CMA roundtable on the use of confidentiality rings and disclosure rooms: 7 November 2016

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Introduction

1. In this short introduction, my purpose is to set out the framework against which this morning's discussion will take place. I will look at the obligations of the CMA, what they are required to do by law, and how the case law in this area has interpreted its duties. It is then for you to put some flesh on to these bones to discuss exactly how these general principles work in practice so that we can all discuss how the existing procedures might better be operated and what particular problems tend to arise in practice.

The statutory scheme

2. It is worth starting by setting out the statutory scheme that underpins the CMA's disclosure of information, as set out in the Enterprise Act 2002.

3. First, is the CMA's duty to consult before taking certain decisions. This is established by section 169 of that Act, which provides as follows:

> *(1) 'Subsection (2) applies where the relevant authority is proposing to make a relevant decision in a way which the relevant authority considers is likely to have a substantial impact on the interests of any person.*
>
> *(2) The relevant authority shall, so far as practicable, consult that person about what is proposed before making that decision*
>
> *[…]*
>
> *(4) In considering what is practicable for the purposes of this section, the relevant authority shall, in particular, have regard to-*
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> *…(b) any need to keep what is proposed, or the reasons for it, confidential.'*

4. As that final subsection notes, the CMA is also bound by requirements of confidentiality. These are addressed in particular in Part 9 of the Enterprise Act 2002.

5. Specifically, section 237 of the Act imposes a bar on the disclosure of information that comes to the CMA in connection with its Competition Act 1998 (CA98) cases and mergers and markets cases, where such information relates to the affairs of an individual or any business of an undertaking. That restriction applies during the lifetime of an individual or while the undertaking continues in existence. Part 9 has potentially serious consequences and failure to comply with it is a criminal offence in some cases.

6. However, the bar on disclosure is not absolute since Part 9 makes provision for a number of 'gateways', which allow such information to be disclosed for certain purposes. A particularly relevant example for today's purposes, is the gateway permitting disclosure to facilitate the exercise by the CMA of any statutory functions (section 241(1)). Those statutory functions include the CMA's functions as regards CA98 cases and markets and mergers cases. If reliance is placed on this gateway when disclosing information, there is no need to obtain the consent of any individual or business to whom the information relates.

7. Before deciding whether to disclose information, including when a gateway is available, Part 9 requires the CMA to have regard to the three considerations set out in section 244, namely the need to exclude from disclosure (so far as it is practicable to do so):

    - any information whose disclosure the CMA considers to be contrary to the public interest;
    - commercial information the CMA considers might significantly harm the legitimate business interests of the undertakings or;
    - information relating to the private affairs of an individual which the authority thinks might significantly harm that individual's interests;
    - the extent to which the disclosure of information relating to the private affairs of an individual or commercial information is necessary for the purpose for which the authority is permitted to make the disclosure.

8. In effect, the CMA is required to undertake a balancing exercise – taking into account the need for disclosure on the one hand, and the harm that may be caused by disclosure to the legitimate interests of businesses or individuals or to the public interest on the other.

9. In January 2014, the CMA published *Transparency and Disclosure: Statement of the CMA's policy and approach* ('the Statement') which provides guidance as to its approach in balancing confidentiality and transparency. The Statement applies in Competition Act and Enterprise Act cases and emphasises the CMA's commitment to be open and transparent about its work, while also seeking to maintain the confidentiality of information it obtains in the exercise of its functions. The Statement goes on to note that when the CMA considers it appropriate to disclose information it will consider the best to method to protect information that is confidential, this may include redacting, anonymising or aggregating confidential information, or – where necessary – using the disclosure rooms and confidentiality rings that are being discussed today.

