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**Quickguides**

# UK merger control

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Quickguide overview

This Quickguide summarises the UK merger control regime under the Enterprise Act 2002.

Topics covered include:

- Relevant law and jurisdiction
- The two stage review process
- Notification and procedure
- Substantive assessment
- Merger remedies

**Brexit**

The UK left the EU on 31 January 2020 and the Brexit Transition Period ended on 31 December 2020. As a result, on 1 January 2021 the UK and EU became two distinct regulatory, legal and customs territories, whose relationship is governed by the Trade and Cooperation Agreement (TCA).

This means that the UK is no longer part of the EU for jurisdictional, procedural and substantive assessment purposes under the EU Merger Regulation (EUMR). In particular, the "one-stop shop" system established under the EUMR no longer applies to the UK, meaning that the UK Competition and Markets Authority (CMA) is now permitted to investigate transactions in parallel with the European Commission.

This Quickguide does not consider UK merger control in relation to transactions which were agreed before 1 January 2021. Businesses should seek legal advice in relation to cases which were in progress and/or transactions agreed before 1 January 2021, as these may be subject to transitional arrangements.

This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. For more information please contact us at London Fruit & Wool Exchange, 1 Duval Square, London E1 6PW T: +44 (0)20 7638 1111 F: +44 (0)20 7638 1112 www.ashurst.com.

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# UK merger control

## 1. Relevant law and jurisdiction

UK merger control legislation is primarily contained in the Enterprise Act 2002 (EA 2002) and is enforced (since 1 April 2014) by the CMA.

The EA 2002 applies to completed or anticipated mergers where:

- two or more "enterprises" cease to be distinct (i.e. are brought under common control or ownership); and
- one or more of the following criteria are satisfied:
  - the UK turnover associated with the enterprise which is being acquired exceeds £70m (the "standard turnover test"); or
  - as a result of the merger, a share of 25 per cent or more in the supply or consumption of goods or services of a particular description in the UK (or in a substantial part of the UK) is created or enhanced (the "share of supply test").

It will usually be relatively straightforward to identify "UK turnover".[1] Where, however, none of the enterprises concerned remains under the same ownership and control (e.g. the merging of two companies or partnerships), the relevant turnover will be calculated by adding together the turnovers of all the enterprises involved and taking away the turnover of the enterprise with the highest turnover.

The target company will be "brought under common control or ownership" in the following circumstances:

- when one party acquires a controlling interest in the other party ("legal control"); or
- when one party acquires the ability to control the commercial policy of the other ("de facto control"); or
- when one party acquires the ability to materially influence the commercial policy of the other ("material influence"). The CMA's guidance indicates that an acquisition of 15 per cent or more of a company's shares is liable to be examined to see whether the holder may be able to influence the policy of the company concerned (although shareholding below 15% can in principle also give rise to material influence); or
- where a party which already has material influence or de facto control acquires a higher level of control.

The EA 2002 also provides that control may be acquired by "associated persons" which act together to acquire joint control. This might apply, for example, where two businesses are bidding jointly to take control of a third.

Where the post-merger control structure is considered to involve enterprises ceasing to be distinct, and the jurisdictional thresholds are met, there is a "relevant merger situation".

As noted above, following the end of the Brexit Transition Period on 31 December 2020, the "one-stop shop" system established under the EUMR no longer applies to the UK, meaning that the CMA is now permitted to (and does) investigate transactions in parallel with the European Commission. The UK's

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[1] "Turnover" means revenue from sales to UK customers in the preceding business year, deducting any sales rebates, VAT and other turnover-related taxes. Turnover is aggregated for all parts of the target business, less any intra-group turnover.

jurisdictional criteria remain unchanged and are likely to be satisfied by numerous transactions that are also notified to the European Commission.

The UK's withdrawal from the EU has no direct impact on the applicability of EU merger control to UK undertakings; if a transaction satisfies the EUMR's jurisdictional criteria, clearance from the European Commission must be obtained before closing. However, revenue generated in the UK will no longer be included as part of EU-wide turnover for the purposes of determining jurisdiction under the EUMR, and the UK will no longer form part of the EU internal market for the purpose of assessing the substantive impact of a transaction. Further details on the EUMR are set out in our Quickguide on "*EU merger control*".

