RESPONSE OF MIRA MAKAR MA FCA, 24 August 2014

witness to the Office of Fair Trading 2011 investigation in respect of main market Chief Executive Officers, Executive Deputy Chairmen; Finance Directors; and Audit Committees
(experience 1995-2006) ie "the buyers" to whom the auditor must report ("an auditor shall report") and those civilly and criminally liable for the defaults of the auditor whether they know about them or not

witness credibility

UK experience: reputation is tied to reputation for integrity: perceived to be high risk to endorse

20 November 2006

Nigel Tristem, board member and Head of Assurance and Ethics in the Assurance practice, partnership formerly trading as Baker Tilly, a firm

"*The reputation for integrity is everything."*

"you have demonstrated that you have integrity in spades."

"….your reputation is higher than ever."

"I think your press coverage was brilliant …….and your reputation was enhanced."

"Your reputation has come out of this well."

"*Whistleblowing is not held against you by proper companies…"*

"I think you would be the perfect head of an audit committee…."

Peter Souster former Chairman Baker Tilly, a firm, author Tolleys Companies and Directors Duties:

"*As a director you could not be faulted as to the steps you were trying to take – "*

Ian White, member Deloitte LLP, called to Bar, Chartered Accountant, forensic accountant, expert witness

"change in BT's risk profile – now that the report is really for you, and FSA and DTI.

We would be acting for the FSA / DTI / Financial Reporting Review Panel."

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judgment in default of acknowledgment of service or defence against PwC 22 December 2010 (2010 Folio 885)

The Office of Fair Trading Statement 21 October 2011 based on the evidence examined was referred to the Competition Commission on 21 October 2011

Press releases 2011 - OFT refers audit market to Competition Commission

115-11 21 October 2011

The OFT has today referred the market for the supply of statutory audit services to large companies in the UK to the Competition Commission (CC) for further investigation.

The decision to make a market investigation reference follows a public consultation which closed in September.

The OFT has been concerned for some time that the audit market is highly concentrated, with low levels of switching and substantial barriers to entry.

In 2010, the four largest firms (PwC, KPMG, Deloitte and Ernst & Young) earned 99 per cent of audit fees paid by FTSE 100 companies. Between 2002 and 2010, the average annual switching rate among FTSE 100 companies was only 2.3 per cent.

Before provisionally deciding to refer the market to the CC, the OFT held a number of meetings with audit service providers, customers and regulatory bodies. One of the issues considered by the OFT during these meetings was the potential for overlap with parallel work ongoing at a European level. However, the nature, content and timing of EU legislation are not settled and the OFT believes that there are a number of important inputs that the CC might make during the legislative process. The OFT also believes that a CC inquiry has the potential to address UK-specific competition concerns that may not be within the scope of the EU's work.

John Fingleton, OFT Chief Executive, said:

'The market for large company audits lacks sufficient competition and does not work well for customers. It is highly concentrated, largely supplied by four big firms, with clients rarely switching between auditors. There are also high barriers to entry for new and smaller competitors. These are not the indicators of a competitive market.

'Voluntary and industry-led efforts to increase competition and choice in this market have proved unsuccessful. Following extensive consultation, we have concluded that a reference to the Competition Commission is appropriate. We believe that such an inquiry will also complement the EU's legislative process.'

Notes

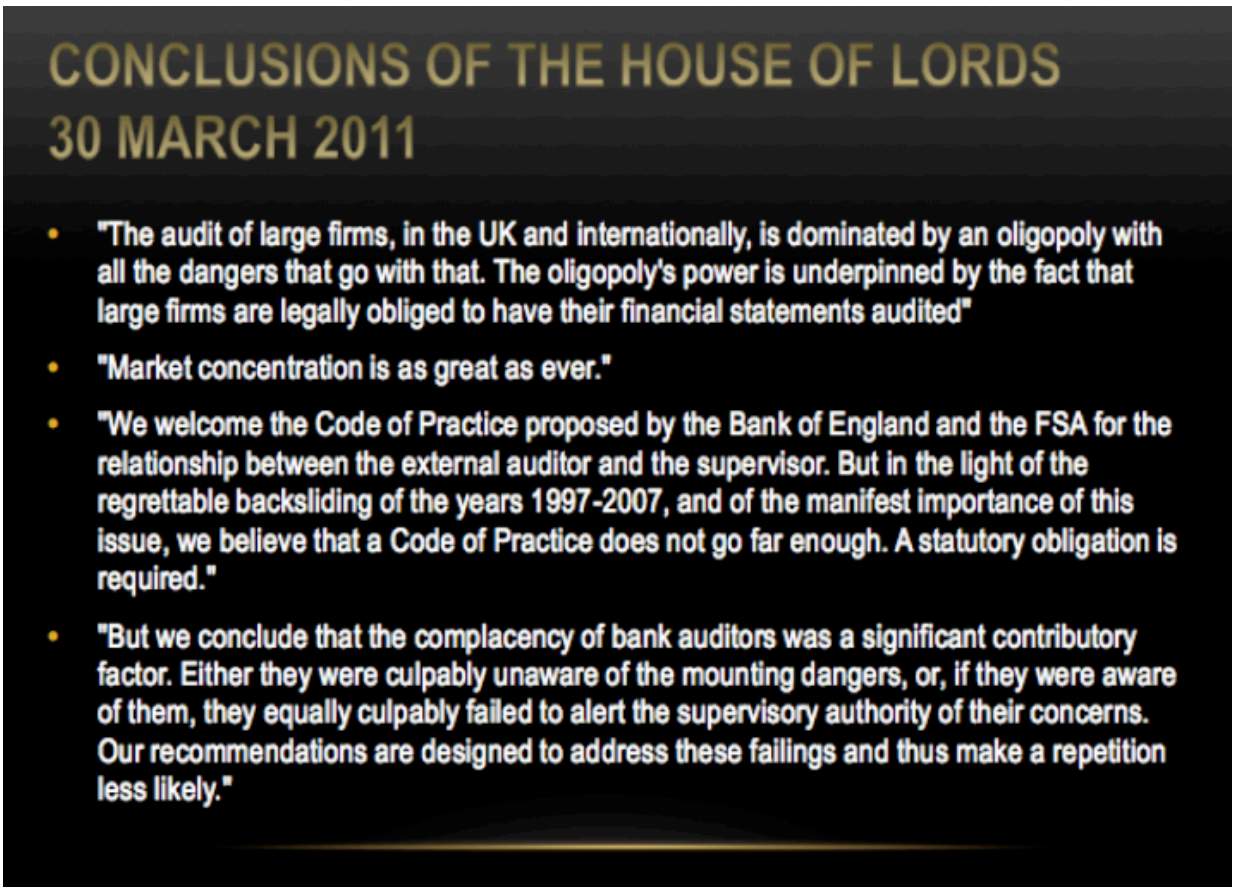
1. Download the OFT's published guidance on market investigation references (pdf 1Mb).
2. See further details on this market investigation reference, including the OFT's decision document.
3. See further details on the OFT's work on the audit market, including its submissions to the House of Lords Select Committee on Economic Affairs.
4. On 17 May 2011, the OFT announced that it had provisionally decided that the competition issues that it had identified in the audit market passed the statutory test for referral to the Competition Commission, but that it wanted to discuss with interested bodies whether potential remedies would be available before reaching a decision on whether to exercise its discretion to refer. See press release OFT announces next steps in audit market. On 29 July 2011 the OFT announced that it had reached a provisional decision to refer the audit market to the CC, and opened a public consultation, see press release OFT provisionally decides to refer audit market to Competition Commission (29 July 2011).
5. The CC must reach its decisions and publish its report within a maximum of two years although, where appropriate, the CC will aim to complete investigations in 18 months or less.

