



## COMPETITION APPEAL TRIBUNAL

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

#### CASE No 1255/1/12/16

Pursuant to rule 14(2) 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 12 April 2016 under section 46 of the Competition Act 1998 (“the Act”) by Merck KGaA (“Merck”) of Frankfurter Straße 250, 64293 Darmstadt, Germany against a decision of the Competition and Markets Authority (“CMA”) dated 12 February 2016 in CASE CE-9531/11 - Paroxetine (“the Decision”). Merck is represented by DLA Piper UK LLP at 3 Noble Street, London, EC2V 7EE (reference: Sarah Smith).

The Decision concerns, amongst other things, an agreement (“the Settlement”) entered into by Generics (UK) Limited (“GUK”) in 2002 to end ongoing patent litigation with pharmaceutical originator company GlaxoSmithKline PLC (“GSK”) relating to paroxetine (supplied in the UK as Seroxat, an antidepressant medicine). The CMA found that GUK infringed section 2(1) of the Act (the “Chapter I prohibition”) and Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) by participating in the Settlement. The CMA found that GSK made value transfers to induce GUK to desist, during the term of the Settlement, from continuing its efforts to enter the UK paroxetine market independently of GSK, and thereby from offering independent generic competition against GSK. According to the Notice of Appeal, at the time of concluding the Settlement, GUK was 100% indirectly owned by Merck. The CMA relied on this fact to hold Merck jointly and severally liable with GUK in respect of the Settlement. The CMA imposed a fine on Merck of £5,841,286 and GUK was held jointly and severally liable for £2,732,765. The Notice of Appeal states that the entirety of Merck’s interest in GUK was sold to Mylan Inc. in October 2007, before the CMA began its investigation of the Settlement. Owing to that sale, Merck has not, at any point during the investigation, had access to any documents concerning the Settlement other than those disclosed on the CMA’s case file.

Under **Ground 1** Merck contends that the CMA erred in finding that the Settlement had the object of restricting competition in breach of the Chapter I prohibition and Article 101. Under **Ground 2** Merck contends that the CMA erred in finding that the Settlement had the effect of restricting competition in breach of the Chapter I prohibition and Article 101. Under **Ground 3** Merck contends that the Decision against GUK and Merck must be set aside for breach of Merck’s rights of defence by reason of the passage of time between the conclusion of the Settlement and the start of the CMA’s investigation – and the potential loss of exculpatory evidence. Under **Ground 4** Merck contends that the CMA was wrong to impose any penalty on Merck or, alternatively, the CMA erred in its assessment of the penalty.

As regards the relief sought, Merck asks the Tribunal to grant the following relief:

- (a) an order setting aside the Decision to the extent that it concerns the Settlement;
- (b) further or alternatively, an order revoking the penalty imposed on Merck under the Decision;
- (c) in the alternative to the orders sought under (a) and (b) above, an order varying the level of penalty imposed on Merck; and
- (d) an order that the CMA pay Merck’s costs of 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.

A request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London, WC1A 2EB (email: [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 post (or email) at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

*Charles Dhanowa OBE, QC (Hon)*  
Registrar

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