Neutral citation [2022] CAT 2

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1407/1/12/21
1411/1/12/21
1412/1/12/21
1413/1/12/21
1414/1/12/21
1419/1/12/21
1421/1/12/21
1422/1/12/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

31 January 2022

Before:

SIR MARCUS SMITH
(President)
SIMON HOLMES
PROFESSOR ROBIN MASON

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) ALLERGAN PLC
(2) ADVANZ PHARMA CORP. LIMITED & OTHERS
(3) CINVEN CAPITAL MANAGEMENT (V) GENERAL PARTNER LIMITED & OTHERS
(4) AUDEN MCKENZIE (PHARMA DIVISION) LIMITED & ANOTHER
(5) INTAS PHARMACEUTICALS LIMITED & OTHERS

Appellants in the Hydrocortisone Proceedings

- and -

COMPETITION AND MARKETS AUTHORITY

Respondent

(the "Hydrocortisone Proceedings")

AND BETWEEN

(1) HG CAPITAL LLP
(2) CINVEN (LUXCO 1) S.A.R.L. & OTHERS
(3) MERCURY PHARMACEUTICALS LIMITED & OTHERS

Appellants in the Liothyronine Proceedings

- and -

COMPETITION AND MARKETS AUTHORITY

Respondent

(the "Liothyronine Proceedings")

Heard remotely on 21 January 2022

RULING

APPEARANCES

In respect of the Hydrocortisone Proceedings

Daniel Jowell QC and Tim Johnston (instructed by Addleshaw Goddard LLP) appeared on behalf of the Allergan Appellant.

Mark Brealey QC (instructed by Morgan, Lewis & Bockius LLP) appeared on behalf of the Advanz Appellants.

Robert O'Donoghue QC and Emma Mockford (instructed by Clifford Chance LLP) appeared on behalf of the Cinven Appellants.

Sarah Ford QC and Charlotte Thomas (instructed by Macfarlanes LLP) appeared on behalf of the Auden/Actavis Appellants.

Robert Palmer QC, Laura Elizabeth John and Jack Williams (instructed by Linklaters LLP) appeared on behalf of the Intas Appellants.

Josh Holmes QC and David Bailey (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

In respect of the Liothyronine Proceedings

Brian Kennelly QC and Daniel Piccinin (instructed by Linklaters LLP) on behalf of the HG Capital Appellant.

Robert O'Donoghue QC and Ben Rayment (instructed by Clifford Chance LLP) on behalf of the Cinven Appellants.

Mark Brealey QC (instructed by Morgan, Lewis & Bockius LLP) on behalf of the Advanz Appellants.

Josh Holmes QC and David Bailey (instructed by the Competition and Markets Authority) on behalf of the Respondent.

A. INTRODUCTION

(1) The Hydrocortisone Decision

1. By a decision dated 15 July 2021 in Case No 50277 concerning excessive and unfair pricing and anti-competitive agreements in relation to hydrocortisone tablets (the **Hydrocortisone Decision**), the United Kingdom Competition and Markets Authority (the **CMA**) found that the various appellants listed above, collectively the **Appellants in relation to the Hydrocortisone Decision**, had infringed UK competition law in the various respects set out in paragraph 1.4 of the Hydrocortisone Decision.

2. The Appellants in relation to the Hydrocortisone Decision, and who are addressees of that decision, fall into five groups, who we shall refer to as follows:

   (1) The **Allergan Appellant**.

   (2) The **Advanz Appellants**.

   (3) The **Cinven Appellants**.

   (4) The **Auden/Actavis Appellants**.

   (5) The **Intas Appellant**.

3. The Appellants in relation to the Hydrocortisone Decision all appeal that Decision, and they do so in notices of appeal filed with the Tribunal during the course of September and October 2021.

4. The CMA filed a single Defence to all of these notices of appeal on 1 December 2021.

(2) The Liothyronine Decision

5. By a decision dated 29 July 2021 in Case No 50395 concerning excessive and unfair pricing with respect to the supply of liothyronine tablets in the UK, the CMA found that the various appellants listed above, collectively the **Appellants in relation to the Liothyronine Decision**, had infringed UK competition law

in the various respects set out in paragraph 1.30 of the Liothyronine Decision. As in the case of the Hydrocortisone Decision, it will be necessary, in due course, to set out exactly the nature of these infringements. We shall refer to the infringements generally as the **Liothyronine Infringements**.

