CA-2025-000642

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL

Marcus Smith J, Simon Holmes and Robin Mason

[2023] CAT 56

B E T W E E N:-

ALLERGAN UNLIMITED COMPANY

(FORMERLY KNOWN AS ALLERGAN PLC)

Appellant

-and-

THE COMPETITION AND MARKETS AUTHORITY

Respondent

ALLERGAN'S SKELETON ARGUMENT ON APPEAL

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*References to the Judgment under appeal are in the form [**X**], where X refers to the paragraph number within the Judgment.*

References to the Bundles are as follows:
*Core bundle: **[Core/tab/page]**;*
*Core supplementary bundle: **[CSupp/tab/page]**;*
*Reference supplementary bundle: **[RSupp/tab/page]**; and*
*Authorities bundle: **[Auth/tab/page]**.*

A. INTRODUCTION AND SUMMARY OF APPEAL

1. This skeleton argument is filed by the Appellant ("**Allergan**") following the grant of permission to appeal by the Competition Appeal Tribunal (the "**Tribunal**") on 4 March 2025.

2. Allergan is a global, US-headquartered pharmaceutical company. In May 2015 one of the UK subsidiaries within the Allergan group – Actavis UK Holdings Ltd ("**Actavis UK**") – purchased a UK niche generics supplier, Auden Mckenzie Holdings Ltd, the parent company of Auden Mckenzie (Pharma Division) Limited (together "**Auden Mckenzie**"**)**. One of Auden Mckenzie's products was hydrocortisone, a drug used for treating adrenal insufficiency. The pre-acquisition paperwork produced by Actavis UK noted, in summary, that whilst hydrocortisone was currently highly profitable that profitability was not anticipated to last . This was because market entry was perceived to be imminent and hydrocortisone sales were predicted to witness "*share erosion of 60% and price erosion of 90% over 3 yrs*."[1] That prediction proved broadly correct. Market entry began in July 2015 and the price of the product began to fall.

3. Hydrocortisone had been purchased ultimately by the Department of Health for many years. The Department of Health had the power to challenge, reduce, or fix that price. It never expressed any concerns about the price it was paying for hydrocortisone. Further, neither the CMA nor any other regulator or customer raised concerns about Auden Mckenzie's pricing of hydrocortisone, certainly none that were known to Allergan.

4. Within two months of the completion of the purchase of Auden Mckenzie (in late May 2015), Allergan agreed in July 2015 to sell its entire global generics business (including Actavis UK and Auden Mckenzie) to Teva. The European Commission cleared Teva's acquisition of Allergan's global generic business in March 2016 subject to Teva divesting Actavis UK (including the hydrocortisone business). As part of that clearance decision, Allergan was required to enter into binding hold separate arrangements, whereby it was precluded from offering any direction to Actavis UK. At around the same time, in March 2016, the CMA opened an investigation into the marketing and sale of hydrocortisone. As the Tribunal found, by that time Allergan was no longer capable of exerting a decisive influence over

[1] URN 00679 and Decision para 3.113. **[Core/23/721]** **[CSupp/1/5-11]** **[RSupp/34/1733-1750]**

Actavis/Auden and Allergan had no involvement in the subsequent investigation until it was told it would be receiving a statement of objections in November 2016. Indeed, during the course of its five year long investigation, the CMA did not interview any employees of Allergan or address a single information request to Allergan.

5. The CMA published its Decision ("**the Decision**")[2] in July 2021. It found that Allergan was part of a single undertaking that was liable for charging excessive prices for both 10mg and 20mg hydrocortisone tablets and for participating in an unlawful agreement in relation to the marketing and sale of 10mg hydrocortisone tablets ("**the 10mg Agreement**").

6. The CMA's findings of infringement spanned a ten-year period. It imposed total penalties of £266.5 million on 7 different entities in relation to that window. £109.1 million of that penalty was imposed on Allergan in respect of the 14 months during which its subsidiary owned Auden Mckenzie: £74.3 million for excessive pricing of the 10mg tablet; £2 million for excessive pricing of the 20mg tablet; and £34.8 million for the 10mg Agreement. Following the Tribunal's finding that Allergan was not liable for the infringement during the hold separate period [**285**], the penalty has been reduced by c£25.7 million to around £83.4 million.[3]

[Core/16/432-437]

7. Allergan advances two grounds of appeal.

8. **Ground 1**, the Tribunal devised and applied a novel "three-Case" economic test by which to decide whether or not a price is unfair (the second limb of the test in Case 27/76 *United Brands v Commission* [1978] ECR 207 ("***United Brands***")). That test finds no support in the existing authorities and is contrary to several cardinal features of the law of excessive pricing. In essence, the Tribunal fell into two main errors. First it reversed the burden of proof: it assumed that once the price had been shown to be excessive the accused parties bore the burden of

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[2] *Hydrocortisone Tablets. Excessive and unfair pricing and anti-competitive agreements* (Case 50277), 14 July 2021. **[Core/23/649-1749]**

[3] The precise quantum of the new penalty has not been agreed between the CMA and Allergan. Pursuant to the Tribunal's Judgment, the CMA and Allergan have agreed a reduction in the penalties imposed on Allergan arising from the 10mg and 20mg Excessive Pricing infringements in accordance with the Tribunal's findings in relation to the hold separate issue. However, as the Tribunal has yet to hand down Judgment on Allergan's penalty under the 10mg Agreement infringement any further reductions have not been finally determined, Its fine in respect of the 10mg Agreement will need to be adjusted at least in line with Tribunal's findings on the hold separate issue.

showing it was fair. Second, it compounded that error by adopting a narrow and prescriptive typology of evidence that might discharge that burden. The practical consequence of this double error was that the Tribunal summarily ignored or dismissed critical evidence that had to be considered under the fairness limb (**Ground 1(a)**); left all demand-side value out of account and failed to consider whether (still less establish that) the price charged bore no reasonable relation to the economic value of the product (**Ground 1(b)**); and failed to consider whether (still less establish that) the prices charged were significantly and *persistently* above the fair price (**Ground 1(c)**).

