



COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPLICATION UNDER SECTION 179 OF THE ENTERPRISE ACT 2002

CASE No. 1220/6/8/13

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 2 October 2013 of an application for review under section 179(1) of the Enterprise Act 2002 (the “Act”), by BMI Healthcare Limited (“BMI”), for a review of a decision dated 27 September 2013 made by the Competition Commission (the “Commission”) refusing to grant access to certain information and documents 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 background to this matter is set out in paragraphs 24-35 of the Tribunal’s decision dated 2 October 2013 in Case No.: 1218/6/8/13 *BMI Healthcare Limited v Competition Commission*, [2013] CAT 24 (“the Judgment”)¹. The Judgment relates to an application made by BMI on 17 September 2013 (“the first application”) challenging a decision by the Commission imposing restrictions on the use which BMI’s advisers might make of information contained in a “disclosure room”. For the reasons set out in the Judgment, the Tribunal concluded that the Commission’s rules governing the disclosure room did not allow a proper and informed response to be made to the Commission’s provisional findings. Accordingly, the decision was in breach of the Commission’s statutory duty in section 169 of the Act and in breach of the rules of natural justice.

In the present application, BMI challenges the Commission’s refusal to grant access that was requested by BMI in a letter of 16 September 2013 to: (i) information and documents concerning centrally relevant issues in the Investigation; and (ii) any exculpatory material in the Commission’s possession (the “Decision”). The present application, therefore, concerns evidence that the Commission is refusing to make available to BMI at all, rather than the restrictions imposed on such disclosure. According to BMI, the present application is thus related to, but does not overlap with, the first application.

In summary, BMI contends that the Decision is wrong in law, unfair and contrary to the principles of natural justice. BMI’s case is that the Decision is unfair as it unnecessarily hampers BMI’s ability to challenge the analysis in the provisional findings report (the “PFs”) and the candidate remedies identified in the notice of intended remedies (the “Remedies Notice”); and that the Commission has wrongly failed to make sufficient disclosure to enable BMI to make meaningful and focused representations on important issues.

By way of relief, BMI requests:

1. The Tribunal quash the Decision and make an order referring the matter back to the Commission with a direction to reconsider and make a new decision disclosing the information and documents BMI has requested to BMI’s external advisers, subject to reasonable and proportionate confidentiality restrictions.
2. Such further or other relief as the Tribunal deems fit.
3. An order that the Commission pays BMI’s costs of and occasioned by this application.

¹ http://www.catribunal.org.uk/files/1218_BMI_Judgment_021013.pdf

4. The Tribunal direct the Commission, by way of interim relief, to extend the administrative deadline for response to the PFs and the Remedies Notice by at least 14 days from the later of disclosure being made pursuant to this application or the Tribunal's judgment on this application.

BMI states that the purpose of its application is to enable BMI to obtain access to the requested evidence in sufficient time for BMI to be able to incorporate its analysis of the requested evidence in its response to the PFs and the Remedies Notice.

The current administrative timetable anticipates a final deadline for all parties' responses/submissions on the provisional decision on remedies in January 2014. BMI submits that this administrative deadline will need to be extended by the same period as the extension to the period for submission of the responses to the PFs and the Remedies Notice. Accordingly, BMI requests that the Tribunal direct a compressed timetable for the determination of the present application.

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 Tribunal's Order of 9 October 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 5pm on 15 October 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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