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IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1334/4/12/19

Salisbury Square House
8 Salisbury Square
London
EC4Y 8AP

21 April 2020

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)
SIR IAIN MCMILLAN CBE DL
PROFESSOR MICHAEL WATERSON

Sitting as a Tribunal in England and Wales

BETWEEN:

ECOLAB INC.

Applicant

- and –

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard at Salisbury Square House on 18-19 February 2020

JUDGMENT

APPEARANCES

Mr Brian Kennelly QC and Mr Paul Luckhurst (instructed by Cleary Gottlieb Steen & Hamilton LLP) appeared on behalf of the Applicant.

Mr Rob Williams and Mr Ben Lask (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

Note: Excisions in this Judgment (marked "[✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

A. INTRODUCTION

1. On 30 November 2018, the Applicant ("Ecolab") acquired the entire issued share capital of The Holchem Group Ltd ("Holchem"). The parties had not given prior notice of this acquisition ("the Merger") to the Respondent ("the CMA"). On 18 December 2018, Ecolab notified the CMA of the completed merger. The CMA began an investigation and on 24 April 2019 it referred the Merger for an in-depth (Phase 2) merger inquiry pursuant to s. 22 of the Enterprise Act 2002 ("EA").

2. The CMA issued its final report ("the Report") on the Merger on 7 October 2019. In summary, the Report determined that: (1) the relevant market affected by the Merger is the supply of formulated cleaning chemicals and ancillary services to food and beverage ("F&B") customers in the UK; (2) the Merger has resulted in the creation of a "relevant merger situation" as defined in s. 23 EA; (3) the Merger has resulted or may be expected to result, in a substantial lessening of competition ("SLC") in the relevant market; and (4) the remedy to be imposed is the divestiture by Ecolab of its subsidiary, Holchem Laboratories Ltd ("Holchem Laboratories") to an approved purchaser. As regards (4), the CMA rejected an alternative divestiture proposal ("ADP"), put forward during the investigation by Ecolab, on the basis that it would not be effective, and a further modification to the ADP proposed by Ecolab.

3. By this application (the "Application"), filed at the Tribunal on 1 November 2019, Ecolab challenged, by way of judicial review, the decision in the Report on four grounds:

   (1) the SLC decision is irrational and unsupported by the evidence;

   (2) the rejection of the ADP was irrational, disproportionate and based on an error of law;

   (3) to the extent that the CMA had doubts about the effectiveness of the ADP, it failed to take reasonable steps to investigate whether those doubts could be addressed; and

(4) in any event, the conclusion that the ADP would not be effective was irrational in light of the further modification of that remedy proposed by Ecolab.

B. FACTUAL BACKGROUND

4. Ecolab is a large US corporation with a global turnover in 2018 of about £11.3 billion. It 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. Among other products, it supplies cleaning chemicals and ancillary services to industrial and institutional customers. The majority of Ecolab's F&B customers in the UK are international customers: i.e., customers who have operations in a number of jurisdictions and contract, often from headquarters outside the UK, for the supply across multiple countries (e.g., a Europe-wide supply contract).

5. Holchem is a supplier of cleaning chemicals and ancillary services, primarily to industrial customers active in the F&B industry, as well as to distributors in the institutional segments in the UK and the Republic of Ireland. Prior to the Merger, it was a private company incorporated in the UK, and some 90% of its turnover comes from UK-only customers. It does not supply international customers.

6. It is common ground that, prior to the Merger, Ecolab and Holchem (together, "the Parties") overlapped in the supply of formulated cleaning chemicals and ancillary services for professional users in the UK. Such professional users can be divided between industrial and institutional customers. Industrial customers include those who use cleaning chemicals to clean manufacturing and processing equipment and premises, and who normally purchase in bulk directly from cleaning chemical suppliers. Institutional customers include those who use cleaning chemicals to clean their premises and equipment at which products or services are offered to consumers. They may be public sector customers, such as hospitals and schools, or private sector customers, such as hotels and

restaurants. Institutional customers tend to purchase cleaning chemicals through distributors, but larger customers purchase direct from the suppliers.

7. The CMA decided at Phase 1 of its investigations that it would focus on the supply of cleaning chemicals to F&B customers, who are a sub-set of industrial customers, in the UK. The Parties' combined market share of supply to institutional customers is low and those customers have numerous alternative options.

C. THE REPORT

8. The Report is a very full document comprising 167 pages plus five appendices. After a short summary section, it is divided into 10 numbered sections, some of which are short. The most significant for present purposes are:

6) Market definition
7) Competitive effects
8) Countervailing factors
10) Remedies.

Market definition

9. As noted above, the Report concluded that the relevant market is the supply of formulated cleaning chemicals and ancillary services to F&B customers in the UK. The CMA rejected the Parties' submission that the relevant product market should also include the supply of unformulated chemicals, which are basic chemicals that can be used in several cleaning processes, but nonetheless considered them in the context of a potential constraint on the Parties when examining the competitive effects of the Merger.

10. The CMA's analysis of the market also considered the differences in size of customers. Both Ecolab and Holchem offered a distinct level of service to their customers according to their level of spend and separated their customers into bands according to customer size. This reflected the general market approach, as other suppliers also gave large customers more site visits, safety training and quality reviews than small customers. However, the CMA did not define

separate markets for customers of different sizes, explaining that whereas small suppliers generally do not compete to supply large customers, all suppliers can compete to supply small customers. The CMA added:

> "6.30 While we have not defined separate markets for customers of different sizes, we take these differences into account in our competitive assessment. In particular, for ease of evidence-gathering and analysis we have drawn distinctions between 'Large customers' with over £50,000 of annual cleaning chemical purchases and 'Small customers' with under £50,000 of purchases…
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> 6.31 However, while we have used the threshold of £50,000 to inform our analysis, we do not consider that there is a sharp distinction between customers spending over and under £50,000. Rather, we consider that there is a continuum of customers by size, with larger customers tending to require greater levels of servicing. This is reflected in the more granular levels of service differentiation provided by the Parties as discussed above."

11. The CMA also considered the distinction between international customers and the rest. International customers are defined as in para 4 above, and therefore suppliers, such as Holchem, who only supply in the UK,[1] cannot serve those customers. The Report found that international customers would be very unlikely to switch to purchasing on a national basis. The CMA recognised that this might provide a basis for defining a separate market for sales of cleaning chemicals to international F&B customers but did not pursue that matter since the Parties would not overlap in such a market. By contrast, the Report found no basis for defining a distinct market for UK-only customers (including international businesses which purchase on a country-by-country basis) because the large suppliers, such as Ecolab, who supply international customers also supply UK-only customers.

12. Ecolab does not challenge the Report's conclusion on market definition. In the Notice of Application, there was a challenge, as part of Ground 1, to the CMA's conclusion, in section 7, that suppliers of formulated F&B cleaning chemicals are subject only to limited constraint from customers' ability to purchase unformulated chemicals, but that aspect of Ground 1 was not pursued.

[1] Holchem makes some supplies to customers in Ireland but that does not affect the position.

Competitive effects

13. The CMA estimated that the size of the relevant market (as defined above) is some £120 million. It found that the estimated shares of both Ecolab and Holchem have been fairly stable over recent years, with Ecolab at 10-20% and Holchem at 20-30%; and that the Merger results in a combined market share of some 30-40%. There are two other large suppliers in the market: Diversey Ltd ("Diversey") and Christeyns Food Hygiene Ltd ("Christeyns"), each with a share now of 10-20%. The Report therefore describes this as a concentrated market, where the four largest suppliers account for 60-70% and no other supplier has a share of above 5%.

14. The Report found that the picture was slightly different when considering the three F&B segments: food, beverage and dairy. Holchem has a much higher share in the food sector than the other two sectors, and Ecolab has a higher share in dairy. In the food sector, the Parties' combined market share is 40-50%. Christeyns is much stronger in dairy than in the other two sectors, where its market share is about equal to that of Ecolab alone. The Report concluded on market shares:

> "7.22 Our analysis of market shares shows that the Merger combines two of the four largest suppliers in the market for formulated cleaning chemicals and ancillary services to F&B customers in the UK, which is already concentrated. The merged entity will be significantly larger in this market than any of its competitors. The same would be true if we looked at the food segment specifically. These market shares suggest that the Merger may be likely to result in a significant reduction in competition."

15. However, the Report proceeded to note that market shares alone do not provide a complete picture as different customers have different requirements, especially in terms of ancillary services, and the suppliers are differentiated in their expertise and focus. The CMA therefore considered it important to consider the closeness of competition between Ecolab and Holchem, relative to the closeness of their competition with other suppliers.

16. The Report found that most customers are looking for more than just the supply of chemicals and emphasise the access to service and expertise of their suppliers, e.g. advice on the most efficient way to use the cleaning chemicals

and ways to implement the cleaning process to minimise disruption and turnaround times in production. The Report states:

> "7.37 We heard consistently during our inquiry that reliability and an efficient and high quality clean is important to customers. This is because of the potentially very high cost of having production disrupted by something going wrong in the cleaning process (eg the taste of the product being affected, or the cleaning process taking too long) or the risk to public health and to the F&B manufacturer's reputation of a food hygiene incident. A number of customers and competitors told us that these considerations are utmost in customers' minds when thinking about switching their cleaning chemical supplier(s)."

