

A Comparative Review of Merger Control in an Era of Heightened Scrutiny of Artificial Intelligence Driven Acquisitions

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Abstract

The rapid consolidation of artificial intelligence capability among a small number of well resourced technology companies has placed unprecedented strain on merger control regimes that were designed chiefly to catch conventional asset and share acquisitions rather than the loose, contractual and often partial arrangements through which control over artificial intelligence talent, data and computing infrastructure is now frequently acquired. This article undertakes a comparative review of how the United States, the European Union and the United Kingdom have responded to that strain. It examines the legal foundations of merger control in each jurisdiction, from Section 7 of the Clayton Act and the 2023 Merger Guidelines in the United States, through the EU Merger Regulation and Article 102 of the Treaty on the Functioning of the European Union, to the substantial lessening of competition test applied under the Enterprise Act 2002 in the United Kingdom. It then turns to recent enforcement practice, including the United Kingdom Competition and Markets Authority's treatment of the Microsoft and Inflection, Microsoft and Mistral, and Amazon and Anthropic partnerships as reviewable mergers, the ongoing scrutiny by the Federal Trade Commission of the Microsoft and Inflection transaction, and the European Commission's conclusion that the Microsoft and OpenAI partnership does not, at least for now, constitute a notifiable concentration. The article also considers the Court of Justice of the European Union's landmark 2024 judgment in Illumina and GRAIL, which sharply curtailed the European Commission's ability to review transactions falling below ordinary notification thresholds. Drawing these threads together, the article argues that artificial intelligence driven acquisitions expose structural gaps common to all three regimes, gaps concerning jurisdictional thresholds calibrated to revenue rather than strategic significance, an underdeveloped doctrine for assessing nascent and potential competition, and an absence of settled tools for evaluating concentration in data, computing infrastructure and technical talent. It closes with a set of recommendations for modernising merger control to meet these challenges without abandoning the legal certainty that transaction parties reasonably require.

Keywords: Merger Control, Artificial Intelligence, Antitrust, Competition Law, Nascent Competition

1. Introduction

Over the past three years, the competitive landscape of artificial intelligence has consolidated around a remarkably small group of firms, each anchored by immense computing capacity, proprietary data and access to a limited pool of specialised technical talent. That consolidation has proceeded in large part not through conventional acquisitions of the kind merger control regimes were built to review, but through a looser assortment of arrangements, minority investments, exclusive cloud computing agreements, licensing deals bundled with the hiring of a target company's key staff, that sit

uneasily within jurisdictional categories developed for a very different era of corporate transaction. Microsoft's relationship with OpenAI, its subsequent hiring of much of Inflection AI's senior staff alongside a licence to its underlying technology, and Amazon's multi billion dollar investment in Anthropic have each, in their own way, tested whether existing merger control doctrine can meaningfully reach the way control over artificial intelligence capability is actually being acquired in practice.

Competition authorities on both sides of the Atlantic have responded, though not always consistently. The United Kingdom's Competition

and Markets Authority took the most assertive early position, treating each of the Microsoft and Inflection, Microsoft and Mistral, and Amazon and Anthropic arrangements as a relevant merger situation within its jurisdiction, notwithstanding that none involved a conventional acquisition of shares or assets¹. All three were ultimately cleared, the Microsoft and Mistral partnership in May 2024, and the Microsoft and Inflection and Amazon and Anthropic arrangements in September 2024, but the CMA's willingness to characterise these arrangements as mergers at all has itself become a significant precedent for how loosely structured artificial intelligence partnerships may be scrutinised going forward². The United States Federal Trade Commission opened its own inquiry into the Microsoft and Inflection transaction in June 2024³, while the European Commission concluded, at least on the information available to it in early 2024, that the Microsoft and OpenAI partnership did not constitute a notifiable concentration under the EU Merger Regulation, even as it continued to examine the exclusivity arrangements between the two companies under separate conduct rules⁴. These divergent outcomes are not merely a matter of jurisdictional idiosyncrasy. They reflect a genuine and largely unresolved doctrinal question, whether merger control regimes built around thresholds keyed to turnover, asset value or share of supply are capable of capturing transactions whose competitive significance lies not in the size of the target as conventionally measured, but in the strategic value of the data, computing capacity or engineering talent being absorbed into an already dominant platform. This article undertakes a comparative review of how three of the world's most influential competition law regimes, those of the United States, the European Union and the United Kingdom, have approached this question, and it asks what modernisation of merger control

doctrine, if any, the current wave of artificial intelligence driven acquisitions actually requires.