9. It is notable that the subsequent Tribunal judgment in *Le Patourel v BT Group Plc and others* [2024] CAT 76 ("***Le Patourel***") reviewed the three-Case approach in the Judgment and respectfully warned against the dangers of taking "*too prescriptive an approach*" when assessing unfairness [82]. It did not adopt the three-Case typology in its subsequent analysis.[4]

[Auth/59/1778]

10. **Ground 2**, the Tribunal failed to grapple properly or at all with Allergan's grounds of appeal as regards penalty. In particular, it failed to reach its own conclusions as to the proportionality of the fine, as it is required to do. It simply concluded that the CMA had not made any "*material error*". In doing so, it erred and misunderstood or misapplied its jurisdiction in relation to penalty (**Ground 2(a)**). Amongst the Tribunal's most marked errors was its finding that all the parties before it had engaged in intentional excessive pricing; it was impossible to reconcile that finding with the uncontested evidence of Mr Stewart, Allergan's witness (**Ground 2(b)**). Further, the Tribunal did not address at all Allergan's appeal as regards the 1000% uplift imposed by the CMA for "specific deterrence" (**Ground 2(c)**). It was this aspect of the CMA's reasoning, in particular, that was so wholly deficient and which produced the marked and disproportionate level of the fine. There was no rational basis for imposing any uplift (still less such an enormous uplift) by reference to Allergan's global turnover in other jurisdictions in order supposedly to deter Allergan from engaging in conduct in circumstances where there was nothing in Allergan's *own* conduct which merited censure in any way.

[CSupp/13/102-119] **[RSupp/1/7-24]**

11. Allergan adopts but does not repeat **Grounds 1(b), 1(c)** and **4** of Auden/Actavis' appeal.

[4] Though it did draw on the notion of distinctive value at points in its reasoning.

B. BACKGROUND FACTS

12. Hydrocortisone is a long-established pharmaceutical product that is used to treat adrenal insufficiency. It is available in various forms on the market in the United Kingdom.

13. Allergan is a global pharmaceutical company that is now exclusively engaged in the manufacture and sale of branded medicines (it now forms a part of the Abbvie group). The history of the relevant changes to corporate ownership in this case are complex. In brief summary:

    13.1. 2013-2014 Allergan underwent series of mergers including with Actavis, Warner Chilcott plc and Forest Laboratories (valued at $77 billion, $8.5 billion and $25 billion respectively).

    13.2. 29 January 2015: Actavis UK Holdings Ltd ("**Actavis UK**"), a subsidiary of then Actavis plc, entered into a binding agreement to acquire Auden Mckenzie.

    13.3. 17 March 2015: Actavis plc and Allergan merger completed. The newly merged entity took on the name Allergan in June 2015 (for simplicity it is referred to as Allergan throughout this skeleton).

    13.4. 29 May 2015: Actavis, completed the acquisition of Auden Mckenzie for £306 million. The CMA found that Allergan's liability ran from this point.

    13.5. 26 July 2015: Allergan contracted to sell the entirety of its global generics business ("**Actavis Generics**") to Teva. Actavis UK and its sales of hydrocortisone tablets formed a part of the sales of Actavis Generics. Within less than two months of its subsidiary acquiring Auden Mckenzie, therefore, Allergan had negotiated its sale, and in doing so put in places steps to exit the generics sector. Mr Stewart's evidence at trial – not challenged – was that from that point onwards the global generics business was managed on an arm's length basis from the retained Allergan business.

    13.6. 1 September 2015: Actavis UK took on responsibility for the sale and marketing of hydrocortisone from Auden Mckenzie.

    13.7. 10 March 2016: the European Commission conditionally cleared Teva's acquisition of Actavis Generics subject to commitments offered by each of Allergan and Teva

dated 4 March 2016. Pursuant to the commitments, Allergan was subject to Hold Separate Obligations that prevent it from exercising control over the business (including Actavis Generics) that was being divested. The Tribunal found that Allergan did not exercise a decisive influence over the relevant subsidiaries from this point onwards (because it was precluded in law from giving them directions or knowing about their trading condition and performance). Allergan's total period of liability was reduced to 9 months 11 days.

13.8. 2 August 2016: the sale of Allergan's global generics business to Teva completed.

14. The CMA's case – in the Decision – was that "*Allergan invest[ed] in and approv[ed] of the strategy of exploiting Auden-Actavis' monopoly position for hydrocortisone tablets*."[5] Elsewhere the Decision held that Allergan "*endorsed*" the continuation of the AM Pharma unlawful strategy post-acquisition.[6] That allegation was repeated in the CMA's Defence. **[RSupp/9/476-704]** However, the CMA did not seek to sustain this case at trial. Mr Stewart – a senior executive within Allergan – gave evidence and was cross-examined. His written evidence specifically denied the findings above: "*I do not agree with the conclusions that the CMA has drawn from the evidence in relation to this period*." [4.4][7] That evidence was not challenged. It was not **[CSupp/13/108]** put to him that Allergan knew, should have known, or approved of the excessive pricing **[RSupp/1/13]** infringements (nor was he asked a single question about the 10mg Agreement). That is consistent with the fact that the CMA did not seek any information from Allergan by way of s.26 Notice during the investigation. Allergan's only role in the CMA's analysis is as a short term parent company, with a large global turnover, that is liable for an enormous share of the overall penalty.

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5 Decision para 9.136. **[Core/23/1523]**

6 Decision para 9.158. **[Core/23/1530]**

7 See also his denial at [4.11]: the documents relied on in the Decision do not "*support the CMA's argument that Allergan approved a strategy of exploiting Auden's position in hydrocortisone tablets or that there was any evidence available at the time of the negotiation that Auden was engaged in anti-competitive activity*…" and [4.12.1]: "*There is no suggestion in any of the contemporaneous documents that any of the Actavis staff (or indeed any of the other bodies engaged in the due diligence process) even considered that Auden's marketing and sale of hydrocortisone tablets was unlawful*." **[CSupp/13/109-110]** **[RSupp/1/14-15]** **[CSupp/13/110]** **[RSupp/1/15]**

15. The other aspect of the factual background relevant to this appeal concerns market entry in the period of Allergan ownership. The pre-acquisition materials, produced by Actavis UK, anticipated that competitive market entry was imminent in 2015. Actavis UK reported to Allergan that it anticipated that hydrocortisone sales would witness "*share erosion of 60% and price erosion of 90% over 3 yrs*."[8] Mr Stewart's evidence (corroborated by the contemporaneous documentation) was that hydrocortisone was only ever expected to be a "*cash cow*" for the "*very short term*."[9] Those expectations were correct. Competitor entry began in July 2015 for the 20mg, followed by a 10mg tablet in October 2015. Prices were falling rapidly by the end of the period of Allergan's ownership and continued to fall thereafter.

