CONSULTATION: Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers

Baker McKenzie welcomes the opportunity to respond to the UK Government's consultation Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers. Our comments are based on our experience of advising clients on UK competition law.

We have responded in detail but three of our main points are:

- *We disagree with the starting point that the current UK merger control regime is a good starting point. There is a high degree of inefficiency with the current nominal "voluntary" regime;*
- *The proposals would significantly erode the "fresh pair of eyes" notion that was built into the current regime when the previously two separate bodies, the Office of Fair Trading (OFT) and the Competition Commission, were essentially merged to create the CMA. This would be a retrograde step.*
- *Any interim measures should be applications by the CMA for an order of the Competition Appeal Tribunal (CAT) – and subject to any conditions of the CAT. This will ensure a balanced regime with safeguards.*

COMPETITION POLICY

1. What are the metrics and indicators the CMA and government could use to better understand and monitor the state of competition in the UK?

1.1 We consider that the Government's proposal to monitor the state of competition in the UK will be fraught with difficulties. The scope of the CMA's 'State of Competition' reports is ambitious and covers the whole of the UK economy. Therefore, any conclusions drawn will be extremely general and subject to numerous caveats. In particular, as the CMA only proposes to look at very broad sectors (that are far broader that any product market), we are unconvinced that its findings will provide meaningful insights into the state of competition in the UK.

1.2 Given these concerns, we believe that the project will suffer from significant limitations regardless of the metrics and indicators used. As such, we do not have a view on which metrics and indicators should be used.

2. Should the CMA have a power to obtain evidence specifically for the purpose of advising government on the state of competition in the UK?

2.1 We do not think that placing a mandatory obligation on companies to produce evidence for the CMA's 'State of Competition' reports can be justified, especially when considering that such reports are intended to provide high level insights on the state of competition across the whole of the UK economy, rather than hone in on specific markets or companies. In particular, companies should not be compelled to incur time and resources in satisfying any requests for evidence, given that such evidence is not needed by the CMA in order to enforce competition law in the UK. Rather, it may be used to help to identify high level competition law trends in the UK; though, as explained in the response to question one, it is unclear whether it will be possible to draw any meaningful insights at all.

2.2 Given the purpose for which the evidence will be used, we consider that it would be more reasonable to make responding to any such requests voluntary.

2.3 If the Government is minded to introduce powers to obtain evidence for the purpose of advising the government on the state of competition in the UK, we strongly suggest that certain conditions should apply, including that:

(a) there are no (or reasonable) deadlines for businesses to respond to a request;

(b) there are no (or no material) penalties for failing to respond (or a late response);

(c) the scope of information requested is limited to recent, objective and readily available information; and

(d) the information obtained is kept confidential and can only be used for the purposes of advising the government on the state of competition in the UK.

3. Should government provide more detailed and regular strategic steers to the CMA?

3.1 Our primary concern is that the CMA should retain its independence. It is well recognised that the independence of competition authorities from political power is a key element of an effective competition regime.[1] In particular, independence allows competition law regulators to take decisions on the basis of legal and economic considerations without being influenced by other interests.

3.2 We consider that the proposal for the government to provide more detailed and regular strategic steers to the CMA will lead to competition law enforcement in the UK becoming more politicised, with, for example, prioritisation and enforcement being dictated by political factors. This loss of the CMA's independence is likely to lead to undesirable outcomes and should be avoided.

MARKETS REGIME

4. Should the CMA be empowered to impose certain remedies at the end of a market study process?

4.1 In our view, the proposal to empower the CMA to impose certain remedies at the end of a market study (i.e. "Proposal 1") presents risks to a fair and proper review process. Whilst we agree that market investigations are costly and lengthy processes for businesses to engage with, and therefore that any short-cutting of this process is likely to be beneficial for businesses, we are concerned that speed and efficiency would come at the expense of a fair and due process in cases where remedies are imposed by the CMA already at the end of a market study (i.e. "Phase I").

4.2 A particular area of concern with Proposal 1 is the suggestion that the CMA Board, not the CMA Panel, would make the decision at the end of Phase I about whether remedies should be imposed at the end of the market study. We strongly believe there is benefit in the current system that requires the CMA Panel to make decisions on remedies, acting as a "fresh pair of eyes", and who are independent to the main CMA delivery team that conducted the initial market study. The proposals would see the CMA effectively "marking its own homework" because the same body (i.e. the CMA Board, that oversees the activities of the Phase I case team) will be both investigating the alleged market harm and

[1] OECD, 'Independence of Competition Authorities - From Designs to Practices', Background Paper by the Secretariat (2016).

deciding whether to impose remedies on market participants. We see a real risk of confirmation bias arising from this.

4.3 Second, although we understand that the most onerous remedies (i.e. structural remedies, including the sales of assets and business divestments) will be reserved for "Phase 2", in reality non-structural remedies are already the more common remedies in market interventions by the CMA and can be equally burdensome for businesses, particularly when requiring significant changes to the parties' existing business models. We are concerned that the proposals lack any checks and balances that would prevent the CMA from misusing these new powers - for example, by conducting quick (and not sufficiently thorough) investigations, and ordering wide-reaching remedies without having a proper look at the market, with lasting consequences. Although the current law imposes on the CMA a duty to keep remedies under review, in practice market remedies are only reviewed (and changed or removed) after many years (sometimes decades) of being in place, even when it is very clear the market has moved on and they have become obsolete. Accordingly, we do not see it as a sufficient safeguard.

5. Alternatively, should the existing market study and market investigation system be replaced with a new single stage market inquiry tool?

5.1 The proposal to replace the existing market study and market investigation system with a new single stage market inquiry tool (i.e. "Proposal 2") is a preferable solution to Proposal 1. In particular, we agree with the approach set out in paragraph 1.66 of the Consultation that any decision by the CMA case team (who carried out the market investigation) to impose binding remedies would be subject to review by independent decision makers drawn from the CMA Panel (who would be responsible for taking the final decision on the existence of harms identified and the appropriate remedies/recommendations to address those harms). We consider this crucial in maintaining a fair and proper process.

5.2 We are also in agreement that a "single stage process could remove many of the inefficiencies inherent to the current two stage market inquiry process", and with the CMA's aim to increase the speed and efficacy of the market inquiry process. A single market inquiry tool would likely be a cleaner and easier process for businesses to engage with the CMA than the current two stage process.

