Neutral citation [2013] CAT 24

**IN THE COMPETITION APPEAL TRIBUNAL**

Case Number: 1218/6/8/13

2 October 2013

Before:

MARCUS SMITH Q.C.
(Chairman)
WILLIAM ALLAN
MARGOT DALY

Sitting as a Tribunal in England and Wales

BETWEEN:

**(1) BMI HEALTHCARE LIMITED**
**(2) HCA INTERNATIONAL LIMITED**
**(3) SPIRE HEALTHCARE GROUP**

Applicants

- and -

**COMPETITION COMMISSION**

Respondent

- and -

**THE LONDON CLINIC**

Intervener

Heard at Victoria House on 30 September 2013

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**JUDGMENT**

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## APPEARANCES

Mr. James Flynn Q.C. and Mr. Gerald Rothschild (instructed by Shearman & Sterling (London) LLP) appeared for BMI Healthcare Limited.

Mr. Stephen Morris Q.C. and Miss Patricia Edwards (instructed by Nabarro LLP) appeared for HCA International Limited.

Mr. Daniel Beard Q.C. and Miss Alison Berridge (instructed by Freshfields Bruckhaus Deringer LLP) appeared for Spire Healthcare Group.

Miss Kassie Smith Q.C. and Mr. Rob Williams (instructed by the Treasury Solicitor) appeared for the Competition Commission.

Pursuant to the Tribunal's Order of 24 September 2013, the Intervener, The London Clinic, made written submissions only.

## I. INTRODUCTION

1. The market investigation regime established by the Enterprise Act 2002 (the "Act") focuses on markets, rather than on the behaviour of individual firms, and requires the Competition Commission (the "Commission"), when a market reference has been made to it by the Office of Fair Trading (the "OFT"), to investigate whether the features of a particular market have an adverse effect on competition. A wide range of remedies is available to the Commission to eliminate, so far as possible, such adverse and detrimental effects on customers as the Commission may identify. Such remedies can include orders that an individual firm divest itself of assets.

2. Most, if not all, of the Commission's market investigations will involve consideration by it of confidential information provided to it by persons involved in or interested in or having knowledge of the market being investigated. These persons will often be concerned that such information remains confidential.

3. Those firms involved in the market being investigated, in particular those firms who may be the subject of remedies that the Commission may impose (which may include divesture), may often have an interest in seeing, and in being able to respond to, such confidential information.

4. It is obvious that, to an extent and depending on the circumstances, these two interests (the protection of confidential information on the one hand, and the rules of natural justice on the other) will conflict. This case is about that conflict.

5. Essentially, the Applicants all contend that the Commission has acted irrationally (in the sense in which that word – a term of art – is understood in the context of judicial review), in breach of its statutory duty to consult under section 169 of the Act and in breach of the principles of natural justice in a decision made by it regarding the disclosure of certain evidence relating to an investigation by the Commission into the private healthcare market (the "Investigation"). More specifically:

(1) By an application dated 17 September 2013, BMI Healthcare Limited ("BMI") applied for a review of a decision by the Commission to withhold from BMI or limit BMI's access to certain evidence on terms which will be considered in greater detail below (the "BMI Application"). That application is made under section 179 of the Act, which provides for the review of decisions of (amongst others) the Commission in connection with a market investigation reference. Such applications must be determined by the Tribunal applying the same principles as would be applied by a court on an application for judicial review.

(2) By an order dated 18 September 2013, the Tribunal abridged the time for lodging a request for permission to intervene in these proceedings to 12pm on 20 September 2013. Two requests for permission to intervene in support of BMI were received, from HCA International Limited ("HCA") and Spire Healthcare Group ("Spire"). Upon considering the substance of these applications, the Tribunal ordered on 20 September 2013 that HCA's and Spire's requests for permission to intervene be treated as notices of application for review under section 179 (respectively, the "HCA Application" and the "Spire Application"). All of BMI, HCA and Spire were given permission to cross-intervene in each other's Applications.

(3) The Tribunal abridged the time for lodging a request for permission to intervene in the HCA and/or Spire Applications to 2pm on 23 September 2013. An application for permission to intervene in the HCA and Spire Applications in support of the Commission was made by The London Clinic ("TLC") and, by an order dated 24 September 2013, TLC was given permission to intervene in these applications, such permission to be limited to written observations only.

(4) The Commission filed and served its defence (which was also the Commission's skeleton argument) on 25 September 2013 and TLC filed a skeleton argument on the same date. Skeleton arguments of BMI, HCA and Spire were filed and served on 27 September 2013.

6. At a case management conference that took place on 20 September 2013, the Tribunal ordered that the BMI, HCA and Spire Applications be heard on 30 September 2013. It was made clear that this hearing would deal only with points of principle, and that the Tribunal would not – at least at this hearing – be prepared to consider submissions in relation to particular documents. Such submissions, if any, would have to be dealt with on a later occasion. For this reason, despite the highly confidential material at issue in all of the Applications, no confidentiality ring was established for the purposes of the hearing.

7. The Applications and the Commission's defence were all supported by evidence in the form of documents and witness statements, which together with the pleadings, skeleton arguments and oral submissions we have taken fully into account. We are grateful to all the parties for the impressive speed with which they have brought together the necessary material so as to enable the Applications to be heard as quickly as they have been.

## II. THE RELEVANT STATUTORY PROVISIONS

8. Unsurprisingly, the Act makes provision both for the protection of confidential information and for the Commission to consult with persons interested in a market investigation.

9. The provisions relating to market investigations are contained in Part 4 of the Act. Section 169 of the Act contains a duty on the Commission to consult. Essentially, by virtue of section 169(1), where the Commission is proposing to make a decision following a market investigation reference pursuant to section 134 of the Act which the Commission considers is likely to have a substantial impact on the interests of any person, the Commission must:

   (1) So far as practicable, consult that person about what is proposed before making that decision: section 169(2);

   (2) In consulting the person concerned, so far as practicable, give the Commission's reasons for the proposed decision: section 169(3).

10. By section 169(4), in considering what is "practicable" for the purposes of section 169, the Commission shall, in particular, have regard to:

    (1) Any restrictions imposed by any timetable for the making of the decision: section 169(4)(a); and

    (2) Any need to keep what is proposed, or the reasons for it, confidential: section 169(4)(b).

11. Turning, for the moment, to the need to protect confidentiality articulated in section 169(4)(b), Part 9 of the Act contains a series of provisions dealing with information coming to the Commission. Section 238(1) defines the term "specified information". For present purposes, information is specified information if it comes to the Commission in connection with the exercise by the Commission of any function it has under Part 4 of the Act. This is so whether the information came to the Commission before or after the passing of the Act.

12. It follows, therefore, that all of the information obtained by the Commission pursuant to its Investigation is specified information within the meaning of section 238. Section 237 of the Act provides so far as material as follows:

> "(1) This section applies to specified information which relates to-
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> (a) the affairs of an individual;
>
> (b) any business of an undertaking.
>
> (2) Such informatiom must not be disclosed-
>
> (a) during the lifetime of the individual, or
>
> (b) while the undertaking continues in existence, unless the disclosure is permitted under this Part."

13. Part 9 then contains a series of provisions permitting information to be disclosed. These provisions (in very brief summary) are as follows:

    (1) Where the information has previously, and properly, been disclosed to the public: section 237(3).

    (2) Where the disclosure is consented to: section 239.

(3) Where the disclosure is required for the purpose of an EU obligation: section 240.

(4) Where the disclosure is for the purpose of facilitating the Commission's functions: section 241.

(5) Where the disclosure is done in connection with civil proceedings (section 241A) or criminal proceedings (section 242) or to an overseas public body (section 243).

14. For present purposes, the only one of these provisions that needs to be considered further is section 241, where the disclosure is made for the purpose of facilitating the Commission's statutory functions. Section 241 provides so far as material as follows:

> "(1) A public authority [here: the Commission] which holds information to which section 237 applies may disclose that information for the purpose of facilitating the exercise by the authority of any function it has under or by virtue of this Act or any other enactment.
>
> (2) If information is disclosed under subsection (1) so that it is not made available to the public it must not be further disclosed by a person to whom it is so disclosed other than with the agreement of the public authority for the purpose mentioned in that subsection."

It was not disputed before us that the Commission's duty to consult under section 169 constituted a "function" of the Commission under the Act.

15. Section 244 of the Act sets out certain conditions relevant to the disclosure of specified information:

> "(2) The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the authority thinks is contrary to the public interest.
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> (3) The second consideration is the need to exclude from disclosure (so far as practicable) -
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> (a) commercial information whose disclosure the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or
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> (b) information relating to the private affairs of an individual whose disclosure the authority thinks might significantly harm the individual's interests.

(4) The third consideration is the extent to which the disclosure of the information mentioned in subsection (3)(a) or (b) is necessary for the purpose for which the authority is permitted to make the disclosure."

16. The importance of the due protection of specified information – including by the Commission – cannot be under-stated: disclosure other than by means of an authorised statutory "gateway" is a criminal offence by virtue of section 245.

## III. THE COMMISSION'S GUIDELINES

17. In April 2013 the Commission published guidance CC7 (Revised), entitled "Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973" (the "CC7 Guidance"). The CC7 Guidance is intended to set out the approach of the Commission and – within the Commission – the approach of the groups who actually carry out market investigations ("Groups").

