



Neutral citation [2024] CAT 29

Case Nos: 1407/1/12/21, 1411/1/12/21, 1412/1/12/21, 1413/1/12/21, 1414/1/12/21

IN THE COMPETITION
APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

29 April 2024

Before:

SIR MARCUS SMITH
(President)
PROFESSOR SIMON HOLMES
PROFESSOR ROBIN MASON

Sitting as a Tribunal in England and Wales

BETWEEN:

ALLERGAN PLC
(The Allergan Appellant)
AMDIPHARM UK LIMITED
AMDIPHARM LIMITED
ADVANZ PHARMA SERVICES LIMITED
ADVANZ PHARMA CORP LIMITED
(The Advanz Appellants)
CINVEN (LUXCO 1) SARL
CINVEN CAPITAL MANAGEMENT (V) GENERAL PARTNER LTD
CINVEN PARTNERS LLP
(The Cinven Appellants)
AUDEN MCKENZIE (PHARMA DIVISION) LIMITED
ACCORD-UK LIMITED
(The Auden/Actavis Appellants)
INTAS PHARMACEUTICALS LIMITED
(The Intas Appellant)

Appellants

- and -

THE COMPETITION AND MARKETS AUTHORITY

Respondent

**JUDGMENT
(PENALTIES)**

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A. INTRODUCTION

1. This Judgment is consequential upon three earlier judgments of this Tribunal:
 - (1) The Judgment (Abuse of Dominance Infringements), which was handed down on 18 September 2023 under Neutral Citation Number [2023] CAT 56. This Judgment determined the appeals in regard to what were described in that judgment as the Abuse of Dominance Infringements.
 - (2) The Judgment (Cartel Infringements), which was handed down on 29 September 2023 under Neutral Citation Number [2023] CAT 57. This Judgment determined the appeals in regard to what were described as the Cartel Infringements on an explicitly provisional basis. The Judgment (Cartel Infringements) was handed down on a “closed” basis by an order of the Tribunal dated 29 September 2023, but is now an “open” judgment pursuant to the order of the Tribunal dated 8 March 2024.
 - (3) The Judgment (Due Process), which was handed down on 8 March 2024 under Neutral Citation Number [2024] CAT 17. This Judgment determined that the appeals against the findings of Cartel Infringements succeed and the provisional findings in the Judgment (Cartel Infringements) (which upheld the Cartel Infringements on a provisional basis) cannot safely stand.
2. This Judgment (Penalty) adopts the terms, abbreviations and descriptions used in the Judgment (Abuse of Dominance Infringements), as set out in Annexes 1 and 2 thereto. All of the facts and matters decided in the Judgment (Abuse of Dominance Infringements) and Judgment (Due Process) are adopted herein without reservation and are referred to as necessary. They are not repeated but are taken as read.
3. The Auden/Actavis Appellants’ Notice of Appeal advanced a ground of appeal in relation to the penalty imposed for the 20mg Agreement (**Ground Eight**). That ground of appeal remains unresolved by the three earlier judgments described in paragraph 1 above and is determined by this Judgment (Penalty).
4. Ground Eight is at once (i) independent of the other grounds of appeal articulated by the Appellants in these proceedings and resolved by the three earlier judgments, and (ii) related to those earlier judgments. It is, therefore, important to read all four judgments as a whole. As to this:
 - (1) The Judgment (Abuse of Dominance) affirmed the penalties imposed by the CMA in relation to the Abuse of Dominance Infringements at [376]. Ground Eight alleges that the penalty imposed by Auden in the round (i.e. in relation to all infringements) is manifestly disproportionate. We are, therefore, very much alive to the totality of the penalties imposed on Auden, as well as the specific monetary penalty imposed in relation to the 20mg Agreement.
 - (2) The Judgment (Cartel Infringements) at [159] did not consider the appeals in relation to penalties, given that it did not finally determine the appeals in regard

to the Cartel Infringements. The Judgment (Due Process) concluded at [147] that the appeals in relation to the penalties imposed by the CMA for the 10mg Cartel Infringements should not be considered. The Tribunal's findings that the appeals against the 10mg Cartel Infringements succeeded rendered these appeals against penalty academic.

5. The Tribunal's findings in its Judgment (Due Process) have no effect on the Tribunal's approach to penalty in this Judgment. The Judgment (Due Process) was concerned with an issue of process regarding the substantive appeals against the Cartel Infringements (which only concerned the 10mg Agreement and not the 20mg Agreement). The success of those appeals rendered the appeals against penalty in regard to the 10mg Agreement academic but said nothing about the penalties imposed by the CMA in regard to the 20mg Agreement.
6. Although the effect of the Judgment (Due Process) is that the penalties in relation to the 10mg Cartel Infringements fall away, the Judgment (Due Process) said nothing about the 20mg Agreement, and the Due Process Question did not concern infringements arising out of that agreement. In regard to the 20mg Agreement, the findings in the Decision stand and these findings were not challenged on appeal.