5.3 However, we are concerned about the CMA's proposal that the timeframe for the single stage process would be "two years by default" (with the option to extend the timetable for a further six months by exception in particularly complex cases). Whilst this timeline would be reasonable in market inquiries where there is already good *prima facie* evidence for the existence of problematic practices and inefficient market structures, we consider that both businesses and the CMA should not be constrained by a long and overdrawn investigation in cases where the inquiry quickly concludes that markets are functioning correctly. We note that paragraph 1.66 states that the CMA "would be expected to conclude investigations more quickly where appropriate" but consider that this option needs to be more explicitly set out in the legislation and that guidance should be issued to describe the circumstances when this faster option will be utilised and the impact on overall timing. A market inquiry is a significant burden to a functioning business and a "default" two year investigation would be incredibly cumbersome both to businesses and to the CMA. Indeed, the market inquiry tool should include a "fast-track" functionality that goes further than the current Phase I market study timeframe for instances where competitive harm can be clearly excluded. A process whereby a decision is taken within, for example, the first two months as to whether the CMA Panel envisages a 6 month review or a two year review would be useful.

6. Should government enable the CMA to impose interim measures from the beginning of a market inquiry?

6.1 We have concerns with the proposal for the CMA to be able to impose interim measures from the beginning of a market inquiry. In particular, we note that (unlike Competition Act 1998 investigations), the businesses subject to a market investigation are not alleged to have breached competition law. There are currently no safeguards in the proposal. As such, we have material reservations about whether there is a policy need to impose interim measures before a full and proper market inquiry has been undertaken and conclusions properly reviewed by both the CMA case team and CMA Panel.

6.2 If the power to impose such measures were to be granted to the CMA, we note that further guidance should be issued as to when and how the CMA intends to use these powers. The Consultation does not provide guidance on how often such measures are expected to be utilised by the CMA, and whether this would be practice as "standard" or "by exception". Sweeping market reforming measures should not, in our opinion, be implemented until a full and proper analysis of the market's performance is undertaken in a full market inquiry.

6.3 Our strong preference is that the CMA should not be the decision maker, were there to be the power to have interim measures. Rather, a better mechanism would be for the CMA to have to apply to the CAT for an order with respect to the imposition of interim measures. This would allow the CMA's reasoning to be tested; but also allow the position to be reviewed periodically during the process. For example, an order may specify that interim measures be in place for a few months, with the issue to then be revisited before the CAT, rather than an order at the start of a two-year process.

7. Should government enable the CMA to accept binding commitments at any stage in the market inquiry process?

7.1 We consider that such an option would, overall, be beneficial. As referenced above, a market inquiry is an incredibly burdensome and uncertain process for businesses, and the option to bypass this and quickly and efficiently remedy the purposed harm would reduce uncertainty for market participants subjected to the inquiry.

7.2 On the other hand, it would be important for the process for offering and agreeing commitments to be clearly set out in both the legislation and the guidelines, so that it is clear to market participants how it will operate in practice. A market inquiry is, by nature, an investigation into the market as a whole and not to any one individual company. It is not clear from the Consultation who would be in a position offer such commitments (e.g., would a critical percentage of the market need to sign up to the commitments), how these would be proposed to the CMA, and the timelines for any negotiation. Our experience is that, even where credible undertakings in lieu of a reference have been offered by the main industry participants, where the market is fragmented the authority has not felt in a position to accept (see, for example, *Investment Consultancy*).

7.3 It is also not clear how parties would be able to formulate commitments to the CMA to address any concerns at earlier stages of the process, when those concerns have not yet been articulated by the CMA (e.g., prior to the communication of provisional findings). In such cases, market participants may effectively feel forced to "over offer" in order to end the market inquiry, which would benefit neither businesses not the structure of the market. We are also concerned that parties may be hesitant to voluntarily offer commitments, if this would essentially be seen as admitting there is "something wrong" in the market and may harm their business presence and brand image. We consider that if this

option is adopted, the CMA would need to at least have issued a statement or notice of its concerns and proposals for market reforms/commitments which the parties could then "offer".

8. Will government's proposed reforms help deliver effective and versatile remedies for the CMA's market inquiry powers?

8.1 The Government is proposing that the CMA would be provided with increased powers to review remedies more flexibly to ensure that they are effective and meeting their intended objectives. Whilst we agree with this concept in principle (as market dynamics can rapidly change), we consider that an ad hoc ability by the CMA to review imposed remedies every several years (as proposed in paragraph 1.87) would cause great business uncertainty. With an ad hoc remedy review power, particularly if that power is exercised frequently, it would not be possible to say with any certainty how durable any remedy will be. Any powers provided to the CMA in this regard should therefore be strictly defined, including a timeline for when remedies will be reviewed by the CMA, and the CMA's scope of ability to amend the remedy at the time of review. We agree with the approach suggested in paragraph 1.87 that businesses can, however, request a further review in response to changing market circumstances as we consider this is the most effective way for the CMA to be alerted to market changes.

8.2 We also have concerns regarding the Government's proposed "implementation trials" as set out at paragraph 1.81. We understand that these would require businesses to test "consumer-facing remedies" to ensure that consumers are "engaging with the remedies and that their interests are being protected". Remedies often require businesses to significantly change their business practice and customer interaction, and cannot be easily implemented, revised and amended in a short period of time. It is not clear from the draft how long such trials would last and how participants in the implementation trial would be selected (given that a market inquiry is by nature an inquiry into the market as a whole). It would be unfair to impose such trials on only a few select players. Overall we consider this an overreach of the CMA's powers and an unnecessary interference in business operations. If the CMA has conducted a full and proper market inquiry and established harms in the market, then it should impose remedies that it considers would rectify such harms. If it is not sure if the proposed remedies work effectively to rectify the harm, it should not impose strict and onerous changes in business practices that may not be required or beneficial to consumers.

9. What other reforms would help deliver more efficient, flexible, and proportionate market inquiries?

9.1 We have no further comments.

MERGER CONTROL

10. Should the current jurisdictional tests for the CMA's merger control investigations be revised? If so, what are your views on the proposed changes to the jurisdictional tests?