18. The CC7 Guidance notes (in paragraph 2.1) that the Commission "aims to be open and transparent in its work while, as appropriate, maintaining the confidentiality of information that it obtains during its inquiries and reviews". When balancing these objectives of transparency and confidentiality, the Group within the Commission carrying out the inquiry or review obviously must have regard to the statutory framework (paragraph 5.1 of the CC7 Guidance: the framework is set out in Section II above), together with the Commission's rules and guidance relating to the process and conduct of investigations. In addition, however, the following factors, which are set out in paragraph 5.2 of the CC7 Guidance, are relevant:

"*(a)* the desirability of Groups taking a consistent approach when applying the principles of disclosure;

*(b)* the desirability of avoiding unnecessary burdens on business, the need to conduct investigations effectively and efficiently, the need to reach properly reasoned decisions within statutory and administrative timescales;

*(c)* the need to disclose information supplied to the [Commission] so that interested persons (main parties or other interested persons) are able to comment on matters affecting them and so that they can draw to the [Commission's] attention any inaccuracies, incomplete or misleading information;

*(d)* the need to protect some information provided to it in the course of its inquiries or reviews and the importance of maintaining the [Commission's] reputation for doing so;

*(e)* the [Commission's] analysis as it affects them; and

*(f)* the desirability of making sufficient information available to the public so that the public may become aware of the main issues arising in inquiries and reviews and are in a more informed position to provide information to the Group.

These considerations may inform the Group as to whether particular information should be disclosed, to whom and the manner of disclosure."

19. The Commission will use its publication of provisional findings and notices of possible remedies as a means of meeting its duty to consult. Thus, paragraph 7.1 of the CC7 Guidance notes:

"The [Commission's] rules require the [Commission] to publish a number of documents, notably the provisional findings and notice of possible remedies, during an investigation. Additionally, the [Commission] has developed a practice of consulting on its provisional decision on remedies (usually through disclosure to the merger parties in merger inquiries and publication in market investigations). The disclosure of provisional findings and a provisional decision on remedies is the main means by which the [Commission] ensures due process and fulfils its duty to consult on certain decisions under section 104 of the Act. When reviewing remedies, the [Commission] similarly publishes a provisional decision either before or as part of publishing a notice of intention to vary or terminate undertakings or orders."

20. The reference to section 104 of the Act is a reference to the duty to consult in respect of merger inquiries; but we can see no reason why paragraph 7.1 is not equally applicable to the duty to consult contained in section 169, and which applies in this case.

21. The CC7 Guidance also considers the various ways in which confidential information may be protected:

"9.14 Groups will often have to consider how information contained in any disclosed documents should be presented or how access should be allowed to confidential information in order to provide protection. There are a number of possible ways in which confidential information may be protected including:

*(a)* provision of ranges as an alternative to providing exact figures (for example, when indicating market shares...);

*(b)* provision of aggregated data as an alternative to individual responses or data (for example, by aggregating sales or purchase figures or by providing a summary of responses from customers);

*(c)* provision of aggregated summaries of submissions and responses to questionnaires;

*(d)* excision of the confidential information from documents (for example, of names, locations and data) when the information excised is not material to the [Commission's] inquiries or its decision or where the excision does not affect the comprehension of the document for the reader concerned;

*(e)* anonymizing the information;

*(f)* disclosure to one or more parties but without publication;

*(g)* disclosure subject to restrictions (for example, disclosure to parties' professional advisers subject to receipt of undertakings); and

*(h)* use of a data room (for example, when a Group considers that access to specific data should be provided but that the sensitivity of the information concerned necessitates additional safeguards to protect the information...

9.15 Of the forms identified in paragraph 9.14, the first four methods will be the usual approaches to take. The sixth, (f) is generally applicable when a Group considers it necessary to disclose a working paper (or part of a working paper) to a party for reasons of due process, and the information is pertinent to one party only. This may also be the method deployed when a Group is concerned that wider publication could be harmful to the functioning of the market."

22. The CC7 Guidance says as follows as regards data rooms:

"9.17 The use of a data room is an option that may be considered when a Group is satisfied of the need to disclose the information for reasons of due process but considers that, due to the nature of the information, additional safeguards are appropriate. Use of a data room has the advantage of limiting further use of the information (and, in the case of surveys, may be a way of ensuring that the identity of individual respondents remains anonymous). However, because of the resource implications associated with their operation they should be used sparingly.

9.18 As their name implies, data rooms may be used when a Group concludes that it is appropriate to provide access to data in order to enable the parties' economic advisers to gain further understanding of the [Commission's] analysis and to examine the data in order to respond to the [Commission's] findings. It will seldom be appropriate to allow access to the parties' other advisers or to use a data room to enable greater access to other information. Those having access to a data room are bound by the rules which the [Commission] applies to the data room and also to undertakings which they provide. These make provision for the proper conduct of the data room and restrict the use and further disclosure of information to which the advisers have access.

9.19 The point at which access should be provided will depend upon the circumstances of the case. Generally, a Group should be resistant to requests made early in an investigation when the relevance of the information requested remains unclear. This is because of the sensitivity of the information and also the resource implications of setting up a data room. Groups may wish to consider both the need for and alternatives to a data room..."

23. The CC7 Guidance says nothing specific about confidentiality rings.

## IV. THE FACTS OF THIS CASE

24. On 4 April 2012, the OFT made a reference to the Commission for an investigation into the private healthcare market pursuant to section 131 and 133 of the Act. On 28 August 2012, the Commission published a notice and summary of its provisional findings and a notice as to possible remedies. On 2 September 2013, the Commission published its provisional findings report. We refer to the provisional findings report and the notice of possible remedies collectively as the "Provisional Findings". The deadline for responses or submissions to these documents was – at this time – 1 October 2012.

25. The Commission reached its Provisional Findings at least in part on the basis of specified information, significant parts of which are excised from the Provisional Findings. Thus, for example, paragraphs 2.31, 3.9, 3.11, 3.13, 3.14, 3.15, 3.22, 3.23, 3.29, 3.33, 3.37, 3.38, 3.39, 3.40, 3.42, 3.43, 3.48, 3.77, 3.99, 3.102, 3.106, 3.110, 5.25, 5.27, 5.28, 5.29, 6.34, 6.40, 6.117, 6.118, 6.149, 6.161, 6.215, 6.216, 6.217, 6.220, 6.222, 6.223, 6.224, 6.226, 6.227, 6.228, 6.245, 6.247, 6.272, 6.275, 6.277, 7.45, 7.46, 7.47, 7.48, 7.49, 7.50, 7.51, 8.11, 8.12, 8.13, 8.16, 8.17, 8.18, 8.19, 8.20, 8.21, 8.22, 8.24, 8.25, 8.26, 8.30, 8.32, 8.33, 8.34, 8.35, 8.37, 8.39, 8.40, 8.41, 8.50, 8.69, 8.70, 8.79, 8.80, 8.81, 8.84, 8.101, 9.25, 9.61 of the Commission's provisional findings report contain excisions (marked by the symbol "[✂]"). The same is true of the annexes to the provisional findings report. Other paragraphs substitute ranges for (what we presume to be) specific figures (e.g. paragraphs 6.127, 6.128 and 6.130).[1]

[1] We should emphasise that whilst this goes to show that the provisional findings report was heavily redacted, not all of the redactions will have been due to what we define as "Confidential Information" in paragraph 31(1) below. Some of the redactions will have been due to specified information that is not Confidential Information. We are not in a position to set out a comprehensive list of redactions

26. The cover page of the provisional findings report contains the following statement:

> "The Competition Commission has excluded from this published version of the provisional findings report information which the inquiry group considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✂]. Some numbers have been replaced by a range. These are shown in square brackets. Non-sensitive wording is also indicated in square brackets."

27. A number of points can be made in relation to these excisions and redactions:

(1) In a number of cases, the redactions are such that the sense of the paragraph is completely lost. Thus, by way of example, paragraph 6.224 provides:

> "In relation to individual PMIs, [✂]."

Paragraph 6.227 is to similar effect.

(2) It is not clear, in many cases, precisely how much text has been excised. The symbol "✂" used by the Commission to identify an excision does not actually indicate how much text has been excised.

(3) The excisions have not been made because the material is irrelevant, but because it is confidential. This was common ground before us, but this is in any event clear both from the note on the cover page of the provisional findings report and from the fact that the Commission made arrangements – which we consider further below – to enable interested parties to see the redacted material and the evidence on which it was based.

28. The process by which the Commission sought to protect confidentiality whilst enabling consultation to take place in respect of the Provisional Findings was to use a data room – the option contemplated at paragraph 9.14(h) of the CC7 Guidance.

29. With some reluctance and – in the case of BMI, an express reservation of rights – all three of the Applicants agreed to the terms of the data room which the

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made just because they refer to Confidential Information, although we were taken to a number of examples of such redactions in the course of the hearing.

Commission put in place. In reality, the Applicants had little choice: the only way the Applicants could access the material was on the Commission's terms. We do not criticise the Applicants for electing to try the Commission's system and only when they found that system unsatisfactory applying to the Tribunal, rather than declining to participate and applying to the Tribunal right away, albeit that (in hindsight) an earlier application to the Tribunal might have been better advised given the facts of this case.

30. The terms on which the Applicants were permitted access to the sensitive material are set out in various undertakings and disclosure rules drafted by the Commission. To take a concrete example, in the case of BMI, three nominated inspectors were permitted to access the data room: Mr Mark Steenson, a solicitor with Shearman & Sterling (London) LLP; Mr Peter Davis, of Compass Lexecon (an accounting and economic consultancy); and Mr Erik Langer, also of Compass Lexecon. The Commission required:

    (1) Personal undertakings from each of Messrs Steenson, Davis and Langer (the "Personal Undertakings"); and

    (2) Entity undertakings from each of the firms employing these people, namely Shearman & Sterling (London) LLP and Compass Lexecon (the "Entity Undertakings").

    These undertakings incorporated certain "Disclosure Room Rules", which supplemented and reinforced the undertakings. Copies of these rules, and of the undertakings, are appended hereto as Annex 1.

31. The data room was, according to these documents, intended to operate as follows:

    (1) Certain confidential information, which the Commission had used to undertake certain analyses, and which was specified information under the Act, would be made available in a data room (respectively, the "Confidential Information" and the "Disclosure Room"): see Recitals IV to VIII of the Personal Undertakings.

