

Fingleton Insights

Navigating a tougher approach

UK M&A: getting the deal done

January 2022



The Competition and Markets Authority's (CMA) approach to mergers has become predictably tough. Businesses appear to be adapting to this by doing fewer deals that could raise competition concerns. This is why, in 2021, the CMA blocked a smaller number of deals than in 2019 and 2020.

Combined with the introduction of a new national security merger regime and the continued role of the CMA in international mergers post-Brexit, this means the UK is likely to represent a greater source of regulatory risk for deal-makers. Businesses involved in M&A activity with a UK connection will need to continue to adapt their approach.

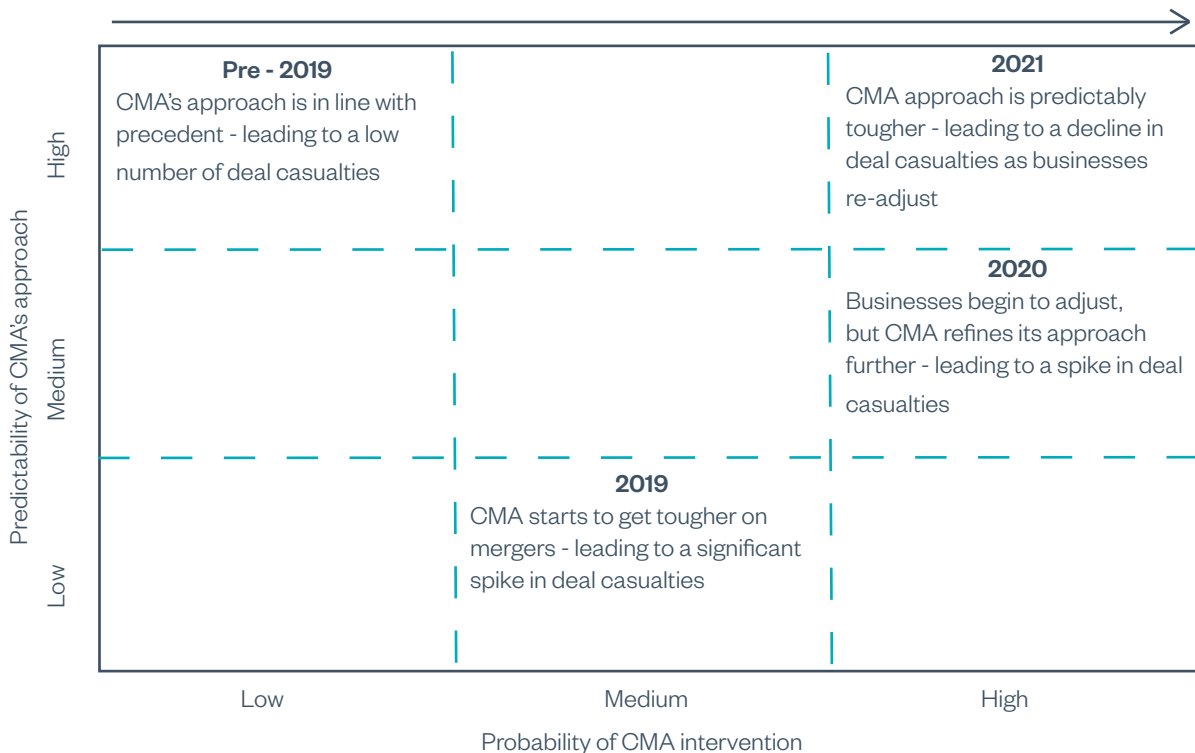
Outlined below are the key factors which businesses involved in deals should consider.

1/ The CMA is now predictably tougher on mergers

In recent years, the CMA has taken a tougher approach to mergers. This resulted in a sharp rise in the number of deals being blocked by the CMA. Underlying this spike in merger prohibitions has been the CMA's focus on deals which may have been less likely to raise concerns in the past - for example, where the merging parties are not active in the same market, or where larger firms are buying much smaller competitors. The CMA has also become more sceptical about the ability of countervailing factors (potential entrants, the expansion of existing competitors, and/or merger specific efficiencies) to address its concerns¹.

Merging parties' internal documentation (such

Evolution of CMA approach to mergers



¹As outlined in the CMA's revised [Merger Assessment Guidance](#).

as emails, internal presentations, competitor monitoring, marketing material and minutes of board meetings) can carry more weight than other types of evidence about the merger or market dynamics. In other words, what businesses say to the CMA may be treated sceptically if their internal documentation tells a different story. This can make it more difficult to change the CMA's mind if it does identify concerns.

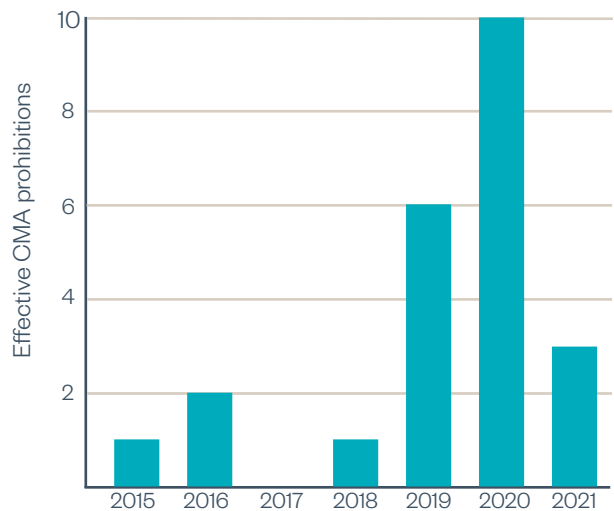
The CMA is also exploring novel competition concerns such as the impact of combining products and data sets. In the vast majority of cases, these concerns have not been enough to stop deals altogether - but they can lead to unexpected and costly CMA merger inquiries which delay completion or integration.