Replace the "voluntary" system

10.1 Before addressing the issue of jurisdictional tests, we note that paragraph 1.93 of the Consultation states "*In government's view, a voluntary and non-suspensory process continues to strike an appropriate balance between consumer protection and regulatory burden for the UK's economy-wide merger control regime and government is therefore not minded to change this.*"

10.2 We disagree with the above view and suggest that the Government should consider more wide-ranging reform in this respect. The "voluntary" nature of the current UK regime may make it appear (on face value at least) efficient. However, in practice, this is not the case. In particular, we consider that:

- The CMA's wide discretion with respect to interpreting the share of supply threshold and unpredictable approach to doing so mean that merger parties face significant uncertainty regarding whether or not their transaction will be investigated by the CMA (in all but the simplest cases). This means that significant resources need to be devoted to deciding whether to submit a voluntary filing.

- The severe and wide-reaching implications of initial enforcement orders ("IEOs"), the uncertainties regarding the ability to obtain derogations, and the CMA's aggressive approach to enforcement mean that many acquirers (e.g. in the private equity space) are filing regardless of their substantive assessment.

- The Government previously consulted in 2011 on whether the UK should replace its voluntary merger control regime with a form of mandatory merger notification but decided to keep the existing voluntary and non-suspensory regime. However, a lot has changed since 2011. The CMA has become significantly more interventionist and, in particular, has transformed its approach to IEOs. As such, the regime is no longer efficient in the way that it may once have been.

10.3 For the above reasons, we query the benefit of the current voluntary system (with IEOs) as it is placing a disproportionate burden on benign or low risk mergers. Given the way that the CMA is approaching the voluntary regime, our view is that it is in fact be preferable to have a more conventional mandatory filing regime (potentially with a short form or simplified review procedure).

Raising the current turnover-based threshold from £70m to £100m

10.4 As the UK has a voluntary filing regime, merger parties must undertake a risk assessment when deciding whether or not to file. The share of supply of the parties is relevant to this risk assessment but the turnover-based threshold is not. With respect to this, we note that:

- it would be very unusual for merger parties to decide to file on the basis of meeting the turnover-based threshold alone i.e. in circumstances where the transaction does not give rise to any substantive effects; and

- where the transaction gives rise to material substantive effects, parties are likely to consider filing regardless of whether the turnover-based threshold is met.

10.5 Given the above factors, raising the current turnover-based threshold from £70m to £100m is largely irrelevant. Indeed, if the Government retains the "voluntary" nature of the UK regime, we suggest that the Government consider removing the turnover-based threshold altogether. Its retention is misleading to merger parties as it implies that, if they do not meet the threshold, this may offer some protection from the CMA's scrutiny when this is not the case in practice.

Creating a safe harbour for mergers between small business

10.6 In principle, this change does not raise any concerns. Baker McKenzie does not often advise on transactions that are likely to fall within the proposed small mergers safe harbour so we do not have any strong views on whether the £10m threshold is set at the correct level.

Adding a new limb to the share of supply test

10.7 As a preliminary comment, we have significant concerns about the existing share of supply test. In most merger control regimes, assessing whether jurisdiction is established is a matter of applying simple, numerical tests. By contrast, such an assessment in the UK takes considerably longer, is not definitive (and cannot be given the asymmetry of information), and places significant regulatory risk on parties, despite the nominally "voluntary" nature of the system. This is particularly the case in the context of deals where, due to the competitive auction/negotiation dynamics, purchasers are under severe pressure to be unconditional on UK merger control clearance. We also note that the CMA does not have to take a decision on jurisdiction at the start but can keep under review as it goes along – negating any efficiency that could otherwise be derived.

10.8 The addition of a new limb to the share of supply test increases these problems yet further for mergers involving a party with UK turnover of more than £100 million. The CMA will be able to assert jurisdiction based on a share of supply of at least 25% of a particular category of goods or services supplied or acquired in the UK or a substantial part of the UK, even if such share is unrelated to the transaction and does not involve an overlap between the parties. Assessing whether this test is met will be extremely burdensome.

10.9 We query whether the purported concerns regarding potential competition and leveraging of market power cannot adequately be dealt with via the existing extremely flexible share of supply test or, if necessary, with a clear, numerical test that can be quickly assessed (e.g. relating to transaction value) and a mandatory filing requirement. Even if they cannot, it is questionable whether the benefits of the new limb will outweigh the further decrease in predictability of the UK regime for business and investors.

10.10 To the extent that the Government does decide to introduce a new limb along these lines, we suggest that the specific share of supply and turnover thresholds should be much higher to limit the number of transactions to which this applies.

11. Are there additional or alternative reforms to the current jurisdictional tests for the CMA's merger control investigations that government should be considering?

11.1 The Government should reconsider switching to a mandatory filing regime with clear bright line filing thresholds for the reasons set out above.

12. What reforms are required to the CMA's merger investigation procedures to deliver more effective and efficient merger investigations?

Allowing the CMA to agree binding commitments earlier during Phase 2

12.1 This sensible reform will make the Phase 2 process more efficient, particularly (as noted at paragraph 1.116 of the consultation document) in circumstances where the parties were simply timed-out on agreeing commitments with the CMA at the end of Phase 1.

Restrict the CMA to refer only the issues that are identified at Phase 1

12.2 We do not support this reform. Whilst in theory it is more efficient, it diminishes the benefits of the independent "fresh pair of eyes" offered by the CMA Panel at Phase 2.

New "fast track"

12.3 We consider that allowing parties to request automatic reference to Phase 2 is a sensible reform that will improve the efficiency of merger control review for the small sub-set of transactions for which this reform will be relevant. To ensure the full potential benefits of this reform are realised, we suggest that the Government does not undermine it by introducing the proposed three-week extension to Phase 2 in such circumstances.

12.4 We agree that there are advantages to allowing the CMA greater flexibility to extend the statutory timetable, such as to enable the parties to agree internationally coherent remedies when dealing with filings in multiple jurisdictions. However, we do not think this flexibility should be open-ended. We consider that the current eight-week extension power should be retained, with the possibility of any further extension being subject to the parties' consent.

Publication requirements in the Gazette for mergers

12.5 We agree that the requirement for the CMA to publish the Merger Notice in the Gazette is outdated. It will be sufficient for the Merger Notice to be published on the CMA website.

CMA PANEL

13. Should the CMA Panel be retained, but reformed as proposed above? Are there other reforms which should be made to the panel process?

13.1 The CMA Panel should be retained. We do not agree with the proposed reforms to the CMA Panel as we consider that they risk undermining the independence of the "fresh pair of eyes" offered by the CMA Panel at Phase 2. We also question the extent that the proposed changes would in practice produce a system that is faster or more efficient.

