Call for Written Evidence by the Public Bill Committee on the Digital Markets, Competition, and Consumers Bill

Submission of Cleary Gottlieb Steen & Hamilton LLP

Introduction & Summary

1. Cleary Gottlieb Steen & Hamilton LLP welcomes the opportunity to comment on the Digital Markets, Competition, and Consumers Bill that was introduced to Parliament on 25 April 2023 (the **Bill**).[1]

2. The global advancement of digital markets regulation heralds a new era of *ex ante* sectoral regulation applying alongside competition law to ensure that digital markets function properly to the benefit of consumers and businesses. The UK was an early proponent of such regulation, and the Bill will give the Competition and Markets Authority (**CMA**)—in particular, its Digital Markets Unit (**DMU**)—a new toolbox to achieve this goal. Separately, the Bill seeks to reform various aspects of existing UK competition law, merger control, and consumer law, responding to calls for reform that have been promulgated for many years. The Bill's comprehensiveness reflects a multi-year effort to devise new rules that balance a generally accepted need for change against the need for a "*proportionate, pro-innovation*" approach.[2]

3. The Bill has the potential to achieve this overarching objective. In places, however, the Bill risks undermining business certainty, innovation incentives, and rights of defence. We identify four main areas where the Bill's drafting could be improved to avoid a chilling effect on competition and innovation:

   - **Greater certainty underpinning the procompetition regime for digital markets**. The flexibility provided to the DMU under the procompetition regime for digital markets is welcome. But three aspects of the regime should be improved to provide greater legal certainty for businesses (**Section I**). First, the DMU's discretion to impose and enforce conduct requirements applicable to firms designated as having strategic market status (**SMS**) should be more carefully defined. Second, the relationship between conduct

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[1] The comments in this submission are made on our own behalf. They are based on our experience representing clients in proceedings before the CMA and other competition authorities. They do not necessarily represent the views of our clients.

[2] UK Government, Government response to the consultation on a new pro-competition regime for digital markets (May 2022), p. 5 (hereinafter *Government Consultation Response*). *See also* UK Government, Government response to consultation on reforming competition and consumer policy (April 2022), p. 10 ("*The UK needs a commercial and regulatory environment that supports businesses to innovate, grow and compete on their merits*") (hereinafter *Government Consultation Response (Competition and Consumer Law)*).

requirements and the DMU's separate power to impose remedies under procompetitive interventions (**PCIs**) should be clarified. Third, the framework for assessing consumer benefits should be improved to ensure—consistent with the Government's intention—that "*[t]he DMU will not be able to take action against conduct that on balance benefits consumers.*"[3]

- **Robust checks and balances on DMU decision making, including an appeal on the merits**. The DMU is a quasi-judicial authority with the power to impose binding conduct rules, intrusive remedies, and quasi-criminal fines (including personal liability for company officers). As such, the DMU's decision making must be subject to robust checks and balances to ensure that the powers are not used in a way that will harm competition and innovation in digital markets. In this connection, the Bill should be improved in three respects (**Section II**). First, a clear mechanism should be introduced for designated firms to make representations to the DMU's decision making committees before a decision is taken. Second, an express access to file procedure during investigations into breaches of conduct requirements should be added. Third, DMU decisions should be subject to full merits appeals rather than the limited grounds available under judicial review.

- **Guardrails on the UK's jurisdiction to review mergers**. The Bill creates a new jurisdictional test for the UK merger control regime, which would grant the CMA even greater flexibility to review transactions. Without sufficient guardrails in place to ensure that the CMA's decision making is robust in identifying mergers that are likely to substantially lessen competition, this new test may have a chilling effect on procompetitive mergers to the detriment of consumers in the UK (**Section III**).

- **Strong procedural safeguards for, and appropriate judicial oversight of, the CMA's direct consumer law enforcement powers**. The Bill introduces a new power for the CMA to enforce breaches (or likely breaches) of consumer law directly, without having to apply to Court. Overall, we welcome this new enforcement mechanism. However, with similar abilities to find infringements and impose fines and remedies as the CMA's competition enforcement powers under the Competition Act 1998 (**CA98**), the CMA's enhanced consumer enforcement powers should be subject to similar procedural rights (*i.e.*, an independent decision maker, the right to make oral and written representations before decisions are taken, and the right of access to file), as well as full merits appeals (**Section IV**).

4. The rest of this submission expands on these concerns and proposes amendments to the Bill to address them.

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[3] Government Consultation Response, ¶64.

I. The Digital Regulatory Regime Must Balance Flexibility Against the Need for Business Certainty

5. The Bill's digital regulatory regime seeks to introduce a flexible and non-prescriptive approach to regulation, while importing some concepts from competition law, such as the assessment of consumer benefits and adverse effects on competition.

6. We welcome this approach. Digital markets are fast-moving. Rigid rules can quickly become irrelevant or inappropriate as technologies evolve. A flexible regime can be better for SMS firms because they should not become shackled by prescriptive rules that do not adapt to market developments. It can be better for complainants, who can bring problematic new conduct to the DMU's attention and encourage it to update the rules based on new evidence. And it can be better for UK consumers, who benefit from up-to-date rules that best serve their interests.

7. The Bill implements this flexibility via a two-step process.[4] First, the DMU would designate a firm as having SMS in respect of one or more digital activities. Second, having designated the firm, the DMU can, following a public consultation, impose conduct requirements on that firm in relation to the designated digital activities. Separately, the DMU can conduct PCI investigations. Following a PCI investigation, if the DMU finds an "*adverse effect on competition*" (**AEC**), it can adopt a "*pro-competitive order*" imposing behavioural, informational, or structural remedies on the firm under investigation.

8. While we agree with the overall goal of flexible regulation, the Bill's implementation of the regime could be improved in three main ways, as described below.

A. The DMU's Discretion To Impose Conduct Requirements Should Be More Carefully Defined in Statute

9. Under the Bill, the DMU can impose conduct requirements on SMS firms that: (i) achieve one of three overarching objectives (namely, trust and transparency, open choices, or fair dealing); and (ii) fall into one of the categories of conduct requirements specified in sections 19-20 of the Bill. The Government explained that this framework would "*ensure the regime is transparent and brings certainty both to firms with Strategic Market Status and to users*."[5]

10. We agree that enshrining principles and objectives, rather than specific and rigid requirements, in the statute can in principle be a sound means of regulating dynamic markets. But contrary to the Government's objectives, the way the Bill would in practice operate—via extremely broad categories of conduct requirements—risks

[4] This reflects the approach set out in the Government's response to its consultation on the new regime. *See* Government Consultation Response, *supra* note 2.