# 2. A two stage review process

In common with many other jurisdictions, UK merger control is a two-stage process. An initial review considers whether the merger raises prima facie competition concerns (a "Phase 1" investigation), with a second stage in-depth review for more contentious mergers (a "Phase 2" investigation). Both stages of the review process are handled by the CMA. The CMA Board (which will normally delegate decision-making powers to a high-ranking CMA officer) is responsible for making Phase 1 decisions and an Inquiry Group (comprising between three and five Panel Members of the CMA, appointed for the merger in question) is responsible for Phase 2 decisions. The CMA Panel comprises people with the requisite depth of relevant experience through their work as professional or academic lawyers, economists, accountants, directors or other business roles.

The CMA has a function to obtain and review information relating to merger situations, and a duty to refer for a Phase 2 investigation any relevant merger situation where it believes that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition (or "SLC") in a UK market. The CMA has powers to investigate mergers on its own initiative based on information in the public domain, following notification of the merger by the parties, or following a third party complaint.

Following a reference for a Phase 2 investigation, the CMA conducts a more detailed analysis to determine whether:

- there is a relevant merger situation falling within the UK merger control regime (i.e. confirming that the UK merger control regime is engaged);
- that relevant merger situation has resulted, or may be expected to result, in a substantial lessening of competition; and
- it should take action to remedy any substantial lessening of competition identified and, if so, what action.

This Quickguide focuses on the practice and procedure for a Phase 1 investigation, and provides a brief overview of Phase 2. For further guidance on Phase 2 procedure please see the separate Ashurst Quickguide, *"UK merger control – Phase 2 references"*.

# 3. Public interest mergers

The EA 2002 also contains provisions allowing political involvement in certain limited categories of merger which have the potential to raise wider public interest concerns. In such cases, the Secretary of State is able to intervene and can impose additional conditions on a merger to address such public interest concerns. Where the merger is felt to be in the public interest overall, notwithstanding any competition concerns, the Secretary of State can even "trump" the competition assessment and clear a merger which has been identified as potentially anti-competitive (as seen for example in the case of the *Lloyds/HBOS* merger in 2008). Currently, the specified considerations in respect of which the Secretary of State is able to make a public interest intervention are limited to media concerns such as

media plurality, accuracy and quality, (since the financial crisis of autumn 2008) the stability of the UK financial system, and (since 23 June 2020, as a result of the COVID-19 outbreak) the need to combat public health emergencies. To date, public interest interventions under the EA 2002 have been relatively rare.

Until the National Security and Investment Act 2021 entered into force on 4 January 2022, the Secretary of State could also intervene in mergers on the grounds of national security/defence concerns. The National Security and Investment Act was introduced against a background of increasing concern regarding the ability of the UK's existing merger and regulatory regime to protect its national security effectively. It established a new statutory regime for the UK Government to scrutinise investments and acquisitions on national security grounds and has significantly strengthened the Government's powers to investigate and potentially prohibit transactions on national security grounds. The National Security and Investment Act contains a mandatory notification regime, backed up by criminal sanctions, for transactions in 17 key sectors thought most likely to raise national security concerns, and a voluntary notification process (underpinned by a "call-in" power) for other transactions that may affect UK national security interests. In its November 2020 impact assessment, the Government stated that it envisaged around 1,000-1,830 notifications being made each year. However, the Government only anticipates calling in a very small proportion of deals for a detailed assessment (the impact assessment estimated 70-95 per year). For further guidance on the UK's new National Security and Investment regime see the separate Ashurst Quickguide, *"UK national security and investment control regime"*.

# 4. Notification and procedure

This section considers:

- the strategic considerations to take into account in deciding whether to notify a merger in the UK, including the active role of the CMA's Mergers Intelligence Committee (MIC);
- the availability of informal advice to discuss the CMA's likely assessment of the merger;
- the ability to proactively engage with the MIC;
- the effective requirement to enter into pre-notification discussions with the CMA;
- the notification process;
- interim enforcement orders and related powers of the CMA; and
- merger fees.

