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Competition Appeal Tribunal rules that use of data rooms is lawful in market investigations, but criticises restrictive access conditions

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In competition investigations, competition authorities receive substantial amounts of confidential business information, some of which will be commercially very sensitive. This information may be used in economic modelling or otherwise be used by the authority to identify anti-competitive conduct, effects or market structures. Some information may be exculpatory.

In a recent judgment (*BMI Healthcare and others v. Competition Commission*), the Competition Appeal Tribunal ("**CAT**") had to assess the legality of arrangements put in place by the Competition Commission ("**CC**") to establish, under restrictive access conditions, a data room in which parties' advisers could review highly confidential information.

The CC's conflicting duties of fairness and protection of confidential information

Competition authorities must balance their duties to protect both the rights of defence of parties under investigation (which favours disclosure) and the confidentiality of information (which favours protection against disclosure), in order to ensure that their procedures are fair and respect due process and parties' rights of defence.

The CC must balance such conflicting duties when conducting market investigations. Under the Enterprise Act 2002, it must consult and give reasons before adopting a final decision (s.169) and must protect confidential information received by it (s.237). It is also subject to common law obligations to act fairly in exercising its powers, including by informing parties that may be adversely affected by its final decision (which could include an order to divest assets) of the case against them and to permit them to make representations.

The dispute

The dispute arose in the context of the CC's Private Healthcare market investigation. Amongst other issues, the CC investigated whether local concentration of private hospitals limited patient choice and led to higher prices for insurers and self-paying patients.

To test this theory of harm, the CC used highly confidential data provided by hospitals and insurers to undertake a number of econometric analyses. In its Provisional Findings (published in late August), the CC stated that in many local areas, there was little competition between private

hospitals, allowing the three largest operators (BMI, HCA and Spire) to charge higher prices and make returns considerably in excess of their costs of capital. The CC therefore indicated, in its Notice of Possible Remedies, that it was minded, amongst other remedies, to require these operators to divest certain hospitals, to increase local competition in a number of areas.

Parties involved in a CC market investigation are entitled to comment on both the CC's Provisional Findings and its Notice of Possible Remedies. Self-evidently, the three largest hospital operators wished to rebut the findings that they possessed market power and were charging excessive prices. They therefore wished to have access to the data and econometric models used by the CC, as well as unredacted versions of the Provisional Findings and Notice of Possible Remedies. Equally, self-evidently, the insurers consider their data to be highly commercially sensitive and did not want it to be released to the hospitals.

The CC therefore established a data room, but under highly restrictive conditions. The three hospitals challenged the conditions under which their advisers could have limited access to the data room. In particular they objected to the CC limiting access to three external advisers, who were permitted to attend the data room on only two days, and prohibitions on the advisers copying or making notes of any third party confidential data and removing notes from the data room.

The CAT's judgment: use of data rooms is lawful

In a judgment handed down only two days after the hearing, the CAT confirmed that the CC is entitled to use a data room (or, less restrictively, a "confidentiality ring") as a means of protecting sensitive confidential information.

A data room may be used where the sensitivity of the information in question warrants it and the limited disclosure to named external advisers is sufficient to enable a party to make a worthwhile response to the CC's preliminary findings against. The CC is the "primary arbiter" of when information is "sensitive" and that its decision to use a data room is not susceptible to judicial review. The same would presumably apply to a decision to use a confidentiality ring, which imposes less onerous restrictions, but still limits access to confidential data.

The CAT's judgment: the terms of access to a data room must be fair and enable parties to make a full response to allegations against them

Although establishment of a data room is a matter for the CC, the CAT considered that it was entitled to review the terms upon which the CC provided access to the data room.

The CAT held that where economic data is used to undertake modelling, the results of which form part of the findings made against a party, a high degree of transparency and disclosure to external advisers is required in order that a party could prepare its response to the CC's findings against it. Only in this way can a party review, understand and test the data relied upon and the models used by the CC and thereby formulate its response to the CC's analysis, findings and remedy proposals.

Therefore, in establishing a data room, the CC must; (i) allow the external advisers to make full notes in the data room (even if the notes cannot be removed from it); (ii) provide the means for the advisers to draft a proper and considered response to the CC's findings, including by discussing matters between themselves and (without disclosing confidential information) with others outside the room, using other materials available to them and testing the robustness of the CC's economic modelling; and (iii) provide sufficient access to the data room, on multiple occasions, since the

drafting of a party's response is an iterative process.

Having established these principles, the CAT held that the conditions under which the CC had established the data room were unfair. It had therefore breached its obligations to consult and to conduct a fair investigative procedure.

Comment

The CAT has sought to strike a balance between two conflicting principles: fair procedures and protecting confidential information. Its judgment is welcome and will provide parties to CC investigations with the opportunity to test robustly the CC's analysis and thereby lead to better decision-making.

Although the CAT's judgment concerns CC market investigations, the principles laid down by the CAT would appear to apply equally to merger and antitrust investigations by the Office of Fair Trading, the CC and – from 1 April 2014 – the Competition and Markets Authority ("**CMA**"): the relevant legislation contains similar obligations to consult before adopting final decisions and to protect confidential information. Whilst, in draft guidelines published for consultation (see *Transparency and disclosure: Statement of the CMA's policy and approach* (July 2013) and Competition *Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases and Competition and Markets Authority Competition Act 1998 Rules* (September 2013)), the CMA anticipates the use of confidentiality rings and data rooms, these may require amendment to reflect the principles laid down by the CAT.

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