The Competition Commission has allocated the following team to the task mandated on 21 October 2011: Laura Carstensen (*Chairman*), Carolan Dobson, Barbara Donoghue, Richard Farrant, Professor Robin Mason. However regretfully the evidence examined has been filtered by "*competition lawyers"* employed by the CC (now CMA), unbeknown to the witnesses, including that referred by the OFT in summer 2011. The work of the Parliamentary Commission on Banking Standards concluding that *the extent of corruption and collusion beggars belief*, has seemingly also not been taken into account. The evidence elicited by the House of Lords Economic Affairs Select Committee on the oligopoly of large operators has also been excluded. This left the FRC CEO and Chairman answering questions before the summer without the benefit of being fully informed by the CC having properly investigated corruption, collusion and the oligopoly exposed by the House of Lords Select Committee in March 2011.

Loss of opportunity by excluding the work of the House of Lords, OFT, PCOBS

Overall there has been the most extraordinary loss of opportunity. This has been exacerbated by (i) the protracted timescales since summer 2011; (ii) the exclusion of the taxpayer funded work of others; (iii) the exclusion of witness evidence in regard the unlawful and irregular pulling down of SMEs and private estates by those profiting from "*statutory audits*"; (iv) the lack of facts and figures from BIS on loss and opportunity to the economy and omission by the BIS economics team to provide analysis of trends and consequences of the lack of corrective mechanisms (a particularly woeful omission given that the Bank of England relies on BIS economics department. BIS insists on producing its own numbers and analysis instead of allowing ONS, NAO and other seasoned professionals to give guidance, who are beyond the reach of the vested interests. BoE is reporting a variance of £1/3 trillion in what it believes its reserves need to be and cannot improve on figures until next year); (v) the absolute refusal by the CC to adopt an "*iterative"* approach to the conduct of its work, constantly revisiting the validity of its deliberations to date (a necessary approach to avoid the trap of producing a white elephant, like HMRC IT systems; health spend on Fujitsu; BIS on ISCIS; BIS, HMCTS, DWP spend on ATOS); foregoing the opportunity of taking a leadership role in Europe on competition and credibility both sides of the border with Scotland.

There is no current mechanism to put aside the time wasted since mid 2011 and start again, this time respecting the evidence which has already been published. The output of the CMA will be seen as an abandonment of the principles of intellectual independence and an attempt to neutralize and bury what is already public. This includes the draft order which shows clearly that the draftsmen do not know what a statutory audit is, or a statutory auditor and appear wholly oblivious to the fact that the essence of a statutory audit, independence of the auditor, no longer exists.



A statutory auditor cannot have a *"strong commercial focus*". If they have, they cannot report independently. Confusingly money is taken by "*auditors"* for "*transaction fees*" (such as mergers) and reports are on the basis of "*what you can get away with*", albeit under the guise of "*audit fees".* Who can unravel this?

As a consequence of the above, the House of Lords decided to reject the evidence of the large operators, in particular the notion that where you have a hole in a balance sheet the problem is a lack of liquidity and the answer is to print more money to fill that hole ("*bail-out").* The omission of adverse reports (that the enterprise will not topple so long as there are government bail-outs) is a statutory offence for which those culpable have not been held to account (*see below*) with consequences and no self-adjusting mechanisms.

The three slides (two above and one below) have been extracted from a pack before Burton J, in the Commercial Court of the Queens Bench Division, on 22 June 2011, in a hearing brought about at the request of Ian Powell and his in-house lawyer, Jack Naylor, using lawyers from Wragge & Co LLP (Birmingham) and counsel from Maitland Chambers (2010 Folio 885). The evidence and explanations aired were described as "*splendid"*, not least because they relied on work that had already been done and did not attempt to either reinvent the wheel or deny or neutralize what had already been exposed, that banks and insurers could not have carried on fraudulently trading and operating off their balance sheets for so long unless those purporting to be independent assurance reporters were totally complicit with them. The evidence packs that were provided to the OFT after the endorsement in court were filtered out by the CC competition lawyers and did not reach the team. The team has not yet made good such omissions and properly ought to do so before concluding or making wrong orders.

The mandate of the CC / CMA

It is apparent that the single main issue in regard this referral by the OFT is accountability of the CMA in particular the lack of independence, filtering of evidence, delays, lack of iteration or internal critical evaluation and the wholesale absence of a process to correct mistakes on the way. The stranglehold by CC competition lawyers means that victims and whistleblowers have been excluded. The focus has been on the creation of a process which it is hoped it can be said means that the project completes, thereby creating an insuperable barrier of the need to go to judicial review to undo, creating more opportunity for CC competition lawyers to waste even more public funds.

