Neutral citation [2012] CAT 14

IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1190/4/8/12

Victoria House
Bloomsbury Place
London WC1A 2EB

24 May 2012

Before:

VIVIEN ROSE
(Chairman)
JONATHAN MAY
PROFESSOR COLIN MAYER

Sitting as a Tribunal in England and Wales

BETWEEN:

SRCL LIMITED

Applicant

- v -

COMPETITION COMMISSION

Respondent

Heard at Victoria House on 16 May 2012

JUDGMENT

APPEARANCES

Mr Paul Lasok QC and Mr Josh Holmes (instructed by DLA Piper UK LLP) appeared on behalf of the Applicant.

Mr Daniel Beard QC and Mr Robert Palmer (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

Introduction

1. On 21 March 2012 the Respondent ("the CC") published its report called "Stericycle, Inc and Ecowaste Southwest Limited" ("the Report") pursuant to section 35 of the Enterprise Act 2002 ("the Act"). The Report set out the CC's conclusions as regards the acquisition by the Applicant ("Stericycle") of the company Ecowaste Southwest Ltd ("Ecowaste"). That acquisition had been completed in January 2011 and was referred to the CC by the Office of Fair Trading on 25 August 2011, pursuant to section 22(1) of the Act.

2. Before the merger, Stericycle and Ecowaste were both active in the business of disposing of healthcare waste, that is, waste that is produced in healthcare settings such as hospitals, GP and dental surgeries, by pharmaceutical companies and tattoo parlors. Some of this waste is categorized as 'healthcare risk waste' because it requires treatment prior to disposal to make it safe. Healthcare risk waste ("HRW") includes items such as needles and syringes, anatomical waste and dressings. Customers using HRW disposal services comprise those who generate large quantities of waste ("LQG customers") and those who generate small quantities of waste ("SQG customers"). Stericycle and Ecowaste also treat waste which is brought to them by "collection-only" operators who provide a service using their own vehicles and other equipment to collect the waste from the customers but contracting with the owner of a treatment facility for the disposal of that waste.

3. The assets acquired by Stericycle on acquisition of Ecowaste included Ecowaste's treatment facility at Avonmouth together with the customer contracts, licences, collection vehicles and other assets associated with the business conducted by Ecowaste in respect of that facility. Stericycle already operated a number of treatment facilities within a 100 mile radius of the Ecowaste Avonmouth facility, namely plants at Frome, Bridgend, Wolverhampton, Bournemouth and Hillingdon.

4. In the Report the CC set out its conclusions on the questions that section 35 of the Act requires it to consider, in particular whether the merger has resulted in a substantial lessening of competition ("SLC") within any market in the United Kingdom for goods

or services. The CC concluded that before the merger, Ecowaste and Stericycle were each other's closest competitors for customers located within the Avonmouth Plant Area, defined as the areas bordering on Avonmouth and Frome.[1] Ecowaste's Avonmouth plant competed most strongly with Stericycle's plant at Frome and, to some extent with Stericycle's plant at Bridgend. This reflected the fact that the Frome plant was the closest geographically to the Avonmouth plant. The CC concluded that the relevant market in this case was the market for the collection, treatment and disposal of HRW for both LQG and SQG customers in the Avonmouth Plant Area.

5. The CC recognized that at the time of the merger Ecowaste was experiencing some financial and operational problems at the Avonmouth plant. It concluded that Ecowaste's parent company would have been under pressure to sell Ecowaste in order to pay off debts incurred in other areas of the group's business. The CC concluded that in the absence of the merger, Ecowaste would have been sold to a third party, most likely another company already operating a business for the collection and treatment of HRW. The new owner would have been financially stronger than the Ecowaste group and would have continued as a competitor to Stericycle but without the financial difficulties caused by the parent company. The CC therefore found that the correct counterfactual for assessing the effect of the merger was not the continued operation of Ecowaste as before but the existence of an independent operator of the Avonmouth plant, separate from Stericycle, competing closely with Stericycle for customers in the Avonmouth Plant Area. The CC found further that the competitive constraint provided from other operators in the market remaining after the merger would not be as strong as the constraint from an independent operator of the Avonmouth plant. It found that neither new market entry nor customer buyer power would be likely to constrain Stericycle post-merger.

