COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 23/CR/Mar12

In the matter between:

The Competition Commission — Applicant

and

Lafarge Industries South Africa (Pty) Ltd — Respondent

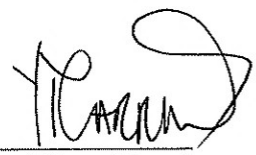
Panel : Y Carrim (Presiding Member), A Ndoni (Tribunal Member) and T Madima (Tribunal Member)

Heard on : 28 March 2012

Decided on : 28 March 2012

Order

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent, annexed hereto marked "A".



Presiding Member
Y Carrim

Concurring: A Ndoni and T Madima

'A'

BEFORE THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD IN PRETORIA)

CT CASE NO:
CC CASE NO: 2008JUN3769

In the matter between:

COMPETITION COMMISSION Applicant

and

LAFARGE INDUSTRIES SOUTH AFRICA (PROPRIETARY)

LIMITED Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND LAFARGE INDUSTRIES SOUTH AFRICA (PROPRIETARY) LIMITED IN RESPECT OF CONTRAVENTION OF SECTIONS 4(1)(b)(i) and 4(1)(b)(ii) OF THE COMPETITION ACT NO. 89 OF 1998, AS AMENDED

The Competition Commission and Lafarge Industries South Africa (Proprietary) Limited hereby agree that application be made to the Competition Tribunal for confirmation of this Consent Agreement as an order of the Competition Tribunal in terms of section 49D read with sections 58(1)(a)(iii) and 59(1)(a) of the Competition Act No.89 of 1998, as amended, on the terms set out below:

1. Definitions

In this Consent Agreement, unless the context indicates otherwise, the following definitions shall apply:

1.1. "***ACMP***" means the Association for Cementitious Material Producers. The ACMP was established in 2005 and its membership is open to producers of cementitious material in South Africa;

1.2. "***AfriSam***" means AfriSam (South Africa) (Pty) Ltd, a private company duly registered and incorporated in accordance with the laws of the Republic of South Africa, with its principal place of business at Corner 14th Avenue and Hendrik Potgieter, Constantia Office Park, Weltevreden Park, Johannesburg;

1.3. "***Ash Resources***" means Ash Resources (Pty) Limited, a private company registered and incorporated in accordance with the laws of the Republic of South Africa, with its principal place of business at 35 Westfield Road, Longmeadow Business Estate, Extension 11, 1609. *Ash Resources* is involved in the business of collecting, classifying and selling fly ash which can be used as a cement extender. Ash Resources was originally owned in equal shares by *PPC, Lafarge, AfriSam* and Eskom Holdings Limited. *Ash Resources* is currently owned by Lafarge South Africa Holdings (Pty) Limited;

1.4. "***C & CI***" means the Cement and Concrete Institute of South Africa, an industry association established by the *Cement Producers;*

1.5. "***CDSA***" means Cement Distributors (South Africa) (Pty) Ltd, a company which was responsible for all sales and distribution of cement during the period when *Cement Producers* in South Africa were granted an exemption to form a lawful cartel;

1.6. "***Cement Producers***" refers collectively to *PPC, AfriSam, Lafarge* and *NPC;*

1.7. "***Cape Sales***" means Cape Sales (Pty) Ltd, the company which was responsible for the sales and distribution of cement in the Southern Region during the period when *Cement Producers* in South Africa were granted an exemption to form a lawful cartel;

1.8. "***CMA***" means the Concrete Manufacturers Association;

1.9. "***Competition Board***" means the regulatory authority established in terms of the repealed Maintenance and Promotion of Competition Act No. 96 of 1979;

1.10. "***CLP***" means the Corporate Leniency Policy issued by the Commission in terms of the Act to clarify the Commission's policy approach on matters falling within its jurisdiction in terms of the Act and gazetted in Government Gazette number 31064 of 23 May 2008;

1.11. "***Commission***" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act with its principal place of business at Building C, Mulayo Building, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, South Africa;

1.12. "***Commissioner***" means the Commissioner of the Competition Commission appointed in terms of section 22 of the Act;

