



COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPLICATION UNDER SECTION 179 OF THE ENTERPRISE ACT 2002

CASE No. 1218/6/8/13

Pursuant to rules 15 and 25 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003) (the “Rules”), the Registrar gives notice of the receipt on 17 September 2013 of an application for review under section 179(1) of the Enterprise Act 2002 (the “Act”). BMI Healthcare Limited (“BMI”) applies for review of a decision by the Competition Commission (the “Commission”) in relation to the use of certain information obtained in a “disclosure room” relating to the Commission’s ongoing investigation into the private healthcare market (the “Investigation”). BMI is represented by Shearman & Sterling (London) LLP of Broadgate West, 9 Appold Street, London EC2A 2AP (ref: James Webber).

The Commission published its provisional findings report and notice of intended remedies in relation to the Investigation on 28 August 2013, and BMI is required to provide any response by 1 October 2013. According to the application, on 9 and 10 September 2013, having signed confidentiality undertakings, three representatives of BMI (the “BMI Inspectors”) entered a disclosure room managed by the Commission containing certain confidential information on which the Commission’s provisional findings rest. There the BMI Inspectors saw certain data which they informed the Commission they considered to be evidence undermining the Commission’s case against BMI (the “Requested Evidence”). The BMI Inspectors wish to liaise with BMI’s other advisers and use the Requested Evidence in formulating BMI’s response to the provisional findings. By its application, BMI challenges the Commission’s failure to permit the BMI Inspectors so to use the Requested Evidence (the “Decision”).

In summary, BMI’s grounds of review are that the Commission’s decision, having already permitted the BMI Inspectors to view all of the data in the disclosure room, not to permit the BMI Inspectors to use any such data which they consider to undermine the Commission’s case against BMI when it responds to that case, is an erroneous exercise of discretion and wrong in law because it is:

- (1) irrational, in that there can be no good reason for the Commission to preclude BMI from relying on information which BMI needs to use to defend itself; and
- (2) in breach of the Commission’s statutory duty in section 169(2) of the Act to consult, which entails a duty to consult fairly and a right on the part of BMI to be heard.

By way of relief, BMI requests the Tribunal to quash the Decision and make an order mandating the Commission to permit the use of the Requested Evidence for the purposes of formulating BMI’s response to the provisional findings. Further or alternatively, BMI seeks such further or other relief as the Tribunal deems fit.

BMI states that, unless the Commission suspends or extends the deadline for BMI’s response to the provisional findings, BMI will request that the Tribunal direct a compressed timetable for these proceedings, facilitating the determination of the application sufficiently in advance of 1 October 2013 to enable use of the Requested Evidence in BMI’s response to the provisional findings, or alternatively that the Tribunal orders an extension of the deadline of 1 October 2013 by way of interim relief.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules. Pursuant to the Order of the Tribunal abridging time for applying for permission to intervene (made 18 September 2013), any request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal,

Victoria House, Bloomsbury Place, London, WC1A 2EB, so that it is received **no later than 12 noon on 20 September 2013**.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar

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