C. THE LAW

16. The authorities in relation to excessive pricing establish the following key propositions.

17. First, the basic test of abuse is the two-limb test set out in *United Brands* [248] – [252]: (i) is the price excessive; and (ii) is it unfair (either in itself or by reference to comparators)? A fuller analysis of this dual test is set out in the judgment of Green LJ in ***Flynn Pharma CoA*** [97]. **[Auth/1/ 81-82]** **[Auth/48/ 1256-1257]**

18. Second, there is no single method or test by which an unlawful price may be identified, at either the first or the second stage of the test. This has two consequences:

    18.1. A competition authority has a "*margin of manoeuvre*" over the approach that it takes when identifying an unlawful price and the evidence that it relies on (per Green LJ in *Flynn Pharma* [97(iii)]). **[Auth/48/ 1256]**

    18.2. Evidence, arguments and reasoning relied on by the accused party to demonstrate that a price is not excessive or is fair must be fairly and properly evaluated: "*If an undertaking relies, in its defence, upon other methods or types of evidence to that relied upon by the competition authority then the authority must fairly evaluate it*." (*Flynn Pharma CoA* [97(viii)], [88] – [89] and [106]). A decision maker will err if it ignores or fails properly to weigh that evidence. As Vos MR explained: "*I do agree with the CAT when it said at para 367 that the CMA could not "simply ignore a prima facie valid argument that a price is fair" whichever alternative it chose to adopt*" **[Auth/48/ 1257, 1253-1254 and 1259]**

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8 URN 00679 and Decision para 3.113. **[CSupp/1/5-11] [RSupp/34/1733-1750] [Core/23/721]**

9 Day 10, p. 218, lines 3-5. **[CSupp/15/193] [RSupp/23/1652]**

[Auth/48/1298] (*Flynn Pharma CoA* [259]). This was why the Tribunal in *Le Patourel* warned against taking "*too prescriptive an approach*" when assessing unfairness (*Le Patourel* [82]).[10] [Auth/59/1778] As the Tribunal noted: "*the Court should balance all the factors involved which go one way or the other, giving them such weight as it considers appropriate, so as then to conclude whether the price was itself unfair*" (*Le Patourel* [56]). [Auth/59/1774]

19. Third, a finding of unlawful pricing is quasi-criminal in nature. This is because competition authorities are entitled to impose very substantial fines. This has three important consequences:

19.1. The burden of establishing the existence of an infringement lies on the CMA. That burden applies as regards both the excessive and the unfair limb (*Flynn Pharma CoA* [115]). A finding that a price is excessive does not lead to a presumption or starting point that the price will also be unfair. Laddie J stressed the importance of this point in *BHB v Chandler* [2005] EWHC 1074 (Ch) [51]: [Auth/48/1263-1264]

> "… comparing prices with costs determines the profit margin. Once that has been achieved it is necessary to go on to the next stage to determine whether the price is unfair. What [the Court of Justice] did not do was suggest that high prices or high margins are the same as unfair prices. Indeed, were Mr Turner right, it seems to me that the law reports would be full of cases where undertakings in dominant positions would have been found guilty of abuse by simply charging high prices. As Mr Vaughan says, the reality is that there are no such cases." [Auth/10/436]

This was affirmed by the Court of Appeal in *Attheraces Limited v British Horseracing Board* [2007] EWCA Civ 38 at [207] - [208]: an excess of price above cost plus was not "*the index of abuse*" but merely a *sine qua non.* [Auth/18/603-604]

Accordingly, it is an error of approach for a competition authority, or a Tribunal, to start from the presumption that a price will be unfair (absent a proper explanation) if it has been found to be excessive at the first limb of the *United Brands* test. As the Tribunal explained in *Le Patourel*: "*it would, in our view, be wrong to approach the Limb 2 exercise as if there were a presumption of unfairness established already by* [Auth/59/1774]

[10] "*We see the usefulness of sketching out different scenarios where distinctive value is either offered or not offered, but would caution against too prescriptive an approach.*" **[Auth/59/1778]**

the mere fact that the price was excessive under Limb 1, subject only to any justification which the defendant can establish" [56]. **[Auth/59/1774]**

19.2. Given the risk of false positives, a finding of infringement should not be made if there is any doubt, or if the evidence points in different directions. Excessive pricing should only be found when, having considered all the evidence, the "*method(s) applied and the other indicator(s) examined … give the authority a sufficiently complete and reliable set of elements which point in one and the same direction*" (*Flynn Pharma Plc and others v CMA* [2018] CAT 11 ("***Flynn Pharma CAT***") citing with approval from AG Wahl in *Latvian Copyright* [294(11)]). **[Auth/39/1036]**

20. Fourth, as the Court of Justice held at *United Brands* [250]: "*charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied is … an abuse*." As Green LJ explained in *Flynn Pharma CoA* [171]: "*economic value*" is "*at base… an economic concept which describes what it is that users and customers value and will reasonably pay for and it arose in the United Brands judgment as an economic description of the abuse of unfair pricing*." As he went on to explain, any valid test for unlawful pricing must be able to accommodate some consideration of value to the customer – demand-side value – at some stage, whether in the excessive or the unfair limb [172]. In this regard, the fact a customer requires a product, and so is compelled to pay a high price for a product, does not mean that demand-side value should be left out of the analysis. In *Flynn Pharma CoA* the CMA argued that demand-side value, in the form of patient benefit, was irrelevant because patients could not be switched between formulations of phenytoin. The Court of Appeal rejected that argument and upheld the Tribunal's finding that the CMA had erred in failing to take into account patient benefit: "*Economic common sense indicates that dependency and the inferences to be drawn from its existence are indeed matters of fact and degree. Even if there is dependency there might still be some economic value but not necessarily reflecting the full price demanded*" [167]. See also the European Commission's stress on the importance of taking into account demand-side value in *Scandlines Sverige AB v Port of Helsingborg Case* COMP/A.36.568.D3 [226] – [228] and the Court of Appeal in *Attheraces*, [212] and [281]. **[Auth/1/81]** **[Auth/48/1279]** **[Auth/48/1279]** **[Auth/48/1278]** **[Auth/71/2273]** **[Auth/18/604-605 and 621]**

21. Fifth, it is well-established that evidence relating to comparators often offers a valuable insight into whether a product price is unfair. One of the criticisms made of the High Court judgment

in *Attheraces* was that it had failed properly to consider comparators [186], [198], [199], [203]. The weight to be placed on those comparators turns on the strength of those prices as evidence of the prices that would arise in a competitive market. **[Auth/18/ 600 and 602-603]**

