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## Decision of the Competition Commission

**CC/DS/0045**

NON- CONFIDENTIAL

**Exclusive sales and purchase agreement between Thermal Valorisation Company  
Limited and Lafarge (Mauritius) Cement Ltd for treated fly ash.**

**21 October 2020**

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**Decision of the Commissioners of the Competition Commission of 21 October 2020**

**Relating to a proceeding under section 63 of the Competition Act 2007 further to an investigation opened by the Executive Director referred to as 'INV 043 -Fly ash: Report of Undertaking**

**(CC/DS/0045- Exclusive sales and purchase agreement between Thermal Valorisation Company Limited and Lafarge (Mauritius) Cement Ltd for treated fly ash)**

**THE COMMISSION**

Mr. M. A. Bocus	-	Chairperson
Mr. A. Mariette	-	Vice-Chairperson
Mr. C. Seebaluck	-	Commissioner
Mrs. M. B. Rajabally	-	Commissioner
Mrs. V. Bikhoo	-	Commissioner

Having regard to the Competition Act 2007,

Having regard to the Competition Commission Rules of Procedure 2009,

Having regard to the Guidelines published under section 38 of the Competition Act 2007,

Having regard to the report of undertakings of the Executive Director dated 25<sup>th</sup> June 2020,

Having regard to undertakings offered by Thermal Valorisation Company Limited as annexed,

**WHEREAS:**

**I. Introduction**

- 1.1 This decision relates to undertakings that have been offered to the Commission by Thermal Valorisation Company Limited ("TVCL"), to address a potential competition concern of the Executive Director in his report of undertakings of the investigation referenced INV 043- Fly ash ( the "Report").
- 1.2 The concern of the Executive Director was in respect to the existence of an exclusive sales and purchase agreement between TVCL and Lafarge (Mauritius) Cement Ltd for treated fly ash (the "Agreement") that could give rise to potential foreclosure effects as highlighted in the Report.
- 1.3 Having taken cognizance of the undertakings offered by TVCL to address the potential competition concern, the Commission made a determination pursuant to section 63 (3) of the Competition Act 2007 (the "Act").

## II. Background

### i. The Parties

- 1.4 TVCL was incorporated in 2014 and is the result of a joint venture between Omnicane Limited ("Omnicane") and Terragen Ltd. TVCL is engaged in the valorisation of coal and bagasse fly ash resulting from Spread Stoker thermal power plants through a process referred to as Carbon Burn-Out ("CBO"). The process involves the combustion of residual carbon in fly ash to produce consistent low-carbon, low loss-on-ignition fly ash.
- 1.5 Lafarge (Mauritius) Cement Ltd ("Lafarge") which was incorporated in 1959 is a public listed company with its majority shares being held by HolcimLafarge Group. Lafarge imports, packs and distributes cement and has over the last 4-5 years been procuring local cementitious materials, which are blended with cement to produce additional products. The cement terminal of Lafarge proposes both bag and bulk delivery. Lafarge distributes different types of cement under the brand name of Baobab.
- 1.6 TVCL and Lafarge are the main parties in this matter.
- 1.7 Kolos Cement Ltd ("Kolos") is a public listed company incorporated in 1996 and has the Gamma Construction Group as its major shareholder. Kolos supplies different grades of cement in both retail and in bulk. Kolos is the complainant and auxiliary party in this matter.

### ii. The concerned product

- 1.8 The conduct under review concerns the product 'treated fly ash', which is considered as an input to cement.

### iii. The investigation

- 1.9 The Executive Director received a complaint from Kolos alleging that the exclusive sales and purchase agreement for treated fly ash between Lafarge and TVCL could potentially hinder its ability to compete with Lafarge in the cement market.
- 1.10 The Executive Director, after having reasonable grounds to believe that restrictive business practice(s) were occurring or about to occur in the cement and fly ash markets, opened an investigation under section 51 of the Act on 18<sup>th</sup> April 2018.
- 1.11 The investigation was opened pursuant to the functions and powers vested in the office of the Executive Director under s 30(c) of the Act, relating to possible concerns subject to review under sections 44 to 48 of the Act.

- 1.12 In November 2018, the Executive Director issued a Statement of Issues (the "SOI") to Kolos, TVCL and Lafarge, highlighting the scope of the investigation and the competition concerns.
- 1.13 In response to the competition concerns raised by the Executive Director in the SOI, Kolos and Lafarge submitted their views while TVCL proposed undertakings in March 2019 and offered a final version of the undertakings in November 2019.
- 1.14 After considering the proposed undertakings of TVCL, the Executive Director produced a provisional report of undertakings, which was finalised following considerations of the views of parties. The final report of undertakings was accordingly submitted to the Commissioners on 25 June 2020.

