Neutral citation [2020] CAT 4

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1334/4/12/19

Salisbury Square House
8 Salisbury Square
London
EC4Y 8AP

17 January 2020

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

ECOLAB INC. ("ECOLAB")

Applicant

- and -

COMPETITION AND MARKETS AUTHORITY ("CMA")

Respondent

RULING: SPECIFIC DISCLOSURE

A. INTRODUCTION

1. This is the decision on an application for specific disclosure made by Ecolab Inc ("Ecolab") in the context of its substantive application under s.120 of the Enterprise Act 2002 ("EA") challenging the decision by the Competition and Markets Authority ("CMA") on the completed acquisition by Ecolab of The Holchem Group Ltd ("Holchem") set out in the CMA's Final Report issued on 8 October 2019 (the "FR"). In this ruling, the notice of application which commenced the substantive proceedings is referred to as "the NoA" and this disclosure application is referred to as "the DA".

2. In the FR, the CMA found that this acquisition gave rise to a relevant merger situation within s.23 EA (a conclusion which is not challenged); and that the merger has resulted or may be expected to result in a substantial lessening of competition ("SLC") in relation to the supply of formulated cleaning chemicals and ancillary services to food and beverage ("F&B") customers in the UK. In determining the remedy pursuant to s.35(3) EA, the FR concluded that Ecolab should sell Holchem Laboratories, the subsidiary of Holchem active in the F&B sector.

3. Pursuant to s.120 EA, a challenge to a decision of the CMA in respect of a merger is to be determined applying the same principles as would be applied by a court on an application for judicial review. Accordingly, such a challenge is not an appeal on the merits of the decision. Further, an application under s.120 must set out the specific grounds on which the decision is challenged: rule 9(4)(d) of the Competition Appeal Tribunal Rules 2015 ("CAT Rules") read with rule 26(1).

4. The CMA has disclosed a number of documents with its Defence to the Application and by way of exhibits to the witness statement of Ms Kirstin Baker, the chair of the Inquiry Panel that was responsible for the FR. Furthermore, while maintaining that it was not obliged to do so, the CMA has provided Ecolab with the document sought by the second request in the DA. The contested disclosure sought by Ecolab now concerns the following category of

documents: "all communications between the CMA and competitors of Ecolab during the Phase 2 enquiry (to the extent not previously disclosed)". Although that is its primary request, Ecolab puts forward an alternative as a fall-back: "all communications with its competitors relating to the issue of remedy".

5. Nothing that I say in this ruling prejudges the issues to be determined at the hearing of the substantive application.

B. GOVERNING PRINCIPLES

6. The Tribunal's power to order specific disclosure is set out in rule 19(1) and (2)(p) of the CAT Rules, to be read in conjunction with the governing principles in rule 4.

7. Disclosure in the context of judicial review proceedings was considered by the House of Lords in *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53 ("*Tweed*"), where the application involved a proportionality argument under the Human Rights Act 1998 and the European Convention on Human Rights ("the Convention"). In his opinion, Lord Bingham stated:

> "2. The disclosure of documents in civil litigation has been recognised throughout the common law world as a valuable means of eliciting the truth and thus of enabling courts to base their decisions on a sure foundation of fact. But the process of disclosure can be costly, time-consuming, oppressive and unnecessary, and neither in Northern Ireland nor in England and Wales have the general rules governing disclosure been applied to applications for judicial review. Such applications, characteristically, raise an issue of law, the facts being common ground or relevant only to show how the issue arises. So disclosure of documents has usually been regarded as unnecessary, and that remains the position.
>
> 3. In the minority of judicial review applications in which the precise facts are significant, procedures exist in both jurisdictions … for disclosure of specific documents to be sought and ordered. Such applications are likely to increase in frequency, since human rights decisions tend to be very fact-specific and any judgment on the proportionality of a public authority's interference with a protected Convention right is likely to call for a careful and accurate evaluation of the facts. But even in these cases, orders for disclosure should not be automatic. The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.
>
> 4. Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skilfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it

> should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says. There may, however, be reasons (arising, for example, from confidentiality, or the volume of the material in question) why the document should or need not be exhibited. The judge to whom application for disclosure is made must then rule on whether, and to what extent, disclosure should be made."