[5] Government Consultation Response, ¶58.

leaving firms (SMS firms, possible complainants, and other businesses) with little predictability and certainty as to how the rules will apply.

11. For example:

- Section 20(3)(b) would establish a category of preventing a SMS firm from "*using its position in relation to the relevant digital activity [...] to treat its own products more favourably than those of other undertakings*." Similarly, section 20(3)(d) would create a category of preventing a SMS firm from "*requiring or incentivising users or potential users of one of the designated undertaking's products to use one or more of the undertaking's other products [...]*." Read literally, these categories could potentially empower the DMU to prevent a designated firm from implementing any product integration involving a designated activity, irrespective of its potential impact on competition or consumer benefits.

- Section 20(3)(g) would establish a category that would prevent a designated firm from "*using data unfairly*." There is no explanation of what is meant by "*using*", what the meaning of "*unfair*" is, when data could be used fairly, whose "*data*" is at issue, or what types of data are captured. Conduct requirements imposed within this category could therefore be unpredictably broad, as the Bill's explanatory notes illustrate through the example of a conduct requirement "*that prevents a designated undertaking from using data in a particular way*."[6]

12. To remedy these concerns and maintain incentives for SMS firms to innovate while complying with the new regime, we propose four improvements:

- First, the Bill's conduct requirement categories should be made more specific to ensure certainty and predictability for SMS firms, complainants, and users.

- Second, the DMU should be required to explain, when it consults on proposed conduct requirements, how each requirement fits into relevant conduct categories.[7]

- Third, there should be an express right in the Bill for firms to obtain non-binding opinions from the DMU on the compatibility of existing and planned practices with specific conduct requirements, similar to the "short-form opinion" system that existed previously for agreements and other conduct.[8]

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6 Bill, Explanatory Notes, ¶163.

7 The Bill currently only requires the DMU to state which categories its proposed conduct requirements relate to in its consultations. *See* Bill, s. 24(2)(b).

8 *See* CMA, Guidance on the CMA's approach to Short-form Opinions, CMA27 (withdrawn) (April 2014).

- Fourth, the DMU should be expressly required to consider consumer benefits at the stage of formulating conduct requirements (*see* section I.C below).

B. The Relationship Between Conduct Requirements and PCIs Needs Clarifying

13. The Government has explained that conduct requirements seek to prevent the exploitation of existing market power rather than address the source of market power.[9] By contrast, PCIs are designed to "*tackle the root causes of entrenched market power*."[10] According to the CMA's vision for the regime, PCIs could be used to address competition issues that do not involve changing a firm's existing behaviour (in which case conduct requirements would be a better instrument).[11] Given the potentially intrusive actions that could be imposed through PCIs, such as structural remedies or mandating interoperability, the Bill proposes that PCIs are subject to a higher legal threshold: the DMU must establish an AEC before imposing a PCI.[12]

14. The Government's explanation of the delineation between conduct requirements and PCIs makes sense. But this delineation is not reflected in the wording of the Bill, which does not explain the circumstances in which PCIs or conduct requirements should be used. The confusion is illustrated by the example of interoperability: both the Government[13] and CMA[14] identify mandating interoperability as a PCI. But the Bill would enable the DMU to implement conduct requirements that prevent a SMS firm from "*restricting interoperability between the relevant services or digital content and products offered by other undertakings*."[15] It is not clear whether this conduct category could be used by the DMU to require an SMS firm to offer interoperability for the first time or whether it only applies to restrictions on interoperability that are already in place. The Government's intention appears to have been the latter.

15. It is important to ensure that the DMU cannot bypass the procedural safeguard in the PCI regime of demonstrating an AEC by using conduct requirements instead to force designated firms to build new features or infrastructures that enable access to their services, APIs, or data. Because these kinds of remedies can be more burdensome,

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9 Government Consultation Response, ¶50.

10 Ibid., ¶79.

11 CMA, [Online platforms and digital advertising market study: final report] (1 July 2020), ¶7.103.

12 Bill, s. 44(1).

13 Government Consultation Response, ¶79. *See also* Bill, Explanatory Notes, ¶253(b).

14 CMA, [A new pro-competition regime for digital markets: Advice of the Digital Markets Taskforce], CMA135 (December 2020) (hereinafter *Digital Markets Taskforce Advice*), ¶13.

15 Bill, s. 20(3)(e). The Government gives the example of preventing a designated undertaking from "*restricting an application developer's access to important information about mobile phone software which prevents the developer from creating new and more effective mobile applications*." *See* Bill, Explanatory Notes, ¶173.

come with a greater risk of unintended consequences for stifling innovation, and involve higher costs, establishing an AEC is an important precondition to show that intervention is justified.

16. The Bill should therefore set out clearer rules on when the DMU can employ its conduct and PCI tools. We suggest the following five improvements:

- **First, conduct requirements should not impose the same obligations as PCIs**. The Bill should make explicit that the DMU may not impose conduct requirements that would have the same impact on the SMS firm as a remedy that should be imposed following a PCI.

- **Second, conduct requirements should not impose positive obligations to take specific action, as that ability is reserved for PCIs**. The Bill should specify that conduct requirements are limited to preventing SMS firms from engaging in a form of conduct understood to be harmful (*e.g.*, based on past cases or empirical evidence), but leave the implementation of the conduct requirement up to the firm. By contrast, if the DMU wishes to impose a specific positive obligation on a firm to take specific action and that involves the firm expending costs to achieve that action (*e.g.*, to build new infrastructure or enable access to its products or services), it should do so through PCIs.

- **Third, PCIs should be subject to an overall proportionality assessment**. Imposing remedies following PCI investigations should be subject to an overall proportionality assessment, similar to the proposed requirement for the CMA to consider the proportionality of enhanced consumer measures it could impose under its new direct consumer law enforcement powers.[16] Indeed, the Government explained in its consultation response that PCIs would be subject to a proportionality assessment, which could limit the DMU's discretion to impose PCIs where alternative mechanisms, such as less intrusive conduct requirements, are available.[17] But no such requirement appears in the Bill.

