



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 46 OF THE COMPETITION ACT 1998

Case No: 1276/1/12/17

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 7 February 2017 under section 46 of the Competition Act 1998 (“the Act”), by Pfizer Inc. and Pfizer Limited. (together, “Pfizer”) against a decision of the Competition and Markets Authority (“the CMA”) dated 7 December 2016, entitled *Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK* (“the Decision”). Pfizer is represented by Clifford Chance LLP of 10 Upper Bank Street, London E14 5JJ (reference: Luke Tolaini).

The Decision concerns phenytoin sodium capsules, an anti-epilepsy drug manufactured by Pfizer (originally branded “Epanutin”). In 2012, Pfizer sold its phenytoin sodium capsule marketing authorisations and certain related assets and rights to Flynn Pharma Limited (“Flynn”). Flynn is a company that focuses on acquiring and commercialising branded products in secondary healthcare markets. Pfizer retained manufacturing of the product, however, due to its concerns about maintaining supply chain consistency. Flynn took charge of the distribution and marketing of the product, paying Pfizer a supply price. Flynn then unilaterally set its own price in the separate downstream market(s) into which it now sells the product. Pfizer is not active in that market.

In the Decision the CMA found separate infringements of the Chapter II prohibition contained in section 18 of the Act and Article 102 of the Treaty on the Functioning of the European Union (“TFEU”), in two separate relevant competition markets by each of Pfizer and Flynn. The first is that Pfizer’s supply price to Flynn is an excessive and unlawful price for the purposes of Chapter II/Article 102 TFEU. Pfizer is said to be dominant in a market defined as the manufacture of phenytoin sodium capsules by Pfizer that are distributed in the UK.

The second infringement is that Flynn’s own prices to its customers (i.e. wholesalers and pharmacists - effectively the National Health Service (“NHS”)), in a market defined as the distribution of Pfizer-manufactured phenytoin sodium capsules in the UK, are also said to be excessive and unlawful, for the purposes of the Chapter II prohibition/Article 102 TFEU. Flynn has appealed the Decision separately: see Case 1275/1/12/17.

Each of Pfizer and Flynn was found guilty of four separate abuses, based on the fact that there are four different phenytoin sodium capsule product strengths/prices. Pfizer and Flynn were fined £84.2 million and £5.2 million, respectively, for infringements said to have commenced in September 2012.

In summary, Pfizer’s principal grounds of appeal are as follows:

1. Pfizer challenges the CMA’s conclusion that it was dominant within the relevant market: the market for the manufacture of Pfizer-manufactured phenytoin sodium capsules that are distributed in the UK. The unrealistically narrow market identified by the CMA flies in the face of the contemporaneous evidence. Furthermore, the CMA’s conclusions on dominance fail to take into account the very substantial countervailing buyer power of the Department of Health (“DH”).
2. The CMA misapplied the proper test for excessive pricing - a price that bears no reasonable relation to economic value (*United Brands*). The CMA says that the economic value is no more than cost plus. This ignores the fact that Pfizer’s phenytoin sodium capsule supply price, and Flynn’s market price, was materially below the price of the identical phenytoin sodium tablet product.
3. Effectively, the only test applied in the Decision is a cost plus test (since it equates “economic value” to no more than cost plus). However, cost, and a cost plus benchmark of a return on sales (“ROS”) of

6% as applied in the Decision, is an erroneous approach.

4. Pfizer's conduct was entirely unobjectionable under Article 102/Chapter II (even if Pfizer was dominant, which it was not). It was lawful for Pfizer to: (i) take into account the revenue-earning potential (or economic value) of the drug to Flynn; and (ii) negotiate *circa* 50% of that figure as the basis for its supply price. If not, the CMA would be concluding that a contractual negotiation in which one party manages to achieve a supply price that is around half of an end-price figure is abusive under Article 102/Chapter II. There is no basis for treating a transfer in resources of this kind as a violation of Article 102/Chapter II, since it does not distort competition.
5. The CMA erred in imposing an £84.2 million fine on Pfizer. No fine should have been imposed due to the novel and unforeseeable nature of the test applied by the CMA in the present case to impugn Pfizer's prices. Alternatively, the fine should be reduced significantly. Furthermore, the CMA erred in finding that a breach occurred throughout the period from September 2012 until the date of the decision.

As regards the relief sought, Pfizer requests that:

- (a) the Decision be annulled in full or in part;
- (b) the fine imposed on Pfizer be annulled or, in the alternative, reduced; and
- (c) the CMA pay Pfizer'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.

A request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London, WC1A 2EB, 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 post at the above address or 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 14 February 2017