COMPETITION APPEAL TRIBUNAL

NOTICE OF AN APPEAL UNDER SECTION 46 OF THE COMPETITION ACT 1998
Case No: 1412/1/12/21

Pursuant to Rule 14 of the Competition Appeal Tribunal Rules 2015 (S.I. No 1648 of 2015) (the "Rules"), the Registrar gives notice of the receipt of an appeal on 30 September 2021 under section 46 of the Competition Act 1998 (the "Act") by Cinven (Luxco 1) S.à.r.l., Cinven Capital Management (V) General Partner Limited and Cinven Partners LLP (together, the "Cinven Entities") in respect of the decision by the Competition and Markets Authority ("CMA") in *Hydrocortisone* – Case 50277 dated 15 July 2021 (the "Decision"). The Cinven Entities are represented by Clifford Chance LLP of 10 Upper Bank Street, London E14 5JJ (reference: Luke Tolaini / Ben Jasper / Greg Olsen).

The Decision concerns the pricing and supply of hydrocortisone tablets in the UK. Most relevantly to this appeal, it finds that Auden Mckenzie and Actavis ("Auden") entered into an agreement, first with Waymade and then with Amdipharm UK Limited, Amdipharm Limited and Advanz Pharma Services (UK) Limited (together "AMCo"), that had as its object the prevention, restriction or distortion of competition, thereby infringing section 2 of the Act (the "Chapter I prohibition"). The Decision states that Auden agreed to make substantial monthly payments first to Waymade and then to AMCo in exchange for each of Waymade and AMCo agreeing not to enter the market independently with their own 10mg hydrocortisone tablets (the "10mg Agreement").

The Decision imposes a fine on AMCo of £42.8 million, of which the CMA holds the Cinven Entities, on the basis of parental liability, solely liable for £20.9 million and jointly and severally liable for £14.2 million (£35.1 million in total).

In summary, the Cinven Entities rely on the following four grounds of appeal:

1. Ground 1. The Decision is wrong to conclude that AMCo made an unwritten promise, in exchange for a "discounted" supply price from Auden, not to enter the market with its own independently sourced 10mg hydrocortisone tablet product. Further the CMA does not explain how AMCo's alleged promise went beyond the short-term rolling exclusive purchasing agreement that AMCo and Auden expressly agreed in writing and which the CMA does not say was unlawful. The agreement not to enter posited by the CMA is contradicted by extensive evidence showing (i) AMCo's intention to enter the market; (ii) AMCo's consistent pursuit of multiple avenues to obtain its own 10mg hydrocortisone product, in the face of significant and lasting developmental challenges; (iii) the barriers presented by the orphan designation issue in terms of AMCo's unilateral assessment of its entry prospects; and (iv) the clear terms of the two written agreements in which AMCo and Auden first formalised, and then extended, their supply arrangements.

2. Ground 2. The CMA has erred in its market definition in the Decision, which finds that there is a relevant product market for hydrocortisone tablets including both full-label tablets (of the kind supplied by Auden) and skinny-label products (of the kind eventually supplied by AMCo and others), and that there was, therefore, a "horizontal" agreement between competitors. While the CMA correctly identifies the small but significant and non-transitory increase in price ("SSNIP") test as the test for market definition, it fails to apply the test in the Decision. This is an important error as, if there are in fact separate markets for full and skinny-label 10mg hydrocortisone tablets (as is the Cinven Entities' case), then AMCo's agreements with Auden were vertical in nature and the CMA's conclusion that there was a horizontal agreement between competitors cannot stand.

3. Ground 3. Even if (contrary to Ground 1) the CMA's factual finding that AMCo and Auden made the 10mg Agreement is upheld, the Decision wrongly concludes, in a number of separate but related

respects, that the 10mg Agreement gave rise to an object restriction for the purposes of the Chapter I prohibition. First, the CMA errs in characterising the alleged 10mg Agreement as "buying off of competition". Second, the CMA wrongly finds that its case is supported by the *Lundbeck, Paroxetine* and *Servier* 'pay for delay' judgments. Third, the CMA mistakenly finds that agreements which forestall action that would have otherwise been favourable to competition necessarily give rise to an object restriction. Fourth, the CMA errs by failing to properly identify and take into account the context and mechanism by which it alleges that the 10mg Agreement restricted competition by object.

4. Ground 4. The CMA was wrong to impose a fine of £35.1 million on the Cinven Entities, which incorporates a c.300% uplift purely for the purpose of specific deterrence, and which is among the largest ever fines imposed, and successfully upheld, by a UK competition authority. The fine is imposed on the basis of parental liability, in a situation where it is not suggested that the Cinven Entities had any role in the allegedly infringing conduct. In particular, in imposing this fine, the CMA has failed to take account of the following factors: (i) that AMCo was advised, by a specialist independent law firm, that the supply arrangements were lawful; (ii) that at least 50% of the relevant market the CMA has defined was inaccessible to AMCo's skinny-label product; and (iii) there is no evidence, and evidence to the contrary, that had AMCo been able to enter the market with its own product this would have led to materially lower prices.

As regards relief, the Cinven Entities seek:

a. the annulment of the Decision in whole or in part;

b. an annulment of the fine imposed on the Cinven Entities or, in the alternative, a reduction thereof; and

c. payment of the Cinven Entities' costs incurred in connection with this appeal.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

Please also note that a direction of the President is currently in place as to the electronic filing of documents: see paragraph 2 of the Practice Direction relating to Covid-19 published on 20 March 2020. Therefore, a request for permission to intervene should be sent to the Registrar electronically, by email to registry@catribunal.org.uk, so that it is received within **three weeks** of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by telephone (020 7979 7979) or email (registry@catribunal.org.uk). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar

Published 27 October 2021