ANTITRUST ENFORCEMENT

14. Should the jurisdictional requirements of the Chapter I and Chapter II prohibitions be changed so that they apply to all anticompetitive agreements which are, or are intended to be, implemented in the UK, or have, or are likely to have, direct, substantial, and foreseeable effects within the UK, and conduct which amounts to abuse of a dominant position in a market, regardless of the geographical location of that market?

14.1 We understand the rationale for extending the territorial extent of the Chapter I and Chapter II prohibitions, to bring the UK system more in line with that of other international systems such as the EU and the US. We do not disagree with the proposed amendments to the Chapter I and II prohibitions, but consider that it should be made clear that the agreement or practice must have an appreciable influence, direct or indirect, actual or potential, on the pattern of trade within the UK,[2] in line with the EU's approach.

[2] Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, para 100.

15. Should the immunities for small agreements and conduct of minor significance be revised so that they apply only to businesses with an annual turnover of less than £10 million?

15.1 In our view, the Government should go further than the proposals and remove the exceptions entirely. We agree with the Government that there is a risk that anti-competitive conduct in small and emerging sectors can be harmful to growth and innovation, and that small markets can be very important to the consumers who use them. We are concerned that the immunities do not disincentivise a culture of compliance amongst small businesses. There is little incentive for a small business to invest any time or resource, however small, in implementing a robust (proportionately) compliance programme if it knows that, in the event of an infringement, it can escape a fine. As a matter of principle, it seems wrong that a business can avoid punishment simply on the basis of its size, which is no real justification. We consider that the immunities undermine the CMA's efforts to promote compliance and awareness of competition law by small businesses in the UK.[3]

16. If the immunity thresholds are revised for agreements of minor significance, should the immunity apply to a) any business which is party to an agreement and which has an annual turnover of less than £10 million or b) only to agreements to which all the business that are a party have an annual turnover of less than £10 million?

16.1 If the Government is minded to retain immunity for small agreements, we consider that the threshold should only apply to agreements to which all businesses that are a party have an annual turnover of £10 million or less (i.e. proposal (b)). This would avoid a scenario where some parties to an anti-competitive agreement are penalised whilst other parties are not, irrespective of their level of involvement.

16.2 As noted above, this approach will incentivise a culture of compliance amongst small businesses, as only a handful of illegal anti-competitive agreements will receive automatic immunity from financial penalties.

17. Will the reforms being considered by government improve the effectiveness of the CMA's tools for identifying and prioritising investigation? In particular will providing holders of full immunity in the public enforcement process, with additional immunity from liability for damages caused by the cartel help incentivise leniency applications?

17.1 We acknowledge the challenges faced by the UK's competition authorities in detecting cartels and competition infringements, and understand the Government's interest in maximising the effectiveness of UK competition investigations (although, as noted elsewhere in this response, this should not come at the expense of parties' rights of defence). We also understand the importance of the UK leniency regime to achieve competition policy objectives.

17.2 Our view is that providing holders of full immunity in the public enforcement process with additional immunity from liability for damages caused by competition infringements will help incentivise leniency applications in the UK to a material extent. We agree that the growth of private damages actions in the competition space has been a key factor in disincentivising leniency applications, in the UK and elsewhere. Post-Brexit the UK competition authorities are expected to investigate increasing

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[3] Research commissioned by the CMA found that only 27% of small businesses and 44% of medium businesses are aware of competition law - IFF Research, Competition Law Business Tracking Research, Competition & Markets Authority, May 2021: Competition Law Business Tracking Research (publishing.service.gov.uk)

numbers of complex and high profile cases where there is UK nexus, meaning that immunity from liability for damages is likely to be attractive to many potential immunity applicants. This in turn will boost the effectiveness of the CMA's tools for identifying and prioritising investigations (in this context, and for consistency, this reform should apply across all the forms of anti-competitive conduct for which leniency is or may become available in the UK). Moreover, for this proposed policy change to fully yield the benefits, it is incumbent upon the CMA to use international fora to seek to influence a change of policy along the same lines globally[4] or at least in key enforcement and litigation jurisdictions.

17.3 On the Government's proposals regarding protections for whistle-blowers, we note the established protections already in place in this area. In our view, any incremental benefit stemming from enhanced whistle-blower anonymity does not and should not outweigh the importance of rights of defence, and companies being able to adequately defend themselves in investigation processes.

18. Will the CMA's interim measures tool in Competition Act investigations be made more effective by (a) changing the procedures for issuing decisions and/or (b) changing the standard of review of appeals against the decision?

18.1 The Government rightly recognises that a desire for the CMA to act swiftly in its investigations must be balanced against businesses' rights of defence. Such rights of defence are just as important at an interim stage of an investigation, where the evidence in relation to alleged conduct will not yet have been fully assessed and there will not yet be any full finding of wrongdoing (whether or not an investigation ultimately concludes with such a finding).

18.2 We do not consider that the Government's proposals will improve the effectiveness of interim measures to a degree that would justify the erosion of rights of defence that the proposals would entail. Changing the rules regarding access to file so that the CMA is only required to provide notice of a proposed decision and the reasons for it would prevent businesses from having a reasonable opportunity to contest evidence underpinning interim measures. In turn, this would prevent the Government from achieving the balance in competition policy to which it refers. It is crucial for the robustness and integrity of the CMA's investigation process that businesses under investigation have a reasonable opportunity to contest the evidence against them. Such parties at an interim measures decision stage should at least have the option of a streamlined access to file process involving key evidence upon which the CMA is relying (i.e., similar to the access to file procedure available in a settlement process).

18.3 We do not consider that changing the standard of review for appeals of interim measures decisions from full merits to judicial review would be appropriate. While we consider that a judicial review standard would be appropriate for decisions relating to non-compliance with investigative and enforcement powers, we support retaining the full merits standard of appeal in Competition Act 1998 cases, including with regard to interim measures decisions. We note again in this regard the importance of companies being able adequately to defend themselves, particularly where there has been no full finding of wrongdoing and in circumstances when an interim decision can have significant immediate consequences for businesses and can directly influence a final decision in practice. Watering down this standard of review in interim measures cases would, in our view, constitute an unjustified erosion of businesses' rights of defence.

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[4] See also statements made by senior officials of the European Commission and the German competition authority in favour of making immunity programmes more attractive.