B. CMA'S DECISION IN RELATION TO PENALTIES

7. The penalty which is the subject of this judgment relates to what the CMA termed the "20mg Agreement" (a term adopted in the Judgment (Abuse of Dominance Infringements)), in place between Auden and Waymade from 11 July 2011 to 30 April 2015. The Decision found that Auden agreed to make substantial monthly payments to Waymade in exchange for Waymade agreeing not to enter the market independently with its own 20mg hydrocortisone tablets,¹ in circumstances where Waymade had developed its own 20mg hydrocortisone tablets and by 28 March 2011 had cleared the regulatory requirements necessary for entry.² Pursuant to the 20mg Agreement, Auden supplied Waymade with 20mg hydrocortisone tablets - Waymade sold some of these on its own account, with the remainder bought back by Auden at a higher price than they were sold to Waymade.³
8. Whilst neither Waymade nor the Auden/Actavis Appellants appealed the CMA's substantive findings in relation to the 20mg Agreement, the Auden/Actavis Appellants did appeal the CMA's approach to calculation of penalty.
9. The CMA imposed a fine of £2,798,525 on Accord-UK for its involvement in the 20mg Agreement, as the economic successor of AM Pharma.⁴ A fine was also imposed on Waymade as a direct participant in the infringement.

¹ Hydrocortisone Decision [1.4].

² Hydrocortisone Decision [6.1].

³ Hydrocortisone Decision [146 – 148].

⁴ Hydrocortisone Decision [10.417].

10. The Decision sets out the CMA's approach to calculation of this penalty in section 10. In summary, its approach was as follows:

- (1) The CMA concluded that the Abuse of Dominance Infringements and the Cartel Infringements in relation to each strength of hydrocortisone tablet (10mg and 20mg) constituted separate and distinct infringements.⁵
- (2) It found that the Auden/Actavis Appellants entered into the 20mg Agreement intentionally or at the very least negligently. They knew or should have known that Waymade was a potential competitor, was making significant payments to it, and those payments were in exchange for non-entry.⁶ The CMA rejected the parties' contentions that there was genuine uncertainty as to the applicable legal tests and that this should be taken into account for intention/negligence, or for mitigation. It found there was no uncertainty or novelty in relation to market sharing/market exclusion agreements.⁷ The CMA went on to apply its procedural guidance in relation to the calculation of penalties, which involves consideration of a series of interrelated steps:
 - (i) *Step One.* The CMA identified the relevant turnover of Auden/Actavis for the 20mg Agreement fine as £2,120,095. Taking into account the nature of the infringement and the need for deterrence, it applied a maximum 30% starting point with respect to all infringements, including the 20mg Agreement,⁸ and justified this starting point in relation to the Cartel Infringements in particular by reference to the harm caused by market exclusion agreements, and the intention of the agreement to maintain Auden/Actavis' 100% market share.⁹
 - (ii) *Step Two.* This fine was then multiplied by the duration of the abuse.¹⁰
 - (iii) *Step Three.* The CMA considered aggravating and mitigating factors in relation to the 20mg Agreement. It applied a 15% uplift as a result of the involvement of directors and senior management.¹¹ It concluded that Accord-UK's compliance activities warranted a 5% discount,¹² but that its cooperation with the CMA's investigation did not warrant further mitigation.¹³

⁵ Hydrocortisone Decision [10.30].

⁶ Hydrocortisone Decision [10.30, 32-33, 42, 45].

⁷ Hydrocortisone Decision [10.117, 10.127].

⁸ Hydrocortisone Decision [10.172].

⁹ Hydrocortisone Decision [10.175].

¹⁰ Hydrocortisone Decision [10.187(d)].

¹¹ Hydrocortisone Decision [10.201 - 203].

¹² Hydrocortisone Decision [10.223].

¹³ Hydrocortisone Decision [10.243].

- (iv) *Step Four.* The CMA concluded that no uplift was necessary for the penalty in relation to the 20mg Agreement for financial benefits, or for specific deterrence. This was because it found that any benefits attributable to the agreement were captured in the financial benefits relating to the 20mg Abuse of Dominance Infringement, which were reflected in the level of the penalty.¹⁴ It also did not apply an uplift for deterrence because the penalty represented 0.2% of the turnover of Accord-UK, which the CMA deemed an effective yet proportionate deterrent.¹⁵

- (v) *Step Five.* The CMA considered whether the penalty required adjustment to avoid double jeopardy and to prevent the statutory cap being exceeded. No adjustment was made in relation to the 20mg Agreement. The CMA also conducted an in the round assessment of the multiple (four) penalties it was imposing on Auden/Actavis. It concluded that the imposition of multiple penalties reflected the serious nature of the individual infringements, and that they did not lead to double counting of financial benefits or an uplift for specific deterrence in relation to the same infringement twice.¹⁶ Accord-UK was held liable for £67,637,244 representing penalties for the Abuse of Dominance Infringements and the Cartel Infringements, of which £2,798,525 related to the 20mg Agreement. The CMA concluded that this aggregated penalty for four infringements was not disproportionate or excessive in the context of serious and harmful infringements when compared to the undertakings' turnover.¹⁷