8. Lord Carswell referred at [26] to the principle that "the intensity of review in a public law case will depend on the subject matter in hand" and said, at [32], that for disclosure in judicial review applications:

> "... it would now be desirable to substitute for the rules hitherto applied a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances. ... Even in cases involving issues of proportionality disclosure should be carefully limited to the issues which require it in the interests of justice."

Lord Brown stated:

> "56. .... In my judgment, disclosure orders are likely to remain exceptional in judicial review proceedings, even in proportionality cases, and the courts should continue to guard against what appear to be merely 'fishing expeditions' for adventitious further grounds of challenge. It is not helpful, and is often both expensive and time-consuming, to flood the court with needless paper."

Lord Brown proceeded to agree with Lord Carswell on the adoption of a "more flexible and less prescriptive principle" and added:

> "57. On this approach the courts may be expected to show a somewhat greater readiness than hitherto to order disclosure of the main documents underlying proportionately decisions, particularly in cases where only a comparatively narrow margin of discretion falls to be accorded to the decision-maker (a *fortiori* the main documents underlying decisions challenged on the ground that they violate an *unqualified* Convention right, for example under article 3). That said, such occasions are likely to remain infrequent: respondent authorities under existing practices routinely exhibit such documents to their affidavits (and, indeed, should readier to do so whenever proportionality is in issue)."

9. Lords Hoffmann and Rodger agreed with the speeches of Lords Bingham, Carswell and Brown.

10. The decisions of the CMA which are subject to challenge by way of judicial review before the Tribunal are typically lengthy and detailed. They generally involve consideration of a very wide range of material received from, or

obtained by interviewing, participants in the relevant market, whether as customers, suppliers or competitors. It has never been the case that all such documents must be disclosed in response to an application under s.120 EA. The Tribunal has now considered the decision in *Tweed* and ruled on applications for specific disclosure in a number of cases which are relied on by both sides on this application: *British Sky Broadcasting Group plc v Competition Commission and anr* [2008] CAT 7 ("*BSkyB*"); *HCA International Ltd v CMA* [2014] CAT 11 ("*HCA*"); and most recently, *Tobii AB (Publ) v CMA* [2019] CAT 25 (*Tobii*"), from which passages are reproduced in the DA (albeit without attribution). Although *BSkyB* and *HCA* were decided under the previous CAT Rules, the present CAT Rules as regards disclosure are effectively the same.[1]

11. In *BSkyB,* the applicant challenged, inter alia, the Commission's conclusions as to its influence over ITV that were based on two specific findings, which the applicant contended were irrational or perverse in that they were unsupported by the evidence. The Commission's position was that those findings were supported by the evidence received from ITV. It was in those circumstances that the then President, Mr Justice Barling, ordered specific disclosure of that evidence (subject to safeguards of its confidentiality). The disclosure was expressly tailored to the findings under challenge: see at [30]. The President said in his ruling, at [31]:

> "In order to deal fairly with Sky's contention that the Commission could not properly make the findings in question on the material before it the Tribunal should have sight of the material relied on by the Commission in making them rather than a synopsis, however conscientiously formulated. Those findings are admittedly very significant in relation to the Commission's overall conclusions as to material influence and effects on competition."

12. *HCA* concerned a report on a market investigation reference under Part 4 EA concerning the supply of private healthcare services. In its report, the CMA, inter alia, required HCA to divest itself of some of the private hospitals that it owned. The CMA's conclusion in its report that there were adverse effects on competition associated with the structure of the market relied crucially on its Insured Prices Analysis ("IPA"), derived from complex computer modelling

[1] The reference to "just and economical conduct of the proceedings" in the former rule 19 is now reflected in the governing principles at rule 4 of the current CAT Rules.

based on the raw data which it had gathered. In its application, HCA said that there were reasonable grounds to suspect that there may have been defects in the CMA's analysis in preparing the IPA. That analysis involved first "cleaning" the raw data to aggregate and simplify it in certain respects, and then subjecting it to further aggregation to give average figures for particular processes, before subjecting it to statistical and regression analysis. HCA sought disclosure of the raw data, the "cleaned" data, the full methodology used to produce the IPA, and the full results from each step of analysis.