18.4 Our proposal would be different but more effective. We would recommend that interim measures applications can be made but are to be subject to the review of the CAT. The CMA would apply to the CAT, which has significant experience in this regard. The CAT would be able to assess the application based on the evidence and arguments made – by both sides – as to the reasons, balance of convenience and urgency. If, for example, the CMA argues that there is an urgent need due to potentially long-lasting damage to the market, that could be tested. Safeguards could also be built into any order of the CAT such as an order for a few months with the position to then be revisited.

19. Will the reforms in paragraphs 1.170 to 1.174 improve the effectiveness of the CMA's tools for gathering evidence in Competition Act investigations? Are there other reforms government should be considering?

19.1 We disagree with the Government's proposals regarding wider powers to interview relevant witnesses. We note that the procedures in relation to interviewing witnesses in merger and market investigations are fundamentally different to Competition Act investigations, with investigations and infringement decisions in relation to the latter having a significant adverse impact on businesses. The robustness and integrity of such investigations would be eroded if the CMA was able to compel interviews from individuals regardless of their connection to a business under investigation; such powers should be confined to persons connected to an investigation.

19.2 Extending the legal duty to preserve evidence that exists in the context of investigations into the cartel offence to all Competition Act investigations is in our view unnecessary. As things stand companies already face very wide and onerous evidence preservation demands in investigations. In practice, those obligations place significant burden on companies in the ordinary course of business and can have a disproportionate impact. In our view, the CMA in its investigations should identify in detail the categories of information that it requires to be preserved, to avoid further increasing this burden. Meanwhile, criminal violations for obstructing a purely civil investigation would be disproportionate, and would be unnecessary to facilitate compliance.

19.3 Regarding the proposals in relation to domestic 'seize and sift' powers, we submit that it would be reasonable for the CMA in the first instance to take images of company laptops and devices when inspecting domestic premises under a warrant, particularly given increased levels of home working. In our view, the CMA should only be able to remove a personal device or materials from domestic premises in exceptional circumstances, given the greater implications this would have for privacy and personal rights. We are therefore opposed to the CMA having a broader 'seize and sift' power generally applicable when inspecting domestic premises under a warrant, on the basis that this would be disproportionate and there are less intrusive but equally effective investigatory steps available to the CMA through the use of adequate technology e.g. to image devices rather than remove them from the premises.

20. Will government's proposals for the use of Early Resolution Agreements help to bring complex Chapter II cases to a close more efficiently? Do government's proposals provide the right balance of incentives between early resolution and deterrence?

20.1 We agree that the use of voluntary resolutions in Competition Act 1998 investigations can be improved, and that this would have efficiency benefits for the CMA's enforcement regime. We further agree that CMA infringement decisions in settlement cases are often overly long and detailed, and that admissions of liability can disincentivise companies from settling.

20.2 In our view, the Government's proposed Early Resolution Agreement model could help bring complex Chapter II cases to a close more efficiently, while preserving general deterrence via imposition of the settlement payment. To incentivise use of these agreements, it is important as proposed that they should not require businesses to admit to an infringement of competition law or facts that constitute such an infringement. Meanwhile, settlement payments required under Early Resolution Agreements should be materially below the level of penalty the relevant business would need to pay under an infringement decision, otherwise this would defeat part of the rationale of businesses entering into the agreements. Furthermore, we encourage the Government to consider expanding the scope of the proposed Early Resolution Agreements to Chapter I cases as well.

20.3 We consider that the Government's other proposals for streamlining the settlement process, relating to binding admissions and short form decisions broadly provide the right balance of incentives between early resolution and deterrence (provided that the relevant rights of defence are not reduced further as currently proposed by the Government). Ultimately, businesses under investigation will be incentivised to pursue settlement by an efficient process respecting due process. Unless these considerations are present, it is unlikely that an appealing balance of incentives will be met. Shorter decisions where admissions from a settling business are binding on the businesses making them, and all parties have chosen to settle, would in our view be a positive development leading to significant efficiencies for all involved in the investigation process. Having said that, it is not clear which specific requirements the Government is proposing to remove from its secondary legislation in order to implement a streamlined process, and we strongly caution against the removal of any procedural requirements which protect the effective exercise of parties' rights of defence.

21. Will government's proposals to protect documents prepared by a business in order to seek approval for, and operate, a voluntary redress scheme from disclosure in civil litigation encourage the use of these redress schemes?

21.1 We support the Government's proposals to protect documents prepared by a business in relation to voluntary redress schemes from disclosure in civil litigation. As the Government notes, the risk that documents prepared by such businesses might be used by damages claimants is likely to disincentivise businesses from offering voluntary redress. It is important that all documents prepared in this context should be without prejudice to private damages actions.

22. Will government's proposed reforms help to speed up the CMA's access to file process and by extension the conclusion of the CMA's investigations?

22.1 We agree in principle that reforms in this area to limit extensive and burdensome redaction exercises would be justified and proportionate, and may have a positive impact in increasing the efficiency of the CMA's investigations. We also agree that a prescribed legal framework and standardised terms for confidentiality rings could be helpful in this regard.

22.2 To satisfactorily balance the need to disclose evidence to businesses under investigation, it is important in our view that businesses have adequate parity of information with their advisers. We would suggest that, as part of the Government's proposals, business's in-house counsel and a limited number of business representatives should also be able to access the CMA's file and have candid discussions with their advisers, subject to having signed confidentiality agreements. This in our view would provide adequate information for businesses under investigation and allow businesses to effectively exercise their right of seeking legal advice, while still safeguarding confidential information and the integrity of the process.

23. Should government remove the requirements in the CMA Rules on the decision makers for infringement decisions in Competition Act investigations?

23.1 We do not consider that the Government should remove these requirements in the CMA Rules. The importance of independence of decision making at the final stage of a case is paramount - as the Government indicates, the use of fresh decision makers mitigates valid concerns around natural biases, and may reduce certain types of error.

23.2 We note in this regard the previous OFT consultation on its investigation procedures in competition cases, which initially proposed introducing collective decision-making in Competition Act cases and led to the implementation of Case Decision Groups. We also note the OFT's recognition at the time that the previous system, in which Senior Responsible Officers were generally both accountable for delivery of a case and the decision-maker, gave rise to the perception of confirmation bias. The OFT stated at the time that a key objective of its consultation was to improve the robustness of its investigation and decision-making processes, and that the proposals would ensure that cases and evidence were tested more robustly and systematically at administrative phase before a decision was taken.

