COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 109/LM/Oct08

In the matter between:

Lafarge South Africa (Pty) Ltd Acquiring Firm

And

Ash Resources (Pty) Ltd Target Firm

Panel	:	D Lewis (Presiding Member) N Manoim, (Tribunal Member), and U Bhoola (Tribunal Member)
Heard on	:	25 March 2009
Order Issued	:	25 March 2009
Reasons Issued:		17 July 2009

Reasons for Decision

Approval

[1] On 25 March 2009, the Tribunal unconditionally approved the merger between Lafarge South Africa (Pty) Ltd and Ash Resources (Pty) Ltd. The reasons for approving the transaction with conditions follow.

The parties

[2] The primary acquiring firm is Lafarge South Africa Holdings (Pty) Ltd ("Lafarge"), a company incorporated in terms of the company laws of the Republic of South Africa. Lafarge is controlled by Financiere Lafarge and has in excess of 50 subsidiaries.[1]

[3] The primary target firm is Ash Resources (Pty) Ltd, a company incorporated in terms of the laws of South Africa. Ash Resources is jointly controlled by Lafarge with 75% interest and by Roshcon (Pty) Ltd ("Roshcon") with 25% interest, the

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[1] See Appendix 1 to the Commission's recommendations, being an Organogram of Lafarge

latter enjoys certain minority protections which confer control.[2] Roshcon is a subsidiary of Eskom Enterprises.

Description of the transaction

[4] In terms of the proposed transaction, Lafarge intends to acquire the remaining 25% shareholding held by Roshcon in Ash Resources. On completion of the transaction, Ash Resources will be 100% owned by Lafarge.

THE PARTIES' ACTIVITIES

Primary acquiring firm

[5] Lafarge is active in South Africa through the following:

Lafarge Mining South Africa

[6] Lafarge Mining South Africa does quarrying/crushing of lime stone; building aggregates (hard rock, stone and sand) and natural gypsum.

Lafarge Industries South Africa (Pty) Ltd ("Lafarge Industries")

[7] Lafarge Industries produces cement and cementious products; blending of cement; ready mix concrete manufacturing, manufacture of gypsum ceiling and wallboards and partitioning systems. In addition, Lafarge Industries South Africa sells and distributes these products.

Primary target firm

[8] Ash Resources is the procurer, manufacturer and distributor of pulverized fly ash. Fly ash is a by-product of coal combustion in the power generation industry. It is produced from combustion of powdered coal during the process of raising steam for the generation of electricity. Ash Resources sells the following products in South Africa:

[2] Lafarge argued that the transaction did not constitute a notifiable transaction as Lafarge had sole control of Ash Resources by virtue of its 75% shareholding and day to day "sole control of Ash Resources." Lafarge averred that it filed the merger under protest as the Commission's advisory opinion had highlighted that the transaction is notifiable. The Commission argued that Roshcon had joint control with Lafarge because of minority protections and afforded to it by the Shareholders' agreement. The Tribunal refrained from hearing argument on that score and stated that Lafarge had an option of either filing or not filing.

[8.1] Dura-Pozz (the trade name given by Ash Resources for classified fly ash) is used as a cement extender in line with SABS 1491 Part 2, and is the only fly ash which is specified for its high grade cement. It is also used and marketed under SABS EN 197 for use in other concretes.

[8.2] The classified fly ash may be refined further to produce even finer particles for use in the highest specification of cement, which may be used in pillars for high rise buildings. This product is sold under the name Super Pozz.

[8.3] Pozz-Fill (the trade name given by Ash Resources for unclassified fly ash) is used by blenders as an extender for cement in certain applications – including compliance with SABS EN 197, and in production of concrete and in the mining industry for backfilling.

[8.4] Pozz sand (used as a reactive sand for brick and block making)

[8.5] Fillers (used in a variety of applications in the polymer industry).

Overlapping activities

[9] Although there is no overlap in the activities of the merging parties, the transaction gives rise to vertical integration. On the one hand, the primary target firm is involved in the upstream production and supply of classified and unclassified fly ash for use as a cement extender and in the production of concrete while on the other hand, the primary acquiring firm is involved in the downstream production of cement and concrete.

Rationale for the transaction

[10] Under the pre-emptive provisions of a shareholder's agreement between Lafarge and Roshcon, Lafarge has the first right to acquire Roshcon's shares in the event that Roshcon wishes to sell its share. The opportunity has now arisen from the desire of Roshcon to dispose of its interests in Ash Resources and for Lafarge to purchase the Roshcon Shareholding. Lafarge still wishes to pursue a BEE strategy in relation to Ash Resources. The parties submitted that

Lafarge is currently in discussions with an identified BEE partner with a view to on-sell the shares in Ash Resources which it will acquire from Roshcon.