- **Fourth, the DMU should consult on its decision to open PCI investigations**. The DMU should be obliged to consult on its decision to open a PCI investigation.[18]

- **Fifth, there should be a short moratorium following the introduction of conduct requirements before moving to a PCI investigation**. The DMU should be required to wait a period of one year following the introduction of

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[16] *See* Bill, s. 175(2). Presently, the CMA can apply to court to enforce enhanced consumer measures. Such measures are also subject to a proportionality test.

[17] Government Consultation Response, ¶83.

[18] The Bill currently only requires the DMU to consult before making a final decision in a PCI investigation. *See* Bill, s. 47.

conduct requirements before making a decision to open a PCI investigation in respect of similar or closely related practices. This would enable the DMU to assess the impact of conduct requirements in the market before it moves to consider more intrusive measures.

C. The Way That Consumer Benefits Are Accounted For in Conduct Requirements and PCI Investigations Should Be Improved

17. The Government has emphasised that the DMU must take into account consumer benefits.[19] Accordingly, it stressed that SMS firms must be able to bring forward evidence that their conduct creates benefits to consumers and that the "*DMU will not be able to take action against conduct that on balance benefits consumers*" (emphasis added).[20] This is a notable point of distinction from the EU's Digital Markets Act, which contains no express consumer benefit defence (and which the Government has sought to distance the Bill from[21]).

18. For example, the Government explained that "*leveraging is not inherently problematic or anticompetitive, and that firms with a strong position in one market may present a healthy disruptive force to an adjacent market in which a different incumbent has market power.*"[22] SMS firms could therefore "*use the exemption to prevent the DMU taking action by proving the benefits that are achieved through leveraging*."[23]

19. These proposals are welcome. Competition policy—including in digital markets—should protect the competitive process.[24] This means that firms should be able to justify conduct that may otherwise raise concerns on the grounds that it creates benefits for consumers that outweigh harms to competition or trading partners.

20. But the way that consumer benefits are currently taken into account under the Bill does not seem to reflect the Government's objectives. To promote business certainty

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19 Government Consultation Response, ¶62.

20 Ibid., ¶64.

21 *See, e.g.*, Michelle Donelan MP, The Times, Digital Markets, Competition and Consumers Bill: ensuring fairness and free markets in the digital age (25 April 2023) ("*[T]he EU approach is blunt and applies blanket rules on firms, which risks creating unnecessary burdens on business*". By contrast, the UK regime will be "*more flexible, bespoke, and targeted*").

22 Government Consultation Response, ¶63.

23 Ibid.

24 *See, e.g.*, *Churchill Gowns Ltd and Student Gowns Ltd v Ede & Ravenscroft and ors.* [2022] CAT 34, ¶68(1) ("*'Competition on the merits' refers, generally, to a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods or services*"); *Streetmap.eu Limited v Google Inc. and ors.* [2016] EWHC 253 (Ch), ¶62 ("*A dominant firm is of course able, and indeed should be encouraged, to compete, and successful competition on its part is likely to harm and may ultimately exclude competitors.*").

and encourage innovation, the consumer benefit framework should be improved in four main ways.

21. **First, consumer benefits should be taken into account both at the stage of developing conduct requirements and when assessing a violation**. The DMU is not required under the Bill to take account of consumer benefits *when it develops* conduct requirements. The obligation only applies when the DMU *enforces existing* conduct requirements.[25]

22. This leaves firms that believe their conduct is justified by consumer benefits in a difficult position. If a firm is considering launching an innovative feature that could breach a conduct requirement, but also may benefit from the consumer benefits exemption, the firm may be deterred from proceeding to avoid breaching the conduct rules. This would harm consumers, who could have benefited from the new innovation. The alternative approach of going ahead with the launch and then later raising the consumer benefits exemption in the firm's defence if the DMU launches enforcement action may be regarded as prohibitively risky. These outcomes would undermine the goal of the digital regulatory regime of creating clear rules of the road that allow digital firms to innovate and compete on the merits in the UK.

23. To resolve these concerns, the Bill should be amended to include an affirmative duty on the DMU to consider potential consumer benefits when it devises conduct requirements, as well as when it enforces them. In this connection, the Bill should at least include a formal process of engagement prior to the adoption of conduct requirements, with a requirement for the DMU, if the SMS firm raises relevant consumer benefits, to assess and take account of them. This approach would provide additional guidance for firms on the parameters within which the DMU may design conduct requirements, under which the DMU will have considerable flexibility and discretion.

24. **Second, consumer benefits should be taken into account in the same way for PCIs as in conduct investigations**. Under the Bill, consumer benefits appear to play an even smaller role in PCI investigations than conduct requirements. In particular, while there is an affirmative duty to consider consumer benefits in conduct investigations, the Bill stipulates that the DMU "*may have regard to any benefits to UK users or UK customers that the CMA considers have resulted, or may be expected to result from [the conduct under investigation]*" (emphases added).[26] It is unclear why consumer benefits should be considered less important in PCI investigations, especially when they may result in more onerous remedies. The Bill should be amended to include a positive duty for the DMU to consider consumer benefits when

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[25] Bill, s. 29.

[26] Bill, s. 44.

deciding whether to order a remedy, in line with the Government's consultation response.[27]

25. **Third, consumer benefits should include not only end consumers but also businesses and other customers of the service**. The Bill refers to *consumer* benefits in connection with conduct investigations, but *customer* benefits in relation to PCI investigations. As a result, benefits to customers that are not end consumers risk being ignored when the DMU enforces conduct requirements, but may be taken into consideration in PCI investigations. While possibly unintentional, this difference is significant because many firms active in digital markets operate in multi-sided markets that involve different sets of users in addition to end consumers, such as app developers, original equipment manufacturers, sellers on a marketplace, businesses listed on platforms, and advertisers. It is well understood that, in such markets, conduct that may harm a group of users on one side of the platform (such as a high price) may be justified by benefits to customers on the other side of the platform (such as a lower or negative price).[28] The Bill should be amended to include a reference to *customer* benefits in relation to conduct investigations.

