Kluwer Competition Law Blog

Competition Commission prohibition of completed merger a warning to companies that do not wait for UK merger clearance

Matthew O'Regan (St Johns Chambers, United Kingdom) · Tuesday, May 8th, 2012

Unlike in most countries, in the United Kingdom, the notification of mergers is voluntary and there is no waiting period that must expire before a merger can be completed. Therefore, many mergers are completed without waiting for merger clearance from the Office of Fair Trading ("OFT") or, if there is a full 'Phase II' investigation, the Competition Commission ("CC"). However, the OFT routinely investigates completed mergers and, each year, several are subject to an in-depth investigation by the CC, particularly those which satisfy the 'share of supply' test (creation or strengthening of a market share of 25% or more), but not the turnover test.

A recent CC decision, *Stericycle/Ecowaste Southwest*, in which it prohibited a completed merger and required the divestment of the acquired business, is a salutary reminder to companies that do not wait for merger clearance before completing their transaction. It is important that companies fully understand and assess the competition risks that may arise from their transaction, before agreeing to complete before clearance is obtained. This is particularly important in smaller mergers, in which the 'share of supply' test may be met: this test is very flexible and does not require the definition of an 'antitrust' market. Care must also be taken when a merger takes place in concentrated and localised markets, where the parties are or may be close competitors; in such markets, merging parties cannot comfort themselves by relying on the fact that customers procure goods or services using tenders. As the CC found, the use of tenders does not automatically mean that there will remain effective competition. Parties should also assess whether remedies that they may propose would be acceptable to the CC: its decision confirms that it remains focused on ensuring that remedies are effective in restoring competition as quickly as possible.

The facts

Stericycle and Ecowaste both provided services to treat and dispose of healthcare waste in the west of England, centred on the cities of Bristol and Bath. Customers, which are mainly hospitals and public health authorities, periodically tender long-term contracts for these services.
The CC found that, in the west of England, the merging parties were particularly close competitors when bidding for contracts; it did so by reference to a number of factors including the location of suppliers' waste treatment plants, levels of spare capacity and an assessment of recent tenders. In particular, Stericycle's plant at Frome was the closest to Ecowaste's plant in Avonmouth.

The finding of an SLC

The CC went on to find that the merger would substantially lessen competition, because other suppliers were not able to exercise a strong competitive constraint on the merging parties. This was due to their more distant location and/or (unlike the merging parties, particularly Ecowaste) a lack of spare capacity. Therefore, the CC considered that, even though customers used a tender process, the market was not a 'bidding market', such that two remaining bidders would not have been 'enough' to ensure effective competition. As a result, customers did not have sufficient alternatives to be able to exercise any buyer power that they might have had, even if the contracts were of significant value and a buyer was larger than its suppliers. Finally, market entry was unlikely to occur and be viable unless a new entrant could win sufficient contracts; this would only be the case if prices were to rise considerably above the competitive level.

CC rejects remedy proposals

The CC rejected two remedy proposals made by Stericycle.

Stericycle's first proposal was to provide competitors with a proportion of the capacity at Ecowaste's Avonmouth plant, equal to Ecowaste's historic average annual throughput. In rejecting this remedy, the CC observed that this 'access' remedy was a behavioural remedy that did not create an effective and independent new competitor.

The CC also rejected Stericycle's second proposal, to divest the Avonmouth plant , with a guaranteed volume of waste to be provided by Stericycle for five years; this proposal was later expanded to include contracts with two large hospitals in Bristol and Bath. The CC considered that this remedy proposal would not have restored effective competition, as contracts are long-term and with only two contracts the Avonmouth plant would not have been a viable and effective competitor: there was no certainty that it would win new contracts and if it would have lost the two retained contracts when they are next retendered, it would have been 'locked out' of the market completely for three to five years. In addition, the volume guarantee given by Stericycle would have created a structural link with the Avonmouth plant, so reducing its independence.

Prohibition, divestiture requirement and appeal

The CC therefore prohibited the merger. It required Stericycle to sell, as a going concern, Ecowaste Southwest to an approved purchaser. This will include the Avonmouth plant , all other assets and all customer contracts. As a number of key contracts (which account for a significant proportion of Ecowaste's business) will be retendered in 2012 and 2013, the CC has required that the divestment be completed on a short timetable to ensure that Ecowaste is able to bid independently for these contracts. Stericycle is also prevented from competing with Ecowaste for these contracts until the divestment is completed, notwithstanding that a Monitoring Trustee will be appointed.

Stericycle has appealed the CC decision to the Competition Appeal Tribunal, challenging the remedy imposed by the CC. In order to ensure that competition is restored as quickly as possible, the appeal will be heard by the CAT on 16 May.

Comment

The CC has clearly taken a strict approach with Stericycle, including preventing it from bidding for new contracts until the divestment is completed.

This decision provides a clear warning to purchasers. Indeed, the recent referral to the CC of three

other completed mergers has reconfirmed that the OFT and CC will continue to focus on the assessment of completed mergers, at both a national and a local level: VPS Holdings/SITEX Orbis (merger of the two largest suppliers of vacant property security services), DCC Energy/Rontec/Total Butler (possible 3 to 2 merger in the distribution of oil products) and McGill's Bus Services/Arriva Scotland West (merger of two largest bus operators in Renfrewshire, to the west of Glasgow). In each case, the purchasers were required to give interim 'hold separate' undertakings whilst in VPS/Sitex Orbis, the CC has required VPS to appoint a monitoring trustee to supervise compliance with its undertakings.

In its recently announced reforms of the UK competition regime, the Government confirmed that the voluntary nature of merger control in the UK would remain. However, the investigation of completed mergers would continue, irrespective of whether a notification is made to the new Competition and Markets Authority ("CMA"). In addition, the CMA will gain new powers to prevent the integration of the merging parties' business pending completion of its investigation, with the ability to require the reversal of integration steps already taken, including during a Phase I investigation. The CMA will also be given the power to impose financial penalties for non-compliance with directions to cease or reverse integration, and will also be able to seek court orders to restrain pre-emptive integration.

It is therefore clear that purchasers will need to continue to consider carefully whether to complete a merger before it is approved by OFT, CC or CMA and, if so, whether to commence integrating the businesses before receiving such approval.

This entry was posted on Tuesday, May 8th, 2012 at 3:44 pm and is filed under Source: OECD“>Antitrust, Source: OECD“>Competition, Source: OECD

“>Mergers, United Kingdom
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.