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CMA Stops the Show: Cargotec Deal Abandoned as UK Blocks After EU Clearance

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The UK's competition watchdog has prohibited a proposed merger that the European Commission had cleared little more than one month ago. On the same day, the US Department of Justice announced that it considered the deal problematic. These developments highlight the growing uncertainties that companies now face in getting global deals through and underline the need for careful, strategic planning to manage competition law risks.

Divergence is real and it can hurt

The assumption that UK competition laws and policies would largely continue to match those of the EU has been a key underpinning of the advice most practitioners have given since Brexit. Whilst still valid in most areas as a matter of law, the approach adopted by the UK Competition and Markets Authority (CMA) has, in fact, been diverging from that of the European Commission (EC) for some time in the field of merger control.

This spilt out when the CMA publicly expressed **skepticism of the EC's Google/Fitbit** clearance in early 2021. However, many commentators argued that this divergence was limited to digital markets and would not affect more traditional industries. The CMA would, it was asserted, do everything it could to coordinate and adopt an approach consistent with the EC particularly in deals in which neither party was a UK company.

That assumption can no longer be made.

Earlier this week, parties to a proposed merger abandoned their deal, which was already cleared by the EC, following a prohibition by the CMA. The CMA concluded that that the divestiture package that had been accepted by the EC was not clear-cut enough to be effective.

The blocked **Cargotec/Konecranes** merger serves as a stark reminder to companies that following the UK's exit from the EU's one stop shop merger regime, divergence in approach between the two authorities is real, and may lead to deals literally falling apart.

In this note, we consider the implications for parties facing parallel merger review before the EU and UK authorities and offer some practical tips to achieve the best outcome. It is clear that parties to transactions facing dual review in the EU and the UK need to pay close attention to the practice of both authorities, particularly in relation to remedies. Timing and cooperative engagement are paramount.

A brief look at the present case

Cargotec and Konecranes are Finnish companies offering container handling equipment and services to port terminals and industrial customers worldwide. The companies announced their proposed US$5 billion merger in October 2020. The deal was notified in a

Related People

Ali Nikpay

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number of jurisdictions, including the UK, EU, U.S., Australia, New Zealand, Singapore and Israel.

When the deal ran into trouble, the parties proposed a divestment remedy which involved carving out asset packages from within each of their existing businesses to be sold as a new combined business.

In February, the EC announced its approval of the deal subject to the divestiture remedy. The EC's Executive Vice-President Margrethe **Vestager said** "*[f]ollowing the remedies offered by the two companies, customers in Europe will continue to have sufficient choice of port equipment and will continue benefitting from competitive prices and a great choice of technology*".

Vestager doubled down on the justification for the EC's clearance of the deal in a speech on 25 March 2022. She asserted that the EC had made sure that the remedies addressed the EC's concerns through the divestiture of "*viable standalone businesses*".

Four days later the **CMA announced that it would block the merger**. The CMA was not satisfied with the parties' proposed remedies, stating that the asset packages "*would not enable whoever bought them to compete as strongly as the merging businesses do at present*" and that the process of carving out the assets and knitting them together "*would be complex and risky*".

Two days from then, Vestager returned to the fray, reiterating her message that the EC had made sure that the proposed remedies addressed its concerns and that the market had given positive feedback on them.

A sign of things to come

We should be cautious in drawing too firm a conclusion from one case. The US, EU and UK authorities regularly communicate with one another and have a strong record of coordinating their actions.

But the CMA's prohibition of the Cargotec/Konecranes merger – and the EC's very public support for the stand it took - suggests greater challenges lie ahead for parallel track cases, in particular when it comes to remedies: what is "clear-cut" for one authority appears no longer to be clear-cut for another. The CMA's public criticism of the EC's Google/Fitbit remedies provides support for the latter.

On the other hand, in September last year the **CMA unconditionally cleared the Meta/Kustomer** merger in Phase I, whilst the deal went to Phase II in Europe (it was **ultimately cleared with remedies in January 2022 by the EC**).