### III. Legal framework

- 1.15 Section 45 of the Act provides for the review of a vertical agreement that does not involve resale price maintenance, where the Commission has reasonable grounds to believe that one or more parties to the agreement is or are in a monopoly situation that is subject to review under section 46.
- 1.16 A "Vertical agreement" is defined under section 2 (1) of the Act as "*an agreement between enterprises each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain and relates to the conditions under which the parties may purchase, sell or resell certain goods or services*".
- 1.17 Section 46 of the Act provides for the existence of monopoly situation and reads as below:

#### **46. Existence of monopoly situation**

*(1) A monopoly situation shall exist in relation to the supply of goods or services of any description where –*

- (a) 30 per cent or more of those goods or services are supplied, or acquired on the market, by one enterprise; or*
- (b) 70 per cent or more of those goods or services are supplied, or acquired on the market, by 3 or fewer enterprises.*

*(2) A monopoly situation shall be subject to review by the Commission where the Commission has reasonable grounds to believe that an enterprise in the monopoly situation is engaging in a conduct that –*

- (a) Has the object or effect of preventing, restricting or distorting competition; or*
- (b) In any other way constitutes exploitation of the monopoly situation.*

- 1.18 Section 46 (3) of the Act sets out the conditions which the Commission must consider in reviewing an abuse of monopoly situation, namely:



- (a) *the extent to which an enterprise enjoys or a group of enterprises enjoy, such a position of dominance in the market as to make it possible for that enterprise or those enterprises to operate in that market, and to adjust prices or output, without effective constraint from competitors or potential competitors;*
- (b) *the availability or non-availability of substitutable goods or services to consumers in the short term;*
- (c) *the availability or non-availability of nearby competitors to whom consumers could turn in the short term; and*
- (d) *evidence of actions or behaviour by an enterprise that is, or a group of enterprises that are, a party to the monopoly situation where such actions or behaviour that have or are likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy of Mauritius, or are or are likely to be detrimental to the interests of consumers.*

1.19 The Act provides an enterprise the opportunity to offer a written undertaking to the Commission to address any concern that has arisen, or is likely to arise, during an investigation in respect of, inter alia, an abuse of monopoly situation.

1.20 Section 2 of the Act provides for the definition of undertaking as being “an obligation or commitment as provided under section 63 given in writing by an enterprise to, and accepted by, the Commissioners, to prevent or terminate a restrictive business practice”.

1.21 The provisions of section 63 of the Act are as follows:

**63. Undertakings**

(1) *An enterprise may offer a written undertaking to the Commission to address any concern that has arisen, or is likely to arise, during an investigation in respect of a restrictive agreement subject to investigation, a monopoly situation or a merger situation.*

(2) *The undertaking may be offered before the start of the investigation or at any stage during the investigation.*

(3) *The Commission may, after having taken cognizance of the report of the Executive Director on the matter, determine a case on the basis of an undertaking if it considers that the undertaking satisfactorily addresses all the concerns it has about any prevention, restriction distortion or substantial lessening of competition.*

(4) *An undertaking accepted by the Commission shall be published by the Commission in the form of a decision of the Commission.*

(5) *An undertaking accepted by the Commission shall have effect as if it were a direction under section 60.*