6. The Appellants in relation to the Liothyronine Decision, and who are addressees of that decision, fall into three groups, who we shall refer to as follows:

   (1) The **HG Appellant**.

   (2) The Advanz Appellants.

   (3) The Cinven Appellants.

   Although the Advanz Appellants are not exactly the same persons as in relation to the Hydrocortisone Decision, the common label is apposite.

7. The Appellants in relation to the Liothyronine Decision all appeal that Decision, and they do so in notices of appeal filed with the Tribunal during the course of September and October 2021.

8. The CMA filed a single Defence to all of these notices of appeal on 13 January 2022.

B. THE HANDLING OF COMPLEX APPEALS

(1) The difficulty stated

9. Both the Hydrocortisone Decision and the Liothyronine Decision are long and complex documents. The Hydrocortisone Decision runs to some 1090 single spaced pages, with Annexes on top. The Liothyronine Decision is about half the length – 433 pages, again with Annexes on top. The various notices of appeal and defences, whilst not as long, are also substantial and densely written documents.

10. None of this is intended as a criticism of any of the parties. Rather, it is necessary to note, at the outset, the challenges that are presented to an orderly hearing of these appeals. Simply reading the decisions under appeal, and the pleadings in

the appeals, is the work of several days. That reading will not be focussed, in the sense of analysing specific points in dispute, because it is necessary to consider the totality of the decisions and the pleadings before a true sense can be obtained of the contentious issues, as opposed to the minor issues and the areas of common ground.

11. One thing that is clear from even a quick perusal of the documents in the case is that it is not possible clearly to differentiate between facts, findings and propositions between the parties that are generally uncontroversial and facts, findings and propositions that are controversial. The basic "spadework" of identifying the issues that are truly in dispute – and ascertaining exactly what is in dispute – needs to be done, and done carefully and fully before the Tribunal can properly begin to grapple with the issues and questions that are truly going to be determinative of the various appeals.

12. One might think that this is – or ought to be – the function of pleadings. In regulatory appeals such as these, that is not the case for at least three reasons:

    (1) The Decisions themselves are discursive and traverse an enormous range of issues, from the very specific (e.g., the regulation of "orphan" drugs) to the exceedingly general (e.g., market definition). It is very difficult for the parties to the appeal in the "pleadings" to articulate in the traditional way ("admitted", "not admitted", "denied") the nature and ambit of the disagreements that may exist. The pleadings, like the Decisions, are discursive and broad in the range of points they cover.

    (2) There can be no question of the CMA calling evidence to substantiate each and every fact in the Decisions. That would render appeals of the Decisions utterly unmanageable. Of course, the pleadings are intended to identify the areas in dispute, but because of the nature of the Decisions and the issues on appeal – as we have described – this does not really happen.

    (3) Issues in competition and markets cases tend to be "layered". A decision on one point – say, market definition – is contingent upon tens, perhaps

even hundreds, of discrete points, some of which (indeed many) may be entirely uncontroversial. Submissions on issues like this need to be informed by an understanding of what is controversial in these discrete points, so that these controversies can be resolved and the main focus at trial be on how they inter-relate and define the market (in this example).

13. We do not consider that the present ("traditional") way of dealing with regulatory appeals works particularly well. The problem with the process of pleadings, witness statements, expert reports and submissions is that although these are produced early on in the process, and to an extent inter-relate, they do not sufficiently delineate in a manner useful to the Tribunal the true areas of controversy and dispute. Yet such delineation is critical to an effective trial. If the Tribunal is in a position of doubt as to the common ground or doubt as to what, exactly, is in dispute, the interests of justice and the vital need for the true issues to be fairly and properly presented at trial are not served.

14. We also consider that an approach that more accurately and fully delineates that which is not in dispute from that which is controverted will result in significant efficiencies – both for the parties and for the Tribunal.

(2) The 8 December 2021 case management conference ("CMC")

15. When, on 8 December 2021, this Tribunal raised the question of alternative ways of trying both sets of appeals – in order to deal with the difficulties discussed in the previous paragraphs – the Appellants in relation to the Hydrocortisone Decision (the CMC was only in relation to the Hydrocortisone Decision) were commendably open to considering these. In particular, the Tribunal raised (in very general terms) the prospect of dealing with these appeals in a "staged" process, involving three or four hearings rather than a single "set piece" trial of some weeks.