26. **Fourth, the consumer benefits standard should be based on causation (not indispensability) and take into account benefits for users of different services**. Under the proposed regime, the DMU can prohibit conduct without an upfront need to show anticompetitive effects. For a SMS firm to benefit from a consumer benefit exemption, it must show that, despite its conduct falling within the relevant requirement or prohibition: (i) the conduct creates benefits to users of the relevant service; (ii) those benefits outweigh the harm to competition; (iii) the conduct is indispensable and proportionate to achieve those benefits; and (iv) effective competition is not eliminated or prevented.[29]

27. While this test broadly mirrors the test for countervailing efficiencies in CA98 cases, that test relates to a different context: in CA98 cases, the CMA will have already established abusive conduct and likely anticompetitive effects. Given the different context, we recommend the following amendments:

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27 Government Consultation Response, ¶80 ("*The DMU will need to take into account any countervailing benefits when considering whether an AEC exists, and consider the impact of any proposed remedies on benefits enjoyed by consumers.*").

28 *See, e.g.*, *Compare the Market Ltd and ors. v CMA* [2022] CAT 36, ¶118 ("*[I]n two-sided platforms the price structure to get both sides on board and to optimise usage of the platform is usually asymmetrical, with prices on one side substantially above those on the other side.*"). In *Ohio v. American Express Co*., the US Supreme Court stressed the need to take into account the multi-sided nature of the market (Case 16-1454, at II.B). This also reflects case law of the European Court of Justice, under which it is always necessary to take into consideration the interactions between the different sides of a two-sided market when "*there are interactions between the two facets of a two-sided system.*" *See* Judgment of 11 September 2014, *Cartes Bancaires*, Case C-67/13, EU:C:2014:2204, ¶79.

29 Bill, s. 29.

- **Move to a causation rather than indispensability standard**. The indispensability standard should be changed to a standard that requires the SMS firm to show that its conduct, on the balance of probabilities, causes the consumer benefits, rather than being indispensable to achieve those benefits. The indispensability standard is unsuitable in this context because, even if it is proved that some conduct creates substantial consumer benefits, the DMU or a complainant could hypothesise a theoretical alternative that would have achieved those benefits, and the customer benefits exemption would not be available. This would risk inhibiting innovation and firms not engaging in conduct that creates consumer benefits, through fear of sanctions.

- **Make clear that customer benefits can arise for different categories of users**. A consumer benefit should not be limited merely to users of the relevant designated service. It is conceivable that some conduct relating to Service A may create considerable benefits for users of a related Service B. For example, integrating a non-designated activity (*e.g.*, a messaging, mail, or video-conferencing service) into a designated activity (*e.g.*, an operating system, search engine, or collaboration service) can give rise to consumer benefits for users of both the designated and non-designated activities. It is unclear why only the former category of benefits should be relevant to the analysis. Accordingly, consistent with the overall purpose of the regime to be flexible and pro-innovation, the assessment should not be limited in this way.

- **Expressly clarify that the Bill requires the assessment of competitive harm by the DMU**. Under section 29(2)(b), the DMU must assess whether the countervailing benefits "*outweigh*" the harm to competition from the violation of the conduct requirement. This presupposes that the DMU will assess the extent of harm to competition attributable to the allegedly infringing conduct; otherwise, it would be impossible to perform the balancing required by the Bill. To avoid confusion, we recommend that the DMU's obligation to quantify competitive harm as part of the countervailing benefits exemption assessment is made explicit. This would reflect the Government's intention that the "*DMU will not be able to take action against conduct that on balance benefits consumers*."[30]

II. The DMU's Decision Making Should Be Subject to Robust Checks and Balances

28. The DMU's powers under the regime are significant:

- It has discretion to impose conduct requirements that apply to designated firms.

[30] Government Consultation Response, ¶64.

- If it finds that a firm has breached conduct requirements, it has wide-ranging powers to impose remedies to stop the breach.[31]
- It can set prices and terms that SMS firms must offer certain counterparties following a process of final-offer arbitration.[32]
- It can impose fines of up to 10% of a SMS firm's global turnover for breaches of conduct requirements.[33]
- It can impose personal fines on a SMS firm's nominated compliance officer.[34]
- It can apply to court for disqualification of designated firms' directors.[35]
- It can impose far-reaching remedies following PCI investigations (including divestments) and fine firms if they do not comply with these remedies.[36]

29. In addition, the Bill provides for private enforcement of conduct requirements, remedies imposed under PCIs, and commitments given under the new regime.[37] Parties can bring standalone claims for damages or follow-on damages claims, as the Bill makes clear that DMU infringement decisions are binding on the High Court and Competition Appeal Tribunal (**CAT**).[38]

30. These kinds of far-reaching powers—in particular, the ability to impose a decision finding illegality and fines that are intended to have deterrent effect—are by their nature quasi-criminal and engage full rights of defence under Article 6 of the European Convention on Human Rights (**ECHR**).[39] Accordingly, antitrust investigations under the CA98—which can (analogously to the new digital regime) result in findings of illegality, substantial financial penalties, reputational damage, and potential claims for follow-on damages—are subject to robust checks and balances, including:

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[31] Bill, s. 31.

[32] Bill, ss. 38-43.

[33] Bill, ss. 83-85.

[34] Bill, s. 85.

[35] Bill, s. 97.

[36] Bill, s. 83(2)(c).

[37] Bill, s. 99.

[38] Bill, s. 100.

[39] *See, e.g.*, Judgment of the ECtHR of 27 September 2011, *A. Menarini Diagnostics S.R.L. v. Italy*, application no. 43509/08. *See also Napp Pharmaceutical v DG of Fair Trading* [2002] Comp AR 13, ¶¶99-100 (applying the jurisprudence of the court in judgment of 8 July 1999, *Montecatini SpA*, Case C-235/92P, ECLI:EU:C:1999:362, ¶¶175 and 176).

- The appointment of new decision makers in the form of an independent decision making group within the CMA (the "Case Decision Group") once a statement of objections has been issued, in order to ensure that a "fresh pair of eyes" decide whether the evidence supports an infringement decision and to avoid actual or perceived confirmation bias.

- A right to make oral and written representations directly to the CMA decision makers before a decision is taken.

- A procedure for access to evidence on the CMA's file.

- Appeals of CMA infringements to the CAT on the merits, allowing parties to contest all questions of fact and law.

