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Ms Laura Carstensen
Deputy Chairman
Competition Commission
Victoria House
Southampton Row
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Dear Madam

Statutory Audit Services Market Investigation: Auditor Clauses in Loan Agreements

We refer to the Competition Commission's ("CC") Provisional Findings and Notice of Possible Remedies recently issued in connection with the above Market Investigation. In particular, the CC has asked for our views on proposed Remedy 4, which is described in the Remedies Notice as the *"prohibition of contractual clauses in template documents limiting choice to the Big 4 firms"*.

At the outset, we would dispute the CC's assertion in the Remedies Notice that reference to the Big 4 firms in the LMA's auditor clause limits choice. Contrary to paragraph 42 of the Remedies Notice, it is not a *"restriction"* and it is incorrect to suggest that it *"effectively mandates the use of a Big 4 audit firm"*. As explained previously, the relevant provision is not compulsory. The names of the Big 4 are presented in brackets (indicating that they may be altered without it constituting a deviation from our template) and the clause expressly provides that any other firm may be appointed with the approval of the majority lenders. Indeed, one of the key findings of the Report on Auditor Clauses commissioned by the CC is that the clause is *"inserted in a way that makes it easy to amend / remove"* and the Report also notes examples of names of non-Big 4 auditors being added to the clause[1].

We should also like to remind the CC of the following points in relation to the origin and rationale for auditor clauses, which may be helpful in its deliberations:

- Template loan documentation is designed to promote efficiency by creating a sensible *starting point* for documentation based upon market practice. Within such template documentation related to highly leveraged transactions there is an obvious and

[1] A7-13 and A7-23, *Report on Auditor Clauses in Loan Agreements*, prepared for the CC by Dr Richard Baylis; Professor Mark Clatworthy and Professor Christopher Pong

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indisputable need to establish upfront an obligation to apply high quality audit services. To do otherwise would place lenders under unacceptable commercial risk.

- Consistent with the aim of promoting efficiency, our template loan documentation specifies potentially acceptable auditors so as to avoid lenders having to engage in the process of agreeing an acceptable auditor in each case. To do otherwise would introduce unnecessary additional complexity and cost into the lending process.

- In indicating that the auditor should be one of the Big 4 firms, or such other firm as may be approved by the majority lenders, our template simply reflects the nature of the highly leveraged arrangements forming the subject matter of the documentation. Such arrangements may well involve cross-border elements and require high quality oversight by an auditor with proven experience and the capability to address such elements. The Big 4 firms undoubtedly meet this requirement but the clause is open ended - others may be added to the list if they are also considered to provide services of a sufficient standard.

In short, we do not consider that there is any need for intervention by the CC so as to prohibit non-compulsory audit clauses of the type contained in our template loan documentation. The CC itself notes in the Remedies Notice that such action *"may not by itself have a substantial impact"* and no compelling evidence is presented to suggest that the proposed action would effectively address in any meaningful way the adverse effect on competition alleged to arise from the five features of the market identified by the CC. Accordingly, we consider that the proposed action by the CC would be inappropriate and disproportionate. We would suggest that any residual concern by the CC could be addressed by a less intrusive measure such as a requirement to emphasise in template documents that the selection of a Big 4 auditor is not compulsory.

Should the CC be minded not to accept our above representations, we would urge that careful thought is given to the form of any prohibition that may be contemplated so as to avoid unnecessary market uncertainty and potential disruption. In our view rather than specifying the form of any future auditor provision it would be preferable to require deletion of specific reference to the names of the Big 4 firms but otherwise leaving the provision intact. This would enable lenders to specify acceptable names of their own choosing when adopting the template documentation without risking additional complexity and delay by forcing the parties to effectively agree the auditor in a separate process.

Yours faithfully

Clare Dawson

Managing Director