COMPETITION APPEAL TRIBUNAL

NOTICE OF AN APPEAL UNDER SECTION 46 OF THE COMPETITION ACT 1998
Case No: 1525/1/12/21

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 12 October 2022 under s. 46 of the Competition Act 1998 (the "1998 Act"), by Flynn Pharma Limited and Flynn Pharma (Holdings Limited) (together, "Flynn") against a decision of the Competition and Markets Authority ("CMA") dated 21 July 2022 entitled *Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK* (the "Decision"). Flynn is represented by Macfarlanes LLP of 20 Cursitor Street, London EC4A 1LT (reference: Cameron Firth).

The Decision finds that Flynn infringed the Chapter II prohibition of the 1998 Act by imposing unfairly high prices for phenytoin sodium capsules manufactured by Pfizer in the UK. Phenytoin sodium is a medicine for the treatment of epilepsy. The Decision also finds that Pfizer has infringed the same provisions by charging Flynn unfairly high prices for phenytoin. The Decision imposes a penalty on each of Pfizer and Flynn. Pfizer has appealed the Decision separately: see Case 1524/1/12/22.

The CMA issued a previous decision, finding an abuse of dominance by excessive pricing, on 7 December 2016 (the "Original Decision"). The Competition Appeal Tribunal (the "Tribunal") upheld the CMA's decision in relation to market definition and dominance. However, the findings of abuse and penalty in the Original Decision were set aside by the Tribunal in its judgment dated 7 June 2018 [2018] CAT 11. The Tribunal's ruling was upheld by the Court of Appeal in its judgment dated 10 March 2020.

In summary, the principal grounds of appeal upon which Flynn relies are that:

1. The CMA's finding that Flynn's prices were excessive and/or unfair is tainted by three fundamental errors: its use of a Return on Capital Employed ("ROCE") analysis; its reliance upon the allegedly excessive supply prices charged by Pfizer, for which Flynn cannot be held responsible; and its reliance upon absolute, rather than percentage, profit margins (**Ground 1**).

2. Contrary to the CMA's conclusions, the returns earned by Flynn on phenytoin capsules are consistent with the returns earned on comparable drugs under normal conditions in the industry. Flynn's prices were therefore not excessive or unfair (**Ground 2**).

3. In addition to its margins being consistent with normal returns in the industry, Flynn's prices were in line with, and were certainly not out of all proportion with, the price of phenytoin tablets and other Anti-Epileptic Drugs. For this additional reason, its prices were not excessive or unfair (**Ground 3**).

4. Even based on its (flawed) ROCE benchmark and its 6% Return on Sales cross-check, the excesses alleged against Flynn, are not of such an order of magnitude that they justify a finding that Flynn's prices were abusively high (**Ground 4**).

5. The Decision mischaracterises Flynn's role in the supply chain as involving limited risk and adding limited value. Flynn carries a number of significant responsibilities and risks, including its duties as a marketing authorisation ("**MA**") holder. These responsibilities and risks are, by their nature, contingent and unquantifiable, which means that they are not captured by the CMA's ROCE analysis (**Ground 5**).

6. The CMA has erred in failing to ascribe any economic value, beyond cost plus, both to phenytoin capsules, or to Flynn's discharge of its role as an MA holder and ensuring security of supply (**Ground 6**).

7. The Decision is wrong to impose a penalty on Flynn. The alleged infringement was not intentional or negligent. In any event, the alleged conduct is caught by the conduct of minor significance regime insofar as it concerns Flynn (**Ground 7**).

8. Alternatively, the CMA's calculation of the amount of any penalty contains errors relating to seriousness, duration, mitigating factors and proportionality (**Ground 8**).

Flynn requests that the Decision be set aside in full or alternatively, that the penalty be set aside or substantially reduced.

Any person who considers that they have 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, KC (Hon)
Registrar

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