(2) The Confidential Information had been used by the Commission to carry out what was termed an "Insured Prices Analysis" (Recital V(a) of the Personal Undertakings) and a "National Bargaining Analysis" (Recital V(b) of the Personal Undertakings). The Applications only relate to this Confidential Information: there are other classes of specified information which were treated differently to the Confidential Information, but this material is irrelevant for present purposes.

(3) Parties interested in the Investigation and in the Confidential Information are termed "Relevant Parties": see unnumbered Recital 1 of the Disclosure Room Rules. A maximum of three advisers ("Advisers") per Relevant Party would be permitted access to the Disclosure Room, provided that each of these Advisers had given a Personal Undertaking (rule 1 of the Disclosure Room Rules).

(4) The Advisers would have access to the Disclosure Room between 9:00am and 5:00pm on 9 and 10 September 2013. Facilities in the Data Room were limited. Each Relevant Party would be provided with two laptops containing the Confidential Information (which was also available in printed form), and these laptops could be used to save files to their hard drive: rule 6 of the Disclosure Room Rules. There was no internet access. Advisers were not permitted to bring in their own electronic devices (rule 8 of the Disclosure Room Rules), but could bring in a "workplan" on two pages of A4 paper (rule 8 of the Disclosure Room Rules), and would be provided with stationery on which to make notes (rule 9 of the Disclosure Room Rules). Rule 4 of the Disclosure Room Rules states that "Advisers may talk to each other in the Disclosure Room but any conversations must be kept as brief and quiet as possible to avoid disturbing other users of the Disclosure Room. There will be no separate facilities such as break out rooms available to Advisers".

(5) Advisers undertook only to use the Confidential Information for the "Permitted Purpose", which Recital IX of the Personal Undertakings defines as "to allow the Advisers an opportunity to better understand the evidence relied upon by the [Commission] so that they can respond to the

[Commission's] Provisional Findings on behalf of the [Relevant Party]": paragraph A of the Personal Undertakings. It is, of course, immediately clear from this that the Confidential Information was relevant to understanding the Provisional Findings – otherwise it would not have been in the Disclosure Room.

(6) In the Personal Undertakings, each Adviser undertook (and in the Entity Undertakings, each entity undertook to use best endeavours to ensure) that:

(i) Accordingly to paragraph B of the Personal Undertakings, no copies (whether electronic or non-electronic) of the Confidential Information were made, except where:

(a) That information solely belonged to the Relevant Party or to the Relevant Party's business and which did not include any Confidential Information belonging to or relating to any other party ("Own Client Data"); and

(b) The information was derived solely from Own Client Data and/or from data in the public domain.

(ii) He would not discuss Confidential Information save with other Advisers of that Relevant Party who had also signed a Personal Undertaking: paragraph C of the Personal Undertakings;

(iii) Any analysis written by any Adviser could in no way be used to disclose Confidential Information, except to the extent where this Information belonged to the Relevant Party itself, without the prior written consent of the Commission: paragraph D of the Personal Undertakings.

(7) Rule 11 of the Disclosure Room Rules provided:

> "Advisers are not permitted to remove any items from the Disclosure Room except for one set of notes, for each Relevant Party, of no more than 20 pages on the final visit of the Advisers of each Relevant Party. These materials must not contain any [Confidential Information], except Own Client Data, as defined in the Undertakings to which these rules will be annexed. These

> materials must be inspected and approved by a member of [Commission] staff prior to being removed from the Disclosure Room. Where necessary, [Commission] staff will redact from the notes any information, including but not limited to any information which may lead to the disclosure of any [Confidential Information]. [Commission] staff will permit the parties an opportunity to make representations on any proposed redactions, and this may take up to 48 hours to complete."

(8) Finally, the Advisers undertook – in paragraph G of the Personal Undertakings – "not to advise any party in relation to any pricing negotiations between any hospital operator and any [private medical insurer] concerning the price and/or terms and conditions of services supplied to patients of the [private medical insurer] for a period of three years starting from the date on which the Disclosure Room closes".

32. We shall refer to this regime as the "Disclosure Room Regime".

33. At the end of their second day in the Disclosure Room, the Advisers of the three Applicants handed in their notes to the Commission pursuant to rule 11 of the Disclosure Room Rules. More specifically:

(1) The notes of BMI's Advisers differentiate between Own Client Data and Confidential Information that was not Own Client Data. This appears to have been at least a technical breach of paragraph B of the Personal Undertakings, but BMI's advisers were careful *(i)* to make clear their approach to the Commission and *(ii)* to stress that BMI considered the Commission's approach to the Confidential Information unworkable. BMI had expressed its concerns about the Commission's process, and reserved all of its rights, in a letter from Shearman & Sterling (London) LLP to the Commission dated 9 September 2013. The notes of BMI's advisers began with the following statement:

> "This document incorporates the information disclosed (and information deriving from that disclosed) which, albeit limited, amounts to exculpatory evidence which undermines the [Commission's] case against BMI. No account has been made of the confidential nature of any of the information included. Our view is that any such concerns can and ought to be dealt with by a suitably drafted confidentiality ring. We encourage the [Commission] to keep in mind the considerations referred to in our letter of 9 September when it is undertaking the confidentiality review it has chosen to grant itself under paragraph 11 of the Disclosure Room Rules. BMI reserves all its rights."

(2) HCA had similarly expressed concerns to the Commission about the rules the Commission was proposing for the Disclosure Room. (These are summarised in paragraphs 13-14 of the HCA Application.) As paragraph 15 of the HCA Application makes clear, HCA's Advisers' report (which was submitted to the Commission) "contained several paragraphs relating to the advisers' need to use, outside the Disclosure Room, the data which they had seen".

(3) Spire's Advisers submitted their notes to the Commission in accordance with rule 11. Spire, too, had (in a letter from its solicitors to the Commission dated 4 September 2013) expressed concerns about the rules the Commission was proposing for the Disclosure Room. Spire's notes also reference more than simply Own Client Data, and referred to Confidential Information that was not Own Client Data.

We do not consider that it is necessary to go into any greater detail into precisely how the Applicants expressed their concerns. The position of all three Applicants is helpfully described in paragraphs 64 to 66 of the statement of Mr Roger Witcomb on behalf of the Commission.

34. The Commission reviewed the notes of all three sets of Advisers, and made significant redactions to those notes intended to excise all material that was not Own Client Data. However, the Commission went on to suggest that it would treat the excised information as a request for additional disclosure. The approach of the Commission is evidenced in an email dated 11 September 2013 from the Commission to BMI:

> "The report contains extensive Data (as defined by the Disclosure Room Rules) which is not Own Client Data contrary to Rule 11. Indeed, BMI's advisers acknowledge at the beginning of the report that in preparing the report 'no account has been made of the confidential nature of any of the information included' in the report.
>
> I refer to our email exchanges at the end of last week and in particular my email to you of 6 September (15.36) and my email of the same date at 18.12 addressed to Chris Bright. In those emails I made clear that BMI's interpretation of the undertakings and rules as enabling it to remove from the disclosure room any information it considers relevant to BMI's defence was incorrect. I also made clear that only Own Client Data or data derived solely from Own client data could be removed. BMI's advisers signed the undertakings which were provided to the

> [Commission] on Monday morning confirming that they would comply with the rules of the Disclosure Room.
>
> We will be making extensive redactions to the report prepared by BMI's advisers. Because of the way in which BMI's advisers have prepared the report in particular by not differentiating between Own Client data and non-Own Client data and given the need for the [Commission] to review two other reports within 48 hours if there is any ambiguity on whether the information is Own Client Data or derived solely from Own Client the data we will excised [*sic*].
>
> The information which is excised we will treat as a further request by BMI for disclosure. As you are aware we are considering BMI's various requests for additional disclosures together with those of other parties. We will revert to BMI in due course with respect to this request as well as the others."

35. Since then the Group dealing with the investigation within the Commission has reviewed the notes of the Applicants' Advisers and indicated that:

    (1) Some (but not all) of the redactions made to those notes can be lifted;

    (2) The notes, so adjusted or "un-redacted", can be disclosed to a further group of external advisers of the Applicants, provided they give appropriate undertakings as to confidentiality, including the undertaking described at paragraph 31(8) above;

    (3) The remaining, redacted, material, is (even after reconsideration) so sensitive that it should not be disclosed outside the confines of the Disclosure Room. No proposals have been made as regards renewed access to the Disclosure Room.

## V. THE LAW

36. Two distinct, but related, aspects of due process need to be considered. First, fair consultation and the implicit duty on an administrative body to provide an effective opportunity to comment; and, secondly, the extent to which the party affected, or that party's representatives, are entitled to participate in this process. We consider both points below.

**Fair consultation**

37. In *R v Home Secretary, ex parte Doody* [1994] 1 AC 531 at 560, in a very different case from the present, Lord Mustill articulated the following general principles as to what a fair hearing required:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

38. It is possible to cite many cases in support of Lord Mustill's fifth and sixth propositions. By way of example, in *Kanda v Government of Malaya* [1962] 1 AC 332 at 337, Lord Denning MR stated:

> "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."

In *R v P Borough Council, ex parte S* [1999] Fam 188 at 220, Charles J stated:

> "One of the basic requirements of procedural fairness is that the decision-maker must disclose to the person affected, in advance of the decision, information of relevance to the decision so that the person affected has an opportunity to controvert it or to comment on it."

39. We consider the following propositions to be clear:

(1) The starting point in considering the Commission's duty to consult must be the Act, which deals expressly with the Commission's responsibilities

in this regard, and which also makes provision for the protection of confidential information. These provisions have been described in Section II above. Sections 169(2) and (3) of the Act require the Commission to consult before making a decision, and to give reasons for that decision before it is made, but in neither case is this obligation absolute. It is qualified ("so far as practicable"), in particular by the Commission's duties in relation to specified information: see, further, paragraphs 10 to 16 above.

