



M&A CALL-IN RISK

NAVIGATING A FRAGMENTED EUROPE

Josef Hainz, Richard Brown, Rebecca Timms, Suayip Öksüz, Daan van Dooren and Margaux Serra of Dentons discuss recent developments in merger control regimes across Europe that have led to heightened call-in risk in M&A transactions.

With the recent drive for competitiveness, growth and strategic autonomy on the global stage, the regulatory landscape for merger control in Europe is changing fast. The Draghi report on European competitiveness, which was published on 9 September 2024, highlighted Europe's "lag" in digital innovation and productivity, and called on the European Commission (the Commission) to close the innovation gap with the US and China (https://commission.europa.eu/topics/eu-competitiveness/draghi-report_en).

The Commission considers that killer acquisitions, where larger companies acquire smaller start-ups, pose a significant threat to innovation. While these acquisitions can present major challenges to market competition, they often do not reach the mandatory thresholds for regulatory scrutiny.

As part of the EU's new competitiveness agenda, the Commission is exploring a number of options for addressing below-threshold mergers and killer acquisitions. In addition, a significant number of national competition authorities (NCAs) in EU member states have either introduced, or are in the process of introducing, call-in powers to enable them to scrutinise mergers that do not meet notification thresholds but may nonetheless raise competitive concerns (see box "Key takeaways for businesses in the EU"). In the UK, the Competition and Markets Authority (CMA) has established a new hybrid jurisdictional test based partly on share of supply and partly on turnover, enabling it to investigate mergers that may raise competition concerns in dynamic markets.

This article explores the fragmentation of the merger control landscape across Europe as

a result of significantly increased call-in risk, and what this means for legal certainty in mergers and acquisitions (M&A).

THE ENFORCEMENT GAP

Below-threshold mergers are transactions that fall below the mandatory notification turnover thresholds in the EU Merger Regulation (139/2004/EC) (EUMR) or national notification thresholds (see box "EUMR turnover thresholds"). Killer acquisitions are where companies seek to eliminate potential sources of future competition. Killer acquisitions frequently occur as below-threshold mergers, such as where a company acquires strategically significant nascent competitors that generate little or no turnover at the time of the transaction. They can take place in any sector, but are particularly prevalent in

dynamic markets such as life sciences and digital technologies.

Article 22 guidance

Under Article 22 of the EUMR (Article 22), member states can ask the Commission to examine a transaction that is not notifiable under the mandatory notification turnover thresholds in the EUMR if it affects trade between member states and threatens to significantly affect competition within the territory of the referring member state. Article 22 was originally intended to allow member states that did not have national merger control regimes to refer transactions to the Commission for review. For example, on 14 March 2024, the Commission accepted an Article 22 referral request to assess the proposed acquisition of Boissons Heintz by Brasserie Nationale, and approved the acquisition on 17 July 2025 (www.practicallaw.com/w-047-9761). Both companies are based in Luxembourg, which is currently the only member state without its own merger control regime, although draft legislation to establish a mandatory merger control regime has now been introduced.

Historically, the Commission discouraged Article 22 referrals for below-threshold mergers. However, the recent increase in below-threshold mergers where the relevant parties' turnover did not reflect their competitive potential led to a perceived enforcement gap. In order to address this, the Commission took an expansive view of Article 22 that would allow it to review below-threshold transactions that potentially raised substantive competition concerns. On 26 March 2021, it published guidance on Article 22 (the Article 22 guidance) that reflected its new stance (https://competition-policy.ec.europa.eu/system/files/2021-10/guidance_article_22_referrals.pdf).

The Article 22 guidance effectively transformed Article 22 into a catch-all corrective mechanism, allowing referrals of transactions from member states' NCAs even for transactions that did not meet national notification criteria.

Illumina/Grail

The Commission's new approach to Article 22 referrals was challenged before the European Court of Justice (ECJ) in *Illumina v Commission and Grail v Commission* (joined cases C611/22 P and C625/22 P; see *News brief "Below-threshold mergers: Illumina finds the holy grail of legal certainty"*, www.practicallaw.com).