22. Sixth, a price will not be unlawful unless it is substantially and *persistently* above the economic value of the product. This was affirmed by the Court of Justice in *Latvian Copyright* [[56]: "*It should be emphasised in this regard that, as observed by the Advocate General in point 107 of his Opinion, the difference must be significant for the rates concerned to be regarded as "abusive". Furthermore, that difference must persist for a certain length of time and must not be temporary or episodic*." The Tribunal affirmed that approach in *Flynn Pharma CAT* [442] – [443]. That conclusion was not challenged before the Court of Appeal. Consistent with this principle, the Tribunal held in *Napp Pharmaceuticals v DGFT* [2002] ECC 13, that a price, even if currently high, will not be abusive and unlawful unless it is also likely to remain significantly high for the reasonable future [390] – [391]. The rationale for this approach was explained by Green LJ in Flynn Pharma CoA: "*Where there are no material barriers to entry high prices can act as a magnet to entry which, in due course, drives prices down. Many markets are thus self-correcting. In the absence of entry barriers regulatory intervention can risk prolonging a monopoly situation by blocking efficient signals which would otherwise promote market entry*" [104]. In short, where prices are coming down by themselves, it is far better to let the market do its work. **[Auth/38/ 938]** **[Auth/39/ 1078-1079]** **[Auth/7/ 362-363]** **[Auth/48/ 1258-1259]**

D. THE JUDGMENT

23. The Tribunal set out the approach that it adopted to excessive pricing at [**308**]-[**330**]. In short, the central concept – as reflected in the reasoning in *United Brands* – is "*value*" [**309**]. **[Core/16/ 445-457]** **[Core/16/446]**

24. The Tribunal then set out in detail its economic methodology, by which it would assess value. It held that the proper approach turned on the theoretical concepts of consumer surplus and producer surplus. In a situation of perfect competition, consumer surplus will be maximised and sellers will have to price at cost: "*Sellers cannot arrogate to themselves the consumers' surplus. Since such a step would inevitably involve an increase in price above Cost, the Seller seeking to erode the Buyers' consumer surplus would fail. In this way, one aspect of economic*

value is maximised namely that of the consumers' surplus" [**320**]. The norm, within the Tribunal's framework, therefore, is that consumers enjoy all possible surplus and producers none. **[Core/16/448]**

25. The remainder of the Tribunal's analysis was devoted to identifying the exceptional cases in which deviations from that norm may or may not be justified: "*In a world where the assumptions of the perfect competition model do not pertain, there are three reasons why Price might exceed Cost*" [**322**]. It set out a three-part typology [**323**]: **[Core/16/449-452]** **[Core/16/452-453]**

    25.1. **Case 1**: a Seller who is able to produce more efficiently than its competitors may secure greater profits. This model played no material part in the Tribunal's later reasoning.

    25.2. **Case 2:** the seller provides "*distinctive value*", most likely as a consequence of product differentiation. Where that distinctive value is in the form of access (such as a mobile phone operator with a superior network) or volume (the producer of face masks during a pandemic), this will only be temporary: "*Provided the market remains contestable, such prices in excess of cost will serve to attract other Sellers, and competition will ensure that prices trend back to cost, and that consumer surplus is protected*." In short, a temporary deviation from perfect competition may occur but prices will soon revert back to cost. All the surplus ultimately reverts to the consumer and they pay less than they are prepared to pay for the product.

    25.3. **Case 3**: producer surplus – price above cost – is secured by a dominant provider in a market with barriers to entry. In this situation a producer is able to secure a sustained surplus above cost. Such prices are never justified.

26. In a nutshell, therefore, the charging of a price materially above cost raises a question, and that question can only be answered in Case 2 if the producer can establish both: (a) the distinctive value that they provide to consumers <u>and also</u> (b) that the distinctive value they are providing will attract market entry with the result that prices revert to cost. If the producer provides distinctive value but market entry is not forthcoming, or not sufficiently forthcoming to drive prices back to cost, distinctive value cannot justify any producer surplus. The temporary nature of any reliance on demand-side value was made clear in [**322(2)(iii)**]:

[Core/16/451]

> "If, through product differentiation (or other ways of providing distinctive value), a Seller creates a product that Buyers value more highly – measured, as ever, by willingness (and ability) on the part of Buyers to pay – then the reward is producer surplus. Consumer value is maximised: Buyers get the products they value and are prepared to pay for. The higher price containing the producer's surplus acts as an incentive for others to enter the market." **[Core/16/451]**

27. Accordingly, a firm trading in conditions where barriers to entry are low may charge well above Cost, in reliance on demand-side value: their product is valued by consumers and is lawfully priced because consumers are willing to pay that price: "*Buyers get the products they value and are prepared to pay for*." This is because price will shortly trend back to cost. But a dominant firm, in a market with barriers to entry, cannot ever justify its price by reference to demand-side value. It does not matter what value the customer places on the product. The seller is in Case 3 and they are not entitled to argue that Buyers get the products they value at the price they pay for them. The seller may price at cost (including some margin) and no more.

28. Having set out its approach, the Tribunal was able, in three paragraphs and two pages, to dispose of all the grounds of appeal and find that the prices were unlawful "*par excellence*" because the price was well above cost and the Appellants had failed to demonstrate that their versions of hydrocortisone provided distinctive value to customers [**340**] – [**342**]. **[Core/16/460-462]**

E. GROUNDS OF APPEAL

GROUND 1: ERRORS OF LAW IN RELATION TO THE LEGAL TEST

29. The Tribunal recognized that its economic methodology was novel, when granting permission to appeal. Novelty is not an indicator of error *per se*: the authorities are clear that unlawful pricing may be identified via a variety of different routes. However, the Tribunal's Case 1-3 typology, and its application of that typology, directly contradicts several cardinal features of the law of unlawful pricing. Having set out its economic methodology in detail, the Tribunal set out some of the case law in relation to excessive pricing [**324**] – [**332**] (rather more briefly). **[Core/16/453-458]** However, the Tribunal failed to consider whether its approach was consistent with that case law. It was not.

Ground 1(a): Reversal of the burden of proof

30. The underpinning of the Tribunal's three-part typology for economic value – and so excessive pricing – is that charging a high price requires positive justification on narrow grounds. This logic recurs throughout the Judgment. It is inherent in the Tribunal's description of its three Cases. A producer must demonstrate that they are either enjoying efficiency gains (Case 1) or that they are providing distinctive value in a contestable market that will trend to cost (Case 2). If they cannot, the price they charge is presumptively unlawful. At [**340**] the Tribunal recalled that it put to the parties the question: "*The question is not, at this stage, "Does Price exceed Cost?", but rather "Why does Price exceed Cost?*" (emphasis added) That was the central logic of the Judgment. **[Core/16/460-461]**

31. This was reflected in the next paragraph [**341**] (emphasis added):

> "… [W]here one has a level of price substantially exceeding Cost or (in this case) Cost Plus value as calculated by the CMA, then (absent an articulated and pro-competitive explanation) any excess will be abusive." **[Core/16/461]**

32. The same logic is evident elsewhere: "*It is significant that none of the Appellants advanced any explanation for the excess that was consistent with a competitive market or which justified a producer surplus through the maximisation of economic value through product differentiation. We find that telling.*" [**342(2)**] (emphasis added) **[Core/16/461-462]**

33. The Tribunal erred in two key respects. First, it reversed the burden of proof. That is abundantly clear from the quotations above. Once the Tribunal had decided that the price was excessive – Limb 1 – it required the Appellants to demonstrate that it was fair. That was a clear error of law; the authorities set out at para. 19.1 above establish beyond doubt that the burden lies on the competition authority throughout (consistent with the presumption of innocence).