17. Significantly, the CMA's surveys of large and of small customers found that on average customers rated technical assistance and support, additional services, and quality and range of products, as being as, if not more, important than price. However, the level of service customers require differs between the different industrial segments, with the high-risk food sector requiring more cleaning and management systems than the brewing sector.

18. The Report found that while most customers are not under contract, larger customers are much more likely to be under contract, with contracts typically being for three to five years with a break clause. Over 50% of each of Holchem and Ecolab's revenue comes from customers under contract.

19. The Report found that customers often stay with the same supplier for long periods of time. A high proportion [✂] of Holchem's revenue comes from customers who have been with them for 10 years or more. The Report noted:

> "7.50 This tallies with comments from both suppliers and customers suggesting that the risk of switching and the cost of changing chemical supplier can be high. For example, several customers emphasised the importance of validating a new supplier's chemicals due to food safety issues, in order to minimise any risks of a food hygiene incident (which has the potential to be very damaging for the customer). A customer also told us that switching will affect cleaning methodologies and the training process, and it would need a compelling case to do that. Some customers may therefore be risk-averse to changing chemical suppliers.
>
> 7.51 The Parties submitted that risks of hygiene incidents are the customer's responsibility, and that any health and safety risks relate to how the products are used rather than the products themselves. While this may be the case, customers also rely on their suppliers of cleaning chemicals for training and support to manage these risks"

20. In response to the Parties' contention that the CMA had overstated the difficulty of switching, the Report stated:

> "7.59 We do not dispute that customers are not locked in to their suppliers, and that switching is possible, typically in a number of months, if customers choose to switch. However, it is clear from the Parties' customer records that customers do not switch frequently, and when asked about barriers to switching customers have raised a number of barriers and costs as discussed above."

21. In considering the closeness of the competition between Ecolab and Holchem, relative to their closeness of competition with other suppliers, the CMA looked in particular at six sources of evidence: (i) the customer base of each Party, (ii) the accounts gained and lost, (iii) data on tenders, (iv) internal documents of the Parties, (v) the views of the Parties' customers, and (vi) the views of the Parties' competitors.

22. Given the limited scope of the challenge to the CMA's conclusion regarding an SLC, it is unnecessary to summarise the Report's findings under all these heads. As regards the customer bases, it is sufficient to note that the Report found that the parties do not compete for international customers since Holchem does not supply those customers. By contrast, as regards UK-only supply, Ecolab and Holchem were found to have similar customer profiles with a significant majority of their customers being low value, whereas for both Parties a small number of high value customers generate most of their revenue: paras 7.84-7.85.

23. As regards the analysis of Ecolab and Holchem's accounts gained and lost, the Report found that:

(1) for Ecolab, Holchem provided a substantial competitive constraint.

> "This is evidenced by Holchem being Ecolab's closest competitor for lost and threatened accounts, as well as for account opportunities. Moreover, across all four account types[2] competition is heavily concentrated between the four large competitors." (para 7.105)

(2) for Holchem, Ecolab is one of its closest competitors, but Christeyns and Diversey are still closer competitors.

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[2] Opportunities (i.e. customers the Parties viewed as potential targets), Threats (i.e. customers the Parties perceived to be at risk of switching), Losses and Gains. [Our footnote]

The CMA recognised that there was some uncertainty around the analysis because of the prevalence of accounts in the data where no particular competitor was identified, so the Report states that these results were considered "in the round with other analysis of the closeness of competition" (para 7.100).

24. As regards the views of the Parties' customers, the Report noted the results of the CMA questionnaires sent, respectively, to large and to small customers, both of which received a response rate of only 15%. Given the scope of the Application, it is the views of small customers that are here relevant. The responses showed that small Ecolab customers were most likely to name Holchem as their best alternative supplier, followed by Diversey; of the other alternative suppliers listed, none was recorded more than once (para 7.147 and Figure 14). Holchem's small customers were most likely to name Diversey as their best alternative supplier (17 customers) with Ecolab not far behind (16 customers). Of the small suppliers named as best alternative by Holchem's small customers, in total 18 were named but most of them by only one customer, and none by more than five customers (para 7.150 and Figure 17, as corrected). The only small supplier named more than twice was Murphy's, a specialist supplier to the brewery industry. The CMA also asked customers to list any previous suppliers they had used in the last five years:

> "7.155 For Small Ecolab customers that responded to the CMA questionnaire, most (18) customers did not name any previous suppliers. The most commonly named previous supplier was Holchem (3 mentions) and Diversey and DBM were also named. The small sample of Large Ecolab customers named only Sopura and Tristel as previous suppliers.
>
> 7.156[3] Most (62) of Holchem's Small customers that responded to the CMA questionnaire also did not name a previous supplier. Among the customers that did name a previous supplier, the most commonly named previous supplier is Diversey (11) followed by Ecolab (9) and Christeyns (9). Murphy's and ACS were mentioned by two each. Some 18 other providers were also listed but each by only one customer. This indicates smaller customers may have some additional options outside of the largest four suppliers but in the main they look to one of Holchem, Ecolab, Diversey and Christeyns."

25. Altogether, the Report concluded (at para 7.171) that the Parties are close competitors and stated:

[3] The figures are shown as corrected by the CMA in its letter of 20 December 2019.

> "7.172 In particular, it is clear that Holchem is the strongest competitive constraint faced by Ecolab in the UK F&B market. Ecolab, conversely, is one of the three main competitive constraints faced by Holchem in the market.
>
> 7.173 The elimination of such competition could be expected to impact not only the Parties' existing customers, but also all future new F&B customers of the Parties in the UK."

26. The Report proceeded to consider the remaining competitive constraints on the Parties. Since Ecolab does not now contend by its Application that the Merger led to no SLC and thus that no remedy could be imposed, it is relevant only to note the Report's finding as regards the constraint provided by smaller F&B cleaning chemical suppliers. Although they account for less than half of the market, collectively their share is nonetheless significant: para 7.191. The CMA contacted 42 smaller suppliers whose names were submitted by the Parties as being their competitors in the UK F&B market. Of the 26 smaller suppliers who provided information, only nine confirmed that they were suppliers of (formulated) cleaning chemicals to the F&B market in the UK (para 7.193(c)). After discussing the characteristics of some individual smaller suppliers, the Report stated:

> "7.195 The Parties submitted that smaller suppliers who specialise in a particular segment, such as Sopura or Niche Solutions, are still a significant constraint in those segments, and that the Parties face a range of suppliers across all segments. However, these suppliers are focused on the beverage segment in which Holchem in particular makes a limited proportion of its sales, and therefore they are not close competitors to Holchem. This is also reflected in the fact that only two of 30 respondents to the Survation questionnaire had heard of Niche Solutions, and only one had heard of Sopura. We have not seen any evidence that there are specialist suppliers in the food segment, which accounts for the largest proportion of both Parties' sales."

27. The Report also refers in this respect to the results of the CMA questionnaire addressed to smaller customers:

> "7.197 The results from our customer questionnaire also suggest that smaller suppliers may be a constraint to some extent only for smaller customers. Some Small customers did appear to view smaller suppliers as a viable alternative. However, of the Small customers who did identify an alternative, the majority named one of the Parties, Diversey or Christeyns."

28. The Report's conclusions on this aspect deserve quotation in full, since they were the target of particular criticism in the course of Ecolab's challenge:

> "7.202 The evidence discussed above consistently indicates that smaller suppliers compete for smaller customers but provide only a minimal constraint when competing for larger customers. Given that larger customers account for the clear majority of both Parties' sales, as discussed at paragraph 7.87 above, we consider that smaller suppliers therefore exert a minimal constraint on the Parties overall.
>
> 7.203 The Parties submitted that these findings show that there is no basis for an SLC finding 'in respect of small customers', as we have found that smaller suppliers can compete for these customers. However, we have not segmented the market by customer size, and our assessment seeks to establish whether an SLC is likely to arise within the market for cleaning chemicals supplied to F&B customers as a whole. Within this market, we have found that smaller suppliers do not significantly constrain the Parties, as they are not effective competitors for the larger customers who account for the vast majority of the Parties' sales. Moreover, while Small customers responding to our questionnaire did view smaller suppliers as good alternatives more often than Large customers, the majority nonetheless named the large suppliers as their best alternatives."

29. The Report separately analysed the competitive constraint faced by the Parties from Diversey, Christeyns and suppliers of unformulated products. The CMA's overall conclusion on competitive constraints were summarised as follows:

> "7.243 We have found that after the Merger, the Parties will face:
>
> (a) A strong constraint from Diversey;
>
> (b) A slightly weaker constraint from Christeyns;
>
> (c) Limited constraints from all other suppliers of formulated cleaning chemicals; and
>
> (d) A limited constraint from unformulated products."