(2) However, as is clear from section 241, the protection of specified information can give way "for the purpose of facilitating the exercise by the authority of any function it has under or by virtue of this Act", and one of the functions of the Commission is the Commission's duty to consult under section 169 of the Act.

(3) The Act thus establishes both the duty to consult and the duty to protect confidential (specifically, "specified") information. Section 244 (set out in paragraph 15 above) then describes three conditions to which the Commission should – "so far as practicable" – have regard "before disclosing any specified information".

(4) The Act thus contains a fairly comprehensive code dealing with the duty to consult and the duty to protect confidential information. There is nothing in the Act which obliges the Commission to withhold material that ought to be disclosed pursuant to the Commission's section 169 duty to consult, simply because that would involve the disclosure of specified information. But, conversely, the Commission is not obliged to disclose each and every piece of specified information as part of its duty to consult. We consider that the Act contains a perfectly clear and workable code. Although we have had in mind the statement in *Lloyd v McMahon* [1987] 1 AC 702-703 that "it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of

fairness", we do not consider it necessary to imply into the Act anything by way of additional safeguard. The provisions of the Act are, in themselves, quite sufficient for this purpose.

(5) The Commission's guidance in relation to confidential information as set out in the CC7 Guidance is entitled to great weight. None of the Applicants criticised this guidance, and it appears to set out a rational and helpful approach to dealing with specified information.

(6) Moreover, whilst what is a fair process in the context of the Act is one for the Tribunal as a matter of law, the Commission's approach in any given case is entitled to great weight. The consideration of the potentially competing interests of due process and the protection of confidential information is a nuanced one, to be undertaken in light of all the circumstances. It is the Commission, and not the Tribunal, that stands in the front line when assessing such matters, and the Tribunal should be slow to second-guess decisions of the Commission, in particular as to how confidential certain material is, and how best to protect the confidentiality in that material. We have well in mind the statement of Lloyd LJ in *R v Panel on Take-Overs and Mergers, ex parte Guinness plc* [1990] 1 QB 146 at 184:

> "Mr. Buckley argued that the correct test is *Wednesbury* unreasonableness, because there could, he said, be no criticism of the way in which the panel reached its decision on 25 August. It is the substance of that decision, viz., the decision not to adjourn the hearing fixed for 2 September, which is in issue. I cannot accept that argument. It confuses substance and procedure. If a tribunal adopts a procedure which is unfair, then the court may, in the exercise of its discretion, seldom withheld, quash the resulting decision by applying the rules of natural justice. The test cannot be different, just because the tribunal *decides* to adopt a procedure which is unfair. Of course the court will give great weight to the tribunal's own view of what is fair, and will not lightly decide that a tribunal has adopted a procedure which is unfair, especially so distinguished and experienced a tribunal as the panel. But in the last resort the court is the arbiter of what is fair. I would therefore agree with Mr. Oliver that the decision to hold the hearing on 2 September is not to be tested by whether it was one which no reasonable tribunal could have reached."

In short, whilst it is for the Tribunal to decide what is and what is not fair, the Commission's approach should be given "great weight".

(7) Finally, whilst Lord Mustill's sixth proposition refers to a person affected by a decision being informed of the "gist" of the case which he has to answer, what constitutes the "gist" of a case is acutely context-sensitive. Indeed, "gist" is a peculiarly vague term. Competition cases are redolent with technical and complex issues, which can only be understood, and so challenged or responded to, when the detail is revealed. Whilst it is obviously, in the first instance, for the Commission to decide how much to reveal when consulting, we have little doubt disclosing the "gist" of the Commission's reasoning will often involve a high level of specificity. Indeed, this can be seen in the Commission's practice, described in paragraph 7.1 of the CC7 Guidance, of disclosing its provisional findings as part of its consultation process. This point is well-illustrated by the approach taken by the Court of Appeal in *R (Eisai Limited) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438, which concerned the judicial review of guidance issued by NICE in relation to the use of a particular drug. Although NICE's procedures involved "a remarkable degree of disclosure and of transparency in the consultation process" (at [66]), nevertheless procedural fairness required the release of still more material – in this case, the release of a fully executable version of an economic model used by NICE, and not merely a "read only" version – so that consultees could fully check and comment on the reliability of the economic model upon which NICE had based its decision (see [49]).

**Who participates in the process?**

40. In the ordinary course, how an affected party participated in the consultation process described above should be up to the affected party. The affected party may choose to act by him-, her- or it-self, or through agents, like lawyers. However, just as the duty to consult is context-sensitive, so too is this aspect of the consultation process. There are circumstances when the affected party's choice as to <u>how</u> it participates in the consultation process will be limited or circumscribed.

41. Instances where an affected party's right in this regard has been circumscribed have received great prominence in two recent decisions of the Supreme Court, *Al Rawi & Ors v Security Service & Ors* [2011] UKSC 34 and *Bank Mellat v Her Majesty's Treasury (No. 1)* [2013] UKSC 38. Both of these cases considered the operation of a "closed material procedure" in court proceedings, a closed material procedure being defined in *Bank Mellat* at [1] as a procedure involving "the production of material which is so confidential and sensitive that it requires the court not only to sit in private, but to sit in a closed hearing (i.e. a hearing at which the court considers the material and hears submissions about it without one of the parties to the appeal seeing the material or being present), and to contemplate giving a partly closed judgment (i.e. a judgment part of which will not be seen by one of the parties)."

42. The point about a closed material procedure is <u>not</u> that material is withheld, but that the persons able to look at such material are circumscribed. At its most extreme, a closed material procedure involves an advocate acting for an affected party in court proceedings, but in circumstances where, once that advocate has seen the "closed" material, he or she is precluded from taking instructions from the affected party.

43. Self-evidently, a closed material procedure constitutes a derogation from the principle of natural justice. In *Bank Mellat* at [3], the Supreme Court expressed itself in trenchant terms:

> "Even more fundamental to any justice system in a modern, democratic society is the principle of natural justice, whose most important aspect is that every party has a right to know the full case against him, and the right to test and challenge that case fully. A closed hearing is therefore even more offensive to fundamental principle than a private hearing. At least a private hearing cannot be said, of itself, to give rise to inequality or even unfairness as between the parties. But that cannot be said of an arrangement where the court can look at evidence or hear arguments on behalf of one party without the other party ("the excluded party") knowing, or being able to test, the contents of that evidence and those arguments ("the closed material"), or even being able to see all the reasons why the court reached its conclusions."

44. Taken to their logical extremes, *Al Rawi* and *Bank Mellat* might be taken to express extreme disapprobation of the Commission's use of confidentiality rings and data rooms – and, indeed, this Tribunal's use of confidentiality rings. After all, confidentiality rings tend to be limited to external advisers (generally,

45. We are very confident that the Supreme Court did not have in mind market investigation references in the Commission in either *Al Rawi* or *Bank Mellat*, and certainly these were not considered by the Supreme Court. Before us, none of the parties suggested that these decisions did anything more than highlight the fact that closed material procedures – and we use that term widely to embrace both confidentiality rings and data rooms – have to be justified by the circumstances, and should be as narrowly used as is possible in those circumstances. But, what those circumstances are is of enormous significance.

46. Accordingly, the provisions of the Act allow the Commission a broad discretion in formulating closed procedures, but subject always to the section 169 duty to consult.

## VI. APPLYING THE LAW TO THE FACTS: THE OUTCOME IN THIS CASE

47. Before us, the Commission emphasised how sensitive the Confidential Information was. We have not, of course, seen that material, and are not minded – certainly not on the hearing of these Applications – to second-guess the Commission in this regard. The Commission is the primary arbiter of what is and what is not sensitive.

48. Mr Morris Q.C., on behalf of HCA, did seek to suggest that the reaction of third parties to the Applications (notably TLC in its written submissions and BUPA in a letter from its solicitors dated 23 September 2013) did not bear out the Commission's concerns on sensitivity. We reject that submission, on two grounds. In the first place, whilst these documents do not seek to lay down precisely how confidentiality is to be protected (a reticence that is to be applauded), they do stress that the material is confidential and sensitive. In the second place, TLC and BUPA have both presumed – and they are correct in that presumption – that the Commission is the appropriate interlocutor when describing to this Tribunal the sensitivity of specified information. Not only

does the Commission have the best overall understanding of the nature of the specified information that it holds, but also it would be impractical and undesirable in case management terms for each provider of confidential information to turn up before the Tribunal to assert the sensitivity of its material when the Commission's entire confidentiality regime for a particular class of documents (here, the Confidential Information contained in the Disclosure Room) is under review. Matters might be different where there is an application centring on a particular document, when highly individuated and document-specific submissions and arguments might be appropriate. But that is not this case.

49. We do not consider that the decision of the Commission, in this case, to protect the Confidential Information by way of a data room instead of one or more of the other ways contemplated in paragraph 9.14 of the CC7 Guidance, to be susceptible of criticism. We accept the Commission's view that the confidential material in this case was extremely sensitive and, in all the circumstances, the decision to protect the "specified information" in this case by way of a data room is unchallengeable on a judicial review basis.

50. However, we do not consider that the Applicants were actually challenging the decision to protect the Confidential Information by way of a data room. Rather, the Applicants were contending that the decision by the Commission to allow access to the Disclosure Room on the terms set out in the Disclosure Room Regime (the "Decision") was irrational, in breach of statutory duty and in breach of the principles of natural justice. The Decision was made after negotiations between the Commission and the Applicants as to the terms of the Disclosure Room Regime ended, and before the Applicants signed up to that Regime – that is, on or about 6 September 2013.