16. Since the Tribunal did not articulate any granular way forward, it was difficult for the parties to be very focussed in their responses. It is, however, fair to record that no-one was in favour of a "staged" approach to the litigation, with issues being decided sequentially in a series of shorter hearings. There are a number

of reasons why we agree with the parties that such an approach is not the way forward, at least in the case of these appeals:

(1) The issues arising out of the appeals – even treating the appeals in relation to the Hydrocortisone Decision as distinct from the appeals in relation to the Liothyronine Decision – are sufficiently inter-twined and inter-related as not to be susceptible of decision sequentially.

(2) There would be real difficulties in properly defining the "subject-matter" for each stage, and a real risk that the Tribunal might find itself in the unfortunate position of wanting to re-visit and possibly revise at a later stage a finding or holding made earlier on.

(3) There would be difficult – and probably insurmountable – questions of convenience and cost. For example, some witnesses might have to attend on multiple occasions, and the prospect of finding (say) four week-long hearing dates over the coming year which could be accommodated in the diaries of all relevant persons is fanciful. In other words, a process like this would – simply as a matter of practicality – take far longer than the ordinary trial process.

(4) Even if the parties were not to seek to appeal the outcomes of a particular "stage", in order for the process we are considering to be effective, the parties would have to have (before the commencement of the next stage) *(i)* the Tribunal's decision in relation to the stage just heard and *(ii)* time to prepare in light of that decision. Even assuming unrealistic speed in the production of what would almost certainly be reserved decisions, it is difficult to see how a staged process could be achieved in <u>less</u> time (end-to-end) than the ordinary trial process. That is disregarding the practical questions articulated in the preceding sub-paragraph.

17. We do not consider a "staged" approach to be realistic or practical, and it does not represent a solution to the problems we have articulated. However, it has been helpful to articulate the difficulties: they both inform and frame the process that we are going to order.

(3) Our proposal prior to the 21 January CMC

18. We first articulated – in somewhat tentative terms – our proposals as to how to case manage these appeals in a document sent to all of the parties to both sets of appeals. They were, therefore, able to consider our proposal, and articulate their responses. It is fair to say that those responses, with the exception of the CMA, which was broadly supportive, ranged between the unenthusiastic and concerned and the very unenthusiastic and concerned. These parties articulated concerns about *(i)* substantive fairness, *(ii)* cost, *(iii)* practicality and *(iv)* the appearance of fairness. As a result of these concerns, we have significantly modified our approach, but retained what we consider to be its essential elements. We remain concerned that the "traditional" ways of ascertaining the common ground and the points of dispute do not work in this type of case. We are, of course, aware that there are risks inherent in any case management departure. All we can say is that this Tribunal is well able to devote the resources necessary to managing the case in the way we are going to order; and that the Tribunal will be alive to the concerns articulated by the parties and will – as necessary – make the appropriate directions to ensure that both sets of appeals remain on track and are properly and fairly heard and disposed of. We are very conscious that we need to keep a close watching eye on the process, and the Tribunal intends to exercise the utmost care to ensure that the concerns articulated by the parties do not become actual.

(4) Our approach in broad terms and the order we are making

19. We consider that what is required about a week before the substantive hearings of these appeals begin is a document, produced with the (enforced) co-operation of the parties between now and the hearing, and under the Tribunal's close supervision and control, a document that we are going to call an **Ambulatory Draft**. The creation of an Ambulatory Draft will be an iterative process. We envisage four or five – perhaps more – Ambulatory Drafts being produced before trial.

20. We have made an order in the appeals against the Hydrocortisone Decision, which we circulated in draft for comment to the parties (given the new process

we envisaged), which comments we have carefully considered (the **Second Hydrocortisone Order**). We will refer to various parts of this order in this ruling and so – for convenience – it is appended to this Ruling at Annex A. We will, in due course, make a similar order in the appeals against the Liothyronine Decision.

21. Paragraph 1 of the Second Hydrocortisone Order provides for the production, by the Tribunal, of a series of Ambulatory Drafts. These drafts will be produced by the Tribunal based upon **Sections** drafted by one or more of the parties to the Hydrocortisone Decision appeals. The manner in which those Sections are to be produced is set out (in general terms) in paragraph 2 of the order, and (in specific terms) in Annex B to the order. These Sections constitute the first of many Sections that the parties will draft. They will be incorporated into what will become **AD2**. Later Sections will be incorporated into later Ambulatory Drafts.