6. The CC therefore found that the merger of Stericycle and Ecowaste resulted in an SLC within the meaning of section 35(1)(b) of the Act. This could be expected to lead to a worsening in price and non-price factors compared with the situation in the absence of the merger.

[1] The Glossary at the end of the Report defined the Avonmouth Plant Area as the area covered by the following local authorities: Bath & North East Somerset, North Somerset, the City of Bristol and South Gloucestershire.

7. The CC then turned to the question of remedies. Section 35(3) of the Act places a duty on the CC to decide three questions when it has concluded that a merger has resulted in an SLC:

(a) whether action should be taken by the CC for the purpose of remedying, mitigating or preventing the SLC concerned, or any adverse effect which has resulted, or may be expected to result, from that SLC;

(b) whether the CC should recommend the taking of action by others for that purpose;

(c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.

8. The Act also requires the CC, in deciding these questions to have regard to the need "to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it": section 35(4). The kinds of remedy that the CC may impose are set out in Schedule 8 to the Act. They include making an order providing for the division of any business (whether by the sale of any part of the undertaking or assets or otherwise) together with ancillary orders as to the transfer of property, rights and liabilities, the adjustment of contracts, and the appointment of trustees to do anything on behalf of another person which is required of that person.

9. The CC has published guidelines, pursuant to section 106(3) of the Act, explaining its approach to the selection, design and implementation of remedies in merger cases ("the Guidelines"). They state (at paragraph 1.7) that:

> "… the CC will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will then select the least costly and intrusive remedy that it considers to be effective. The CC will seek to ensure, … that no remedy is disproportionate in relation to the SLC and its adverse effects".

10. Divestiture remedies are considered in more detail in Part 3 of the Guidelines. Paragraph 3.1 states that such remedies seek to remedy the SLC either by creating a new source of competition by disposing of the business or assets to a new market

participant, or by strengthening an existing source of competition through disposal to an existing market participant which is independent of the parties to the merger. The Guidelines identify three risks to be assessed when considering a divestiture remedy:

(a) composition risks: that is the risk that the assets or business included in the package divested may be too small or inappropriately configured so that the package is not attractive to purchasers or may not enable the purchaser to operate as an effective competitor on the market;

(b) purchaser risks: that is the risk that no suitable purchaser will come forward or that the merged parties will dispose of the package to a weak or otherwise inappropriate purchaser;

(c) asset risks: that is the risk that the competitive capability of the package will deteriorate before divestiture can take place for example because customers move their business elsewhere or key staff leave the business.

11. The Report sets out the CC's analysis of three different possible remedies: an access remedy (Option 1), a plant and equipment divestment remedy (Option 2) and full divestment. The first two options had been put forward by Stericycle as alternatives to the full divestment remedy which the CC had indicated was likely to be an effective remedy. The CC records in the Report that it received views from interested parties on the suggested full divestment remedy. Stericycle was the only party to propose alternative remedies to full divestment.

12. The CC's reasons for rejecting Stericycle's alternative remedies are part of Stericycle's challenge to the Report and will be considered later in this judgment. For the moment it suffices to say that the CC concluded that full divestment of Ecowaste was the only effective and proportionate remedy. The CC set a date by which the business had to be sold and referred to various additional requirements, including measures to ensure that the assets of the business did not deteriorate before the new purchaser could take over the business. The CC also stated that in the event that Ecowaste had not been sold by the deadline set, the CC would be able to appoint a divestment trustee to oversee the sale of the business without a minimum price.

Stericycle's challenge to the remedy set out in the Report

13. Stericycle's application to the Tribunal is brought under section 120 of the Act which provides that any person aggrieved by a decision of the CC in connection with a merger reference may apply to the Tribunal for a review of that decision. Section 120(4) provides that in determining such an application, the Tribunal shall apply the same principles as would be applied by a court on an application for judicial review. The scope of the Tribunal's task when exercising a judicial review function has been discussed in a number of earlier judgments of the Tribunal and the Court of Appeal, see for example *BAA v Competition Commission* [2012] CAT 3 ("*BAA*") where the Tribunal set out the principles that applied in an analogous context.