1.13. "***Complaint***" means the complaint initiated by the *Commissioner* in terms of section 49B(1) of the Act on 02 June 2008 under case number 2008Jun3769 against *PPC, Lafarge, AfriSam, NPC* and *Slagment* for alleged contravention of section 4(1)(b)(i) and (ii), 5(1) and 8(c)[1] of the Act. On 20 November 2010, the *Commissioner* amended the *Complaint* to include an alleged contravention of section 4(1)(a) of the Act by the *Cement Producers*;

1.14. "***Consent Agreement***" means this consent agreement duly signed and concluded between the *Commission* and *Lafarge*;

1.15. "***Lafarge***" means Lafarge Industries South Africa (Proprietary) Limited, a private company duly registered and incorporated in accordance with the laws of the Republic of South Africa, with its principal place of business at 35 Westfield Road, Longmeadow Business Estate, Extension 11, Edenvale. *Lafarge* was previously known as Blue Circle;

1.16. "***NPC***" means Natal Portland Cement Cimpor (Pty) Ltd, a private company duly registered and incorporated in accordance with the laws of the Republic of South Africa, with its principal place of business at 199 Coedmore Road, Bellair, Durban. Until 2002, *NPC* was owned by *PPC, AfriSam* and *Lafarge* in equal shares;

[1] The complaint under section 8(c) of the Act only relates to PPC.

1.17. "***PPC***" means Pretoria Portland Cement Company Limited, a public company registered and incorporated in accordance with the laws of the Republic of South Africa, with its principal place of business at 180 Katherine Street, Sandton, Johannesburg;

1.18. "***SACPA***" means the South African Cement Producers Association, an industry association established by the *Cement Producers*;

1.19. "***SACU market or region***" refers to South Africa, Botswana, Lesotho, Swaziland and Namibia;

1.20. "***Slagment***" means Slagment (Pty) Ltd, a private company duly registered and incorporated in accordance with the laws of the Republic of South Africa, with its registered offices at Corner 14th Avenue and Hendrik Potgieter, Constantia Office Park, Weltevreden Park, Johannesburg. *Slagment* was a joint venture among the *Cement Producers* and was acquired by *AfriSam* in 2002. *Slagment* is involved in the business of purchasing and processing raw slag which is used as a cement extender;

1.21. "***the Act***" means the Competition Act No. 89 of 1998, as amended;

1.22. "***Tribunal***" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act as a Tribunal of record, with its principal place of business at Building C, Mulayo Building, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria.

2. Background to the complaint investigation

2.1. For many years in South Africa dating back to the 1940s, *Cement Producers* were granted exemptions in terms of legislation then in force to conduct the manufacture and distribution of cement under the aegis of a lawful cartel. A set of institutional arrangements was put in place to manage the activities of the lawful cartel. These institutional arrangements included the *CDSA* and *SACPA*. *NPC, Slagment* and *Ash Resources* were jointly owned by *PPC, AfriSam* and *Lafarge*.

2.2. The most salient features of the lawful cartel were:

2.2.1 Agreed market shares largely based on each *Cement Producer's* original production capacity;

2.2.2 The division of South Africa into two main regions – the Northern Region and the Southern Region;

2.2.3 A centralised sales and distribution system. *Cement Producers* sold and distributed cement through the *CDSA* in the Northern Region and *Cape Sales* in the Southern Region. At the end of each accounting period there was a system of quota balancing to distribute proceeds of cement sales;

2.2.3 A unitary pricing model known as the Twycross pricing model. In terms of this pricing model the *Lafarge* factory in Lichtenburg was used to determine a base price and actual prices to

customers were derived from the base price plus the cost of rail to the customer.

2.3. The *Competition Board* withdrew the exemption in 1995. In view of the logistical difficulties associated with establishing their own sales, marketing and transport functions, the *Cement Producers* were afforded until the end of September 1996 to terminate the lawful cartel.