34. Second, the Tribunal summarily dismissed the Appellants' arguments and evidence in relation to economic value. The only evidence it was willing to countenance was evidence that hydrocortisone (as provided by Auden/Actavis) offered distinctive value, by comparison to other formulations or presentations of the drug, and so fell within Case 2. That error compounded the Tribunal's error in reversing the burden of proof.

35. This is reflected in the Tribunal's approach to the Appellants' arguments. It explained that "*a number of other points were raised before us in these appeals which we need to dispose [of]*" [**346**]. The next two pages summarily dismissed all the Appellants' grounds of appeal. By way of example, the Tribunal found that because of market intervention and distortion, caused by regulation "*the prices of medicinal products in the market were not competitive prices, but were distorted for reasons that we have given. Nothing can be learned from them.*" [**348**] All evidence and analysis that did not fit within the Tribunal's three-case typology was dismissed.

[Core/16/463]

[Core/16/463]

36. That was a marked departure from the existing authorities. In *Flynn Pharma CoA* this Court held that the CMA enjoyed a margin in relation to the evidence before it but that it should not dismiss out of hand *prima facie* exculpatory evidence. The Tribunal in *Le Patourel* described the three-case approach in the Judgment but then cautioned against adopting "*too prescriptive an approach*". This was a courteous rejection of the economic straitjacket set out in the Judgment. Elsewhere the Tribunal in *Le Patourel* went out of its way to affirm that [56]:

[Auth/59/1778]

[Auth/59/1774]

    36.1. It is wrong to approach Limb 2 (the unfairness limb) "*as if there were a presumption of unfairness established already by the mere fact that the price was excessive under Limb 1*"; and

    36.2. "*[I]f and when Limb 2 is reached, the Court should balance all the factors involved which go one way or the other, giving them such weight as it considers appropriate, so as then to conclude whether the price was itself unfair*."

37. The Tribunal in this case erred in both these respects.

Ground 1(b): Error of law as to demand-side value

38. The Tribunal was correct to find that the CMA erred in failing to take "*economic value*" into account [**337**]. The CMA's error – in the Decision – was an important focal point of the appeals. However, the Tribunal then fell into a closely connected error. It adopted such a narrow definition of economic value, and established such a restrictive test by which it might be identified, that it dismissed as irrelevant all and any demand-side value provided to patients.

[Core/16/459]

39. The centrality of demand-side value to the assessment of economic value is well established in the authorities set out above in para. 20. However, the Tribunal excluded all consideration of demand-side value to patients (other than distinctive value). This was why the Tribunal

dismissed what it called the Appellants' "*red herring*" and found that the very significant benefits enjoyed by patients, in the form of life enhancements, economic benefits and health benefits did not "*justify[ ] <u>any</u> excess of Price over Cost*" [**339**]. The Tribunal accepted that such benefits existed and that patients valued them: "*<u>Of course</u> patients will value life-saving medicaments*" [339] (emphasis original). However, the Tribunal concluded that in markets with a high barrier to entry patients "*must buy the Product*": in such circumstances the value to the patient above cost was always nil [**339(1)**]. **[Core/16/460]** **[Core/16/460]**

40. Rather than being a red herring, the value of the Product to the patients was a critical question that had to be considered when resolving the question of economic value. It had to be taken into account at some stage in the analysis and the Tribunal erred when it left it out altogether.

41. The Tribunal's conclusion on demand-side value mirrors the CMA's original conclusion that was rejected by the Tribunal in *Flynn Pharma CAT* [416]: the CMA held that when patients 'need' a product, the demand-side value is nil. The CMA appealed against the Tribunal's rejection of that finding but its appeal was dismissed in *Flynn Pharma CoA* [167]. The fact that a customer does not have any alternatives does not mean that the demand-side value of the product collapses to zero. The precise nature of that demand-side value is a matter of detailed fact-sensitive consideration. By leaving it wholly out of account, the Tribunal fell into the CMA's fallacy in *Flynn Pharma CAT* and the appeal must be allowed for that reason. **[Auth/39/1072]** **[Auth/48/1278]**

42. One consequence of this error as to demand-side value is that the Tribunal failed to apply its mind to the question whether the price bore a reasonable relation to the economic value of the product. It cited from various authorities, which set out that test: [**308**], [**325**] and [**327(2)**]. However, this formed no part of its own analysis. Indeed, it <u>could</u> not because the Tribunal did not engage in any detail with the evidence before it concerning the economic value of the product. On its approach, economic value was to be equated to cost, unless the Appellants had adduced evidence of product differentiation. Having identified that, in its view, the Appellants had not adduced evidence that went to Case 2 (this novel test having never before been articulated), the Tribunal considered that it was not obliged to even consider the other evidence before it. This was a clear error of law: the Tribunal was required – consistent with all the prior authorities – to weigh all the other evidence in the round or to enquire whether the price charged bore a reasonable relation to the value of the product. **[Core/16/445 and 453-456]**

43. The purpose of this test, alongside the other elements of the test for unlawful pricing, is to give the accused party the benefit of the doubt. As well as reflecting the presumption of innocence, this is also consistent with the relative uncertainty attaching to the identification of an unlawful price. That the Tribunal's new methodology leaves no space for such flexibility is further evidence that it is not consistent with the existing case law.

Ground 1(c): Error as regards the requirement that the price be materially and *persistently* higher than cost

44. The authorities in relation to this are set out in para. 22 above. They establish that the price must be "persistently" high, which means not only that the excessive prices must have sustained for some time in the past but also that the price is not likely to come down due to new entry in the short term i.e. the market must not be one which is likely to self-correct. Again, the Tribunal's narrow methodology failed to accommodate this important proviso. The fact that prices had already stimulated market entry, and that prices were falling by the end of the relevant period and anticipated to fall precipitously (and subsequently did so), was addressed in a single sentence: "*The situation before us – <u>whatever</u> phase is under consideration – falls within Case 3 and it follows that even if prices are falling provided they sit above Cost (or Cost Plus in this case) they infringe the Chapter II prohibition*" [**342(4)**]. **[Core/16/462]** The fact of market entry and the speed at which prices were anticipated to fall were irrelevant. Once the case fell within Case 3, that was the beginning and end of the analysis.