2. Artificial Intelligence and the Changing Mergers and Acquisitions Landscape

2.1 Growth of Artificial Intelligence Markets

The commercial value attributed to artificial intelligence capability has grown at a pace few other technology sectors have matched, driven substantially by the commercial success of large language models and the generative applications built on top of them since the widely publicised release of consumer facing chatbots from 2022 onward. This growth has concentrated disproportionately among a handful of firms possessing the combination of capital, proprietary data and specialised infrastructure that training and deploying frontier artificial intelligence models currently requires, a concentration that has made the market structure of the artificial intelligence sector, rather than any single product or service within it, the central preoccupation of competition authorities examining the space. Investment figures reported across the sector since 2023 have run into the hundreds of billions of dollars in aggregate, with a striking share of that capital flowing through, or alongside, the very platform companies whose existing market positions in cloud computing and consumer software already attract sustained antitrust attention, a coincidence of capital and incumbency that competition authorities have found difficult to treat as merely incidental.

2.2 Patterns of Artificial Intelligence Acquisitions

Rather than pursuing conventional acquisitions of artificial intelligence startups outright, the largest technology platforms have increasingly favoured a

¹See 'Can't Take My AIs Off You: The CMA's Review of AI Partnerships' (Lexology, 2024).

²See ai fray, 'UK CMA Clears Third AI Partnership Analyzed as Merger: Amazon Anthropic' (2024).

³CNN Business, 'Microsoft's AI Deal Under Federal Investigation' (6 June 2024).

⁴Global Competition Review, 'AI Partnerships: Microsoft/OpenAI Avoids EU Merger Probe, Exclusivity Clauses Draw Scrutiny' (2024).

repertoire of alternative transaction structures, minority equity investments paired with commercial agreements, exclusive cloud computing supply arrangements, and licensing deals accompanied by the hiring of a target's founders and senior engineers, a pattern exemplified by Microsoft's dealings with both OpenAI and Inflection AI. These structures share a common feature relevant to merger control, namely that none necessarily involves the acquisition of a controlling shareholding in the conventional sense, even where the practical effect closely resembles the absorption of a competitor's most valuable assets and personnel into the acquiring firm. Commentators tracking the sector have catalogued a growing list of comparable arrangements beyond the headline Microsoft and Amazon transactions, suggesting that what might initially have appeared to be a small number of unusual deals is, in fact, becoming the dominant transaction structure through which large platform companies engage with the artificial intelligence startup ecosystem more generally.

2.3 Strategic Drivers of Artificial Intelligence Transactions

Several strategic considerations explain why large technology platforms have favoured these looser transaction structures over outright acquisition. A minority investment or licensing arrangement typically attracts less immediate regulatory attention than a full acquisition, preserves the target's formal independence for purposes of continuing to raise capital from other investors, and, where the underlying objective is chiefly to secure access to talent and technology rather than to operate the target as a going concern, may simply be a more efficient way of achieving that objective than negotiating and integrating a full corporate acquisition. There is also a simpler commercial logic at work in several of these transactions, since a cloud computing provider investing in or partnering with a promising model developer secures a valuable long term customer for its own infrastructure regardless of whether the relationship is ever converted into full ownership,

a dynamic that makes the commercial partnership an attractive end in itself rather than merely a stepping stone toward eventual acquisition.

2.4 Data, Compute and Artificial Intelligence Talent as Acquisition Assets

What is being acquired in these transactions differs materially from the physical assets and customer relationships that merger control has traditionally been concerned with. Training data, access to scarce graphics processing unit computing capacity, and the tacit expertise held by a relatively small global pool of frontier artificial intelligence researchers have each become independently significant objects of competitive value, such that a transaction may raise genuine competition concerns even where it transfers no conventional physical assets or market share at all, a feature of the artificial intelligence sector that sits awkwardly within merger control frameworks built around more tangible indicators of market power. The scarcity of advanced graphics processing units in particular has become a recurring theme in commentary on artificial intelligence competition, since access to that hardware, often allocated through long term supply agreements with a small number of chip manufacturers, can function as a genuine barrier to entry independent of any conventional measure of market share, meaning that a transaction consolidating preferential access to such hardware may raise competition concerns even where the parties' combined share of any downstream product market remains modest.

3. Legal Foundations of Merger Control

3.1 United States: Section 7 of the Clayton Act and Federal Merger Control

Merger control in the United States rests principally on Section 7 of the Clayton Act, which prohibits acquisitions of stock or assets where the effect may be substantially to lessen competition or to tend to create a monopoly in any line of commerce⁵. This deliberately open textured

⁵Clayton Act 1914, 15 USC section 18.

standard has been elaborated over decades through case law and, more recently, through the Merger Guidelines jointly issued by the Federal Trade Commission and the Department of Justice, the most recent and considerably more expansive version of which was finalised in December 2023⁶. Notification of qualifying transactions above statutory thresholds is required under the Hart Scott Rodino Antitrust Improvements Act, which gives the agencies a waiting period within which to review a proposed transaction before it may be completed. Transactions structured as minority investments, licensing arrangements or hiring initiatives, however, do not automatically trigger this notification obligation even where their competitive effect closely resembles that of a reportable acquisition, a gap that has become increasingly salient as artificial intelligence transactions have proliferated in precisely this non reportable form.