Key takeaways for businesses in the EU

There are a number of key principles that businesses operating in the EU should be aware of in relation to recent developments in merger control:

- The scope of the European Commission's call-in power, as outlined in Article 22 of the EU Merger Regulation (139/2004/EC), remains contested. The European Court of Justice's ruling in *Illumina v Commission and Grail v Commission* narrowed its use and the pending appeal in *Nvidia Corp v Commission* will further test its limits (joined cases C611/22 P and C625/22 P; T-15/25).
- A significant number of EU member states' national competition authorities (NCAs) have introduced, or are consulting on, legislation to enable them to review below-threshold mergers. Increased call-in risk at NCA level should be factored into transaction timelines and deal documents, where appropriate.
- Even where a transaction falls below both EU and national merger control thresholds, it may be prudent for merging parties to conduct an early, substantive competition analysis in order to assess and mitigate the risk of a future referral to the NCAs, and subsequently to the European Commission.
- Proactive engagement with relevant NCAs should be considered for transactions that are possible candidates for being called in.
- Businesses should stay informed and carefully follow the outcome of current developments in order to navigate potential call-in risks.

com/w-044-4880). On 20 September 2020, the US company Illumina Inc entered into an agreement to acquire another US company, Grail Inc. Both companies developed blood tests for the early detection of cancers. The transaction did not reach the EUMR, or any member state, notification thresholds as Grail did not have any turnover in the EU and only minimal turnover elsewhere in the world.

On 20 April 2021, a few weeks after it published the Article 22 guidance, the Commission accepted an Article 22 referral request in relation to the proposed acquisition of Grail as it considered that Grail's competitive significance was not reflected by its lack of turnover and that the transaction threatened to significantly affect competition in the referring member states. Illumina and Grail challenged the Article 22 referral before the EU General Court, arguing that Article 22 does not apply to mergers where national thresholds have not been reached. The General Court dismissed the claim (*Illumina Inc v Commission T-227/21*).

Illumina and Grail appealed to the ECJ, which held that the General Court had erred in its interpretation of Article 22 and annulled the referral request. In doing so, the ECJ put an end to the Commission's more expansive

interpretation of Article 22, concluding that the Commission does not have the power to scrutinise transactions over which member states have no jurisdiction. In particular, the ECJ found that the Commission's approach was inconsistent with the objectives of the EUMR and imposed significant uncertainty on businesses operating in the EU.

The ECJ also pointed to potential EU and national legislative amendments that could address the enforcement gap posed by killer acquisitions, either by providing for a safeguard mechanism that would enable the Commission to scrutinise these transactions, or through the revision of member states' notification thresholds in national legislation.

The Commission withdrew the Article 22 guidance on 29 November 2024.

Plugging the gap

Echoing the ECJ's comments in *Illumina*, in its 2024 annual report on competition policy the European Parliament called on the Commission to:

- Encourage member states to introduce call-in powers that expand their jurisdiction to review mergers and therefore be able to refer below-threshold

transactions to the Commission under Article 22.

- Consider the possibility of amending the EUMR to enable the review of mergers below EU or national merger control thresholds (www.europarl.europa.eu/doceo/document/A-10-2025-0071_EN.html).

Call-in powers. A significant number of NCAs already have the power to call in below-threshold transactions for review, including Denmark, Hungary, Italy, Ireland, Latvia, Lithuania, Slovenia and Sweden (see box “EU member states’ call-in powers”). In addition, several member states are in the process of implementing new call-in powers, including the Netherlands, France and Belgium (see “Focus on new call-in powers” below).

The legality of calling in a below-threshold transaction based on a national call-in power, and subsequently referring it under Article 22, was tested in October 2024 when the Commission stated that it would be reviewing the proposed acquisition of the Israel-based AI infrastructure software company Run:ai Labs Ltd by the US-based computing hardware and platforms company Nvidia Corporation (https://ec.europa.eu/commission/presscorner/detail/en/mex_24_5623). While the transaction did not meet Italian merger control turnover thresholds, the Italian NCA made use of its call-in powers to refer it to the Commission, which unconditionally cleared the transaction in December 2024 (https://ec.europa.eu/competition/mergers/cases1/202516/M_11766_10599589_2740_3.pdf).