Key principles on disclosure: the 'gist'

10. Underpinning this statutory scheme, however, are the requirements of fairness under common law and Article 6 of the European Convention on Human Rights. These require, in practice, that the affected party must be informed of the case against him or her, often referred to the 'gist' of the case in administrative cases. This term was used, in particular by Lord Mustill in *R v Home Secretary, ex parte Doody*[1] , in setting out six propositions on the requirements of fairness:

> *'… (1) where an Act of Parliament confers an administrative power, there is a presumption that this will be exercised in a manner which is fair in all circumstances. (2) The standards of fairness are not immutable. They might change over time both in general and in their application to decisions of particular type. (3) The principles of fairness are not to be applied 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 representation without knowing what factors may weigh against his interests fairness will very*

[1] [1994] AC 531, 560.

often require that he is informed of the gist of the case which he has to answer.'

The key, therefore, is the gist.

11. Where information is not confidential, no problem arises. The real issue is where the regulator, in this case the CMA, is sitting on confidential information. On the one hand, there is an obligation to provide the person affected with the gist of what is being said against him. On the other hand, there is a need to protect the rights of those to whom the CMA owed an obligation of confidence.

12. The obligation to disclose the gist of the case against a person can create a lot of challenges for regulators and prosecutors.

13. An example some way from the usual competition law problems is public interest immunity. Whilst in civil cases there is a balancing act which may come out in appropriate cases in favour of denying disclosure, in criminal cases, the balance is invariably struck in favour of the defendant. The usual problem is that of informants. The crown can't reveal the identity of the informant. In many cases it may not matter why the police decided to search the house where the drugs were found. But sometimes it will be apparent that it is relevant to the defence being run and the Crown may have to decide whether to give up the information or not to rely on the search of the house at all.

14. And a similar principle has been applied in competition law context by the Competition Appeal Tribunal (CAT) in *Ryanair v Competition Commission (CC)*[2]*:*

> *'once it has been determined by the CC that fairness does require disclosure, then disclosure should be made whether directly to the person affected or to his representatives in some form (including by way of confidentiality ring or data room process). If the material is so sensitive that no such disclosure can be made, then it should usually follow that the CC should not rely upon such material in its decision.'*

15. But competition law presents special problems. Confidential information needs protection in many spheres. But what is unique about competition law is that one man's market advantage is invariably another's market disadvantage and much of the information which CMA handles and relies

[2] 2014 CAT 3 at [134]

upon is likely if disclosed to benefit one market participant at the expense of another.

16. What is clear, is that gist doesn't mean that everything must be disclosed. In *BMI v CC (No.1) [2013] CAT 24* ('BMI Healthcare'), at para [39(7)], the CAT said:

> '*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 degree of specificity.'*

17. The point was considered further in *Ryanair Holdings plc v CC [2013] CAT 25* ('Ryanair) at para [8], where the Tribunal stated that:

> *'We agree that you do have to look at the facts of each case. At one end of the spectrum there may be a case where numbers are involved and you need to see the relevant numbers or data in order to understand the gist of what is being put. In other cases, more like the present, you need to know what the general position is …'*

Disclosure by the CMA

18. Having alluded to the recent cases which have considered disclosure by the CMA or its predecessor, let us know look at those three cases – *Ryanair, BMI Healthcare*, and *Groupe Eurotunnel v CC 2013 CAT 24 (Groupe Eurotunnel)* – in a bit more detail.

19. *Ryanair* concerned Ryanair's acquisition of a 29.8% share in Aer Lingus. The issue was whether redacted names of airlines should be disclosed. The courts held that the names were not necessary for Ryanair to understand the 'gist' of the case that the minority stake was a significant impediment to some form of union or collaboration with a third party. The case is somewhat disappointing, in that it went to the Court of Appeal[3] and one might have hoped for some

[3] 2015 EWCA Civ 83.

authoritative statements of principle but the Court of Appeal did little more than say it could find no fault with the CAT judgment.

