IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA, and STATE OF CONNECTICUT, ex rel. RICHARD BLUMENTHAL, ATTORNEY GENERAL, Plaintiffs, v. OLDCASTLE NORTHEAST, INC.; CRH plc; TILCON, INC.; and BTR plc, Defendants.	Civil Action No.: 396CV01749 AWT Filed: September 5, 1996

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On September 3, 1996, the United States filed a civil antitrust Complaint, which alleges that the proposed acquisition by CRH plc ("CRH") through Oldcastle Northeast, Inc. ("Oldcastle"), of Tilcon, Inc. from BTR plc would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that the combination of the two most significant competitors in the asphalt concrete market in the greater Hartford, Connecticut area

would lessen competition substantially in the production and sale of asphalt concrete in the greater Hartford area. As defined in the Complaint, the greater Hartford area includes the following cities and towns in Connecticut: Hartford, New Britain, Newington, Wethersfield, Farmington, West Hartford, Bloomfield, Windsor, South Windsor, East Hartford, Manchester, Glastonbury, Windsor Locks, East Granby, Plainville, Rocky Hill, Enfield, Avon, Elligton, and East Windsor. The prayer for relief in the Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; and (2) a permanent injunction preventing CRH from acquiring control of Tilcon's asphalt concrete business, or otherwise combining such business with Oldcastle's own business in the United States.

When the Complaint was filed, the United States also filed a proposed settlement that would permit CRH to complete its acquisition of Tilcon's asphalt concrete business, but require certain divestitures that will preserve competition in the greater Hartford area. This settlement consists of a Stipulation and Order and a proposed Final Judgment.

The proposed Final Judgment orders CRH to divest Tilcon's East Granby, Connecticut quarry and two of the three, hot-mix asphalt plants located at the East Granby quarry and certain related tangible and intangible assets. CRH must complete the

divestiture of these plants and related assets within one hundred and eighty (180) calendar days after the date on which the proposed Final Judgment was filed (i.e., September 3, 1996), in accordance with the procedures specified therein.

The Stipulation and Order and proposed Final Judgment require CRH to ensure that, until the divestitures mandated by the proposed Final Judgment have been accomplished, the East Granby quarry and the two hot-mix asphalt plants and related assets to be divested will be maintained and operated as an independent, ongoing, economically viable and active competitor. CRH must preserve and maintain the quarry and the two hot-mix asphalt concrete plants to be divested as saleable and economically viable, ongoing concerns, with competitively sensitive business information and decision-making divorced from that of Oldcastle's asphalt concrete business. CRH will appoint a person or persons to monitor and ensure its compliance with these requirements of the proposed Final Judgment.

The United States and defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II.

DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Oldcastle, Tilcon and the Proposed Transaction

Through its wholly owned subsidiary, Oldcastle, CRH is engaged in the business of manufacturing and selling asphalt concrete and extracting and processing aggregate in the state of Connecticut. In the greater Hartford area, Oldcastle operates three hot-mix plants that produce asphalt concrete and a quarry that produces aggregate which is used for, among other things, manufacturing asphalt concrete at the three hot-mix plants. In 1995, Oldcastle had sales of $314 million.

Through its wholly owned subsidary, Tilcon, BTR is engaged in the business of manufacturing and selling asphalt concrete and extracting and processing aggregate in the state of Connecticut. In the greater Hartford area, Tilcon operates six hot-mix plants that produce asphalt concrete and two quarries that produce aggregate which is used for, among other things, manufacturing asphalt concrete at the six hot-mix plants. In 1995, Tilcon had sales of $349 million.

On June 19, 1996, CRH, through Oldcastle, agreed to acquire all of the outstanding voting securities of Tilcon from BTR for a purchase price of $270 million. This transaction, which would take place in the highly concentrated greater Hartford area asphalt concrete manufacturing industry, precipitated the government's suit.

B. The Transaction's Effects in the greater Hartford area

The Complaint alleges that the manufacture and sale of asphalt concrete constitutes a line of commerce, or relevant product market, for antitrust purposes, and that the greater Hartford area constitutes a section of the country, or relevant geographic market. The Complaint alleges the effect of Oldcastle's acquisition may be to lessen competition substantially in the manufacture and sale of asphalt concrete in the greater Hartford area.

Asphalt concrete is material that is used principally for paving and is produced by combining and heating asphalt cement (also referred to in the industry as "liquid asphalt" or "asphalt oil") with aggregate. A plant that produces asphalt concrete is commonly referred to as a "hot-mix plant." No good economic functional substitutes exist for asphalt concrete. Manufacturers and buyers of asphalt concrete and other paving materials recognize asphalt as a distinct product.

Manufacturers of asphalt located in the greater Hartford area sell and compete with each other for sales of asphalt concrete within the greater Hartford area. Due to high transportation costs and long delivery time, manufacturers of asphalt concrete located outside the greater Hartford area do not sell a significant amount of asphalt concrete for use within the greater Hartford area.

The Complaint alleges that Oldcastle's acquisition of Tilcon would substantially lessen competition for the manufacture and sale of asphalt concrete in the greater Hartford area. Actual and

potential competition between Oldcastle and Tilcon for the manufacture and sale of asphalt concrete in the greater Hartford area will be eliminated.

Oldcastle and Tilcon are the largest producers of asphalt concrete in the greater Hartford area and are the only producers of asphalt concrete in the greater Hartford area that own their own sources of aggregate for manufacturing asphalt concrete for highway projects. They are also the only manufacturers of asphalt concrete located in the greater Hartford area that supply asphalt concrete for highway construction projects built by the Connecticut Department of Transportation in the greater Hartford area. The Connecticut Department of Transportation is the largest purchaser of asphalt concrete in the greater Hartford area.