14. Mr Beard QC, acting for the CC, emphasized that as regards the issues raised in this case, the CC has a broad discretion which the Tribunal should respect. First, in so far as Stericycle challenged the weight that the CC had placed on evidence or on particular factors that it took into account, this was not a matter that was susceptible to judicial review. As the Tribunal said in *Stagecoach Group plc v Competition Commission* [2010] CAT 14, paragraph 45, an applicant seeking to overturn the CC's conclusion on a factual issue must show:

> "either that there is simply no evidence at all to support the Commission's conclusions or that on the basis of the evidence the Commission could not reasonably have come to the conclusions that it did. The fact that the evidence might have supported alternative conclusions, whether or not more favourable to [the Applicant], is not determinative of unreasonableness in respect of the conclusion actually reached by the Commission".

15. Further, when the challenge relates to the remedy imposed by the CC, the Tribunal has recognized that the CC must be afforded an appropriate margin of appreciation and that the Tribunal will not intervene in those assessments without good reason. In particular, the Tribunal should show particular restraint in "second guessing" the educated predictions for the future that have been made by an expert and experienced decision-maker such as the CC. However, as the Tribunal stated in *BAA* (at paragraph 20(7)):

> "In applying both the ordinary domestic rationality test and the relevant proportionality test …, where the CC has taken such a seriously intrusive step as to order a company to divest itself of a major business asset …, the Tribunal will naturally expect the CC to have exercised particular care in its analysis of the problem ... and of the remedy it assesses is required. The ordinary rationality test is

> flexible and falls to be adjusted to a degree to take account of this factor ... It is a factor which is to be taken into account alongside and weighed against other very powerful factors referred to above which underwrite the width of the margin of appreciation or degree of evaluative discretion to be accorded to the CC, and which modifies such width to some limited extent. It is not a factor which wholly transforms the proper approach to review of the CC's decision which the Tribunal should adopt …"

Ground A: the way the CC approached its task

16. The first of the four grounds on which Stericycle challenges the Report relates to the test applied by the CC in coming to its conclusion that full divestment of Ecowaste was the only effective remedy. Stericycle argues that the CC failed to engage in any adequate analysis as to the minimum divestment package that was required to address the SLC identified and that the CC erred by considering only the specific remedies proposed by Stericycle. Stericycle asserts that the CC appears to have assumed that full divestment was necessary rather than considering what remedy would be proportionate. In his skeleton argument and at the hearing, Mr Lasok QC for Stericycle said that the CC had confused its task by seeking a remedy that brought about a market situation that was akin to the counterfactual that they had chosen, rather than a remedy which removed the SLC that had been identified. This confusion was evidenced by passages in the CC's Defence to this application and in its skeleton argument for the hearing. Stericycle said that the CC had ignored the fact that the Guidelines refer to the CC taking as its starting point divestiture "of all *or part of* the acquired business" (paragraph 3.6 emphasis added) and to the CC seeking "to identify the smallest viable, stand-alone business that can compete successfully on an ongoing basis" (paragraph 3.7 of the Guidelines).

17. In our judgment there is no basis for this complaint. The Tribunal made clear in *Somerfield plc v Competition Commission* [2006] CAT 4 at paragraphs 99 and 100, that although the CC does, in accordance with the Guidelines, seek the least costly and intrusive remedy that will be effective in addressing the SLC identified, it is entitled to consider divestment of the entity acquired as a starting point:

> "… it is not unreasonable for the CC to consider, as a starting point, that "restoring the status quo ante" would normally involve reversing the completed acquisition unless the contrary were shown. After all, it is the acquisition that has given rise to the SLC, so to reverse the acquisition would seem to us to be a simple, direct and easily understandable approach to remedying the SLC in question. …

> 100. We do not therefore consider that the CC's approach in deciding that its normal starting point is to consider divestment of the acquired business can be criticised as outwith its margin of appreciation."