45. This stark reasoning illustrates the remarkable inflexibility of the Tribunal's approach. Competition to reduce prices need not be considered: the prices are unlawful until they have reverted to the norm of cost.[11] For that reason, the Tribunal was able to disregard the evidence before it that Allergan correctly anticipated market entry and imminent price reductions. The Tribunal thus ignored the important and well established proviso in *NAPP* at [390] – [391]. **[Auth/7/362-363]**

[11] The Tribunal's model rests on the proposition that prices will revert to Cost (or at least close to cost) prior to the point at which they cease to be abusive. Despite its protestations to the contrary, therefore, the Tribunal's model rests on a framework that is very close to that of "*perfect competition*" as opposed to the proper framework, which is "*sufficiently effective*" or "*workable*" competition: *Flynn Pharma CoA* [97(i)]. **[Auth/48/1256]**

GROUND 2: PENALTY

The approach required by the authorities and the approach adopted in the Judgment

46. The lawfulness of the 10mg Agreement penalty is not in issue before the Court because – as a result of the procedural development of this case – the lawfulness of that penalty has not yet been decided by the Tribunal. However, the scale of that second penalty is relevant to the overall proportionality of the penalties imposed (see further below).

47. The appeal on the penalty is an appeal on the merits and not restricted to judicial review principles. The proper approach, when hearing an appeal in relation to penalty, was set out in *Napp*: "*It follows, in our judgment, that the Tribunal has a full jurisdiction itself to assess the penalty to be imposed, if necessary regardless of the way the Director has approached the matter in application of the Director's Guidance. Indeed, it seems to us that, in view of Article 6(1) of the ECHR, an undertaking penalised by the Director is entitled to have that penalty reviewed ab initio by an impartial and independent tribunal able to take its own decision…*"[12] (emphasis added). In conducting that assessment, it will have regard to the Penalty Guidance [499]- [500]. **[Auth/7/392]**

[Auth/66/2238]

48. The Tribunal should not "*ignore*" the CMA's conclusions (they should be lent appropriate weight) "*but ultimately the Tribunal must make its own assessment as to the penalty which is appropriate in all the circumstances*" (*FP McCann Limited v CMA* [2020] CAT 28 [72]). The authorities emphasise the need for "*rigorous scrutiny*" and the need for the Tribunal to "*reach… its own conclusions on the merits*" (*Rowland UK Ltd v CMA* [2021] CAT 8 [87]). **[Auth/49/1305]** **[Auth/50/1334-1335]**

49. The function of the Tribunal, therefore, is to conduct its own careful consideration of the appropriate penalty, in light of all the information before it. There are a very considerable number of examples of cases in which the Tribunal has – in the exercise of its powers – reduced or varied the penalty imposed. One ready example, in the context of alleged excessive pricing in the pharmaceutical context, is the judgment in *HG Capital LLP and others v CMA* [2023] CAT 52. The Tribunal in that case carefully reviewed each step of the penalty calculation, **[Auth/53/1432-1604]**

[12] Cited with approval by the Court of Appeal in *Argos Ltd and Littlewoods Ltd v JJB Sports plc v OFT* [2006] EWCA Civ 1318 at [161]- [165]. **[Auth/16/521-523]**

devoted over 20 pages to this issue, and reduced the penalty imposed, having concluded that no deterrence uplift was necessary.

50. The Tribunal's approach as regards penalty was exiguous:

    50.1. The distinction between the cost and the price of the product was so stark that all the undertakings before it "*would have been well-aware*" that this raised a question that required answer/explanation [**354**]. For this reason, the excessive pricing infringement was committed "*intentionally*" [**355**]. **[Core/16/465]** **[Core/16/464-465]**

    50.2. The Tribunal then described the CMA's approach and its conclusions in relation to penalty [**358**] – [**372**]. **[Core/16/465-470]**

    50.3. The Appellant's submissions on appeal were summarized in two paragraphs [**373**] – [**374**] and rejected in two paragraphs [**375**] – [**376**], largely on the grounds that the CMA's approach did not disclose anything "*amounting to a material error*." **[Core/16/470-471]** **[Core/16/471-472]**

51. In short, the Tribunal showed no signs of meaningfully engaging in its obligation to assess for itself the size of the penalty or its proportionality.

Allergan's Appeal

52. Allergan's overarching submission is that the penalties in this case are grossly disproportionate and cannot be justified. In relation to the alleged abuses under consideration, Allergan is liable for a total penalty of £76 million in respect of a c. nine-month period during which one of its subsidiaries owned a company that sold an unlawfully priced product. Of that sum, £50.3 million is attributable to the excessive pricing infringements alone. The agreed facts are:

    52.1. Mr Stewart was responsible for overseeing a huge portfolio: "*it was not just looking at Hydrocortisone. I am looking at 10,000 products… UK is just one component of a very big transaction. We had 8,000 employees, we had 40 manufacturing facilities.*"[13]

    52.2. Allergan agreed to sell the offending subsidiary within two months of acquiring it. It only continued to own it while it obtained merger control clearance and completed the transaction.

[13] Day 10, p. 176, lines 7-13. **[CSupp/15/190] [RSupp/23/1649]**

52.3. The CMA did not seek any documents from Allergan or interview any of its employees during the investigation. At trial it did not challenge Allergan's evidence that it did not know about the excessive pricing infringement (or indeed the 10mg Agreement infringement). Nor was it put to Mr Stewart that he should have known of the infringements.

52.4. Allergan's liability arises solely on the basis that it forms part of a single undertaking with its offending subsidiaries.

52.5. The colossal size of the fine imposed upon Allergan (which remains greater than any other single participant in the infringements) arises very largely because of the imposition of an uplift for "deterrence". This deterrence is not based upon any identified acts or omissions on the part of Allergan, nor Allergan's supposed degree of culpability, but is based upon Allergan's large global turnover. That global turnover is largely in other markets and attributable in significant part to its corporate expansion.

Ground 2(a): The Tribunal failed to conduct its own assessment of the penalty or the proportionality of the penalty

53. At [**374**], the Tribunal identified that it was required to "*make its own assessment of the level of the penalty on the basis of a "broad-brush" approach, taking the case as a whole*". As above, that assessment involved subjecting the CMA's approach and conclusions to "*rigorous scrutiny*". **[Core/16/471]**

54. The Tribunal did not carry out this assessment. It directed itself that the "*starting point*" was the CMA's Decision and proceeded to summarily dismiss all the Appellant's detailed submissions in two paragraphs. The Tribunal's error of approach is reflected in the key words in [**376**]: the Tribunal asked itself whether the CMA had made a "*material error*". In adopting that approach it failed to conduct the task required of it and it failed to scrutinise rigorously the CMA's conclusions. **[Core/16/471-472]**

55. The Judgment only addresses two of the many points set out in the Notice of Appeal and argued at trial. First, it addressed the first step of the penalty calculation: seriousness [**376(1)**]. The Tribunal found that the infringement was serious, and that it had been committed intentionally **[Core/16/471-472]**

because "*Any business person… would have appreciated that these margins were only defensible if there was some legitimate means of differentiating the 10mg and 20mg Focal Products from the competition*." In short, the Tribunal found that its novel Case 2 methodology was so obvious to any business person that Allergan and its subsidiaries must have known that they were acting unlawfully. That finding is obviously unsustainable and is addressed in detail under Ground 2(b) below.

