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Fingleton Insights

CMA Remedies Wrapped - Part Two

How to face the music in 2023

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2022 was a bumper year for interesting merger remedy decisions. So, we thought this would be a good time to play a riff on 'Spotify Wrapped', to produce 'CMA Remedies Wrapped'. In this series, we distil the key developments in merger remedy decisions into four main themes (revisit Theme #1).

Our aim is to:

- provide legal and economic advisors in the cut and thrust of CMA engagement with a bird's eye view of the recent evolution of remedy policy, and some practical takeaways that flow from it; and
- help businesses that are planning transformative mergers to better understand how they can lean into the CMA process to their advantage.

We cover each of the four themes in turn, adding an emblematic tune (not necessarily representative of Fingleton's tastes). This article covers Theme #2 in the series.

Theme #2: Counting stars - intangibles take centre stage

In early 2021, the CMA revised its merger assessment guidelines to include several pages of thinking on potential and dynamic competition. This guidance was followed by merger cases in which the CMA studied innovation theories of harm (*Roche / Spark*), potential competition (*Amazon / Deliveroo*) and dynamic competition (*Facebook / Giphy*).

Phase 2 decisions in 2022 marked a continuation of this trend in the context of remedies by focussing on intangible assets that would be important to retaining the potential and dynamic competitive tension from divestment businesses. *Cargotec / Konecranes*, *Carpenter / Recticel* and *Sika / MBCC* are good examples of where intangibles - such as brand, patents/know-how

and the capacity for R&D - took centre stage in 2022.

What can we learn from these decisions? Is the CMA counting stars like One Republic?

Decide the 'principles' of your remedy package up front

The CMA acknowledges that it does not expect the parties to provide a full list of assets to be transferred under a remedy. However, the parties in *Cargotec / Konecranes* did not provide any indication of the general principles that they proposed to use as a guide to determining what's in and what's out.

Without these principles, the CMA felt it had no way of overcoming the information asymmetry between it and the merging parties, giving rise to the risk that the scope of the package was not right.

Thinking critically about high-level principles when you're in the rough and tumble of Phase 2 may be tough with the pressure of preparing for site visits, hearings and working paper responses. But it is crucial to making a successful pivot to remedies after an SLC finding, and could usefully be front-loaded to earlier in the process.

Understand the importance of branding to competition when designing restricted brand licences

Cargotec / Konecranes showed that branding is sometimes a critically important feature of remedy design at the CMA, even in intermediary markets where customers are typically expected to 'see through' branding. In this case, the CMA was concerned that 'sharing a brand' would lead to confusion among customers and that there was a risk to the purchaser in rebranding after the licence had run its course. Similarly, in *Sika / MBCC*, branding was a focus for the CMA in its referral decision. That's why the parties committed to a clean separation of branding post-merger, with the merged entity retaining branding only in countries where the remedy-taker would not be active. The CMA accepted this proposal but only after careful explanation that brand-sharing globally would not impact the divestment business's standalone competitiveness in the UK.

Develop a clear carve-out plan for R&D and shared IP

The CMA has been increasingly granular in its assessment of the R&D capabilities of proposed remedies packages.

In *Cargotec / Konecranes*, the CMA was concerned that IP to be shared between the merged entity and the divestiture purchaser would not include R&D assets that were developed outside the perimeter of the divestment business but could be used by the divestment business. It was also crucial that the terms of any licensed IP ensured the purchaser had the necessary resources - including employees - to carry out its own development of shared IP.

When looking at employees, it isn't just about the numbers. The CMA was slow to accept the parties' claims that R&D employees would be divided up between the retained and divested businesses based on which business they

"predominantly" spent time working for. It was cautious about using 'time spent' as a solitary metric because there may be other ways in which R&D employees that predominantly spend time on retained business projects are crucial to the divestment business.

The same was true in *Sika / MBCC* where the CMA went beyond a simple 'time spent' measure. It explored any R&D collaboration projects and secondments between the divisions - all with a view to identifying interdependencies between the carve-out business and the retained business' employees.[1] The CMA's decision in *Sika / MBCC* also showed a strong preference for a reverse carve-out structure that puts the risk of 'missing assets' (particularly intangibles) on the merging businesses. Sika's strategy is a good example of a completist approach to CMA remedy proposals, recognising that remedies are not a negotiation with the CMA but rather a one- or two-shot game.[2]

In summary, these 'counting stars' decisions send a message to businesses and advisors on remedies planning: R&D cannot be an afterthought in remedies planning. It is seen as critical to restoring the pre-merger level of competition. And this is true even in relatively low-tech industries like cranes, costruction chemicals or foam.

If you'd like to explore these ideas further with us, we would be happy to continue the conversation.

Profiles

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Carlo helps clients understand complex competition and regulatory challenges, identifying and mitigating multi-jurisdictional risks on complex and high-value deals. He draws on his experience advising in Fingleton and legal private practive to provide thoughtful and innovative advice with a view to protecting long-term value.

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Joel specialises in strategic advice on complex transactions that touch the UK. His experience and approach help clients gain a deep understanding of the objectives and priorities of key stakeholders so that they can successfully anticipate and navigate regulatory processes. Before joining Fingleton in February 2022, Joel was Senior Director of Mergers at the UK Competition and Markets Authority.

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1 A third party prompted the CMA by explaining that know-how would exist in the 'minds of the staff' meaning that the staff and the know-how which came with the R&D centres were just as important as the relevant patents.

2 Unlike in *Cargotec / Konecranes* and *Sika / MBCC*, it was not possible to carve relevant R&D resources out of the target's R&D facility in *Carpenter / Recticel*. Instead, the parties' proposed divestment business would have been supplied R&D services by the merged entity through a transitional agreement. The CMA did not accept this fix.