COMPETITION APPEAL TRIBUNAL

NOTICE OF AN APPEAL UNDER SECTION 46 OF THE COMPETITION ACT 1998
Case No: 1407/1/12/21

Pursuant to Rule 14 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) ("the Tribunal Rules"), the Registrar gives notice of the receipt of an appeal on 16 September 2021, under section 46 of the Competition Act 1998 on behalf of Allergan plc ("Allergan"). The appeal is brought in respect of the Competition and Markets Authority's ("CMA") decision in Hydrocortisone Tablets: *Excessive and unfair pricing and anti-competitive agreements* (Case 50277), dated 15 July 2021 ("the Decision"). Allergan is represented by Addleshaw Goddard LLP of Milton Gate, 60 Chiswell street, EC1Y 4AG, London (reference: Bruce Kilpatrick / Valeri Bozhikov).

Allergan, headquartered in Dublin, Ireland, is a global pharmaceutical company. Its business is focused on developing, manufacturing and commercialising branded pharmaceutical, device, biologic, surgical and regenerative medicine products for patients around the world.

The Decision follows the conclusion of three separate CMA investigations, later combined into one investigation. It finds a number of different addressees liable for various infringements spanning (in their widest extent) between 2008 and 2018 in relation to the sale of hydrocortisone tablets. Hydrocortisone is a prescription-only medicine used to treat adrenal deficiency. The various alleged infringements concern: (a) charging excessive and unfair prices in relation to 10mg and 20mg hydrocortisone tablets; and (b) entering into anti-competitive agreements in relation to the supply of 10mg and 20mg hydrocortisone tablets.

Allergan's involvement in the alleged infringements derives from the period 29 May 2015 to 1 August 2016, during which time it owned (indirectly) both Auden McKenzie and Accord-UK, which are alleged to have directly carried out the infringing conduct.

The Decision imposes a total fine of £109.1 million on Allergan. £74.3 million in relation to the 10mg unfair pricing abuse (on a sole liability basis); £2.0 million, on a joint and several basis with Accord-UK, in relation to the 20mg pricing abuse; and £34.8 million in relation to one of the agreements concerning the supply of the 10mg tablet (on a sole liability basis).

Allergan advances the following grounds of appeal, which are, in summary:

1. Allergan challenges the CMA's findings in relation to the underlying infringement. The CMA is wrong to find that Auden Mckenzie and later Actavis UK were dominant in the market for selling hydrocortisone tablets. Further, the CMA has fallen into error in finding abuse arises in the form of excessive pricing. In particular: (i) it has failed to take account of the fact that it was anticipated that there would very shortly be (and there was in fact) market entry and effective competition leading to lower prices and (ii) it has failed properly to consider the evidence in relation to more than one prima facie relevant comparator product. As to the 10mg Agreement, the agreement itself was not unlawful on its face and the CMA has failed to establish that Actavis UK's staff (who took over the contract part way through the relevant period) adopted the allegedly unlawful understanding that lay behind the agreement.

2. In the alternative, Allergan submits that the CMA has fallen into error in attributing liability to Allergan during the period between 10 March 2016 and 1 August 2016. During that period the infringing subsidiary formed part of a Hold Separate Business that was functionally and operationally separate from Allergan; and Allergan was precluded from exercising any influence over its subsidiary at all (pursuant to certain Commitments given to the European Commission). In

these circumstances, the presumption of decisive influence – that the CMA applied to Allergan as the ultimate parent company – is rebutted.

3. In the alternative, the fine imposed by the CMA is unlawful and disproportionate. The exceptionally large fine arises out of a period of alleged infringement of just 14 months, during which Allergan is only liable as a parent company, rather than a direct infringer. There was at the relevant time (and remains) considerable legal uncertainty in relation to the circumstances in which an abuse in the form of excessive pricing can arise, particularly given the circumstances of this case (in particular the prospect of imminent market entry). Furthermore, Allergan could not be expected to have understood or known about any implicit understanding that lay behind the 10mg Agreements. Further, the CMA has unjustifiably inflated the penalty at each and every stage of the fining process, including the imposition of an unprecedented 1000% uplift for specific deterrence (on the apparent basis that the end customer is the National Health Service). That uplift is inappropriate in circumstances where Allergan is a US multinational, whose revenues are largely made in a foreign jurisdiction (the USA) where excessive pricing forms no part of antitrust law. Allergan says that the CMA has failed to take a step back and so has imposed a fine that is not possible to justify at each stage of the analysis or in the round.

As regards relief, Allergan seeks:

a. The annulment of the Decision, to the extent that it finds Allergan liable for charging excessive and unfair prices (10mg and 20mg) and entering into unlawful agreements (10mg);

b. Alternatively, the annulment of the Decision, to the extent that it finds Allergan liable for those infringements during the Hold Separate Period;

c. Alternatively, the annulment of the fine imposed on Allergan or, in the alternative, a substantial reduction of that fine; and

d. Payment of Allergan'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.

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

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