be made in the future.

of the “major’s” conduct, without the need to actually enter into an illegal cartel. The OFT considers that the possibility and effectiveness of such coordination, which may dampen competition and lead to higher prices, is increased by frequent cross-supply, joint ventures (at all levels of the supply chain) and contacts between the “majors” across multiple markets. However, the OFT has conceded that it has not undertaken any detailed analysis as to whether coordination is actually occurring or is likely to occur as a result of these features of the market.

- *Difficulties in independent ready-mix operators obtaining competitive quotes for cement from alternative suppliers:* the OFT claims that the “majors” charge more for cement to independent operators than to their own operations and to each other, and also refuse to provide competitive quotes to supply independents already supplied by another cement producer.
- *Possible “margin squeezing” by the “majors” between the cement and ready-mix markets:* the OFT claims to have identified evidence (albeit apparently circumstantial) that the “majors” have increased the price of cement supplied to independent ready-mix producers whilst, at the same time, reducing their prices for ready-mix, possibly to below the break-even level. In addition, there is some (albeit largely anecdotal) evidence of “majors” refusing to supply cement to independents. This may have resulted in a “margin squeeze” on independents, who cannot profitably supply ready-mix as a result of low prices for ready-mix and a high cost of cement.
- *High barriers to entry:* barriers to entry are high in the aggregates sector due to limited potential sites for new quarries and restrictions inherent in the planning system and in the cement sector, due to the costs of building a new plant and difficulties in obtaining planning permission. As a result, there has been little or no entry in primary aggregates and none in cement. This may reduce the competitive pressure on existing producers.
- *A planning system that may favour incumbent operators, deter new market entry and facilitate coordinated commercial conduct:* the planning system is complex and expensive and favours existing operators, for example by not granting permission for new quarries where the existing “landbank” falls below target levels and by favouring the extension of existing quarries over new, greenfield sites. This may make new entry difficult and thus limit new competitive pressure on the “majors”. In addition, the Managed Aggregates Supply System (“MASS”) increases transparency in the market, which may make coordination of competitive activity more likely and/or more stable.

The CC will now investigate whether these, and other market features, may restrict competition in any or all of the aggregates, cement or ready-mix sectors. As well as looking at the structure of these markets and the conduct of market participants, it will

review the planning system, in particular the role of “landbank” targets and the operation of MASS.

## What will happen next?

The CC has not yet published its administrative timetable for its investigation. This is expected shortly.

Based upon many previous market investigations, it can be expected that, by March or April, the CC will issue detailed questionnaires to suppliers, customers and other interested parties, followed by site visits and hearings. It will then likely publish its initial thoughts, or “emerging thinking”, probably during the late summer, to which parties may respond in writing and/or at a hearing. By the middle of 2013, the CC will publish its provisional findings on whether it has identified competition concerns and (if required) propose remedies. Following written responses by, and further hearings with, interested parties, the CC will publish its conclusions on remedies and then its final report; this will probably be in late 2013.

## What could be the outcome of the CC’s investigation?

It is possible that the CC may find that the aggregates, cement and ready-mix markets are competitive and that no regulatory intervention is required. However, in view of the OFT’s preliminary findings and its decision to make a market reference, it is to be expected that the CC will identify some form of adverse effect on competition. If so, the CC will likely propose and, after consultation, impose a series of remedies to encourage new entry, reduce the possibility for producers to restrict supply and promote competition.

The CC can impose a variety of remedies itself, including, for example:

- The divestment of businesses or assets, such as quarries, cement import terminals, ready-mix plants.
- The unwinding or restructuring of joint ventures.
- Obligations on the owners of essential infrastructure (such as road or rail terminals or wharves) to provide access to third parties on fair and reasonable terms.
- Price controls.
- Measures to prevent unfair practices, such as discrimination in the price charged to third parties by a vertically integrated producer for the supply of raw materials (such as cement)
- Measures to prevent the “hoarding” of land so that it cannot be used by competitors.
- Requiring suppliers to adhere to binding codes of conduct on the supply of aggregates and cement to other producers, construction companies and other end users.

The CC can also recommend that other public bodies take steps to improve competition by reducing barriers to entry and expansion. For example, it could recommend that government revise existing, or adopt new, legislation on planning or the environment. It could also recommend that planning authorities revise their procedures and criteria for granting permission for new or expanded quarries, terminals or ready-mix plants.

## We can help

A market investigation by the CC imposes considerable demands upon companies, large and small. The CC will demand large amounts of data, including on sales and costs. It will also demand considerable quantities of internal documents. Companies must provide these data and documents and often to tight deadlines. As described above, they will also need to respond in writing to a number of documents that the CC will publish at different stages of its investigation and may be invited to a hearing before the CC.

Burges Salmon has a leading competition practice. We are described by Chambers as having *"a growing, full-service competition practice that consistently gives clients extremely strong and spot on advice"*. We are the only firm based outside of London to have a national ranking in Legal 500. Our team has recently been strengthened by the arrival of Matthew O'Regan, who has many years of experience in London and Brussels as a senior lawyer with an international law firm that is widely regarded as having the pre-eminent competition practice globally.

We have considerable experience of CC market investigations and have been involved in many investigations, including into railway rolling stock, payment protection insurance, airports and local bus services. In addition, we have considerable experience of all types of competition investigations by the OFT, the CC, the European Commission and other competition and regulatory authorities. We are experienced in handling large volumes of

data and documentation, and work with companies and their other advisers (such as economists) to minimise the demands on them. We work with our clients to assist them in not only responding to the CC's demands but in putting forward their own views on how their markets work, on the CC's analysis and on the CC's proposals for remedies.

If you would like to discuss in more detail the CC's investigation or how Burges Salmon could assist you at any stage in the CC's investigation, please contact Laura Claydon, Matthew O'Regan or your usual Burges Salmon contact.

Further information on Burges Salmon's Competition Group, please see our website at <http://www.burges-salmon.com/Practices/commercial/competition>.

For further information on the CC's investigation, please see the CC's website at [http://www.competition-commission.org.uk/inquiries/ref2012/aggregates\\_cement\\_and\\_ready\\_mix\\_concrete/](http://www.competition-commission.org.uk/inquiries/ref2012/aggregates_cement_and_ready_mix_concrete/)

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