18. Using full divestment as a starting point is not the same as *assuming* that full divestment is necessary. The CC issued a notice on possible remedies to the merger parties on 13 December 2011 ("the Remedies Notice"). This stated that the panel had considered whether the divestiture of less than the whole of Ecowaste could be a feasible alternative to divestiture of the whole of Ecowaste but that it did not consider that such a remedy would be effective in this case. The fact that that sentence was not expressed, as it might have been, as a provisional conclusion does not support a contention that the CC had at that stage made up its mind irrevocably against partial divestment. The Remedies Notice, read as a whole, makes clear that:

> "The Group will consider any other practicable remedies – structural or behavioural – that the parties or any interested third parties propose in order to address the expected SLC and any resulting adverse effects."

19. Stericycle certainly did not treat the Remedies Notice as closing off any discussion of partial divestment. On the contrary, there followed extended discussions between the CC and Stericycle over the possible alternative divestment packages referred to in the Report as Options 1 and 2. On 9 January 2012 Stericycle attended a hearing with the CC at which the remedies options were discussed and Stericycle was invited to put forward any other proposals that it wished the CC to consider. Following that meeting, Stericycle revised Option 2 and a further meeting was held between Stericycle and the CC to discuss that revised option. In order to consider the revised option fully, the CC extended the time limit for the conclusion of the investigation from 8 February 2012 to 4 April 2012. In February 2012 the CC sent Stericycle a remedies working paper assessing the effectiveness of the revised Option 2. Stericycle was given an opportunity to respond to that working paper before the Report was finalised.

20. There is nothing in the procedure followed by the CC that suggests that the CC assumed that only full divestment would be an effective remedy or that it failed to give proper consideration to other options proposed.

21. We agree with the CC that it is not required to investigate of its own volition every possible configuration of divestment package before concluding that divestment of the

business acquired is the only effective option. It is sufficient if it assesses those which present themselves as likely candidates to the members of the panel considering the issue or which are proposed by consultees, including, of course, the parties to the merger.

22. The Report does not indicate that the CC applied the wrong test by focusing on the counterfactual rather than on the SLC. We have considered the passages in the Report on which Mr Lasok relied, bearing in mind that one should not focus on the way particular sentences have been drafted but look more broadly at how the CC approached its task. The Tribunal has on a number of occasions stressed that CC reports should be read as a whole and not analysed as if they are statutes: see for example *Barclays Bank plc v Competition Commission* [2009] CAT 27 at paragraph 76.

23. Stericycle argues that if the CC had properly focused on the SLC it would have concluded that divestment of the Avonmouth plant and equipment was a sufficient remedy because the SLC arose from the fact that other operators did not have a treatment plant close enough to the Frome and Avonmouth plants to provide a sufficient competitive constraint. We do not accept that the SLC arose only because other companies did not have a local facility – that is not how it was expressed in the Report. Distance from customers is discussed as an important factor in the Report both in defining the geographic market and in assessing whether the remaining operators provided an effective constraint on the merged entity. However, the CC was clear that distance from the customer was not the only criterion by which customers chose their suppliers: see paragraph 7.71 of the Report. It was the loss of Ecowaste as a credible bidder in the Avonmouth Plant Area that gave rise to the SLC and it was the ability to compete effectively as a provider of both collection and treatment services that was being sought as a remedy. The question of what was needed in order to restore a credible bidder to the market was the question that was rightly addressed by the CC in section 8 of the Report.

24. The CC noted that the purchaser of the divestment package was likely to be a company which already had industry expertise and a track record of successful operation: see paragraph 8.45. That affected the content of the divestment package in that there was no need to include what the CC referred to as back office functions in the package. But

the CC was not bound, in our judgment, to conclude that because the purchaser was likely to be an existing operator rather than a new entrant, this meant that the purchaser would become a credible bidder simply by acquiring the Avonmouth plant and equipment.

25. The Report shows that the CC had well in mind throughout the discussion of the remedies that, having concluded that there was a need to restore a viable competitor to the Avonmouth Plant Area, it had to decide how much of the acquired Ecowaste business needed to be divested to create an attractive and viable business package likely to be purchased by an operator wishing to compete with Stericycle. Clearly there is a link between restoring the counterfactual and remedying the SLC since, as the CC said at paragraph 8.62 of the Report:

> "A full divestment of Ecowaste Southwest will restore the situation absent the merger and therefore address the loss of rivalry at source. It is therefore a comprehensive and effective remedy to the SLC…"

Acknowledging that link between the two concepts is not the same, in our view, as substituting restoration of the counterfactual for the remedying of the SLC.