## The decision whether to notify a merger

There is no obligation under the EA 2002 to seek prior clearance of a qualifying merger from the CMA either before or after the merger takes place, and there are no sanctions for proceeding without clearance. The commercial decision whether (a) to notify and (b) to make the transaction conditional on receipt of merger clearance, usually depends on a combination of:

- an analysis of the risk of a reference for a Phase 2 investigation and the likely ultimate outcome (clearance, conditional clearance, prohibition, etc.). Ultimately the CMA can (and, in appropriate cases, will) require the buyer in an anti-competitive completed merger to divest the acquired business. Completion without prior clearance of a merger which raises competition concerns therefore carries commercial risk for the buyer. There is limited commercial risk for the seller because the CMA does not have power to require the seller to repurchase the target business, only to require the buyer to divest it (or, in some cases, part of its existing business);
- the likely impact of notification on the transaction timetable. The fact that notification is not compulsory means that in cases where speed is desirable (for example to meet a deadline or where the target is in financial difficulty), the parties can take advantage of the voluntary nature of the UK

regime to press ahead, notwithstanding the associated risks. This may mean that the decision is taken to notify but to have an unconditional transaction (i.e. to complete without waiting for merger clearance);

- the relative bargaining positions of the parties. In some cases, the seller is not prepared to wait for merger clearance, or perhaps a purchaser is bidding against competing bidders whose offers do not qualify for merger clearance. The buyer may therefore have to accept the risk of an unconditional deal;
- the likelihood that the CMA will hear about the merger from another source and investigate on its own initiative. The CMA has a general duty to keep itself informed about mergers which may qualify for investigation. Its MIC reviews the financial and business press to identify mergers which might be subject to UK merger control and uses the CMA's general information-gathering powers to ask the parties questions about the merger. Many merger investigations (particularly of completed transactions) are started in this way. Secondly, if the merger has been notified in other jurisdictions, the CMA may hear about it from another competition authority. Finally, the CMA may learn about a merger following a complaint about it by a customer or competitor; and
- the CMA's powers to impose a far-reaching "initial enforcement order" or IEO. It is also relevant, in deciding whether to notify, that the CMA can freeze any further integration of a completed merger which it is reviewing, freeze an anticipated merger and even reverse any integration steps which have been taken (as noted further below, IEOs in fact go further than simply freezing integration/requiring merging businesses to be held separate and are onerous to comply with).

The CMA retains power to refer a merger for a Phase 2 investigation until the later of:

- four months after completion of the merger; or
- four months from the date on which "material facts" about the merger entered the public domain.

Mainly because of the work of the MIC, it is very rare for this deadline to prevent the CMA from commencing a Phase 2 investigation into a potentially anti-competitive merger.

## Informal advice

While the CMA no longer has a formal process for requesting informal advice, parties may still approach the CMA to discuss whether informal advice may be available in their particular case. Parties may seek informal advice from the CMA about its likely view of a particular merger in relation to good faith, confidential transactions (i.e. which are not yet in the public domain) where the question of whether the CMA is likely to refer the merger for a Phase 2 investigation is a genuine issue (in other words, there could be a realistic potential competition concern). As there is no longer a set process for seeking informal advice, parties should discuss with the CMA whether informal advice may be available and if so, how the process would work (including what information to provide to the CMA, the type of advice available and timing).

In practice, it should however be noted that informal advice has been largely superseded by MIC briefing papers, considered below.

## Submitting a briefing paper to the MIC

Merger parties are welcome to submit a short briefing note (around 5 pages) to the MIC, explaining why they do not propose to submit a notification to the CMA. There is no CMA fee associated with this process, which is confidential. As the process does not involve the CMA contacting third parties, its utility for merger parties is dependent on the quality and accuracy of the information they provide to the MIC.

Briefing notes will typically provide information on the merger and explain why it does not give rise to a substantial lessening of competition and/or does not meet the UK jurisdictional criteria, so that the CMA should not formally investigate the merger. In respect of mergers which have not yet completed, the note may list the key stages to be concluded prior to completion.

The CMA will typically only consider a briefing note after the merger agreement has been signed (with limited exceptions such as a public bid). It is therefore not a means of obtaining prior guidance as to the CMA's likely position.