22. The Ambulatory Drafts will be documents produced under the supervision of the Tribunal, but the drafts will explicitly state that the content is not that of the Tribunal, and that that content cannot, and should not, be attributed to the Tribunal. Some parties have contended that this must mean that the Ambulatory Drafts can be no more than a "stitching together" of successive Sections, without substantive input of the Tribunal. That quite fundamentally mistakes the Tribunal's approach:

    (1) We would expect all parties to approach the drafting of Sections bearing in mind the purposes of Ambulatory Drafts set out in paragraph 6 of the order.

    (2) In an ideal world, the parties' Sections will require no more than "stitching together". But the perfect is the enemy of the good, and we doubt that a coherent draft can be produced without considered input from the Tribunal. The parties are – understandably, but we consider mistakenly – concerned that this will involve an element of pre-judgment on the part of the Tribunal. We were addressed at length on this point on 21 January 2021.

(3) We should say unequivocally: there can be no question of this Tribunal adopting an unfair process. The parties' concerns are unfounded because (we consider) they have fundamentally misunderstood what the Tribunal has in mind. Our provisionally-stated approach expressly abjured a staged process of decision making. Instead, what is intended is a drafting process that concludes with significant tracts of background fully articulated, with the parties' positions on points of controversy fully stated, and the battle lines clearly demarcated but not resolved. What the Ambulatory Drafts seek to articulate are rigidly defined areas of dispute, in relation to which the parties can then address us during the course of the hearing. As we have said on a number of occasions, a key benefit of the process, and of the Ambulatory Drafts in particular, is to enable all to have a true appreciation of the matters that the parties collectively view to be common ground (in particular, see paragraph 6(a)(iv) of the order. That, in turn, will highlight the areas of true controversy, which will of course be a matter for trial.

(4) There can be no question, none, of this Tribunal resolving even provisionally a contested point of law or a contested point of fact until it has heard all of the evidence and the parties' final submissions.

23. The parties, understandably, only want a Section included in an Ambulatory Draft if all of the parties are agreed as to its precise wording. That is unworkable. Either agreement will never be achieved, or else the points of controversy (which the Tribunal wants articulated, not buried) will be lost, either in substance or in nuance, as the parties struggle towards compromise wording that satisfies all except the Tribunal. The process contemplated by the Second Hydrocortisone Order wrests final control of the drafting process away from the collective agreement of the parties, and transfers it to the Tribunal. That, we consider, is as it should be.

24. The upshot is that Sections will be drafted by one or more parties, but not by all parties, nor (necessarily) with all of the parties' consent: see paragraph 2(b) of the order. Naturally, there should be consultation in the drafting process, and the Tribunal will stand ready to provide guidance – should this be needed – in

relation to what would assist it. The Sections so produced will be incorporated into a "draft" Ambulatory Draft circulated in the first instance to the parties only. That will enable any serious issues with the draft to be identified, but (to be clear) the Tribunal's expectation is that the draft will evolve and become clearer over time. Nothing, in any Ambulatory Draft, commits the Tribunal to anything. We repeat: whilst each Ambulatory Draft is a document produced under the control and supervision of the Tribunal, the contents of any Ambulatory Draft cannot and should not be attributed to the Tribunal.

25. The parties should proceed on the basis that Ambulatory Drafts will be published, although we will consider this question afresh in the light of the draft AD2.

26. We trust that this makes the Tribunal's position clear. We should make two, further points:

(1) The Tribunal dealt, at the outset of the CMC on 21 January 2022, with the parties' concerns, and those portions of the transcript should be read with this ruling.

(2) We are conscious that this is a new process. We will keep it under review. It is intended to work in parallel with, and in harmony with, the more "traditional" dispositions that we are making. Thus, we consider, for instance, that some Sections can and should be drafted in parallel with the Replies due towards the end of February 2022. However, if the process proves unworkable and cannot be made to work by the Tribunal's case management powers, then it will be abandoned.

C. HEARING OF THE APPEALS

27. Although we were tempted to hear both sets of appeals together, we are persuaded that that risks over-loading the process. Accordingly:

(1) The appeals in relation to the Liothyronine Decision will be heard (by a differently constituted Tribunal) in September/October 2022, with a time estimate of three weeks.

(2) The appeals in relation to the Hydrocortisone Decision will be heard (by this Tribunal) in November/December 2022, with a time estimate of three weeks, but with two weeks in reserve ear-marked for judgment writing and not evidence or submission. We will, as appropriate, consider deploying these two weeks for other purposes at a CMC to be scheduled for the end of July 2022.