26. We find that there is no basis for impugning the procedure which the CC adopted to assess the appropriate remedy in this case or for concluding that the CC erred in the test it applied.

Ground B: ignoring relevant considerations, taking into account irrelevant considerations and failure to gather necessary information

27. In section 8 of the Report, the CC considered both Options 1 and 2 proposed by Stericycle. Under Option 1 Stericycle would make capacity equal to the average annual throughput of the Avonmouth plant prior to its acquisition available to one or more suitable parties at an agreed price, guaranteed for the duration of the contract. Stericycle would also transfer one contract to a purchaser in order, Stericycle argued, to give the purchaser both credibility in the market and a base from which to build its market presence. The CC described Option 1 as an access remedy creating, in effect, a collection-only company which would have its waste treated by Stericycle. The CC had concluded earlier in the Report, as part of the reasoning behind the finding of an

SLC, that collection-only companies were not capable of providing a constraint on the merged entity comparable to that of a competing collection and treatment company. The CC referred to that conclusion in rejecting Option 1 as a viable remedy. Stericycle has not sought to argue in this application that the CC acted unreasonably in rejecting Option 1.

28. Stericycle does, however, challenge the CC's rejection of the revised Option 2 as an effective remedy. In the Notice of Application, Stericycle identifies eight reasons why the CC objected to Option 2 and then seeks to knock out each reason in turn. Stericycle asserts that all of the CC's objections failed to take account of relevant considerations, were based on irrelevant considerations or lacked any evidential basis because the CC had failed to undertake the inquiries necessary to establish the correct position. The CC characterizes this Ground as, in reality, an attack on the merits of the Report's conclusions, disclosing no error that is susceptible to judicial review.

29. At the time that the Report was published, Option 2 proposed by Stericycle comprised the following package:

    (a) Stericycle would divest the property at Avonmouth including all physical assets there (other than a spare shredder but including all bins and vehicles), all intellectual property rights associated with the name "Ecowaste", all regulatory licences and permits required to operate the Avonmouth site, all staff engaged in carrying on the Ecowaste business at Avonmouth and all customer facing staff then employed by Ecowaste;

    (b) Stericycle would transfer to the purchaser two of the main four contracts with customers currently using the Avonmouth plant - referred to by the CC as Ecowaste's "Key Contracts";

    (c) Stericycle would provide the purchaser operating the divested plant with a guaranteed volume of waste material to treat for a period of five years and would set the price for disposal of that material at a level that would allow full cost recovery plus a profit margin;

(d) Stericycle would allow other major customers associated with the Avonmouth plant to terminate their contracts on 90 days notice and would be willing to provide waste collection services for the purchaser of the business at prices to be agreed.

30. The most important difference between Option 2 and full divestment, so far as the assets to be disposed of are concerned, is that only two of the Key Contracts would be included in the divestment package. In this regard, the Report records the following points:

(a) strong customer relations are important to an operator's credibility in the market, particularly when it comes to bidding for the retender of an existing contract: see paragraph 8.30;

(b) the Key Contracts are long term (typically lasting five years) and are due to be retendered within the next 12 months – if the new owner of the divested package does not win these tenders it will be locked out of the market for a considerable period: paragraph 8.33;

(c) the four Key Contracts are a large majority of Ecowaste's business: paragraph 8.31;

(d) one of the Key Contracts that Stericycle was prepared to divest (Royal United Hospital, Bath) would be tendered independently but the other three Key Contracts (for servicing local primary care trusts or 'PCTs') would be tendered as a cluster and it was likely, based on previous tenders, that the same operator would win all three tenders;

(e) the CC could not be certain that customers would agree to the transfer of the two Key Contracts thereby creating a composition risk for a package based on Option 2.