Countervailing factors

30. Section 8 of the Report considered whether there are countervailing factors which may prevent an SLC from arising. That included potential new entry into the UK market or expansion of existing competitors. As part of that discussion, the Report considered the entry in the UK of Kersia, a global business supplying cleaning chemicals to the F&B market which had recently started expanding in the UK. Altogether, the Report concluded that there were insufficient countervailing factors to prevent an SLC.

31. In its Notice of Application, Ecolab included, under its challenge to the SLC finding in Ground 1, the contention that the CMA had wrongly dismissed evidence of expected expansion by Kersia. However, that part of Ground 1 was not pursued. Accordingly, the CMA's conclusion on countervailing factors was no longer challenged.

32. On the basis of the analysis of competitive effects and countervailing factors, the very brief section 9 of the Report simply set out the CMA's finding that the Merger has resulted, or may be expected to result, in an SLC in the relevant market.

Remedies

33. In section 10, the Report first explained the CMA's preliminary conclusion that divestiture of Holchem was the appropriate and effective remedy, which was then revised to the divestiture of Holchem Laboratories, thereby excluding two smaller operating companies owned by Holchem which provided only limited products and services within the scope of the inquiry. However, Holchem Laboratories accounts for the great majority of Holchem's revenue.

34. Ecolab does not contend that anything other than a structural remedy would be appropriate. But irrespective of the outcome of Ground 1 of its Application, Ecolab's case is that either its ADP or its revised ADP incorporating a fallback remedy should have been adopted, or at least further investigated. Accordingly, in this summary we concentrate on the findings of the Report in that regard.

35. The Report examined and discussed the ADP over 132 paragraphs: paras 10.105-10.237. Some of the details of the ADP, and of the third party responses to the CMA's inquiries regarding it, are confidential. However, essentially the ADP comprised the divestiture of a portfolio of customers of one of the Parties ("the transferring Party") to an existing supplier that already had its own F&B product range and which would, during a reasonable transition period, convert those customers to its own cleaning products. The Parties recognised that this divestiture could not be to either Diversey or Christeyns, as that would give rise to some of the same competition concerns as the Merger, but engaged in

discussion with two potential purchasers who had large global businesses in this field although they were much less prominent in the UK market.

36. The transfer of the portfolio of customers (referred to as "the Divestment Customers") envisaged, for those customers who had contracts with the transferring Party, that their contracts would be transferred to the purchaser, and also the transfer of:

(1) the database records concerning Divestment Customers, including their previous order histories;

(2) equipment at the sites of Divestment Customers that belonged to the transferring Party;

(3) sufficient staff from the transferring Party to provide services to Divestment Customers, subject to employment law restrictions; and "reasonable training assistance and expert support services for the purchaser's staff if necessary would continue to be provided to those customers for an agreed transitional period to help ensure smooth transition of the customer relationships." To that end:

> "[the transferring Party] would provide financial incentives to each transferring employee payable on condition that they remain employed by the purchaser for a reasonable period from the date of the purchase agreement" (para 10.106(d)).

37. In addition, the ADP included commitments that:

(1) the agreement with the purchaser would include financial incentives so that there would be no cost of switching for the customers;

(2) the transferring Party would enter into a transitional services agreement to support the purchaser and the Divestment Customers until the purchaser can convert them to the purchaser's own products. That agreement could be limited to one year, with any extension being subject to CMA consent;

(3) the transferring Party would provide uninterrupted supply for the Divestment Customers with the full range of cleaning chemical products (and any necessary ancillary equipment or parts) they currently purchase during the transitional period, in the form of a supply agreement on commercial terms of those products to the purchaser for resale, and assistance with converting customers to the purchaser's own products;

(4) the transferring Party would not supply F&B products to any Divestment Customer supplied by the transferring Party in the previous year, for a period of [two] years from the date of the purchase agreement, with the exception of customers that made any product purchase from the other Party (i.e. the non-transferring Party) in the previous year.

38. The Report notes:

> "10.107 The Parties submitted that implementation of the Alternative Divestiture Proposal would be facilitated through the transitional services agreement and supply agreement. Under the assistance provided by those agreements any purchaser would, within an agreed transition period, be expected to convert the customers to equivalent products offered by the purchaser. The Parties submitted that production of additional chemicals should not be a problem for a purchaser given supply-side substitutability, spare capacity, minimal costs of purchasing additional manufacturing assets, and the possibility of entering into toll agreements.
>
> …
>
> 10.121 Ecolab told us that it has confidence that the Divestment Customers will transfer across and that it does not matter whether or not customers have contracts or have the benefit of a change of control clause. Ecolab considers that what is most important is that Ecolab and the purchaser retain the trust of customers, enable a smooth transition, and make the transfer attractive to the customer, rather than relying on any legal framework to force a customer to transition. Ecolab considers that the remedy poses significantly less switching risk for customers than an ordinary change of supplier post-tender given the Transitional Services Agreement and transfer of ... account managers and provision of customer information."

39. Further, the Parties submitted that the ADP could be carried out relatively quickly, given that they were talking to two potential and interested purchasers.

40. The Report recorded that the CMA spoke to "a range of third parties" to seek views on potential remedies. We consider that the views of customers are more relevant in this regard than those of competitors whose response might well be

influenced by their own commercial interests in respect of the Merger. The Report summarised the views of customers as follows:

> "10.126 All the customers that we spoke to told us that transferring their supply to another provider would be costly and some said it would be time consuming. Three of Ecolab's and one Holchem customer told us they would not support any remedy that involved the transfer of their supply to another provider. One larger Ecolab customer told us that provided the service and product quality did not change it would be 'OK', but it noted that it would come at significant cost to them. One customer told us that switching supplier is not a big risk, whilst nine others said there were risks to overcome that could have significant negative impacts on their business, such as service disruption...."

41. The CMA also spoke to the two potential purchasers identified by the Parties.

42. The CMA assessed the ADP under the following four heads:

(1) the transfer of customers: paras 10.161-10.172;

(2) the transfer of staff: paras 10.173-10.180;

(3) warehousing, distribution and manufacturing: paras 10.181-10.187; and

(4) brand and reputation: paras 10.188-10.195.

43. The Report further considered the availability of suitable purchasers (paras 10.196-10.215) and the risks to the divestiture process in terms of the transfer process and the transitional period (paras 10.216-10.229). The CMA's conclusions on the ADP merit quotation in full:

> "10.230 As outlined in the sections above, we consider the proposed remedy package has serious shortcomings with regard to its comprehensiveness and material risks with regard to its effectiveness.
>
> 10.231 The Alternative Divestiture Proposal is not that of a stand-alone business that includes all of the relevant assets pertinent to the SLC. It is [less than half] of the size of Ecolab's UK F&B business. This limitation in the scope of the divestiture package and uncertainty regarding its precise composition in terms of customers included in the portfolio constrains its ability to act as a comprehensive solution to address the SLC we have found.
>
> 10.232 A fundamental source of risk is the transfer of customers from [the transferring Party] to a purchaser, as opposed to transferring a viable, stand-alone business. The evidence from customers is clear and conclusive: they

would not welcome a remedy of this type as it would impose costs on them, take time and create risk to their ongoing operations. Most customers in this market cannot be forced to move without their consent, as they either have no contract or would need to agree to novation of their contract, and at the point of being required to transfer, customers are likely to weigh up their options, which include returning to [the transferring Party] or finding another supplier. Some may agree to move to a purchaser and be supplied with its products, but we have no certainty of customers doing so, no guarantee they will remain and no powers of redress if they reasonably choose not to.

10.233 We have also identified significant further risks that undermine the comprehensiveness and effectiveness of the remedy:

(a) The remedy relies heavily on the cooperation of [the transferring Party's] employees agreeing to change employer.

(b) A number of customers do not have contracts, so it is unclear what is being divested.

(c) During the period in which the customers are being transferred, it is not clear that the prospective purchaser would have the capacity to be actively and effectively competing in the market and it is not clear how the purchaser can be said to be competing effectively with the Parties during a substantial transitional period if it is supplying its customers with [the transferring Party's] products.

10.234 Given the manifest shortcomings that we have identified in terms of the composition of the remedy package, we consider that these would be very difficult for a purchaser to overcome.

10.235 In this context we have carefully considered the purchasers proposed by the Parties and consider that they would not overcome these shortcomings. Moreover, we do not consider any other suitable purchaser would be able to overcome these shortcomings.

10.236 The evidence from customers and the above risks lead us to conclude that the risk profile of the Alternative Divestiture Proposal is high, and therefore it is very unlikely to be an effective remedy.

10.237 Based on the evidence set out above, we consider that the Parties' Alternative Divestiture Proposal would not represent an effective or comprehensive solution to address the SLC and resulting adverse effects identified by the CMA."

44. The Parties' revised ADP included an alternative fallback divestiture proposal, which remains confidential and is described briefly in the Report at para 10.110. It does not receive any further discussion or assessment in the Report, a matter which Ecolab strongly criticised under Ground 4 of the Application.