23.3 In our view, the objectives pursued by the OFT when it implemented the current rules on Case Decision Groups continue to hold. The robustness and fairness of the CMA's processes would be called into question by the Government's proposals, while we note the Government cites no specific figures or evidence to support its contention that the use of fresh decision makers creates delay.

23.4 We support the Government's view that the CMA should have internal procedures to ensure that its Competition Act decisions are fair and robust. We also believe it is essential for the robustness of the CMA's processes that its key procedural requirements are set out in an external legal framework, noting the CMA's already far-reaching powers in investigations. We therefore do not think it would be appropriate for the CMA to have autonomy to itself determine the most effective internal decision-making processes for Competition Act investigations, and believe that the requirements on the decision makers for infringement decisions in Competition Act investigations should continue to be set out in secondary legislation.

APPEALS

24. What is the appropriate level of judicial scrutiny for decisions by the CMA in Competition Act investigations?

24.1 We consider that "full merits" review remains the appropriate standard of review in Competition Act cases. This is not a case of looking anew at all arguments but assessing the challenge based on the grounds falling squarely within the four corners of the notice of appeal. We therefore support the current system, which we consider to be working well. There have been a number of previous consultations on the standard of review in competition cases over the years, in response to which businesses and their advisers have expressed concerns. Those concerns remain valid today, if not more so in light of Brexit's impact on the CMA's workload. We also note that the other proposals being consulted upon envisage a number of material changes to the existing UK competition system, in many places reducing existing procedural safeguards or increasing CMA powers. Diluting appeal rights in this context is particularly concerning.

24.2 Following previous consultations, Government decided to improve administrative decision making through the creation of the CMA. The CMA's record of success on appeal indicates that its decisions

have held up well to scrutiny. That is not to suggest that they are "*gold-plated*", but rather that the depth and quality of decision making is commensurate with the CMA's extensive powers.

24.3 We consider that "full merits" review remains the appropriate standard of review in Competition Act cases for the following reasons:

(a) Full merits review is consistent with the serious nature of infringement findings under the Competition Act. This is particularly so given the quasi-criminal nature of such infringements[5], the significant financial penalties of up to 10% of turnover, the implications of being deemed a recidivist in future investigations with consequential fine uplifts, the high likelihood of follow-on damages claims and the long-term brand and reputational damage.

(b) The existence of a right to appeal on the merits helps ensure the quality of CMA decisions, even absent an appeal being filed in a specific case. Lowering the standard may lead to poorer quality decision making with reduced prospects of errors being corrected on appeal. This in turn may reduce confidence in the UK's competition law framework and have a negative effect on incentives to invest as a result.

(c) The system of appeals before the CAT is working well with proper scrutiny applied and decisions taken at appropriate speed. In our experience, the CAT is a particularly efficient and effective tribunal which is known for its active management of cases such that the opportunities for appellants to cause delay or manipulate the system are extremely limited, to the extent that they exist at all. Further, it is unlikely that judicial review will lead to the speedier resolution of Competition Act breaches; judicial review can lead to *more* remittals to the CMA as the CAT cannot re-take the decision itself, such that decision making may become lengthier and less predictable.

(d) The UK's separation from the EU means that the CMA will be conducting more investigations, which are more strategically significant and likely to be more complex than before.[6] It is therefore even more important that those investigations result in quality decision-making. Full merits review helps protect and ensure such quality by incentivising competition authorities to carry out a thorough substantive assessment of all the facts / evidence. This in turn maximises the prospects of the UK maintaining a world-class competition regime outside the EU.

24.4 Despite many previous consultations on rights of appeal, including in 2013's '*Streamlining regulatory and competition appeals*' consultation, the case for reform of the standard of review in Competition Act appeals has never been made out.[7] We consider that the following concerns raised by stakeholders and summarised by Government in 2013 remain just as valid in 2021:

(a) the current standard of review is well understood; changing it could risk creating uncertainty, and so fail to achieve the stated objectives of the consultation document;

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5 The quasi-criminal nature of competition law infringements and the consequent implications for a party's rights of defence has been extensively considered by the Courts. For a recent example, see Green LJ in *CMA v Flynn Pharma & Ors, Pfizer & Ors* [2020] EWCA Civ 339 at [138], citing *Napp Pharmaceutical Holdings v DGTF* [2002] CAT 1 at paragraphs [99] - [100], Case C-235/92 *P Montecatini v EC Commission* [1999] ECR I-4575 at paragraphs [175] and [176], *Menarini Diagnostica SRl v Italie* (27th September 2011) and *Argos/Littlewoods v Office of Fair Trading* [2006] EWCA Civ 1318 at paragraph [18].

6 Paragraph 0.6

7 The standard of review for s. 192 Communications Act 2003 cases was changed from full merits to judicial review by the Digital Economy Act 2017.

(b) it may lead to unintended consequences, such as skirmishes between parties at the preliminary stages as to whether the matter can be heard;

(c) regulators may spend more time "JR-proofing" their decisions rather than necessarily setting out the substantive reasoning behind their proposals; and

(d) more decisions may be remitted back to the authority, which could ultimately increase the time taken to reach a final outcome.[8]

24.5 We also stand by the concerns raised by the Competition Law Committee of the City of London Law Society (CLLS) to a proposed change to the standard of review in Competition Act cases in its 2013 consultation response (to which Baker McKenzie contributed).[9]

24.6 The Consultation refers to calls to reform the standard of review made by the Furman Review, the Penrose Report and Lord Tyrie's reform proposals - the concern being that the current appeal standard "*encourages resource intensive appeals*" and leads the CMA to produce "*lengthy 'gold-plated' decisions*".[10] Having considered the calls for reform, we do not consider them to have made a persuasive case that change is necessary.

(a) In the Furman Review, the Digital Competition Expert Panel recommended a more limited standard of review in antitrust cases, including interim measures (subject to a more independent CMA decision making structure). The concern seems to be that appeals may impose an undue burden on authorities and therefore limit their ability to act (either due to lack of resources or risk aversion), which is seen as particularly pressing in the digital sector and in light of Brexit. In our view, the solution to an authority's risk aversion is not to dilute appeal rights but to equip that authority to tackle the complex nature of digital markets through experienced hiring practices, sufficient funding and suchlike. Appeal rights are an important safeguard of quality decision making and help ensure actual and perceived fairness in the system, in a way that would not be achieved by a right to challenge on procedural or irrationality style grounds alone. Further, we are not aware of any evidence that a fear of appeals is the reason for a lack of action by the UK competition regulators in digital markets.

