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# Newsletter EU Law

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## Merger between Cargotec and Konecranes cleared

On 24 February 2022 the Commission cleared the proposed merger between Cargotec and Konecranes. The approval is conditional on the divestiture of certain businesses.

Cargotec and Konecranes are the largest European and amongst the leading global manufacturers of container and cargo handling equipment, as well as providers of terminal automation solutions. The Commission had concerns that the transaction would have substantially lessened competition. To address the Commission's concerns Cargotec offered to divest its cranes and straddle/shuttle carrier business, including a manufacturing plant in Poland and a licence for use of Cargotec's Kalmar brand. In the mobile equipment markets Konecranes agreed to divest its business for the manufacturing and commercialisation of reach stackers, full container handlers, empty container handlers, and forklift trucks, including manufacturing plants in Sweden and China, as well as contracts with distributors.

## General Court dismissed Scania's appeal

On 2 February 2022 the General Court maintained a fine of EUR 880 million imposed in 2017 by the Commission for Scania's participation in a cartel between truck manufacturers.

Scania withdrew from the settlement procedure and the Commission followed a 'hybrid' procedure, combining the settlement procedure and the standard administrative procedure in cartel matters. The General Court observed that the Commission's decision to follow a hybrid procedure does not, in itself, entail an infringement of the presumption of innocence, the rights of the defence or the duty of impartiality. The Commission is bound solely by the statement of objections and must review the file in the light of all the relevant circumstances. The Commission's legal classification of the facts with regard to the settling parties does not in itself presuppose that the same legal classification of the facts was necessarily adopted by the Commission and there is nothing to prevent the Commission from relying on evidence used in both decisions of the hybrid procedure. Scania did not deny that it had had the opportunity to submit all the evidence to challenge the facts and evidence on which the Commission relied in the standard administrative procedure, including the evidence added to the file after the statement of objections.

As regards the concept of a 'single and continuous infringement', the General Court found that the Commission had established to the requisite legal standard that the collusive contacts which took place over time at different levels in Scania's undertakings, taken together, formed part of an overall plan aimed at achieving the single anti-competitive objective of restricting competition on the market.

## Acquisition of Kustomer by Meta approved

On 27 January 2022 the Commission cleared the acquisition of Kustomer by Meta (formerly Facebook) conditional on commitments by Meta.

Kustomer, founded in 2015 in the US, is a Customer Relationship Management (CRM) software provider offering businesses solutions to manage communications with consumers across different channels in a single tool. Facebook's messaging channels WhatsApp, Messenger and Instagram are important means through which businesses interact with their customers, and are inputs for customer service and support CRM software providers. Meta and Kustomer therefore operate in vertically-related markets.

The investigation focused on whether Meta may disadvantage Kustomer's rival providers, such as denying or degrading their access to the application programming interfaces ('APIs') for Meta's messaging channels. Meta offered comprehensive access commitments with a 10-year duration, including a guarantee for non-discriminatory access, without charge, to its publicly available APIs for its messaging channels to competing CRM software providers and new entrants. Meta also committed to make available equivalent improvements to Kustomer's rivals. A trustee will monitor the implementation and third parties can invoke a binding dispute resolution mechanism. The proposed transaction did not meet the turnover thresholds of the EU Merger Regulation. However, the transaction was required to be notified to Austria for regulatory clearance. Austria submitted a referral request to the Commission. The Commission considered itself the competent authority because the case was referred to it by the Austrian competition authority. The German competition authority had doubts about whether the Commission was competent, therefore investigated the merger in parallel and cleared it on 11 February 2022, too, however "with some stomach ache" as the president of the German antitrust watchdog commented.

## General Court annulled EUR 1.06 billion fine on Intel

On 26 January 2022 the General Court annulled in part the Commission decision as well as a fine of EUR 1.06 billion on Intel.

In 2009 the Commission imposed on Intel a fine for having abused its dominant position on the worldwide market for x86 processors between 2002 and 2007. The action brought by Intel against that decision was dismissed in its entirety by the General Court in 2014. However, in 2017 the European Court of Justice (ECJ) set aside that judgment and referred the case back to the General Court, because like the Commission, the General Court had relied on the assumption that the fidelity rebates granted by an undertaking in a dominant position were by their very nature capable of restricting competition.

The Commission had to analyse the extent of the undertaking's dominant position on the relevant market. It had also to assess the possible existence of a strategy intended to exclude at least as-efficient competitors (AEC). The Commission erred in law by concluding that the AEC test, which it nevertheless carried out, was not necessary to enable it to establish that Intel's rebates at issue were abusive. The General Court found that the infringement had not been sufficiently demonstrated if the undertakings concerned put forward a separate plausible explanation of the facts. The General Court stated also that the Commission had not established to the requisite legal standard the capacity of each of the rebates at issue to have a foreclosure effect, in the light of the arguments put forward by Intel regarding the Commission's assessment of the relevant analysis criteria. It also found that the Commission did not consider properly the criterion relating to the share of the market covered by the contested practice and also did not analyse correctly the duration of the rebates. As to the amount of the fine imposed by the Commission, the General Court considered that it is not in a position to identify the amount of the fine which relates solely to the naked restrictions and annulled the entire fine.

## Deutsche Telekom awarded compensation on interest

On 19 January 2022 the General Court awarded Deutsche Telekom EUR 1.8 million compensation for the harm which it suffered as a result of the Commission's refusal to pay it default interest on the unduly paid amount of the fine.

In 2014 the Commission imposed on Deutsche Telekom a fine of EUR 31 million for abuse of its dominant position on the Slovak market for broadband telecommunications services. In 2018 the General Court upheld Deutsche Telekom's action in part and reduced the fine by EUR 12 million. The Commission repaid that amount to Deutsche Telekom, however, it refused to pay default interest for the period between the date of payment of the fine and the date of reimbursement of the portion of the fine held not to be due. The General Court rejected Deutsche Telekom's claim directing the Commission to pay compensation for lost revenue as a result of the loss of use of the principal amount. However, it upheld Deutsche Telekom's action regarding the Commission's obligation to pay default interest, because the Commission had no discretion in that regard. The General Court concluded that the refusal to pay interest constituted a serious breach of Article 266 TFEU, which results in the EU incurring non-contractual liability.

## Merger of Daewoo Shipbuilding and Hyundai prohibited

On 13 January 2022 the Commission prohibited the proposed acquisition of Daewoo Shipbuilding & Marine Engineering by Hyundai Heavy Industries Holdings. Both companies are two of the three largest players in the very concentrated market for the construction of large Liquefied Natural Gas (LNG) carriers, which are an essential element in the supply chain of LNG. The worldwide market represents up to EUR 40 billion, with European customers accounting for almost 50% of all orders.

The investigation concluded that the combined entity would have been by far the largest player in the world, with only one other large competitor in the market. Large LNG carriers are highly sophisticated and differentiated vessels that are extremely complex to build. Entering the market and successfully operating in it is very difficult. The parties did not formally offer remedies and the Commission prohibited the proposed transaction

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**This publication is intended for general information only. On any specific matter, specialised legal counsel should be sought.**

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**Luther, EU Law Center  
Avenue Louise 326, 1050 Brussels, Belgium  
Phone +32 2 6277 760, Fax +32 2 6277 761  
helmut.janssen@luther-lawfirm.com**

# Luther.

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