D. THE LEGAL FRAMEWORK

The Enterprise Act 2002 (EA)

45. Where, as here, a reference is made under s. 22 EA, the questions to be decided are prescribed by s. 35 EA, which provides insofar as relevant:

> "**35 Questions to be decided in relation to completed mergers**
>
> (1)… the CMA shall, on a reference under section 22, decide the following questions—
>
> (a) whether a relevant merger situation has been created; and
>
> (b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.
>
> (2) For the purposes of this Part there is an anti-competitive outcome if—
>
> (a) a relevant merger situation has been created and the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services; or
>
> …
>
> (3) The CMA shall, if it has decided on a reference under section 22 that there is an anti-competitive outcome (within the meaning given by subsection (2)(a)), decide the following additional questions—
>
> (a) whether action should be taken by it under section 41(2) for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition;
>
> (b) whether it should recommend the taking of action by others …
>
> (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
>
> (4) In deciding the questions mentioned in subsection (3) the CMA shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it."

46. Ss. 38-39 EA provide that the CMA shall prepare and publish a report on a reference under section 22, containing its decisions on the questions it is required to answer by virtue of s. 35, within 24 weeks of the date of the reference. S. 38(3) further states:

> "The CMA shall carry out such investigations as it considers appropriate for the purposes of preparing a report under this section."

And s. 39(3) states:

> "The CMA may extend, by no more than 8 weeks, the period within which a report under section 38 is to be prepared and published if it considers that there are special reasons why the report cannot be prepared and published within that period."

47. S. 41 EA addresses the imposition of a remedy. It provides, insofar as material:

> "**41 Duty to remedy effects of completed or anticipated mergers**
>
> (1) Subsection (2) applies where a report of the CMA has been prepared and published under section 38 within the period permitted by section 39 and contains the decision that there is an anti-competitive outcome.
>
> (2) The CMA shall take such action under section 82 or 84 as it considers to be reasonable and practicable—
>
> (a) to remedy, mitigate or prevent the substantial lessening of competition concerned; and
>
> (b) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition.
>
> (3) The decision of the CMA under subsection (2) shall be consistent with its decisions as included in its report by virtue of section 35(3) … unless there has been a material change of circumstances since the preparation of the report or the CMA otherwise has a special reason for deciding differently.
>
> (4) In making a decision under subsection (2), the CMA shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it."

48. S. 41A EA prescribes that the CMA shall discharge its duty under s. 41(2) within a period of 12 weeks of the date of publication of the report under s. 38. Pursuant to s. 41A(2), the CMA may extend that period by no more than six weeks if it considers that there are special reasons for doing so.

49. There is no statutory definition of "special reasons" for the purpose of s. 39(3) or s. 41A(2).

50. Further, s. 103(1) EA provides as follows:

> "**103 Duty of expedition in relation to references**

> (1) In making any decision for the purposes of its functions of making and determining references under this Part, the CMA shall have regard, with a view to the prevention or removal of uncertainty, to the need for making a decision as soon as reasonably practicable."

51. S. 106 EA requires the CMA to prepare and publish general advice and information about the making and consideration by it of references under s. 22. The CMA has duly published a number of guidance documents, including its guidance on *Merger remedies* (CMA87) in December 2018.

The *Merger remedies* guidance ("CMA87")

52. After summarising the statutory obligations in the EA, CMA87 states, at para 3.4:

> "The CMA will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will then select the least costly and intrusive remedy that it considers to be effective. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects."

53. The next paragraph addresses that issue in more detail:

> "**Effectiveness**
>
> 3.5 The CMA will assess the effectiveness of remedies in addressing the SLC and resulting adverse effects before going on to consider the costs likely to be incurred by the remedies. Assessing the effectiveness of a remedy will involve several distinct dimensions:
>
> (a) Impact on SLC and resulting adverse effects. The CMA views competition as a dynamic process of rivalry between firms seeking to win customers' business over time. Restoring this process of rivalry through structural remedies, such as divestitures, which re-establish the structure of the market expected in the absence of the merger, should be expected to address the adverse effects at source. Such remedies are normally preferable to measures that seek to regulate the ongoing behaviour if the merger parties (so-called behavioural remedies, such as price caps, supply commitments or restrictions on use of long term contracts). Behavioural remedies are unlikely to deal with an SLC and its adverse effects as comprehensively as structural remedies and may result in distortions when compared with a competitive market outcome.
>
> (b) Appropriate duration and timing. Remedies need to address the SLC effectively throughout its expected duration. Remedies that act quickly in addressing competitive concerns are preferable to remedies that are expected to have an effect only in the long term or where the timing of the effect is uncertain.
>
> (c) Practicality. A practical remedy should be capable of effective implementation, monitoring and enforcement. To enable this to occur, the

operation and implications of the remedy need to be clear to the merger parties and other affected parties. The practicality of any remedy is likely to be reduced if elaborate and intrusive monitoring and compliance programmes are required. Remedies regulating ongoing behaviour are generally subject to the disadvantage of requiring ongoing monitoring and compliance activity.

(d) Acceptable risk profile. The effect of any remedy is always likely to be uncertain to some degree. In evaluating the effectiveness of remedies, the CMA will seek remedies that have a high degree of certainty of achieving their intended effect. Customers or suppliers of merger parties should not bear significant risks that remedies will not have the requisite impact on the SLC or its adverse effects."

54. Chapter 5 of CMA87 is entitled: **Divestiture Remedies**. The Introduction states:

> "5.1 A divestiture seeks to remedy an SLC by either creating a new source of competition, through disposal of a business or set of assets to a new market participant, or by strengthening an existing source of competition, through disposal to an existing market participant independent of the merger parties.
>
> 5.2 To be effective in restoring or maintaining rivalry in a market where the CMA has decided that there is an SLC, a divestiture remedy will involve the sale of an appropriate divestiture package to a suitable purchaser through an effective divestiture process."

55. The scope of the divestiture package is addressed in paras 5.6 et seq. That section includes the following significant passages:

> "***Package definition***
>
> 5.6 In identifying a divestiture package, the CMA will take, as its starting point, divestiture of all or part of the acquired business. This is because restoration of the pre-merger situation in the markets subject to an SLC will generally represent a straightforward remedy. The CMA will consider a divestiture drawn from the acquiring business if this is not subject to greater risk in addressing the SLC. In appropriate cases, the CMA may be willing to leave open to the merger parties which of the overlapping businesses they wish to sell, with the UILs [undertakings in lieu of reference] or Final Undertakings stipulating that one of them must be sold.
>
> 5.7 In defining the scope of a divestiture package that will satisfactorily address the SLC, the CMA will normally seek to identify the smallest viable, stand-alone business that can compete successfully on an ongoing basis and that includes all relevant operations pertinent to the area of competitive overlap. This may comprise a subsidiary or division or the whole of the business acquired. Following discussion with the merger parties, the CMA may modify the scope of the proposed divestiture package, provided that the parties can demonstrate, to the CMA's satisfaction, that the modified package addresses the SLC and the modification does not create significant composition, purchaser or asset risks after taking account protective measures.
>
> …

> 5.9 The scope of a divestiture package will be outlined, with reasons, in the CMA's decision or final report, and will be specified in greater detail in the UILs accepted, the Final Undertakings accepted or the Final Order made by the CMA when implementing the remedy.
>
> …
>
> 5.11 In appropriate cases, the CMA will consider other structural or quasi-structural remedies. A structural remedy other than divestiture might comprise, for example, an amendment to IP licences to grant a divestment purchaser a perpetual and royalty-free licence.
>
> ***Divestiture of an existing business or package of assets***
>
> 5.12 The CMA will generally prefer the divestiture of an existing business, which can compete effectively on a stand-alone basis, independently of the merger parties, to the divestiture of part of a business or collection of assets. This is because divestiture of a complete business is less likely to be subject to purchaser and composition risk and can generally be achieved with greater speed.
>
> 5.13 Where a proposed divestiture comprises part of a business or specified assets, such as IP rights, the capabilities and resources of prospective buyers are likely to be more critical to a successful outcome than for a standalone business. A package of assets proposed for divestiture may, for example, lack an established infrastructure and its viability may therefore be more dependent on an appropriate match with the capabilities if the purchaser.
>
> 5.14 A package of assets may also be far more difficult to define or 'carve out' from an underlying business, and the CMA may have less assurance that the purchaser will be supplied with all it requires to operate competitively. In such circumstances, the CMA is likely to require additional protective measures, such as the identification of an upfront buyer … to mitigate increased purchaser and composition risk. Where a package of assets is proposed for divestiture, the CMA will require the merger parties to specify the composition and operation of the package in detail."

56. Ecolab did not suggest that any part of CMA87 was inappropriate as statutory guidance pursuant to s. 106 EA.

Challenge to CMA's decisions

57. Finally, s. 120 EA enables any person aggrieved by a decision of the CMA under Part 3 EA, which includes ss. 35-41, in connection with a reference in relation to a relevant merger situation to apply to this Tribunal for a review of that decision. S. 120(4) states that in determining such an application, the Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.