Following submission of a briefing note, the parties may be asked to provide further information. The CMA will generally provide a substantive response to the briefing note within 2-4 weeks that either:

- it "has no further questions at this stage". This provides a strong indication that the CMA will not formally investigate the merger. However, the CMA retains the discretion to investigate, for example if further information comes to light; or
- the CMA intends to formally investigate the merger. The parties will then typically be required to submit a notification and the pre-notification process below will commence.

## Pre-notification discussions

If the decision is taken to notify a merger voluntarily to the CMA, the parties will be expected to first provide the CMA with a draft of the notification (referred to as a Merger Notice) and to engage in "pre-notification discussions". Such discussions with the CMA were once simply "best practice" but are now considered by the CMA to be mandatory. The risk of not engaging in pre-notification discussions is that the CMA may reject a notification as incomplete (see below). Pre-notification discussions take seven to eight weeks on average but have been known to take as long as five months, so this is not a quick process. (The lengthy duration of the process reflects in part the voluntary nature of the UK merger control regime, which means that nearly all deals notified will raise some degree of possible competition issue). Parties seeking to hold pre-notification discussions should complete a case allocation form to allow for the selection by the CMA of an appropriate case team. The CMA will endeavour to allocate a case team within five working days.

The pre-notification procedure involves dialogue with the CMA on the completeness of the draft submission (and not on the question of whether the merger will be cleared or referred). The process involves sending the submission to the CMA in "final draft" form, which it will then review. The CMA has recently indicated that the first draft submitted by the parties is very rarely complete. In other words, it will almost always ask for additional information. Where the CMA considers that it will need more information to investigate particular issues, the CMA case officers will typically issue a request for information. In some cases, this will be a formal information request under section 109 EA 2002, backed up by potential sanctions for failure to comply. . The CMA has the ability to reject a notification which is incomplete so the pre-notification process is helpful in ensuring that the submission is accepted immediately on formal submission. This in turn will ensure that the clock will start to run as regards the statutory time limits for the CMA's decision.

In practice, the pre-notification process is increasingly used to commence the substantive assessment of the merger outside the statutory time frame for review which applies once the notification has been formally submitted. Where the deal is public (as would ordinarily be the case), this will frequently involve the CMA contacting third parties for comment before its formal Phase 1 period has commenced.

## Submitting a written notification (Merger Notice)

As explained, there is no obligation on the parties to a qualifying merger to notify it to the CMA for clearance. However, if a notification is made, the parties must follow the prescribed statutory procedure, providing all the information requested in the pro forma Merger Notice (unless formal waivers have been granted by the CMA for specific information).

A Merger Notice may be rejected by the CMA, in particular, if it suspects that it contains false or misleading information, if it suspects that the parties do not propose to carry the arrangements into effect, or if the party notifying fails to supply the required information or any subsequently requested information.

Once the CMA has confirmed that the submitted notification is complete, it has 40 working days to either clear the transaction or refer it for a Phase 2 investigation. This period cannot be extended.

However, the CMA may "stop the clock" on the 40 working day period if it considers that the addressee of a formal written notice has not complied with a request to:

- give evidence;
- produce documents; or
- supply other specified information.

Once the requested information has been provided the CMA will restart the clock and time will continue to run on the 40 working day deadline. The CMA aims to issue a decision within 35 working days in 60 per cent of merger investigations. Where the parties accept that a Phase 2 reference will very likely be made, they can request the CMA to "fast track" the case. Where such a request is accepted, the CMA will aim to make the reference decision within 10 to 15 working days.

## Initial enforcement orders and related powers of the CMA

As noted above, the CMA has discretionary powers to impose an initial enforcement (or "hold separate") order. Among other things, such orders suspend all integration of the merging businesses, typically from the outset of a Phase 1 investigation (and often prior to the formal commencement of a Phase 1 investigation in the case of a completed merger). The CMA also has powers to reverse any integration steps which have already taken place (for example, re-creating separate reporting lines or functions within a business).

Although often referred to as hold separate orders, initial enforcement orders are in fact more far-reaching than simply preventing (further) integration. They also restrict disposals of parts of the relevant businesses or anything else which might impair the ability of the relevant businesses to compete independently, such as changes to the organisational structure, management or key staff, or changes to goods or services supplied. The parties will also need to submit fortnightly compliance statements. Where the parties wish to take any action which is not permitted by the IEO, they will need to submit a derogation request. IEOs are therefore onerous to comply with.

