



COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPLICATION UNDER SECTION 120 OF THE ENTERPRISE ACT 2002

CASE No. 1334/4/12/19

Pursuant to rules 14 and 26 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the “Rules”), the Registrar gives notice of the receipt on 1 November 2019 of an application for review under section 120 of the Enterprise Act 2002 (the “Act”) by Ecolab Inc. (“Ecolab”) against a decision dated 8 October 2019 (the “Decision”) made by the Competition and Markets Authority (the “CMA”). Ecolab is represented by Cleary Gottlieb Steen & Hamilton LLP of 2 London Wall Place, London EC2Y 5AU (Reference: Nicholas Levy, Paul Gilbert and John Messent).

On 30 November 2018, Ecolab completed the purchase of the entire issued share capital of The Holchem Group Limited (“Holchem” and, together with Ecolab, the “Parties”). On 24 April 2019, after a Phase 1 investigation, the CMA referred this transaction (the “Transaction”) for an in-depth Phase 2 investigation pursuant to section 22(1) of the Act and appointed an inquiry group. In its Decision, the CMA effectively prohibited the Transaction.

The Parties to the Transaction carry out the following activities:

- (a) Ecolab is a global supplier in water, hygiene and energy technologies, providing cleaning, water treatment and sanitising products and services to customers operating in food service, food processing, hospitality, healthcare, industrial, and oil and gas industries. It supplies, among other products, cleaning chemicals and ancillary services to industrial and institutional customers. The majority of Ecolab’s food and beverage (“F&B”) customers within the UK are international customers (i.e., customers who have operations in multiple jurisdictions and procure for more than one country, generally from headquarters outside the UK). Its other F&B customers operate solely in the UK or procure for their UK operations alone (“UK-only customers”).
- (b) Holchem is a supplier of cleaning chemicals and ancillary services primarily to industrial customers active in the F&B industry, as well as distributors in the institutional segments in the UK and the Republic of Ireland. Holchem is incorporated in the UK and achieves much of its income from UK-only customers. It does not supply international customers.

In the Decision, the CMA determined that Ecolab’s acquisition of Holchem would result in a substantial lessening of competition (“SLC”) on the market for the supply of formulated cleaning chemicals (and ancillary services) to F&B customers in the UK (the “SLC Decision”) and required Ecolab to divest either all of Holchem or Holchem Laboratories (the “Remedy Decision”).

According to the Application, the CMA has effectively prohibited a merger where the Parties’ combined market shares are low (30-40%), where customers identified more than 35 other competitors beyond the four largest (comprising approximately a third of the market), where the only conceivable competition concerns relate to one customer segment within that market (namely large UK-only F&B customers), and where there is compelling evidence of entry and expansion from new and existing suppliers.

Moreover, the CMA required Ecolab to divest the entire Holchem Laboratories business, even though Ecolab offered a more proportionate remedy.

In summary, Ecolab submits that the CMA's SLC Decision and Remedy Decision are unlawful on four grounds:

1. The SLC Decision was irrational, the CMA made errors of assessment and the evidence in the Decision does not support its SLC finding. Ecolab argues that the CMA's assessment was flawed and irrational in four principal respects:
 - (a) First, the CMA identified an SLC relating to the market "as a whole". However, the CMA's own evidence shows that on no basis could there be any SLC affecting international customers (for which Holchem does not compete) or small UK-only customers (that are served by a large number of small and large suppliers). The only customer segment where the Transaction could plausibly have a material effect was large UK-only F&B customers.
 - (b) Second, in respect of large UK-only F&B customers, the evidence from customers and competitors does not support the CMA's conclusion that Ecolab and Holchem are constrained by only two other suppliers. The CMA wrongly characterized the Transaction as a "four to three" merger, when around one-third of demand is met by suppliers other than the four largest producers.
 - (c) Third, the CMA wrongly dismissed evidence of expected expansion by Kersia, a large European competitor that has already entered the UK F&B market. In particular, the CMA failed to take reasonable steps to investigate Kersia's likely expansion.
 - (d) Fourth, the CMA wrongly dismissed compelling evidence that suppliers of formulated F&B cleaning chemicals are constrained by customers' ability to purchase "unformulated" products.
2. The CMA's decision to reject Ecolab's proposed remedy was irrational, disproportionate, and based on an error of law. In rejecting Ecolab's remedy proposal (and requiring the divestment of Holchem or Holchem Laboratories), the CMA applied the wrong legal test. It wrongly approached the issue of remedy on the basis that it needed to identify measures capable of restoring pre-merger competition. The correct approach would have been to seek a remedy that was effective in addressing the SLC. The CMA's incorrect starting point infected the entire remedies process.
3. To the extent the CMA had doubts as to the effectiveness of Ecolab's remedy, it failed to take reasonable steps to investigate whether those doubts could be addressed. Had the CMA needed more time to carry out its investigation and satisfy its statutory obligations to consult, it could and should have extended the deadline for issuing its Decision (as Ecolab suggested). The CMA's ability to extend its inquiry is precisely for circumstances - such as those arising in the present case - where there are special reasons to do so. The CMA failed to give any reasons for rejecting Ecolab's suggested extension or to balance the need for a full and fair investigation with the negligible impact of extending its investigation by a few weeks.
4. In any event, the CMA was irrational to conclude that Ecolab's proposed remedy would not be effective. In carrying out its proportionality assessment, the CMA should have considered whether accepting Ecolab's proposed remedy (rather than requiring the immediate forced divestiture of Holchem or Holchem Laboratories) would have resulted in any prejudice to the public interest.

Ecolab invites the Tribunal:

- (a) To declare that the SLC Decision and/or Remedy Decision are unlawful;
- (b) To quash the SLC Decision and/or Remedy Decision;

- (c) To remit the matter to the CMA to reconsider and make a new decision under section 35 of the Act;
- (d) To order the CMA to pay to Ecolab the costs that Ecolab has reasonably incurred in bringing this application; and.
- (e) Such other order or relief as the Tribunal may consider appropriate.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules. Pursuant to the Order of the President of the Tribunal abridging time for applying for permission to intervene (made on 8 November 2019), any request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London, WC1A 2EB, so that it is received **no later than 5pm on 19 November 2019**.¹

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or email (registry@catribunal.org.uk). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar

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¹ Please note that the Tribunal's address for service will change with effect from 18 November 2019: see the [Rule 6 notice](#) published on 11 November 2019 for further details.