Sir Marcus Smith
President

Simon Holmes

Prof. Robin Mason

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

Date: 31 January 2022

ANNEX A

IN THE COMPETITION APPEAL TRIBUNAL

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

BETWEEN:

(1) ALLERGAN PLC
(2) ADVANZ PHARMA CORP. LIMITED & OTHERS
(3) CINVEN CAPITAL MANAGEMENT (V) GENERAL PARTNER LIMITED & OTHERS
(4) AUDEN MCKENZIE (PHARMA DIVISION) LIMITED & ANOTHER
(5) INTAS PHARMACEUTICALS LIMITED & OTHERS

Appellants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

ORDER
(the "Second Hydrocortisone Order")

UPON hearing leading counsel for the Appellants (Mr Brealey, QC, Ms Ford, QC, Mr Jowell, QC, Mr O'Donoghue, QC, and Robert Palmer QC) and counsel for the Respondents (Mr Holmes, QC) in the above-referenced proceedings (collectively, the "Hydrocortisone Proceedings" at a Case Management Conference on 21 January 2022 (the "CMC")

AND UPON the order of the Tribunal made 8 December 2021 (the "First Hydrocortisone Order")

AND UPON READING the documents on the Tribunal file recorded as having been read

IT IS ORDERED THAT:

Progression and case management through the use of Ambulatory Draft documents

1. In parallel with the other directions made in this case, the Hydrocortisone Proceedings will be progressed and case managed through the use of "Ambulatory Drafts" or "ADs". These documents shall be produced by the Tribunal from time to time and will be based on the sections drafted by one or more of the parties to the Hydrocortisone Proceedings ("Sections") in accordance with the directions contained in this and subsequent orders.

2. All Sections shall be produced:

   (a) According to a subject-matter, specification and methodology provided for (the "Specification").

   (b) By the party or parties ordered to do so (the "Producing Party"). The Producing Party shall consult, as appropriate, with the other parties in order to produce a Section that meets the Specification but the Producing Party is not obliged to obtain the agreement of all other parties to the Section it submits to the Tribunal.

   (c) By a date provided for, when it shall be filed with the Tribunal and provided to the other (non-Producing Parties).

   (d) In Microsoft Word format.

   (e) Referencing, so far as possible, the pleadings, witness statements, expert reports and other documents in the Proceedings, and utilising (to the fullest extent possible) the Magnum Opus II Case Management System put in place by the Appellants and the Respondents (the "Case Management System"). For the avoidance of any doubt, references to the content of witness statements and expert reports are permitted, but subject *(i)* to that material being adduced in evidence and *(ii)* to the weight attributed to that material after hearing the witness in question.

   (f) In a style and using definitions consistent with the current Ambulatory Draft. The current Ambulatory Draft ("AD1") is appended to this order as **Annex A**.

3. Each Section, when filed with the Tribunal, shall be filed with a short-form statement of costs (a "Statement of Costs") stating (on no more than a single A4

page) the [approximate] costs incurred by the Producing Party in producing a particular Section.

4. Each Producing Party shall file the Sections identified in **Annex B** hereto, by the dates there specified, and in accordance with the Specification there set out.

5. The Tribunal shall, as and when appropriate, circulate in draft form, the next iteration of the Ambulatory Draft, to enable the parties to identify:

   (a) Any material that is confidential and which should be redacted if the Ambulatory Draft were to be published.

   (b) Any aspects of the Ambulatory Draft which may be prejudicial to any party. The parties shall bear in mind paragraph 6 of this Order, and the fact that whilst each Ambulatory Draft is a document produced under the control and supervision of the Tribunal, the contents of any Ambulatory Draft cannot and should not be attributed to the Tribunal.

   The Tribunal will make provision, from time to time, for the parties to make suggestions as to the drafting of the current Ambulatory Draft.

6. As regards the nature, purposes and content of Ambulatory Drafts, the parties are obliged to bear in mind the following:

   (a) The essential purposes of Ambulatory Drafts are:

      (i) To set out, in as much detail as is appropriate, those matters which are uncontroversial, but which need to be set out in order to enable the Tribunal to produce, in due course, a fully reasoned decision.

      (ii) To identify and demarcate, in as much detail as is appropriate, the areas of controversy and dispute between the parties.