56. For the purposes of this ground, the notion that legitimate differentiation is the *sine qua non* of unlawful pricing was not obvious to "*any business person*." Indeed, it was not obvious to any well-advised specialist competition lawyer at the time of the infringement or at any time before the Judgment was handed down. As Allergan pointed out in its Notice of Appeal, the leading competition law textbooks at the time stressed that: **[RSupp/6/233-234]**

> "*[E]xcessive pricing has proved to be a notoriously difficult abuse to prosecute, principally on account of the complexity involved in calculating what amounts to an unreasonably high price… Conversely from a dominant undertaking's point of view, control of excessive pricing poses a problem of legal certainty: how high can its prices be set?*"[14]
>
> "*The fact that the price charged provides a high margin over cost is not conclusive of abuse. For example, for pharmaceutical drugs, it is generally recognised that the revenue earned from the drugs which are brought to market has to cover the manufacturer's research and development cost which embrace also other drugs that never reach production. Moreover, the English Court of Appeal has said that the law on excessive pricing is about the distortion of competition and safeguarding the interests of consumers and not about controlling excessive profits… Furthermore, calculation of what is a 'reasonable profit' can itself be a difficult and contentious exercise*."[15]
>
> "*There are persuasive arguments against direct control of prices under competition law [including the] formidable difficulties in telling whether a price really is exploitative: by what standards can this be assessed?... It is clear that neither the European Commission nor the Competition and*

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14 Faull and Nikpay, *The EU Law of Competition* (2014) 3rd, edn., §4.825-6. **[Auth/80/2457]**

15 Bellamy and Child, *European Community Law of Competition* (2013) 7th edn., §10.108. **[Auth/79/2455]**

> *Markets Authority ('the CMA') in the UK have an appetite for investigating high prices under Article 102 or the Chapter II prohibition."*[16]

57. Allergan does not suggest that well-advised parties would not know of the possibility that products could be charged at an unlawful price. However, the suggestion that an infringement must have been obvious because any business person would or should recognise that prices above cost could only be justified by product differentiation in a contestable market is fanciful.

58. Second, the Tribunal's second point was that "*the law as we have found it to be aligns very closely with what should be the objective of entrepreneurs the world round: making profits substantially in excess of cost by creating consumer value through the development and sale of products that differentiate themselves from the products of competitors by appealing to what consumers want to buy*" [**376(2)**]. This is effectively the same conclusion expressed differently. In the Tribunal's view, all market participants should have anticipated the novel and unprecedented economic analysis that underpinned the Judgment. That is unsustainable. **[Core/16/472]**

59. Beyond the cursory consideration of these two points, the Tribunal failed to grapple with any of the points put to it in relation to penalty. In particular, it did not consider the proportionality of the penalty. The Tribunal was required to "*take a step back*" and assess the proportionality of the fine in the round, exercising its own judgment when it did so (*Kier v Office of Fair Trading* [2011] CAT 3, [166]-[168]). There is no evidence that it carried out that assessment. Had the Tribunal taken a step back it would have had to consider and take into account: **[Auth/24/714-715]**

    59.1. The extraordinarily large penalties imposed, in relation to the very short period of time during which Allergan indirectly owned Auden Mckenzie.

    59.2. The prices charged for hydrocortisone had been notified to, known to and paid by the Department of Health for years. During Allergan's ownership of Auden/Actavis, hydrocortisone was under the auspices of a voluntary pricing regime (Scheme M) that permitted intervention by the Department of Health, including in respect of price. Nevertheless, the Department of Health had failed (both before and during Allergan's period of ownership) to take any step to investigate, let alone seek to reduce, the price

[16] Whish and Bailey *Competition Law* (2015), pp. 760-1. **[Auth/81/2459-2460]**

of hydrocortisone. The Tribunal itself found that this was an example of "*complete and utter regulatory failure which we find disturbing*" [**273(2)**]. Nor was Allergan aware of any investigation by the CMA or any other complaint regarding the prices for hydrocortisone when Actavis UK acquired Auden Mckenzie. How was Allergan, a US company overseeing numerous subsidiaries globally, reasonably supposed to identify (apparently immediately on acquisition) an excessive and unlawfully abusive price allegedly charged by a newly purchased UK company in circumstances where i) the alleged excessive pricing in question had allegedly persisted for several years in full knowledge of the UK regulators; and ii) those regulators had powers to control the price but had taken no action and made no enquiry or complaint? **[Core/16/ 424-425]**

59.3. The existence of that regulatory power has been held by other tribunals in relevantly similar cases to be something that must be taken into account as regards penalty (and provides a reason to reduce the penalties imposed by the CMA). In *Flynn Pharma CAT*, the Tribunal did not decide the question of penalty, because it did not have to, but noted that the 400% uplift for deterrence was "*difficult to justify…particularly having regard to the new price control powers of the DH*." [461] In *HG Capital (Liothyronine)* the Tribunal found – in a similar vein – "*[T]he Tribunal considers that the powers available to the DHSC to control prices under the Costs Act are a further reason to conclude that a deterrence uplift is unnecessary*." [493] The Tribunal in this case heard detailed submissions on this point but did not mention it at all in the lengthy Judgment. **[Auth/39/ 1084-1085]** **[Auth/53/ 1603]**

59.4. Further, Allergan anticipated that prices for hydrocortisone would fall dramatically in the short to medium term due to imminent competitive pressure.

59.5. Allergan was fined twice in relation to two notionally separate but in reality closely connected infringements. Allergan was not aware of either infringement.

60. None of these matters forms any part of the Tribunal's reasoning, because it did not consider them at all. It simply concluded that the CMA had not fallen into "*material error*" and so failed to exercise its function in relation to this aspect of the appeal.

Ground 2(b): The Tribunal erred when it found that Allergan (or the undertaking of which it forms a part) acted intentionally

61. This point is already addressed in part above. The Tribunal made an omnibus finding – as regards all relevant periods of ownership and all undertakings – that the excessive pricing infringement was committed intentionally, because it was obviously not within Case 2. In reaching that conclusion, the Tribunal went considerably further than the CMA, which did not find that all the infringements were intentional. The Tribunal erred in making this finding because:

    61.1. It erred in law when it failed to appreciate that Allergan's penalty was calculated and imposed by the CMA separately. Liability is found at the level of the undertaking but the CMA imposed a penalty on Allergan by reference to its own conduct, intention and responsibility. For that reason, it was necessary for the Tribunal separately to determine whether Allergan had acted intentionally or negligently.

