



COMPETITION APPEAL TRIBUNAL

NOTICE OF AN APPEAL UNDER SECTION 46 OF THE COMPETITION ACT 1998

Case No: 1422/1/12/21

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 14 October 2021 under section 46 of the Competition Act 1998 (the “Act”), by Mercury Pharmaceuticals Limited, Advanz Pharma Services (UK) Limited, Mercury Pharma Group Limited, and Advanz Pharma Corp. Limited (together, “Advanz”) against a decision of the Competition and Markets Authority (the “CMA”) dated 29 July 2021 in Case 50395 entitled *Excessive and unfair pricing with respect to the supply of liothyronine tablets in the UK* (the “Decision”). Advanz is represented by Morgan, Lewis & Bockius UK LLP of Condor House, 5-10 St. Paul’s Churchyard, London EC4M 8AL United Kingdom (reference: Frances Murphy / Leo Theodosiou).

The Decision concerns 20mcg liothyronine sodium tablets (“Liothyronine”), a medicine, like levothyroxine tablets, that is used for the treatment of hypothyroidism.

By the Decision the CMA determined that Advanz abused its dominant position contrary to section 18 of the Act, by charging excessive and unfair prices for Liothyronine from at least 1 January 2009 to 31 July 2017 (“Infringement Period”) and fined Advanz £40.9 million.

In summary, Advanz’s principal grounds of appeal are:

1. Advanz’s conduct does not give rise to an infringement under section 18 of the Act because Advanz did not act unilaterally. The National Health Service (the “NHS”) and the Department of Health (the “DH”), the sectoral price regulator and Advanz’s sole customer in the UK, acquiesced in Advanz’s prices for Liothyronine. Advanz implemented price increases in order to help remedy significant supply and compliance issues, including in relation to Liothyronine, that were of concern to the Medicines and Healthcare products Regulatory Agency and the DH. Advanz voluntarily notified the DH/NHS of each proposed price increase for Liothyronine and only implemented them following receipt of written confirmation from the DH/NHS that the price increases were “approved”. The DH/NHS never once in the Infringement Period complained, nor criticised, nor negotiated on the price of Liothyronine. Throughout the Infringement Period, the DH/NHS had statutory, non-statutory and informal powers to intervene on the price of Liothyronine, but did not do so.
2. Advanz was not dominant in the supply of Liothyronine because in the Infringement Period the DH/NHS had very substantial countervailing buyer power including a range of effective statutory, non-statutory and informal powers to intervene and reduce the price of Liothyronine. These powers included paragraph 30 of Scheme M (of which Advanz was a member) and informal powers that the Courts have previously recognised.
3. The CMA has erred materially in arriving at a finding of an infringement on the basis of a cost-plus methodology, which in Advanz’s submission is wrong in principle. In any event, the CMA has erred in the application of its cost-plus approach, and it has improperly dismissed a number of meaningful comparators and methodologies that are more suitable on the facts of this case including that the pharmaceutical industry operates on a portfolio pricing model.
4. The CMA has erred in imposing a fine on Advanz. There should be no fine on Advanz (or it should be greatly reduced) including because the CMA erred in its finding that Advanz acted intentionally or negligently (the CMA has revised its position repeatedly in this case in its three statements of objections and four letters of facts, including to reflect judgments by the Tribunal and the Court of Appeal respectively in Phenytoin ([2018] CAT 11 and [2020] EWCA Civ 339)). Further, and, in

any event, the CMA's calculation of Advanz's fine is vitiated by material errors of law and factual assessment.

As regards the relief sought, Advanz requests that:

- a. the Decision be set aside in whole or in part so far as it concerns Advanz;
- b. the fine imposed on Advanz be annulled or, in the alternative, reduced significantly; and
- c. the CMA be ordered to pay Advanz's costs incurred in connection with 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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