



## COMPETITION APPEAL TRIBUNAL

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

Case No: 1421/1/12/21

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 14 October 2021 under section 46 of the Competition Act 1998 (the “Act”) by Cinven Capital Management (V) General Partner Limited, Cinven (Luxco 1) S.à.r.l. and Cinven Partners LLP (together, the “Cinven Entities”) in respect of the decision by the Competition and Markets Authority (“CMA”) in Liothyronine – Case 50395 dated 29 July 2021 (the “Decision”). The Cinven Entities are represented by Clifford Chance LLP of 10 Upper Bank Street, London E14 5JJ (reference: Luke Tolaini / Ben Jasper / Greg Olsen).

The Decision concerns Liothyronine Tablets, which are used for the treatment of thyroid hormone deficiency and certain other conditions. The CMA finds that Mercury Pharmaceuticals Limited, Advanz Pharma Services (UK) Limited, and Mercury Pharma Group Limited (together, the “Mercury Pharma Companies” and, together with their beneficial owners during the Relevant Period, “Advanz”) infringed section 18 of the Act (the “Chapter II Prohibition”). According to the CMA, Advanz held a dominant position on the market for the supply of Liothyronine Tablets in the UK and abused that dominant position between 1 January 2009 and 31 July 2017 (the “Relevant Period”) by charging prices for Liothyronine Tablets that were “excessive” and “unfair” for the purposes of the Chapter II Prohibition. The Decision imposes a fine of £101.4 million on Advanz, of which the CMA holds the Cinven Entities, on the basis of parental liability, jointly and severally liable for £51.9 million.

In summary, the Cinven Entities rely on the following four grounds of appeal:

1. Ground 1. The CMA has wrongly ignored real-world indicators of economic value, which show that the prices charged for Liothyronine Tablets between 31 August 2012 to 20 October 2015 (the “Cinven Ownership Period”) were not unfair. Specifically, the CMA finds that the appropriate benchmark for assessing whether prices for Liothyronine Tablets were unfair is the total of (a) the cost of making the tablets and (b) a reasonable rate of return (the “Cost Plus” benchmark). There is, however, a four-year period, post the Relevant Period (the “Post-Entry Period”), in which multiple competitors sold Liothyronine Tablets. The prices at which Liothyronine Tablets have actually been sold, during the Post-Entry Period, under conditions of competition are very significantly higher than the theoretical Cost Plus figure the CMA has used to make its finding of unfair pricing. The CMA has wrongly rejected these post-entry prices as a relevant comparator, as well as other real benchmarks based on market data including from (but not limited to) actual and potential competitors in the supply of Liothyronine Tablets.
2. Ground 2. The CMA errs by intervening in the market for Liothyronine Tablets. First, as the entry barriers for Liothyronine Tablets were, and are, surmountable (which is accepted by the CMA), the essential jurisdictional basis for the CMA's intervention under the Chapter II Prohibition in this case is lacking. Second, the CMA's intervention has the effect of distorting efficient entry into the market for Liothyronine Tablets and, therefore, competition. The CMA finds, in its Decision, that “competition is not an end in itself”, which the Cinven Entities submit is an incorrect finding of law: it would be antithetical to competition law if the CMA could act in a manner that would prevent (or deter) entry indefinitely or, equivalently, to impose a pricing obligation on an incumbent firm that prevents (or deters) entry.
3. Ground 3. Even if (contrary to Grounds 1 and 2) the CMA's reliance on the Cost Plus benchmark in its Decision was legitimate, the CMA has made a series of errors in setting the Cost Plus level. Once

these errors are corrected, they show that there is no basis to consider prices during the Cinven Ownership Period as excessive and unfair for the purposes of the Chapter II Prohibition.

4. Ground 4. The CMA was wrong to impose a fine of £51.9 million on the Cinven Entities. The fine is imposed on the basis of parental liability, in a situation where it is not suggested that the Cinven Entities had any role in the allegedly infringing conduct. In particular, in imposing this fine, the CMA has erred because (among other reasons): (i) it cannot reasonably be said that Advanz was aware or ought to have been aware, that its conduct was anti-competitive or its prices were unfair; (ii) the conduct in this case cannot be properly characterised as the most serious possible infringement of competition law, or deserving of a 40% uplift for deterrence purposes; and (iii) the CMA has failed to take account of relevant mitigating factors which should result in a reduction of the penalty, particularly that the sector specific regulator, the Department of Health and Social Care, was made aware of each of Advanz's price increases in advance and chose not to intervene.

As regards relief, the Cinven Entities seek:

- a. the annulment of the Decision in whole or in part;
- b. an annulment of the fine imposed on the Cinven Entities or, in the alternative, a reduction thereof; and
- c. payment of the Cinven Entities' costs incurred in connection with this 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](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

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