Global considerations

There was a broader global dimension to Cargotec/Konecranes, beyond the UK-EU divergence. In particular, on the same day as the CMA's prohibition, the **U.S. Department of Justice announced that the deal would have led to an "*illegal consolidation*" and that it had informed the parties that the proposed remedy was insufficient**.

The **ACCC has discontinued its review** following the abandonment of the transaction, but it noted in its press release that Australian customers had expressed strong concerns on the proposed remedy.

These elements underline the need for merging parties to factor in potentially different approaches across multiple jurisdictions, and the possibility that a tougher approach by one or several authorities may jeopardise the approval prospects of a deal that is cleared in other jurisdictions.

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How do you get your deal through unscathed?

There are four main things that companies need to bear in mind:

- **Should the UK be a condition precedent**: the UK merger regime is voluntary and is non-suspensory. As a result many companies opt not to have UK clearance as a condition precedent. Whilst this often makes sense, much greater thought than in the past needs to go into the question. Cargotec/Konecranes not only underlines that the CMA is now one of the toughest regulators in the world but also that it is willing to go its own way on remedies, even in deals between two non-UK companies.
- **Timing**: Having a robust, well thought out strategy on the timing of deal announcement and engagement with the authorities is critical. The merger review timetables of the EC and CMA do not line up - the CMA's review period is longer than that of the EC. Parties may want to stagger their submissions so that the CMA and EC are reviewing remedy packages at the same time. There is also a disconnect between the stage at which each authority may be willing to accept large, upfront remedy packages. The EC does, in certain circumstances, accept these in Phase 1, whereas the CMA typically requires an in-depth investigation to get comfortable. On the face of it, it appears that Cargotec and Konecranes may have simply run out of time to get the CMA comfortable with a revised divestiture package.
- **Defining the right remedy package**: In cases where remedies are on the cards, plan them early, discuss them early with the authority and make them as clear-cut as commercially possible. Cargotec/Konecranes confirms that it is difficult to persuade authorities to accept mix-and-match remedies. Parties should avoid remedies that could be difficult to implement and must take into account the remedy preference of each authority (a one-size-fits-all remedy package is no longer always an option).
- **Facilitate cooperation between agencies**: It is clear that cooperation between the EC and the CMA is not at its strongest. That means that the parties and their advisors will need to work much more closely and proactively with both authorities; "leave it to the authorities to sort things out between themselves" is no longer a viable strategy (if it ever was!).

The following Gibson Dunn lawyers prepared this client alert: Ali Nikpay and Mairi McMartin.

Gibson Dunn's lawyers are available to assist in addressing any questions that you may have regarding the issues discussed in this update. For further information, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Antitrust and Competition practice group, or the following:

Ali Nikpay – Co-Chair, Antitrust & Competition Group, London (+44 (0) 20 7071 4273, anikpay@gibsondunn.com)

Attila Borsos – Partner, Antitrust & Competition Group, Brussels (+32 2 554 72 11, aborsos@gibsondunn.com)

Deirdre Taylor – Partner, Antitrust & Competition Group, London (+44 20 7071 4274, dtaylor2@gibsondunn.com)

Christian Riis-Madsen – Co-Chair, Antitrust & Competition Group, Brussels (+32 2 554 72 05, criis@gibsondunn.com)

Nicholas Banasevic – Managing Director, Antitrust & Competition Group, Brussels (+32 2 554 72 40, nbanasevic@gibsondunn.com)

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Jessica Staples – Of Counsel, Antitrust & Competition Group, London (+44 (0) 20 7071 4155, jstaples@gibsondunn.com)

Mairi McMartin – Associate, Antitrust & Competition Group, Brussels (+32 2 554 72 29, mmcMartin@gibsondunn.com)

Rachel S. Brass – Co-Chair, Antitrust & Competition Group, San Francisco (+1 415-393-8293, rbrass@gibsondunn.com)

Stephen Weissman – Co-Chair, Antitrust & Competition Group, Washington, D.C. (+1 202-955-8678, sweissman@gibsondunn.com)

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