(b) The 2021 'Power to the People' report by John Penrose MP does not include any specific recommendations regarding the standard of review, noting that perceptions differ as to what should replace the current standard. Rather, it recommends an end-to-end review of the whole system. Such a review is beyond the scope of this consultation response. Nonetheless, as regards the one specific suggestion made, we have some sympathy with the proposal that all competition appeals should go to the CAT rather than the "*complicated thicket of different legal routes and rules*".[11]

(c) The concerns outlined in Lord Tyrie's letter of 21 February 2019 do not correspond with our experience or understanding of the current appeals system. Specifically:

(i) Hearings on a single appeal do not "*often last for four weeks or more*"[12]. Of the recent Competition Act appeals, the *five* appeals against the CMA's Paroxetine decision were

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8 Streamlining regulatory and competition appeals: consultation - summary of responses (publishing.service.gov.uk)

9 CLLS response to consultation Streamlining Regulatory and Competition Appeals

10 1.203

11 Section 2.6 of the Penrose Report

12 page 35, para 1

held over 18 days (3.5 weeks), Royal Mail's appeal of Ofcom's bulk mail delivery services decision was heard over 18 days (3.5 weeks) and the *two* appeals against the CMA's Phenytoin decision were heard together over 13 days (2.5 weeks).[13] Most other appeal hearings were considerably shorter, such as the 1.5 day hearing in *Roland v CMA* and five days in the *Lexon* and *FP McCann* appeals respectively.

(ii) Lord Tyrie's concerns regarding the admission of new evidence at the appeal stage which could have been provided to the CMA[14] repeat a concern extensively considered as part of Government's '*Streamlining regulatory and competition* appeals' consultation in 2013. We do not recognise this concern and, in any event, note the additional powers granted to the CAT following that consultation to control the admission of new evidence (see CAT Rule 21(2)). Further, any Notice of Appeal must include a statement identifying any evidence which was "*not before the maker of the disputed decision*" ensuring that there is proper scrutiny of the evidence such that appeal rights are not abused.[15] In any event, in our experience, parties are incentivised to maximise their prospects of success at the administrative stage, with few wishing to prolong the process by holding material back for deployment on appeal.

(iii) Lord Tyrie appears to misread the National Audit Office's (NAO) 2016 report on the UK Competition Regime as suggesting that the existing appeal system is ripe for exploitation by infringing parties and their overly-litigious advisors.[16] When the relevant paragraph is read in full, the reference to the UK being the "*best jurisdiction in the world to defend a competition case*" appears in fact to relate to the administrative stage rather than appeals.[17] The NAO refers to the lack of statutory deadlines for the CMA's Competition Act investigations and the consequential squeeze on resources from other work which is subject to strict timelines, as well as the apparent lower profile of competition enforcement work. We therefore do not consider the NAO's report to support any changes to the appeals system.

(iv) Lord Tyrie states that full merits review "*means that the CAT reviews all of the CMA's findings of fact, its economic assessment and its application of the law in the relevant decision*"; he describes parties as arguing the merits anew and having a "*second bite of the cherry*".[18] We see little evidence for this, and in any event the CAT is limited to determining the case by reference to the grounds of appeal. The case law is also clear that an appeal on the merits is not a *de novo* hearing.[19]

24.7 Overall, we consider that the CAT, applying the existing standard of review, performs the role the Government has in mind for it. We see nothing in the CAT's recent decision making history, or in our

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13 For further details, see the following CAT case pages: Paroxetine appeals, Royal Mail appeal and Phenytoin sodium appeals

14 page 35, para 2

15 See, for example, the CAT's consideration of whether new evidence should be admitted in *Ping v CMA* [2018] CAT 8

16 page 35, para. 3

17 " *2.15 Furthermore, many stakeholders and legal practitioners we spoke to think there are strong incentives for businesses to litigate if they lose a case, which can lead to risk aversion in the competition authorities. One stakeholder told us that the UK was the best jurisdiction in the world to defend a competition case; this was consistent with the views of several other interviewees. Competition Act enforcement cases, unlike mergers or market investigations, do not have any statutory deadlines and are at risk of being squeezed by activities that do. Several interviewees told us that, in their view, the CMA's competition enforcement work has a lower profile with their competition staff than, for example, the two current large market investigations*."

18 page 35, para 1 and footnote 63

19 See, for example, Green LJ in *CMA v Flynn Pharma & Ors, Pfizer & Ors* at [141] - [147]

experience of the CAT, to suggest that the existing standard of review prevents it from meeting the objectives outlined at paragraph 1.205 of the Consultation. We consider that lowering the standard of review would negatively affect the CAT's ability to meet the objectives Government identifies and we therefore see no justification for moving away from full merits review in Competition Act cases.

24.8 While we largely agree with the Government's view on what the scrutiny and powers exercised by the courts should achieve (as outlined in paragraph 1.205), we have some concerns regarding the expectation that the CAT will give "*deference*" to a regulator's decision in certain circumstances.[20] There is not and should not be a formal obligation for the CAT to defer to a regulator. In this regard, we refer to the discussion at [135] - [152] of the judgment in *CMA v Pfizer / Flynn Pharma* [2020] EWCA Civ 339, in which Green LJ considered the finely balanced distinction between the CMA's "*margin of manoeuvre or appreciation*" and the CAT's supervisory jurisdiction, stating that the CAT is not bound to defer to the judgement call of a competition authority where it has a full merits jurisdiction. We agree with the nuanced position articulated by Green LJ and see no basis to deviate from the current standard. Indeed, the CAT is itself a specialist body which is uniquely positioned to make decisions under the Competition Act by drawing on the combination of legal, economic and business expertise of its panels. It has shown itself capable of doing this, while having regard to the technical judgement and expertise of the regulator whose decision is under review.

25. What is the appropriate level of judicial scrutiny for decisions by the CMA in relation to non-compliance with investigative and enforcement powers, including information requests and remedies across its functions?