20. In *Groupe Eurotunnel,* the applicants brought a review of the CMA's final report on the acquisition by Eurotunnel of certain assets of SeaFrance S.A.. Eurotunnel claimed that the CMA acted unfairly by not providing to it (through its external economic and legal advisers in confidentiality ring) important parts of its provisional findings and key evidence that it relied on, prejudicing materially Eurotunnel's ability to defend itself. SCOP, a workers cooperative, also appealed the CMA's decision on the same grounds, alleging that its right to a fair hearing had been breached by the CMA's failure to disclose a working document to it. CAT held that Eurotunnel had not shown it was unable to understand the 'gist' of the case. In relation to SCOP's challenge, the CAT found that it had not been necessary for the CMA to withhold the entirety of the Remedies Working Paper and that it could have disclosed the 'gist' without disclosing the document in its entirety. However, the fact that the SCOP had the opportunity to address the points made against it and took the opportunity to do so by submitting its own legal opinion and arguments meant that the CMA's procedural failings were immaterial.

21. *BMI Healthcare* was the one case where the challenge succeeded. In the context of its market investigation reference into the supply or acquisition of privately funded healthcare services in the UK, the CC ran a disclosure room on the basis of tight undertakings BMI claimed that, having already permitted the BMI advisers to view all of the data in the disclosure room, the CC was wrong not to permit the advisers to use any such data in BMI's response. The Tribunal held that the rules put in place by the CC in the investigation to govern access to and use of the disclosure room did not enable BMI to make a proper and informed response and were deficient in three aspects:

    a) It was wrong in principle to confine the parties' advisers to recording in their notes only own client data or information derived solely from the advisers' own client and/or from data in the public domain: it was the confidential information that is not own client data that would be of real interest to the advisers and which they will wish to review, to see how the CC had relied upon it.

    b) The way in which the parties' advisers were not allowed to remove confidential information from the disclosure room prevented the drafting of a worthwhile response, in that, the advisers could not discuss points amongst themselves, they had no access to other material that they might need to look at, they had no opportunity to discuss matters with persons outside the disclosure room, and no opportunity to test the robustness of the data.

c) The period of time for which the advisers were allowed access to the disclosure room was unreasonably short. Therefore, according to the CAT, the way the disclosure room was run in that case was in breach of CMA's statutory duty to consult under s.169 of the Enterprise Act 2002, was unfair and in breach of principles of natural justice.

22. What can be gleaned from these three decisions? The problem is that they are inevitably fact-specific and it is dangerous to try to draw conclusions from how the court treated one set of facts.

23. However, the judgments do provide some more general insights. In particular, in *BMI Healthcare*, the CAT set out a series of guiding principles[4] which may be summarised as follows:

a) That in considering the authority's (in that case the CC's, now the CMA's) duty to consult, the starting point must be the Enterprise Act 2002.

b) That, as is clear from section 241 of the Act, the protection of specified information can give way 'for the purpose of facilitating the exercise by the [CMA] of any function it has under or by virtue of this Act', and one of those functions is the duty to consult under section 169 of the Act.

c) That the Act thus establishes both the duty to consult and the duty to protect confidential ('specified') information.

- Section 244 then describes the three conditions that I referred to before, to which the CMA should – 'so far as practicable' – have regard 'before disclosing any specified information'.

d) Next, that the Act thus contains a fairly comprehensive code dealing with the duty to consult and the duty to protect confidential information.

- On the one hand, there is nothing in the Act which obliges the CMA to withhold material that ought to be disclosed pursuant to the CMA's section 169 duty to consult, simply because that would involve the disclosure of specified information.

- But, conversely, the CMA is not obliged to disclose each and every piece of specified information as part of its duty to consult.

The Tribunal described the Act as containing a 'perfectly clear and workable code', and did not consider it necessary to imply into the Act

[4] At [39]

anything by way of additional safeguard. The provisions of the Act were, in the Tribunal's view, quite sufficient in themselves for this purpose.

e) The CMA's guidance in relation to confidential information is entitled to great weight.

f) Similarly, whilst what is a fair process in the context of the Act is one for the Tribunal as a matter of law, the CMA'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 CMA, 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 CMA, in particular as to how confidential certain material is, and how best to protect the confidentiality in that material.

g) Finally, as regard Lord Mustill's sixth proposition in *Doody* that a person affected by a decision should be informed of the 'gist' of the case which he has to answer, the Tribunal noted that what constitutes the 'gist' of a case is acutely context-sensitive, describing 'gist' as a peculiarly vague term. '*Competition cases*', the Tribunal remarked '*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 CMA to decide how much to reveal when consulting, disclosing … the "gist" of the CMA's reasoning will often involve a high level of specificity'.*

24. So from this it is clear that the CAT will look at whether the 'gist' has been disclosed and whether the procedure adopted enables the party to make a proper and informed response to the case against them. It is also evident that the CAT will not second-guess the CMA and that on an application to the court to review the CMA's decision, the standard is the same as judicial review.