31. With the ability to set the rules applicable to designated firms and enforce them with fining powers, the DMU's decision making authority fully engages Article 6 rights. We would accordingly expect the DMU's procedures to be subject to robust checks and balances similar to those in CA98 investigations, including an appeal to an appellate body having "*full jurisdiction*" to examine "*all questions of fact and law.*"[40]

32. Under the Bill, however, parties seem to lack equivalent procedural rights, in three significant ways, as discussed below.

A. The DMU's Decision Making Committees Should Be Experienced, Well-Staffed, and Required To Hear Parties' Representations

33. The DMU's proposed decision making structure is novel: it does not adopt the structure used for the CMA's merger, antitrust, or markets processes. The proposal is that certain decisions will be reserved to the CMA Board or delegated by them to a committee or subcommittee of the Board.[41] The proposed list of decisions includes whether to make an SMS designation, impose or revoke conduct requirements, or order, replace, or revoke a remedy imposed under a PCI.

34. This structure gives rise to several questions, such as whether:

- The same committee will deal with all issues relevant to a given firm (*e.g.*, its SMS designation, formulation of its conduct requirements, and any subsequent PCI investigations), which would enable the committee to build firm-specific expertise and facilitate a more efficient dialogue.

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40 *CMA v Flynn Pharma Limited and ors.* [2020] EWCA Civ 339, ¶137.

41 *See* Bill, s. 104. A committee must: (i) include at least two non-executive directors or the CMA Chair and a non-executive director; and (ii) consist of at least 50% non-executive directors or 50% CMA panel members.

- The committees will be adequately staffed, in light of the complex factual issues likely to be under consideration and the requirement for a minimum of two committee members currently in the Bill.

- Parties will be able to make oral and written representations to the committee before a decision is taken, or only to the CMA staff undertaking the investigation.

35. These questions should be clarified in the Bill. It is, in particular, important that parties will be able to make oral and written representation to the DMU's decision makers before adverse decisions are reached or conduct requirements or remedies are imposed.

36. We are also concerned that decisions to impose enforcement orders for breaches of conduct requirements are not included in the list of decisions that are reserved for the CMA Board or delegable to a committee or sub-committee.[42] This means that, despite the far-reaching powers the DMU has to impose remedies, the CMA Board can delegate these decisions to the CMA staff.[43] This is concerning because the DMU does not, under the Bill, have a duty to consult before making an enforcement order.[44] The Bill should be amended to include a positive duty for the DMU to consult before imposing an enforcement order, which should also be included in the list of matters at section 104(8) that can only be delegated to a committee or sub-committee including CMA Board and panel members.

B. Conduct Investigations Should Include a Right of Access to File

37. The Bill does not provide for an access to file procedure when the DMU investigates breaches of conduct requirements. All that is required is that the DMU notifies the firm that it is launching a conduct investigation, considers the firm's representations before returning an infringement decision, and gives the firm notice of its findings.[45] An access to file procedure should be included for two main reasons:

- First, access to file in proceedings that can result in quasi-criminal penalties is an essential element of the party's rights of defence, in particular the right to a fair hearing and equality of arms.[46] It is included in CA98 investigations, which similarly can result in fines of up to 10% of global turnover. As the CMA notes, access to file ensures that firms "*can properly defend themselves*

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42 Bill, s. 31, read in conjunction with Enterprise and Regulatory Reform Act 2013, Sch. 4, ¶29.

43 Enterprise and Regulatory Reform Act 2013, Sch. 4, ¶29(1)(b).

44 Bill, s. 31(5).

45 Bill, ss. 26, 27, and 30.

46 *See, e.g.,* Judgment of the ECtHR of 18 March 2014, *Beraru v Romania*, application no. 40107/04, ¶70.

against the allegation of having breached competition law and have an opportunity to make representations in respect of any proposed penalty."[47]

- Second, although access to file procedures have been criticised as being time-consuming and causing delays to the administrative procedure,[48] the process can be expedited through the use of confidentiality rings.[49]

38. The Bill should be amended to include an express access to file procedure when the DMU investigates alleged breaches of conduct requirements, including, where appropriate, the use of confidentiality rings.

C. Appeals of DMU Decisions Should Be Reviewed on the Merits

39. The Bill proposes that appeals of DMU decisions are made on judicial review grounds, rather than a full merits review. This is despite the fact that, as with CA98 cases that are subject to full merits appeals,[50] the DMU has the power to find past behaviour illegal and issue quasi-criminal penalties. Such decisions engage fundamental rights, and an appeal to an appellate body having "*full jurisdiction*" to examine all questions of fact and law must be available.[51]

40. As the Court of Appeal explained in relation to the CA98:[52]

> *From case law it is possible to draw various conclusions about the role of judicial bodies in relation to the margin of appreciation of a competition authority: (i) for a (non-judicial) administrative body lawfully to be able to impose quasi-criminal sanctions there must be a right of challenge; (ii) that right must offer guarantees of a type required by Article 6; (iii) the subsequent review must be by a judicial body with 'full jurisdiction'; (iv) the judicial body must have the power to quash the decision 'in all respects on questions of fact and law'; (v) the judicial body must have the power to substitute its own appraisal for that of the decision maker; (vi) the judicial body must conduct its evaluation of the legality of the decision 'on the basis of the evidence adduced' by the appellant; and (vii), the existence of a margin of discretion accorded to a competition authority does not dispense with the requirement for an 'in depth review of the law and of the facts' by the supervising judicial body.*

[47] CMA, Guidance on the CMA's investigation procedures in Competition Act 1998 cases, CMA8 (10 December 2021), ¶11.21.

[48] Government Consultation Response (Competition and Consumer Law), ¶1.143.

[49] CMA, Guidance on the CMA's investigation procedures in Competition Act 1998 cases, CMA8 (10 December 2021), ¶¶7.12-7.13.

[50] The Government has consulted on whether to change the standard of review in CA98 cases from review on the merits to a judicial review standard before. *See, e.g.,* UK Government, Streamlining Regulatory and Competition Appeals (19 June 2013). Following its 2013 consultation, in which the CAT itself argued against moving to a judicial review standard, the Government did not move forward with any change. *See* CAT, Streamlining Regulatory and Competition Appeals: Response of the Competition Appeal Tribunal.

[51] *CMA v Flynn Pharma Limited and ors.* [2020] EWCA Civ 339, ¶136.

[52] Ibid., ¶140.