It is apparent from the statement below that the CMA has been set up without accountability, and to close down and neutralize the work of the OFT, who are mainstream full time long term civil servants. The NAO has reported a civil service headcount reduction over recent years of 23% but has not evaluated the catastrophic impact on the economy of losing the independence of the OFT, to substitute by an agency that is not accountable to anyone and which filters evidence which the OFT did not appear to do. The statement below shows interference by BIS Ministers now coining a new term "*Steer*", with a capital "S", whilst taking no responsibility for whether their "*Steer"* is right, wrong or indifferent or explaining WHO in the civil service is going to plug the gap left by closing the OFT, including without public consultation.

BIS Ministers have not as yet addressed the June 2010 report of the OFT on "*insolvency practitioners".* These are indemnified agents registered with the Insolvency Service, who are granted exclusive entry to activity transferring the capital and wealth of the economy and private individuals to the banks and insurers, "*skimming"* their take off the top on the way and reporting as "*statutory auditor"* on those profiting, thereby covering up on their collective wrongdoing. This evidence is germaine to a proper understanding of the workings of "*corruption and collusion",* without which this current project of the CMA cannot even begin.

Second BIS Minister Jo Swinson started an investigation into whistle-blowing in summer 2013. BIS has not reported that the need for whistleblowers would disappear as would the obligation of the state to protect them from retaliation were it the case that (i) auditors report independently (i.e. properly) and (ii) BIS prosecuted whenever false auditors' reports (including omissions) were reported as having been filed in Companies House. Unless and until whistleblower protection is guaranteed, i.e. harassment and revenge attacks on whistle-blowers criminalized and prosecuted under current law, including harassment and grievous bodily harm (mental torture) with whistle-blowers given covert human source protection whether or not expressly commissioned, it will remain impossible to secure that evidence which is needed to do the current project properly. The CMA does not offer either the protection of Parliamentary privilege or normal protection of a new identity and protection for family and employees. Accordingly it starts with no chance of securing the evidence needed to investigate properly. It is reduced to being a voice for the vested interests, as R3. This is a trade association purporting "*education"* and "*public interest"* to secure charity money.

With no chance of independent evidence, a rejection of that from OFT and Parliament, its raison d'etre of independence has been defeated as it cannot report independently without independent evidence and witnesses. Consequently it has nothing to bring to the international stage by way of thought leadership or otherwise and no contribution to any Europe referendum leaving UK citizens wholly reliant on Europe to protect them from their own executive. The release is below (October 2013):

New competition authority comes into existence

From: Competition and Markets Authority, Competition Commission, Department for Business, Innovation & Skills and Office of Fair Trading
History: Published 1 October 2013
Part of: Preventing and reducing anti-competitive activities and Business and enterprise
The UK's new unified competition body, the Competition and Markets Authority, launched today in shadow form before going live in April 2014.

The Competition and Markets Authority will bring together the Competition Commission (CC) with the competition and certain consumer functions of the Office of Fair Trading (OFT) in order to promote competition, both within and outside the UK, for the benefit of consumers.
The CMA will not initially be taking on any casework, which will remain with the OFT and CC until April 2014, but as a shadow body it will be empowered to make the necessary preparations to allow the new authority to assume its responsibilities next year.

The launch was marked by the publication for consultation of the new authority's proposed vision, strategy and values. The CMA's overall ambition is to be consistently one of the leading competition and consumer agencies in the world. To achieve this it has proposed 5 goals which are to:

deliver effective enforcement

extend competition frontiers

refocus consumer protection

develop integrated performance

achieve professional excellence

The Department for Business, Innovation and Skills (BIS) has also today published a Ministerial Statement of strategic priorities, to which the new competition authority must have regard.

The government strategic steer asks the CMA to:

identify markets where competition is not working well and tackle the constraints on competition in these cases using the competition and consumer enforcement tools that it considers most appropriate. In doing so it should take account of consumer behaviour, be willing to consider potential competition concerns in business-to-business markets, and assess whether there are specific sectors where enhanced competition could contribute to faster growth

enforce antitrust rules robustly and fairly where they are breached

play a key role in challenging government where government is creating barriers to competition

provide leadership and work with partner agencies to deliver positive competition outcomes

This steer is a transparent statement of the government's aspirations, publicly setting out the long term goals of the government in relation to competition and growth. The CMA is not bound by the steer.

Competition Minister Jo Swinson was speaking at the launch event, which was held at the CMA's headquarters, Victoria House, along with CMA Chairman, David Currie and Chief Executive Alex Chisholm.

Jo Swinson, Competition Minister, said:

The shadow launch of the CMA is a significant step towards delivering a world-class competition regime in the UK that promotes growth and builds a stronger economy.

We are determined to ensure that the CMA has the strong powers, guidance and resources it needs to create a competition regime that is both strong and streamlined, protecting consumers and businesses alike from unfair practices from day one. That is why we have been implementing wide-reaching reforms and have published our aspirations for the CMA today.

David Currie, CMA Chairman, said:

Our ambition is to be a leading competition and consumer agency, at the forefront of delivering important results and innovation, and to achieve this on a consistent basis - over time and across the full range of our work. We want to be as good at what we do as anyone in the world, and we think this is a realistic aim given the strong legacy we are inheriting from our predecessors, the Competition Commission and Office of Fair Trading.

Alex Chisholm, the CMA's Chief Executive, said:

This is a significant milestone in the creation of the new authority. As well as giving us the ability to carry out the necessary preparations for April 2014, it is also an opportunity to set out our proposed ambitions for the CMA.

Today we outline our goals, our strategy for achieving these and how we will deploy the new agency's full range of resources and powers for the maximum benefit. We are setting ambitious goals for what consumers and business can expect of us and what we expect of ourselves. We'd encourage all those with an interest to let us know their views.

The new authority will be the UK's unitary body responsible for promoting competition across the economy. It will work in the interests of consumers and businesses, operating with flexibility and with a more streamlined approach to decision making. Bringing together the OFT's competition and key consumer functions with the functions of the CC, the CMA will be a single powerful advocate of competition both in the UK and globally.

