

Competition & Regulatory Newsletter

2 - 15 October 2019 / Issue 21

Quick Links

- [Main article](#)
- [Other developments](#)
 - [Merger control](#)
 - [Antitrust](#)
 - [General competition](#)

CMA blocks Ecolab's completed acquisition of Holchem

On 7 October 2019 the UK Competition and Markets Authority (CMA) announced its [decision](#) to block Ecolab Inc.'s completed acquisition of The Holchem Group Limited, and to require Ecolab to sell Holchem Laboratories Limited.

Background

Ecolab and Holchem are two of the largest suppliers of formulated cleaning chemicals and related ancillary services to food and drinks manufacturers in the UK. Ecolab completed its acquisition of Holchem on 30 November 2018.

In the UK, notification of a merger is voluntary in that there is no requirement to notify the CMA, even when the transaction meets the CMA's jurisdictional thresholds. The CMA can, however, investigate on its own initiative. In this case, the parties opted not to make a voluntary notification to the CMA, but the CMA determined that the jurisdictional thresholds were met on the basis of the share of supply test.

On 27 December 2018 the CMA served an [initial enforcement order](#) on Ecolab, requiring the company to refrain from integrating Holchem into its business pending completion of the CMA's review.

On 10 April 2019 the CMA [announced](#) its intention to refer the acquisition for a Phase 2 investigation unless Ecolab offered suitable undertakings in lieu. In its initial Phase 1 investigation, the CMA had found the parties to be two of the largest suppliers of cleaning chemicals to businesses manufacturing food and drink products in the UK. The CMA provisionally found that the businesses would face limited competition after the merger. This lack of competition could adversely affect businesses manufacturing food and drink products in the UK, by driving up prices and reducing the quality of products and services. Ecolab offered no undertakings in lieu, and so, on 24 April 2019 the CMA [referred](#) the merger for a Phase 2 investigation.

CMA's final report

The CMA published the [final report](#) on its Phase 2 investigation on 7 October 2019. The CMA found that:

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[Main article](#)[Other developments](#)[Merger control](#)[Antitrust](#)[General competition](#)

The merger combined the largest supplier, Holchem, with another large supplier, Ecolab, creating a merged entity with 30-40 per cent of the market for the supply of formulated cleaning products and ancillary services to food and drink customers in the UK (making it around twice the size of the next competitor).

- Data showed that Holchem is the strongest competitive constraint faced by Ecolab, and Ecolab is one of three main competitive constraints faced by Holchem. This was corroborated by evidence from the parties' customers, as well as the parties' internal documents.
- Whilst two significant competitors would remain, smaller suppliers and other specialist suppliers would only provide a limited constraint, and only for some customers. The CMA saw the merger as a '4-to-3' concentration.
- Unformulated cleaning products (i.e. basic cleaning materials unmixed with other chemicals and not found to be in the same relevant product market) would only offer a weak constraint on the merged entity.
- Given customers' low switching rates and other barriers to entry and expansion, expansion by smaller competitors would not be sufficiently likely or timely to prevent the substantial lessening of competition.

In terms of remedies, the CMA considered that only the sale of the entirety of Holchem or of Holchem Laboratories Limited would address its concerns. The CMA considered that a sale of Holchem Laboratories is the smaller divestiture package and therefore the more proportionate remedy - Ecolab is therefore required to sell Holchem Laboratories subject to the CMA's approval of the purchaser. The CMA rejected Ecolab's proposed remedy - the transfer of a portfolio of customers - on the basis that the evidence from customers strongly suggested that they would not welcome such a transfer, and the CMA had no powers to force customers to remain with the transferee.

Reaction to the CMA's decision

Ecolab Inc. [said](#) it "*strongly disagrees*" with the CMA's decision. Chief Executive Douglas Baker said "*We strongly believe that the UK market would remain highly competitive following the merger and are disappointed with the CMA's findings. (...) We are reviewing the full report provided by the CMA in detail and will carefully consider our options and next steps.*" Ecolab's share price fell 1.8 per cent to \$191.11 in the trading day following the CMA's decision.

Holchem [said](#) "*Although we are disappointed with this decision, it does not affect the service to our customers. Our priority, as Holchem, is to continue to serve as your hygiene partner and expand our ability to bring you the latest technologies and the highest food safety standards to support your operations.*"

Looking forward, Ecolab and/or Holchem could apply to the Competition Appeal Tribunal (CAT) for a review of the CMA's decision within four weeks of the decision being notified to them. The CAT, in conducting a review of a CMA merger decision, applies the principles as would be applied by a court on an application for judicial review. If Ecolab and/or Holchem's protests find no favour with the CAT, they could then appeal the CAT's decision (on points of law only) to the Court of Appeal.