13. The Tribunal said at [17] that it did not find determination of the application for disclosure easy but, on balance, concluded that disclosure of the commercial data sought was necessary and proportionate and was required to enable HCA's judicial review application to be determined fairly and justly. The Tribunal stated, at [30]-[31]:

> "… HCA has raised a serious case regarding data input and possible methodological flaws in the CMA's analysis which the CMA will be called upon to answer in the course of these proceedings. HCA is not seeking disclosure simply on the off-chance that it might throw up some hitherto unsuspected error of calculation by the CMA. It wishes to have disclosure to assist it to make good an arguable case which it has already set out and advanced.
>
> 31. In the circumstances of this case, we consider that fairness between the parties does require that HCA have access to the material covered by its disclosure application and that this is not outweighed by any of the countervailing practical issues we have reviewed above. The IPA was absolutely critical as the basis for the CMA's findings of relevant AECs and thus for its decision to impose the divestment remedy. Arguable grounds of attack on the IPA have already been identified by HCA and such an attack will inevitably be centre stage in these proceedings. The CMA may have good answers to that attack, and will of course submit that in making the inevitable evaluative judgments required at each stage in taking the raw data, refining them into the cleaned data then analysing them as it did, it is entitled to the benefit of a substantial margin of appreciation or evaluation. But in our view, this does not mean that in this case HCA should be practically disabled from making the best case it can by being deprived of information about the underlying data (including the raw data) and a clear picture of the methodology employed by the CMA. HCA should not have to meet such difficulties as it may face in showing that the CMA has acted unlawfully in refining the data and then in choosing to analyse it as it did while subject to the practical disadvantage that it does not actually know the facts regarding what the CMA has done to construct the IPA."

14. Further, in *HCA* the divestiture of hospitals within the company required under the remedy engaged Article 1 of the 1st Protocol to the Convention. The

Tribunal accordingly stated, as an additional justification for the disclosure it ordered, at [36]:

> "... proportionality analysis for the purposes of the Human Rights Act 1998 requires that the evidential basis adduced by a public authority to justify an interference with Convention rights should be "relevant and sufficient": see *BAA Ltd v Competition Commission* [2012] CAT 3, [20(5)]. The greater the interference with Convention rights, the more robust and reliable the evidential basis relied upon to justify that interference may be required to be. Critical examination of such evidential basis in the process of adversarial litigation may make a significant contribution to ensuring that the evidential basis is sufficiently robust and reliable to justify the measure taken on the basis of it. The Tribunal might find itself hampered in examining whether the serious interference with HCA's rights in issue in these proceedings is lawful and proportionate in circumstances where (as HCA contends, and which will be a matter for argument at trial) HCA had not had a full opportunity to address the evidential basis for the measures decided on by the CMA in the course of its investigation nor an opportunity to subject that evidential basis to full and informed critical scrutiny subsequently in the course of the litigation to challenge that interference."

15. Finally, in *Tobii*, a merger case in which a divestiture remedy was ordered, the Chairman (Mr Hodge Malek QC) in his ruling considered, in the light of these prior authorities, each of the various categories of documents which were the subject of Tobii's specific disclosure application as against the grounds of the substantive application under s.120 EA:

(1) As regards the CMA's Requests for Information ("RFIs") sent to competitors and their responses, some of which were referred to in paragraphs of the final report, which were requested in so far as they contained evidence relating to the assessment of vertical foreclosure, the Chairman held that the final report together with the CMA's prior working paper on vertical effects (disclosed to the applicant in the course of the inquiry) contained a gist of the competitor evidence and that disclosure of all competitor RFIs and responses was neither necessary nor relevant. The relevant ground of the substantive application was that the CMA's conclusion on vertical foreclosure effects was unsupported by evidence: that could be justly and fairly determined on the basis of the material already available in the working paper and the final report.

(2) As regards the request for unredacted percentage figures for market shares of the various suppliers used in two tables in the final report (which set out only percentage ranges) and the underlying data broken down by product from which they were calculated, Tobii argued that this was necessary for it showed the factors taken into account by the CMA in its approach to market definition and its conclusion as to an SLC (both challenged in the substantive application) and whether the CMA took into account irrelevant considerations. This request was also refused on the basis that the unredacted figures were not relevant for the purpose for which they were sought and the market share data in the form that Tobii wanted did not exist.