However, Nvidia has objected to the Commission’s review of the transaction on the basis that it does not meet national turnover thresholds and has lodged an appeal before the General Court (*Nvidia Corporation v Commission T-15/25*). Nvidia is arguing, in particular, that the exercise of the Article 22 referral mechanism, based on the discretionary Italian call-in power, does not deliver the legal certainty required after *Illumina* (see box “Mitigating call-in risk in M&A transactions”).

Amending the EUMR. As suggested by the European Parliament, the EUMR could be amended to introduce a safeguard mechanism that would enable the Commission to directly call in for review mergers that fall below the EUMR or national

EUMR turnover thresholds

Under the EU Merger Regulation (139/2004/EC) (EUMR), any concentration that has an EU dimension must be notified to the European Commission for approval before it is completed. A concentration will have an EU dimension where it exceeds the turnover threshold in Article 1(2) or Article 1(3) of the EUMR.

The Article 1(2) threshold will be exceeded where:

- The combined aggregate worldwide turnover of all the undertakings concerned is more than €5 billion.
- The aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than €250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same EU member state.

The Article 1(3) threshold will be exceeded where:

- The combined aggregate worldwide turnover of all undertakings concerned is more than €2.5 billion.
- The aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than €100 million.
- The combined aggregate turnover of all of the undertakings concerned is more than €100 million in each of at least three member states.
- In each of at least three of these member states, the aggregate turnover of each of at least two of the undertakings concerned is more than €25 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same member state.

thresholds. While high-level Commission officials have recently (informally) indicated that there may be no other choice than to “open up” the EUMR to plug the enforcement gap, such a move is not considered to be a priority for the Commission in the short to medium term, despite the complexity and uncertainty of the current call-in risk for businesses.

An alternative solution for addressing killer acquisitions would be for the Commission to lower the current merger control thresholds in the EUMR, or even introduce a new threshold based on transaction value, as is in place in Austria and Germany. While these changes would have the benefit of increasing predictability and legal certainty for dealmakers, they could potentially lead to a significant increase in notifiable transactions that do not raise any competitive concerns. Any increased burden on EU businesses would run contrary to the Draghi report, which called for swifter and more streamlined merger control. However, this issue could

be partly mitigated by the introduction of a “super-simplified” procedure that would fast-track merger notifications that are clearly unproblematic.

For the time being, the Commission’s May 2025 review of the horizontal and non-horizontal merger guidelines offers a helpful framework for assessing killer acquisitions and defensive acquisitions of nascent competitors, particularly in key dynamic sectors, and may shed light on the transactions that could be candidates for call in at member state level (https://competition-policy.ec.europa.eu/mergers/review-merger-guidelines_en).

Abuse of dominance

Before the adoption of the EUMR, the ECJ held that a merger could potentially be caught by the abuse of dominance provisions in Article 102 of the Treaty on the Functioning of the European Union (Article 102) (*Continental Can Company Inc v Commission Case 6-72*). After the adoption of the EUMR it was uncertain

whether *Continental Can* still applied, as Article 21(1) of the EUMR provides that the EUMR “alone” applies to mergers and many considered that this rendered *Continental Can* obsolete.

In *Towercast v Autorité de la concurrence and others*, the ECJ considered this question and concluded that *Continental Can* is still fully applicable, therefore confirming that NCAs can potentially investigate transactions under the abuse of dominance framework for unilateral conduct set out in Article 102 if they are not caught by EU or national merger control regimes, as in the recent cases in the Netherlands (Ziemann/Brink’s and Foresco/DWP) and Belgium (Proximus/EDPnet and Dossche Mills/Ceres) (C449/21) (see “*The Netherlands*” and “*Belgium*” below).

However, *Towercast* cannot fully replace Article 22’s broader referral mechanism, since Article 102 provides only limited grounds for merger prohibition. To prohibit a merger under Article 102, the transaction must involve an entity that already holds a dominant position before the merger takes place; it would not be sufficient if the merger itself would create the dominance. The practical impact of *Towercast* therefore remains relatively limited.