31. The CC concluded:

> "8.38 We consider that the purchaser would be a stronger competitor if it had all the customers that Ecowaste Southwest presently services (including all Key Contracts) since it would be able to demonstrate its ability to service a more substantial base of customers in the Avonmouth Plant Area from the Avonmouth Plant. …
>
> 8.49 In addition to the transfer of physical assets, we consider that an effective divestment package would include all of Ecowaste Southwest's customer contracts. Without these customer contracts we consider that Ecowaste Southwest would not be a viable competitor. …"

32. It is clear from the Report that the CC's primary concern was that the purchaser of the divestment package should be given the best possible chance of winning the Key Contracts when they come up for tender over the coming year. The four Key Contracts are crucially important to the viability of the Ecowaste business. This concern is entirely understandable and the CC was entitled to examine any proposed package falling short of full divestment with great care. The CC identified certain aspects of the Option 2 package which it concluded would put the purchaser in "in a less strong position at the next tender" than if it had all four of the Key Contracts: paragraph 8.34. In particular, the purchaser would be in an existing relationship with only one of the three PCTs intending to retender as a cluster whereas Stericycle would be in an existing supply relationship with two of those PCTs. Further, existing customers might not agree to transfer their contracts to what would have to be a new legal entity.

33. The CC's task was then to decide whether these factors were important enough to justify the more intrusive remedy of full divestment as compared with Option 2 preferred by Stericycle. The CC decided that the factors were that important. Stericycle may disagree with that conclusion but that is a balance struck by the CC which could only be disturbed on judicial review grounds if there was clear evidence of irrationality or unreasonableness on the part of the CC. It is not our task to consider whether Option 2 would create a competing business sufficiently strong to remedy the SLC identified but rather to consider whether the CC's conclusions are outside the range of rational responses by the CC to the questions it had to consider pursuant to section 35 of the Act.

34. Stericycle submitted that the CC's finding that the transfer of all four Key Contracts is necessary to ensure that the purchaser is a strong competitor was irrational because it was based on an unsupported assertion that the incumbent service provider is in a better position when bidding on a retender than a competitor. Mr Lasok said that there was no evidence to support such a finding.

35. The CC says in paragraph 8.30 of the Report that during discussions with customers of Ecowaste "the importance of strong customer relationships became clear to us". At paragraph 7.71, the CC set out the qualities that customers had said they look for in bidders, including experience in providing a HRW service and a trading history. In paragraph 8.30 the CC also refers to the evidence of Tradebe, the operator of a rival treatment plant in Birmingham, that the value of the business "lay in the contracts and the associated customer relationships".

36. The CC has not shown us any statements in which customers express the views that underlie what is recorded in the Report. We accept that the CC has to keep the length of its reports within reasonable bounds and cannot cite all the evidence it receives on the myriad factual issues resolved in the course of its Report. But once a challenge is brought that focuses on a particular aspect of the Report, it is open to the CC to serve with its Defence more details of the evidence relied on as regards the aspect which is now the subject of closer scrutiny.

37. The evidence the CC did put before the Tribunal was the transcripts of Stericycle's remedies hearings before the CC in January 2012. At the first hearing on 9 January 2012 the CC asked Stericycle why it was so keen to retain the existing contracts. Mr Johnston, the Managing Director of Stericycle, explained that this was because Stericycle hoped to offer additional services to those customers. When he was asked directly whether it would put Stericycle in a better position "when re-bidding comes around" he said "Not necessarily – partially in some cases, but for the revenue associated with additional services as well". At the second hearing on 24 January 2012 Mr Lloyd, the Finance Director of Stericycle, was asked whether it was a fair assumption that customer relationship is key to winning contracts. He replied "Well I think it is an important factor but as we said in terms of Yorkshire, it is not the be-all and end-all, because at the moment the NHS is very much more driven by price."

38. We consider that these answers lend some support to the CC's conclusion that customer relationships are important in this sector and hence that the SLC was more likely to be remedied if the purchaser of the divested package had the benefit of all four Key Contracts rather than the contract being divided between the purchaser and Stericycle in the manner envisaged in Option 2. As we read the relevant passages in the Report, this was not simply a point about an incumbent's advantage at the time when the tender bids are being considered but a more general point about how this market works. It is, moreover, a factor that is entirely to be expected when considering the dynamics of competition in the market for a service the proper performance of which is of utmost importance to the customer; which is provided under long term contracts; and which involves daily contact between the provider and the customer.

