

## Microsoft Takeover Shows The Need For EU-UK Cooperation

By **Salomé Cignal de Ugarte and Raphaël Fleischer** (June 13, 2023, 4:28 PM BST)

On April 26, the U.K. Competition and Markets Authority prohibited Microsoft Corp.'s \$69.7 billion acquisition of Activision Blizzard, Inc., indicating that it would harm competition in "the fast-growing cloud gaming market."<sup>[1]</sup>

Only a few weeks later the same transaction was conditionally approved by the European Commission.<sup>[2]</sup>

The diverging outcomes of European enforcers regarding a global merger have fueled heated discussions surrounding regulatory disparities after Brexit and raised questions with regard to a potential rift between the CMA and the EC.

However, a closer examination reveals a more nuanced picture, suggesting that convergence may prevail over divergence. In fact, this case has now prompted antitrust agencies to take steps toward formal cooperation between the EU and the U.K.<sup>[3]</sup>

The contrasting outcomes of the Microsoft/Activision case highlight one of the few instances since Brexit, where the CMA and the EC have reached opposite conclusions, despite analyzing the same deal, based on the same facts and affecting global markets.

At the core of the divergence is the agencies' approach to remedies and their assessment of behavioral commitments to address competition concerns.

The parties offered nonstructural remedies, consisting of licensing commitments, with a 10-year duration. The package included a free license for consumers to stream all Activision games for which they have a license, via a cloud service of their choice and a corresponding free license to cloud game streaming service providers.

While the EC viewed these remedies as adequate, enabling broader access to popular games through cloud game streaming, the CMA found them insufficient for the rapidly evolving gaming and cloud gaming segments, leading to the blockage of the deal.

For Executive Vice President and EU Competition Commissioner Margrethe Vestager, the commitments "fully address" the competition concerns identified and "will enable for the first time the streaming of



Salomé Cignal de Ugarte



Raphaël Fleischer

[certain] games in any cloud game streaming services, enhancing competition and opportunities for growth."

Moreover, in her view, the EC's decision is pro-competitive as it "represents an important step in this direction by bringing [...] popular games to many more devices and consumers [...], thanks to cloud game streaming."

In contrast, the CMA opted for a strict approach to behavioral commitments, outlining that the licensing remedies had "significant shortcomings" and would by their nature require the CMA and other enforcers to "effectively regulate" the growing and fast-moving global cloud gaming sector.

### **A Turning Point or an Anomaly?**

This was not the first time since Brexit that the CMA and the EC have diverged on their views regarding a potential global tie-up. Only last year, the CMA prohibited the multibillion-euro merger between Cargotec and Konecranes, one month after the EC had conditionally cleared that same deal.[4]

That said, there are more examples of both agencies converging on their merger control outcomes than diverging, even on complex global transactions like Nvidia Corp. and Arm or Sika AG and MBCC Group.

As recently pointed out by the CMA, divergence is inevitable, since both agencies work on the basis of different legal frameworks and different case law, and also place different weight on the evidence with which they are provided.

But it is an exception, not the rule. In fact, only two out of the 27 cases that the CMA has launched in parallel with the EC since Brexit have concluded differently.

Outside of merger control, the CMA and the EC would also seem to converge in most areas of enforcement. For instance, the U.K.'s Vertical Agreement Block Exemption Order, which entered into force in 2022, shares many similarities with the EU's Vertical Block Exemption Regulation, albeit with some key distinctions driven by the U.K. market's characteristics, e.g., dual distribution or the assessment of noncompete obligations.

Similarly, in sustainability agreements and digital markets, differences arise due to varying legislative priorities, but efforts to bridge these gaps through cooperation and harmonization are expected.

### **Toward Formal Cooperation Between the EC and the CMA**

The EC has indicated that, despite the divergent outcome on the Microsoft and Activision review, cooperation with other antitrust agencies around the world was "excellent." [5] This included the CMA in the U.K., and also Canada, the U.S., Australia and New Zealand.

Yet, this case has also demonstrated the need for better EU-U.K. cooperation in the post-Brexit era. Commissioner Vestager has emphasized the desire for a formal competition cooperation agreement akin to the one the EC has with the U.S., acknowledging the existing consensus between the agencies.

The CMA has in turn urged the U.K. government to work toward such an agreement to facilitate information sharing and alignment in ongoing reviews and investigations, particularly in digital markets.

Before Brexit, the EC and the CMA used to cooperate and exchange information in the context of the European Competition Network, through which the EC and the national competition authorities of the member states collaborate with each other.

But this mechanism no longer exists. In turn, the EU-U.K. Trade and Cooperation Agreement, signed in December 2020, which sets out the new legal framework between the EU and the U.K., does not provide for a comparable close cooperation and allows only for the cooperation in the field of competition that is permitted under domestic rules.[6]

Pursuant to Article 361(4) of the agreement, however, the EU and the U.K. may enter into an agreement on cooperation and coordination between the EC, the competition authorities of the member states and the CMA, which may include conditions for the exchange and use of confidential information.

On this basis, EU ministers have now given the mandate to launch discussions between the EC and the CMA for a formal competition cooperation agreement.

On June 8, the council adopted, without discussion, a decision authorizing the opening of negotiations with the U.K. on cooperation and exchange of information in competition matters.[7]

The agreement will supplement the EU-U.K. Trade and Cooperation Agreement within the meaning of Article 2 of the agreement, and cover cooperation with the U.K. competition authorities on matters related to the application of competition law.

In the meantime, without a formal EU-U.K. cooperation agreement, parties to M&A transactions will need to assess the risk of potential divergences in approach between competition authorities, particularly with regard to remedies.

While the EC might seem to adopt a more permissive approach to behavioral commitments than the CMA, this will ultimately depend on the specificities of a particular case. Both agencies still follow a rigorous approach to remedies and will continue generally to prefer structural remedies.

However, in certain situations, solutions other than divestitures, such as granting access to a technology or an asset, might be acceptable to address the competition concerns.

In these cases, the conditions for doing so will be stringent and will need to be coupled with the appropriate monitoring mechanisms.

---

*Salomé Cisnal de Ugarte, Ph.D, is a partner and Raphaël Fleischer is a senior associate at King & Spalding LLP.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] See CMA Final report about the anticipated acquisition by Microsoft of Activision Blizzard, Inc, of 26 April 2023.

[2] See press release of conditional approval of 15 May 2023, M.10646, Microsoft/Activision Blizzard.

[3] See Council decision authorizing the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement on cooperation and exchange of information in competition matters; 9466/23, adopted on 8 June 2023.

[4] See CMA Final report about the anticipated merger between Cargotec Corporation and Konecranes Plc, of 31 March 2022; M.10078, Cargotec/Konecranes, conditional approval of 24 February 2022.

[5] See speech of EVP Vestager of 25 May 2023.

[6] See Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, on the one part, and the United Kingdom of Great Britain and Northern Ireland, on the other part, Official Journal of EU, L 149/10, 30.04.2021, which entered into force on 1 May 2021.

[7] See above, Council Decision authorizing the opening of negotiations.