



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 46 OF THE COMPETITION ACT 1998

Case No: 1344/1/12/20

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 11 May 2020 under section 46 of the Competition Act 1998 (“the Act”), by Lexon (UK) Limited (“Lexon”), against a decision of the Competition and Markets Authority (“the CMA”) dated 4 March 2020 in Case 50507.2 *Nortriptyline Tablets (Information Exchange)* (the “Decision”). Lexon is represented by Maitland Walker LLP, 22 The Parks, Somerset TA24 8BT (reference: Julian Maitland-Walker).

The Decision finds that Lexon and several other suppliers of Nortriptyline Tablets engaged in a concerted practice (or series of concerted practices) by which they knowingly substituted practical cooperation between them for the risks of competition. Specifically, they exchanged competitively sensitive strategic information on pricing, volumes, timing of supplies and entry plans in relation to the supply of Nortriptyline Tablets in the UK contrary to the prohibition imposed by section 2(1) of the Act and Article 101(1) of the Treaty on the Functioning of the European Union (“the Information Exchange”). The CMA identifies two separate infringement periods: 27 July 2015 to 27 May 2016 (“Period 1”) and 5 December 2016 – 27 January 2017 (“Period 2”). The Decision finds that Lexon participated in the Information Exchange during Period 1 and that in each of Period 1 and Period 2, the Information Exchange was a single and continuous infringement, which had the object of restricting competition in the supply of Nortriptyline Tablets in the UK. The CMA imposed financial penalties on the undertakings involved. Lexon was fined £1,220,383.

Lexon raises three grounds of appeal:

1. **No object infringement:** Lexon submits that the CMA falls back on an “object” case because any “effects” case would be unsustainable. The price of Nortriptyline fell by about 50% during the alleged infringement period and was in part due to Lexon instilling fresh competition into the market for Nortriptyline. The CMA gives no credit to Lexon for this. Instead it wrongly accuses Lexon of attempting to stifle competition. The Court of Justice of the European Union has re-affirmed in Case C-228/18 *Budapest Bank* that “by object” allegations must be restrictively applied and should not be used as an easy option to avoid carrying out an effects-based analysis. In Lexon’s submission, the CMA’s analysis falls short of what is required in an object infringement. The overall ground of appeal is that the CMA has failed to prove that Lexon exchanged information with the objective to maintain prices.
2. **No single and continuous infringement:** It is not alleged that after the gap of six months (between the end of Period 1 and the beginning of Period 2) Lexon had any involvement in the conduct in Period 2. Yet, the CMA appears to find that Lexon was party to a single and continuous agreement for the whole period. According to Lexon, this analysis is flawed.
3. **Fine:** The CMA does not impose a penalty on Lexon for Period 2, only Period 1. In Lexon’s submission, the fine is harsh and inappropriate given in particular that it was Lexon who, in part, introduced competition into the market which led to the fall in prices and thus the prices that the NHS pays.

Lexon submits that for the reasons given above:

1. its appeal against infringement be allowed and the Decision set aside in so far as it concerns Lexon;
2. the penalty be set aside or reduced; and
3. an appropriate order for costs be made.

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

Published 28 May 2020