51. One might expect that this would involve a consideration of the Disclosure Room Regime described in paragraphs 28 to 31 above in the light of the legal principles set out in Section V above. Matters are, however, not so straightforward. Before us, the Commission contended that the Disclosure Room Regime did not set out the entire or final position, and that the

Commission was, in fact, operating a "two stage" process. This two stage process, according to the Commission's submissions, operated as follows:

(1) The Disclosure Room Regime was modified so as to allow the Advisers to include, in their notes, Confidential Information other than Own Client Data or information derived solely from Own Client Data and/or from data in the public domain.

(2) The notes of the Advisers would be reviewed by the Commission, as envisaged by the Disclosure Room Regime. Confidential Information other than Own Client Data or information derived solely from Own Client Data and/or from data in the public domain would be redacted, but the inclusion of that material in the notes would be treated as a request for the disclosure of that material.

52. The basis for this submission was the Commission's email of 11 September 2013 to BMI, which is set out in paragraph 34 above, and which does indeed state that Confidential Information other than Own Client Data or information derived solely from Own Client Data and/or from data in the public domain contained in the Advisers' notes will be treated as "a further request by BMI for disclosure".

53. The problem with this submission is that the email post-dates rather than pre-dates the Advisers' entry into and use of the Disclosure Room. Miss Kassie Smith Q.C., for the Commission, sought to found the institution of the "two stage process" on a date prior to the use of the Disclosure Room by the Advisers by referring to an email from the Commission to BMI dated 6 September 2013 and timed at 18:12. This email, which was to BMI only, states:

> "Further to our conversation this afternoon, I thought it might be helpful to re-iterate and expand on my comments regarding the ability of advisers to request that particular Non-Own Client Data be removed from the Disclosure Room and, if so, subject to what conditions. We do consider as I mentioned that a blanket ability on advisers to remove any information would undermine the purpose of the Disclosure Room.
>
> Whilst, the Disclosure Room rules and undertakings have been established as per my earlier email, as I mentioned if a party's advisers consider that particular information is important to their defence that they need to remove it from the Disclosure Room, they can make that request to us, and this may be permitted and may be subject to

particular safeguards. For example, we have already received a request in relation to the basket of treatments and are considering the basis on which the parties' advisers (e.g. economic) may be provided with a copy."

54. Miss Smith also relied on the sixth numbered point in an earlier email of the same day, also to BMI, timed at 15:36, which (somewhat delphically) stated, in response to BMI's representations on the Personal and Entity Undertakings and Disclosure Room Rules:

> "Whilst in practice this is the position, we have expressly referenced that representations can be made with regard to redactions to the report."

55. Even assuming (which we do) that there were similar communications to HCA and Spire, we consider that there is no basis for the contention that the Disclosure Room Regime was modified in the manner suggested by Miss Smith or at all. To the contrary, it is clear that the Disclosure Room Regime stood, in the manner set out in the Personal and Entity Undertakings and in the Disclosure Room Rules, at the time the Advisers were using the Disclosure Room. As to this:

    (1) Point 6 in the email timed at 15:36 is simply referring to the last two sentences of rule 11 of the Disclosure Rules, which state that "[w]here necessary, [Commission] staff will redact from the notes any information, including but not limited to any information which may lead to the disclosure of any [Confidential Information]. [Commission] staff will permit the parties an opportunity to make representations on any proposed redactions, and this may take up to 48 hours to complete." It is obvious that this sentence is referring to the possibility of there being a disagreement between the Advisers and the Commission as to what constitutes Own Client Data and what constitutes Confidential Information that should not appear in the notes, and entitles the Advisers to make representations on such points. The email is not re-writing the provisions of the Disclosure Room Regime so as to entitle Advisers to refer to anything other than Own Client Data or information derived solely from Own Client Data and/or from data in the public domain.

    (2) Nor does the email timed at 18.12 assist Miss Smith. It is quite clear that this email is doing no more than reiterating that the Disclosure Room

> Regime stands, whilst making clear that further requests will be entertained, should the affected parties choose to make such requests. Indeed, this was the evidence of Mr Witcomb. In paragraph 62 of his witness statement, Mr Witcomb refers to this email and states that "[t]he email explains that, although the [Commission] considers that a blanket ability on advisers to remove any confidential data from the disclosure room would undermine the purpose of the disclosure room, if the party's advisers considered that particular information is relevant to their defence so that they need to remove it from the disclosure room, they can make that request to the [Commission]. This might be permitted subject to particular safeguards."

56. Accordingly, we find that the Commission did not modify the Disclosure Room Regime. The Commission did no more than express itself open to further representations as to how specified information and – in particular – how the Confidential Information might be treated in the future and, as has been described in paragraph 35 above, some of the material redacted from the Advisers' notes has been disclosed into a confidentiality ring.

57. In principle, it is perfectly possible for a subsequent decision (or subsequent decisions) making further disclosure of confidential information to cure an earlier decision not to disclose that was procedurally unfair.[2] But, to establish that there is an effective cure depends on answers to the prior questions whether there is a malady at all and, most importantly, what is the precise nature of that malady, if there is one. In the present case, it suffices to note at this stage that the cure posited by the Commission is the possible release of some (but not all) information from the Disclosure Room, whereas the Applicants' complaints concern their ability to access and use the information not released from the Disclosure Room. The Commission's response to the deemed requests for further disclosure (noted at the end of the previous paragraph) emphasises the significance of the distinction.

[2] The subsequent decision would, of course, have to be made in good time to enable the affected party to use the material to make representations upon it. But that would be the case here: the Commission has agreed to extend the deadline for responses to the Provisional Findings until 14 days after judgment in the Applications is handed down.

58. Before we turn to the question of whether, as the Applicants contended, the Disclosure Room Regime was an unlawful one in judicial review terms, we should say this about the importance of undertakings to the proper functioning of both confidentiality rings and data rooms. The undertakings given by the professionals who participate in confidentiality rings and data rooms to do, or not to do, certain things are essential to the operation of these confidentiality rings and data rooms. Compliance with such undertakings is an important and serious matter. Indeed, for lawyers, the breach of an undertaking is likely to involve questions of professional misconduct. We do not think it right for the Commission "informally" to seek to "vary" undertakings that have been formally given; nor, we should add, do we think it wise for those subject to such undertakings to accept or rely upon such "informal variations". It would appear, in this case, that some or all of the Advisers did not comply with their undertakings not to make notes of Confidential Information (albeit that no harm resulted from this, given that these notes were redacted by the Commission) and that the Commission, perhaps at the time, but certainly by 11 September 2013, was signalling that such non-compliance was acceptable as a "modification" to the Disclosure Room Regime. It must be recorded for future reference that such an approach is neither appropriate nor adviseable: it leads to a lack of clarity, undermines an essential pillar to the operation of confidentiality rings and data rooms, and places those who have given undertakings in the invidious position of, at least on the face of it, being in breach of an undertaking formally given.

59. We turn to the Disclosure Room Regime.

60. The Advisers were given access to the Disclosure Room for the Permitted Purpose described in paragraph A of the Personal Undertakings: that is, to allow the Advisers an opportunity to better understand the evidence relied upon by the Commission so that they can respond to the Commission's Provisional Findings.

61. In this context, the following points bear emphasis:

    (1) Whilst paragraph A of the Personal Undertakings refers to allowing "the Advisers" an opportunity to understand and respond to the Commission's

Provisional Findings, the Advisers are doing so on behalf of the Relevant Party by whom they are appointed. The question is not what is fair for the Advisers, but what is fair for the Applicants.

(2) The Confidential Information in the Disclosure Room is clearly highly technical in nature, as is evidenced by the description contained in Recital V of the Personal Undertakings and, indeed, from the passages in the Provisional Findings that we were shown. Given the technical nature of the material, we consider it to be the case that a fair disclosure of the "gist" of a case will require – as in *Eisai* (see paragraph 39(7) above) – a high degree of disclosure and transparency on the part of the Commission.

(3) This was borne out by the Applicants' submissions before us, which suggested that in order properly to respond to the Provisional Findings, the underlying data relied upon by the Commission would have to be understood, and that detailed and quite possibly highly technical responses would have to be prepared by the parties. Just as we are not inclined to second-guess the Commission in its determination of how to handle the Confidential Information, neither are we inclined to dispute that the Applicants need to see this material in order to meet and prepare their response. As paragraph 7.1 of the CC7 Guidance makes clear, one of the principal ways in which the Commission performs its duty to consult is by publishing its provisional findings and notices as to possible remedies. Clearly, to the extent that those provisional findings are redacted, the ability of interested parties to respond is hindered. The fact that the Commission made arrangements – by use of the Disclosure Room – to enable interested parties to see the unredacted Provisional Findings and the evidence on which they were based only goes to show how aware the Commission was of this fact.

62. The short conclusion is that consideration by the Applicants of the Confidential Information is the starting point for examining what fairness requires. It will be the Applicants who will be affected by any adverse decision of the Commission, not their advisers. Implicit in this starting point is the fact that it is for the Applicants to decide how they wish to respond. In cases like the present,

doubtless that will involve the retention of an expert legal team, and expert economists and accountants. But, at the end of the day, what the "interested person" (we shall use this term as shorthand to refer to parties like the Applicants, who may be affected a decision, and who are entitled to be consulted on it) chooses to do to respond is a matter for that person, and not for that person's legal or advisory team, still less for the body whose provisional decision is being responded to. That, we consider, is very much the message emanating from the Supreme Court in the recent cases considered in paragraph 41 above.

63. This starting point may be modified and derogated from to take account of the confidential nature of the information in question. We recognise that market investigations involve – as here – considerable amounts of very confidential material, and that if that material is not appropriately safeguarded, confidence in Commission investigations will be eroded and – quite possibly – damage done to the operation of markets because of the market sensitivity of the information involved. But it must always be borne in mind that derogations from the starting point that we have identified must be such as to enable the party affected to respond.

64. The law recognises a number of such derogations: in competition law, confidentiality rings are common and data rooms, whilst rarer, are certainly not unknown. As the Commission's own guidance recognises, and as the Commission's submissions in this case accepted, there is a clear distinction between the operation of a confidentiality ring and the operation of a data room.

