

COMPLETED ACQUISITION OF THE HOLCHEM GROUP LIMITED BY ECOLAB INC.

Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups¹

Introduction

1. On 24 April 2019, the Competition and Markets Authority (CMA), in exercise of its duty under section 22(1) of the Enterprise Act 2002 (the Act), referred the completed acquisition of The Holchem Group Limited by Ecolab Inc. (the Merger), for further investigation and report by a group of CMA panel members (the Inquiry Group).
2. For the purposes of preventing pre-emptive action, on 24 December 2018, the CMA served an initial enforcement order under section 72(2) of the Act on Ecolab Inc., Ecolab U.S. 2 Inc. and Ecolab (U.K.) Holdings Limited, in relation to the completed acquisition by Ecolab Inc. of The Holchem Group Limited.
3. In its provisional findings on the reference notified to Ecolab Inc. and the Holchem Group Limited (the Parties) on 6 August 2019, the CMA, among other things, provisionally concluded that the Merger has resulted in the creation of a relevant merger situation, and that the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition (SLC) in the supply of formulated cleaning chemicals and ancillary services for food and beverage (F&B) customers in the UK.
4. The CMA's analysis provisionally indicates that this has resulted, or may be expected to result, in adverse effects, for example in the form of lower service levels or higher prices compared to what would otherwise have been the case absent the Merger.
5. This Notice sets out the actions which the CMA considers it might take for the purpose of remedying the SLC and/or any resulting adverse effects identified in the Provisional Findings Report.²

¹ CMA Rules of Procedure for Merger, Market and Special Reference Groups (CMA17, 2014).

² <https://www.gov.uk/cma-cases/ecolab-inc-the-holchem-group-limited>.

6. The CMA invites comments on possible remedies by 13 August 2019.³

Criteria

7. In deciding on a remedy, the CMA shall in particular have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLC and any adverse effects resulting from it.⁴
8. To this end, the CMA will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will select the least costly and intrusive remedy that it considers to be effective.
9. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.⁵

Possible remedies on which views are sought

10. The CMA prefers structural remedies, such as divestiture or prohibition, over behavioural remedies, because:
 - (a) structural remedies are more likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;
 - (b) behavioural remedies are less likely to have an effective impact on the SLC and its resulting adverse effects, and are more likely to create significant costly distortions in market outcomes; and
 - (c) structural remedies rarely require monitoring and enforcement once implemented.⁶
11. At this stage, the CMA has identified one potential structural remedy:
 - (a) Requiring the divestiture of the whole of The Holchem Group Limited, which is in effect, a prohibition of the merger.
12. The CMA's current view is that a structural remedy involving a divestiture of part of Ecolab Inc. is unlikely to be effective at addressing our concerns given that Ecolab Inc.'s F&B cleaning chemicals supply business is incorporated into a much larger business, carrying out activities outside of the scope of this

³ Date: Responses to the Notice of Possible Remedies are typically requested within 14 days of publication of the Notice (and in any event, no less than seven days) so that they can be considered before response hearings (CMA 2 Mergers: guidance on the CMA's jurisdiction and procedure, paragraph 13.1)

⁴ Sections 35(4) and 36(3) of the Act.

⁵ [Merger Remedies: CMA87](#) (December 2018), paragraph 3.3 and 3.4. This has been adopted by the CMA board.

⁶ [Merger Remedies: CMA87](#) (December 2018), paragraph 3.46. This has been adopted by the CMA board.

inquiry. We currently think that it may be unworkable to separate out parts of Ecolab, whether along customer lines or along other lines.

13. However, we will consider any structural remedy offered by the parties.
14. The CMA's current view is that a behavioural remedy is very unlikely to be an effective remedy to the SLC or any resulting adverse effect that it has provisionally identified. The CMA will consider any behavioural remedies put forward as part of this consultation, absent any submission, the CMA is currently minded to not pursue behavioural remedies any further.
15. The CMA will consider any other practicable remedies that the main parties, or any interested third parties, may propose that could be effective in addressing the SLC and/or any resulting adverse effects.
16. In determining an appropriate remedy, the CMA will consider the extent to which different remedy options would be effective in remedying, mitigating or preventing the SLC or any resulting adverse effects that have been provisionally identified.
17. The CMA will also consider whether a combination of measures is required to achieve a comprehensive solution – for example whether any behavioural remedies would be required in a supporting role to safeguard the effectiveness of any structural remedies. The CMA will evaluate the impact of any such combination of measures on the SLC or any resulting adverse effects.

