COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 47 OF THE COMPETITION ACT 1998

Case No: 1348/2/12/20

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 4 May 2020 under section 47 of the Competition Act 1998 ("the Act"), by Mr Amit Patel ("the Appellant"), a former director of Auden Mckenzie (Pharma Division) Limited and Auden Mckenzie Holdings Limited (together, "Auden Mckenzie"), against a decision of the Competition and Markets Authority (the "CMA") dated 4 March 2020 in Case 50507.2 *Nortriptyline Tablets (Market Sharing)* (the "Decision"). The Appellant is represented by Ashurst LLP of London Fruit & Wool Exchange, 1 Duval Square, London E1 6PW (reference: Euan Burrows / Steven Vaz / Laura Carter).

The Decision finds that from September 2014 until May 2015, King Pharmaceuticals Ltd and Praze Consultants Ltd (together "King") and Auden Mckenzie were party to an agreement relating to the supply of Nortriptyline Tablets to a large pharmaceutical wholesaler (the "Agreement") that had as its object the restriction of competition by market sharing, fixing prices and fixing quantities, in breach of the prohibition imposed by section 2(1) of the Act (the "Chapter I prohibition") and Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU").

The Appellant raises two grounds of appeal:

1. The Decision erred in law in finding that the Agreement restricted competition "by object" within the meaning of the Chapter I prohibition and Article 101(1) TFEU. In summary, the Decision erred in the application of the concept of restriction of competition "by object" because it:

    a. failed properly to assess the implications of its factual findings as to the content of the Agreement for its legal assessment. The Decision instead purported to categorise the Agreement as:

        i. "market sharing", whereas the facts as found in the Decision actually confirmed that the Agreement did not aim to share the market, but rather was limited to an arrangement to supply a single wholesaler customer;

        ii. "price fixing", whereas the facts as found in the Decision actually confirmed that the price was not "fixed" as that term is understood for the purpose of object infringements of competition law but rather involved a price negotiated and agreed by the customer, which was a very significant discount from the prices at which both King and Auden Mckenzie had previously supplied that customer; and

        iii. "fixing volumes / production quotas", whereas the facts as found in the Decision actually confirmed that the quantities supplied by Auden Mckenzie and King to that customer significantly increased during the period of the Agreement compared to the prior and subsequent periods, and did not find that the customer was unable to obtain additional volumes from Auden Mckenzie or King at a different price;

    b. failed to establish sufficiently robust and reliable experience that an agreement such as the Agreement is, by its very nature, harmful to the proper functioning of competition and is a restriction by object; and

    c. failed to properly assess the implications of its factual findings as to the legal and economic context of the Agreement for its legal assessment. In particular, the Decision failed to consider the counterfactual, did not establish that the Agreement was capable of leading to higher prices to pharmacies or the NHS, and dismissed the fact that, taking into account the structure of the market,

the Agreement had pro-competitive effects in the form of increased supply to the wholesaler customer at very low prices.

Having failed to establish a restriction of competition by object, and having declined to conduct any effects analysis such as to establish any actual effect on competition, the Decision failed to demonstrate that there was any "prevention, restriction or distortion of competition", as required for a finding of infringement of the Chapter I prohibition and/or Article 101(1) TFEU.

2. The CMA committed a fundamental procedural error by adopting a procedure which did not allow for the facts and conclusions in the Decision properly to be established and tested. In particular, it did not allow the Appellant fairly or meaningfully to be heard on the allegations in the Statement of Objections before reaching a Decision which has the potential to cause real prejudice to him.

As regards the relief sought, the Appellant seeks:

1. the annulment of the Decision (in whole or in part);

2. further or alternatively, remittal of the matter to the CMA with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal; and

3. an order that the CMA pay the Appellant's costs incurred in bringing the appeal

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.

Please also note that a direction of the President is currently in place as to the electronic filing of documents: see paragraph 2 of the Practice Direction relating to Covid-19 published on 20 March 2020. Therefore, a request for permission to intervene should be sent to the Registrar electronically, by email to registry@catribunal.org.uk, 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 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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