39. We have read the other passages in the transcripts to which Mr Lasok referred us where the Stericycle personnel attending the meeting stressed the importance of price in the award of contracts. The reference to Yorkshire in Mr Lloyd's reply quoted above relates to a point Mr Jurkiw (a partner in the law firm representing Stericycle) had made earlier at that hearing where he gave two recent examples of tender exercises where the winner had not had any previous relationship with the customer at all. Mr Jurkiw said "in the current environment price is absolutely the number-one criterion" and that relationships were "secondary". The Report considers examples of successful and unsuccessful market entry in the discussion of entry barriers: see paragraphs 7.130 onwards and Appendix F.

40. The CC was faced with a range of evidence from different interested parties about the importance of customer relationships, some of that evidence indicating that they were important and some indicating that price was of primary importance. This is not a case, therefore, where we can say that there was no evidence for the CC to weigh. The CC appropriately considered and weighed the available evidence. The balance that the CC struck finding that customer relationships needed to be taken into account when configuring the divestment package is not a matter that can be overturned on judicial review grounds.

41. At the hearing Mr Lasok took us to Directive 2004/18/EC[2] setting out the procurement rules for the award of public services contracts. He argued that the provisions of this Directive rule out the possibility that the purchaser of the divestment package would be in any stronger position bidding for the two retendered Key Contracts as the incumbent provider than as a competitor against the incumbent Stericycle. He relied also on the ruling of the Court of Justice in Case C-532/06 *Emm. G. Lianakis v Dimos Alexandroupolis* [2008] ECR I-251. The principle he sought to derive from the Directive and the judgment was that a public body is only entitled to take into account the characteristics of a tenderer at the stage of the procurement exercise when the public body is selecting which companies should be allowed to submit a tender. Once the field of candidates has been selected and the tenderers put in their bids, the customer must focus exclusively on the characteristics of the tender, not of the bidder. Mr Lasok argued that where the incumbent provider is invited to put forward a bid, the public body is precluded from taking into account its experience with that provider when assessing which is the most economically advantageous bid it has received. It was therefore inappropriate for the CC to rely on evidence from HRW disposal customers that they favoured the incumbent supplier when considering bids.

42. In the *Lianakis* case, it was clear that the three award criteria that the Municipal Council of Alexandroupolis had listed in its contract notice focused entirely on the characteristics of the tendering companies. They were not criteria aimed at identifying the tender which was the most economically advantageous as is required, now, by Article 53(1)(a) of Directive 2004/18/EC.[3] The Court does not say that in a case where the contract award criteria are properly directed at identifying the most economically advantageous tender, the customer must put out of its mind any experience it has of dealing with the various bidders when scoring them against those criteria. We do not consider the *Lianakis* case goes as far as it would need to go to make good this point for Stericycle.

[2] *Official Journal* 30.4.2004 L134/114. The Directive was implemented in the United Kingdom by the Public Contracts Regulations 2006 (SI 2006/5).

[3] That is criteria linked to the subject matter of the public contract in question for example quality, price, technical merit, aesthetic and functional characteristics, cost-effectiveness, after sales service, technical assistance or delivery period.

43. The other part of Option 2 which the CC considered was the volume guarantee to be offered to the purchaser of the divestment package. Stericycle was prepared to commit to supplying a given volume of waste to be treated at the Avonmouth plant for a period of at least five years. The CC's primary objection to this was that ongoing links of this kind between the merged parties were unsatisfactory (paragraph 8.35):

> "…the volume guarantee creates a reliance by the purchaser on SRCL which would not be the case in the full divestment option and as such SRCL and the purchaser would not be as independent as they would be compared with a full divestment as proposed by the CC."