In addition, Article 14 of the Digital Markets Act (2022/1925/EU) (DMA) requires large digital platforms that are designated as gatekeepers to report all transactions to the Commission, including those falling below relevant turnover thresholds (see feature article “*Digital markets regulation: comparing the new EU and UK regimes*”, www.practicallaw.com/w-040-0659). However, after *Illumina*, Article 22 arguably no longer provides the Commission with an independent power to review these reported transactions.

FOCUS ON NEW CALL-IN POWERS

The Netherlands, France and Belgium are each proposing to introduce new call-in powers to address the perceived enforcement gap in relation to below-threshold transactions.

The Netherlands

The Dutch competition authority (ACM) has recently called for additional market intervention instruments, focusing on two key proposals:

- The introduction of a new competition tool (NCT), as outlined by the chair of the ACM, Martijn Snoep, in a speech on 7 February 2025 (www.acm.nl/nl/publicaties/speech-martijn-snoep-de-nieuw-competition-tool-het-waarom-en-het-hoe).
- The granting of a call-in power to investigate acquisitions that fall below the statutory turnover threshold if there are concerns about competition, as outlined by Mr Snoep in a blog published on 7 November 2024 (www.acm.nl/nl/publicaties/blog-martijn-snoep-update-van-het-concurrentietoezicht).

While the implementation of the NCT, which would be similar to the CMA’s market investigation powers in the UK, is not currently on the political agenda, a consultation on amendments to the Dutch Competition Act that are aimed at incorporating the ACM’s desired call-in power closed on 18 April 2025 (www.internetconsultatie.nl/insroepbevoegdheid/b1) (see “*UK merger control*” below).

The proposed call-in power would allow the ACM to require additional information from the companies involved in mergers where the standard turnover thresholds have not been exceeded and, on review of that additional information, to require a formal notification of the transaction if competition risks appear substantial. Following notification, the ACM would be able to block the transaction or allow it only under certain conditions. To ensure compliance, the ACM would also retain the power to dissolve mergers if parties proceed without prior approval.

Following the closure of the call-in power consultation, on 22 April 2025 the ACM proposed a package of measures that are designed to balance effective market oversight with business certainty (www.acm.nl/system/files/documents/reactie-acm-op-internetconsultatie-initiatiefwet-insroepbevoegdheid.pdf). These include:

- Raising the standard turnover thresholds to focus intervention on transactions of genuine competitive significance.
- Introducing an asymmetrical turnover threshold specifically for call-in purposes, meaning that just one of the parties (usually the buyer) needs to meet a certain level of turnover.

EU member states’ call-in powers

EU member state	Call-in power?
Austria 	No
Belgium 	In progress
Bulgaria 	No
Croatia 	No
Cyprus 	Yes
Czechia 	In progress
Denmark 	Yes
Estonia 	No
Finland 	No
France 	In progress
Germany 	No*
Greece 	No
Hungary 	Yes
Ireland 	Yes
Italy 	Yes
Latvia 	Yes
Lithuania 	Yes
Luxembourg 	In progress
Malta 	No
Netherlands 	In progress
Poland 	No
Portugal 	No
Romania 	No
Slovakia 	No
Slovenia 	Yes
Spain 	No
Sweden 	Yes

* In certain circumstances, there may be a notification obligation on companies for three years following the completion of a sector enquiry.

This table is provided for information purposes only and should not be used as a substitute for legal advice. In particular, the interpretation of what constitutes a call-in power may vary according to jurisdiction and the overall context.

- Publishing comprehensive procedural guidelines to ensure transparency and predictability in the ACM's decision making.

Impact of the reforms. Together, these reforms aim to equip the ACM with the flexibility that it needs in order to tackle emerging competition concerns, while safeguarding the legal clarity and administrative efficiency that businesses require. However, some commentators take the view that the new powers would be redundant because the ACM is already reviewing mergers that fall below the standard turnover threshold. For example, on 7 March 2025 the ACM launched an investigation on the basis of the Dutch equivalent of Article 102 into the below-threshold acquisition of the Dutch arm of the German cash-in-transit company Ziemann by Brink's, the largest cash-in-transit services company in the Netherlands (www.acm.nl/nl/publicaties/acm-start-onderzoek-naar-overname-ziemann-door-geldtransporteur-brinks).