All the documents will be available on the CMA's homepage or via its Twitter account @CMAgovuk and LinkedIn page. The CMA Board and Senior Executive Team have already been appointed and consultation has been taking place on new secondary legislation, part 1 and part 2, and draft guidance, part 1 and part 2, relating to the CMA.

Notes for editors

1.Enquiries should be directed to: Rory Taylor: rory.taylor@cc.gsi.gov.uk Siobhan Allen: siobhan.allen@cc.gsi.gov.uk, 020 7271 0242 Kasia Reardon: kasia.reardon@oft.gsi.gov.uk, 020 7211 8901

2.The CMA will be legally established on 1 October 2013 and become fully operational on 1 April 2014. The Enterprise and Regulatory Reform Act which creates the CMA received Royal Assent on 25 April 2013. The new unified Authority will bring together the CC with the competition and certain consumer functions of the OFT and will be responsible for advocating competition for the benefit of consumers. The CMA will bring about significant benefits to business and consumers, including greater coherence, flexibility, speed and transparency in the operation of the competition regime.

3.The CMA is an independent non-ministerial government department. As part of its proposals on the establishment of the CMA and broader competition reforms, the government proposed the setting of a non-binding ministerial statement of strategic priorities for the CMA, the Steer. The Steer released today is intended to provide a transparent statement of how the government sees the competition regime fitting with its broader economic priorities. government and stakeholders recognise that the independence of the CMA is vital to its success. This applies to the CMA's setting of its priorities, the choice of tool it uses to address problems it has identified and in making final decisions on cases. The government is publishing today the response to consultation on the draft steer.

4.In preparation for the launch of the CMA in April 2014 the CMA has appointed a number of panel members. Along with the recent announcements on the appointments to the CMA Board and the Senior Executive team these appointments complete the establishment of the CMA's corporate structure. The panel members are currently members of the CC and will serve concurrently as panel members of both the CC and the CMA until 1 April 2014 when the CC will close. As CMA panel members they will continue to serve as members of ongoing inquiries that transfer from the CC to the CMA. All the panel appointments being made to the CMA are from the group of panel members appointed to the CC in 2009 plus the Deputy Chairs who were appointed in January 2012.

5.The Competition Minister, Jo Swinson, will be giving a speech at the launch of the CMA, explaining the rationale for the creation of the CMA, wider competition reforms and the steer for the CMA. Any enquiries on the Steer should be directed to Sneha Patel on 0207 215 5984.

power for the CMA makes no difference

Much is said about "*powers",* as much was said about increasing the "*powers*" of the FRC. The FRC can do nothing with more "*powers"* as its non executives and part time executives come from the vested interests it must hold to account, and some of these, it would seem according to those concerned, are imposed on it. No-one has evaluated how extremely demoralizing it must be to go to work each day knowing you cannot make a difference. The CMA is heading in the same direction with inevitable economic damage.

CMA does not have the jurisdiction to make the draft order proposed by its team

The CMA has not carried out an independent examination of independent evidence or explained why it has come up with a report, recommendations and a draft order that fly in the face of the work done to date since 2010. This is by Parliamentary bodies holding the executive to account and the OFT working without the constraint of CC "*competition lawyers*" filtering evidence apparently focused on seeking to justify their employment at the expense of the economy and the victims of the vested interests operating by "*corruption and collusion".* Corruption (1906 Act) and collusion (Criminal Law Act 1977) are offences. Experienced financial crime investigators ought properly to have been those calling for evidence; ensuring existing evidence was assimilated; and providing protection to witnesses.

A full report on this project will be required for the Hansard records before the end of the Parliamentary term and the next election. This will need to explain why the FRC did not have a completed report to consider and inform the Economic Affairs Select Committee when it provided evidence before the 2014 summer break, just before RBS admitted that it had reported inaccurately on GRD, itself shortly after its own auditor informed it was stepping down. It will also need to explain why the unlawful and irregular *"pulling down*" of RSM Tenon Group Plc (witnesses to the CC) did not cause the CC to re-think its conclusions. This includes the fact that it was pulled down by Baker Tilly UK Holdings Ltd (BT), an operation financed by, and financially dependent on, RBS. BT acted together with the RBS statutory auditor. BT had lost its capacity by July 2012, to the extent it had any, when it notionally incorporated on 27 March 2007, charging what it did not have to secure funding, having asset stripped its business to defeat contingent creditors and in order to go around a second time at no prima facie risk to itself or its members.

For completeness, basic feedback points on the nine sections of the draft order are set out below.

Pre-amble to the detail (independence of mind):

Mandatory professional standards require the audit team to rotate every seven years. Year one is support to the previous team; year two leading, supported by the previous team; year six and seven leading and supporting the successor team respectively. Years three to five have the team alone. Rotation is therefore in-built by team and no improvement of independence of mind can be achieved by moving from one auditor to an another (firms). Rotation of auditor is therefore irrelevant to independence. The auditor must resign immediately on discovery of loss of independence citing reasons, not wait X years as envisaged by CMA.

Part 1

1.1. The CMA does not have the jurisdiction to make the draft order as it stands for the reasons stated above. Accordingly if it proceeds, either it will be of no effect or it will promote contraventions of the law, fuelling the problems identified by the OFT, Parliamentary Committees and PCOBS.

1.2. It is not good use of judicial review to address this issue "*as though*" it were a proper order, that properly was being challenged: under the Equalities Act (discrimination) those affected must be consulted in advance and in this case they have been totally excluded. The courts have rulet on bureaucrats making work for other bureaucrats and that these activities are not to be encouraged. They are likely to take the same stance to bodies as the CMA which deny the work of Parliament and the OFT, and systematically exclude those entitled to protection (as directors) including under the Consumer Protection Regulations.

1.3. The descriptions of a company which enters the FTSE 100 or FTSE 250 index is wholly random. The definition will pick up financial bubbles and financial companies with balance sheets that cannot be tested, as banks; insurers; the stock exchange; UK quoted companies used as vehicles to "dump" other companies without the rigour of an IPO; vehicles used to take money out of the market and place it in *"deposits*" which are charged to banks and which banks can use to leverage up their access to wholesale markets; and corporates which conduct their true business off their balance sheet using indemnified agents supplied by their "auditor" or the "auditor" of those benefiting. There is little or no point in attempting to impose controls on one sector because the operators will simply operate somewhere else. Indeed the FRC's new chairman is now lobbying for two sets of accounts: will the CMA's order apply to one set or to both and why has this not been addressed in the draft order?

