CARGOTEC/KONECRANES: RED CARD TO MIX-AND-MATCH REMEDIES?

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Divergence in outcomes in the first parallel in-depth merger review by the European Commission and the UK competition authority

In a recent decision, the United Kingdom's Competition and Markets Authority (the **"CMA"**) blocked the proposed merger (the **"merger"**) between Cargotec Corporation (**"Cargotec"**) and Konecranes plc (**"Konecranes"**) (together, the **"parties"**) after its Phase 2 investigation identified substantial competition concerns.[1][2] The decision came just a few weeks after the same transaction had been approved subject to remedies by the European Commission.[3] The merger was eventually abandoned following the CMA Decision.

Some commentators have indicated that these conflicting approaches have *"set the tone for [the CMA's] future divergence from the European Commission"* and, in particular, *"exposed the authorities' conflicting views on remedies"*.[4] This case was the first Phase II review conducted in parallel by the CMA and the European Commission.

[1] Competition and Markets Authority, *Anticipated merger between Cargotec Corporation and Konecranes Plc*, Final Report. 30 March 2022. Available online at https://assets.publishing.service.gov.uk/media/62458e408fa8f52773d76abf/310322_Cargotec_Conecranes_Final_Report.pdf (link visited 5 April 2022). Hereafter, the **"CMA Decision"**.

[2] The authors did not work for any of the parties or third parties on this merger.

[3] European Commission Press Release. Mergers: Commission clears the merger of Cargotec with Konecranes, subject to conditions. 24 February 2022. Available online at https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1329 (link visited April 2022).

[4] *Cargotec-Konecranes merger sets tone for future UK-EU divergence*, available online at https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/mergers-and-acquisitions/cargotec-konecranes-merger-sets-tone-for-future-uk-eu-divergence/ (link visited 5 April 2022).

The parties are active in the provision of container handling equipment to ports in the UK and Europe. After a Phase 2 investigation, both the European Commission and the CMA found that the merger would have raised competition concerns in some markets for products in this area. While the Commission's decision is yet to be published, the CMA's decision shows that the finding of substantial lessening of competition (SLC) stemmed from the parties being close competitors, as well as the lack of competitive constraints exerted by their competitors. The CMA based their finding on the parties' high market shares, its bidding analysis, third party views, and internal documents. An important driver of this closeness of competition, in the CMA's view, was that the parties were able to offer "one-stop-shop" solutions for all of the customer's cargo handling equipment needs. Further, notwithstanding Chinese suppliers benefitting from cost advantages resulting from state-ownership, the CMA concluded that the parties were able to compete effectively with Chinese suppliers that focused on specific market segments and faced barriers to entry and expansion.

Mix-and-match divestment not matching the CMA's expectations

The parties proposed a so-called "mix-and-match" divestment that would include the sale of Cargotec's automation systems (sold under the brand Kalmar) and Kronecane's lift truck business, which together would cover the extent of the overlap between the parties' cargo handling businesses. The parties also proposed to the CMA that the entirety of the remedy be sold to a single purchaser, which would, as a result, be able to offer a complete cargo handling equipment offer.

What is a mix-and-match divestment?
A "mix-and-match" divestment is a proposed sale that includes assets from the two merging parties, rather than an existing business unit from one of the parties only. Mix-and-match divestments have in the past been accepted by both the European Commission (e.g. in various pharma mergers where the European Commission typically allows the sale of only of the parties' products for each problematic overlap) and the CMA (e.g. retail mergers such as EG/Asda). In these past cases, the individual parts of the remedy were typically sold as a standalone business.

While the European Commission was content that the proposed divestments were sufficient to allay any competition concerns created by the merger, the CMA considered that this approach would create a significant risk to the effectiveness of the remedy. Key to the CMA's finding was some customer's preference for "one-stop-shop" solutions for their cargo handling needs. Despite finding that each sub-product constituted a separate market, the CMA identified the ability to provide "one-stop-shop" solutions as an important driver of the parties' closeness of competition.

The CMA considered that the remedy did not provide this advantage even if it was sold to a single firm given that the process of carving out these businesses from the two parties to create a new competitor would come with a risk. This risk would hamper, in the CMA's view, the divestment business' ability to compete with the merged entity to the extent that it would mitigate the effectiveness of the remedy. The CMA also considered that the divestment business would benefit from fewer economies of scale than the parties or the merged entity, due to its more limited size. The CMA's competitive assessment noted that the parties' ability to compete with a complete portfolio of cargo handling equipment and their significant scale made them particularly close competitors. The CMA considered the proposed remedies would not effectively replace this. On this basis, the CMA decided to block the merger. The CMA indicated that it would consider a remedy comprised of the entirety of the cargo handling equipment business of one of the parties. However, because such a divestment was not offered by the parties, the CMA did not investigate this option further.

The CMA Decision highlights the importance of careful remedy design to obtain a merger approval. This involves both the need to ensure that the remedy does not create new risks (such as creating a new entity that includes assets of the two parties) as well as that the remedy addresses the theories of harm as expressed in the competitive assessment of a merger.