



**IN THE COMPETITION
APPEAL TRIBUNAL**

Case No: 1525/1/12/22

BETWEEN:

**(1) FLYNN PHARMA LIMITED
(2) FLYNN PHARMA (HOLDINGS) LIMITED**

Applicants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

ORDER – EXTENSION OF TIME

UPON the application made on 29 July 2022 for an extension of time for the Applicants to file an appeal against the decision of the Respondent of 21 July 2022 regarding the supply of phenytoin sodium capsules in the UK (“the Decision”) (“the Application”)

AND UPON there being no objection from the Respondent to the extension

AND HAVING REGARD TO rule 9(2) of the Competition Appeal Tribunal Rules 2015 (“rule 9(2)”, “the Tribunal Rules”)

IT IS ORDERED THAT:

The time for the Applicants to file their Notice of Appeal is extended to 12 October 2022.

REASONS:

1. First, the Application refers to constraints on the time of internal representatives of the Applicants over the period in which the appeal is to be prepared. By way of context, it is said that the Applicants have a small management team and do not have an in-house legal team. The CEO, described as the only full-time employee

of the Applicants that has knowledge of the background of this long-standing investigation, provides instructions to external lawyers with conduct of the Respondent's investigation, balancing this alongside his day-to-day management role. His availability with regard to this appeal is constrained over the summer holiday period by the need to provide cover for other members of staff who are due to be away, as well as his own leave which is planned from 12 September 2022. It is also explained that the only representative of the Applicants with access to the material within the Respondent's confidentiality ring, a non-executive director of the Applicants, will be away for much of August 2022.

2. Combined with this, the experts that the Applicants had engaged in the original appeal before the Tribunal and in the remittal investigation to date¹ have planned leave over August. One of those experts also has commitments in relation to another set of proceedings before the Tribunal, the trial of which is due to commence on 26 September 2022. It is understandable that the Applicants would wish to retain the same experts that were instructed in the original appeal and who were involved in the subsequent remittal investigation, and further, their retention is likely to be of greater assistance to the Tribunal than the instruction of new expert witnesses at this stage.
3. In addition, the Applicants' external counsel have several weeks of holiday planned during the month of August 2022, as do the external solicitors instructed by the Applicants.
4. The availability of personnel, and in particular external legal advisers, over the summer vacation will not normally amount to exceptional circumstances for the purposes of rule 9(2). See for example *Allergan plc v Competition and Markets Authority - Ruling (Extension of time)* [2021] CAT 26, ("*Allergan*"). However, there is the additional factor of the position of the Applicants' CEO, who is responsible for giving instructions, in a small organisation and unsupported by internal legal support. In this respect, it is relevant that the Decision, so I am told,

¹ The Decision concerns matters which were remitted by the Tribunal to the Respondent for re-consideration, following the appeal to the Tribunal of a previous decision of the Respondent relating to supply of phenytoin sodium capsules in the UK dated 7 December 2016: see Case No: 1275/1/12/17.

runs to some 560 pages (including annexes) and imposes a significant fine at the statutory maximum of 10% of the Applicants' worldwide turnover.²

5. Given the magnitude and importance of this task, and the long and complex history of the matter, there are in my view grounds to find exceptional circumstances which warrant a short extension of time.
6. I also have regard to the requirement that the Tribunal deals with a case justly and at proportionate cost, including ensuring that the case is dealt with expeditiously and fairly (rule 4(2)(d) of the Tribunal Rules), and to the Tribunal's powers of active case management in rule 4(4) of the Tribunal Rules.
7. In that regard, I place weight on the following additional factors:
 - a. The Tribunal has granted an extension of time to file a Notice of Appeal to the other addressees of the Decision.³ The requirement that the Tribunal actively manages cases to ensure that proceedings are dealt with justly and fairly, and expeditiously, means that this weighs in favour of granting an extension of time in relation to these Applicants also. Accordingly, I consider there are real efficiency benefits, not only for the Tribunal but also for the parties involved, in having both sets of appeals of the Decision running to the same timetable in the first instance; and
 - b. I do not see any material prejudice to the Respondent in allowing the extension, and the Respondent does not object to the extension (although, as Roth J pointed out in *Allergan*, this is not in any way determinative of the position).
8. As such, taking all of these factors together, I consider there are exceptional circumstances for the purposes of rule 9(2) justifying an extension of time. These arise from (i) the particular circumstances of the Applicants' internal team and (ii)

² Competition and Markets Authority, Press Release, "£70 million in fines for pharma firms that overcharged NHS" (21 July 2022) <https://www.gov.uk/government/news/70-million-in-fines-for-pharma-firms-that-overcharged-nhs>.

³ See the Reasoned Order dated 4 August 2022 in Case No: 1524/1/12/22 Pfizer Inc. and Pfizer Limited v Competition and Markets Authority.

the need to manage the case justly and proportionately in the context of other appeals of the same Decision, but not (iii) the impact of the summer vacation on the availability of external advisers or experts.

9. Accordingly, I grant the extension sought by the Applicants.

Ben Tidswell
Chair of the Competition Appeal Tribunal

Made: 5 August 2022
Drawn: 5 August 2022