3.2 European Union: The EU Merger Regulation and Article 102 TFEU

Within the European Union, concentrations meeting the turnover thresholds set out in the EU Merger Regulation must be notified to and cleared by the European Commission before completion, with the Commission empowered to prohibit or require modification of transactions that would significantly impede effective competition, in particular through the creation or strengthening of a dominant position⁷. Where a transaction does not meet the Regulation's notification thresholds, or where the arrangement in question does not amount to a concentration at all, the Commission may still, in principle, scrutinise the conduct of a dominant undertaking under Article 102 of the Treaty on the Functioning of the European Union, which prohibits abuse of a dominant position, a route the Commission has indicated it is pursuing in respect of certain exclusivity arrangements within the Microsoft and OpenAI partnership even having concluded that the partnership itself is not

a notifiable concentration⁸. This reliance on Article 102 as a fallback mechanism carries its own limitations, since an abuse of dominance investigation typically proceeds considerably more slowly than merger review and requires the Commission to establish an existing dominant position and an identifiable abuse, a materially heavier evidentiary burden than the prospective, effects based assessment merger control ordinarily applies. The practical consequence is that a partnership found to fall outside the concentration requirement may, in effect, escape any meaningful ex ante competition scrutiny at all, since a conduct based investigation under Article 102 can typically only begin once the arrangement has already been operating for some period, allowing any anticompetitive effects to take hold before the Commission is even in a position to act, a sequencing problem that has no equivalent in a functioning merger control regime, where review is intended, and generally succeeds, in preceding rather than following the transaction it examines.

3.3 United Kingdom: The Enterprise Act 2002 and the Substantial Lessening of Competition Test

United Kingdom merger control operates under the Enterprise Act 2002, which empowers the Competition and Markets Authority to review qualifying mergers where it believes that the merger has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services. Jurisdiction may be established either through the target's United Kingdom turnover exceeding a statutory threshold or through the parties together supplying at least twenty five per cent of a relevant good or service in the United Kingdom, a share of supply test the CMA has applied with notable flexibility in characterising loosely structured artificial intelligence partnerships as relevant merger situations even in the absence of any formal

⁶United States Federal Trade Commission and Department of Justice, Merger Guidelines (18 December 2023).

⁷Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings (EC Merger Regulation) [2004] OJ L24/1.

⁸Global Competition Review (n 4).

change in shareholding. Unlike the mandatory notification regimes applied in the United States and European Union, the United Kingdom's merger control system remains voluntary in the sense that parties are not legally required to notify a qualifying transaction before completion, though the CMA retains the power to call in a transaction for review of its own initiative, a power it has exercised directly in each of the three artificial intelligence partnerships discussed in this article.

3.4 Merger Notification, Jurisdiction and Review under Competition Law

Across all three jurisdictions, the trigger for mandatory or, in the United Kingdom's case, potential regulatory review turns on a jurisdictional test calibrated primarily to size, whether measured by turnover, asset value or share of supply, rather than to the strategic or competitive significance of the transaction as such. This calibration made reasonable sense for merger control regimes designed principally to catch large scale industrial and commercial consolidation, but it creates an obvious vulnerability where a transaction's competitive significance derives from access to a strategically vital but commercially modest sized target, precisely the profile of many artificial intelligence startups whose current revenue bears little relationship to their longer term competitive potential.

3.5 Judicial and Administrative Development of Merger Control Principles

Merger control doctrine in each of these jurisdictions has continued to evolve through judicial and administrative decision making even as the underlying statutory texts have remained comparatively stable, and the artificial intelligence sector has already begun to generate precedent of its own. The Court of Justice of the European Union's September 2024 judgment in *Illumina and GRAIL*, discussed further in part seven, sharply curtailed the European Commission's ability to review transactions falling below ordinary

notification thresholds⁹, while the CMA's phase one decisions on the Microsoft and Inflection and Amazon and Anthropic partnerships have already become influential reference points for how a share of supply based jurisdictional test can be applied to non traditional transaction structures.