Divestiture

18. In evaluating possible divestitures as a remedy to the provisional SLC it has found, the CMA will consider the likelihood of achieving a successful divestiture and the associated risks. In reaching its view, the CMA will have regard to the following critical elements of the design of divestiture remedies:

The scope of the divestiture package

19. To be effective in remedying the provisional SLC, any divestiture package would need to be appropriately configured to be attractive to potential purchasers and to enable the purchaser to operate effectively as an independent competitor.
20. The CMA's initial views are that a divestiture of the whole of The Holchem Group Limited would be effective at addressing its concerns. This would require Ecolab Inc. to divest everything that it acquired as part of the Merger.

21. In relation to a divestiture of The Holchem Group Limited, the CMA invites views on:
- (a) the package of assets to be divested, in particular whether a sale of Holchem Laboratories Limited only, thus excluding Merlin Chemicals Limited⁷ and Imperial Janitorial Supplies Limited⁸, would be effective at addressing our concerns;
 - (b) whether there are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market;
 - (c) whether there are risks that a suitable purchaser is not available or that the merger parties will divest to a weak or otherwise inappropriate purchaser;
 - (d) whether there are risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture; and
 - (e) any other elements that may be required.

Identification of a suitable purchaser

22. The CMA will wish to be satisfied that a prospective purchaser:
- (a) is independent of the main parties;
 - (b) has the necessary capability to compete;
 - (c) is committed to competing in the supply of cleaning chemicals to F&B customers in the UK; and
 - (d) will not create further competition concerns.⁹
23. The CMA invites views on whether there are any specific factors to which the CMA should pay particular regard in assessing purchaser suitability.

⁷ The company's principal activity is the manufacture of janitorial products.

⁸ The company's principal activity is the retail of cleaning products.

⁹ [Merger Remedies: CMA87](#) (December 2018), paragraph 5.20 and 5.21.

Effective divestiture process

24. The CMA invites views on the appropriate timescale for achieving a divestiture.
25. The CMA will consider what, if any, procedural safeguards may be required to minimise the risks associated with this divestiture.
26. The CMA invites views on whether the functions of the monitoring trustee should be amended to oversee the divestiture and to ensure that the business to be divested is maintained during the course of the process.
27. The CMA will have the power to mandate an independent divestiture trustee to dispose of the divestiture package if:
 - (a) the merger parties fail to procure divestiture to a suitable purchaser within the initial divestiture period; or
 - (b) the CMA has reason to expect that the merger parties will not procure divestiture to a suitable purchaser within the initial divestiture period.
28. In unusual cases, the CMA may require that a divestiture trustee is appointed at the outset of the divestiture process. The CMA invites views on whether the circumstances of this Merger necessitate such an approach.

Cost of remedies and proportionality

29. In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, that it considers will be effective. The CMA will also seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. Between two remedies that the CMA considers equally effective, it will choose the one which imposes the least cost or restriction.
30. The CMA invites views on what costs are likely to arise in implementing each remedy option.

Relevant customer benefits

31. In deciding the question of remedies, the CMA may have regard to the effects of any remedial action on any relevant customer benefits in relation to the creation of the relevant merger situation.¹⁰

¹⁰ Section 36(4) of the Act, see also [Merger Remedies: CMA87](#) (December 2018), paragraph 3.15 and 3.16.

32. Relevant customer benefits are limited by the Act to benefits to customers in the form of:
- (a) 'lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom ... or
 - (b) greater innovation in relation to such goods or services.'¹¹
33. The Act provides that a benefit is only a relevant customer benefit if:
- (a) it accrues or may be expected to accrue to relevant customers within the UK within a reasonable period as a result of the creation of that situation; and
 - (b) it was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.¹²
34. The CMA welcomes views on the nature of any relevant customer benefits and on the scale and likelihood of such benefits and the extent (if any) to which these are affected by the different remedy options we are considering.

Next steps

35. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish the CMA to consider, by 13 August 2019 (see Note (i)).
36. A copy of this notice will be posted on the CMA website¹³.

Kirstin Baker
Inquiry Group Chair
6 August 2019

Note

This notice of possible actions to remedy, mitigate or prevent the SLC or any resulting adverse effects is made having regard to the Provisional Findings Report announced on 6 August 2019. The main parties have until 27 August 2019 to respond to the Provisional Findings Report. The CMA's findings may alter in response to comments it receives on its Provisional Findings Report, in which case the CMA may consider other possible remedies, if appropriate.

¹¹ Section 30(1)(a) of the Act, see also [Merger Remedies: CMA87](#) (December 2018), paragraph 3.17.

¹² Section 30(3) of the Act, see also [Merger Remedies: CMA87](#) (December 2018), paragraph 3.19.

¹³ <https://www.gov.uk/cma-cases/ecolab-inc-the-holchem-group-limited>