[11] With regards to Roshcon, which is controlled by Eskom Enterprises, part of Eskom Holdings, Eskom has decided to realise non-core assets and investment holdings in order to raise funds for further necessary infrastructure development. The shareholding in Ash Resources is non-core to Eskom and accordingly offered to Lafarge under the pre-emptive provisions of a shareholders' agreement between Lafarge and Roshcon.

The relevant market

[12] The Commission has defined the upstream market as the market for the production and supply of fly ash. The fly ash is a by-product of powdered coal combustion in the power generation industry and is used as a cement extender. The parties and the Commission submitted that fly ash can be classified or unclassified. Unclassified fly ash is derived directly from the combustion process and can have bigger granules. Classified fly ash is termed "classified" because of the different sizes of the particles and their chemical strength.

[13] The difference between the Commission's approach to that of the merging parties is that the merging parties, while not making a definitive finding on the product market, argued for a broader market which include cement extenders because, as they averred, fly ash (whether classified or unclassified) is substitutable with many cement extenders. The Commission, on the other hand, argued that there is no credible substitute for fly ash because of various reasons like cost and differing chemical properties, among others.

[14] The Commission further defined two downstream markets namely, the downstream market for the production and supply of blended cement, and the downstream market for the production and supply of ready-mix concrete. The merging parties did not define the market in this way. For the purposes of these reasons, we will consider the markets defined by the Commission.

Competition analysis

[15] The Commission submitted that if the substitutes for classified ash are not taken into account, Ash Resources has 100% of the classified fly ash market. The Commission further stated that if the market shares of the suppliers of the substitutes to classified fly ash were considered, then Ash Resources' market share would go down as the suppliers of the substitutes accounted for 45%. These are Slament (29%), PPC (13%) and Bernoberg (3%). Ash Resources faces competition from Ulula, a new entrant into the market, which stated that it can account for 20% while Ash Resources can account for 80% of the classified fly ash market.

[16] With regards to unclassified fly ash, the Commission submitted that Ash Resources has a market share of 67%, which diminishes to 10% when it is considered within the broader cement extender market, including classified fly ash and other cement extenders. While Ash Resources remains the major supplier of unclassified fly ash, it faces competition from other market players like Starline Distributors (29%). Natal Portland (9%) utilises fly ash from Majuba Power Station for its own internal purposes.

Downstream production and supply of blended cement

[17] Cement extenders predominantly utilise unclassified fly ash. Lafarge purchases its entire unclassified fly ash requirements from Ash Resources and as a result, there is no question of customer foreclosure. The Commission found it not necessary to consider the sizes of the cement blenders *vis a vis* that of Lafarge as the main concern with this transaction is input foreclosure.

Downstream production and supply of ready-mix concrete

[18] The Commission submitted that for completeness sake, the major suppliers of ready mix are Lafarge (25%), Holcim (28%), Pronto (13%), and Wearne (6%), among others. Lafarge purchases its entire classified fly ash requirement from Ash Resources. Customer foreclosure is unlikely as there are other credible substitutes to Lafarge.

Foreclosure concerns

[19] If one considers the capacity of the new entrant, Ulula, then Ash Resources has 80% of the market for classified fly ash and Ulula has 20%. With regards to unclassified fly ash the parties have a market share of 27% which diminishes to 10% when one includes the other cement extenders.

[20] It seems that although Lafarge has the ability to foreclose its competitors in the ready mix market, there is no incentive to do so post merger as currently Lafarge only utilizes 34% of total classified capacity and 8% unclassified fly ash from Ash Resources' production. There is no change to the pre-merger situation once the merger has been approved and implemented. In addition, as the Commission has identified, there are two new entrants namely Ulula and Sephaku Cement. Ulula is still increasing its production capacity and currently has capacity to supply 20% of the classified fly ash requirements. Sephaku has not yet begun production of fly ash but has the potential and will start producing for the cement market by mid-2010

Public Interest

[21] There are no public interest issues.

Conclusion

[22] The merger is approved unconditionally.

_________________ **<u>17 July 2009</u>**

D Lewis **DATE**

Tribunal Member

N Manoim and U Bhoola concurring.

Tribunal Researcher : R Kariga

For the merging parties: J Wilson instructed by Bell Dewar & Hall

For the Commission : M Ngobese and B Majenge (Mergers and Acquisitions)