4. Competition Concerns in Artificial Intelligence Driven Acquisitions

4.1 Market Concentration and Entrenchment

The 2023 Merger Guidelines devote particular attention to the risk that a dominant firm's acquisition may entrench or extend an already dominant position, a concern the guidelines associate with mergers that increase switching costs, interfere with the growth of competitive alternatives, or deprive rivals of the scale economies and network effects needed to compete effectively¹⁰. Artificial intelligence markets are especially susceptible to this dynamic given the scale economies inherent in training frontier models, meaning that an acquisition consolidating computing capacity or proprietary training data in the hands of an already leading firm can raise entrenchment concerns considerably more acute than an equivalent transaction in a less scale sensitive sector. The entrenchment concern is compounded where the acquiring firm also controls the cloud infrastructure on which rival artificial intelligence developers depend, since such a firm is uniquely positioned to extract informational and pricing advantages from that dependency in ways that have no obvious parallel in sectors where the dominant incumbent is not simultaneously a critical supplier to its own downstream competitors.

4.2 Killer and Nascent Competitor Acquisitions

A related but distinct concern involves the acquisition of nascent competitors, firms that do not yet pose a significant competitive constraint

⁹Case C611/22 P *Illumina Inc v European Commission* ECLI:EU:C:2024:677 (3 September 2024).

¹⁰United States Federal Trade Commission and Department of Justice, Merger Guidelines (n 6) Guideline 6.

but that possess a reasonable probability of growing into one absent the acquisition. The 2023 Merger Guidelines direct the agencies to examine both actual potential competition, the elimination of a likely future entrant, and perceived potential competition, the removal of competitive pressure exerted by a firm the market regards as a credible future threat, and specifically note that nascent threats often emerge during periods of technological transition, precisely the environment artificial intelligence currently represents¹¹. Identifying which artificial intelligence startups genuinely qualify as nascent competitors, rather than merely promising but ultimately marginal entrants unlikely ever to constrain an incumbent meaningfully, remains a genuinely difficult empirical exercise, and critics of an expansive nascent competitor doctrine have warned that overly aggressive intervention risks discouraging the very investment in early stage artificial intelligence companies that has driven much of the sector's innovation to date.

4.3 Data and Computational Infrastructure Concentration

Beyond conventional product market concerns, artificial intelligence driven acquisitions raise the more novel question of whether the consolidation of data and computing infrastructure in the hands of a small number of firms constitutes an independent competition harm, distinct from any effect on a downstream product market. A firm controlling a disproportionate share of the specialised computing hardware and proprietary datasets needed to train competitive frontier models may be able to foreclose rivals from the inputs necessary to compete at all, a foreclosure risk that traditional market share analysis, focused on downstream products rather than upstream inputs, is not always well positioned to detect. Addressing this risk requires competition authorities to develop a working methodology for assessing upstream input concentration comparable to the methodologies long applied in sectors such as telecommunications and energy,

where control over an essential physical network or resource has historically been recognised as a distinct source of market power deserving its own dedicated analytical framework.

4.4 Vertical and Ecosystem Effects

Many of the transactions attracting the closest scrutiny, including Microsoft's relationships with OpenAI and Inflection and Amazon's investment in Anthropic, are vertical in character, combining a cloud computing platform with an artificial intelligence model developer, rather than horizontal combinations of direct competitors. The 2023 Merger Guidelines explicitly extend their concern to ecosystem competition, recognising that a combination of complementary offerings from multiple providers may constrain a dominant incumbent even where no single provider offers a directly competing product, a framing that maps closely onto the platform and model layering characteristic of the current artificial intelligence market¹². Applying an ecosystem based theory of harm in practice requires an authority to map the full stack of complementary layers, computing infrastructure, foundation models, fine tuning tools and end user applications, that together constitute a functioning artificial intelligence product, a mapping exercise considerably more complex than the single market definition exercise merger control has traditionally relied upon.

It is worth pausing on why acquisitions of specialised technical talent present such a distinctive challenge for merger control frameworks that were designed with product and services markets, rather than labour markets, primarily in view. A transaction that removes a small team of researchers from the pool of independent artificial intelligence developers does not, in itself, resemble a conventional acquisition of a competing product or service, since no product changes hands and no customer relationship is transferred. Yet the effect on the competitive landscape can nonetheless be substantial where the acquired individuals represent a scarce and highly specialised category

¹¹United States Federal Trade Commission and Department of Justice, Merger Guidelines (n 6) Guideline 4.

¹²United States Federal Trade Commission and Department of Justice, Merger Guidelines (n 6) Guideline 6.

of expertise, the loss of which measurably reduces the number of independent centres of innovation capable of developing competing frontier models. Competition authorities assessing such transactions are therefore required to look past the absence of a conventional product market effect and ask instead whether the transaction meaningfully reduces the diversity of independent research efforts within the sector, a question that existing merger notification frameworks, built around thresholds tied to turnover and asset value, are not naturally well suited to answer without some degree of doctrinal adaptation.

