



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPLICATION UNDER SECTION 179 OF THE ENTERPRISE ACT 2002

CASE NO.: 1225/6/8/14

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 13 March 2014, of an application for review under section 179 of the Enterprise Act 2002 (the “Act”) by Hope Construction Materials Limited (the “Applicant”) of the decision 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 Mayer Brown International LLP of 201 Bishopsgate, London EC2M 3AF (ref.: Gillian Sproul / Merlie Calvert).

The Applicant is a subsidiary of Brimary Investments Sàrl, which is jointly-owned by Mittal Investments Sàrl (“Mittal”) and M1 Group. According to the Notice of Application, the Applicant was formed by Mittal to own and operate the majority of the aggregates, cement and ready-mix concrete assets that Lafarge and Tarmac were required to divest as a condition of the Commission giving clearance for the creation of Lafarge Tarmac Holdings Limited (“Lafarge Tarmac”). Mittal completed its purchase of those assets on 7 January 2013 and the Applicant commenced operations on the same date. That was also the date on which Lafarge Tarmac came into existence.

According to the Notice of Application, the Commission drew a firm distinction in the Final Report between largest heavy-building materials producers on Great Britain (“GB”), collectively referred to as the “Majors”, as they stood prior to, and after, 7 January 2013. Prior to that date, the Majors were Aggregate Industries UK Limited (Aggregate Industries), Cemex UK Operations Limited (“Cemex”), Hanson and HeidelbergCement AG (together “Hanson”), Lafarge Aggregates Limited and Lafarge Cement UK Limited (together, “Lafarge”) and Tarmac. As from 7 January 2013, however, the Majors were Aggregate Industries, Cemex, Hanson, Lafarge Tarmac and, as a “fringe” player, the Applicant, which is the smallest of the Majors. It is stated, however, that the Applicant’s intention has always been to look for opportunities to acquire further assets to expand its presence in the GB cement markets and to compensate for the constraints placed on it by its size, production capacity and geographical reach.

The Applicant states that, in the Final Report, the Commission found that Cemex, Hanson and Lafarge Tarmac had the ability to exploit the current (and past) structural susceptibility of the GB cement markets to co-ordination. The Commission found that the result of co-ordination between producers was that prices were higher to the extent of an estimated £30m per annum and/or the quality aspects of the firms’ offers were lower than would otherwise be the case. The Commission, therefore, identified an adverse effect on competition (“AEC”) and a material customer detriment in the form of those higher prices, which were the result of the GB cement markets not working effectively.

The Commission further found that Tarmac, the smallest producer in GB and in a similar position to the Applicant, was not privy to the alleged co-ordination of the other Majors over the relevant period and that the introduction of the Applicant to the market in January 2013 made no change to the number of participants in the market, the number of cement producers, or to the total cement production capacity, and that the market’s “susceptibility” to co-ordination had proved resilient to more significant changes.

According to the Applicant, the Commission proposed to remedy the AEC by requiring Lafarge Tarmac to divest one cement manufacturing works (the “Divestment Assets”), subject to certain conditions, including a

condition that the “suitable purchaser” for the Divestment Assets cannot be an existing GB cement producer (the “GB Prohibition Condition”), thus facilitating the entry of a new, fifth GB cement producer. The Applicant states that the Commission is, in addition, imposing certain behavioural remedies designed to make the market less transparent and to add uncertainty, so reducing the ability to co-ordinate behaviour.

By its Notice of Application, the Applicant seeks to set aside the GB Prohibition Condition, which prohibits the Applicant, as an existing GB cement producer, from purchasing the Divestment Assets, on four grounds. These may be summarised as follows:

1. the GB Prohibition Condition is irrational because, if the Applicant were permitted to purchase the Divestment Assets, this would create a more effective competitor than another purchaser, by definition not a GB cement producer, obliged to operate at the scale of the Divestment Assets;
2. the Commission’s decision is also irrational as the GB Prohibition Condition would not, in all likelihood, deal effectively with the AEC found by the Commission but would, instead, create a weak, fifth GB cement producer whose impact on the alleged co-ordination of the Majors would be slight;
3. in imposing the GB Prohibition Condition, the Commission ignored clear and credible evidence that the Applicant would be an effective competitor and would continue to pursue an independent competitive strategy, and the Commission took into account unsupported theories that the introduction of a fifth competitor would eliminate the AEC found; and
4. the proper time to consider the merits of any potential purchaser of the Divestment Assets is at the time of the bids, when all bids can be compared and evaluated, and the Commission has acted irrationally by imposing the GB Prohibition Condition and foreclosing the possibility that, when compared to other bidders, a GB cement producer such as the Applicant might be superior in discharging the Commission’s obligations to remedy the AEC identified.

The Applicant seeks as relief an order:

- quashing the Final Report in so far as it relates to the GB Prohibition Condition, which acts as a bar to the Applicant purchasing the Divestment Assets; and
- directing the Commission to pay the Applicant’s costs of bringing this 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.catribunal.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