41. By contrast, judicial review is *not* an appeal that examines all questions of fact and law, and therefore does not comply with the Article 6 ECHR requirement for an appeal of full jurisdiction against decisions of a quasi-criminal nature.[53] Accordingly, it is doubtful whether the proposed framework is compliant with fundamental rights of defence and ECHR rights.

42. It is therefore necessary for the Bill to introduce a full merits review. This would enhance the integrity of the new regulatory regime by improving the quality of the DMU's decisions. The possibility of more detailed scrutiny of facts and law underpinning the DMU's decisions through a full merits review makes it less likely that errors will occur in the decision in the first place. If anything, a full merits review is even more justified for DMU decisions compared with CA98 cases because, unlike those cases, it is the DMU that imposes the rules that designated firms have to comply with in the first place, subject to broad principles and objectives (as described above in Section I.A).

43. Five main arguments have been advanced to justify the use of a judicial review standard.

44. First, it has been suggested that a full merits review is unnecessary due to the DMU's "*expertise in deciding how best to promote competition in digital markets.*"[54] But there is no requirement that significant DMU decisions are taken by experts in digital markets; decision makers can be drawn from a pool of CMA executive and non-executive directors and panel members (Section II.A above). The Bill lacks any assurance that the DMU's decision makers will have specialist expertise or experience in dealing with the companies subject to the regime.

45. Besides, even if the decision maker in a first instance decision is an expert, that does not justify precluding a full merits appeal.[55] As Sir Gerald Barling explained when the Government previously proposed (and then rejected) moving to a judicial review standard for CA98 cases (where the original decision maker, the CMA, would also have had expertise in how to promote competition): "*It would be deeply troubling if a decision of that kind made by an administrative body carrying out the roles of*

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[53] *See, e.g.*, *Argos/Littlewoods v Office of Fair Trading* [2006] EWCA Civ 1318, ¶18 (finding, in a CA98 appeal, that "*some other types of appeal, not now relevant, are not to be decided 'on the merits' but by applying the same principles as would be applied by a court on an application for judicial review,*" but that in the present case the appeals "*were, in effect, full hearings with such relevant evidence as any party wished to adduce, witnesses being cross-examined if appropriate*," which was "*necessary so as to ensure that Article 6 of the European Convention on Human Rights*" was satisfied).

[54] Government Consultation Response, ¶101.

[55] Judgment of the ECtHR of 27 September 2011, *A. Menarini Diagnostics S.R.L. v. Italy*, application no. 43509/08 (where the original decision was taken by a competition agency with expertise, but the ECtHR made clear that full merits appeal must be available).

investigator, prosecutor, judge and jury, were subject to anything less than a full merits review by a court."[56]

46. Second, full merits reviews are allegedly too slow and result in "*very protracted litigation.*"[57] But if full merits appeals are too slow, the better response would be to introduce mechanisms to make those proceedings more efficient (*e.g.*, confidentiality rings, targeted disclosure, efficient case management, and strict limits on third-party interventions). Fettering fundamental rights of defence, by contrast, is not a panacea to address slow litigation.

47. In addition, in an appeal on the merits, the court is able to substitute its own decision directly for the regulator's, and this may actually, overall, save time and expense. By contrast, on a judicial review, if a decision is successfully challenged, that decision would generally be quashed with the issue being remitted back to the regulator to take a fresh decision. This would require a further investigation and decision making process. The CAT previously emphasised this point when arguing against moving to a judicial review standard for CA98 cases.[58]

48. Third, the judicial review standard is said to be appropriate for the digital regime because of its similarities to market investigations, where CMA decisions are appealable on judicial review grounds.[59] This reasoning seems misplaced:

- Unlike many decisions the DMU will be able to take, market investigation decisions involve no finding of past wrongdoing, financial penalties, or personal liability, which are the types of decisions that most clearly engage Article 6 ECHR rights. Market investigation decisions are therefore different to decisions the DMU can take under the Bill.

- Merger inquiries and market investigations are subject to additional procedural checks and balances that do not clearly feature in the new regime, such as a

[56] Sir Gerald Barling, Reforming the UK Competition Regime – assessing the impact of new legislation and challenges ahead for the CMA (remarks at Westminster Business Forum, 10 September 2013), pp. 4-5. When the government decided not to introduce a prosecutorial system with the advent of the CMA, but to maintain an administrative system, it was on the basis that CMA infringement decisions would be subject to appeals on the merits. In its March 2012 response to the consultation paper, the government explained, "*The Government accepts the strong consensus from the consultation that it would be wrong to reduce parties' rights and therefore intends that full merits appeal would be maintained in any strengthened administrative system.*"

[57] PBC Deb (Bill 294) 13 June 2023 (remarks of Sarah Cardell).

[58] *See* CAT, Streamlining Regulatory and Competition Appeals: Response of the Competition Appeal Tribunal, ¶¶14-15 (noting that "*in judicial review cases, the need to remit a case to the regulator for a fresh decision (which may itself be appealed) extends the overall time [...] that a case takes and it is at least open to question whether, taken overall, judicial review cases are shorter*," and "*[n]ot only is the difference in intensity and length between the two standards over-stated, but applying a full merits standard may enable a decision that would be struck down on judicial review to be salvaged*.").

[59] *See* Tom Smith and David Gallagher, In Defence of Judicial Review: The established UK appeal standard is the best approach for a dynamic digital economy (May 2023), p. 2.

fresh pair of eyes in the form of an Inquiry Group being appointed as decision makers at Phase 2, the right of the parties to make oral and written representations to the Inquiry Group before a final decision is taken, and public consultation requirements enabling third parties to express their views. In addition, the CMA must consult before referring a market for a detailed market investigation. There is currently no equivalent obligation to consult before the DMU opens a PCI investigation.

49. Fourth, judicial review is said to be appropriate because it is not a "*light-touch procedural review*"[60] and the tribunal can "*hear[...] evidence.*"[61] But whether appeals on judicial review grounds are heavy or light touch, or can hear new evidence, is not the issue; rather, the problem is that judicial review lacks full jurisdiction to consider the merits of the regulator's decision. Instead, the court is focused on whether the decision was lawful, was a decision that a reasonable regulator could have reached (rather than having to be the right decision on the facts), and was it made following the correct procedures. This standard of review does not fully comply with Article 6 ECHR.