Rationality

58. Ecolab's challenge is brought essentially on rationality grounds. The approach to be adopted in such a case has been considered extensively in previous cases. In *BAA v Competition Commission* [2012] CAT 3, the Tribunal, chaired by Sales J (as he then was), helpfully summarised the principles derived from the authorities. That case concerned a judicial review under s. 179 EA of a decision of the Competition Commission ("CC") on a market investigation but the approach is the same as for an application under s. 120 EA: see s. 179(4). The Tribunal stated, at [20]:

> "(3) The CC, as decision-maker, must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it .... The CC "must do what is necessary to put itself into a position properly to decide the statutory questions": *Tesco plc v Competition Commission* [2009] CAT 6 at [139]. The extent to which it is necessary to carry out investigations to achieve this objective will require evaluative assessments to be made by the CC, as to which it has a wide margin of appreciation as it does in relation to other assessments to be made by it: compare, e.g., *Tesco plc v Competition Commission* at [138]-[139]. In the present context, we accept Mr Beard's primary submission that the standard to be applied in judging the steps taken by the CC in carrying forward its investigations to put itself into a position properly to decide the statutory questions is a rationality test: see *R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55; [2005] QB 37 at [34]-[35] and the following statement by Neill LJ in *R v Royal Borough of Kensington and Chelsea, ex p. Bayani* (1990) 22 HLR 406, 415, quoted with approval in *Khatun*:
>
> > "The court should not intervene merely because it considers that further inquiries would have been desirable or sensible. It should intervene only if no reasonable [relevant public authority – in that case, it was a housing authority] could have been satisfied on the basis of the inquiries made."
>
> (4) Similarly, it is a rationality test which is properly to be applied in judging whether the CC had a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did. There must be evidence available to the CC of some probative value on the basis of which the CC could rationally reach the conclusion it did: see e.g. *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320, 1325; *Mahon v Air New Zealand* [1984] AC 808; *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142; [2004] ICR 1364 at [93]; *Stagecoach v Competition Commission* [2010] CAT 14 at [42]-[45];"

59. In that case, the CC imposed a divestiture remedy, and BAA challenged the requirement that it should sell Stansted airport. Among its complaints, BAA alleged a disproportionate interference with its property rights under Article 1

of Protocol 1 to the European Convention on Human Rights. Addressing the position where property rights were in issue, the Tribunal stated at [20(5)]:

> "Where social and economic judgments regarding "the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken" are called for, a wide margin of appreciation will apply, and – subject to any significant countervailing factors, which are not a feature of the present case – the standard of review to be applied will be to ask whether the judgment in question is "manifestly without reasonable foundation": *James v United Kingdom* (1986) 8 EHRR 123, para. 46 (see also para. 51). Where, as here, a divestment order is made so as to further the public interest in securing effective competition in a relevant market, a judgment turning on the evaluative assessments by an expert body of the character of the CC whether a relevant AEC exists and regarding the measures required to provide an effective remedy, it is the "manifestly without reasonable foundation" standard which applies."

60. Further, the Tribunal stated generally, at [20(6)]:

> "It is well-established that, despite the specialist composition of the Tribunal, it must act in accordance with the ordinary principles of judicial review: see *IBA Health v Office of Fair Trading* [2004] EWCA Civ. 142 per Carnwarth LJ at [88]–[101]; *British Sky Broadcasting Group plc v Competition Commission* [2008] CAT 25, [56]; *Barclays Bank plc v Competition Commission* [2009] CAT 27, [27]. Accordingly, the Tribunal, like any court exercising judicial review functions, should show particular restraint in "second guessing" the educated predictions for the future that have been made by an expert and experienced decision-maker such as the CC: compare *R v Director General of Telecommunications, ex p. Cellcom Ltd* [1999] ECC 314; [1999] COD 105, at [26]."

61. We also refer to *Stagecoach Group PLC v Competition Commission* [2010] CAT 14, which, like the present case, was a judicial review of a decision on a completed merger. The Tribunal, chaired by Ms Vivien Rose (as she then was), stated at [45] that on a rationality challenge the hurdle which the applicant (Stagecoach) had to overcome is a high one, and continued:

> "Where Stagecoach asserts that there is no or no sufficient evidence to support one of the Commission's key findings, Stagecoach must show either that there is simply no evidence at all to support the Commission's conclusions or that on the basis of the evidence the Commission could not reasonably have come to the conclusions that it did. The fact that the evidence might have supported alternative conclusions, whether or not more favourable to Stagecoach, is not determinative of unreasonableness in respect of the conclusion actually reached by the Commission. We must be wary of a challenge which is "in reality an attempt to pursue a challenge to the merits of the Decision under the guise of a judicial review", ..."

62. None of those principles were in dispute in these proceedings and they are the principles which we shall apply.

E. THE APPLICATION

Ground 1: The SLC Decision was irrational

63. Although Ecolab's Notice of Application set out Ground 1 on four distinct bases, only one of them was in the end pursued. Ecolab contends that it was irrational and contrary to the evidence for the CMA to have identified an SLC relating to the market as a whole. It submitted that the CMA's own evidence showed that there could be no SLC affecting international customers or "small UK-only customers (that are served by a large number of small and large suppliers)." Hence, the Application states (at para 8(a)):

> "The only customer segment where the Transaction could plausibly have a material effect was large UK-only customers."

64. It is notable that there is no attempt to challenge the CMA's definition of the relevant market. The market comprises the supply of formulated chemicals to all F&B customers in the UK. It is true that the Report recognises that there would be no reduction in competition in the supply to international customers. However, not only are international customers a clearly segregable category (see para 4 above) but Holchem does not supply such international customers at all so there was no overlap between the Parties as regards those customers.

65. The position as regards small customers is different in both respects. First, the Report stressed that there is no bright-line division between large and small customers, and the threshold of £50,000 was adopted for ease of analysis: Report, para 6.31 (see para 10 above). Further, the Parties significantly overlap in the supply to small customers. As regards UK-only supply (i.e., excluding international customers), they have similar customer profiles: para 22 above.

66. The Report of course recognised that there are certain differences as regards small customers and large customers, and indeed the CMA sent separate questionnaires to those two groups. But the evidence set out in the Report

showed that the small customers both of Ecolab and of Holchem looked to large suppliers as their best alternative far more than to small suppliers; and specifically:

(1) the supplier named most by the small customers of Ecolab as their best alternative was Holchem, closely followed by Diversey;

(2) the supplier named most by the small customers of Holchem as their best alternative was Diversey, closely followed by Ecolab.

See at para 24 above.

67. In our view, the conclusion that the Parties were close competitors for all customers, and not just for large customers, as summarised at paras 7.172-7.173 of the Report, quoted at para 25 above, was therefore clearly open to the CMA on the evidence and cannot be regarded as manifestly without reasonable foundation. It is that same finding which was relied on at para 7.203 when considering the degree of competitive constraint which the Parties faced as regards smaller customers from smaller suppliers.

68. For Ecolab, Mr Kennelly QC emphasised the finding that small suppliers account for a significant minority share of the market as a whole: Report, para 7.191. Since large customers purchase from the large suppliers, it can be inferred that the majority of the supply to small customers is made by small suppliers, who will all remain competitors after the Merger, so that the merged entity will be subject to significant restraint as regards supply to small customers. However, that refers to all small suppliers in aggregate, whereas there are only four large suppliers. Similarly, although significantly more of Holchem's small customers named a small supplier rather than Ecolab as their best alternative, no individual small supplier was named by more than two customers: Report, para 7.156 (para 24 above).

69. The CMA submitted that it is fundamentally mistaken to equate the competitive constraint provided by very many small suppliers to that from a single supplier of equal size. Not only do we see the force of that submission, but the question

is not whether we would reach the same view of the constraint from small suppliers as regards small customers but whether the view reached by the CMA was one that a competition authority could reasonably arrive at on the basis of the evidence from its inquiries. As the Tribunal observed in *Stagecoach*, this is not a merits appeal: para 61 above.

70. Although Ecolab sought to criticise the finding in para 7.243 of the Report, arguing that this did not fairly reflect the position as regards small customers, that paragraph, as Mr Williams pointed out, is only a summary statement of the competitive constraints discussed and analysed over the previous 70 paragraphs. The particular position as regards small suppliers and small customers is considered directly at paras 7.191-7.203. And we have above rejected the argument that para 7.203 was without reasonable foundation on the evidence.

71. In the end, what the CMA had to decide was whether the Merger, and thus the loss of constraint provided by Ecolab and Holchem as against each other, would lead to an SLC in the market as defined, or whether that was so as regards only a particular segment of that market. While Mr Kennelly could point to elements in the Report that looked at small and large customers differently, and the loss of competition for large customers was clearly more pronounced, we consider that the evidence in the Report clearly is sufficient to support the finding that there was an SLC across the market as defined. It must be emphasised that the question for the CMA was not whether as a result of the Merger there remains no, or only insignificant, competition: it is whether the Merger has resulted or may be expected to result in a SLC. In our judgment, on the evidence summarised above it cannot be said that the CMA could not reasonably come to the conclusion which it reached: i.e., that the Merger would remove a significant competitive constraint in the supply to UK-only customers, and not only in the supply to large UK-only customers, and thus give rise to an SLC in the market as defined.