4.5 Artificial Intelligence Talent and Acqui Hires

The acqui hire, in which an acquiring firm hires substantially all of a target's key personnel and licenses its technology without formally acquiring the target company itself, has emerged as a particularly contested transaction structure in the artificial intelligence sector, exemplified by Microsoft's arrangement with Inflection AI in 2024. The CMA's decision to treat this arrangement as amounting to a relevant merger situation, on the basis that it combined the hiring of key employees with a technology licence sufficient to bring the parties' activities together, represents one of the more consequential recent extensions of merger control doctrine to a transaction structure that would, on a narrower reading, have escaped review altogether¹³.

5. Merger Control of Artificial Intelligence Acquisitions in the United States

5.1 Statutory and Institutional Framework

Enforcement authority over mergers in the United States is shared between the Federal Trade Commission and the Antitrust Division of the Department of Justice, which divide responsibility for reviewing transactions across different sectors of the economy by informal agreement, with

technology and digital markets transactions, including the great majority of significant artificial intelligence deals, having fallen predominantly within the Federal Trade Commission's remit in recent years. This informal division of labour, developed through decades of practice rather than any binding statutory allocation, has meant that the Commission's own institutional priorities and analytical preferences have disproportionately shaped how artificial intelligence transactions specifically are reviewed, a concentration of expertise that has certain efficiency advantages but that also means the agency's particular reading of the 2023 Merger Guidelines carries outsized influence over the sector as a whole.

5.2 Federal Trade Commission and Department of Justice Oversight

Both agencies have signalled a considerably more assertive posture toward technology sector consolidation since 2021, a posture reflected directly in the more expansive 2023 Merger Guidelines and in a series of public statements from agency leadership identifying artificial intelligence partnerships specifically as a priority area for scrutiny, notwithstanding that many such partnerships do not take the form of a conventional reportable transaction under the Hart Scott Rodino framework. Both agencies have also made increasing use of compulsory process tools, including civil investigative demands, to gather information about artificial intelligence partnerships that were never formally notified, a practice that effectively extends the agencies' investigative reach beyond the boundaries of the mandatory notification regime even where their ultimate enforcement authority under Section 7 of the Clayton Act remains formally unchanged.

5.3 Treatment of Emerging and Potential Competition

The Federal Trade Commission's inquiry into the Microsoft and Inflection transaction, opened in June 2024, tests directly whether the agency's

¹³United Kingdom Competition and Markets Authority, Microsoft Corporation's Hiring of Certain Former

Employees of, and Licensing of Technology from, Inflection AI Inc: Summary of Phase 1 Decision (2024).

nascent competitor and entrenchment theories, formalised in the 2023 Merger Guidelines, can be applied to a transaction structured specifically to avoid the conventional acquisition form those guidelines were principally drafted to address¹⁴. The inquiry remains at an investigative stage, and no formal enforcement action had been announced at the time of writing, but its very existence signals that the agency regards the acquiree structure as, at minimum, a legitimate subject of merger control scrutiny rather than a structure that automatically falls outside its jurisdiction.

5.4 Recent Enforcement Developments in Artificial Intelligence Transactions

Beyond the Inflection inquiry, both agencies have continued to develop their approach to artificial intelligence transactions through a combination of second request investigations, public workshops examining generative artificial intelligence competition issues, and continued refinement of guidance on how the 2023 Merger Guidelines apply to technology sector consolidation, an evolving body of soft law that, while not binding, has already begun to shape how transaction parties structure artificial intelligence deals in anticipation of potential agency scrutiny.

6. Merger Control of Artificial Intelligence Acquisitions in the European Union and United Kingdom

6.1 European Union Merger Control Framework

The European Commission's jurisdiction under the EU Merger Regulation depends on the existence of a concentration, generally understood as a lasting change in control over an undertaking, a requirement that has proven considerably harder to satisfy in respect of minority investments and commercial partnerships than in respect of conventional acquisitions¹⁵. This structural requirement has meant that several of the most

closely watched artificial intelligence partnerships, including Microsoft's relationship with OpenAI, have so far fallen outside the Commission's merger jurisdiction altogether, leaving Article 102 of the Treaty on the Functioning of the European Union as the principal remaining avenue for scrutiny of any resulting competition concerns. The concentration requirement's focus on lasting structural change means that even a very substantial minority investment, so long as it does not confer the kind of decisive influence the Regulation requires, will simply fall outside the Commission's merger jurisdiction altogether, a binary, all or nothing quality that neither the United Kingdom's share of supply test nor the more flexible standard applied in Federal Trade Commission investigative practice shares to quite the same degree.

6.2 European Commission Scrutiny of Artificial Intelligence Transactions

Having concluded in early 2024 that the Microsoft and OpenAI partnership did not amount to a notifiable concentration, the European Commission has nonetheless continued to examine specific features of the arrangement, in particular exclusivity clauses that may restrict OpenAI's ability to deal with Microsoft's cloud computing rivals, under the Union's conduct based competition rules rather than through merger control¹⁶. This bifurcated approach, declining merger jurisdiction while pursuing a parallel conduct based inquiry, illustrates both the doctrinal limits of the concentration requirement and the Commission's determination to find some available legal basis for scrutinising artificial intelligence partnerships it regards as competitively significant. Commissioner statements accompanying the Microsoft and OpenAI review have also signalled that the Commission regards its current toolkit as imperfectly suited to the sector, prompting renewed internal discussion of whether the Digital Markets Act, originally designed to address a

¹⁴CNN Business (n 3).