The CMA can utilise these powers in respect of both anticipated and completed mergers. For mergers completed without prior clearance, the CMA's practice is to impose an IEO in substantially all cases that it investigates (although the CMA may decide to lift the order prior to concluding its Phase 1 review if it becomes comfortable that there are no competition concerns).

The power to impose an IEO in the case of an anticipated merger (e.g., one which is conditional on CMA clearance) is far less commonly deployed, but has been used in a few cases to date.

The CMA's IEO powers can be (and frequently are) used before the CMA has established whether the jurisdictional thresholds have been met – it needs only to suspect that a merger situation has arisen or is intended. The CMA's powers to impose IEOs and to reverse any integration steps already taken are a factor that may make buyers more resistant to attempts by the seller to pass all regulatory risk on to the buyer.

## Merger fees

Merger fees are payable in respect of any merger (subject to some limited exceptions) that qualifies as a relevant merger situation and in which the CMA (or Secretary of State in public interest cases) reaches a decision on whether or not to refer the merger for a Phase 2 investigation (regardless of whether a reference is made or not). Fees are payable by the person (or group of people) submitting the Merger Notice or, if the CMA launches an own-initiative investigation, by the person(s) acquiring control. Merger fees are payable at the end of Phase 1, when the CMA announces its decision whether to refer or clear the merger.

The table below shows the current bands for merger fees.

| | MERGER FEE |
|---|---|
| UK turnover of the target does not exceed £20m | £40,000 |
| UK turnover of the target is greater than £20m but does not exceed £70m | £80,000 |
| UK turnover of the target is greater than £70m but does not exceed £120m | £120,000 |
| UK turnover of the target is greater than £120m | £160,000 |

# 5. Substantive assessment

## The CMA's duty to refer

As indicated above, the CMA is under a duty to refer a relevant merger situation for a Phase 2 investigation where the CMA believes that it is, or may be, the case that:

- a relevant merger situation has been created, or arrangements are in progress which if carried into effect will result in the creation of a relevant merger situation; and
- the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market(s) in the UK for goods and services.

Case law has indicated that the CMA has a wide margin of discretion whether to refer cases where the risk of a merger leading to a substantial lessening of competition is believed to be more than fanciful but less than 50 per cent: in practice, the CMA will refer a merger where it considers that there is a "realistic prospect" of a substantial lessening of competition. Above a 50 per cent risk, a reference must be made.

The CMA considers that a merger may be expected to lead to a substantial lessening of competition when it is expected to weaken rivalry to such an extent that customers would be harmed. This may come about, for example, through reduced product choice, or because the merged business could profitably raise prices, reduce output and/or product quality or reduce innovation. The CMA has also indicated that it considers that the core analysis under the substantial lessening of competition test is a comparison of whether the conditions of competition in the relevant market are better with or without the merger. Further information about the substantive assessment of mergers may be found in Ashurst's Quickguide, "*Substantive economic analysis in merger control*".

## Exceptions to the CMA's duty to refer

The CMA may decide not to refer a merger for a Phase 2 investigation if it believes that:

- the market(s) concerned is/are not of sufficient importance to justify a reference (known as the "de minimis" exception – this exception may be available where the affected markets (including all players in the relevant markets, not just the parties) are worth less than £15m in aggregate, subject to various wider considerations); or
- any relevant customer benefits arising out of the merger outweigh the substantial lessening of competition; or
- in the case of an anticipated merger, the arrangements are not sufficiently advanced, or not sufficiently likely to proceed, to justify a reference.

It is not unusual for mergers involving small markets to be permitted to proceed under the de minimis exception. It is, by contrast, very unusual for a merger to be cleared at Phase 1 on grounds of customer benefits.

# 6. Undertakings in lieu of a reference (Phase 1 remedies)

Under the EA 2002, the CMA may accept binding undertakings from the parties to a merger as an alternative to making a reference for a Phase 2 investigation. If the CMA decides that its duty to refer applies, the parties must make their offer of undertakings in lieu no later than five working days from receipt of the CMA's reasoned decision to refer. The CMA will have no more than ten working days after the announcement of its Phase 1 decision to decide whether to pursue such undertakings. If the CMA decides to pursue undertakings, it has until 50 working days after the date of publication of its Phase 1 decision within which to finalise and accept the undertakings in lieu, subject to a possible further extension of up 40 working days.