Ground 2: rejection of the ADP was irrational, disproportionate and based on an error of law

72. Ecolab asserted under this ground of the Application that since the SLC related only to larger customers, the CMA was clearly wrong to reject a remedy which was directed at that SLC. To that extent, this Ground is essentially dependent on Ground 1. Since we have rejected that ground and dismissed the challenge to a wider finding of an SLC, this argument falls away.

73. Ecolab also contended that the CMA adopted a legally erroneous approach by seeking a remedy that restored the market to pre-Merger conditions of competition rather than to remedying the SLC; and that applying the latter test, the rejection of the ADP was disproportionate and irrational.

74. However, the duty on the CMA was to find "as comprehensive a solution as was reasonable and practicable" "for the purpose of remedying, preventing or mitigating" the SLC: s. 35(3)-(4) EA. This is a high duty, as Patten LJ explained in giving the leading judgment (with which Laws and Floyd LJJ agreed) in the Court of Appeal in *Ryanair Holdings PLC v CMA* [2015] EWCA Civ 83, at [57]:

> "What the CMA has to decide on the ordinary civil standard of proof is whether an SLC has or may be expected to result. Once it has reached that conclusion then the action which it has to take must be such as to *remedy* or *prevent* the SLC concerned. It is not at that stage in the exercise concerned with weighing up probabilities against possibilities but rather with deciding what will ensure that no SLC either continues or occurs. Section 35(4) confirms this."

75. It is this duty which is, in our view correctly, encapsulated in the concept of an "effective remedy" discussed in CMA87: see para 53 above. The CMA there explains that structural remedies are generally preferable to behavioural remedies, a contention which is not here at issue since the ADP is also a structural remedy. And further, for a structural remedy, the CMA takes divestiture of all or part of the acquired business as its "starting point", since it will generally be a straightforward remedy, but that it will in appropriate cases consider other structural or quasi-structural remedies. On any fair reading of the Report, that is precisely the course the CMA followed in the present case, and we see no basis for detecting any error of law.

76. On the issue of proportionality, as Mr Williams pointed out, proportionality questions arise when:

(1) various alternative remedies are available, in which case the CMA should select that which is least onerous; or

(2) where the costs resulting from the remedy outweigh the benefits which it brings.

77. In the present case, there is no suggestion of (2). And as regards (1), the reason the CMA rejected the ADP was because it concluded that it would not be an effective remedy. Unless that conclusion is overturned, questions of proportionality therefore do not arise.

78. Accordingly, the real thrust of Ecolab's complaint under Ground 2 is that it was irrational for the CMA to reject the ADP on the basis that it would not be an effective remedy. We turn to address this criticism.

79. The objective in seeking an effective divestiture remedy is to establish a competitor that will remove the loss of competition resulting from the Merger, i.e. from one of the merging parties. The ADP put forward by Ecolab involved the divestiture by one of the Parties of certain of its customers. To be effective, the ADP critically depended on those "Divestment Customers":

(1) transferring to the purchaser identified by Ecolab; and

(2) remaining with that purchaser.

80. The CMA considered that there was a significant risk as regards both of those factors. In our view, the evidence in the Report clearly entitled it to reach that conclusion. The Report found that switching supplier was seen by customers as high risk: para 7.50; that these were products (and services) for which price was not the major factor in choosing supplier: para 17 above. The Report records the views expressed to the CMA by several customers: paras 10.131-10.139. Although the ADP involved covering the customers' costs of

switching, there was no way that Ecolab could oblige the Divestment Customers to move to the purchaser chosen by Ecolab as opposed, for example, to moving to Diversey or Christeyns. The Report noted that for those customers who had contracts, those contracts typically had a change of control clause which enabled the customer to terminate the contract in the event that the Parties sought to move it to a new supplier; whereas for those customers without contracts, who accounted for a significant part of the Parties' remedy package, Ecolab could only seek to obtain each customer's agreement to move to the purchaser of the divestment package and fund incentives for them to do so. Although the ADP was expressed in terms of the "transfer" of its Divestment Customers to a "purchaser", these expressions disguise the fact that there could be no assurance that those customers would transfer to the party entering into such an agreement with Ecolab. As the Report stated at para 10.166:

> "The evidence from customers as set out in paragraphs 10.131 to 10.139 above is clear and conclusive on this point. All the large customers we spoke to would not welcome a transfer of the kind proposed in the Alternative Divestiture Proposal, and would, at the point of being forced to move, assess their options."

81. Further, at para 10.190, the CMA noted that both Ecolab and Holchem had trusted reputations and a long-standing UK presence, and considered that a supplier lacking those attributes would struggle to convince customers that it should become their new supplier and generally to compete sufficiently effectively to address the SLC. The Report continued, at para 10.191:

> "Ecolab told us that customers can, and do, test suppliers' reliability rather than rely on reputation. We agree with this characterisation of competitive conditions. However, given the costs, time and risk transferring imposes on customers set out in paragraphs 10.131 to 10.139, customers are more likely to test trusted companies with long-standing UK presence."

We consider that these were manifestly conclusions which the CMA could reasonably reach on the evidence. Although Mr Kennelly submitted that there was no evidence supporting the preference for suppliers with a "long-standing" presence in the UK, in fact when discussing the recent entry into the UK market of Kersia, a large supplier overseas, the Report found that Kersia was predicting very modest sales targets in its first three years to 2022 (paras 8.38-8.40) and that only a minority of even the large customers had heard of it (para 8.42).

82. We note that the Report also expressed concern about the risk that the Divestment Customers may choose not to transfer away to a new supplier at all (e.g. para 10.169). That is mistaken, since the ADP involved an undertaking not to supply a Divestment Customer with the products of the transferring Party for a specified period. Unsurprisingly, Mr Kennelly emphasised this error, which is repeated in a number of places in the Report. However, we do not regard this mistake as material since it does not undermine the basic shortcoming in the ADP highlighted by the CMA: that there could be no confidence that the Divestment Customers would transfer to the purchaser of the divestment portfolio and thus create a new, fourth significant supplier in the UK. The fact that some might do so was manifestly insufficient. For the remedy to be effective, the great majority of the Divestment Customers would have to transfer to the selected purchaser to establish it as a new, fourth large supplier.

83. Moreover, as Mr Williams pointed out, a divestiture remedy adopted by the CMA constitutes a one-off intervention. If the risk involved in that remedy materialised, there would be nothing that the CMA could do about it and the SLC would then persist. That of course is one reason why the CMA, in our view entirely reasonably, does not favour a remedy for which it cannot feel a high degree of confidence of success. This point was indeed expressly relied on in the Report: see the final sentence of para 10.232, quoted at para 43 above.

84. Further, the CMA was concerned about the transitional period involved in the ADP. During that period, Divestment Customers could continue to purchase the products of the transferring Party which would be supplied through the purchaser of the divestment package under a transitional supply agreement. This element of the ADP was seen as important in ensuring continuity of supply over a period during which the customers could trial and test the products of the purchaser, a process which virtually all customers regarded as essential before switching supply. The ADP, as put forward by the Parties, envisaged that such a transitional period would last a year. The two purchasers identified by the Parties and with whom Ecolab engaged in preliminary discussions, in their provisional, non-binding proposals disclosed to the CMA suggested that this period should be, in the one case, for "up to" three years, and in the other case for 12-18 months. Even if it were limited to a year, that meant that for a

significant period after the merger, the merged entity would continue to have an extensive role in supplying Divestment Customers. As a result, the SLC would not be remedied quickly.

85. In addition, the Report noted that there was a lack of certainty as to the scope of the ADP on the important issue of who would be included as Divestment Customers. As set out at para 10.111 of the Report, the proposed composition of this divestment portfolio underwent a series of revisions. In particular, when the CMA requested details of the customers who would be included, the scale of customer revenue involved in the divestment was reduced [by about a third from what had been stated in the original proposal] [✂]. Subsequently, it was increased, but to less than originally stated, by the introduction of [a number of further customers] [✂]. However, the two purchasers with whom Ecolab was in discussion set out their non-binding proposals to acquire the divestment package on the basis that it comprised customers generating the higher revenue figure originally mentioned. Although we recognise, as Ecolab submitted, that this may well have been resolved in further negotiations, we think that this lack of clarity on the evidence as at the end of September 2019 was a matter which the CMA was entitled to take into account.

86. There were other concerns about the ADP set out in the Report, concerning for example the proposed transfer of staff, but we think it is unnecessary to go into them to determine the grounds raised by the Application.

87. The Report stated that the CMA assessed the effectiveness of the ADP in accordance with CMA87: para 10.140. That guidance explains that when the merging parties are putting forward a remedy, it is for them to show that their proposal will be effective. Hence para 4.57 of CMA87 states:

> "The CMA will consider remedy options proposed by the merger parties and others, in addition to their own proposals. Parties will be expected to demonstrate that their proposed remedy options will address effectively the provisional SLC and the resulting adverse effects."

See also para 5.7, quoted at para 55 above.