In addition, after receiving a notification from the Belgian company Foresco in May 2024 relating to its proposed acquisition of competitor pallets sellers DWP and Vierhouten Palletindustrie, which exceeded the turnover thresholds, the ACM carried out a review into Foresco's broader acquisition strategy. Since 2019, Foresco had acquired 17 rival pallet sellers in the Netherlands, only four of which met the turnover thresholds for mandatory notification.

ACM ultimately cleared the proposed acquisition in February 2025 (www.acm.nl/en/publications/acm-clears-acquisition-pallet-sellers-dwp-and-vierhouten-competitor-foresco-and-investigates-strategy-serial-acquisitions). This was the first time that the ACM had assessed an acquisition within the context of a strategy of serial acquisitions, also known as "roll-up" acquisitions, and it helpfully explained the assessment framework that it uses to assess these transactions (www.acm.nl/system/files/documents/samenvatting-besluit-foresco-vertaling-eng.pdf).

It remains to be seen how the ACM's proposals will evolve as the legislative process advances, and what impact this will ultimately have on deal-making strategies and risk assessments across the Dutch M&A landscape. Given Mr Snoep's reappointment as the chair of ACM with effect from 1 September 2025, and his

Mitigating call-in risk in M&A transactions

Businesses are understandably concerned that the rise in the use of call-in powers in Europe, which give national competition authorities (NCAs) broader discretion to intervene in mergers, could lead to significant uncertainty for M&A transactions. In particular, if only some EU member states choose to adopt call-in powers, this could lead to further fragmentation of the regulatory landscape across Europe.

With only limited guidance on how NCAs will, or should, use their call-in and referral powers, businesses in dynamic and nascent markets are not in a position to analyse or minimise this risk entirely. In order to effectively mitigate competition risks in transactions, businesses should:

- Conduct a comprehensive analysis of the competition risks in the transaction at an early stage, including call-in risks in all relevant jurisdictions.
- Consider proactively engaging with potentially competent NCAs, even on a no-names basis, in order to gain clarity on the need for notification. This is particularly important for transactions that involve target companies in dynamic sectors such as life sciences and digital technologies.
- Consult any published guidance on the relevant NCAs' call-in powers.
- Consult any reports published by the relevant NCAs that highlight areas of focus for the upcoming year, which may be helpful in indicating a heightened call-in risk.
- Incorporate a robust and clearly formulated condition precedent clause in transaction documents in order to address any potential call-in risk.

strong advocacy of the new call-in power and the NCT, it is clear that the debate over these powers is far from settled (www.acm.nl/nl/publicaties/martijn-snoep-herbenoemd-als-bestuursvoorzitter-van-de-acm).

France

The French competition authority (ADLC) launched a public consultation on 14 January 2025 in which it presented three options for addressing mergers that fall below notification thresholds (www.autoritedelaconurrence.fr/sites/default/files/2025-01/2025.01.14_Consultation%20publique%20concentrations%20sous%20les%20seuils_ENG.pdf).

Option 1. The first proposal was the implementation of a call-in power for the ADLC based on quantitative and qualitative criteria. This would include the parties' cumulative turnover threshold, the impact of the transaction on competition in French territory and the risk of significantly harming competition. The ADLC's order to notify the transaction could be sent before completion or no later than a limited period of time after completion.

Option 2. The second proposal was the introduction of an obligation to notify if one of the parties has been:

- The subject of a merger control prohibition decision or a clearance decision subject to commitments.
- Fined or has accepted commitments in relation to anti-competitive practices.
- Designated as a gatekeeper by the Commission under the DMA.

Option 3. The third proposal would limit the scope of the ADLC's activity to the enforcement of provisions on anti-competitive practices, such as Articles 101 and 102 of the TFEU, after a merger has completed. This would not involve changing the legal framework that currently applies in France.

The ADLC has confirmed that the stakeholders that responded to the consultation firmly rejected option 2 in favour of option 1, which was, nonetheless, also criticised for the uncertainty that it would create for

businesses. The ADLC is currently working on a new proposal to the French government.