50. Fifth, full merits appeals are said to give rise to misaligned incentives because parties seek to appeal decisions they perceive to be incorrect rather than settle cases, which "*makes it a lot harder to reach constructive, collaborative outcomes*."[62] It is questionable whether this justifies departing from a full merits review:

- Significant downsides still exist to appealing opportunistically on the merits, namely adverse cost orders, reputational damage, and the time and expense of court proceedings.

- An appeal is not automatically suspensory, so there is no incentive to appeal simply to delay decisions.

- Many CA98 cases have been settled in recent years,[63] where there is a right to appeal on the merits, and an increasing number of merger decisions have been appealed despite only a judicial review standard, so the evidential basis for this claim is lacking.

- The notion that parties seek to appeal incorrect decisions rather than settle should not itself be seen as problematic; the CMA is not infallible and the

[60] PBC Deb (Bill 294) 13 June 2023 (remarks of Sarah Cardell).

[61] UK Government, Digital Markets, Competition and Consumers Bill: European Convention on Human Rights Memorandum for the Bill as Introduced in the House of Commons, ¶40.

[62] PBC Deb (Bill 294) 13 June 2023 (remarks of Sarah Cardell).

[63] *See, e.g., Supply of Rangers FC-branded clothing* [2022] (Case 50930) and *Supply of Products to the Construction Industry (Pre-case Concrete Drainage Products)* [2019] (Case 50299).

prospect of an independent review on the merits is likely to improve its decision making.

III. The CMA's Additional Jurisdictional Flexibility in Merger Control Must Be Accompanied by Robust Checks and Balances

51. The Bill introduces a new jurisdictional test for the UK merger control regime that will enable the CMA to review transactions where just one of the merging parties has a share of supply of at least 33% and UK turnover over £350 million, and the other party meets a UK nexus test.[64] This is significant because it would allow the CMA to call in transactions even when there is no overlap in the merging parties' activities, and where one party has minimal revenues or activities in the UK.[65] It therefore provides the CMA with even greater flexibility—over and above the considerable flexibility that already exists under the share of supply jurisdictional test[66]—to review transactions of any size where just one firm has significant UK revenues and shares of supply. In addition, transactions carried out by SMS firms must be reported to the CMA if certain conditions are met.[67]

52. The introduction of these tests coincides with the CMA having taken a more interventionist approach to merger control over the past few years. This includes the CMA having called in a number of foreign-to-foreign mergers with limited UK nexus, considered novel and complex theories of harm, including an increasing number of mergers with no horizontal overlaps, and hardened its position against behavioural remedies, with a strong preference for structural remedies.[68]

53. To avoid deterring investment in UK businesses for fear of a lengthy and uncertain CMA merger investigation, it is important that the CMA uses the new jurisdictional test in a proportionate way, only calling in mergers for review where there is a genuine risk of a substantial lessening of competition. The CMA should also be required to issue guidance to advise businesses when it would be likely to call in a merger for review under the new jurisdictional tests.

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64 Bill, Sch. 4, ¶5.

65 When introducing the Enterprise Bill, the Government acknowledged that a regime that allowed the CMA to intervene even when the parties do not overlap and the turnover test is not met would have been overly burdensome. The House of Commons Research Paper published at the time of the Bill confirms that "*[t]he Government has decided against introducing a third threshold test which would have caught mergers in linked (but separate) markets.*" *See* Enterprise Bill, Research Paper 02/21 (4 April 2002), p. 44.

66 The CMA's former Executive Director for Markets and Mergers, Andrea Gomes da Silva, has described how the UK's jurisdictional rules endow the CMA with "*a degree of freedom and flexibility that is not the case in other jurisdictions.*" *See* comments reported in Nicholas Levy *et al.*, Merger Control, U.K.: Trends & Developments 2020, Chambers Global Practice Guide (2020).

67 Bill, ss. 55-66.

68 *See, e.g.*, CMA, Merger remedies, CMA87 (13 December 2018), ¶3.46.

54. In addition, it is important that the CMA's merger analysis is robust in terms of identifying mergers that will result in a substantial lessening of competition. This is especially the case given the limited judicial oversight of CMA merger decisions, with appeals based only on judicial review grounds. To that end, we recommend that the introduction of this new test is accompanied by a strengthening of checks and balances, including: (i) ensuring full access to the CMA's file of third party submissions, rather than merely the "gist" of the evidence; (ii) expanding the role of the procedural officer to cover all procedural disputes, instead of only disputes over the confidentiality of information the CMA proposes to publish; and (iii) providing parties with a greater ability to engage with the Inquiry Group outside formal site visits and hearings. In addition, the introduction of the new test could justify reconsideration of whether a full merits review should be available for CMA merger decisions.

IV. The CMA's Direct Consumer Law Enforcement Powers Should Be Subject to Appropriate Checks and Balances and Full Merits Appeals

55. The Bill proposes new powers for the CMA to enforce consumer law directly. Under the proposals, the CMA could issue infringement decisions and impose fines (of up to 10% of global turnover) and remedies (including so-called "enhanced consumer measures") directly without applying to court, as is currently required.[69] These increased powers bring the CMA's consumer protection toolkit more in line with its enforcement capabilities under the CA98 regime.

56. This shift to an administrative model could rationalise the process of consumer law enforcement and ensure that the ultimate goal of consumer law—protecting consumers and maximising their welfare—is served in a more efficient manner. The CMA's enhanced enforcement powers must, however, be coupled with adequate procedural safeguards and robust judicial oversight, commensurate with those in CA98 cases.

57. Accordingly, in its consultation response, the Government said that it would ensure "*appropriate separation between those investigating potential breaches of consumer law and those making the decision within the CMA's internal process.*"[70] Parties under investigation would be able to "*see the case against them*" and have "*the opportunity to make written and/or oral representations as appropriate in order to ensure a fair process*."[71] The Government also made clear that "*a trader subject to a CMA direct enforcement decision that could directly or indirectly result in monetary*

[69] *See, inter alia*, Bill, s. 174.

[70] Government Consultation Response (Competition and Consumer Law), ¶3.23.

[71] Ibid.

penalties will be able to lodge a full merits appeal."[72] We suggest four amendments to ensure that the Bill fully reflects these proposals.