88. As noted above, CMA87 makes clear, under heading of "Effectiveness", the importance of the remedy having an acceptable risk profile. We think that para 3.5(d) bears repetition:

> "The effect of any remedy is always likely to be uncertain to some degree. In evaluating the effectiveness of remedies, the CMA will seek remedies that have a high degree of certainty of achieving their intended effect. Customers or suppliers of merger parties should not bear significant risks that remedies will not have the requisite impact on the SLC or its adverse effects."

89. It is precisely that lack of such high degree of certainty which the CMA found as regards the ADP, for the reasons set out above, and we consider that they were fully entitled to do so on the evidence.

90. Further, CMA87 at para 3.5(b) explains that in applying the criterion of effectiveness, the CMA considers that remedies which act quickly in addressing competitive concerns are preferable to remedies that are expected to have an effect only in the long term. The transitional period involved in the ADP, as discussed above, had this very shortcoming.

91. At paras 5.12 to 5.14 (quoted in full at para 55 above), the CMA explained why it generally preferred the divestiture of an existing business, which can compete on a stand-alone basis, to the divestiture of part of a business, because of the risks that are likely to surround the latter. Noting the potential difficulty of defining the assets that were to be divested from an existing business, para 5.14 significantly concludes:

> "Where a package of assets is proposed for divestiture, the CMA will require the merger parties to specify the composition and operation of the package in detail."

In the present case, the ADP did not even involve a package of "assets", since the Divestment Customers were not controlled (let alone owned) by the transferring Party: the lack of assurance that those customers would in fact move to, and remain with, the potential purchaser was one of the most significant problems with the ADP.

92. Altogether, we find that rejection of the ADP against the criterion of effectiveness and failing to achieve "as comprehensive solution as is reasonable

and practicable" to the SLC was a decision well within the CMA's margin of appreciation on the evidence before it. In our judgment, it clearly cannot be condemned as "manifestly without reasonable foundation", applying the standard set out in the *BAA* case.

93. We should add that we did not obtain assistance from the previous merger decision of the CMA in *Rentokil Initial and Cannon Hygiene* (25 January 2019) ("*Rentokil/Cannon*"), on which Ecolab sought to rely. It is true that in that case the CMA accepted as the remedy a divestiture package which involved the divestiture of the contracts of certain customers of Cannon UK Ltd, and related assets. However, merger decisions of the CMA do not constitute precedents and it is axiomatic that each case turns on its own facts and that the characteristics of one market may be very different from those of another. Consistency is achieved by the CMA applying its statutory guidance in CMA87. Moreover, we note that there are a number of significant distinctions between that case and the present case:

(1) in *Rentokil/Cannon*, the SLC that was found concerned specifically the provision of waste disposal services to national and multi-regional customers, not in the market generally, and it was the contracts with all those customers ("the SLC Contracts") which were to be divested;

(2) there, the relevant customers were all under contract, and the vast majority of those contracts were on Cannon's standard terms, which did not include a change of control or novation clause: *Rentokil/Cannon*, para 11.67. As the Report here noted, that was a contrast with the present case: para. 10.185, n 276.

(3) there, the parties proposed that the divestment could be structured as a sale of all the shares in Cannon UK Ltd after assets and liabilities not related to the SLC Contracts had been transferred out. The sale of the 'Cannon' and 'Cannon Hygiene' brands were also included. The CMA assessed the remedy on that basis, which therefore involved the transfer of a legal entity: paras 11.30-11.31.

Ground 3: Failure to take reasonable steps to investigate whether doubts as to the effectiveness of the ADP could be addressed

94. In the alternative to Ground 2, if the CMA's concerns about the ADP on the evidence as it stood cannot be condemned as unreasonable, Ecolab submitted that the CMA failed to take reasonable steps to investigate whether those concerns could be addressed. In particular, given that the Parties revised and expanded upon the ADP in the latter stage of the inquiry and identified two major companies who were interested in purchasing the divestiture package which Ecolab put forward, Ecolab submitted that the CMA should have engaged in further consultation with customers and with those two potential purchasers. Insofar as the CMA did not have time to take those steps within the statutory timetable, Ecolab submits that the CMA should have extended the deadline for its report pursuant to EA s. 39(3).

95. In order to assess this ground, it is important to have in mind the sequence of events. The Phase 2 reference was made on 24 April 2019, which meant that the 24 weeks deadline pursuant to s 39(1) EA for publication of the final report was 8 October 2019.

96. On 6 August 2019, the CMA published its Remedies Notice indicating that it was considering ordering the divestiture of Holchem. On 16 August 2019, the Parties responded putting forward their first version of the ADP, involving the divestiture of certain customers of one of the Parties. That proposal did not identify any potential purchasers. The CMA, following its usual procedure, also began the process of consultation about potential remedies with affected third parties. As explained in CMA87, at para 4.56:

> "The CMA's notice of possible remedies is a starting point for discussion with the merger parties and other parties, including customers, competitors and any relevant sectoral regulator."

97. On Saturday, 17 August 2019, Ecolab's solicitors wrote to the CMA protesting that the CMA had set up calls with customers for the following week to solicit their views on the CMA's proposed remedy and urged that this should be postponed until after the Remedies Hearing to be held with the Parties on 27

August. The letter said that the Parties in any event resisted disclosure of the ADP to customers or other third parties:

> "If rumours spread in the market prior to the Parties' having had the opportunity to share a balanced message with employees and customers to reassure them that their interests were being prioritized, there would be a significant risk of employees leaving the company or customers switching to a different supplier as a result of the uncertainty. This prospect could severely damage the Parties' businesses."

98. The CMA replied on 20 August 2019, stating that it was not appropriate to pause or delay its discussions with third parties, which normally takes place in parallel with further consideration of whether or not the merger gives rise to an SLC. The letter stated:

> "… we note your concern about disclosure of your alternative remedy. We consider it important that we can publish a non-confidential version of your proposal as soon as possible and have contacted you separately on this matter. However, we also believe that we are able to discuss potential remedies with third parties and still manage commercial sensitivities. Indeed, we can discuss standard merger divestment options without harming the legitimate business interests of the parties. Although we understand your concern about giving a 'balanced message' to employees [of the transferring Party], we nonetheless view consultation on potential remedies as an important step in our consideration of remedies and you have not indicated to us when you might communicate with [the transferring Party's] employees."

99. The CMA received a brief written response to its inquiries from one major customer on 14 August 2019. It conducted consultation with three other customers of the Parties on 20-21 August. The Remedies Hearing with the Parties duly took place on 27 August. In the course of that hearing, the Parties disclosed the identities of the two potential purchasers with whom they had commenced discussions. They did so only after emphasising that those discussions were "at a very early stage" and that they were concerned that the names of the two companies were kept confidential. The Parties' solicitor stated:

> "We would completely understand that at a future date, you may have to disclose who the actual purchaser will be, but at least for the next two weeks if that can be completely confidential."

100. Later that day, the Parties' solicitors sent a non-confidential summary of its ADP (referred to as "the Response Summary"). This set out in detail the proposal, without indicating the identity of the proposed Divestment Customers

or of the potential purchasers. The summary stated (at para 3.4) that the objective was that the purchaser "would quickly be established as a strong fourth player" in the UK F&B market. The solicitors' covering letter said:

> "… as regards the CMA's need to consult, the Response Summary sets out Ecolab's proposed remedy in sufficient detail for the CMA to be able to consult with third parties. The Response Summary allows the CMA to consult on whether a partial divestment carved out from one of the Parties' UK businesses, together with an extensive transitional agreement to support customers and ensure a smooth transition of its business is a viable remedy. Any issues which the CMA may wish to explore with third parties in relation to the feasibility of such a remedy do not, to us, appear to relate to the precise scope or identity of the customers who are being carved out, but rather to the feasibility of a carve-out *per se*. While we understand that the CMA may eventually envision the need to consult on the identity of the divesting party, it will have further opportunities later in the process to further consult on the precise remedy and purchaser being proposed."

101. On 4 September 2019, the CMA set up a second round of consultation with a number of customers, supplying them with this Response Summary; and by 16 September it either had telephone discussions or received brief written responses from six customers to its questions regarding the ADP as so summarised. That included a further response from a large customer that had responded in late August.

102. On 10 September, the CMA provided the Parties with its Remedies Working Paper. On 17 September, the Parties submitted to the CMA their Response (the "Remedies Response"), which annexed their revised ADP. The revised ADP:

(1) provided for the divestiture of a greater number of the transferring Party's UK customers;

(2) stated (at para 1.6):

> "In order to facilitate the transfer of customers to the Purchaser,… Ecolab will ensure that the agreement with the Purchaser includes financial incentives so there is no cost of switching for the customers and, in any event, that customers are incentivised to switch."

The Parties said in the Remedies Response that Ecolab had made progress in its discussions with the two potential purchasers identified at the Remedies Hearing, but the identities of those purchasers were still confidential.

103. The Remedies Response and revised ADP also included a fall-back alternative divestiture proposal that would apply in the event that a binding agreement with a suitable purchaser had not been entered into within a defined period. That alternative is addressed under Ground 4 below.