25.1 There is no standard of review specified in s. 114 of the Enterprise Act 2002 (EA02) for appeals against CMA decisions to impose penalties for failure to comply with the CMA's administrative procedure in the context of merger, market or Competition Act investigations. Rather, s 114(5) EA02 gives the CAT the power to quash and substitute penalties, or the dates by which they must be paid, if it considers it "*appropriate to do so*". In *Electro Rent Corporation v CMA* [2019] CAT 4, the only case in which the standard of appeal under s. 114 has been considered, the CAT held that it was not restricted to determining the matter on judicial review grounds.[21]

25.2 In our view, a judicial review standard is appropriate for the review of administrative penalties under s. 114 EA02. We note that Electro Rent argued in the aforementioned case that penalties challenges under s. 114 were equivalent to criminal penalties, but that the CAT disagreed. In line with the CAT's reasoning, we consider these penalties to be administrative - this contrasts to the quasi-criminal penalties imposed for the infringement of the Chapter I and II prohibitions, as well as the higher cap on those penalties.[22] Accordingly, we do not consider full merits review to be required in order to protect a party's rights of defence here.

25.3 We note that the Government is also consulting on increasing the cap on fines for non-compliance with the CMA's administrative process (see paras. 1.218 - 1.223). If implemented, the CMA would have much larger fining powers with a possible cap of 1% of annual turnover and daily penalties of 5% of daily turnover on the table. Should the increase in the cap be implemented, the scale of these

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20 " *Government considers that the scrutiny and powers exercised by the courts should ensure that […] Appropriate deference is given to an expert regulator's decisions on matters of technical judgment and expertise*"

21 The CAT dismissed Electro Rent's appeal.

22 Penalties for breaches of Chapter I and II are capped at 10% of worldwide turnover of the undertaking concerned. By contrast, penalties for breaches of administrative procedure are capped at: (a) 5% in the case of gun-jumping in a merger context; and (b) £30,000 (fixed amount) and/or £15,000 (daily rate) for other procedural breaches.

fines would make it particularly important that appropriate checks and balances are in place. Nonetheless, we consider that a judicial review standard is sufficient in this context.

26. Are there reforms which fall outside the scope of government's recent statutory review of the 2015 amendments to Tribunal's rules which would increase the efficiency of the Tribunal's appeal process for Competition Act investigations?

26.1 We do not have any comments.

INVESTIGATIVE POWERS AND PENALTIES

27. Will the new investigative powers proposed help the CMA to conclude its investigations more quickly? Are the proposed penalty caps set at the right level? Are there other reforms to the CMA's evidence gathering powers which government should be considering?

27.1 We believe that the proposed new investigative powers will not materially impact the speed of the CMA's investigations. There already is an increasing burden being placed on businesses involved in CMA cases. Adding further to already onerous procedural requirements will likely make the process more cumbersome and subject to more challenges, with the inefficiencies that this will entail.

27.2 Across the UK penalty regime for procedural infringements, in our view fines should only be imposed where a breach is intentional or deliberate, for example for acts done with the clear intention of obstructing an investigation, or an intention to provide false or misleading information or destroy evidence. Given the increasing time pressures and resource burdens placed on companies during CMA investigations, imposing penalties where breaches fall below this level of intent would be disproportionate.

27.3 The proposed personal accountability for the provision of evidence is highly onerous. We note that information requests in CMA investigations are often extensive, with deadlines that are typically extremely challenging and responses normally outside the possible direct knowledge of any single individual. It would in our view be unrealistic and unreasonable to require personal declarations in such a scenario. As the CMA is expected to take on a leading role post-Brexit in investigating larger multinational companies with global operations and complex reporting structures, it is important to appreciate the reality of how responses to information requests are handled in practice. If the Government insists on proceeding with its proposals in this area, the relevant legal framework should make clear that liability for false declarations arise only for the most deliberate and flagrant breaches, for example deliberately misleading an investigation.

27.4 We also disagree with the Government's proposed wider prohibition against providing false or misleading information to the CMA in relation to voluntary information requests. We believe that this could have a chilling effect on engagement. We further note that the CMA is already able (and indeed accustomed) to "weeding out" responses to its requests that it considers to be unreliable.

28. Will the new enforcement powers proposed improve compliance? Are the proposed penalty caps at the right level? Are there other reforms to the CMA's enforcement powers which government should be considering?

28.1 We do not have any comments.

29. What conditions should apply to the CMA's use of investigative assistance powers to obtain information on behalf of overseas authorities?

29.1 Should the government empower the CMA to obtain information on behalf of overseas authorities, we consider that appropriate checks and balances should be in place to ensure that any requests for information are necessary and proportionate in scope.

29.2 We note that the 'Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities Model Agreement' envisages that the CMA, may, at the request of an overseas authority:

(a) take the testimony or statements of Persons or otherwise obtain investigation information from individuals;

(b) obtain documents, records or other forms of information;

(c) locate or identify individuals or things; and

(d) execute searches and seizures.[23]

29.3 The scope of assistance that could be provided under the proposed powers is, therefore, potentially very broad. This means that businesses could face a raft of disruptive inspections, interviews and requests for information requested by overseas authorities. As such, it is incumbent on the CMA to ensure that requests by overseas authorities are proportionate, justified and not vexatious.

29.4 At the very least, we suggest that the CMA is only empowered to obtain evidence on behalf of overseas authorities provided (i) those authorities have given reciprocal commitments, (ii) the confidentiality laws in the relevant overseas jurisdiction provides protection that is at least as strong as under domestic competition law, and (iii) any information exchanged is returned once the proceedings are over. These are requirements of the US 1994 International Antitrust Enforcement Assistance Act (IAEAA), which authorises the Department of Justice and the Federal Trade Commission to conclude antitrust mutual assistance agreements with foreign authorities.[24] Under an IAEAA agreement, authorities can assist each other in obtaining evidence located in each other's countries and, therefore, the IAEAA is an appropriate model here.

29.5 More broadly, we think that it would be helpful for an independent decision-maker, such as a court, to decide whether requests should be granted, taking into account whether they are necessary and proportionate. Failing this, the CMA should be required to consider these factors in its own decision-making.

Baker McKenzie

September 2021

[23] Available here: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/914038/MMAC_---_pdf.pdf >, s. 3.3(b).

[24] International Competition Network, 'Co-operation between Competition Agencies in Cartel Investigations', Report to the ICN Annual Conference, May 2006, available here: < https://ec.europa.eu/competition/international/multilateral/2006.pdf >, p. 14.