(3) The application for disclosure of responses to RFIs from customers was granted. The Chairman explained that decision, and its limits, as follows:

> "46. ... Tobii's pleaded Grounds 3 and 4 of its NoA include arguments that the CMA unreasonably and irrationally based its decisions on customer evidence that is unreliable due to flawed questionnaires. It is my view in the particular circumstances of this case that the 30 customer responses, which were disclosed in aggregated summaries contained in the limited paragraphs of the Provisional Findings and Final Report, may well assist the Tribunal to justly determine whether the customer evidence received by the CMA in response to their customer questionnaires [in] this particular investigation is reliable. The question regarding whether the customer evidence is reliable is distinct from the other issue which Tobii has raised, namely whether the summaries in the Final Report accurately reflect the gist of the customer evidence. I draw a distinction also between the 30 customer responses referred to at paragraph 5.15 and Table 5-1 of the Final Report and the additional evidence obtained from calls and written information requests from third parties referred to at paragraph 7 of the Final Report. The latter additional evidence was not obtained by the CMA using the customer questionnaires which Tobii complains of. Therefore, that additional evidence is neither necessary or relevant for the Tribunal to justly determine whether the 30 customer responses are reliable."

16. However, the Chairman proceeded to state, at [48]:

> "I emphasise that my decision regarding the 30 customer responses in this case is not to be taken as a precedent by other applicants in future judicial review applications to suggest that decision makers such as the CMA are under a general obligation to disclose underlying evidence and material collected in their investigation so that a party can test for itself whether the evidence is reliable, or that decision makers are required to disclose more than the gist of their case."

17. In the light of these decisions, it is possible to set out certain principles governing the Tribunal's approach to specific disclosure in such cases, which are based in part on the helpful summary in the CMA's written response to the DA:

(1) The principles to be applied are those appropriate to disclosure in applications for judicial review.

(2) The decision maker in responding to the substantive application to challenge its decision is under a duty of candour. Where a particular document or documents are significant to a contested decision and relevant to the grounds of challenge, they should normally be disclosed at the outset rather than a deponent attempting to summarise them in a witness statement. But in particular where the decision is lengthy and detailed, the decision maker is not under a more general obligation to disclose all the material referred to in the decision2 or which it collected in the course of its investigation.

(3) Disclosure in such cases is never automatic and an order for specific disclosure will usually be unnecessary. This is because the issue is usually the lawfulness of a body's decision-making process rather than the correctness of its substantive decision or because the decision-maker has complied with its duty of candour.

(4) In every case, the Tribunal must be satisfied that the disclosure sought is relevant, proportionate and necessary in order to determine the issues before it fairly and justly.

(5) The need for the requested disclosure must be examined in the light of the circumstances of each individual case. Prominent amongst those circumstances are likely to be: the nature of the decision challenged; the grounds upon which the challenge is being made; the degree of evidence already provided in the decision, in the course of the prior investigation and in the response to the substantive application before the Tribunal; and the nature and extent of the disclosure being sought.

(6) Even in cases involving issues of proportionality and Convention rights, orders for disclosure are "likely to remain exceptional";[2] and such disclosure should be "carefully limited to the issues which require it in the interests of justice".[3] In that regard, the greater the alleged interference with Convention rights, the stronger the justification for scrutiny of the evidential basis relied upon.

(7) Mere 'fishing expeditions' "for adventitious further grounds of challenge" [4] will not be allowed.

(8) Where provision of the disclosure sought will be burdensome or the disclosure is voluminous, that is a factor to be weighed but is not in itself decisive.

C. THE PRESENT CASE

18. Ecolab's challenge to the CMA's decision on this completed merger relies on four grounds (NoA, paras 7-15):

(1) The decision finding an SLC was irrational. The CMA made errors of assessment and the evidence in the FR does not support its SLC finding. In turn, this ground relies on five contentions (NoA, para 56):[5]

(b) The scope of the SLC: there could be no SLC affecting international customers or small UK-only customers.

(c) Constraint from small suppliers: in respect of large UK-only F&B customers, the evidence from customers and competitors does not support the conclusion that Ecolab and Holchem are constrained by only two other major suppliers.

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[2] Lord Brown's speech in *Tweed* at [56], cited in *BSkyB* at [23] and *Tobii* at [14].
[3] Lord Carswell's speech in *Tweed* at [32], cited in *BSkyB* at [22] and *Tobii* at [13].
[4] Lord Brown's speech in *Tweed* at [56], cited in *BskyB* , and [24]. See also *Tobii*, at [17].
[5] They are numbered (b)-(f) because in the NoA subsection (a) is a summary.