44. The CC's rejection of a volume guarantee arrangement between the two main competitors in the market was clearly right. It was not simply a matter of the possible disclosure of commercially confidential information between them as Mr Lasok submitted at the hearing. A contract under which one supplier commits to purchasing a substantial proportion of its competitor's services for an extended period would be a most unusual one and risks itself causing a distortion of competition in the market. The CC cannot be criticized for regarding this as an undesirable outcome of the investigation.

45. In the light of these considerations we do not consider that the CC acted irrationally in rejecting Option 2 as an effective alternative to full divestment. The CC was entitled to conclude that the purchaser would be a stronger competitor if all four Key Contracts were included in the divestment package than it would be if Option 2 were accepted. We therefore reject this ground of Stericycle's challenge.

Ground C: the comparative costs of Option 2 and full divestment

46. The third ground of Stericycle's challenge is that the CC did not take into account the interests of Stericycle when assessing what remedy to apply. The Guidelines make clear that the comparative cost of different remedies only becomes relevant where the CC identifies a number of remedies which would be effective in addressing the SLC. In such a case the CC will seek to select the least costly remedy that it considers will be effective.

47. That situation has not arisen here. The CC's conclusion that Option 2 was not an effective alternative to full divestment has not been undermined by Stericycle's arguments. There was no reason for the CC in this case to go on to consider the costs of Option 2 as compared with full divestment.

48. The Guidelines also say that the costs that the acquirer would incur in divesting itself of the business are not normally taken into account, see paragraph 1.10:

> "… for completed mergers, the CC will not normally take account of costs or losses that will be incurred by the merger parties as a result of a divestiture remedy as it is open to the parties to make the merger proposals conditional on competition authorities' approval. It is for the parties concerned to assess whether there is a risk that a completed merger would be subject to an SLC finding and the CC would expect this risk to be reflected in the agreed acquisition price. Since the cost of divestiture is, in essence, avoidable, the CC will not, in the absence of exceptional circumstances, accept that the cost of divestiture should be considered in selecting remedies."

49. That would have been the position here, even if the CC had found that Option 2 was an effective remedy. Stericycle in its skeleton argument suggests that it believed that Ecowaste was about to be wound up by HM Revenue and Customs and that the Avonmouth plant might have been closed down by the Environment Agency. It thought that the purchase of Ecowaste was urgent. However, Ecowaste has not challenged the CC's conclusions that the counterfactual in this case was that Ecowaste would have been bought by another operator who would have continued to compete with Stericycle in this market. There is nothing in the circumstances of Stericycle's acquisition of Ecowaste that could be regarded as exceptional.

Ground D: backstop of sale without a minimum price

50. Having concluded in the Report that full divestment was the correct remedy to impose, the CC went on to consider the practical aspects of arranging that divestment. The CC set a deadline for the disposal – the precise date being confidential - and stated:

> "8.60 In the event that Ecowaste Southwest is not sold by [date], we would have the ability to require the appointment of a divestment trustee to oversee the sale of the business without a minimum price. The divestment Trustee would be responsible for the management of the divestment process, including determining the sales process required. …"

51. Stericycle complains that by giving this indication, the CC has created a significant and unnecessary risk that Ecowaste will be sold for a fraction of its true value. It suggests that potential buyers will be tempted to hold back from offering to buy the divestment package from Stericycle in the hope that they will be able to buy it later at a reduced price from the divestment trustee.

52. We agree with the CC that there is nothing in this point. It is clear from the Report that the CC's principal concern was that the divestment takes place quickly. In any completed merger there are concerns about the diminishing viability of the acquired entity in the hands of the acquirer, even if the business is being handled by a Hold Separate Trustee in the interim. In this case there was also the need for the new owner to establish itself before the retendering of the Key Contracts: see paragraph 8.52 of the Report. The CC's decision to encourage Stericycle to proceed speedily with divestment by announcing the backstop of the appointment of a divestment Trustee and sale without a minimum price was within its discretion. The contrary risk that Stericycle posits was unlikely to arise given that there are a number of potential bidders expected to be interested in acquiring the Ecowaste business.

Conclusion

53. In the light of the reasoning set out above, Stericycle's application is dismissed.

Vivien Rose Jonathan May Professor Colin Mayer

Charles Dhanowa
Registrar

Date: 24 May 2012