

Kluwer Competition Law Blog

UPDATE: Stericycle/Ecowaste merger: Competition Appeal Tribunal rejects appeal against remedies

Matthew O'Regan (St Johns Chambers, United Kingdom) · Tuesday, June 19th, 2012

An earlier [post](#) considered the Competition Commission's ("CC") prohibition of Stericycle's completed acquisition of a competitor, Ecowaste Southwest. Having found that the merger would have resulted in a substantial lessening of competition ("SLC") in the treatment of healthcare risk waste in southwest England, the CC required Stericycle to divest the entirety of the acquired businesses to an approved buyer, on an accelerated timetable. Stericycle was also prohibited from bidding for any contracts presently held by Ecowaste until it had implemented the remedy.

On 24 May, the Competition Appeal Tribunal ("CAT") dismissed Stericycle's appeal against the remedy imposed by the CC. This [judgment](#) was handed down only eight days after the hearing of the appeal, which was itself less than a month after the CC published its [final report](#) on 21 March 2012.

Stericycle did not challenge the CC's SLC finding, but only the remedies. The CAT was required to determine the appeal on the basis of judicial review principles (see Enterprise Act 2002, s.120(4)). This meant that the CAT was required to assess the reasonableness of the CC's decision, but could not undertake a rehearing of the relevant facts and reach its own factual conclusions. In addition, the CAT was obliged to afford the CC a margin of appreciation in exercising its discretion in determining appropriate remedies to remedy the SLC identified by it.

The CAT held that the CC was entitled to conclude that the full divestment of Ecowaste was the only effective remedy for addressing the SLC. In doing so, it had considered, but rejected, two alternative and less onerous remedies proposed by Stericycle. Indeed, it had undertaken extensive discussions with Stericycle on remedies, including a formal hearing and several other meetings. The CC had also provided Stericycle with its assessment of its alternative proposals and had given it an opportunity to respond to that assessment before the CC finalised its report into the merger. The CC was plainly entitled to consider a full divestment as an appropriate remedy. It was not obliged to consider of its own volition all possible divestments, but only those which it considered were likely or which were proposed to it by Stericycle or a third party. This it had done. The CC's procedure for assessing remedies was therefore appropriate and reasonable.

As the merger had resulted in the loss of a credible competitor, Ecowaste, the CC was entitled to require a remedy that would restore such a credible bidder. It was furthermore entitled to find that this would not have been achieved by simply divesting Ecowaste's plant at Avonmouth with two of its four key contracts. Therefore, in view of the evidence before the CC, it was not unreasonable

or irrational for the CC to conclude that the entirety of Ecowaste's business would need to be divested, in order to create a viable, attractive and competitive package that would be acquired by a third party and have the best chance of winning the key contracts held by Ecowaste when they were next retendered.

The CAT also considered whether the CC was required to take into account the likely costs to Stericycle of being obliged to divest all of Ecowaste, at no minimum price and on a short timescale. It held that the CC was not so obliged. A full divestment was the only appropriate remedy to the SLC identified by it. The CC's duty to consider the costs of different remedies and to impose the least costly remedy can apply only where the different remedies would each be effective in addressing the SLC. This was not the case: Stericycle's proposed alternative remedies would not have been effective.

In rejecting Stericycle's argument concerning the costs that it would incur in implementing a full divestment, the CAT clearly emphasised that, in the context of a completed merger, the costs incurred by the acquirer in implementing a divestiture remedy are not to be taken into account by the CC in imposing a remedy. Stericycle could have made completion conditional on receiving merger approval. By not doing so, it had taken the risk of that approval not being forthcoming, whether at all or only subject to conditions. This included the risks of a full divestment and of achieving only a low sale price. In any event, the CC was entitled to impose a short divestment period (after which a divestment trustee would be appointed to sell Ecowaste at no minimum price) in order to ensure that the new owner would have sufficient time for its new owner to become established as an effective bidder before the four key contracts are retendered.

Stericycle's challenge to the remedies imposed by the CC was therefore unsuccessful. On 7 June, the CC announced that Stericycle had given [final undertakings](#) to divest Ecowaste. In view of the CAT proceedings, the CC had earlier agreed to a short (unspecified) [extension to the divestment period](#).

The CAT's judgment is a further reminder of the risks that a purchaser takes in completing a merger without awaiting competition approval in the United Kingdom. In order to avoid a full divestment of the acquired business (if necessary by a trustee) if the merger is found to create an SLC, the purchaser must demonstrate to the CC (and, if necessary, the CAT) that there is an alternative remedy that is equally effective in restoring effective competition. This, Stericycle had failed to do. Therefore, it is clear that in planning a competition strategy for a merger transaction, the purchaser must assess realistically the competition issues raised by the merger, the remedies (and any viable alternatives) that may be required of it, the likelihood of those remedies being required and the likely costs that it may incur in implementing those remedies.

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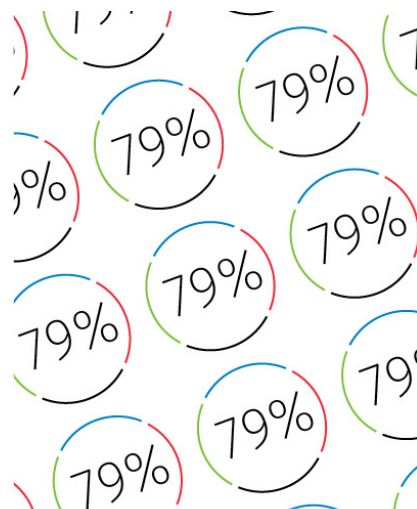
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