¹⁵EC Merger Regulation (n 7) art 3.

¹⁶Global Competition Review (n 4).

different set of platform gatekeeping concerns, might eventually be adapted or supplemented to capture artificial intelligence partnerships that fall outside the Merger Regulation's concentration requirement.

6.3 United Kingdom Merger Control Framework

The Competition and Markets Authority's share of supply jurisdictional test, requiring no minimum transaction value or target turnover, has given it considerably greater flexibility than either the United States or European Union frameworks to assert jurisdiction over loosely structured artificial intelligence arrangements, a flexibility the Authority has used deliberately in its review of the Microsoft and Mistral, Microsoft and Inflection, and Amazon and Anthropic partnerships. This flexibility is not without its own limits, however, since the twenty five per cent share of supply figure must still be established by reference to some identifiable market, a market definition exercise that becomes considerably more contestable where the product in question, a foundation model or a cloud based artificial intelligence service, does not map neatly onto the more conventional product categories share of supply analysis was originally designed to measure.

6.4 Competition and Markets Authority Approach to Artificial Intelligence Transactions

In each of its three artificial intelligence partnership reviews to date, the CMA first addressed the threshold question of whether a relevant merger situation existed at all before turning to a substantive assessment of competitive effects, ultimately clearing all three transactions, Microsoft and Mistral in May 2024 and Microsoft and Inflection and Amazon and Anthropic in September 2024, generally on the basis that the target's competitive significance in the relevant markets was not yet sufficient to give rise to a realistic prospect of a substantial lessening of

competition¹⁷. The Authority's willingness to engage with the jurisdictional question at all, rather than treating these arrangements as self evidently outside its remit, remains the more consequential feature of these decisions for future transaction planning than their ultimately permissive substantive outcomes. Transaction parties structuring future artificial intelligence partnerships with any meaningful United Kingdom dimension must now proceed on the assumption that the CMA will at least consider whether a relevant merger situation exists, even where the arrangement in question bears little formal resemblance to a conventional acquisition, an assumption that has already begun to influence how such deals are documented and publicly described from the outset.

7. Comparative Analysis of Regulatory Approaches and Emerging Challenges

7.1 Comparison of Jurisdictional Thresholds

Of the three regimes compared in this article, the United Kingdom's share of supply test has proven the most readily adaptable to artificial intelligence partnerships lacking a conventional change in shareholding, since it does not depend on any minimum transaction value or target turnover figure that a strategically significant but commercially modest artificial intelligence startup might well fail to meet. The United States and European Union frameworks, by contrast, remain more firmly anchored to transaction value and turnover thresholds respectively, a design choice that offers greater ex ante certainty to transaction parties but correspondingly greater difficulty capturing high value, low revenue targets of the kind common in the artificial intelligence sector. This trade off between certainty and reach is not a new one in merger control theory, but the artificial intelligence sector has thrown it into unusually sharp relief, since the very characteristic that makes an early stage model developer commercially modest by conventional revenue measures, a young company still some distance

¹⁷ai fray (n 2).

from monetising its technology at scale, is often exactly the characteristic that makes it strategically valuable to an acquirer seeking to secure a long term competitive advantage before that monetisation occurs.

7.2 Comparison of Substantive Assessment Standards

The substantive standards applied once jurisdiction is established, substantial lessening of competition in the United States and United Kingdom and significant impediment to effective competition in the European Union, are functionally similar in their underlying economic concerns but have developed distinct doctrinal vocabularies for addressing nascent competition, with the 2023 Merger Guidelines' explicit treatment of entrenchment and nascent threats currently offering the most developed analytical framework of the three regimes for artificial intelligence specific theories of harm. The European Union's significant impediment to effective competition standard and the United Kingdom's substantial lessening of competition test remain, in the abstract, capable of accommodating comparable reasoning, but neither jurisdiction has yet issued guidance addressing nascent competition in the artificial intelligence sector with the same specificity the 2023 Merger Guidelines provide, leaving practitioners in both jurisdictions to extrapolate from general principles and from the still developing body of regulatory decisions discussed in parts five and six of this article.