      (iii) The objective is to enable the final hearing of the appeals to proceed in a manner focussing efficiently on the matters actually in dispute, in circumstances where the parties can be satisfied as to what is, and what is not, common ground.

      (iv) To give the Tribunal a clear appreciation of the matters that the parties view to be common ground.

   (b) It is not the purpose of an Ambulatory Draft to determine any matter in dispute between the parties, whether of law or fact. The Tribunal can only

properly determine disputed questions of law and/or fact after hearing all of the evidence and having heard final submissions of all of the parties.

The Tribunal is reliant on the parties settling the Sections with this paragraph in mind. If and to the extent that a party culpably falls short in the settling of any given Section, the Tribunal may declare all or part of the costs identified in a Statement of Costs to be irrecoverable by that party in any event.

7. There shall be a case management conference in the week commencing 25 July 2022. Provision shall, in due course, be made for earlier case management conferences (as necessary) and for a pre-trial review (if required).

8. The appeal will be heard in November/December 2022 with a time estimate of three weeks. (The Tribunal will allocate a further two weeks, immediately thereafter, for judgment writing.)

9. Costs in the case.

10. There be liberty to apply.

Sir Marcus Smith
President of the Competition Appeal Tribunal

Made: 28 January 2022
Drawn: 28 January 2022

ANNEX A

AMBULATORY DRAFT 1

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

[*]

Before:

SIR MARCUS SMITH
(President)
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)

Collectively, the "Appellants"

- and -

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard at Salisbury Square House on:

8 December 2021 (a case management conference)

21 January 2022 (a case management conference)

Incorporating:

[Sections]

AMBULATORY DRAFT 1

APPEARANCES

(The representatives below appeared at one or more of the hearings listed above, but did not necessarily appear at all of these hearings)

Daniel Jowell QC and Tim Johnston (instructed by Addleshaw Goddard LLP) appeared on behalf of the Allergan Appellant.

Mark Brealey QC (instructed by Morgan, Lewis & Bockius LLP) appeared on behalf of the Advanz Appellants.

Robert O'Donoghue QC and Emma Mockford (instructed by Clifford Chance LLP) appeared on behalf of the Cinven Appellants.

Sarah Ford QC and Charlotte Thomas (instructed by Macfarlanes LLP) appeared on behalf of the Auden/Actavis Appellants.

Robert Palmer QC, Laura Elizabeth John and Jack Williams (instructed by Linklaters LLP) appeared on behalf of the Intas Appellants.

Josh Holmes QC and David Bailey (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

A. INTRODUCTION

(1) The Decision

1. By a decision dated 15 July 2021 in Case No 50277 concerning excessive and unfair pricing and anti-competitive agreements in relation to hydrocortisone tablets (the **Hydrocortisone Decision**[1]), the United Kingdom Competition and Markets Authority (the **CMA**) found that the various appellants listed above, collectively the **Appellants**, had infringed UK competition law in the various respects set out in paragraph 1.4 of the Hydrocortisone Decision. It will be necessary, in due course, to set out exactly the nature of these infringements, for they differ according to the persons against whom they are made. However, we shall refer to these infringements generally as the **Infringements**.

2. The Appellants in relation to the Hydrocortisone Decision, and who are addressees of that decision, fall into five groups, who we shall refer to as follows:

   (a) The **Allergan Appellant**.

   (b) The **Advanz Appellants**.

   (c) The **Cinven Appellants**.

   (d) The **Auden/Actavis Appellants**.

   (e) The **Intas Appellant**.

3. The various companies and/or persons comprising these groups are specifically listed above, but it will be necessary to explain in greater detail their nature and commercial inter-relationship.

4. The Appellants in relation to the Hydrocortisone Decision all appeal that Decision, and they do so in notices of appeal filed with the Tribunal during the course of September and October 2021. We shall refer to these notices of appeal as follows:

   (a) The **Allergan NoA**.

   (b) The **Advanz NoA**.

   (c) The **Cinven NoA**.

   (d) The **Auden/Actavis NoA**.

   (e) The **Intas NoA**.

5. The CMA filed a single Defence (the **Defence**) to all of these notices of appeal on 1 December 2021.

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[1] A list of the terms and abbreviations used in this Draft, together with the paragraph in which that term/abbreviation is first used, is at Annex 1 hereto.

(2) Structure

6. [Deliberately incomplete.]