58. **First, a new decision maker not previously involved with the case should be appointed to decide whether there has been an infringement**. The Bill currently contains no requirement to appoint an independent decision maker (or decision making group) once provisional findings of infringement have been issued. Instead, it is left up to the CMA to devise its own decision making processes.[73] Given the importance of independent decision makers to act as a "fresh pair of eyes" in relation to the CMA's initial investigation and avoid actual or perceived confirmation bias between the CMA issuing preliminary findings and a final decision,[74] the Bill should provide for independent decision makers to take final decisions. This would reflect similar processes in CA98 investigations, merger inquiries, and market investigations.[75]

59. **Second, the Bill should include a right to make oral and written representations to the CMA decision makers before an adverse decision is taken**. Parties under investigation should have an express right to make oral and written representations to the decision makers before a decision is taken so that they can fully exercise their rights of defence. The Bill currently specifies that a provisional infringement notice must invite the respondent to make representations, but does not specify that these representations can be made directly to the decision makers, nor that they can be made orally and in writing.[76]

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[72] Ibid., ¶3.26.

[73] Bill, s. 203. The requirements for the CMA to consult "*such persons as the CMA considers appropriate*" and for the Government to approve the CMA's procedural requirements is inadequate. At the very least, the Bill should specify the requirement for an independent decision making group.

[74] *See* Sarah Cardell (then CMA General Counsel), Speech at the IBC UK Competition Law Conference, London (23 February 2016) ("*It is worth reiterating the importance of Case Decision Groups (CDG) as the final decision makers in all competition enforcement cases (other than those involving settlement or commitments). [...] Concerns had been expressed during the reforms of the UK competition regime that led to the formation of the CMA, that decision making was influenced by confirmation bias or preconceptions formed earlier when investigating a case. The collective 'fresh pair of eyes' and clear separation of decision making provided by the CDG provides parties to our investigation with confidence that such risks are avoided.*"). *See also* CMA, Options to refine the UK competition regime: The CMA's response to the government's consultation (27 June 2016), ¶1.8 ("*[T]he phase 2 system [in merger and markets cases] helps to ensure fair, evidence-based decision-taking, safeguards against risks of confirmation bias, and improves the robustness of overall decision-taking. [...] [A]ny changes proposed now should not undermine the core principles of independent, rigorous and evidence-based decision-taking at phase 2 on which this system is founded.*").

[75] As the Government said in its consultation response, "*[T]he existing administrative competition regime provides a helpful, if not determinative, reference point for setting the CMA robust governance and decision-making parameters to reach fair, evidence-based decisions that command the confidence of business and stands up to independent scrutiny by the courts*." Government Consultation Response (Competition and Consumer Law), ¶3.10.

[76] *See* Bill, s. 173(4)(c). In fact, s. 173(4)(d) makes clear that it is up to the CMA to specify the means by which representations can be made.

60. **Third, the Bill should include a procedure for access to file after preliminary findings are issued**. As explained above, access to file is a critical procedural protection in cases that can result in findings of illegality and quasi-criminal penalties, such as the proposed new consumer law enforcement regime. The Bill should therefore make provision for an access to file procedure once a preliminary infringement notice has been issued.

61. **Fourth, infringement decisions should be subject to full merits appeals**. As with decisions of the DMU described above, the CMA's power to make findings of past illegal behaviour and issue quasi-criminal fines engages parties' rights under Article 6 ECHR. It is therefore necessary for the CAT to have full jurisdiction to examine all relevant questions of fact and law and substitute its own appraisal for that of the CMA (*i.e.*, an appeal on the merits).

62. According to the Government, this standard of review is appropriate where the CMA is making decisions "*under an administrative model*" that involve "*both a finding that a business had failed to comply with its legal obligations and potentially significant sanctions*."[77] Accordingly, the Government proposed full merits appeals of CMA infringement decisions under its new direct consumer protection enforcement powers. Although the Bill makes provision for appeals that, at first glance, appear to fulfil this promise,[78] we identify two aspects of the Bill that should be improved:

- **Appeals should include findings of liability as well as penalties and directions**. The Bill makes provision for appeals of CMA decisions to "*impose a monetary penalty*", the "*nature or amount of any such penalty*", and "*the giving of directions*."[79] It does not, however, expressly provide for appeals of infringement decisions themselves, even though it is equally important for such decisions to be subject to full merits appeals.[80] This is especially the case when the CMA could, under the Bill, find infringements in respect of conduct that has not actually been implemented but that the CMA believes the respondent "*is likely to engage in*."[81] As a result, it would seem that—under the current wording of the Bill—such appeals would need to be made to the High Court on ordinary judicial review grounds, which would not reflect the Government's original proposal. The Bill should therefore make express provision for the appeal of the CMA's findings of illegality (in line

[77] Government Consultation Response (Competition and Consumer Law), ¶3.26.

[78] *See* Bill, s. 194.

[79] Bill, s. 194(1).

[80] It is possible that the reference to "*relevant notice*", which includes a final infringement notice (*see* Bill, s. 194(8)(a)), is intended to mean that final infringement decisions are also appealable pursuant to the terms of this section, but this is unclear and needs clarifying.

[81] Bill, s. 173(2)(a). The CMA cannot issue fines in respect of this type of infringement (Bill, s. 174(5)), but may impose directions.

with the CA98 regime[82]), as well as decisions relating to penalties and directions.

- **The CAT must have full jurisdiction to examine all relevant questions of fact and law**. The Bill sets out a list of grounds that the above-listed decisions can be appealed on, including that: (i) the decision to impose a fine or directions was based on an error of fact; (ii) the decision was wrong in law; (iii) the amount of the fine or nature of the penalty was unreasonable; or (iv) the decision was unreasonable for any other reason.[83] We are concerned that this standard of review falls short of a full merits standard that would grant the CAT full jurisdiction to quash CMA decisions in all respects on any point of fact or law, as is available under the CA98 regime.[84] The Bill should make clear that the CAT has full merits jurisdiction over the CMA's consumer infringement decisions, as in the CA98 regime.

63. These amendments would ensure that the CMA's decision making process is subject to equivalent safeguards and judicial oversight as are available under the current CA98 regime, where the CMA has analogous powers.

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82 *See* CA98, s. 46, which permits firms to appeal the "*decision*" of the CMA that the Chapter I or Chapter II prohibition has been infringed.

83 Bill, ss. 194(2) and (3).

84 *See* CA98, s. 46 and Sch. 8.