3. Complaint investigation and findings

3.1. On 02 June 2008, the *Commissioner*, acting in terms of section 49B(1) of *the Act*, initiated the *Complaint* against *PPC, Lafarge, AfriSam, NPC* and *Slagment* for alleged contravention of sections 4(1)(b)(i) and (ii), 5(1) and 8(c) of the Act. The allegations relating to section 8(c) of the Act relate to *PPC* only. The initiation of the *Complaint* was predicated on, *inter alia*, information gleaned from the *Commission's* economic research into the market structure, firm behaviour, and outcomes, including pricing, of various construction-related products, one of which was cement.

3.2. On 24 June 2009, after duly making applications to the High Court, the *Commission* executed warrants of search and seizure at the respective premises of the *Cement Producers*. Subsequent to the execution of the warrants, on 07 August 2009 *PPC* applied for and was granted conditional immunity by the *Commission* in terms of the *CLP*.

3.3. The *Commission's* investigation indicates that:

3.3.1. Following the demise of the lawful cartel, in 1995 the *Cement Producers* reached an understanding to continue to target market shares each producer had enjoyed under the lawful cartel based on the *SACU region*. Notwithstanding the 1995 understanding, in 1996 *PPC* gained market share in excess of its agreed market share resulting in retaliation by the other *Cement Producers* which precipitated a price war among *Cement Producers* in the period between 1996 and 1998.

3.3.2. In or between 1997 and 1998 the *Cement Producers* held a series of meetings with a view to ending the price war and stabilising the market. These meetings culminated in the *Cement Producers* reaching an agreement on market shares, pricing parameters for different types of cement, scaling back on marketing and distribution activities including the closure of certain offices and depots in some regions, and not to offer special discounts on higher quality cement.

3.3.3. Representatives of *AfriSam, PPC* and *Lafarge* met regularly in the period between 1999 to 2002 to discuss the implementation of the agreement.

3.3.4. As part of maintaining and monitoring the targeted market shares, and thereby restraining price competition, the *Cement Producers* agreed to submit detailed cement sales data to an audit firm appointed by the *C & CI*. On a monthly basis, the

audit firm then aggregated the sales data across the firms and disseminated the aggregated data to the *Cement Producers*. On this basis, the *Cement Producers* could measure their own market shares for the *SACU market* as a whole, as well as for defined sub-regions, product categories and customer categories, and monitor if their rivals were abiding by the arrangements.

3.3.5. The *C & CI* was an important mechanism in enabling *Cement Producers* to target market shares. *Cement Producers* agreed on the format of templates used for submitting monthly sales data to the *C & CI*. The templates are known as Schedules A – J. The *Cement Producers* initially agreed on and introduced schedules A to E. In 2002, schedules F to H were introduced and in 2006 schedule J, on sales data relating to imports of cement. In 2007 the *Cement Producers* also agreed to submit to the C&CI total regional sales data on a weekly basis.

3.3.6. This information exchange through the C&CI ended in 2009.

3.3.7. The *Cement Producers* used sales data disseminated by the *C & CI* to monitor their own market shares by region, end-user and imports.

3.3.8. The *Cement Producers* also had an opportunity to meet regularly in, *inter alia*, meetings of the *C & C I*, *CMA*, and *ACMP*.

3.3.9. While *NPC* was until the early 2000s jointly owned by *Lafarge*, *PPC* and *AfriSam*, representatives of *NPC* attended the meetings referred to in 3.3.2 above, in and about 1998, and submitted data separately to the *C & CI* in accordance with the agreement to target market shares. *NPC* was, therefore, party to the anti-competitive arrangements.

4. Settlement discussions

4.1. *Lafarge* contacted the Commission soon after it became aware that the *Commission* had initiated an investigation against *Lafarge*, to understand the allegations.

4.2 At the same time, *Lafarge* conducted a thorough internal investigation into the allegations. On 19 July 2010 *Lafarge* informed the *Commission* of the outcome of its investigation. Lafarge's investigation indicated that its new management discontinued the contraventions. However, the Commission suggested that Lafarge should carry out further investigation which was done by Lafarge.

4.3. *Lafarge* cooperated in the *Commission's* investigation and facilitated the *Commission's* interviews of current and former employees, conducted in terms of section 49A of *the Act*.

