



Neutral citation [2021] CAT 26

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1407/1/12/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

26 July 2021

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

ALLERGAN PLC

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

RULING – EXTENSION OF TIME

1. On 15 July 2021 the Competition and Markets Authority (“CMA”) issued a decision finding infringements of Chapters I and II of the Competition Act 1998 in relation to the supply of hydrocortisone tablets by Accord-UK and Auden Mckenzie (“the Decision”). Allergan plc (“Allergan”) is one of thirteen addressees of the Decision and is subject to penalties totalling £109.1 million.
2. Allergan is one of a number of addressees of the Decision that have indicated their intention to appeal. By an application made on 20 July 2021, Allergan seeks an extension of time in which to file its notice of appeal.
3. Rule 9 of the Competition Appeal Tribunal Rules 2015 (“the CAT Rules”) provides insofar as relevant:

“9(1) An appeal to the Tribunal shall be made by filing a notice of appeal within two months of the date upon which the appellant was notified of the disputed decision or the date of publication of the decision, whichever is the earlier.

(2) The Tribunal may not extend the time limit provided under paragraph (1) unless it is satisfied that the circumstances are exceptional.”

4. Accordingly, unless extended, the time for Allergan to appeal will expire on 15 September 2021. By its application, Allergan seeks an extension of 16 days to 1 October 2021.
5. The Tribunal has previously considered the provision for an extension of time under the CAT Rules. In *Hasbro UK Limited v DGFT* [2003] CAT 1, the then President stated that it is impossible to produce any indicative, let alone comprehensive, definition of what is meant by “the circumstances are exceptional”, observing that each case much turn on its own facts. However, he continued:

“In my judgment, the general intention behind the Tribunal’s Rules is that the initial time for lodging an appeal is intended to be strict. Cases that do not involve *force majeure* in the strict sense, in my judgment, only rarely give rise to “exceptional circumstances”.

As far as the Tribunal is concerned the deadline in commencing proceedings is, in many ways, the keystone of the whole procedure.”

6. In *Prater v OFT* [2006] CAT 11, the solicitors acting for the applicant were stuck in traffic when attempting to file paper copies of their client’s notice of appeal. The paper copies of the notice of appeal (and the accompanying materials) were filed out of time, i.e. shortly after the 5pm deadline. The solicitors did, however, contact the Tribunal Registry well before the expiry of the time limit and provided regular updates on the situation. They also filed an electronic copy of the notice of appeal (excluding the accompanying materials) by email by the 5pm deadline. The President considered that the particular facts of the case could be regarded as exceptional circumstances for the purposes of extending the time limit. However, in his ruling the President stated, at [30]:

“The time limit for commencing an appeal under Rule 8(1) [now Rule 9(1)] is central to the Tribunal’s Rules and the entire case management system operated by the Tribunal. In that context the need for clarity and certainty is paramount. The Tribunal receives a great number of complex and lengthy documents in many kinds of different cases often within short deadlines. It is imperative that the present Rules be strictly observed.”

7. More recently, in *Lexon (UK) Limited v CMA*, by order of 28 April 2020 I granted the appellant an extension of time to file its notice of appeal of seven days on the grounds that a key individual had been ill with Covid-19 symptoms and therefore unable to give instructions to the appellant’s legal representatives. I held that this constituted exceptional circumstances.

8. Allergan relies on three grounds in submitting the circumstances in the present case are exceptional in terms of Rule 9(2). First, it relies on the upcoming summer vacation period and stated in its application that Allergan’s employees who would be assisting with preparation of the appeal and its legal advisors have summer holidays planned with their respective families in August and September. Secondly, it refers to the legal and factual complexity of the Decision, which is over 1000 pages long and comprises, in essence, three separate decisions with separate finds relating to:

- (a) excessive and unfair pricing of 10mg hydrocortisone tablets in the UK;
- (b) excessive and unfair pricing of 20mg hydrocortisone tablets in the UK;
and
- (c) anticompetitive agreements in relation to 10mg hydrocortisone tablets.

Thirdly Allergan relies on the fact that the investigative stage has taken five and a half years such that the relatively short extension should be considered in light of the considerable time which the CMA has taken to prepare the Decision and the length of the proceedings as a whole.

9. Addressing these three grounds in reverse order, I do not see that the length of the investigative stage can possibly constitute exceptional circumstances as regards the time for filing a notice of appeal. That period is in the past and, as Allergan recognises, a very lengthy investigative stage is not unique. For example, *Generics (UK) Limited and Others v CMA* [2018] CAT 4 concerned appeals from a CMA decision (“*Paroxetine*”) for which the prior investigation stage had lasted four and a half years and, as in the present case, the CMA took a year and a half between the issue of the supplemental statement of objections and the delivery of its final decision.
10. As regards the second reason relied on, although the length and complexity of the Decision no doubt may make this a weighty appeal, in my judgment, that is not something which in itself can constitute exceptional circumstances. A number of the decisions of the CMA and specialist regulators are lengthy and very complex: e.g., the decision in *Paroxetine* gave rise to very complex issues and was some 700 pages long but none of the five groups of appellants sought additional time to prepare what were very substantive notices of appeal. The time period of two months set out in Rule 9(1) of the CAT Rules is an extensive one which allows for the fact that competition infringement decisions are often complex: cp the time period of four weeks for a challenge to a merger decision in Rule 25(1), which is subject to an equivalent limitation on any extension under Rule 25(3).
11. As regards the first ground, in response to enquiry by the Tribunal, Allergan’s solicitors stated that they do not know about the holiday dates of relevant individuals in their client and therefore ask that the application be considered by reference to the availability of solicitors and counsel and not Allergen employees. As regards the solicitors, the Tribunal has been told that the two lead solicitors have holidays arranged for 13 days and 19 days respectively over the two-month period but their dates of absence scarcely overlap. I have little

doubt that on a case of this size other lawyers in the solicitors' firm will also be working on the appeal. The junior and leading counsel who have been instructed will be away for virtually the whole of August. However, the fact that the lawyers, or indeed anyone, takes a holiday in the summer months cannot, in my view, can be described as exceptional. If it had been intended to exclude the month of August from the time for an appeal, this would have been stated in the CAT Rules. Moreover, the case is not a new one. Allergan and its lawyers have been engaged in confronting the issues and presenting arguments to the CMA over several years. Even if counsel have been newly instructed, they have a month outside their holidays to devote to the case and the solicitors can be working on the appeal while counsel are away. It is also open to Allergan to instruct counsel who have greater availability over the summer months.

12. Accordingly, I consider that the criterion in Rule 9(2) for an extension of time is not fulfilled and this application is therefore refused. I should add that although the CMA has consented to the application, the question of an extension under Rule 9(2) is for the Tribunal to determine and cannot be achieved by agreement between the parties.

The Honourable Mr Justice Roth
President

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 26 July 2021