



COMPETITION APPEAL TRIBUNAL

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

Case No: 1434/1/12/22

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 25 April 2022 under section 46 of the Competition Act 1998 (the "Act"), by Cinven Capital Management (V) General Partner Limited, Cinven (Luxco 1) S.à.r.l., and Cinven Partners LLP (together, the "Cinven Entities") in respect of the decision by the Competition and Markets Authority ("CMA") in Case 50511-2 (*Prochlorperazine*), dated 3 February 2022 (the "Decision"). The Cinven Entities are represented by Clifford Chance LLP of 10 Upper Bank Street, London, E14 5JJ (reference: Luke Tolani/Greg Olsen).

The Decision concerns Prochlorperazine 3mg buccal tablets sold in packs of 50 as a prescription-only medicine ("Prochlorperazine POM"). The CMA finds that Alliance and Lexon entered into an agreement that had as its object the prevention, restriction or distortion of competition, thereby infringing section 2 of the Act (the "Chapter I prohibition"). The Decision states in summary that: (a) Alliance paid Lexon in exchange for Lexon agreeing not to enter the market with its own Prochlorperazine POM developed jointly with Medreich (the "Market Exclusion Agreement"); (b) the Market Exclusion Agreement was implemented through two agreements made between Focus Pharmaceuticals Ltd (together with its beneficial owners during the Relevant Period, "Focus") and each of Alliance and Lexon; and (c) Medreich was aware of the Market Exclusion Agreement (or could reasonably have foreseen it and was prepared to take the risk), and can be therefore said to have participated in the Market Exclusion Agreement. The Decision imposes a fine on Focus of approximately £15.4 million, of which the CMA holds the Cinven Entities, on the basis of parental liability, solely liable for approximately £4.85 million and jointly and severally liable for approximately £1.8 million (£6.7 million in total).

The Cinven Entities appeal the decision. The grounds of appeal on which the Cinven Entities rely are:

1. The CMA has erred in its approach to the burden and standard of proof in its assessment of the evidence relating to Focus's participation in the alleged anticompetitive conduct. In particular, the CMA has wrongly: (i) relied on a narrow selection of three documents to find liability, which are in any event ambiguous; (ii) failed properly to assess all of the evidence in the round and properly to consider exculpatory evidence, in particular other contemporaneous documents; and (iii) drawn unwarranted inferences as to Focus's commercial incentives in circumstances where perfectly plausible explanations existed for Focus's conduct which did not depend on any anticompetitive intent.
2. The CMA has applied the wrong legal test in determining whether Focus participated in the alleged Market Exclusion Agreement. To conclude that Focus was liable as a participant in the alleged unlawful conduct, the CMA should have addressed itself to the test of whether Focus knew or should have known of the alleged Market Exclusion Agreement between Alliance and Lexon. This conclusion cannot safely be reached on the balance of probabilities. Instead, the CMA erred in assessing Focus's liability by reference to the question of whether Focus was aware of the Market Exclusion Agreement (or could reasonably have foreseen it and was prepared to take the risk). By this error, the CMA has again diluted the standard of proof it must meet in a manner that favours a finding of liability.

3. The Decision has erred in imposing a fine of £6.7 million on the Cinven Entities. The fine is imposed solely on the basis of parental liability; it is not suggested that the Cinven Entities had any role in the allegedly infringing conduct. In particular, in imposing this fine, the CMA has erred: (i) in finding that the intention and/or negligence threshold is met; (ii) in imposing an exorbitant uplift of almost 250% in respect of specific deterrence on the Cinven Entities; and (iii) in failing to take into account the lesser 'facilitator' role which Focus is alleged to have played in the alleged infringement.

As regards relief, the Cinven Entities ask for:

- a. The annulment of the Decision in whole or in part;
- b. An annulment of the fine imposed on the Cinven Entities or, in the alternative, a reduction thereof;
and
- c. Payment of the Cinven Entities' costs incurred in connection with this appeal.

Any person who considers that they have 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

Published 16 May 2022