The CMA's approach is now predictably tougher for firms looking to do deals in the UK.

2/ Businesses are adapting to the CMA's tougher approach

Three deals were prohibited or abandoned in Phase 2 in 2021, compared to 10 in 2020 and six in 2019². The reduction in the number of prohibitions appears to be driven by businesses and their advisors adjusting to the CMA's tougher approach, i.e. fewer deals with possible competition concerns are getting done. Briefing notes submitted to the CMA's merger intelligence committee³ have increased from 25 in 2018/19 to 82 in 2019/20, and 83 as of October 2021⁴. This implies firms are taking a more

Effective CMA prohibitions (2015 -2021)



Source: Fingleton analysis of CMA merger decisions

cautious approach to deal clearance in the UK by seeking initial reactions from the CMA at the earliest stage.

3/ The CMA is reviewing more international mergers

The CMA continues to be a stumbling block for international mergers. This is the case even where the target has limited turnover in the UK, or where the deal has been cleared in the merging parties' core geographic market(s).

Brexit has also magnified the CMA's impact on international mergers. In 2021, several mergers were reviewed by both the CMA and the EU Commission which (pre-Brexit) would have otherwise been solely reviewed by the

² Cases where the CMA issued a prohibition decision, the deal was cancelled post-opening of a Phase 2 investigation (cases abandoned prior to the Phase 2 referral decision are not included), or the remedies effectively amount to prohibition.

³ The CMA's mergers intelligence committee monitors unnotified mergers that the CMA might be interested in reviewing.

⁴ CLA webinar '[Merger Control: developments from recent cases and proposals for reform of UK merger control](#)', 13 October 2021.

EU Commission. This increases the number of parallel regulatory processes for these mergers, making these timelines much more challenging for businesses to manage and coordinate⁵. Where concerns are identified, businesses will also need to consider the jurisdictional differences in approaches to remedies. For example, the CMA may be less likely to accept behavioural remedies in place of structural divestments than the EU Commission⁶.

4/ National security regime to add further risk

A new transaction and investment screening regime came into force in the UK on 4 January 2022⁷. This has given the UK government broad powers to intervene in a range of deals on national security grounds. The government has estimated that it will review between 1000-1800 transactions a year under this new regime⁸.

While the National Security and Investment Act 2021 highlights 17 specific sectors that will face particular scrutiny, the regime offers broad scope to intervene in deals across the economy. This means that issues that have come to the fore in recent years (e.g. supply chain disruptions during the pandemic) may trigger increased government interest even in sectors that would not typically be expected to be the focus of national security rules⁹.

The UK's new national security regime will increase regulatory costs and execution risks for businesses looking to do deals in 2022. In addition, where CMA merger clearance interacts with the new national security regime, businesses will need to develop compelling deal clearance narratives that are consistent with the priorities of both regimes.

Practical tips for businesses looking to get deals done in 2022

Whilst the factors discussed above increase challenges for businesses, there are ways to minimise regulatory risk. Businesses trying to get deals done in 2022 should:

- **Conduct early and thorough pre-deal risk assessments** which take into account the CMA's tougher approach to mergers as well as any potential national security implications.
- **Engage with competition authorities in multiple jurisdictions as early as possible.** For international deals with a UK nexus, this will mitigate the impact that the CMA's unusual procedural rules may have on deal timings.
- **Think creatively about how to structure deals.** This is particularly important as

⁵ Unlike in many other jurisdictions such as the EU, in the UK there is no requirement to notify mergers. For mergers which are not notified, the CMA has up to four months post-closing to 'call in' the deal. This means it is possible that the CMA will open an investigation once reviews in the EU or other jurisdictions are well underway, or even complete - making deal timelines much more difficult to manage. The CMA is aware of these issues and has outlined a number of ways it will seek to increase alignment with merger investigations in other jurisdictions in its [Guidance on jurisdiction and procedure](#).

⁶ Behavioural remedies target the future behaviour of the merging parties - for example, data access conditions, supply obligations, and licensing requirements.

⁷ Certain deals that have taken place on or after 12 November 2020 can also be 'called in' by the UK government.

⁸ BEIS 'National Security and Investment Bill: Impact Assessment', 09 November 2020. .

⁹ For more details on the National Security and Investment Act 2021 see [here](#).

competition closing conditions are now less likely to be accepted by sellers (as sellers are probably now more aware of the CMA's tougher approach).

- **Develop a clear and consistent narrative for deal clearance from the outset.** This will be particularly important for deals which could raise national security and competition concerns.

Contact the author



Geoffrey Gray
Principal

geoffrey@fingleton.com
+44 7901 333659

About Fingleton

Fingleton is the leading strategic advisory firm for matters with a UK regulatory or competition dimension. We help business leaders and policymakers anticipate and navigate novel and complex challenges. Drawing on our deep expertise, we ask the vital questions at the outset, with clients valuing our clear, constructive and independent advice.