25. The cases also provide some more specific insights on the use of confidentiality rings and disclosure rooms as means of disclosure. However, the starting point in this regard is to consider first the Supreme Court

decisions in *Al Rawi v The Security Service*[5] and *Bank Mellat v HM Treasury (No 1)*[6].

26. *Al Rawi* concerned the question as to whether it was permissible at common law for the civil courts to adopt what was called a special advocate procedure, a procedure which by statute is available in certain immigration and asylum tribunals. In *Al Rawi*, Lord Dyson said[7]:

> *'where the whole object of the proceedings is to protect a commercial interest, full disclosure may not be possible if it would render the proceedings futile. This problem occurs in intellectual property proceedings. It is commonplace to deal with the issue of disclosure by establishing 'confidentiality rings' of persons who may see certain confidential material which is withheld from one or more of the parties to the litigation at least in its initial stages. Such claims by their very nature raise special problems which require exceptional solutions. I am not aware of a case in which a court has approved a trial of such a case proceeding in circumstances where one party was denied access to evidence which was being relied on at the trial by the other party.'*

27. David Richards J said in *McKillen v Misland (Cyprus) Investments Ltd*[8], a company law case, that he had spoken to the specialist intellectual property judges and none of them had experience of a confidentiality ring – or 'confidentiality club' as it was referred to in that case – operating at trial. He concluded as follows[9]:

> *'If such a departure from the principles of natural justice is not permitted in a case where there are good grounds for considering that serious issues of national security arise, it can hardly be supposed that it would be available in a case concerning the financial circumstances of a party.*
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> *In the light of the decision and discussion in Al Rawi, it is my view that at common law the court has no jurisdiction to deny a party access to the evidence at trial. But if the jurisdiction does exist, it is in my judgment so exceptional as to be of largely theoretical interest.'*

28. David Richards J put this in wide terms and this is a highly controversial principle. It is less problematic where the party is a company, because there

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[5] 2011 UKSC 34
[6] 2013 UKSC 38
[7] At [64]
[8] 2012 EWHC 1158 (Ch)
[9] At [49-50]

should be less problem in limiting access to specified individuals within a company. He does not refer to competition cases.[10] But in *BMI Healthcare* the CAT dealt with this position rather more robustly[11]:

> *'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).*
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> *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.'*

29. The same chairman, Marcus Smith QC, gave the judgment of the CAT in *Groupe Eurotunnel.* Following *BMI,* the CAT said[12] that in *Al Rawi and Bank Mellat:*

> *'the Supreme Court was considering the permissibility of closed procedures (as defined in those decisions) in the context of criminal and civil trials . Al Rawi concerned a civil action for damages, and Bank Mellat a review of an administrative decision done on a judicial review standard. Both Lord Dyson in Al Rawi and Lord Neuberger in Bank Mellat made it clear that this was the question before them, not the wider question of what "fairness" required in administrative proceedings generally.*
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> *There is no suggestion, either express or implied in either decision, that the Supreme Court intended its observations in relation to "closed procedures" to be applied either generally to administrative decisions or in the specific context of the Commission's statutory procedure in this case. .. the suggestion that the decisions in Al Rawi and Bank Mellat are to be read across as the new standard to be applied to all*

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[10] The *Pay TV* cases before the CAT had in fact involved significant parts of the evidence being dealt with in confidence from other parties to the reference

[11] At [44-45]

[12] At [186-187]

administrative decision making procedures is a misreading of those decisions.'

30. While that endorsement of the confidentiality rings is fresh in your minds, I will hand over to the Panel to continue the discussion, thank you.