Completed acquisition by Aggregate Industries UK Limited of Atlantic Industries UK Limited

No. ME/3978/08

The OFT's decision on reference under section 22(1) Enterprise Act 2002 (the Act) was given on 2 March 2009 (the Decision). The full text of the Decision was published on 16 March 2009.

THE PARTIES

1. **Aggregate Industries UK Limited** (AI) is a wholly-owned subsidiary of the Holcim Group and a subsidiary of Aggregate Industries Limited. AI produces and supplies aggregates (both primary and secondary), asphalt (and asphalt surfacing services), ready-mixed concrete and other concrete products.

2. **Atlantic Aggregates Limited** (Atlantic) is a regional heavy building materials company which supplies secondary aggregates. Atlantic operates from sites at Gunheath (Cornwall) and Lee Moor (Devon). Atlantic's turnover for the year ending 31 December 2007 was £3.9 million.

TRANSACTION

3. AI acquired the entire issued share capital of Atlantic on 31 July 2008.

JURISDICTION

4. On 31 July 2008 the enterprises AI and Atlantic ceased to be distinct. The parties were both active in the supply of aggregates in Cornwall and Devon and after the merger had a share of supply of

greater than 25 per cent. Therefore, the share of supply test in section 23 of the Act was met.

BACKGROUND

5. The parties overlap in the supply of secondary aggregates in Cornwall and Devon.

6. The Decision found that, on the balance of the evidence, it is or may be the case that the merger resulted or may be expected to result in a substantial lessening of competition in the supply of secondary aggregates in the Gunheath area. The finding was unaffected if primary aggregates were included within the analysis.

7. To address the Office of Fair Trading's (OFT's) competition concerns, AI (and its parent company, Aggregate Industries Limited) offered to divest Atlantic's Gunheath operations (the Divestment Business), thereby effectively removing the overlap created by the merger in that area.

8. Before accepting the offered undertakings in lieu of a reference the OFT wanted AI to propose a buyer upfront. This was because of the risk profile of the undertakings. The key reasons for the OFT's view on this were:

   - the successful operation of the Divestment Business run by any buyer would require a supply agreement from Imerys Minerals Limited (Imerys) and consent from Imerys to allow the buyer to operate on its site

   - the merger was completed. When a merger is completed there may be greater difficulty in separating a divestiture package or the merged parties may have weaker incentives to pursue timely divestiture, and

   - given the economic climate at the time, the OFT had concerns as to whether the number of candidate suitable purchasers would be lower than would otherwise normally be expected for this type of business.

9. AI proposed Brookland Sand and Aggregates Limited (Brookland) as the purchaser for the Divestment Business. The OFT considers that Brookland is a suitable purchaser for the Gunheath Divestment Business on the basis that it fulfils the purchaser approval criteria in paragraph 3.1 of the undertakings. Specifically, on the information available to it the OFT considers that Brookland:

- has the necessary expertise and technical capacity to run the Gunheath Divestment Business in competition with AI. Norman Barry Cleave who runs Brookland already operates on the site as a contractor to Atlantic for the purpose of screening and crushing the aggregates (through Norman Cleave Plant Hire). Further, as a part of the proposed divestment the Gunheath Divestment Business General Manager, Sales Manager and Weighbridge Operator will all transfer to Brookland. This, and Norman Barry Cleave's familiarity with the requirements of the Atlantic business at Gunheath leads the OFT to conclude that Brookland can reasonably be expected to run the business in competition to AI

- can reasonably be expected to obtain all necessary approvals, licences and consents from any regulatory or other authority including landlord's consent to the transfer of any leasehold interest. Indeed, Brookland has reached an agreement with Imerys to operate on the site and to receive raw material from Imerys

- is independent of and unconnected to the AI Companies and the Group of Interconnected Bodies Corporate to which the AI Companies belongs and any Associated Person or Affiliate of the AI Companies or such Group of Interconnected Bodies Corporate, and

- has the necessary incentives to maintain and operate the business in competition with AI.

10. As such, the OFT believes that sale of the Divestment Business to Brookland will remedy the substantial lessening of competition concerned or any adverse effect which has or may have resulted from it, or may be expected to result from it.

CONSULTATION

11. On 15 February 2010 the OFT published the proposed undertakings inviting interested parties to give their views on them by 2 March 2010 pursuant to paragraph 2(1) Schedule 10 of the Act.

12. The OFT received one response to its consultation. The respondent was concerned that Brookland would not supply secondary aggregates to third parties but rather transfer all output to AI. The OFT has not seen any evidence that this will be the case and has received confirmation from AI that there are no arrangements in place between Brookland and AI in this respect.

DECISION

13. The Decision concluded that the merger would be referred to the Competition Commission if the parties failed to give suitable undertakings pursuant to section 73 of the Act to address the competition concerns identified in the Decision.

14. The OFT considers that the undertakings are clear-cut and appropriate to remedy, mitigate or prevent the substantial lessening of competition and any adverse effects resulting from it. The OFT has therefore decided to accept the undertakings offered by AI and Aggregate Industries Limited.

15. The merger will therefore not be referred to the CC and the undertakings, which have been signed by AI and Aggregate Industries Limited, will come into effect from 3 March 2010.