4.4. Soon after the confirmation of the consent agreement concluded by the *Commission* and *AfriSam*, *Lafarge* subsequently approached the *Commission* with a view of holding exploratory discussions on

settlement. On 26 January 2012, the *Commission* and *Lafarge* held a meeting at which *Lafarge* made a settlement proposal.

4.5. After engaging in discussions on the appropriate terms of the settlement, on 05 March 2012 the parties eventually reached consensus which is reflected in this *Consent Agreement*.

5. Admissions

5.1. *Lafarge* admits the following:

5.1.1. *Lafarge* admits that it entered into agreements and arrangements with *PPC and AfriSam*, that extended to *NPC* by virtue of the control exercised by the three firms over *NPC*, as well as subsequent understandings with *PPC, AfriSam* and *NPC* all of which had the effect of indirectly fixing cement prices in contravention of section 4(1)(b)(i) of *the Act*; and

5.1.2. *Lafarge* admits that it entered into agreements and arrangements with *PPC and AfriSam* that extended to *NPC* by virtue of the control exercised by the three firms over *NPC*, as well as subsequent understandings with *PPC, AfriSam* and *NPC* all of which had the effect of dividing the cement market through the allocation of market shares in contravention of section 4(1)(b)(ii) of *the Act*.

6. Agreement concerning future conduct

Lafarge agrees and undertakes to:

6.1. prepare and circulate a statement summarising the content of this *Consent Agreement* to its employees who are managers and directors within thirty (30) days of the date of confirmation of this *Consent Agreement* as an order of the *Tribunal*;

6.2. refrain from engaging in price fixing and market division in contravention of sections 4(1)(b)(i) and (ii) of *the Act*; and

6.3. continue to implement its current compliance programme in order to ensure that its employees, management and directors do not engage in any conduct which constitutes a prohibited practice in terms of *the Act*. A copy of the current programme shall be submitted to the *Commission* within thirty (30) days of the date of confirmation of this *Consent Agreement* as an order of the *Tribunal*.

7. Co-operation

7.1. *Lafarge* undertakes to co-operate fully with the Commission in its investigation and prosecution of the remaining respondent(s).

7.2. This co-operation includes, but is not limited to:

7.2.1. providing the *Commission* with all relevant evidence reasonably available to it that might assist the *Commission* in its investigation and prosecution of the remaining respondent(s);

7.2.2. ensuring that all current *Lafarge*'s employees, and to the extent possible, former employees, who have knowledge of the relevant meetings and discussions among the *Cement Producers,* are available to, and co-operate with, the *Commission*, both for purposes of consultation and to give evidence in proceedings before the *Tribunal.*

8. Administrative penalty

8.1. *Lafarge* accepts that it is liable to pay an administrative penalty in terms of sections 58(1)(a)(iii) and 59 of the Act in the amount of **R 148, 724, 400.00.** The administrative penalty represents 6% of *Lafarge's* annual turnover for cement in the *SACU region* (inclusive of internal sales to *Lafarge's* readymix division) for the financial year ended 31 December 2010.

8.2. *Lafarge's* shall pay the administrative penalty to the *Commission* within six (6) months of the date of confirmation of this *Consent Agreement* as an order of the *Tribunal*;

8.3. *Lafarge* shall remit payment of the administrative penalty into the following bank account:

Name of account holder: **COMPETITION COMMISSION**

Bank name: **ABSA BANK PRETORIA**

Account number:	**4050778576**
Branch code:	**323345**

8.4. The penalty will be paid over by the *Commission* to the National Revenue Fund in accordance with the provisions of section 59(4) of *the Act*.

9. Full and final settlement

This *Consent Agreement*, upon confirmation as an order of the *Tribunal*, concludes all proceedings between the *Commission* and *Lafarge* in relation to the Commission's investigation under case number: 2008Jun3769.

SIGNED at Longmeadow on this the 8th day of March 2012.

Duly authorised signatory

of Lafarge Industries South Africa (Proprietary) Limited

SIGNED at Pretoria on this the 6 day of March 2012.

Shan Ramburuth
Commissioner, Competition Commission