1.4. The CMA's team has referred to the "*order"* remaining in force until varied or revoked: it has not done any compatibility testing with existing law nor has it factory tested its proposals. Whilst it continues refusing to revisit its work to date, it is depriving itself of the opportunity of proposals which are compatible with current law. The best it can hope for is a nullity and an electorate that goes back to the original OFT and Parliamentary work in order to be informed on the true position.

1.5. Importantly the auditor is legally and criminally liable for the proper use of the knowledge within his head; the knowledge of one member is the knowledge of the firm. The move from one firm to another facilitates the knowledge of "auditor" number one going with him and "auditor" number two arriving "*blind".* The technique has been around since at least the turn of the millennium, with the auditor relying on the shareholders "*adopting"* the "*accounts"* by resolution at the private shareholders meeting. Indeed in some cases, as G4S, 31 December 2004 there was a six month gap as the first exited, not telling the world they had charged "*transaction fees*". The second turned up after the AGM, apparently with no-one auditing anything, and a veil over the financial arrangements, funding and post balance sheet events to the AGM on 30 June 2005. A move from one auditor to the next is the last thing in the world an investor or director would want, unless it is a private company and there are extended periods of parallel running.

Part 2

2.1. The definitions are wrong, otiose and unhelpful**.** In particular the "*audit committee"* is made up of directors severally liable and fully accountable to the main Board of the enterprise. They carry personal legal and criminal liability as directors for everything they do or omit to do. They are responsible for ensuring that the enterprise maintains proper records at all times including emanating from the auditor.

Part 3

3.1. There is no such thing as a "*statutory audit services agreement*". A "*statutory audit*" is not a "*service".* The auditor shall report by a letter to management to the directors severally who are responsible for proper accounts including the reports emanating from the statutory auditor. The auditor offers himself and the shareholders accept, with the directors dealing with casual vacancies. The "*transaction*" is both B to B and B to C, as directors are both "*the company*" and individuals with an obligation to safeguard the assets of the enterprise at all times including from the effect of purported auditors who are not independent but do not reveal that fact. Letters of engagement are not available for inspection at the registered address.

3.2. It would seem the anonymous draftsman has got confused between a statutory audit and other "*services*" like an annual MOT; annual check on the gas boiler; and dental and other checks. In a statutory audit, the (independent) auditor reports on himself, what he has done and what he thinks of it.

3.3. There are no live inspections of auditors at work. There is no chance of a competitive labour supply until the barriers to entry (which currently exclude the bulk of potential suppliers) disappear and those purporting to be statutory auditors to leverage other activities are precluded from doing both.

Part 4

4.1. Comply or report (why not) is not appropriate. It results in institutional funds voting adversely simply by virtue of the statement of non compliance. This is "*as though"* the fact that the CMA lawyers have made up oppressive rules which operate to contravene the law (immediate response where there is loss of independence) and seek to tell people how to run their businesses without responsibility for getting it wrong, going so far as to issue draft orders without even revealing the names of the authors, were some kind of benchmark of "*being good*" and a short-coming if rejected. As matters stand there is no mechanism for charging the CMA for the time of its witnesses it has wasted nor requiring it to account for the economic loss of opportunity as highlighted earlier (above).

4.2. The effect is also that those complying receive a "*tick*" when in fact the purported auditor may have not reported independently and the change is associated with burying knowledge that properly ought to be reported, the usual risk on change. Importantly the resignation of an auditor is an important market signal (reasons must be given). The mechanism the CMA has invented stops the market working properly on a fully informed basis in this regard (e.g. Deloitte re RBS, PwC re Barclays etc).

Part 5

5.1. The Audit Committee comprises directors severally. It cannot become an agent of the Board without rendering the Board meaningless. Public companies standard articles of association require the enterprise to be run by its board. The CMA cannot cause corporates to contravene their articles of association. Telling directors that they "*may consult*" is extraordinarily offensive (5.3).

5.2. There is no negotiation about "*scope"* in regard a statutory audit. The auditor plans his own work because he reports on himself and what he has done. He will report adversely if he does not receive all the information and explanation he requires. Importantly he is precluded from "*double-guessing"* management and when reporting on those operating on "*what they can get away with"* he must assess whether they will succeed and resign, with reasons, if he thinks not or otherwise does not agree.

5.3. The Audit Committee has no executive mandate in regard procurement. If the purported auditor were not independent and did not say, i.e. they became or continued office holder by deception, they would have to be sacked and proceedings brought if harm has been caused. The fee level is not a risk item. Whether staff are qualified or the job is being used to train them is a serious risk. All staff should be named and feature in the report and accounts with potted CV in the same way as directors are subject to public scrutiny; pay and contract terms should be stated as well as insurance arrangements and address for service of documents.

Part 6

6.1. There is no such thing as an "*auditor appointment*". The statutory auditor is an office holder and must comply with independence criteria and assessment at all times before during and after his period of office. There is no difference between a loss of independence six weeks after starting or five years after starting. A purported auditor who skimps on business acceptance in the mistaken belief the government will want him to report positively is punting with their business. They could lose their reputation as being able to get away with whatever they do merely because of who they are.

Part 7

6.2. Enterprises are no longer "*standalone"*. The presumption of a one-to one relationship between enterprise and purported auditor no longer applies and has not since at least the turn of the millennium. The CMA cannot tell global operators either how to run their businesses or how to manage their procurement or other operating risks. The relationship between internal and external auditors has not been addressed and properly ought to have been.

6.3. Imposing rules on UK quoted companies which other jurisdictions do not have is anti-competition in the same was as the ongoing refusal of prosecutors to prosecute wrong-doers and BIS "*policy*" inventing new sections into the Companies Act 2006 so that purported auditors do not get prosecuted.

6.4. There is no such thing as an "*incumbent auditor".* An auditor is a statutory office holder. His period of office is from the day he starts until the period of account where he ends. His liability for the period of office remains for ever. If he has not reported properly he remains fully liable and any notional resignation (or not offering to continue) is of no effect.