A further complication in comparing substantive standards across the three regimes is that the underlying counterfactual against which competitive harm is measured becomes considerably harder to construct in a nascent competition setting than in a conventional merger between established rivals. Where two mature firms already compete for the same customers on broadly comparable terms, an authority can point to observed market shares, pricing patterns and switching behaviour as evidence of the competition a transaction would eliminate. An

early stage artificial intelligence developer, by contrast, may not yet have entered the market the acquirer already serves, may be pursuing a technically different approach whose eventual commercial trajectory is genuinely uncertain, and may never have generated the kind of market facing evidence that conventional merger analysis is built to interpret. Authorities applying the substantial lessening of competition and significant impediment to effective competition standards to such transactions are therefore required to reason probabilistically about a counterfactual that, in a meaningful sense, does not yet exist, a task the 2023 Merger Guidelines acknowledge more directly than either the European Union or United Kingdom frameworks currently do in their published guidance.

7.3 Minority Investments and Strategic Partnerships

Minority investments of the kind Amazon made in Anthropic present a genuinely difficult case across all three jurisdictions, since such investments typically fall short of the change in control that EU merger control requires and often fall below the notification thresholds applicable in the United States, leaving the United Kingdom's share of supply test as, in practice, the most likely route through which such an investment might attract merger control scrutiny at all, as the CMA's review of the Amazon and Anthropic arrangement itself demonstrated¹⁸. The CMA's own decision in that matter is worth recalling in more detail here, since the Authority found that Anthropic's United Kingdom turnover fell well short of the statutory threshold and that the parties' combined share of supply did not reach the twenty five per cent figure required to establish jurisdiction on that alternative basis either, meaning the arrangement was in fact cleared at the jurisdictional stage rather than after a full substantive assessment, a distinction that matters considerably for understanding how much weight the clearance decision should actually carry as precedent for larger or more advanced artificial intelligence investments in the future.

¹⁸ai fray (n 2).

7.4 Transactions Below Traditional Merger Thresholds

The European Commission's own attempt to address the problem of competitively significant but below threshold transactions, through an expansive reading of the Article 22 referral mechanism in the Illumina and GRAIL matter, was decisively rejected by the Court of Justice in September 2024, which held that Article 22 referrals are permissible only where the referring member state itself possesses domestic merger control jurisdiction over the transaction in question, grounding its reasoning in considerations of legal certainty and the Regulation's structured, threshold based design¹⁹. That judgment leaves a genuine enforcement gap at the level of European Union law for artificial intelligence transactions structured to fall below both national and Union thresholds, a gap the Commission has acknowledged and that has already prompted renewed discussion of legislative reform. Proposals under discussion within the Union's competition policy community since the judgment include a formal transaction value threshold modelled on the approach already used in Austria and Germany, which would capture very high value acquisitions of low turnover targets without reviving the broader, judicially rejected reading of Article 22, though any such reform would require legislative amendment to the Merger Regulation itself and is unlikely to be finalised quickly given the ordinary pace of Union legislative procedure.

7.5 Regulatory Convergence and Divergence

Notwithstanding the doctrinal differences catalogued above, the three jurisdictions examined in this article have converged on at least one point, a shared recognition that artificial intelligence partnerships structured as licensing arrangements, minority investments or acqui hires deserve close competition scrutiny notwithstanding their non conventional form. Where the jurisdictions continue to diverge is in the legal tools available to

translate that shared concern into actual reviewable jurisdiction, with the United Kingdom currently possessing the most flexible instrument and the European Union, following Illumina and GRAIL, arguably the least.

8. Recommendations

8.1 Modernising Merger Notification Thresholds

Legislators in the United States and European Union should consider supplementing existing turnover and transaction value thresholds with a qualitative trigger, along the lines of the United Kingdom's share of supply test, that allows competition authorities to assert jurisdiction over transactions involving a strategically significant concentration of data, computing infrastructure or specialised technical talent even where conventional financial thresholds are not met, calibrated carefully to avoid capturing routine commercial transactions of no genuine competitive significance. Any such qualitative trigger should be paired with a clear and publicly available set of factors guiding its application, drawing on the CMA's own published reasoning in the Microsoft and Inflection and Amazon and Anthropic decisions, so that transaction parties retain a reasonable ability to predict whether a given deal is likely to attract review before committing significant resources to its structuring and negotiation.

8.2 Strengthening the Assessment of Nascent Competition

Competition authorities should continue to develop and publish sector specific guidance, building on the foundational work already done in the 2023 Merger Guidelines' treatment of nascent and potential competition²⁰, explaining concretely how these doctrines apply to artificial intelligence transactions specifically, including illustrative examples drawn from the CMA's own published decisions on the Microsoft and Inflection and

¹⁹Illumina v Commission (n 9).

²⁰United States Federal Trade Commission and Department of Justice, Merger Guidelines (n 6) Guideline 4.

