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The UK Competition Authority and US DoJ block the merger of two Finnish suppliers of equipment to port operators and reject the remedies offered by the parties *(Cargotec / Konecranes)*

UNITED KINGDOM, MERGERS, MANUFACTURING, SERVICES, TEST SLC (MERGER), REMEDIES (MERGERS), MERGER (PROHIBITION), MERGER (NOTION), UNITED STATES OF AMERICA

UK Competition Authority, *Cargotec / Konecranes*, Press Release, 29 March 2022
UK Competition Authority, *Cargotec / Konecranes*, Final Report, 31 March 2022

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Cargotec/Konecranes: Failed shipping equipment merger illustrates aggressive UK/U.S. enforcement and increased skepticism of remedies*

On March 29, 2022, global container handling equipment providers [Cargotec and Konecranes] abandoned their proposed $5 billion merger after the United Kingdom Competition and Markets Authority (CMA) and the U.S. Department of Justice Antitrust Division (DOJ) rejected the parties' proposed settlements, and the *CMA concluded that the transaction should be prohibited*. The same remedies had already been accepted by the European Commission, which cleared the merger to proceed in February. This is one of several recent examples of deals being abandoned due to antitrust challenges in the UK and United States.

The deal illustrates (1) the extent to which decisions in different jurisdictions may diverge, with the most restrictive regimes determining outcomes; (2) a growing trend of increased skepticism toward merger remedies, particularly in the UK and United States; (3) heightened risk around transactions touching key elements of critical supply chains, with regulators on the lookout for areas vulnerable to concentration in light of global developments ranging from pandemic to war; and (4), more broadly, the increasingly difficult regulatory landscape that dealmakers must navigate in undertaking global mergers.

Background

The combination involved two Finnish suppliers of equipment and services used by port terminal operators, logistics companies, and other industrial firms to lift and handle containers and cargo around the world. According to the CMA, Cargotec and Konecranes are among the world's leading manufacturers of container handling equipment, and the two largest suppliers in Europe, with shares in excess of 70% in some segments. Following an in-depth Phase 2 investigation, the CMA found that the companies competed closely for business in the UK, that the merger would reduce UK customers' alternatives from four to three or even three to two in certain segments, and that remaining competitors (including Chinese suppliers) would exert only a weak constraint on the merged entity. As a result, the CMA concluded that the deal would lead to a substantial lessening of competition, with "serious consequences for UK port terminals and other customers, including higher prices and lower quality products and services across a wide range of container handling products." [*1*] The parties' proposed remedies to address the specific segments of concern consisted of business units from each party that would be sold as a new combined business. The CMA found the proposed remedies insufficient, and when the parties refused to offer a more substantial package, the deal was blocked. A month before the CMA's decision, the *European Commission had conditionally approved the deal*, finding the remedies offered to be sufficient to address their concerns.

Regulators are taking an increasingly aggressive approach to merger enforcement

It is well known that the European Commission is no pushover when it comes to reviewing mergers, so what explains this divergence in approach?

Competition authorities around the world have aggressively stepped up merger enforcement, spurred by a range of political and economic factors. In the UK, the CMA has been taking an increasingly aggressive stance against mergers for several years. In the lead-up to Brexit, the authority was given a significant infusion of resources, which it deployed to full effect, as reflected in its recent case statistics. The frequency of case referrals to Phase 2 have almost doubled over the past four years compared to previous rates. And the rate of clearance at Phase 2 has dropped dramatically, with only 20% of deals referred since 2018 being approved, compared to an average success rate of around 50% from 2010 to 2017. Taking advantage of its highly flexible jurisdictional test, the CMA has intervened in numerous global deals, and has been unafraid to reach outcomes that diverge from other global regulators. This has led to several global deals being abandoned following CMA intervention, even where other regulators had cleared the deal or chose not to intervene. [*2*] It has now developed a reputation as one of the most aggressive and unpredictable antitrust enforcers in the world.

In the United States, the Biden administration has heralded a new era of aggressive enforcement. In July 2021, *President Biden issued a sweeping executive order* announcing a "whole-of-government competition policy," directing more than a dozen federal agencies to work with the DOJ and the Federal Trade Commission (FTC) on 72 initiatives to "address overconcentration, monopolization, and unfair competition in the American economy." In keeping with this mandate, the agencies have taken several significant steps to strengthen merger review, often departing from longstanding enforcement policy, including (1) temporarily *suspending the practice of granting early termination* of the initial 30-day HSR waiting period; (2) broadening the scope of information sought in Second Requests; (3) issuing "warning letters" for transactions the FTC cannot fully investigate in statutorily prescribed timelines, cautioning merging parties that the investigation remains open (indefinitely) and they close at their own risk; (4) adopting a *"prior approval" policy* requiring parties that enter into settlements to resolve competition concerns to give the FTC veto power over future deals in related areas for at least 10 years; and (5) launching a broad-ranging public inquiry aimed at *revisiting and likely revising the Merger Guidelines*.