Main article
Other developments
 Merger control
 Antitrust
 General competition

Other developments

Merger control

European Commission opens Phase 2 investigation into Boeing/Embraer

On 4 October 2019 the European Commission **announced** that it has opened an in-depth Phase 2 investigation under the EU Merger Regulation into the proposed creation of two joint ventures by aircraft manufacturers Boeing and Embraer. The Commission is concerned about the removal of Embraer as the third largest global competitor in the already highly concentrated commercial aircraft industry.

The Commission is in particular concerned that the proposed transaction may eliminate a small but important competitive force in the concentrated overall single-aisle market where Embraer provides a price constraint on Boeing and Airbus as the market leaders. Furthermore, it found that potential entrants from China, Japan and Russia seem to face high barriers to entry and expansion and may be unable to replicate the competitive constraint currently exerted by Embraer. The Commission is therefore concerned that the transaction may result in higher prices and less choice.

Margrethe Vestager, the EU Competition Commissioner **said** in a statement: “*We want to make sure that mergers in commercial aircraft do not significantly reduce effective competition on prices and product development.*”

Antitrust

Shanxi regulator fines five premixed concrete companies a total of RMB 250,000 for price-fixing

On 8 October 2019 the Shanxi provincial branch of the State Administration for Market Regulation (the Shanxi AMR) **issued** five penalty decisions against five pre-mixed concrete companies for price-fixing. The companies are **Yongji Xinli Concrete**, **Yongji Baobao Concrete**, **Yongji Yida Concrete**, **Yongji Jinxin Concrete**, and **Yongji Sanxin Concrete**.

The five companies entered into an agreement on 31 October 2018 to increase the sales price of premixed concrete. Their reasons for doing so included increased costs due to the implementation of environmental governance and substantial increase in the cost of raw materials. The Shanxi AMR started its investigation in May 2019 and issued the penalty decisions in September 2019. The regulator fined each company RMB 50,000 (approximately £5,600), despite the fact that the agreement had not been implemented yet.

The Shanxi AMR found that the relevant product market is the supply of premixed concrete, a material made of cement, sand, stones and chemical additives, and which is not easily substitutable with other construction materials due to factors including functionality and costs. The relevant geographic market is the area of Yongji city, which is where the companies and downstream users are concentrated.

This is an interesting case because it concerned a price-fixing agreement that had not actually been implemented. Although the fine was nominal, it sends a strong message that companies will be found liable for price-fixing conduct even if there is limited anti-competitive effect.

- [Main article](#)
- [Other developments](#)
 - [Merger control](#)
 - [Antitrust](#)
 - [General competition](#)

General competition

FCA publishes interim report on pricing of home and motor insurance

On 4 October 2019 the Financial Conduct Authority (FCA) published the [interim report](#) of its market study into the pricing of home and motor insurance. This report is part of a wider package of work the FCA is undertaking in this sector. The interim report sets out the FCA's concerns about how pricing in these markets leads to consumers who do not switch or negotiate with their provider, and as a result, pay high prices for their insurance.

The FCA found that most firms, when setting a price, include their expectations of whether a customer will switch or pay an increased price. The FCA found that insurers often sell policies at a discount to new customers and increase premiums when customers renew, targeting increases at those less likely to switch. Another of the FCA's interim findings is that firms engage in a range of practices to raise barriers to switching. Christopher Woolard, Executive Director of Strategy and Competition at the FCA, [said](#) *"This market is not working well for all consumers. While a large number of people shop around, many loyal customers are not getting a good deal."*

The FCA claims that, of the circa 6 million policyholders who pay high prices and are not getting a good deal, 1 in 3 consumers who paid high premiums showed at least one characteristic of vulnerability, such as having lower financial capability. For consumers who bought combined contents and building insurance, lower income consumers (below £30,000) pay higher margins than those with higher incomes.

The FCA outlined a number of potential remedies. These mainly include the FCA's continued efforts to ensure firms improve the oversight of their pricing practices. The FCA is also considering measures including prohibiting practices that could discourage switching; banning or restricting practices like raising prices for consumers who renew year on year, or requiring firms to automatically move consumers to cheaper equivalent deals; as well as making firms be clear and transparent in their dealings with customers.

The FCA intends to publish a final report and consultation on remedies in Q1 2020.

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