*Exhibit*

*[Signature]*

*[Signature]*  
*mk*

#### IV. The findings of the Executive Director

##### (i) The Competition Concerns

- 1.22 The concern of the Executive Director is whether the exclusive sales and purchase agreement between TVCL and Lafarge in relation to cement-grade fly ash can have anti-competitive foreclosure effects in the downstream markets for the supply of cement in Mauritius.
- 1.23 The Executive Director found that the agreement between TVCL and Lafarge is a vertical agreement as defined under s.2 of the Act that may be reviewable under s. 45 of the Act.
- 1.24 There are three conditions that need to be satisfied under s.46 of the Act in order to review a vertical agreement. The conditions are the existence of a monopoly situation; the position of dominance and the harm to competition.
- 1.25 In order to determine the likely existence of a monopoly situation, the markets concerned should be established.
- 1.26 On account of the undertakings provided by TVCL with a view to allaying the competition concerns as raised at the SOI level, the Executive Director made no conclusive determination on the relevant markets concerned.
- 1.27 As a basis to the assessment of the undertakings, the potential markets are:  
(1) the supply of cement-grade fly ash in Mauritius; and  
(2) the supply of bagged and bulk cement in Mauritius.
- 1.28 The Executive Director opined that:  
(i) the markets being reviewed may fall within the definition of a monopoly situation as per s.46(1) of the Act, given the market structure with only two operators, Kolos and Lafarge, in the market for the supply of cement in Mauritius and with only TVCL in the market for the supply of cement-grade fly ash; and  
(ii) there could potentially be dominant players in the respective markets for the supply of cement-grade fly ash and cement.
- 1.29 The theory of harm used here is input foreclosure, where a dominant upstream supplier may engage in conducts such as refusing to supply or denying access to an input to a downstream customer or rival, the effect of which likely raises the latter's cost of production and consequently leads to a substantial foreclosure in the relevant market.
- 1.30 The analysis on potential foreclosure effect conducted by the Executive Director reveals the following: -  
(i) Cement-grade fly ash is likely to represent a significant share of the costs of production of cement for Kolos and the cost of switching to substitutes would likely be very high for Kolos. The high switching costs



are likely to be passed on to end consumers thus putting Kolos at a disadvantage compared to Lafarge.

- (ii) The Agreement may potentially give the parties to the contract the ability to foreclose Kolos from the downstream markets for cement; the likelihood of TVCL to be a monopoly may give it the incentive to charge monopoly prices<sup>1</sup>; the Agreement may potentially enable TVCL to keep the prices of cement-grade fly ash above the competition level with a possibility of allowing TVCL and Lafarge driving the prices of fly ash and fly ash based composite cement up over time; and the Agreement prevents Kolos from finding a close enough substitute to the downstream cement market.
- (iii) Despite the willingness and ability (in terms of logistics and infrastructure) of Kolos to produce fly ash based composite cement similar to Lafarge, the impugned Agreement and the duration thereof may impede its ability to enter the market of supply of cement-grade fly ash in the foreseeable future.

**(ii) The undertakings and the assessment of undertakings**

**A. The undertaking**

- 1.31 TVCL has, pursuant to s. 63 (1) of the Act offered undertakings to address the anticompetitive foreclosure identified by the Executive Director during the course of his investigation.
- 1.32 TVCL, without admitting any wrongdoing or liability whatsoever under the Act, is proposing to sell [REDACTED] of its cement-grade fly ash production at a price not less favourable than that offered to Lafarge. The proposed undertakings are conditional on the following cumulative conditions:
  - a) the sale of the fly ash being undertaken gradually during a ramping period of [REDACTED];
  - b) the aforementioned condition would apply to [REDACTED] the fly ash produced by TVCL [REDACTED];
  - c) Kolos undertaking to purchase from TVCL [REDACTED] of the bed ash; and
  - d) Kolos agreeing to commit to a term aligned on [REDACTED]

**B. The assessment of undertakings**

- 1.33 The Executive Director assessed the efficacy of the undertakings in addressing the competition concerns raised in terms of effectiveness, timeliness and proportionality<sup>2</sup>.

<sup>1</sup> According to economic doctrine

<sup>2</sup> As per the Competition Commission Guideline 6: Remedies and Penalties

- 1.34 The assessment conducted shows that the undertakings submitted by TVCL effectively address the concerns of the Executive Director; the [REDACTED] ramping period for the sales of processed fly ash is justified for reason of smooth implementation in relation to production and logistics; and the benefits to be derived from the implementation of the undertakings outweigh the cost involved in reviewing the impugned Agreement.

**V. The Recommendation of the Executive Director**

- 1.35 Based on his assessment of the undertakings offered by TVCL, the Executive Director finds that these undertakings satisfactorily address the competition concerns raised.
- 1.36 To monitor the undertakings offered by TVCL, the Executive Director recommends that TVCL be required to submit information to the Commission relative to production and sales of cement-grade fly ash to Lafarge and Kolos on an annual basis for the first 6 years of the undertakings. More specifically: (a) capacity, volume of production of processed fly ash and revenue generated; (b) the detailed information relative to the volume of and price at which the processed fly ash would be sold to Lafarge and Kolos; and (c) any discounts, whether direct or indirect and any other terms of payment which would directly or indirectly affect the price or matter incidental thereto.
- 1.37 The Executive Director finally recommends the Commission to accept the undertakings submitted by TVCL along with a monitoring mechanism.