Concerns about prior lax enforcement leading to concentration and consumer harm

In both jurisdictions, these shifts have been driven in part by a belief that competition enforcement has been too lax and that, as a result, markets have become too concentrated. In recent legislative proposals to further enhance the CMA's powers, the UK Government has cited a body of academic research showing increased levels of market power and reduced competition over time. FTC Chair Lina Khan recently alluded to these studies, noting that "evidence suggests that decades of mergers have been a key driver of consolidation across industries . . . with workers, farmers, small businesses, and consumers paying the price," and that "[a] lack of competition also appears to have left segments of [the U.S.] economy more brittle, as consolidated supply and reduced investment in capacity can render us less resilient in the face of shocks." [*3*] Along similar lines, studies on both sides of the Atlantic have evaluated the success of remedies over time and have cast doubt on their effectiveness in preserving competition. [*4*] Regulators have pointed to this research as justifying a strong preference for structural divestment of pre-existing, standalone businesses, a disinclination to accept behavioral/conduct remedies, and indeed in some cases, the notion that remedies should not be accepted at all, and that anticompetitive deals should prohibited outright.

In *Cargotec/Konecranes*, the proposed remedy involved the divestment of two separate business units, one from each of the parties, designed to address the specific overlap areas. However, both the DOJ and the CMA sent strong messages that this kind of "mix and match" solution was unacceptable. The CMA, in particular, highlighted concerns that the proposed carve-out was subject to material "composition" risk, stemming from insufficient or missing assets that would be needed to compete effectively, as well as a lack of certainty as to the effectiveness of the carve-out, which would not necessarily be cured by the right purchaser. The CMA was also concerned that the package was not of sufficient scale to create a viable competitor, given value placed by customers on portfolio breadth. The parties would have had to offer elements going beyond the immediate overlaps identified by the CMA to create an acceptable package.

Fundamental differences in the remedial toolkits of the U.S., UK, and EU regimes

Key differences in the structure of merger control regimes and the legal standards applied by regulators also can drive divergence and differing outcomes.

In the United States, the antitrust agencies retain broad discretion in considering and negotiating remedies and are under no statutory obligation to entertain settlements. For transactions that receive a Second Request (the analog to Phase 2 review), it can be very difficult for merging parties to comply with the agency's investigation while also proving the sufficiency of a fix during the review process. If the agency is unconvinced, it may sue to block a transaction, in which case the proposed remedy may be litigated in a federal court, where the precise legal standards and burdens of proof relating to fixes remain somewhat unclear.

In the UK, while the ability for parties to offer (and for the CMA to impose) remedies is built into the regime, the CMA has broad discretion and is subject to a high legal standard to ensure that any remedies will be effective in restoring competition lost as a result of a merger. This places the balance of power firmly against the parties, who have to meet high standards of proof regarding the ability of the remedy to succeed, while having little recourse to challenge the outcome, given the high standards which must also be met in order to appeal a CMA decision.

Contrast this to the EU regime: the ability to offer and negotiate remedies is also built into the legislative framework, but the Commission has less discretion to reject remedies out of hand if they perform well in the market test process. In *Cargotec/Konecranes*, the EU Competition Commissioner suggested that the Commission's hands were tied because an extensive market test involving 60 market participants had confirmed that the remedy would replace lost competition and there was significant market interest in purchasing the divestiture package. In other words, if the Commission had rejected the remedies, it would have faced a legitimate risk of appeal. The buyer would also have required upfront approval, giving the Commission comfort that it would have final say on the divestment purchaser before the deal could close. This illustrates why the Commission might be more willing than other regulators to consider pragmatic solutions to address competition issues in complex transactions, enabling deals to proceed.

What does this mean for future deals involving potential overlaps?

Cross-border deals involving businesses that have material overlaps may face significant—and sometimes insurmountable—hurdles. Parties should bear in mind the following key points when considering deals involving competitors, or the creation of a significant vertical link:

- **First**, there is no one-size-fits-all approach to the assessment of mergers. Parties cannot assume that regulators will take a consistent approach, even where they collaborate extensively, as they did in this case. This lack of predictability means that it is more important than ever to get antitrust advice early in order to formulate a strategy to coordinate parallel merger filings, maximize the chances of consistent outcomes, and plan for divergent ones.

- **Second**, the bar has been raised for securing approval for challenging deals, in particular where there is a reduction in the number of competitors from four to three, and especially where parties compete closely. In such cases, the risk of prohibition and/or challenge is greater than ever. This needs to be factored into early-stage commercial decision-making in the boardroom, as well as deal deal negotiations around risk allocation.

- **Third**, where remedies are needed, the standard for acceptance will be high. Fully structural fixes involving stand-alone businesses have always been favored by regulators, but now more than ever, creative solutions—even if objectively viable—will face an uphill struggle due to lack of certainty as to their long-term ability to truly remedy the loss of competition brought about by the deal.

- **Fourth**, as regulators increasingly look to antitrust as a tool to address a broad range of economic and social challenges, parties undertaking deals impacting politically sensitive areas (such as critical supply chains in the era of COVID) should be prepared for additional headwinds and proactively consider communications and advocacy strategies that anticipate such scrutiny.

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[*1*] *Competition Markets Authority, Press Release, CMA blocks planned Cargotec/Konecranes merger* (Mar. 29, 2022).

[*2*] For example, in May 2020, the *Sabre/Farelogix* deal was abandoned following CMA intervention, even though the parties won in litigation against the DOJ. Later that year, Taboola/Outbrain was abandoned after it was referred to Phase 2 in the UK, even though it had been cleared in the United States.

[*3*] *Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement* (Jan. 18, 2022).

[*4*] *See generally* John Kwoka, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (1st ed. 2015).