104. It is in the light of the revised ADP that Ecolab contends that the CMA failed to conduct reasonable inquiries.

105. However, as regards consultation with the two potential purchasers, the CMA did discuss the revised ADP with both of them. The CMA held a hearing with Purchaser A [✂] on 24 September 2019 and the same day had a telephone consultation with Purchaser B [✂]. Purchaser A, through its parent company, had submitted a detailed "non-binding expression of interest" on 22 September and Purchaser B sent a "non-binding proposal" to Ecolab on 1 October. Both of those proposals, along with the answers of the two purchasers to the CMA's questions are considered and commented upon in the Report: paras 10.202 to 10.209. The CMA did not dispute or disbelieve the capability of both potential purchasers. But it noted that both proposals involved potential extensive transitional periods which, as set out above, was one reason why the CMA considered the ADP did not satisfy the requirements of effectiveness. Further, the Report noted, in regard to each of the two proposals, that it "provides for no legal mechanism for contracts or customers to be transferred": paras 10.206, 10.209. The impossibility of any such mechanism was highly pertinent to the risk that the remedy would not be effective. Indeed, although Purchaser B told the CMA on 24 September 2019 that it "would expect" to transfer the majority of the divested customers to its products, it said that it "had insufficient information to provide a precise estimate of the likely number of customers that would successfully transfer. It acknowledges that this is a risk." In our view, the CMA made a reasonable assessment of the evidence of both potential purchasers.

106. As regards customers, Ecolab strongly criticised the CMA for failing to conduct further consultation with them on the revised ADP. We consider that criticism is misplaced. It was notable that the responses from customers before and after the original ADP were not materially different. While the revised ADP added

a commitment to cover the customers' cost of switching, this remained vague. Even if it were to cover all the expenditure involved, including the significant customer time of trialling the new supplier's products,[4] there was no suggestion that Ecolab would be offering an indemnity against what customers had expressed as a particular concern about switching supplier: the risk of a food hygiene incident which would cause significant reputational damage. The Report made clear that this concern about moving supplier was a particular feature of this market: see para 7.37 (quoted at para 16 above). Ecolab's submission that this concern should have been dismissed because there was no evidence that either Purchaser A or Purchaser B had ever been involved in a food hygiene incident is, in our view, divorced from reality.

107. The Parties sought to emphasise that the identity of either Purchaser A or Purchaser B as a large, international supplier would give the Divestment Customers the confidence to switch to that supplier when forced to leave the transferring Party. However, the Parties did not permit the CMA to disclose those potential purchasers' identity: this was very deliberately omitted from the Response Summary prepared for the purpose of consulting customers on 27 August. Even as late as 17 September, three weeks before the statutory deadline for publication of the report, the Parties required that the potential purchasers' identities be kept confidential. This was of course well beyond the two weeks envisaged by the Parties' solicitor at the Remedies Hearing. Although Mr Kennelly disavowed this suggestion, the position of Ecolab, as it appeared to us from the submissions and the evidence, was that it wished for time to complete negotiations on final terms with either Purchaser A or Purchaser B, at which point the CMA should have gone out to re-consult customers on a concrete proposal for divestiture to a specified purchaser. Since that clearly could not have been achieved so as to enable the CMA to make a decision and produce a report by 8 October, the CMA should have extended the deadline by a further eight weeks under s. 39(3) EA.

[4] The Remedies Response said, at para 2.20, that "[t]he agreement between Ecolab and the purchaser *could* include any financial reimbursement of the time and costs for the customers, …" [our emphasis].

108. In our judgment, that misunderstands both the process of consultation in which the CMA seeks to engage and the basis for an extension of the statutory deadline. The Parties, with highly experienced legal advisors, were well aware of the 24 weeks statutory time-limit prescribed by s. 39(1) EA. If they leave the submission of a remedy right up against the deadline, or prevent the CMA from consulting in due time on what they consider are crucial aspects of the remedy, they are not entitled to expect the CMA to invoke "special reasons" under s 39(3) EA and extend the period for publication of the report. Over and above the time period for a report specified in s 39 EA, the CMA is under a fundamental duty of expedition under s 103 EA: para 50 above. This was not, in the context of the many mergers which the CMA has to assess under the statutory regime, a complex market nor an inquiry that involved elaborate analyses. Merging parties are not entitled to rely on "special reasons" because they want more time to complete their negotiations with third parties, on which they then wish the CMA to conduct further consultation; or, as Mr Williams put it, "to further develop their proposals" and then "have another opportunity to convince the CMA that an alternative remedies package is capable of addressing the CMA's concerns." The CMA was able to decide in due time what it considered was an effective remedy; and it was entitled to conclude that it should proceed to reach its final conclusions and publish its report in accordance with s. 39(1) EA.

109. Moreover, on the basis of the evidence it had gathered, the CMA was within the bounds of its reasonable judgement in concluding that neither of the proposals from the two potential purchasers had a realistic prospect of meeting the basic deficiencies in the effectiveness of the ADP. Both proposals involved a long transitional period. And the risk that the Divestment Customers would choose to switch instead to one of the two large suppliers that were well-known in the UK remained. Mr Kennelly sought to rely on the statement in the Remedies Response, at para 2.20, that:

> "Ecolab would … offer to provide the CMA with evidence that Divestment customers have agreed to transfer to the purchaser before seeking purchaser approval."

On Ecolab's own case, that could be canvassed only after the purchaser was identified. Aside from the consequent delay, the CMA was entitled as a matter of reasonable judgement to determine that there was no practical likelihood of this being achieved. As the Report stated, at para 10.198:

> "We do not consider that either the Parties or any potential purchaser can provide the CMA with assurance that they could sufficiently mitigate this risk because it is inherent in the design of the remedy."[5]

110. In any inquiry, it is no doubt possible to suggest further investigations or additional consultation which could usefully be carried out. However, s. 38(3) EA provides that the CMA "shall carry out such investigations as it considers appropriate." As stated in *BAA*, that is an evaluative assessment and the CMA has "a wide margin of appreciation" in deciding to what extent it is necessary to carry out investigations to put itself in a position properly to decide the statutory questions: para 58 above. When the CMA was able reasonably to reach a conclusion on a remedy that was effective and comprehensive, we consider that it was well within that margin in deciding not to carry out further consultation on the Parties' proposed alternative, especially when there was no reason to suppose that this would overcome the shortcomings the CMA had identified in the ADP and when such consultation would almost inevitably have required the CMA to extend the statutory period for delivery of its report.

111. Finally, under this head, we should refer to ss. 41-41A EA which provide for a 12 weeks period following publication of the report in which the CMA shall take action to remedy the SLC and any resulting adverse effects. That does not provide for a further period in which the CMA can consider what remedy is appropriate. It is clear from s. 38 EA that in the report published pursuant to that provision the CMA must address the statutory questions in s. 35, including specification of the remedy: s 35(3). The object of s. 41 is, in essence, supplementary: it is addressing the *imposition* of the remedy, and thus must be consistent with the decision as to remedy in the report, unless there has been a subsequent material change of circumstances: s. 41(3). Hence, in the present

[5] While that risk was expressed to include the possibility also that a customer would choose to move back to Ecolab, which as noted above mistakenly failed to recognise that this would be precluded under the ADP, that does not undermine the CMA's basic objection.

case, where the remedy set out in the Report is the sale of Holchem Laboratories to a purchaser approved by the CMA, the period under ss. 41-41A enables the drafting of appropriate undertakings or the making of a final order, giving effect to the details of the divestiture process set out in para 10.95 of the Report. Accordingly, this stage follows the CMA's decision in its report as to what remedy should be adopted and it has no relevance to the present application.

Ground 4: Irrational rejection of Ecolab's further modification of its proposed remedy

112. This ground is based on the fall-back alternative divestiture proposal ("FADP") that was put forward by the Parties in their response to the Remedies Working Paper on 17 September 2019.

113. The details of the FADP are confidential. But it was a remedy that would apply in the event that Ecolab had not entered into a binding agreement with a suitable purchaser for the Divestment Customers within a defined period. [✂]. Ecolab contends that in the light of that fallback, the CMA's rejection of the ADP was irrational.

114. However, as explained above, the CMA did not conclude that the ADP failed to provide an effective and comprehensive remedy because it was concerned that a purchaser for the Divestment Customers could not be found. The problem was not a doubt as to whether either of the two potential purchasers identified by the Parties, with both of whom the CMA held discussions, would in fact proceed to conclude such an agreement with Ecolab.

115. Assuming that Ecolab did reach agreement with one of the two potential purchasers it had identified, and that the ADP was implemented, the problem was the significant shortcomings in the ADP itself. It was those shortcomings which led the CMA to conclude that it was not an effective and comprehensive remedy, as explained above.

116. Accordingly, the FADP did not address or mitigate any of the principal objections to the ADP. It therefore merited no further consideration by the

CMA, and it does not affect the rationality of the CMA's assessment of the ADP. In those circumstances, it is unsurprising that the FADP receives only brief mention in the Report, at para 10.110.

F. CONCLUSION

117. For the reasons set out above, we unanimously dismiss all four grounds of the Application.

The Honourable Mr Justice Roth Professor Michael Waterson Sir Iain McMillan CBE DL
President

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

Date: 21 April 2020