65. A confidentiality ring limits the persons who may see certain (confidential) information. Typically, the interested person – including in-house lawyers – will be excluded from the ring, which tends to comprise external advisers only. A confidentiality ring does not confine access to the information protected by it to a specific location. Those within the ring can review, consider and respond to that information in their own offices, surrounded by the information and infrastructure that will enable them to draft a response that will constitute their client's response. It will be possible for those within the ring to consider how

the response to the confidential information can best be integrated with other parts of the response, dealing with non-confidential information.

66. Necessarily, the information within confidentiality rings must be of such a nature that it can be dealt with and responded to by those within the ring without these persons having to disclose that information to those outside the ring. The upshot is that although the ability of the interested party to respond is inconvenienced by the existence of a confidentiality ring, the presence within the ring of the interested party's advisers does not preclude a proper and informed response by (or perhaps, rather, on behalf of) the interested party.

67. A data room operates very differently from a confidentiality ring. Not only is access to the room limited to a defined class of person (in this, data rooms are similar to confidentiality rings), but also the confidential information is retained at a secure location – in the data room. This prevents the sort of accidental disclosure of confidential information that can occur in the case of confidentiality rings.

68. Use of a data room will certainly involve additional inconvenience to an interested party and its advisers. It may well mean more than this: it may mean that the drafting of a response is made materially more difficult. But this additional burden can be justified provided: *(i)* the sensitivity of the material in question warrants it; and *(ii)* the interested person is still – despite the additional difficulties – able to make worthwhile representations (to adopt Lord Mustill's term in *Doody*).

69. This means that where a data room is deployed to protect sensitive information, there must be facilities available in the data room so as to enable a proper and informed (or "worthwhile") response.

70. The rules governing the Disclosure Room in this case were not fit for this purpose. The Disclosure Room Regime was deficient, and fundamentally so, in three basic respects.

71. First, confining the Advisers to recording in their notes only Own Client Data or information derived solely from Own Client Data and/or from data in the public

domain is wrong in principle. This is information which – by definition – the Advisers can see outside the Disclosure Room. What will be of real interest to the Advisers will be Confidential Information that is not Own Client Data or information derived solely from Own Client Data and/or from data in the public domain. It is this information (and its relationship to Own Client Data) that they will particularly wish to review, to see how the Commission has relied upon it. Whilst they may be unable to remove such notes from the Disclosure Room, that does not justify the prohibition on the making of notes that are plainly required if they are to make effective use of their access to the Disclosure Room.

72. Secondly, given that this was a data room, the Advisers of Relevant Parties were obviously not going to be allowed to remove Confidential Information from it. That, as we have described, is the key difference between a confidentiality ring and a data room. The Disclosure Room Regime comprehensively failed to ensure that this obstacle to the drafting of a worthwhile response was addressed. The Advisers were not provided with the means of drafting a proper and considered response to the Confidential Information whilst in the Disclosure Room. The facilities afforded to them were insufficient to enable them to respond. In particular:

(1) There was no real way in which the Advisers could discuss points amongst themselves: see paragraph 31(4) above.

(2) The Advisers had no access to other material that they might need to look at: see paragraph 31(4) above.

(3) The Advisers had no opportunity to discuss matters with persons outside the Disclosure Room: paragraph 31(6) above. Self-evidently, the Advisers would not be permitted, and would not, disclose Confidential Information. But it might be very important to discuss how a potential point arising out of the Confidential Information might fit into the Relevant Party's overall response to the Provisional Findings.

(4) The Advisers had no opportunity to test the robustness of the Confidential Information, for example by analysing and cross-checking data contained in tables of information and data redacted by the Commission.

In short, the rules imposed by the Commission rendered it unreasonably difficult for a response to the Provisional Findings, which addressed matters arising out of the Confidential Information, to be drafted.

73. Thirdly, the period of time in which the Advisers were allowed access to the Disclosure Room was unreasonably short. As a general rule of thumb, a data room ought to be open at reasonable business hours up until the end of the consultation period, and ought to provide for multiple visits. The latter requirement is important not simply to enable the Advisers to correct or complete their notes but, more fundamentally, because drafting a response to the Provisional Findings which incorporates[3] an effective response to the matters arising from the Confidential Information is necessarily an iterative process (all the more so where the Advisers are limited in number and necessarily exclude all employees of the Relevant Party).

74. We unanimously conclude, for the reasons that we have given, that 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 comprehensively failing to give the Applicants a fair opportunity to correct or contradict the Commission's Provisional Findings (to use the test in *Kanda*) or to make worthwhile representations (to use the test in *Doody*). The question before us is whether or not the Commission adopted a procedure that was fair (see paragraph 39): we hold that the procedure embodied in the Disclosure Room Regime was unfair. We do not consider that the appropriate standard for assessing the Commission's procedure is one of irrationality (in the judicial review sense): but, if it were, then we would hold the decision to adopt the procedure to be an irrational one also.

[3] By incorporation, we mean contained within the totality of the response to the Provisional Findings, but with such physical separation as is necessary to preserve the confidentiality of the Confidential Information.

75. We do not consider that these deficiencies are capable of being cured by the Commission's conduct after the Disclosure Room closed. This is because the restrictions on the Advisers whilst they were in the Disclosure Room were so great as to preclude the drafting of a worthwhile response to the Provisional Findings. That is so, even if the Commission permitted the Applicants to rely upon the notes of the Advisers in completely unredacted form.

76. We have said nothing about the restriction that was imposed upon the Advisers by way of paragraph G of the Personal Undertakings. This, as is described in paragraph 31(8) above, is a restriction on the Advisers advising parties in relation to negotiations between hospital operators and private medical insurers for a future period.

77. The question as to the fairness of undertakings as to future conduct turns on the consideration of two related questions. First, the extent to which a given adviser needs to see the material in the data room so as to enable the interested party to submit a worthwhile response. Whilst many advisers might like to see such material, or consider that seeing such material may benefit the interested party, the real question is whether the presence of that adviser is necessary to enable the interested party to respond. Secondly, the extent to which that adviser is "substitutable"; that is, the extent to which the party affected will be unduly prejudiced in being deprived of that particular adviser in receiving advice on other matters. Clearly, these questions are context-sensitive, but due consideration will have to be given to the issues identified in paragraphs 40 to 46 above.

78. Had the Disclosure Room Regime been otherwise compliant with the rules of natural justice, then we do not consider that paragraph G of the Personal Undertakings would have rendered the Disclosure Room Regime unfair by itself. However, in reaching this conclusion, we are very conscious that the Advisers in this case appear to have been simultaneously substitutable in relation to advice on other matters and sufficiently expert to enable the Relevant Party to make effective use of the Disclosure Room. In other words, the Relevant Party's ability to receive advice, whether in relation to the present

matter or other matters, would not materially be hampered by the fact that this undertaking was required.

## VII. PREMATURITY

79. The Commission suggested that the Applications were premature. We reject that submission. Given our conclusion that the decision to adopt the Disclosure Room Regime was fundamentally flawed, this was not a process that could be put back on track by the sort of subsequent corrective measures taken by the Commission in the period after the Disclosure Room closed (see paragraphs 51 to 58 above). Since the Commission's stance was that there was, essentially, nothing wrong with the Disclosure Room Regime, it was entirely appropriate for the Applicants to appeal the decision when they did. Indeed, as we noted in paragraph 29 above, in hindsight an even earlier application might have been desirable.

## VIII. OTHER MATTERS

80. We were addressed on a number of more specific matters, notably:

    (1) The question of re-access to the Confidential Information in the Disclosure Room.

    (2) The question of whether the material in the Disclosure Room was sufficient for the purposes of natural justice.

    (3) The question of whether HCA should have disclosed to it a document which Mr. Morris referred to as a "basket of treatments".

81. The first matter we consider has been resolved by this judgment, and nothing more needs to be said. The second point was not pressed by Mr. Beard, and we say nothing more. The third point we consider to be so specific that we cannot deal with it in this judgment. If HCA wish to take this matter further, it will have to be dealt with on a later occasion.

82. If the parties consider it necessary, the Tribunal will hear submissions as to the appropriate relief consequent on this judgment in due course.

Marcus Smith Q.C. William Allan Margot Daly

Charles Dhanowa O.B.E., Q.C.
(Hon)
Registrar

Date: 2 October 2013

## ANNEX 1

## 1. The Personal Undertakings

COMPETITION COMMISSION

**PRIVATELY-FUNDED HEALTHCARE SERVICES MARKET INVESTIGATION**

**UNDERTAKINGS GIVEN BY [EXTERNAL ADVISER] TO THE COMPETITION COMMISSION IN RELATION TO THE ACCESS TO A DISCLOSURE ROOM ('UNDERTAKINGS')**

**WHEREAS**

I. On 4 April 2012 in exercise of its powers under sections 131 and 133 of the Enterprise Act 2002 (the 'Act'), the Office of Fair Trading made a reference to the Competition Commission (the 'CC') for an investigation into the supply or acquisition of privately-funded healthcare services in the United Kingdom (the 'Investigation').

II. On 28 August 2013, the CC published its provisional findings in the Investigation (the 'Provisional Findings Report').

III. During the course of the Investigation the CC has acquired confidential information from a number of hospital operators and private medical insurers ('PMIs') for the period from 2007 to 2013. The CC also obtained confidential patient invoice data provided by Healthcode over the same period (together 'Confidential Information').

IV. The CC considers that the Confidential Information is specified information within the meaning of section 238 of the Act which relates to the business of an undertaking and/or the affairs of an individual and therefore which falls within the general restriction on its disclosure by virtue of section 237 of the Act. Pursuant to section 241 of the Act, the CC may disclose specified information to any other person for the purpose of facilitating the exercise by it of its statutory functions.