(d) Constraint from Kersia: the CMA wrongly dismissed evidence of expected expansion by Kersia, a large European competitor.

(e) Constraint from suppliers of unformulated F&B cleaning chemicals: the CMA wrongly dismissed evidence that suppliers of formulated chemicals were constrained by customers' ability to purchase unformulated products.

(f) The SLC finding is irrational in any event: the level of the combined market share of Ecolab and Holchem and the presence of Diversey and Christeyns as two other large suppliers precludes an SLC.

(2) The decision to reject Ecolab's proposed remedy was irrational, disproportionate and based on an error of law. Under this ground, Ecolab contends that:

(a) the CMA applied the wrong legal test;

(b) in any event, the alternative remedy proposed by Ecolab would have effectively addressed the anti-competitive concern that the CMA had identified.

(3) The CMA failed to take reasonable steps to investigate whether its doubts as to the effectiveness of Ecolab's alternative divestiture remedy could be addressed, including by extending the deadline for the FR in order to conduct a fuller investigation.

(4) The CMA acted irrationally in rejecting Ecolab's fall-back alternative divestiture proposal.

19. With its defence to the NoA, the CMA disclosed the following material:

(a) a new version of the FR in which redactions had been lifted from numerous previously redacted paragraphs;

(b) 11 documents containing or recording communications (including notes of hearings) with 10 customers of Ecolab and Holchem in relation to the issue of remedy;

(c) All documents recording communications (including notes of the hearings) with companies which had been in negotiation with Ecolab regarding its proposed alternative divestiture proposal.

20. In seeking specific disclosure of all communications between the CMA and competitors of Ecolab during the Phase 2 inquiry (to the extent not already disclosed), the DA states that access is required to these communications "so that Ecolab can fully and fairly develop Grounds 1, 2 and 3 of the [NoA]". More particularly, Ecolab contends that these are relevant and necessary in connection with Grounds (1)(c), (1)(e), (2)(b) and 3 above: DA para 32. Accordingly, the application has to be considered in the light of each of those contentions.

Ground 1(c) and (e)

21. As regards Ground (1)(c) and (e), respectively constraint from smaller suppliers and constraint from suppliers of unformulated chemicals, Ecolab bases its contention that the disclosure sought is relevant and necessary on several specific references in the FR. I therefore address each of those in turn:

Para 7.120

22. The FR states at para 7.120(c): "*Several smaller suppliers told us they do not participate in tenders, with one saying that there was no point in smaller companies bidding....*" This is stated in the context of the discussion of tenders. The CMA considers tenders extensively and the data regarding tenders is set out at paras 7.113 – 7.118. That evidence is derived from the four largest suppliers. The comment in para 7.120(c) is set out only to resolve a concern that that evidence may give a distorted picture in that it does not include data from the smaller suppliers. However, the challenge made in the NoA as regards the conclusion drawn by the CMA as regards small suppliers and tenders is not that the data was not reliable or robust, but that the evidence set out in the FR does

not support the conclusion reached at para 7.196(c) that small suppliers compete for a minimal proportion of Ecolab and Holchem's tenders and virtually never win against them: see NoA, para 84. Accordingly, to resolve that challenge it is sufficient to look at the tender evidence set out in the FR and it is not relevant to see what smaller suppliers told the CMA about tenders. The disclosure is therefore not relevant or necessary fairly to determine this point.

Paras 7.193-7.194

23. These paragraphs refer to the fact that the CMA received communications from 26 smaller suppliers across Phases 1 and 2 of the inquiry, of whom only nine confirmed that they were suppliers of cleaning chemicals to the F&B market in the UK. The FR then makes specific reference to the responses from four of those nine plus Kersia and states simply that five were significantly smaller suppliers with sales of between £25,000 and £450,000 in the UK market. The communications with Kersia (which are relevant to Gound 1(d)) have been disclosed. In the DA, Ecolab states that it disputes this evidence, referring to NoA, paras 76-78 and 81-89. However, neither in those paragraphs nor under Ground 1(c) as a whole is any of the evidence summarised in these two paragraphs of the FR disputed. Instead, Ecolab makes observations on the correct interpretation of this evidence and relies on evidence it put forward itself. Ecolab's case is summarised at para 89 of its NoA:

> "The evidence – including the CMA's own tender data – shows that small suppliers compete effectively with larger suppliers and serve a significant portion of the UK F&B market including UK-only customers of all sizes."