Amazon and Anthropic partnerships, so that transaction parties and their advisers have a clearer basis for anticipating how a proposed structure is likely to be assessed. Such guidance would ideally address directly the empirical question flagged in part four, how an authority should distinguish a genuinely nascent competitive threat from a promising but ultimately non threatening early stage company, rather than leaving that distinction to be worked out afresh in each individual investigation without any shared methodological starting point.

A closely related institutional question is how much weight merger control guidance should place on transparency toward transaction parties themselves. There is an inherent tension between an authority's interest in preserving flexibility to address novel transaction structures as they arise and a transacting party's legitimate interest in being able to predict, with reasonable confidence, whether a proposed structure is likely to attract scrutiny before it commits to that structure and to the commercial arrangements built around it. Overly rigid published guidance risks being outpaced by the next transactional innovation the sector produces, while overly vague guidance leaves parties structuring transactions largely in the dark. The most workable solution available to regulators is probably not a single definitive rulebook but an evolving body of illustrative decisions, of the kind the CMA has already begun to build through its Microsoft and Inflection and Amazon and Anthropic reviews, published with sufficient reasoning that practitioners can extrapolate general principles even as the specific facts of each new transaction differ from those that came before.

8.3 Addressing Data, Compute and Ecosystem Concentration

Merger control frameworks should be adapted to treat concentration in upstream inputs, specialised training data, computing hardware and platform access, as an independently relevant consideration in artificial intelligence transactions, rather than assessing competitive effects solely by reference to downstream product markets, reflecting the genuine possibility that a transaction may

foreclose rivals from essential inputs without producing any immediately visible effect on consumer facing prices or output.

8.4 Enhancing Cross Border Regulatory Cooperation

Given that the largest artificial intelligence transactions routinely implicate the jurisdiction of the United States, the European Union and the United Kingdom simultaneously, as the CMA's own parallel reviews of the Microsoft and Inflection and Amazon and Anthropic arrangements alongside the Federal Trade Commission's separate inquiry into the Inflection transaction illustrate, the three regimes' respective authorities should pursue closer procedural cooperation, including coordinated timing of review and shared factual investigation where appropriate, to reduce the risk of inconsistent outcomes and unnecessary duplication of effort for transaction parties operating across all three markets.

8.5 Developing AI Sensitive Merger Assessment Frameworks

Finally, competition authorities should invest in the specialised technical expertise necessary to assess artificial intelligence transactions on their own terms, including a working understanding of how model training, computing infrastructure procurement and technical talent markets actually operate, so that merger review in this sector rests on genuine technical literacy rather than the extrapolation of doctrine developed for conventional industrial and consumer markets onto a sector with materially different underlying economics.

9. Conclusion

The comparative review undertaken in this article demonstrates that merger control regimes in the United States, the European Union and the United Kingdom have each been tested, in different ways and to different degrees, by the distinctive transaction structures through which control over artificial intelligence capability is currently being

acquired. The United Kingdom's Competition and Markets Authority has shown the greatest doctrinal flexibility, extending its share of supply test to acqui hires and minority investments that would likely escape review under the more threshold bound frameworks applied in the United States and European Union. The Federal Trade Commission's ongoing inquiry into the Microsoft and Inflection transaction suggests a comparable, if procedurally distinct, willingness to scrutinise non conventional transaction structures, while the European Commission's declination of merger jurisdiction over the Microsoft and OpenAI partnership, and the Court of Justice's decisive rejection of the Commission's expansive Article 22 referral practice in Illumina and GRAIL, together leave the European Union's merger control regime currently least equipped among the three to reach transactions of this kind.

None of this suggests that any of the three regimes has yet arrived at a fully satisfactory answer to the challenge artificial intelligence driven acquisitions present. The recommendations advanced in this article, qualitative jurisdictional triggers, sector specific guidance on nascent competition, explicit attention to upstream input concentration, closer cross border cooperation and deeper technical expertise within the agencies themselves, are offered as practical steps toward closing that gap rather than as a claim that the underlying statutory frameworks require wholesale replacement. The Clayton Act, the EU Merger Regulation and the Enterprise Act 2002 have each proven capable of doctrinal evolution before, and the task now facing regulators in all three jurisdictions is to complete a comparable evolution quickly enough to keep pace with a sector whose competitive structure is being determined, transaction by transaction, considerably faster than merger control doctrine has historically been accustomed to move.

What is ultimately at stake in getting this right is not merely the fate of any single transaction but the future competitive structure of a technology that is rapidly becoming foundational to a very wide range of economic activity. A merger control regime that cannot meaningfully reach the acquisitions shaping that structure risks presiding over a consolidation it was specifically designed to

prevent, while a regime that overreaches risks discouraging the very investment and collaboration that has driven much of the sector's genuine technical progress. Navigating between those two risks, rather than resolving decisively in favour of either, is the central and continuing task this article has set for merger control in the years immediately ahead.

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