**VI. Determination**

- 1.38 The Commission takes note of the Report of undertakings of the Executive Director which provided relevant considerations to the provisions of the Act in his investigation, INV 043- Fly ash.
- 1.39 The Commission takes note of the views of the parties made on the provisional report of undertakings.
- 1.40 The Commission is satisfied that the Executive Director has had regard to the submissions of each of the three parties while drafting his Final Report of undertaking.
- 1.41 Having regard to the information presented in the Report, including the views of the parties concerned, the Commission is satisfied that the Agreement is a vertical agreement as defined under section 2 of the Act which involves an upstream supplier and a downstream customer.
- 1.42 The Agreement, in itself, does not constitute a breach of the Act unless it is established that one or more parties to the agreement is or are in a monopoly situation that is subject to review under section 46.



- 1.43 The Commission gives due consideration to the fact that the Executive Director made no conclusive determination on the relevant markets concerned. The Commission is of the considered view that potentially affected markets should be identified to carry out an assessment of whether the undertakings address the potential competition concerns raised.
- 1.44 Note has been taken of the fact that Lafarge has taken the views that, fly ash competes in the same relevant market as the other SCMs such as limestone, basaltic filler and slag.
- 1.45 Given the fact that the undertakings were provided at an initial stage of the investigation, the Commission believes that focus should be on whether the proposed undertakings by TVCL, a main party to the investigation, likely address the probable harm that could likely occur from the existing Agreement. For that matter, the potentially affected markets could be used as a basis rather than having a conclusive determination made at that level.
- 1.46 Therefore, in assessing the probable harm and the undertakings provided by TVCL, the Commission is satisfied that the markets considered are:
- (1) the supply for cement-grade fly-ash in Mauritius; and
  - (2) the supply of bagged and bulk cement in Mauritius.
- 1.47 In consideration to section 46 (1) of the Act, the Commission believes that if the two main parties are found to be dominant in the above-defined respective markets, there could arise matters of competition concerns in the form of input foreclosure, having the object or effect of preventing, restricting or distorting competition.
- 1.48 On this basis, the Commission has reviewed the undertakings provided by TVCL and the assessment made by the Executive Director on account of section 63 of the Act, to make a determination on whether such undertakings would likely address the foreseeable adverse circumstances in the event of a monopoly situation in the markets under review.
- 1.49 The Commission is satisfied that the undertakings given address the potential competition concerns raised. The undertaking of TVCL to sell [REDACTED] of cement grade fly ash to Kolos<sup>3</sup> at a price not less favourable than that offered to Lafarge will allow Kolos to compete in the cement grade market thus counteracting the foreclosure effects in the downstream supply of cement markets.
- 1.50 The Commission is also of the view that opening cement grade fly ash market to Kolos will help keep the price competition and avoid a circumstance whereby TVCL and/or Lafarge become(s) able to charge monopoly prices. This will benefit end consumers.

<sup>3</sup> for the reasons elaborated regarding the effectiveness of the undertakings at paragraphs 6.9 to 6.11 of the Report of Undertakings of the Executive Director.

*BBB*

*[Signature]*

*MR*

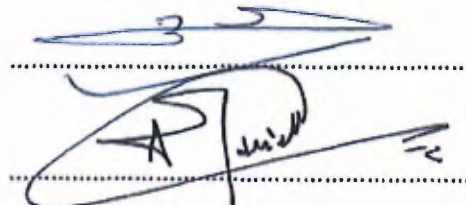
*[Signature]*

- 1.51 The Commission also finds the ramping period of [REDACTED] to be fair and reasonable in view of the logistics and implementation that need to be put in place by Kolos and TVCL.

## VII. Decision

- 1.52 In light of the above, the Commission decides as follows: -
- a. We accept the undertakings offered by TVCL which are being published as per section 63 (4) of the Act (see Annex);
  - b. We order TVCL to submit information to the Commission relative to production and sales of cement-grade fly ash to Lafarge and Kolos on annual basis for the first 6 years of the undertakings. More specifically: (a) capacity, volume of production of processed fly ash and revenue generated; (b) the detailed information relative to the volume of and price at which the processed fly ash would be sold to Lafarge and Kolos; and (c) any discounts, whether direct or indirect and any other terms of payment which would directly or indirectly affect the price or matter incidental thereto;
  - c. We order TVCL to submit written evidence, in the form of a report, of the implementation of the undertakings within one (1) month after the ramping-up period of [REDACTED] has elapsed;
  - d. The undertakings shall be effective as from the date of this decision.