V. The CC has used the Confidential Information to carry out the following analyses:

a) an analysis of prices charged by hospital operators to PMIs for treatments provided to insured patients from 2007 to 2011 ('Insured Prices Analysis'). This analysis is focused on HCA, BMI, Spire, Nuffield and Ramsay – and to a lesser extent on The London Clinic – and the six largest PMIs (Bupa, AXA PPP, Aviva, PruHealth, Simplyhealth and WPA). It contains Confidential Information relating to (i) type of treatments offered (ii) number of treatments offered and (iii) invoice data (including patient-level records of the hospital services received, such as patient visit date, discharge date, episode setting

(inpatient, daypatient and outpatient) and surgical procedure (CCSD code), and the invoiced charge and itemized charges for each treatment). The analysis calculates the average revenue per admission. The CC has also constructed a price index using a common basket of treatments; and

b) an analysis of negotiations between PMIs (Bupa, AXA PPP, Aviva, PruHealth, Simplyhealth and WPA) and hospital operators (HCA, BMI, Spire, Nuffield and Ramsay) on the terms on which hospital operators provide hospital services to PMIs' policyholders ('National Bargaining Analysis'). This analysis contains Confidential Information provided by hospital operators and PMIs in their submissions and responses to market questionnaires, including internal documents relating to these negotiations.

VI. The Insured Prices Analysis including its results, i.e. insured price levels and rankings, both aggregated and disaggregated by PMI or hospital operator, as well as the price index are set out in section 6 of the confidential version of the CC's Provisional Findings Report and in appendix 6.12.

VII. The National Bargaining Analysis is set out in section 6 of the confidential version of the CC's Provisional Findings Report and in appendix 6.11.

VIII. For the purposes of facilitating its market investigation functions, the CC has decided to disclose to a restricted group of external advisers of the three main hospital operators which the CC provisionally considers have market power in the setting of prices they charge for treatment of insured patients:

(i) the extracts of the Insured Prices Analysis contained in paragraphs 6.203 to 6.248 of section 6 of the confidential version of the CC's Provisional Findings Report, appendix 6.12, and the list of treatments used in each basket to construct the price index; and

(ii) the relevant extracts of the National Bargaining Analysis relating to each hospital operator contained in paragraphs 6.145 to 6.189 of section 6 of the confidential version of the CC's Provisional Findings Report and in appendix 6.11, so that each Adviser will only have access to the full extracts of the analysis which relates to the CC's analysis of their own client bargaining with each relevant PMI;

(together 'the Data').

IX. Disclosure of the Data is made to the external advisers of [name of the party] (each an 'Adviser' together 'Advisers') in order to allow the Advisers an opportunity to better understand the evidence relied upon by the CC so that they can respond to the CC's Provisional Findings on behalf of [name of the party] (the 'Permitted Purpose').

X. Having regard to the particularly sensitive nature of the Data, the CC considers that access to this information should be governed by strict rules. The Advisers will have access to the Data on 9 and 10 September 2013 from 9:00am to 5:00pm in a room at the CC offices (the 'Disclosure Room'). The access to the Data will be governed by rules (the 'Disclosure Room Rules', which are annexed to these undertakings) and subject to these Undertakings.

XI. Disclosure of the Data without the prior written agreement of the CC is not permitted and may constitute a criminal offence under section 245 of the Act.

XII. [name of firm] has been instructed by [name of the party], which is a party to the Investigation, for the purposes of providing [legal/economic] advice to [name of the party] in relation to the Investigation. [name of adviser] is employed by [name of firm] as a [legal/economic adviser].

**NOW THEREFORE**

I, [name of Adviser], [profession] at [name of firm] who have been engaged by [name of the party] in connection with the Investigation undertake to the CC in my own name and not that of [name of firm] which has given separate undertakings upon access to the Data:

A. To use the Data for, and only for, the Permitted Purpose on behalf of [name of party];

B. Not to make any electronic or non-electronic copy in any format of any Data, or remove any Data in any format from the Disclosure Room, except as permitted in clauses (i) and (ii) below of these Undertaking in relation to Own Client Data;

C. Not to discuss, disclose, transmit, communicate, or otherwise make the Data available in any other manner to any other person (including any other legal or economic adviser, officer or employee of [name of firm] or other external adviser, officer or employee of [name of the party]) save for those Advisers employed by [name of firm] who have also provided Undertakings to the CC in respect of this disclosure;

D. To ensure that any analysis undertaken or any report written by any Advisers of [name of firm] can in no way be used to disclose any Data which does not belong to [name of party]; nor should it enable or assist [name of party] to gain any understanding of its position in the market relative to any other hospital operator. Therefore, I undertake not to share any Data in any discussion with, or in any document (including draft responses to the Provisional Findings Report) sent to, [name of the party] or its advisers, except with the prior written consent of the CC;

E. To abide by the Disclosure Room Rules which are annexed to these Undertakings;

F. To notify the CC immediately if I become aware of or suspect that any Adviser of [name of Firm] has failed to comply with these Undertakings or Disclosure Room Rules;

G. Not to advise any party in relation to any pricing negotiations between any hospital operator and any PMI concerning the price and/or terms and conditions of services supplied to patients of the PMI for a period of three years starting from the date on which the Disclosure Room closes; and

**PROVIDED THAT**

These Undertakings above shall not apply to any Data that:

(i) solely belongs to or relates solely to [name of the party] or to [name of the party]' business and which does not include any confidential information belonging to or relating to any other party ('Own Client Data');

(ii) is derived solely from Own Client Data or from data that at the time of supply is in the public domain or subsequently comes into the public domain, except through breach of these Undertakings or the Undertakings given by [name of firm and names of Advisers] in relation to this disclosure;

(iii) at the time of supply is in the public domain or subsequently comes into the public domain, except through breach of these Undertakings or Undertakings given by [name of firm and name of Advisers]; and/or

(iv) is required to be disclosed by law or regulation, so long as I consult with the CC prior to disclosure on the proposed forum, timing, nature and purpose of the proposed disclosure.

**AND IN AGREEMENT THAT**

These Undertakings shall be governed by and construed in accordance with English law and I submit to the exclusive jurisdiction of the English courts for all purposes.

These Undertakings have been executed and take effect from the date on which they were signed.

[Name of Adviser]

*[Signature]*

[date]

## 2. The Entity Undertakings


**PRIVATELY-FUNDED HEALTHCARE SERVICES MARKET INVESTIGATION**

**UNDERTAKINGS GIVEN BY [EXTERNAL FIRM] TO THE COMPETITION COMMISSION IN RELATION TO THE ACCESS TO A DISCLOSURE ROOM ('UNDERTAKINGS')**

**WHEREAS**

I. On 4 April 2012 in exercise of its powers under sections 131 and 133 of the Enterprise Act 2002 (the 'Act'), the Office of Fair Trading made a reference to the Competition Commission (the 'CC') for an investigation into the supply or acquisition of privately-funded healthcare services in the United Kingdom (the 'Investigation').

II. On 28 August 2013, the CC published its provisional findings in the Investigation (the 'Provisional Findings Report').

III. During the course of the Investigation the CC has acquired confidential information from a number of hospital operators and private medical insurers ('PMIs') for the period from 2007 to 2013. The CC also obtained confidential patient invoice data provided by Healthcode over the same period (together 'Confidential Information').

IV. The CC considers that the Confidential Information is specified information within the meaning of section 238 of the Act which relates to the business of an undertaking and/or the affairs of an individual and therefore falls within the general restriction on its disclosure by virtue of section 237 of the Act. Pursuant to section 241 of the Act, the CC may disclose specified information to any other person for the purpose of facilitating the exercise by it of its statutory functions.

V. The CC has used the Confidential Information to carry out the following analyses:

a) an analysis of prices charged by hospital operators to PMIs for treatments provided to insured patients from 2007 to 2011 ('Insured Prices Analysis'). This analysis is focused on HCA, BMI, Spire, Nuffield and Ramsay – and to a lesser extent on The London Clinic – and the six largest PMIs (Bupa, AXA PPP, Aviva, PruHealth, Simplyhealth and WPA). It contains Confidential Information relating to (i) type of treatments offered (ii) number of treatments offered and (iii) invoice data (including patient-level records of the hospital services received, such as patient visit date, discharge date, episode setting (inpatient, daypatient and outpatient) and surgical procedure (CCSD code), and the invoiced charge and itemized charges for each treatment). The analysis calculates the average revenue per admission. The CC has also constructed a price index using a common basket of treatments; and

b) an analysis of negotiations between PMIs (Bupa, AXA PPP, Aviva, PruHealth, Simplyhealth and WPA) and hospital operators (HCA, BMI, Spire, Nuffield and Ramsay) on the terms on which hospital operators provide hospital services to PMIs' policyholders ('National Bargaining Analysis'). This analysis contains Confidential Information provided by hospital operators and PMIs in their submissions and responses to market questionnaires, including internal documents relating to these negotiations.

VI. The Insured Prices Analysis including its results, ie. insured price levels and rankings, both aggregated and disaggregated by PMI or hospital operator, as well as the price index are set out in section 6 of the confidential version of the CC's Provisional Findings Report and in appendix 6.12.

VII. The National Bargaining Analysis is set out in section 6 of the confidential version of the CC's Provisional Findings Report and in appendix 6.11.

VIII. For the purposes of facilitating its market investigation functions, the CC has decided to disclose to a restricted group of external advisers of the three main hospital operators which the CC provisionally considers have market power in the setting of prices they charge for treatment of insured patients:

(i) the extracts of the Insured Prices Analysis contained in paragraphs 6.203 to 6.248 of section 6 of the confidential version of the CC's Provisional Findings Report, appendix 6.12, and the list of treatments used in each basket to construct the price index; and

(ii) the relevant extracts of the National Bargaining Analysis relating to each hospital operator contained in paragraphs 6.145 to 6.189 of section 6 of the confidential version of the CC's Provisional Findings Report and in appendix 6.11, so that each Adviser will only have access to the full extracts of the analysis which relates to the CC's analysis of their own client bargaining with each relevant PMI;

(together 'the Data').

