



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 46 OF THE COMPETITION ACT 1998

Case No: 1275/1/12/17

Pursuant to rule 14 of the Competition Appeal Tribunal Rules 2015 (S.I. No. 1648 of 2015) (“the Rules”) the Registrar gives notice of the receipt of an appeal on 7 February 2017 under section 46 of the Competition Act 1998 (“the Act”), by Flynn Pharma Limited and Flynn Pharma (Holdings) Limited (together, “Flynn”) against a decision of the Competition and Markets Authority (“the CMA”) dated 7 December 2016, entitled *Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK* (“the Decision”). Flynn is represented by Macfarlanes LLP of 20 Cursitor Street, London EC4A 1LT (reference: Cameron Firth).

In the Decision the CMA found that Flynn had infringed the Chapter II prohibition contained in section 18 of the Act and Article 102 of the Treaty on the Functioning of the European Union by imposing unfair prices for phenytoin sodium capsules¹ manufactured by Pfizer Limited and Pfizer Inc (together, “Pfizer”), in the UK. The Decision also found that Pfizer had infringed the same provisions by charging Flynn unfairly high prices for phenytoin. Flynn and Pfizer were fined £5,164,425 million and £84.2 million respectively and both companies were directed to reduce their prices. Pfizer has appealed the Decision separately: see Case 1276/1/12/17.

In summary, the principal grounds of appeal on which Flynn relies are that:

1. The CMA wrongly excluded phenytoin capsules supplied by NRIM Limited (“NRIM”)² from its market definition (completely or, on its alternative market definition, from November 2013 onwards), contrary to the evidence which Flynn says shows, in particular, actual substitution between the two products and that NRIM’s capsules exerted a price constraint on Flynn’s products, including after November 2013.
2. If the market is correctly defined to include NRIM’s capsules, Flynn does not occupy a dominant position in the relevant market.
3. Further or alternatively to Ground 2, the finding of dominance is contradicted by the evidence which shows that Flynn did not exercise sufficient market power to occupy a position of dominance; and is based on a number of legal errors, including the finding that the Department of Health (“DH”) does not have significant buyer power, which is contradicted by the DH’s ability and legal powers to intervene in drug prices.
4. The CMA’s methodology for allocating Flynn’s common costs on the basis of sales volumes produces a meaningless and arbitrary result. In particular, it does not reflect the way in which Flynn’s costs are incurred, is not a methodology which (to Flynn’s knowledge) has ever been adopted by any generic pharmaceutical company in the UK, including Flynn, and is contrary to the cost allocation methodology used in the Pharmaceutical Price Regulation Scheme (“PPRS”).
5. The CMA’s benchmark rate of a 6% return on sales (“ROS”) derived from the PPRS rules is misconceived. The PPRS scheme applies only to branded products and the ROS benchmarks of that scheme are inappropriate for unbranded generic products. The evidence shows that the returns

¹ Phenytoin sodium is a medicine for the treatment of epilepsy.

² There are two companies which manufacture and supply phenytoin sodium capsules to the UK; these are Pfizer and NRIM.

earned both by Flynn on most other products in its portfolio and by other suppliers of generic pharmaceutical products are substantially above the 6% ROS threshold.

6. Even if (contrary to Ground 5) a relevant benchmark could be derived from the PPRS, Flynn's prices are not excessive if the methodology for allocating costs under the PPRS is properly applied (which the CMA failed to do) and the permitted margin of tolerance under the PPRS rules is taken into account.
7. The CMA wrongly disregarded two key benchmarks relating to the gross margins earned by Flynn on other products in its portfolio, which show that the margins earned by Flynn on phenytoin are not excessive.
8. The CMA wrongly disregarded the fact that Flynn's prices for phenytoin capsules have at all material times been substantially below those for phenytoin tablets as a benchmark (and were deliberately set on that basis). The tablet prices should have been the key comparator for determining whether capsule prices were excessive and/or unfair (including the assessment of economic value), since they are precisely the same active substance, had been subject to a dramatic price reduction following intervention by the DH, and would be the main product to which patients would have had to switch if the phenytoin capsules had been withdrawn.
9. The CMA wrongly relied on a number of other entirely irrelevant and subjective considerations in support of its finding that Flynn's prices were unfair.
10. Alternatively, the penalty should be set aside because any infringement by Flynn was not intentional or negligent.
11. Alternatively, the penalty should be reduced because any infringement was not "the most serious" type of competition law infringement.
12. Further or alternatively, the penalty of £5,164,425 imposed on Flynn is disproportionate, taking into account the percentage that it represents of Flynn's annual profits after tax for the latest three years for which accounts have been provided.

As regards the relief sought, Flynn requests that:

- (a) the Decision be set aside in full; or alternatively
- (b) the penalty be set aside or substantially reduced.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

A request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London, WC1A 2EB, so that it is received within **three weeks** of the publication of this notice.

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

Charles Dhanowa OBE, QC (Hon)
Registrar
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