Mr. M. A. Bocus (Chairperson)



Mr. A. Mariette (Vice-Chairperson)



Mr. C. Seebaluck (Commissioner)



Mrs. M. B. Rajabally (Commissioner)



Mrs. V. Bikhoo (Commissioner)

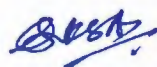


21 October 2020



## ANNEX

### Undertakings of Thermal Valorisation Company Limited offered on 08 November 2019 (The “Undertakings”)





## Annex I: Undertakings of Thermal Valorisation Company Limited

### THERMAL VALORISATION CO LTD

Omnican House  
Mon Trésor Business Gateway  
New Airport Access Road  
Plaine Magnien, 51521  
Mauritius  
☎ 230 660 0600 ☎ 230 211 7093 BRN C14125897

8 November 2019

The Executive Director  
Competition Commission of Mauritius  
10<sup>th</sup> Floor, Hennessy Court  
Cnr Suffren & Pope Hennessy Streets  
Port-Louis

Dear Sir,

**Re: final and recapitulating undertakings of Thermal Valorisation Co Ltd ('TVCL')**

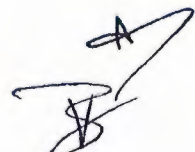
We refer to our meetings and various exchanges in connection with investigation "INV043 – Fly ash".

#### Background

1. On 17 July 2017, the Competition Commission of Mauritius ('CCM') initiated an enquiry based on information submitted to the CCM by Kolos Cement Ltd ('Kolos'), namely that Lafarge (Mauritius) Cement Ltd ('Lafarge') and Omnicane had entered into an exclusivity agreement for the supply and purchase of processed fly ash in Mauritius.
2. On 18 April 2018, the CCM opened an investigation having found reasonable grounds to believe that the alleged exclusivity agreement constituted restrictive business practices in the cement and fly ash markets.
3. On 23 November 2018, the CCM set out the anticipated scope of its investigation as well as its preliminary concerns in its Statement of Issues (the 'SoI').
4. On 09 January 2019, representatives of TVCL met with officers of the CCM to discuss the SoI. This was followed by a letter dated 15 January 2019 setting out our written responses to the SoI.
5. Undertakings were subsequently offered by TVCL for the CCM's consideration, pursuant to section 63 of the Competition Act 2007 (the 'Act'), by way of a letter dated 28 March 2019.
6. On 21 May 2019, representatives of TVCL met with officers of the CCM to discuss the undertakings previously made by the former.
7. On 25 June 2019, a complementary undertaking was submitted by TVCL to the CCM.
8. Pursuant to this, emails have been exchanged and now the CCM has requested from TVCL the present final undertakings. These final undertakings aim at summarising the terms that would be agreeable to the parties in respect of the said investigation and, as such, supersede all the previous undertakings and exchanges in this respect.

[Confidential]– COMPETITION COMMISSION







NOW:


Without any admission of wrongdoing or liability whatsoever under the Competition Act 2007 (the 'Act') and with the view of allaying the CCM's competition concerns as raised in the SoI, TVCL offers the following undertakings for the CCM's consideration pursuant to section 63 of the Act:

1. Subject to point 2 below, TVCL agrees to sell to Kolos [REDACTED] of the production of fly ash of its plant at a price not less favorable than the one offered to Lafarge, on the following cumulative conditions:
  - a. That this would be made gradually during a ramping-up period of [REDACTED]
  - b. That this would apply to [REDACTED] the fly ash produced by TVCL [REDACTED];
  - c. Kolos undertaking to purchase from TVCL [REDACTED] of the bed ash; and
  - d. Kolos agreeing to commit on a term aligned on [REDACTED]
2. Although the above-mentioned undertaking has been discussed and agreed in-principle with Lafarge, it remains subject to Lafarge formally agreeing to release TVCL from its obligation under the sale and purchase agreement dated [REDACTED] signed between Lafarge and TVCL (the "SPA") to sell all its quantities of fly-ash and bed ash to Lafarge and to Lafarge continuing to purchase its quantities at the purchase price agreed in the SPA.

We look forward to a favourable reply from the CCM in view of finalising the agreements with Lafarge and Kolos, and remain at your disposal for any additional information that you may require.

Yours faithfully

  
.....  
Jacques M d'Unienville, GOSK  
Director

  
.....  
Jerome Jaen  
Director

[Confidential]– COMPETITION COMMISSION