Those contentions are not dependent on disclosure of the communications from small suppliers. The disclosure is therefore unnecessary for this point to be fairly decided.

Para 8.16 and para 8.20

24. These two paragraphs are part of section 8 of the FR, where the CMA considered whether there are countervailing factors that may preclude an SLC from arising. The CMA concluded that there were some strategic barriers to entry and economies of scale and concluded:

> "8.49 Given the above, we consider that even if entry or expansion were to occur in the event that prices go up or services degrade after the Merger, it is unlikely to be sufficient to provide a credible alternative for a significant proportion of customers.
>
> …
>
> 8.52 We therefore consider that entry or expansion would not be timely, likely and sufficient to prevent an SLC from arising in this case".

25. There is no specific challenge to that conclusion or section 8 FR in the NoA - except as regards the potential expansion of Kersia which is the subject of Ground 1(d) and not relied on in the DA. The nearest the NoA approaches it is in para 78(d) where Ecolab states:

> "The basic products are made to the same EU standards by all suppliers (regardless of their size or reputation) and there are no capacity constraints in this industry. Therefore the key differentiator between large and small suppliers is primarily their total revenue and number of sale/support staff. There are therefore very limited barriers to the expansion of smaller suppliers, given the relative ease with which staff can be recruited and/or trained."

There is no direct reference to capacity constraints or staff recruitment in the CMA's analysis of barriers to entry/expansion, and even if it may be said that there is some implicit reference, it is of minimal significance as against the various other factors considered in section 8, such as non-scale strategic barriers, the views of customers, and the recent history of the way entry and expansion has been achieved. It would accordingly be wholly disproportionate to give the requested disclosure by reference to this point, even if it is an issue in the case at all.

Paras 7.200-7.201

26. These two paragraphs summarise what the CMA was told by two other large suppliers, Diversey and Christeyns, regarding their view of the competition provided by smaller suppliers. There is of course no basis for suggesting that the FR does not correctly summarise what they told the CMA. Those views are challenged by Ecolab at NoA para 80, but not on the basis that this was not what those suppliers said but on the ground that their views should have been received with scepticism given their commercial incentives, and more rigorously tested. The requested disclosure is neither necessary nor relevant for those arguments

to be advanced and determined fairly and justly by the Tribunal. The position is very different from the customer responses considered in *Tobii*, where the issue was whether the customer responses were reliable in the light of an allegedly flawed customer questionnaire: para 15(3) above.

Paras 7.217-7.222

27. These paragraphs summarise what the CMA was told by Diversey and Christeys regarding their views of competition from suppliers of unformulated products. Those passages are referred to in the NoA, but again they are challenged not on the basis that these views were not expressed but that they were accepted by the CMA with insufficient scepticism or testing of their evidence. For the same reason set out above as regards paras 7.200-7.201, disclosure is therefore neither necessary nor relevant for the issue raised by Ecolab, or for the Tribunal to decide it.

Paras 7.223-7.226

28. These paragraphs summarise evidence from two suppliers of unformulated chemicals and one alternative cleaning solution provider. In its NoA at para 103, Ecolab contends that this evidence, as so summarised, does not support the CMA's conclusions. Specifically, it challenges reliance on the evidence of the former as of limited value and unrepresentative and points to the evidence of the latter (as summarised in the FR) as confirmatory of its own case. Accordingly, the requested disclosure is not necessary or relevant to the arguments Ecolab is putting forward, or for the Tribunal to decide them.

Paras 8.23 and 8.24-8.27

29. These paragraphs fall within section 8 concerning countervailing factors. The observations set out above as regards that part of the FR therefore apply. The paragraphs refer to what suppliers said about the reputational and strategic advantages which they enjoy. The DA states that Ecolab questions "the efficacy" of those submissions and challenges those assertions, referring to NoA

para 78. However, aside from para 78(d) discussed above, it is only para 78(e) which contests those points on a very particular basis:

> "e) Furthermore, all customers have in-house hygiene managers at every plant, i.e., in-house expertise. There is therefore limited competitive advantage to be gained by larger suppliers through their ability to provide support, advice, or a particular reputation."