6.5. There is no such thing as a "*competitive tender process".* A statutory audit is a commodity activity with the obligations on any vendor identical to the other. The auditor must "*offer*" as only he knows if he is independent, competent, can resource and meet timescales. The decision to potentially change auditor is price and market sensitive and would not normally be notified publicly.

Part 8

8.1. The members of the CMA cannot give "*directions"* without risking becoming shadow directors. The likelihood that they could be fully informed to be able to make a decision is remote to non existent. Any attempt to do this could subject it to action.

Part 9

9.1. The "*monitoring"* that is suggested is totally impossible. The market cannot be regulated by both the FCA and the CMA ie an orderly market must be maintained by the FCA, which has prosecution powers. A third party which has no prosecution powers cannot muscle in, either as prosecutor or under FSMA 2000 more generally. The CMA cannot publish what it does not own and must comply with DPA.

9.2. The maintenance of proper records is a legal obligation with up to seven years imprisonment for defaults. The CMA properly has no powers either to invent extra record keeping or demand inspection. The records are protected under the DPA and the auditor has rights of access as a processor not data controller. The CMA has not dealt with evidence of the purported auditors forging records; destroying records (including in the courts); colluding with lawyers to mislead the FCA, CIB and prosecutors; reporting on banks in regard their indemnified satellite vehicles rather than on those vehicles; or contravening the laws on telling the truth to the statutory auditor (i.e. reporting properly on their own knowledge rather than purging the risk register, signing "*blind*", using "*exceptions based reporting*").

9.3. Importantly the CMA has not addressed the question that on conversion to an attempt at a *"limited liability partnership"* the former statutory auditors knowingly turned themselves into litigation vehicles. These are controlled by secret membership agreements which cede control to the legal centre which operates to eliminate risk before or after it comes home to roost, allowing individuals to "*move on*" or "*retire".* It is apparent that a vehicle of self-interest does not have the independence that is required for a statutory audit function, and that those referring to themselves as "*statutory auditors"* in such circumstances are setting out to mislead and operate on a "*what you can get away with basis",* rather than an independent report on which the directors severally can rely ("*an auditor shall report"* to those charges with governance of the enterprise). The consequences, the current regime of "*scapegoats*", jailing directors for the defaults of their supply chain, is the predictable and predicted outcome.

9.4. Most importantly the CMA has not carried out any explicit investigation into the large firms operating as businesses whilst purporting to be a statutory auditor. It has not reported that by definition a statutory auditor cannot be involved in other activity which is not mainstream assurance reporting and cannot properly operate in tandem with a lawyer accessing insurance and underwriting that negates independence. It has not modelled the devices and instruments used to shift and convert risk, without which any attempt to understand the market is hopeless and public funding is futile to protect the public.

9.5. Spectacularly the CMA has managed to totally overlook all reference to the Transatlantic Trade and Investment Partnership (TTIP) and its impact on reducing quality, reducing choice and making wrongdoers outside the reach of curtailment by government (they can sue if government action affects profit). It ignores the impact of the purported auditors acting to reduce competition by bringing down SMEs and personal estates; separating turnover and contracts from the underlying cost base including employment rights and property expenses and tax, thereby ruthlessly cutting out smaller competitors to themselves or those not wishing to get involved in the risk management substitute for statutory audit; and using statutory audit to achieve credibility to operate in other markets, including with the benefit of the commercial information attained from purported statutory audit and related assurance work. The CMA was told in evidence that it must compare post tax take-home pay of those operating in these businesses which purport to deliver statutory audits with the equivalent statutory work in the official receiver, insolvency service, BIS, Land Registry etc and investigate where these are out of line. It has chosen not to do this, the prima facie indicator that the supply of resource is not operating efficiently.

9.6. The question of trading with personal information; information with is protected by statutory confidentiality; and insider information has not been addressed nor explanation sought from the Information Commissioner as to why there have been no s55 prosecutions. The question of delaying formal notification of resignation has not been addressed nor has omitting to provide true reasons. There is no consideration of omitting to report adversely in circumstances of third party financial dependence or permitting statements to exclude full explanation of financing arrangements and covenant performance history. No report has been made of the use of members accounts to undertake off balance sheet transactions for banks and others including the payment of bribes and passing of proceeds of crime. The dead-line for reporting has been missed with no power to make an out-of-time report/issue a draft order. The excuse (EU making changes) for not having an excuse, is not an excuse.

9.7. Finally there are serious constitutional law issues arising: the law that brought in the CMA and its powers did not state that this was intended to allow the authority of Parliament, voice of the electorate, to be by-passed or undermined. The CMA, through its blind reliance on "*competition lawyers*" has not responded to any of the serious warning signs and objections, nor corrected the "*summary*" these lawyers came up with that first came out when the report was "*finalized*" and which was wrong in law and an embarrassment to the CMA and BIS. The approach raises fundamental questions as it whether the CMA is fit for purpose and the risks to the public of not stopping before the results of its activity hit the courts and, once again, the judiciary are left to invent, as new rules contravene the legal status quo.

9.8. The CMA has thrown down the gauntlet to Parliament and the public by deferring dealing with objections; delaying to the last minute public notification that it has no mechanism for correcting its own mistakes; and slipping out its draft order at the end of July 2014, in the knowledge that Parliament and MPs were in recess not returning by 24 August 2014. It has excluded Trading Standards and the OFT from its work and has not taken evidence from prosecutors or victims.

9.9. There are consequences to further delays in not addressing the foregoing promptly; omitting to review the operations of the CMA, in particular its use of competition lawyers rather than those used to economic modelling, having a hypothesis and testing it as well as experienced in handling witnesses; and consequences for other projects in particular industries subject to statutory audit.

9.10. There is an open question about the standing of the outputs of the review of the audit market given the sheer extent of contraventions in law; operations; process (exam question) and timescales. The constitutional law issues arising in regard the use of Parliament together with the ominous introduction of a *"steer*" from junior BIS ministers, without responsibility, indicates a prima facie ministerial dereliction of duty. Plainly the project needs to go back to the drawing-board and the question must be resolved as to whether the CMA can be made fit for purpose. The public is much worse off by the closing down of the informed and experienced OFT. The thinking is ill-conceived that the public can do without it and without the Parliamentary Committees and Commission or, worse, that a new body as the CMA should be created in order to neutralize their powerful evidence and "*kick into the long grass*" the compelling case for change. The message is plain, that the vested interests themselves have become the unelected government and the CMA, as currently set up and operating, is choosing to do nothing about it.