The acquisition would create a dominant asphalt concrete company in the greater Hartford area. It would reduce the number of competitors operating hot-mix plants in the greater Hartford area from three to two and reduce the number of competitors located in the greater Hartford area supplying asphalt concrete construction projects built by the Connecticut Department of Transportation in the greater Hartford area from two to one.

As a result of the acquisition, prices for asphalt concrete in the greater Hartford area are likely to increase. Oldcastle would control the asphalt concrete market in the greater Hartford area, and it would have market power to increase the price of asphalt concrete in the greater Hartford area. In response to an increase,

purchasers could not switch to another producer of asphalt concrete. The only alternative manufacturer of asphalt concrete in the greater Hartford area (Sales Construction) would have its only source of aggregate in the greater Hartford area controlled by Oldcastle.

New entry in the greater Hartford area is unlikely to restore the competition lost through Oldcastle's removal of Tilcon from the marketplace. De novo entry into the manufacture and sale of asphalt concrete requires a significant capital investment and likely would take over two years before any new hot-mix asphalt plant could begin production. Connecticut zoning provisions make it very difficult to open a quarry in the greater Hartford area, and none have been opened in fifty years.

C. Harm to Competition as a Consequence of the Acquisition

The Complaint alleges that the transaction would have the following effects, among others: competition for the manufacture and sale of asphalt concrete in the greater Hartford area will be substantially lessened; actual and potential competition between Oldcastle and Tilcon in the manufacture and sale of asphalt concrete in the greater Hartford area will be eliminated; and prices for asphalt concrete in the greater Hartford area are likely to increase above competitive levels.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition in the production and sale of asphalt concrete in the greater Hartford area

by placing in independent hands the East Granby quarry and two of the three hot-mix asphalt plants used by Tilcon to serve the greater Hartford area, thus maintaining the existing level of suppliers in the market place. The two asphalt plants required to be divested by CRH have a combined capacity of six tons and account for half of the asphalt capacity at East Granby. Oldcastle would be permitted to retain a separate six ton asphalt plant at the East Granby location. In response to a price increase from Oldcastle, purchasers would be able to turn to one or more producers with (1) significant capacity to produce asphalt concrete in the greater Hartford area and (2) an independent source for aggregate in the greater Hartford area for use in manufacturing asphalt concrete in the greater Hartford area.

Within one hundred and eighty (180) calendar days after filing the proposed Final Judgment, CRH must divest its East Granby quarry and the two hot-mix asphalt plants, all located in East Granby, Connecticut, and related assets. CRH, at its option, may negotiate a supply agreement for the purpose of supplying CRH with aggregate and stone products produced at the East Granby quarry, but such a supply agreement cannot be a condition for divestiture. The East Granby quarry and two hot mix asphalt plants and related assets will be sold to one or more purchasers who demonstrate to the sole satisfaction of the United States that they will be an economically viable and effective competitor, capable of competing effectively in the manufacture and sale of asphalt concrete in the greater Hartford area.

Until the ordered divestitures take place, CRH must take all reasonable steps necessary to accomplish the divestitures, and cooperate with any prospective purchaser. If CRH does not accomplish the ordered divestitures within the specified one hundred and eighty (180) calendar days which may be extended by up to sixty (60) calendar days by the United States in its sole discretion, the proposed Final Judgment provides for procedures by which the Court shall appoint a trustee to complete the divestitures. CRH must cooperate fully with the trustee.

If a trustee is appointed, the proposed Final Judgment provides that CRH will pay all costs and expenses of the trustee. The trustee's compensation will be structured so as to provide an incentive for the trustee to obtain the highest price for the assets to be divested, and to accomplish the divestiture as quickly as possible. After the effective date of his or her appointment, the trustee shall serve under such other conditions as the Court may prescribe. After his or her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish the divestiture. At the end of six (6) months, if the divestiture has not been accomplished, the trustee shall file promptly with the Court a report that sets forth the trustee's efforts to accomplish the divestiture, explains why the divestiture has not been accomplished, and makes any recommendations. The trustee's report will be furnished to the parties and shall be filed in the public docket, except to the extent the report contains information the trustee

deems confidential. The parties each will have the right to make additional recommendations to the Court. The Court shall enter such orders as it deems appropriate to carry out the purpose of the trust.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act (15 U.S.C. § 15) provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment neither will impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act (15 U.S.C. § 16(a)), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against CRH, Oldcastle, BTR or Tilcon.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within

which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person should comment within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

J. Robert Kramer
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 3000
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its Complaint against the defendants. The United States is satisfied, however, that the

divestiture of the assets and other relief contained in the proposed Final Judgment will preserve viable competition in the manufacture and sale of asphalt concrete in the greater Hartford area that otherwise would be affected adversely by the acquisition. Thus, the proposed Final Judgment would achieve the relief the government would have obtained through litigation, but avoids the time, expense and uncertainty of a full trial on the merits of the government's Complaint.

VII.

STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the court may consider--

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). As the Court of Appeals for the District of Columbia Circuit recently held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether

enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See United States v. Microsoft, 56 F.3d 1448 (D.C. Cir. 1995).

In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24598 (1973). Rather,

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988), quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also Microsoft, 56 F.3d 1448 (D.C. Cir. 1995). Precedent requires that:

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

United States v. Bechtel, 648 F.2d 660,666 (9th Cir. 1981) (emphasis added).

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" (citations omitted). United States v. American Tel. and Tel. Co., 552 F. Supp. 131, 150 (D.D.C. 1982), aff'd sub nom., Maryland v. United States, 460 U.S. 1001 (1983).

VIII.

DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Respectfully submitted,

Executed on: September 5, 1996

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/s/

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