C. THE AUDEN/ACTAVIS APPEAL: GROUND EIGHT

11. The Auden/Actavis Appellants challenged the penalty imposed as manifestly disproportionate, not merely in regard to the 20mg Agreement infringements, but considering the totality of the penalty for all infringements. In particular, it was noted that the different penalties combined constituted several times the statutory cap. The Auden/Actavis Appellants criticised how the CMA applied its procedural guidance to each of the infringements individually and taken together, including the 20mg Agreement. They also challenged the CMA's assessment of the fines for both 20mg infringements as a whole, on the grounds that (i) the CMA erred in its assessment of the financial benefit, and application of an uplift to the fines for the 20mg Abuse of Dominance Infringement without first considering the total fines for the 20mg Abuse of Dominance and Cartel Infringements against any alleged financial benefit, and (ii) as a whole the CMA failed to take the requisite step back.

12. The Auden/Actavis Appellants challenged: (i) the CMA's treatment of the Cartel Infringements for each strength of hydrocortisone tablet as separate abuses, and

¹⁴ Hydrocortisone Decision [10.328].

¹⁵ Hydrocortisone Decision [10.331].

¹⁶ Hydrocortisone Decision [10.406-408].

¹⁷ Hydrocortisone Decision [10.415].

treatment of the 20mg Abuse of Dominance and Cartel Infringements as separate;¹⁸ (ii) the CMA's conclusion that the infringement was committed intentionally or negligently;¹⁹ (iii) the use of a 30% starting point for each of the infringements at step 1; (iv) the failure of the CMA to apply a discount for Auden's cooperation with the investigation at step 3; (v) the CMA's approach at step 4, in particular its decision to impose an uplift on fines already totalling £9.9 million for the 20mg Infringements, against a supposed financial benefit of £6.8 million; (vi) the CMA's use of factors to justify an uplift which it already used to justify the use of the 30% starting point in step 1; and (vii) the outcome which imposes a fine at multiple times the statutory cap in relation to "essentially the same course of conduct".²⁰

D. ANALYSIS

13. As noted in the Judgment (Abuse of Dominance Infringements) at [374], this is a merits review, and the Tribunal may revoke or vary the amount of any penalty imposed. As in that judgment, our approach is to review the CMA's application of its guidance, and then to assess the level of penalty with a broad-brush approach, taking the case as a whole. Although, of course, this Tribunal could take a different approach in this Judgment (Penalty) to the approach taken in the Judgment (Abuse of Dominance Infringements), consistency between Judgments arising out of the same process of appeal is highly desirable. We have considered whether a different approach is required in the case of Ground Eight, and we have concluded that there is no occasion to take a different approach in this case.
14. The Judgment (Abuse of Dominance Infringements) affirmed the penalties imposed in relation to the Abuse of Dominance Infringements (at [376]). We see no reason for departing from that approach in this case. It is necessary, however, to consider the CMA's approach to calculation of the penalty imposed in relation to the 20mg Agreement.
15. We do not find material error in relation to the CMA's approach, and we accordingly affirm it. The infringements arising out of the 20mg Agreement were not substantively appealed before us, and we make the following comments which concern the inter-relationship between substantive infringement and penalty:
 - (1) We agree with the CMA that imposing penalties for each separate infringement was justifiable, and that each infringement constituted a distinct abuse.
 - (2) There was no uncertainty at the time as to the unlawfulness of horizontal market sharing agreements.

¹⁸ Auden Notice of Appeal [199 – 193].

¹⁹ Auden Notice of Appeal [194 – 195].

²⁰ Auden, Written Opening Submissions [252 – 253].

- (3) We agree with the CMA as to the seriousness of the nature of this infringement – the 20mg Agreement was a horizontal market sharing agreement, and this justifies the 30% starting point in step 1.
 - (4) The CMA’s approach does not obviate the statutory cap. Different penalties were imposed for different, serious, infringements.
 - (5) The Decision makes clear that the CMA did take a step back to assess if the aggregated penalties were disproportionate or excessive. It explains how the CMA avoided double-counting and it assessed the fines as a whole.
16. In our judgment, applying an “on the merits” standard of review, the penalty is not unfair or disproportionate in the round, taking into account the seriousness of the conduct, which is a by object infringement. Accordingly, we affirm the penalties imposed by the CMA, having considered on the merits the basis upon which those penalties were calculated.
17. This Judgment is unanimous.

Sir Marcus Smith
President

Professor Simon Holmes

Professor Robin Mason

Charles Dhanowa OBE, KC (Hon)
Registrar

Date: 29 April 2024