Mira Makar MA FCA (Miss) - 24 August 2014

references: https://www.gov.uk/cma-cases/statutory-audit-services-market-investigation

Part 1

1. General – title, commencement and scope

1.1 This Order may be cited as The Statutory Audit Services for Large Companies Market Investigation (Mandatory Use of Competitive Tender Processes and Audit Committee Responsibilities) Order 2014. This Order shall come into force on 1 January 2015 and applies to Financial Years beginning on or after 1 January 2015.

1.2 This Order applies to the provision of Statutory Audit Services in the United Kingdom.

1.3 The provisions of this Order apply to a Company from the date on which it enters the FTSE 100 or FTSE 250 index until the date on which it ceases to be a FTSE 350 Company.

1.4 The Order shall continue in force until such time as it is varied or revoked under the Act. The variation or revocation of the Order shall not affect the validity or enforceability of any rights or obligations that arose prior to such variation or revocation.

Part 2

2. Interpretation

2.1 In this Order:

Act means the Enterprise Act 2002;

Audit Committee has the meaning given by paragraph 10B of Schedule 10 to the Companies Act;

Audit Committee Report means the separate section of a FTSE 350 Company's annual report detailing the work of the Audit Committee in discharging its responsibilities and prepared in accordance with the UK Corporate Governance Code as amended from time to time;

Audit Engagement Partner means the individual identified by an Auditor or Incumbent Auditor as being primarily responsible for the conduct of the Statutory Audit;

Auditor means a person eligible for appointment as a statutory auditor under Part 42 of the Companies Act;
Auditor Appointment means the appointment of an Auditor of the accounts of a Company under Part 16 of the Companies Act;
Bidder means any Auditor participating in a Competitive Tender Process;
CMA means the Competition and Markets Authority;
Companies Act means the Companies Act 2006;
Company means a company formed under the Companies Act;
Competitive Tender
Process means *(a)* a process by which a Company invites and evaluates bids for the provision of Statutory Audit Services from two or more Auditors; and *(b)* includes a Competitive Tender Process completed in a period where the Company was not a FTSE 350 Company. Completion of a Competitive Tender Process shall be construed as the first day of the Financial Year in relation to which the Auditor Appointment is made pursuant to that process;
FCA means the Financial Conduct Authority;
Financial Year means the financial year of a Company as determined in accordance with section 390 of the Companies Act;
Firm means an entity, whether or not a legal person, which is not an individual and includes a body corporate, a corporation sole and a partnership or other unincorporated association;
FRC means the Financial Reporting Council;
FTSE 100 index means the share index maintained by the FTSE Group in connection with the 100 companies listed on the London Stock Exchange with the highest market capitalisation from time to time;
FTSE 250 index means the share index maintained by the FTSE Group in connection with the 250 companies listed on the London Stock Exchange consisting of the 101st to 350th companies with the highest market capitalisation from time to time;
FTSE 350 Company means a Company whose equity shares are admitted to trading on the London Stock Exchange and which is included on the FTSE 100 index or FTSE 250 index;
FTSE Group means the business of FTSE International Limited operating under the FTSE Group name;
Group means a parent undertaking and its subsidiary undertakings;
Incumbent Auditor means the person serving as Auditor to the FTSE 350 Company at the time at which relevant obligations arise pursuant to this Order;
Listing Rules means the set of requirements for companies listed on a United Kingdom stock exchange and which are the responsibility of the FCA operating as the United Kingdom Listing Authority;
London Stock
Exchange means the main market of the stock exchange provided by the London Stock Exchange PLC;
Non-Audit Services means any professional service provided by an Auditor to the FTSE 350 Company other than Statutory Audit Services;
Parent Undertaking has the meaning given by section 1162 of the Companies Act;
Person includes any individual, firm, partnership, body corporate or association;
Report means the report of the CC entitled *Statutory audit services for large companies market investigation: a report on the provision of statutory audit services to large companies in the UK* and notified on 15 October 2013;
Statutory Audit means an audit carried out in accordance with Part 16 of the Companies Act;
Statutory Audit
Services means the professional services provided by an Auditor in performing a Statutory Audit;
Statutory Audit
Services Agreement means an agreement between an Auditor and a FTSE 350 Company for the provision of Statutory Audit Services in connection with an Auditor Appointment and includes the renewal of such an agreement in connection with a subsequent Auditor Appointment;
Subsidiary
Undertaking has the meaning given by section 1162 of the Companies Act;
UK Corporate
Governance Code means the FRC's UK Corporate Governance Code which applies to companies with a premium listing of equity shares under the Listing Rules. 2.2 In this Order any reference to:
(a) '**working day**' means any day except for Saturday, Sunday, Christmas Day, Good Friday or a bank holiday under the Banking and Financial Dealings Act 1971; and
(b) a government department or non-departmental public body or organisation or person includes a reference to its successor in title.
2.3 The headings used in the Order are for convenience and have no legal effect.
2.4 References to any statute or statutory provisions shall be construed as references to that statute or statutory provision as amended, re-enacted or modified, whether by statute or otherwise.
2.5 The Interpretation Act 1978 applies to this Order except where words and expressions are expressly defined.
2.6 The provisions of this Order are without prejudice to the duties and liabilities attaching to directors by law.
Part 3
3. The prohibition
3.1 An Auditor and a FTSE 350 Company must not enter into or give effect to a Statutory Audit Services Agreement unless:
(a) subject to Article 6, the FTSE 350 Company has made an Auditor Appointment pursuant to a Competitive Tender Process in relation to one or more of the preceding nine consecutive Financial Years or has conducted a Competitive Tender Process for an Auditor Appointment in relation to the next Financial Year immediately subsequent to the nine preceding Financial Years;
(b) the terms of the Statutory Audit Services Agreement, including, to the extent permissible by law and regulations, the Statutory Audit fee and the scope of the Statutory Audit, have been negotiated and agreed only between:
(i) the Audit Committee, either acting collectively or through its chairman, for and on behalf of the board of directors; and
(ii) the Auditor; and
(c) the provisions of Article 4 have been complied with.
Part 4
4. Mandatory use of Competitive Tender Processes – further provisions
4.1 Where a FTSE 350 Company has not completed a Competitive Tender Process for Auditor Appointments in relation to five consecutive Financial Years, the Audit Committee must set out in the Audit Committee Report relating to the fifth Financial Year:
(a) the Financial Year in which the FTSE 350 Company proposes that it will next complete a Competitive Tender Process; and
(b) the reasons as to why completing a Competitive Tender Process in the Financial Year proposed is in the best interests of the FTSE 350 Company's members.
4.2 The information specified in Article 4.1(a) and (b) must also be supplied by the Audit Committee in each subsequent Audit Committee Report (following the Audit Committee Report referred to in Article 4.1) until such time as the FTSE 350 Company completes a Competitive Tender Process.
4.3 Where the Audit Committee considers that the proposed Financial Year is no longer appropriate for the completion of a