The ADLC has also examined, for the first time, below-threshold transactions under Article 101 of the TFEU (and the corresponding provision of the French commercial code) on anti-competitive agreements in the meat-cutting sector. In June 2015, three major corporate groups in the sector, Akiolis, Saria and Verdannet, completed five mergers. The mergers did not exceed the thresholds under the French Commercial Code for an ex ante review. In May 2024, following *Towercast*, the ADLC considered whether the mergers had an anti-competitive object or effect and ultimately concluded that they did not (www.autoritedelaconurrence.fr/en/press-release/meat-cutting-sector-first-time-autorite-examines-under-antitrust-law-mergers-below) (see “Abuse of dominance” above).

Belgium

In its Priorities Paper 2025, the Belgian Competition Authority (BCA) explicitly stated that it will focus on merger control during 2025 (www.belgiancompetition.be/en/about-us/publications/priorities-paper-2025). In particular, the BCA announced that it will consider introducing a call-in power to allow it to examine the competitive impact of a merger that is below the EUMR and national notification thresholds. According to the BCA, this is because of the potentially detrimental impact that killer acquisitions can have on Belgian competitiveness.

In a LinkedIn post on 17 April 2025, the president of the BCA, Axel Desmedt, further announced that Belgium needs a mechanism that allows the BCA to examine below-threshold transactions in order to prevent roll-up acquisitions and killer acquisitions. The BCA's reasons for adopting such a mechanism are twofold:

- Belgian quantitative thresholds are high compared to other member states, meaning that some transactions which may harm competition do not trigger the notification obligation to the BCA.
- The BCA currently relies on *Towercast* to examine below-threshold transactions; for example, it opened two investigations into the Proximus/EDPnet merger in 2023 and the Dossche Mills/Ceres merger in 2025 by applying *Towercast* (www.bma-abc.be/nl/beslissingen/23-rpr-17-proximus-

Key takeaways for businesses in the UK

Businesses operating in the UK should consider the following principles in light of recent developments in UK merger control:

- When considering a merger or acquisition, it is vital to conduct nuanced risk assessments that take account of current policy and legislative changes.
- Businesses with high UK turnover and market presence should carefully consider whether a transaction may fall within the new hybrid merger control test.
- Early, proactive engagement with the Competition and Markets Authority may be advisable if a deal could attract scrutiny.
- It is important for businesses to stay informed and carefully follow the outcome of current developments in order to navigate potential competition risks.

edpnet; www.belgiancompetition.be/en/decisions/25-rpr-21-aud-dossche-mills-ceres). However, Mr Desmedt considers that this mechanism would not be as effective as a pre-transaction review process.

It is envisaged that the process of introducing these changes is likely to take at least a year. Although Mr Desmedt has recommended holding a public consultation on possible proposals, this has not been officially confirmed.

UK merger control

In January 2025, the highly publicised replacement of CMA chair Marcus Bokkerink with ex-Amazon UK executive Doug Gurr as interim chair of the CMA, followed by the government's subsequent strategic steer to the CMA on 15 May 2025, has put the spotlight firmly on merger control in the UK (www.gov.uk/government/publications/strategic-steer-to-the-competition-and-markets-authority/). Echoing the Draghi report, the strategic steer sets out the government's expectations for the CMA, encouraging it to use its tools proportionately, and prioritise pro-growth and pro-investment interventions at the same time as minimising uncertainty for dealmakers.

The UK operates a voluntary merger control regime, so parties are not obliged to notify a transaction even if it meets relevant turnover thresholds. Rather, businesses must make their own assessment as to whether the CMA might call in their deal for review. If the parties believe that a deal could attract scrutiny, proactive engagement with the CMA may be advisable. As an alternative

to the submission of a merger notice, which triggers a formal merger review process, this can be carried out through an informal briefing paper, together with appropriate conditionality and protections built into the deal documents. This generally involves the merging parties conducting the same sort of initial substantive competition analyses, including reviewing overlaps between the parties' operations, as may now be needed to assess the below-threshold call-in risk by NCAs.

