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CMA Forced to Backtrack on Hospital Divestments in Private Healthcare Market Investigation

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The Competition and Markets Authority (“CMA”) has backed down from its decision in the Market Investigation into Privately Funded Healthcare Services (the “PH Investigation”), which required HCA to divest some of the private hospitals it owns. The climb-down is another major setback for the PH Investigation, the latest of several for the CMA during what has been a troubled inquiry. It is concerning that this reversal comes only after the Competition Appeal Tribunal ordered the CMA to disclose key evidence supporting its conclusion. For a major competition inquiry to collapse simply following disclosure of the evidence is highly damaging to the CMA’s nascent reputation. The CMA will want to take urgent steps to improve matters for current high profile inquiries into energy and banking. Hopefully, those steps will include a fundamental rethink of the approach to disclosure in ongoing and future investigations.

Context

In the PH Investigation, the CMA concluded that HCA’s hospitals had market power in Central London and that, as a result of this, it was charging excessive prices to self-pay patients and to private medical insurers. In order to rectify the problem, the CMA imposed a number of remedies, including a divestment order requiring HCA to sell either the Wellington hospital or both the London Bridge and Princess Grace hospitals. HCA appealed the CMA’s findings before the CAT and sought to have the divestment order quashed. If the appeal is successful, the CAT would remit the matter back to the CMA for reconsideration, giving appropriate directions as to how the new process should be conducted.

During the appeal, the CAT granted to HCA disclosure of certain materials (including data and methodologies) which the CMA had used in its work during the PH Investigation. Specifically, these materials related to the CMA’s Insured Prices Analysis (“IPA”) – this was a key pillar on which the CMA’s case for the divestment of HCA’s hospitals relied, but one that had already been heavily criticised during the course of the PH Investigation. Indeed, it was flaws in the IPA that led to BMI Healthcare (“BMI”) obtaining a blocking minority on the CMA’s decision-making panel protecting BMI from a divestiture remedy. Notably, BMI also had to take the then Competition

Commission to the CAT in order to obtain access to the evidence needed to make this ultimately successful submission.¹ None of the materials disclosed to HCA during the appeal had been seen by HCA when the PH Investigation was ongoing. As such, the parties had previously been unable to comment on or make representations as to the robustness and appropriateness of the materials prior to the CMA making its decision. Following the CAT's order for disclosure – which was strongly resisted by the CMA – these materials were open to direct scrutiny and could be challenged by HCA and its advisors. It is this disclosure which has caused the CMA's case to collapse.

Recent Developments

While the contents of these materials and the subsequent representations made by HCA will not be made publicly available, the CMA is now of the opinion that it is no longer able to stand by the results of its IPA. It therefore has no legal basis on which it can order the divestment of HCA's hospitals. It is understood the CMA has written to the CAT requesting that it remit the matter back for further consideration.

This does not mean HCA is completely off the hook. It is possible that the CAT could remit the matter to the CMA with instructions to redo the analysis in respect of HCA, only for the CMA to come to the same outcome under a revised approach. However, the CMA would certainly be under increased scrutiny to ensure it conducts, and is seen to conduct, a fair and transparent assessment, the results of which will be rigorously tested. It is difficult to see how this could be achieved with a remittal panel composed of the same members as the original panel.

This is not the first time in the PH Investigation that the CMA has been forced into retreat, either in respect of the fairness of its procedures or the strength of its analyses. When the PH Investigation was still live, BMI was lead applicant (joined by Spire and HCA) in successful litigation in the CAT against the CMA's disclosure process concerning, among others, materials relating to its IPA. In its judgment, the CAT criticised the CMA for adopting an "unfair" and "irrational" process and for "comprehensively failing" to give the parties a fair opportunity to correct or contradict the CMA's provisional findings or to make worthwhile representations. This forced the CMA to reopen the disclosure room on fairer terms, which enabled BMI to effectively undermine the CMA's analyses and secure the minority dissent preventing it from having to divest any hospitals.

Important Considerations

The concern for parties subject to a market investigation is twofold: first is the lack of economic capability the analysis in the PH Investigation suggests; second is the clear lack of adequate disclosure arrangements. Certainly, if the CMA had allowed sufficient access to the evidence it was relying on during the PH Investigation then the issues that are only now arising would have come to light much sooner, potentially preventing not only litigation that is expensive, time-consuming and resource-constraining for all concerned, but serious commercial damage to parties concerned as well as harm to the CMA and the UK's regulatory reputation.

¹ Shearman & Sterling acted for BMI throughout the PH Investigation.

These recent events will certainly be unwelcome at the newly formed CMA, no doubt keen to focus on its own market investigations into the banking and energy sectors, rather than dealing with legacy investigations of the old Competition Commission. However, unless significant changes in procedure are adopted it seems likely that the market investigation regime will come under ever closer supervision from the Courts and parties will feel the need to litigate more assertively – resulting in cost and inefficiency for all concerned.

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