Competitive Tender Process, it must provide reasons for the decision in the Audit Committee Report published immediately subsequent to the making of the decision.
4.4 Subject to Article 6, the FTSE 350 Company, in preparing its tender documents, must have regard to the need to ensure that tender documents allow Bidders to understand its business and the type of Statutory Audit to be carried out.

Part 5

5. Audit Committee responsibilities – further provisions

5.1 Only the Audit Committee, acting collectively or through its chairman, and for and on behalf of the board of directors, is permitted:
(a) to the extent permissible by law and regulations, to negotiate and agree the Statutory Audit fee and the scope of the Statutory Audit;
(b) to initiate and supervise a Competitive Tender Process;
(c) to make recommendations to the board of directors as to the Auditor Appointment pursuant to the Competitive Tender Process;
(d) to influence the appointment of the Audit Engagement Partner; and
(e) subject to Article 5.2, and to the extent permitted by law and regulations, to authorise an Incumbent Auditor or an Auditor appointed to replace an Incumbent Auditor to provide any Non-Audit Services to the FTSE 350 Company or the Group of which that FTSE 350 Company is a part, prior to the commencement of those Non-Audit Services.
5.2 The Audit Committee may specify a policy for permitted Non-Audit Services including setting materiality thresholds based on the value of the proposed
Non-Audit Service engagements.
5.3 The Audit Committee may consult such persons as it deems appropriate in the performance of the obligations in Articles 3.1(b), 4.1, 5.1 and 5.2.

Part 6

6. Transitional provisions – mandatory use of Competitive Tender Processes

6.1 Subject to Article 6.2:
(a) where an Incumbent Auditor has been the subject of Auditor Appointments with a FTSE 350 Company in relation to 20 or more consecutive Financial Years as at 17 June 2014, Articles 3.1(a) and 4.4 shall apply in respect of Auditor Appointments made on or after 17 June 2020; or
(b) where an Incumbent Auditor has been the subject of Auditor Appointments with a FTSE 350 Company in relation to 11 or more but less than 20 consecutive Financial Years as at 17 June 2014, Articles 3.1(a) and 4.4 shall apply in respect of Auditor Appointments made on or after 17 June 2023; or
(c) where an Incumbent Auditor has been the subject of Auditor Appointments with a FTSE 350 Company in relation to less than 11 consecutive Financial Years as at 17 June 2014, Articles 3.1(a) and 4.4 shall apply in respect of Auditor Appointments made on or after 17 June 2016.
6.2 Where an Auditor other than the Incumbent Auditor as at 17 June 2014 is the subject of an Auditor Appointment with a FTSE 350 Company on or after 17 June 2016, Articles 3.1(a) and 4.4 shall apply in respect of that and all subsequent Auditor Appointments.

Part 7

7. Monitoring and compliance

7.1 A FTSE 350 Company must include a statement of compliance with the provisions of this Order in the Audit Committee Report for each Financial Year.
7.2 The Incumbent Auditor must, where requested by the CMA, provide, within 15 working days of the request, a schedule of the following information to the CMA in relation to each FTSE 350 Company for which it is the Incumbent Auditor on the relevant date:
(a) the last Financial Year in which the FTSE 350 Company completed a
Competitive Tender Process; and
(b) in relation to the Audit Committee Report published immediately prior to the relevant date:
(i) whether the FTSE 350 Company has included a statement of compliance with the provisions of this Order;
(ii) whether the Audit Committee has made a statement in accordance with the provisions in Articles 4.1 or 4.2; and
(iii) if the Audit Committee has made such a statement, the next Financial Year in which the FTSE 350 Company intends to complete a Competitive Tender Process.
7.3 For the purposes of Article 7.2, '**relevant date**' means [1 January], beginning with [1 January 2016] and annually thereafter.

Part 8

8. Directions by the CMA as to compliance

8.1 The CMA may give directions falling within Article 8.2 to:
(a) a person specified in the directions; or
(b) a holder for the time being of an office so specified in any body of persons whether incorporated or unincorporate.
8.2 Directions fall within this paragraph if they are directions:
(a) to take such actions as may be specified or described in the directions for the purpose of carrying out, or ensuring compliance with, this Order; or
(b) to do, or refrain from doing, anything so specified or described which the person might be required by this Order to do or refrain from doing.
8.3 In Article 8.2 above, 'actions' includes steps to introduce and maintain arrangements to ensure that any director, employee or agent of an Auditor, Incumbent Auditor or FTSE 350 Company carries out, or secures compliance with, this Order.
8.4 The CMA may vary or revoke any directions so given.

Part 9

9. Supply of information to the CMA

9.1 Any person to whom this Order applies is required to provide to the CMA any information and documents required for the purposes of enabling the CMA to monitor the carrying out of this Order or any provisions of this Order and/or to review the effectiveness of the operation of this Order, or any provision of this Order.
9.2 Any person to whom this Order applies may be required by the CMA to keep and produce those records specified in writing by the CMA that relate to the operation of any provisions of this Order.
9.3 Any person to whom this Order applies and whom the CMA believes to have information which may be relevant to the monitoring or the review of the operation of any provisions of this Order may be required by the CMA to attend and provide such information in person.
9.4 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.