These initial risk assessments have been further complicated by a recent expansion of the CMA's jurisdiction, which builds on already flexibly applied thresholds, balanced against a changing policy environment in which the government is encouraging the CMA to be more targeted and proportionate in its interventions.

The hybrid test

In January 2025, the Digital Markets, Competition and Consumers Act 2024 established a new jurisdictional test, referred to as the hybrid test, which is designed to address killer acquisitions (see Briefing “The CMA's expanding scope under the DMCCA: implications for deal strategy”, www.practicallaw.com/w-045-1176). The hybrid test, which is based partly on share of supply and partly on turnover, enables the CMA to investigate mergers that do not meet turnover thresholds but may nonetheless raise competition concerns in dynamic markets.

Theoretically at least, the hybrid test could significantly increase the number of transactions that the CMA reviews, including in circumstances where the target

has only limited operational links to the UK; for example, obtaining local licences or local intellectual property registrations in anticipation of servicing UK customers. The hybrid test does not require an overlap in the products or services that the parties currently supply, meaning that the CMA can take jurisdiction over the acquisition of start-ups or deals between firms at different levels of the supply chain or in neighbouring markets.

It was anticipated that the hybrid test could reinforce the CMA's robust approach to merger control after Brexit (see *feature article "Competition planning for Brexit: racing against time"*, www.practicallaw.com/w-027-9926). This played out in the recent scrutiny of a number of AI partnerships that did not meet relevant thresholds elsewhere, such as the CMA's investigations into:

- The partnership between Microsoft Corporation, OpenAI Inc and OpenAI OpCo LLC in December 2023 (www.practicallaw.com/w-047-0677).
- Microsoft Corporation's partnership with Inflection AI in July 2024 (www.practicallaw.com/w-045-1004).
- Alphabet Inc's partnership with Anthropic PBC in October 2024 (www.gov.uk/cma-cases/alphabet-inc-google-llc-slash-anthropic-merger-inquiry).

The CMA's wide margin of discretion when it comes to applying the share of supply test was confirmed by the Competition Appeal Tribunal following an appeal of the CMA's high-profile decision to block Sabre Corporation's proposed acquisition of Farelogix Inc, despite Farelogix being a US company with no UK turnover (*Sabre Corporation v CMA [2021] CAT 11*; www.practicallaw.com/w-031-4847).

However, despite the CMA now having a significantly broader remit in terms of merger control, its current pro-growth agenda and the introduction in February 2025 of the "4Ps" programme for change (incorporating the four principles of pace, predictability, proportionality and process) are expected to result in more proportionate and predictable decision making, with a renewed focus on UK consumers and businesses ([https://competitionandmarkets.blog.gov.uk/2025/02/13/new-cma-proposals-to-drive-growth-investment-and-](https://competitionandmarkets.blog.gov.uk/2025/02/13/new-cma-proposals-to-drive-growth-investment-and)

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business-confidence/). In particular, on 20 June 2025, the CMA consulted on a new "wait and see" policy for multi-jurisdictional mergers, whereby it may decide not to open an investigation into a deal that is already being reviewed by another authority if the transaction "involves exclusively markets that are wider than the UK" and the proposed remedies are capable of addressing UK competition concerns (<https://connect.cma.gov.uk/changes-to-the-cma-s-mergers-guidance-cma2-and-merger-notice-template>).

The way forward

For now, businesses and their advisers will need to be mindful of increased transactional risk following the introduction of the hybrid test. They will also need to conduct nuanced risk assessments that take account of recent policy and legislative changes, keeping in mind the CMA's latest decisional practice (see box "Key takeaways for businesses in the UK").

While it is likely that the CMA will exercise its discretion to step back from cross-border

deals that do not have a clear impact on UK businesses and consumers, there is no guarantee that this will be the case. In practice, there may also be a risk of a future call-in if it emerges that the CMA does not agree with the parties' assessment that the transaction has no UK-specific impact, or if the CMA is not confident that reviews in other jurisdictions will catch competition concerns that are relevant to the UK. In that case, the CMA's wide margin of discretion to call in deals with a seemingly negligible presence in the UK, or between parties that do not compete directly with each other, has only been strengthened.

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