Such undertakings may be structural (e.g. divesting part of the business) or behavioural (i.e. as to future conduct), although structural undertakings are generally regarded by the CMA as a more appropriate remedy for competition problems in a merger situation, particularly at Phase 1. Generally, undertakings in lieu must offer a "clear cut" remedy to the competition concerns, so more complex remedies (such as most behavioural remedies) will very rarely be acceptable and the preference is for simple divestments which remove the anti-competitive overlap outright. Where undertakings in lieu are proposed by the parties and the CMA considers that they may be acceptable, the CMA will consult with third parties to "market test" the suitability of the proposed remedy.

Although the process of agreeing undertakings is not one of to-and-fro negotiation with the CMA, it does consider offers seriously and will engage in some discussion with the parties in light of the desirability for both the parties and the public purse of avoiding the costs of a Phase 2 investigation.

# 7. Phase 2 investigations

When a merger is referred for a Phase 2 investigation, the CMA's (more specifically, the Inquiry Group's) duty is to investigate and decide whether the merger has resulted in, or may be expected to result in, a substantial lessening of competition (an "anti-competitive outcome"). The CMA will decide this issue on a balance of probabilities, i.e. whether a substantial lessening of competition is more likely than not. This is a higher threshold than the "realistic prospect" test applied at Phase 1.

If the CMA concludes that the merger has resulted or can be expected to result in an anti-competitive outcome, then it must consider whether it or another body should take action – and, if so, what action – to remedy, mitigate or prevent the substantial lessening of competition or any resulting adverse effects, taking into account the need to ensure as comprehensive a solution as is reasonable and practicable. The CMA must also have regard to the impact of the remedy on any customer benefits expected to be generated by the merger.[2]

The CMA has 24 weeks, beginning with the date of the reference, to undertake its Phase 2 analysis and to prepare and publish its report and decision (including with regard to remedies). One extension of no more than eight weeks may be allowed. Historically, Phase 2 investigations have generally taken at least 20 weeks and usually the full 24 weeks. There is no "fast track" option.

[2] As noted, Ashurst's Quickguide; "*Substantive economic analysis in merger control*", considers in more detail the substantive assessment of mergers.

# 8. Phase 2 remedies

Phase 2 remedies are negotiated with, accepted by, and monitored by the CMA. If suitable undertakings cannot be agreed with the parties, the CMA will make an order to remedy the adverse findings. All such undertakings and orders are published.

Broadly speaking, the types of remedies which the CMA might consider include the following:

- remedies structured to restore or maintain all or part of the pre-merger status quo such as prohibiting all or part of an anticipated merger or reversing a completed one (in either case, this typically involves divesting one or more of the merging parties' businesses[3] to a suitable purchaser, to remove the anti-competitive overlaps between the purchaser and target and allow the remainder of the merger to proceed);
- remedies intended to increase competition following the merger either from existing or new competitors (such as requiring the merged entity to give access to essential facilities or to license intellectual property); and/or
- remedies designed to exclude or reduce the ability of the merged firm to exploit increased market power arising out of the merger (such as imposing a price cap or other price constraint, requiring increased transparency of prices or obliging the merged business to refrain from conduct aimed at inhibiting entry) – these types of "behavioural" remedies are not favoured by the CMA and are used relatively rarely.

The CMA has a period of 12 weeks following its Phase 2 decision within which to negotiate and finalise remedies with the parties. This may be extended by up to six weeks if there are "special reasons" for doing so (this is not a particularly high threshold). The essential framework and objectives of the remedies will have been included in the CMA's final Phase 2 decision, so this later phase deals with the detailed negotiation and drafting of the undertakings which the parties will commit to in order to implement the remedies. Third party consultation will also take place within the same time frame.

[3] "Business" in this context can mean anything from a single brand or even a single intellectual property right to a fully autonomous standalone subsidiary depending on the circumstances of the merger.

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