B. THE INFRINGEMENTS FOUND BY THE CMA IN THE DECISION

7. [Section [1A]]

8. [Section [1B]]

C. THE RELEVANT FACTUAL BACKGROUND

9. [Section [2]]

D. THE APPEALS AND THE VARIOUS GROUNDS OF APPEAL OF THE APPELLANTS

10. [Section [3]].

ANNEX 1

TERMS AND ABBREVIATIONS USED IN THE DRAFT

(paragraph 1, footnote 1 of the Draft)

TERM/ABBREVIATION	FIRST USE IN THE DRAFT
Advanz Appellants	Paragraph 2
Advanz NoA	Paragraph 4
Allergan Appellant	Paragraph 2
Allergan NoA	Paragraph 4
Auden/Actavis Appellants	Paragraph 2
Auden/Actavis NoA	Paragraph 4
Cinven Appellants	Paragraph 2
Cinven NoA	Paragraph 4
Decision	Paragraph 1
Defence	Paragraph 5
Infringements	Paragraph 1
Intas Appellant	Paragraph 2
Intas NoA	Paragraph 4

ANNEX 2

A LIST OF THE FACTUAL AND EXPERT WITNESS EVIDENCE ADDUCED BY THE PARTIES

(paragraph [*], footnote [*] of the Draft)

[Section 5]

ANNEX B

SECTIONS TO BE DRAFTED IN ACCORDANCE WITH PARAGRAPH 4 OF THE SECOND HYDROCORTISONE ORDER

(All terms and definitions are as per AD1)

Section Number	Specification	Producing party	Date for production
Section [1A]	A short-form statement setting out the Infringements found by the CMA in the Decision, identifying *(i)* the broad nature of the Infringement, *(ii)* the period of the Infringement, and *(iii)* the person(s) found to have infringed.	CMA	25 February 2022
Section [1B]	A short-form statement, identifying the penalties imposed on each person.	CMA	25 February 2022
Section [2]	**(a)** It is anticipated that Section [2] will be long, setting out the necessary factual background so that any person reading Section [3] will be able to understand the grounds of appeal. **(b)** The drafting intention is that Section [2] should be limited to a description of facts and matters that are uncontentious. Where facts or matters are contentious, then this should either be noted with a statement that the controversy will be addressed later in the Draft (for the avoidance of doubt, no drafting of the later controversial matters should be attempted) or (if unavoidable) the controversy should be articulated setting out all sides. **(c)** In the first instance, the parties should agree, by the date specified: *(i)* a list of topics to be covered in Section [2]; *(ii)* the order in which they should be covered; and *(iii)* the party who is to settle each particular topic. A list is to be provided to the Tribunal on the date specified. **(d)** Thereafter, the topics are to be filed, in accordance with the list provided and subject to any changes indicated by the Tribunal, by the date specified.	The parties	10 February 2022 for the work specified in Section [2]**(c)** 11 March 2022 for the work specified in Section [2]**(d)**
Section [3]	A short-form statement, setting out the grounds of appeal of each Appellant, stating *(i)* the broad nature of the ground	The Appellants collectively	25 February 2022

	of appeal and *(ii)* the party or parties advancing that particular ground of appeal. The parties should approach Section [3] on the basis that it is not intended that this Section comprise a complete statement of all points of controversy between the parties. Rather, the drafting intention should be that any person, reading only the Draft, should be in a position to understand each specific ground of appeal in issue.		
Section [4]	A neutral and complete chronological narrative of the facts and matters (including references to documents and witness statements) relevant to the market agreement allegedly concluded by Advanz. For the avoidance of any doubt, the relevant material should be adduced briefly, with (so far as possible) a minimum of quotation. However, where the significance of a document is controversial, quotation may be inevitable. Statements as to what may be inferred or concluded from a particular document or event are not permitted. Provision will be made at a later date for submission and argument, and this is to be avoided in this Section. The narrative should, self-evidently, seek to provide a chronological narrative sufficient to enable the Tribunal to understand the issues underlying the Decision, the grounds of appeal, and the subsequent pleadings. It should not be drafted as a partisan document. Rather, the parties should anticipate that later Sections will make provision for the identification of the issues actually in dispute.	Advanz	11 March 2022
Section [5]	A table, listing by party the evidence (factual and expert) adduced so far by each party. The table should identify: (i) The name of the person(s) making the statement or giving the report. (ii) The position and/or discipline of that person. (iii) The date of the statement/report.	The parties	10 February 2022

	(iv) A short-form term by which the document can be referenced: e.g. "**Smith 1**"		