Ecolab Inc v. Competition and Markets Authority: Judicial Review of UK Merger Decisions

April 28, 2020

On 21 April 2020, the Competition Appeals Tribunal (the "**CAT**") handed down its judgment (the "**Judgment**") rejecting the appeal of Ecolab Inc. ("**Ecolab**"), a global company incorporated in the US, against the CMA's merger decision on Ecolab's acquisition of The Holchem Group Ltd ("**Holchem**"), a UK-based target. The judgment means that Ecolab must now continue with the sale of the majority of Holchem to an approved purchaser without delay.

The case reiterates the burden on merging parties to devise an *effective and comprehensive* remedies package; and the importance of respecting the CMA's timing constraints. Merging parties should also not expect further consultation by devising alternative remedies packages for examination.

The CMA's merger decision

On 30 November 2018, Ecolab acquired Holchem, notifying the CMA of the completed transaction on 18 December 2018. The CMA issued its final report on 7 October 2019, determining that the transaction had resulted or may be expected to result in a substantial lessening of competition ("**SLC**") in the relevant market of the supply of formulated cleaning chemicals and ancillary services to food and beverage customers in the UK. As a result, the CMA imposed a remedy requiring Ecolab to divest its subsidiary, Holchem Laboratories to an approved purchaser.

During remedy discussions, the CMA rejected two further proposals submitted by Ecolab: (i) an alternative divestiture proposal concerning the divestiture of a portfolio of customers of one of the parties to an existing supplier that had its own food and beverage range and which would convert those customers to its own cleaning products during a reasonable transition period; and (ii) a 'fallback' alternative divestiture proposal, the details of which remain confidential but which would have been applied had Ecolab not entered into a binding agreement with a suitable purchaser for the intended transferring customers.

Ecolab's application for judicial review

On 1 November 2019, Ecolab applied to the CAT for a judicial review of the CMA's final report, citing the following grounds:

1. Ground 1: The CMA's SLC decision was irrational and unsupported by the evidence;[1]

2. Ground 2: Rejection of the alternative divestiture proposal was irrational, disproportionate and based on an error of law;

3. Ground 3: To the extent that the CMA had doubts about the effectiveness of the alternative divestiture proposal, it failed to take reasonable steps to determine whether those doubts could have been addressed;

4. Ground 4: In any event, the rejection of the alternative divestiture proposal on the basis that it would be ineffective was irrational in view of the subsequent modification proposed by Ecolab.

The CAT's judgment

Section 120, Enterprise Act 2002 enables any person aggrieved of a merger decision of the CMA to apply to the CAT for a review of that decision. The CAT will not engage in an assessment of the merits. Instead, its standard of review is that of judicial review, meaning that examination is limited to matters of legality, fairness and rationality with quashing and remittal as possible remedies.

In rejecting all of Ecolab's grounds of appeal, the CAT emphasised the high burden that any applicant would have to discharge when seeking to essentially challenge the rationality of the CMA's decision.

Ground 1: The CMA's SLC decision was irrational and unsupported by the evidence

Ecolab asserted that it was irrational for the CMA to identify an SLC relating to the market overall with the CMA's own evidence demonstrating that there could be no SLC affecting international or small UK-only customers. Whilst noting the opposing views on competitive constraints, the CAT focused rejection of this ground on *"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"*[2]. Importantly, the CAT emphasised that the assessment of whether the transaction would result in a

[1] Ecolab did not challenge the CMA's findings on market definition, only including in its first ground of appeal a challenge to the CMA's conclusion that suppliers of formulated food and beverage cleaning chemicals are subject to a limited constraint from customers' ability to buy unformulated chemicals. However, Ecolab did not pursue this aspect of the first ground of appeal further (Judgment, paragraph 12).
[2] Paragraph 69, Judgment.

realistic prospect of a substantial lessening of competition did not require the transaction to remove *all* competition (or leave only insignificant competition).

Ground 2: Rejection of the alternative divestiture proposal was irrational, disproportionate and based on an error of law

In dismissing this ground of appeal, the CAT clarified that the CMA's duty is *"encapsulated in the concept of an 'effective remedy'"*.[3] This limits the CMA's assessment to determining whether the remedy proposed by the merging parties will ensure that the SLC either does not continue or will not occur. In this case, the CMA was right to base its conclusions on evidence that for the remedy to be effective, there needed to exist a strong likelihood that the majority of the customers envisaged to be transferred to the selected purchaser would actually transfer. Furthermore, the CAT emphasised the high degree of certainty required concerning the effectiveness of the remedies, expressed in the CMA's merger remedies guidance as follows:

"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."[4]

Ground 3: To the extent that the CMA had doubts about the effectiveness of the alternative divestiture proposal, it failed to take reasonable steps to determine whether those doubts could have been addressed

Ecolab contended that the CMA failed to engage in further consultation with customers and two potential purchasers identified in the divestiture package. In examining this ground, the CAT set out the stages leading up to the imposition of the final remedy package, concluding that the CMA did not commit any procedural errors in its review. The CAT concluded that:

- The "special reasons" open to the CMA under Section 39(3), Enterprise Act 2002 to extend the period for publication of its report will only be invoked in exceptional circumstances.

- In any event, the CMA is subject to an ongoing duty of expedition under Section 103, Enterprise Act 2002.

- The CMA enjoys a wide margin of appreciation in determining whether further investigation is required: if the CMA is able to reach a conclusion on a remedy that is effective and comprehensive, it need not carry out further consultation.

[3] Paragraph 75, Judgment.
[4] Paragraph 3.5d), *Merger remedies (CMA87)*, December 2018.

- The 12-week period following publication of the CMA's final report provides for action to remedy the SLC and any resulting adverse effects. It does not provide for a further period for the CMA to consider what remedy is appropriate.

Ground 4: In any event, the rejection of the alternative divestiture proposal on the basis that it would be ineffective was irrational in view of the subsequent modification proposed by Ecolab

The CAT contended that the CMA was correct not to engage in review of Ecolab's "fall-back" alternative divestiture proposal in light of its conclusions concerning the first alternative remedies package.

Comment

The Judgment suggests some key takeaways for merging parties in (i) framing remedies packages (together with those discussed under Ground 3 above); and (ii) constructing any subsequent appeal of the CMA's final decision:

- The importance of developing an effective and comprehensive remedies package which responds adequately to the CMA's views on the SLC, even if the merging parties disagree with the CMA's underlying competition assessment.

- Devising a remedies package on the understanding that it constitutes a 'one-off intervention' for the CMA, meaning that if any risks involved in the remedy persist, the CMA would not later be able to prevent the SLC from persisting. Therefore, the remedy must provide a high degree of certainty that it will address the CMA's competition concerns.

- In light of the specific nature of the judicial review process, parties should (i) base their application for review on clear procedural errors; (ii) avoid raising substantive arguments liable to divert the tribunal's attention from the judicial review process; and (iii) engage in a thorough assessment of their own interaction with the CMA to ensure they have adequately respected the CMA's ongoing duty of expedition under Section 103, Enterprise Act 2002.

  If you have questions please contact Matthew Levitt and Dina Jubrail.