    61.2. The uncontested evidence before the Tribunal was that Allergan's senior executives did not know about the infringement and could not reasonably be expected to know about it. In such circumstances, it is impossible to see how the Tribunal could have concluded that Allergan itself acted intentionally.

    61.3. Mr Stewart also offered a clear explanation of why the infringement was not committed negligently. He explained that the margin for hydrocortisone was *"[N]ot all that dissimilar from some of our other businesses within Actavis*."[17] This was consistent with a presentation that was put to Mr Stewart when being cross examined of the top ten Actavis products in the UK, which showed that hydrocortisone had the third highest profit margin and a materially similar level of margin to another three. As he explained, those margins were "*Similar, and that is why Hydrocortisone did not get flagged as a bit of an issue because it was in the margin profile of other products that we had in our UK business*."[18] Had the Tribunal considered this evidence, it would

[17] Day 10, p. 126, line 15 – page 127, line 11. **[CSupp/15/159-160] [RSupp/23/1618-1619]**

[18] Day 10, p. 173, lines 19-22. **[CSupp/15/193] [RSupp/23/1652]**

have concluded that any infringement on the part of Allergan was neither intentional nor negligent.

62. As above, it was necessary for the Tribunal to consider these issues in an individualised manner in respect of Allergan. Whereas liability is attributed at the level of an undertaking, penalties are imposed at a company level and the proper level of a penalty is something that can only be assessed on a company-by-company basis. On any view, therefore, insofar as Allergan's alleged intention or negligence was derived wholly from any intention or negligence on the part of its Actavis subsidiary, the fine could not be subject to any further uplift attributable to Allergan itself.

Ground 2(c): The Tribunal erred when it found that the 1000% uplift for specific deterrence – imposed on Allergan – was justified

63. The CMA imposed a 1000% uplift of the fine on Allergan, in relation to the excessive pricing infringement, on the basis that this was necessary to specifically deter Allergan from committing such infringements again. The inappropriateness of that uplift was squarely put in issue by Allergan in its Notice of Appeal, oral and written submissions. The Tribunal did not specifically address this point at all (Step 4 of the Fines Guidance). That was a clear failure to decide an important ground of appeal before it.

64. The CMA's reasoning in the Decision was, in summary, as follows:

64.1. Allergan's penalty at the end of Step 3 of the fines process, as regards the 10mg excessive pricing infringement, was £6.8 million (Decision Table 10.3 and 10.7). That was out of a total penalty for all participants in relation to 10mg excessive pricing of £54 million. That ratio is not surprising; Allergan's total period of ownership only accounted for 12% of the period during which the infringement occurred. **[Core/23/1665 and 1707]**

64.2. At Step 4 the CMA imposed a 1000% uplift for specific deterrence. That uplift was justified by reference to:

64.2.1. Allergan's profits that were said to derive from the sale of hydrocortisone tablets: £37.9 million.

64.2.2. The CMA then proceeded to double that figure on the basis of Allergan's size and global turnover (Decision [10.277] and [10.288]. The CMA reasoned that a company of that size would not be deterred by any smaller fine. **[Core/23/ 1712 and 1714-1715]**

64.3. Accordingly, the fine was uplifted by 1000% to £74.3 million in order to "deter" Allergan from repeating offending.

65. Had the Tribunal considered that question afresh – as it had to – it would have concluded that the 1000% uplift was manifestly not justified because:

65.1. It cannot be just to seek to impose (or uplift) a penalty to "deter" when there is no historic conduct or culpability specific to the company in question that merits deterrence. As the General Court has found, materially increasing the penalty imposed on a parent company purely by reference to that parent company's turnover is not justified unless there are particular characteristics of the parent company's conduct which justify that uplift (Case T-827/14 *Deutsche Telekom AG v Commission* (ECLI:EU:T:2018:930).[19] In this case there were no such circumstances. The uplift was based purely on Allergan's global size and not on conduct or culpability that is relevantly connected to the infringement. The Tribunal clearly misdirected itself in law. **[Auth/41/ 1098-1145]**

65.2. Insofar as the uplift was intended to be based upon Allergan's own supposed misconduct in relation to the infringement (which it apparently was not) it was wholly unjustified, in particular, given (i) the short period of ownership (ii) the longstanding nature of the alleged excessive pricing prior to Allergan's period of ownership and the absence of any regulatory intervention or complaint in relation to the historic pricing (notwithstanding the regulator's knowledge of the same); (iii) the anticipation by Allergan that prices were about to fall in response to competitive pressure in the short to medium term. More importantly, nobody suggested at trial that Allergan knew, or should have known, about the infringement. Accordingly, the only deterrence a fine

[19] See also Case C-597/13 P *Total v Commission*, (EU:C:2015:613), [38]. **[Auth/35/894]**

of this magnitude creates is a deterrence to international investment in UK pharmaceutical companies.[20]

65.3. The uplift resulted in Allergan's penalty – as a parent-company for a very short proportion of the total duration of the infringement – becoming liable for over 50% of the total fine in relation to the excessive pricing infringement. That was unfair and disproportionate in itself.

65.4. The uplift was directly contrary to the guidance offered by the Tribunal in *Flynn Pharma CAT*, where the Tribunal stated that a 400% uplift was "*difficult to justify*" ([461]) in relevantly similar circumstances. **[Auth/39/ 1084-1085]**

65.5. The CMA's approach leans heavily on Allergan's global turnover. But that turnover is overwhelming generated in other jurisdictions. Further, much of that turnover is generated in the USA, where there is no excessive pricing infringement and no basis to deter any future such pricing.

66. Against this backdrop, there was no possible justification for what Allergan understands to be the largest ever competition law uplift for specific deterrence in the United Kingdom. An uplift for specific deterrence is meant to be tailored to the particular circumstances of the individual company in question, not mechanically imposed on the basis of global turnover alone, as it was in this case.

Auden/Actavis' Grounds

67. Allergan adopts but does not repeat **Grounds 1(b), 1(c)** and **4** of Auden/Actavis' appeal.

DANIEL JOWELL KC

TIM JOHNSTON

Brick Court Chambers

18 March 2025

[20] The Tribunal's approach stands in sharp contrast to that in *HG Capital (Liothyronine)* [488] – [496], where the Tribunal found that there was no justification for a specific deterrence uplift, in circumstances where the company in question did not need specific, as opposed to general, deterrence. **[Auth/53/ 1602-1603]**