

Denis Kelly
Competition and Markets Authority
Victoria House
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22 August 2014

Dear Mr Kelly

Consultation on Draft Order

I am writing on behalf of KPMG LLP in response to the Competition and Market Authority's (CMA) publication of its Draft Order on "Mandatory Use of Competitive Tender Processes and Audit Committee Responsibilities" on 24 July 2014. We have set out below our detailed comments in respect of the Draft Order for your consideration. We would be very happy to discuss the comments included herein if this would be helpful.

Mandatory Use of Competitive Tender Processes/Responsibilities of Audit Committees Order

- We understand that the CMA intends that Part 6 and Article 3.1 of the Draft Order implement provisions consistent with Article 41 of EU Regulation No 537/2014 ("the Regulation"), to minimise possible future difficulty for entities interpreting both the Draft Order and the Regulation. However, we note that there are differing views being expressed regarding the operation of Article 41(3) of the Regulation, and also ambiguity around whether the start date of an audit engagement for the purposes of calculating the 'maximum duration' to which the Article refers should in fact be 17 June 2016 rather than the date on which the audit engagement began. This is because the latter results in an arguably counter-intuitive earlier rotation date for auditors appointed more recently.
- In our view, there are a number of relevant points the CMA should consider in this respect:
 - first, we would like to understand whether the CMA's proposed inclusion of text in the Order that differs from the text of the Regulation (in particular, Part 6.1(c) of the Order), is intended to clarify the operation of the Regulation;
 - if the CMA is indeed seeking to clarify the operation of the Regulation, we do not understand why the CMA would propose that companies with the shortest audit tenure (under 11 years) have to tender at an earlier date than those with longer tenures. Such a requirement does not appear to be logical. A more logical approach could be clarifying

that the start date of an audit engagement for the purposes of calculating the ‘maximum duration’ under Part 6.1(c) is 17 June 2016;

- however, if the European Commission or United Kingdom ultimately adopts a different approach to the Regulation in order to clarify its operation, we question whether any such subsequent modifications could be appropriately dealt with in the Order as it is currently drafted; hence
- in light of the above, and if the CMA’s intention is to simply mirror the Regulation (including the counter-intuitive earlier rotation date for auditors appointed more recently) we would suggest that Part 6 is either excluded or simply refers to the provisions of the Regulation which the CMA seeks to enshrine in the Order. In our view, duplicating the Regulation in Part 6 of the Order provides no additional benefit and potentially causes confusion and inconsistency for those companies seeking to comply with both the Order and the Regulation.
- We note that in the Draft Order’s existing form an inconsistency also exists between the transitional provisions included in the Regulation and those included in the Draft Order, the former of which refers to ‘consecutive years’ (i.e. calendar) and the latter of which refers to ‘Financial Years’. As with the above, potential issues arising from this difference in wording would also be avoided if the Order instead referred to the wording of Article 41.
- We note that under Part 7 of the Draft Order the incumbent auditor may be requested by the CMA to provide information in respect of a client’s tendering history and the content of its Audit Committee Report. We consider that it would be more appropriate for the CMA to request this information directly from the entity. Auditors would have to ask their clients to check any information and to give permission for them to provide it to the CMA under this Part. Requiring companies to provide this information directly would be consistent with Paragraph 11 of the Explanatory Notes to the Order, which states that Part 7 contains an obligation on FTSE 350 companies (rather than their auditors) to state their compliance with the Order.
- Article 9.4 – we maintain that it would be desirable to amend Article 9.4 (emboldened text added) to read ‘Subject always to Part 9 of the Act, the CMA may publish any information or documents that it has received in connection with the monitoring or the review of this Order or any provisions of this Order for the purpose of assisting the CMA in the discharge of its functions under or in connection with this Order, **excluding commercially sensitive information identified by the company if such information or documents are received by the CMA pursuant to this Order**’, given the possibility that such information could be commercially sensitive or that its release by the CMA could be prejudicial to legitimate business interests.
- We note that Article 9 appears to require companies and their auditors to keep information indefinitely. The open-ended scope of Article 9 is likely to present practical challenges given that most entities do not keep records for longer than 7 years after the end of the accounting reference period to which documents relate. Accordingly, we would suggest that Article 9 be



revised to place a time limit on how long information needs to be kept and that the time limit chosen should fall within that 7 year period.

If any of the above is not clear or you would like to discuss further, then I would be more than happy to assist. Please do not hesitate to contact me.

Yours sincerely

David L Gardner

David L Gardner
Director of Public Policy