



COMPETITION APPEAL TRIBUNAL

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

**Case No: 1438/1/12/22**

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 4 April 2022 under section 46 of the Competition Act 1998 (the “Act”), by Lexon (UK) Limited (“Lexon”) and its parent company, Lexon UK Holdings Limited (“Lexon Holdings”) (together, “the Appellants”) against a decision of the Competition and Markets Authority (the “CMA”), dated 3 February 2022 in Case 50511-2 *Prochlorperazine* (the “Decision”). The Appellants are represented by Maitland Walker LLP of 22 The Parks, Minehead, Somerset TA24 8BT (reference: Julian Maitland-Walker and Adrian Render).

The Decision concerns prochlorperazine 3mg buccal tablets sold in packs of 50, a prescription only generic medicine (“Prochlorperazine POM”), that is used for the treatment of (inter alia) nausea and vomiting.

By the Decision the CMA found that:

1. Lexon was, with its joint venture partner, Medreich Plc, a subsidiary of Medreich Ltd. (together, “Medreich”), a potential competitor in the supply of Prochlorperazine POM in the United Kingdom;
2. By 7 June 2013 (alternatively, at the latest by 22 June 2013) Lexon entered into a ‘pay for delay’ agreement (referred to in the Decision as the “Market Exclusion Agreement”) with the incumbent supplier of Prochlorperazine POM, Alliance Pharmaceuticals Limited (“Alliance”), pursuant to which (i) Alliance would de-brand its own Prochlorperazine POM product and sell it at a fixed price exclusively to a third undertaking, Focus Pharmaceuticals Limited (“Focus”), which would distribute it on an exclusive basis, (ii) Lexon would not commercialise in the United Kingdom the Prochlorperazine POM product that it had jointly developed with Medreich, other than a single batch necessary to avoid the application of the ‘sunset clause’ in Medreich’s Prochlorperazine POM marketing authorisation (“MA”, which would have become invalid if a batch was not sold within three years of its grant) and (iii) Alliance would indirectly transfer value (through Focus) to Lexon, through Focus sharing with Lexon the profits it made on the sale of Alliance’s Prochlorperazine POM product;
3. Focus became a party to the alleged Market Exclusion Agreement by 22 June 2013 and Medreich subsequently also became a party from 5 February 2014;
4. Lexon was a party to the alleged Market Exclusion Agreement from 7 June 2013, but in any event from 22 June 2013 until 31 July 2018 (the “Infringement Period”); and
5. The alleged Market Exclusion Agreement had the object of restricting competition in the supply of Prochlorperazine POM in the United Kingdom and thereby infringed the Chapter I prohibition of the Competition Act 1998.

The CMA imposed a fine of £7.3 million on Lexon, for which Lexon Holdings is jointly and severally liable in the sum of £593,780.

The Appellants appeal the Decision. The principal grounds of appeal on which the Appellants rely are:

1. The CMA has not met its burden of proof in establishing that, on the balance of probabilities, Lexon was party to the alleged Market Exclusion Agreement:

- a. The CMA adduced no positive evidence (whether documentary or witness evidence) as to either (i) the conclusion of the alleged Market Exclusion Agreement between Lexon and Alliance or (ii) the terms of that alleged agreement;
  - b. The CMA was not entitled to draw inferences (from separate distribution agreements between Focus and Alliance and between Focus and Lexon, documentary evidence and the parties' conduct), as to the existence and terms of that alleged agreement, as (i) certain findings of primary fact made by the CMA from which such inferences were drawn were not supported by the evidence, and (ii) other findings of primary fact that the CMA could properly make based upon that evidence did not support the inferences drawn to support the conclusion that Lexon and Alliance entered into the alleged Market Exclusion Agreement, whether on or before 7 or, alternatively, 22 June 2013; and
  - c. The evidence available to the CMA supported an alternative plausible explanation that did not involve Lexon being party to the alleged Market Exclusion Agreement.
2. The penalty imposed on the Appellants was manifestly excessive and disproportionate.

As regards the relief sought, the Appellants request that:

- a. The Decision be set aside insofar as it finds that Lexon was a party to the Market Exclusion Agreement during the Infringement Period;
- b. The penalty imposed on the Appellants be revoked;
- c. In the alternative, that that penalty be reduced significantly;
- d. That the CMA pay the Appellants' costs; and
- e. Such other order or relief that the Tribunal may consider appropriate.

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](mailto: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](http://www.catribunal.org.uk). Alternatively, the Tribunal Registry can be contacted by telephone (020 7979 7979) or email ([registry@catribunal.org.uk](mailto:registry@catribunal.org.uk)). Please quote the case number mentioned above in all communications.

*Charles Dhanowa OBE, QC (Hon)*  
Registrar

Published 16 May 2022