30. The specific point regarding customers' in-house expertise is not addressed in the FR. The CMA's reasoning on reputational and strategic advantages in section 8 is more broadly based, resting particularly on the responses from customers (which have been disclosed), the evidence as to switching rates and internal Ecolab documents: FR paras 8.46-8.51. In that context, and given the points raised in the NoA, I regard the disclosure requested as disproportionate and certainly not reasonably necessary for the Tribunal fairly to decide the argument put forward challenging the basis for the CMA's conclusion on strategic advantages: cp *HCA* where the IPA was "absolutely critical" as the basis for the findings of adverse effects on competition: para 13 above.

Ground 2(b)

31. In the DA, Ecolab states that the CMA "relied heavily on the view of four or five competitors" in section 10 FR in concluding that Ecolab's alternative divestiture proposal would be ineffective. However, although the views of competitors are summarised at paras 10.127-10.130, there is in fact scant reliance upon them in the CMA's extensive assessment of Ecolab's proposed remedy: see paras 10.140-10.237. An exception is the views of those companies with whom Ecolab had been in discussion regarding its proposal and those communications have been disclosed.

32. Moreover, nowhere in the NoA under Ground 2(b) is there any challenge to the views of competitors set out in paras 10.127 to 10.130. Ecolab asserts in the DA that the disclosure sought "is likely to contain information that Ecolab considers to be highly relevant to enabling it to fully and fairly advance the grounds identified in its pleaded case." However, since the pleaded grounds do not make any reference to the views of competitors (other than companies with whom Ecolab was in negotiation regarding its alternative remedy), this would

not be disclosure that is relevant or necessary to determine the issues raised by Ground 2(b). Ecolab is not seeking this disclosure to make good an arguable case which it has already advanced under Ground 2(b): cp *HCA* (para 13 above). On the contrary, this aspect of the DA has all the hallmarks of a fishing expedition seeking material for new allegations or further grounds.

Ground 3

33. It is clear from the NoA that Ground 3 is effectively directed at the CMA's rejection of Ecolab's revised alternative divestiture proposal, submitted after the CMA's Remedies Working Paper which was issued on 10 September 2019.

34. The DA states under this head that from the disclosure it has received "it appears to Ecolab that the CMA may not have consulted with Ecolab's competitiors on the likely effectiveness of" Ecolab's revised alternative divestiture proposal. It is suggested that this was partly due to timing and the ground of challenge is that the CMA failed to take reasonable steps to investigate, and if necessary should have extended the deadline for the FR: NoA paras 152-162. As explained by Ms Baker in her witness statement, after receipt of the revised proposal the CMA consulted only those companies with whom Ecolab had been in negotiation regarding its proposal. The communications between the CMA and those companies have been disclosed. Accordingly, there is no basis for suggesting that disclosure of the communications with other competitors, that took place *before* Ecolab put forward its revised alternative divestiture proposal, is necessary or relevant to consideration of this ground of challenge.

Ecolab's fall-back position

35. Ecolab's alternative request is for disclosure of communications with competitors relating only to the issue of remedy, i.e. Grounds 2 and 3. In support of that request, Ecolab emphasises that this comprises a very small number of documents. However, although where the disclosure sought is voluminous or burdensome that is a factor weighing against making an order, it is not the case that the fact that only a few documents are involved can in itself justify a requirement to give disclosure. Disclosure will not be ordered unless

the documents are necessary and relevant to the grounds of challenge and for the Tribunal to determine those grounds justly and fairly: para 17(4) above. Since I have concluded that disclosure is not justified as regards Grounds 2 and 3, Ecolab's fall-back position does not assist its application.

D. CONCLUSION

36. Accordingly, the application for specific disclosure is refused. I should add that in arriving at that conclusion it has not been necessary to reach a view as to whether in a case where a merger has not been pre-notified to the CMA, an order for divestiture of the business acquired involves any real interference with the acquirer's rights under Article 1 of Protocol 1 to the Convention. That is a matter on which the Tribunal may need to hear argument at the substantive hearing. For the purpose of this ruling, and assuming that the CMA's remedy did engage Ecolab's Convention right, I consider that the question whether the CMA's decision has a sound and reliable evidential basis can be fully assessed on the basis of the material in the FR and subsequently disclosed by the CMA.

The Hon Mr Justice Roth
President

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 17 January 2020