IX. Disclosure of the Data is made to the external advisers of [name of the party] (each an 'Adviser' together 'Advisers') in order to allow the Advisers an opportunity to better understand the evidence relied upon by the CC so that they can respond to the CC's Provisional Findings on behalf of [name of the party] (the 'Permitted Purpose').

X. Having regard to the particularly sensitive nature of the Data, the CC considers that access to this information should be governed by strict rules. The Advisers will have access to the Data on 9 and 10 September 2013 from 9:00am to 5:00pm in a room at the CC offices (the 'Disclosure Room'). The access to the Data will be governed by rules (the 'Disclosure Room Rules', which are annexed to these undertakings) and subject to these Undertakings.

XI. Disclosure of the Data without the prior written agreement of the CC is not permitted and may constitute a criminal offence under section 245 of the Act.

XII. [name of firm] has been instructed by [name of the party], which is a party to the Investigation, for the purposes of providing [legal/economic] advice to [name of the party] in relation to the Investigation.

**NOW THEREFORE**

[Name of firm] has been engaged by [name of the party] in connection with the Investigation undertakes to the CC that will use best endeavours to ensure that [insert name of Advisers]:

A. Will use the Data for, and only for, the Permitted Purpose on behalf of [name of party];

B. Will not make any electronic or non-electronic copy in any format of any Data, or remove any Data in any format from the Disclosure Room, except as permitted in clauses (i) and (ii) below of these Undertaking in relation to Own Client Data;

C. Will not discuss, disclose, transmit, communicate, or otherwise make the Data available in any other manner to any other person (including any other legal or economic adviser, officer or employee of [name of firm] or other external adviser, officer or employee of [name of the party]) save for those Advisers employed by [name of firm] who have also provided Undertakings to the CC in respect of this disclosure;

D. Will ensure that any analysis undertaken or any report written by any Advisers of [name of firm] can in no way be used to disclose any Data which does not belong to [name of party]; nor should it enable or assist [name of party] to gain any understanding of its position in the market relative to any other hospital operator. Therefore, [name of firm] undertakes not to share any Data in any discussion with, or in any document (including draft responses to the Provisional Findings Report) sent to [name of the party] or its advisers, except with the prior written consent of the CC;

E. Will abide by the Disclosure Room Rules which are annexed to these Undertakings;

F. Will notify the CC immediately if they become aware of or suspect that any Adviser of [name of firm] has failed to comply with these Undertakings or Disclosure Room Rules;

G. Will not advise any party in relation to any pricing negotiations between any hospital operator and any PMI concerning the price and/or terms and conditions of services supplied to patients of the PMI for a period of three years starting from the date on which the Disclosure Room closes; and

**PROVIDED THAT**

These Undertakings above shall not apply to any Data that:

(i) solely belongs to or relates solely to [name of the party] or to [name of the party]' business and which does not include any confidential information belonging to or relating to any other party ('Own Client Data');

(ii) is derived solely from Own Client Data or from data that at the time of supply is in the public domain or subsequently comes into the public domain, except through breach of these Undertakings or the Undertakings given by [names of Advisers] in relation to this disclosure;

(iii) at the time of supply is in the public domain or subsequently comes into the public domain, except through breach of these Undertakings or Undertakings given by [name of advisers] in relation to this disclosure; and/or

(iv) is required to be disclosed by law or regulation, so long as [name of firm] consults with the CC prior to disclosure on the proposed forum, timing, nature and purpose of the proposed disclosure.

**AND IN AGREEMENT THAT**

These Undertakings shall be governed by and construed in accordance with English law and I submit to the exclusive jurisdiction of the English courts for all purposes.

These Undertakings have been executed and take effect from the date on which they were signed.

[Name of person authorised to sign on behalf of firm]

*[Signature]*

[date]

## 3. The Disclosure Room Rules

**PRIVATELY-FUNDED HEALTHCARE SERVICES MARKET INVESTIGATION**

**DISCLOSURE RULES IN RELATION TO THE ACCESS BY EXTERNAL ADVISERS TO CERTAIN SPECIFIED INFORMATION ('DISCLOSURE ROOM RULES')**

The Competition Commission ('CC') makes available a room at its offices at Victoria House, Southampton Row, London, WC1B 4AD (the 'Disclosure Room') to the professional legal and/or economic advisers (each an 'Adviser' and together the 'Advisers') instructed by certain relevant parties (each a 'Relevant Party' and together the 'Relevant Parties') to the Private Healthcare Market Investigation (the 'Investigation').

The Disclosure Room contains information which the CC considers to be specified information within the meaning of section 238 of the Enterprise Act 2002 (the 'Act') which relates to the business of an undertaking and/or the affairs of an individual (the 'Data', as further described in recital VIII of the Undertakings to which these Disclosure Room Rules are annexed). Under section 241 of the Act the CC may disclose specified information for the purpose of facilitating the exercise by the CC of its statutory functions. Disclosure of the Data in the Disclosure Room is for the sole purpose of allowing the Advisers an opportunity to better understand the evidence relied upon by the CC relating to the insured prices analysis, where the CC has analysed prices charged by the private hospital operators from 2007 to 2011 to different Private Medical Insurers ('PMIs') for treatment of insured patients ('Insured Prices Analysis'), and to the national bargaining analysis, where the CC has analysed the evidence relating to how the main hospital operators and the PMIs negotiate and their respective strengths and weaknesses in national negotiations ('National Bargaining Analysis') so that they can respond to the CC's Provisional Findings ('PFs') on behalf of [name of the party] . Further disclosure of the Data without the written prior agreement of the CC may constitute a criminal offence under section 245 of the Act.

Entry to the Disclosure Room and conduct within it and use of the Data is permitted subject to these rules and upon suitable undertakings being given to the CC, to which these rules will be attached:

1. A maximum of three Advisers per Relevant Party will be allowed in the Disclosure Room. Each Adviser must have given the Undertakings to the CC before entering the Disclosure Room, and is deemed to have agreed to these rules;

2. The name and job title of each Adviser seeking entry to the Disclosure Room, and details of the firm they work for and the Relevant Party on behalf of whom they are acting, together with the signed Undertakings must be provided in writing to the CC prior to entry to the Disclosure Room;

3. The Disclosure Room will be open each day from 9.00am to 5:00pm on 9 and 10 September 2013. A member of CC staff will be present in the Disclosure Room at all times. This member of staff will ensure that these rules are complied with and will be

able to pass on messages to other CC staff (e.g. IT staff or the inquiry team) if problems arise which prevent analysis of the Data;

4. Advisers may talk to each other in the Disclosure Room but any conversations must be kept as brief and quiet as possible to avoid disturbing other users of the Disclosure Room. There will be no separate facilities such as break out rooms available to Advisers;

5. Advisers must adhere to the usual rules for access to the CC's offices. In particular, visitors' badges must be worn visibly at all times and Advisers must not leave the Disclosure Room at any time without informing a member of CC staff;

6. The Disclosure Room will contain two laptop computers for each Relevant Party with the following specification:

(a) access to a specific subfolder containing the Data, which will be in Word and Excel data files;
(b) no storage medium other than the hard drive will be available (the floppy disk drive, the USB ports and the CD writer—if any—will be disabled). Advisers will be able to save material to the hard drive overnight; and
(c) no internet or email capability will be available;

7. A printed copy per Relevant Party of the information described at paragraph 6(a) above will be available in the Disclosure Room, as well as printed copies of the redacted PFs including appendices.

8. Advisers are not permitted to take any items into the Disclosure Room including any device allowing contact external to the Disclosure Room or any device that can be used to record information. This includes but is not limited to: mobile phones, PDAs, laptop computers, memory sticks, cameras, notebooks and papers. Each party's Advisers will however be able to take in two sheets of A4 paper setting out the Advisers workplan which will be inspected by CC staff upon the Advisers' entry into the Disclosure Room. The workplan may not be removed from the Disclosure Room at any time and will be destroyed securely by the CC at the end of the Disclosure Room process;

9. Stationary will be available in the Disclosure Room. Advisers will be provided with an A4 sized envelope in which they may place the workplan and any handwritten notes for storage at the CC overnight. The envelope will be sealed and placed in a lockable cupboard at the CC's offices and will be securely destroyed by the CC at the end of the Disclosure Room process;

10. No copies of the Data in whole or in part are to be made or removed from the Disclosure Room in any format whatsoever, nor may Advisers take any materials whatsoever from the Disclosure Room except as specifically permitted by paragraph 11 of these Disclosure Room Rules in accordance with the Undertakings given by [name of adviser] and [name of firm];

11. Advisers are not permitted to remove any items from the Disclosure Room except for one set of notes, for each Relevant Party, of no more than 20 pages on the final visit of the Advisers of each Relevant Party. These materials must not contain any Data, except Own Client Data, as defined in the Undertakings to which these rules will be annexed. These materials must be inspected and approved by a member of CC staff prior to being removed from the Disclosure Room. Where necessary, CC staff will redact from the notes any information, including but not limited to any

information which may lead to the disclosure of any Data. CC staff will permit the parties an opportunity to make representations on any proposed redactions, and this may take up to 48 hours to complete.

12. Any Adviser who does not comply with these rules will be required to leave the Disclosure Room at the request of a CC staff member and the CC may consider other options including the exclusion of the Adviser and/or the Relevant Party concerned from current or future disclosure processes run by the CC within the context of the market investigation. The CC reserves all of its rights in this regard.

13. The CC may at any time vary these Disclosure Room Rules for good reason, which may include reasonable suspicion that a breach of these Disclosure Room Rules and/or of the Undertakings has occurred.