IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1524/1/12/22 and 1525/1/12/22

BETWEEN:

(1) PFIZER INC
(2) PFIZER LIMITED

Appellants

- v –

THE COMPETITION AND MARKETS AUTHORITY

Respondent

AND BETWEEN:

(1) FLYNN PHARMA LIMITED
(2) FLYNN PHARMA (HOLDINGS) LIMITED

Appellants

- v –

THE COMPETITION AND MARKETS AUTHORITY

REASONED ORDER (COSTS)

UPON the Tribunal's Judgment dated 20 November 2024 ([2024] CAT 65])

AND UPON reading the parties' submissions on costs dated 10 January, 17 January, 24 January, and 14 February 2025 respectively

AND HAVING REGARD to the Tribunal's powers under Rule 104 of the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules")

IT IS ORDERED THAT:

1. The Tribunal shall make no order as to costs. The parties are to bear their own costs.

REASONS

1. In its judgment dated 20 November 2024 ([2024] CAT 65) (the "Judgment"), the Tribunal upheld the appeals of each of Pfizer and Flynn challenging the CMA's Decision entitled *Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK* (Case 50908) (the "Decision"), which was ultimately set aside on the basis of the material errors identified. The Tribunal exercised its jurisdiction to remake the Decision and found that all four infringements alleged against Flynn were made out, and that three of the four infringements alleged against Pfizer were made out (but that Pfizer's prices for the 25mg Capsules did not infringe the Chapter II prohibition). The Tribunal imposed a fine of £62,370,000 on Pfizer and a fine of £6,704,422 on Flynn.

2. In its application for permission to appeal the Judgment on 20 December 2024, Flynn suggested that it intended to seek the costs of its appeal but noted that the Tribunal had not yet given any directions in respect of costs. On 14 January 2025, the CMA filed cost submissions, asking for its own costs of the appeal. This ruling therefore addresses the matter of costs arising from the appeal against the Decision.

3. Costs are governed by rule 104 of the Tribunal Rules. Under Rule 104(2), the Tribunal "*may at its discretion, subject to rules 48 and 49, at any stage of the proceedings make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings*". Rule 104(4) contains a non-exhaustive list of factors to which the Tribunal may have regard. They are:

    a. The conduct of the parties in relation to the proceedings.
    b. Any schedule of incurred or estimated costs.
    c. Whether a party has succeeded on part of its case, even if it has not been wholly

successful.

d. Any admissible offer to settle.
e. Whether costs were proportionately and reasonably incurred.
f. Whether costs are proportionate and reasonable in amount.

4. The Tribunal has a broad discretion as regards the costs to be awarded: *CMA v Flynn Pharma Ltd* [2022] UKSC 14, [120]. As a starting point, it will seek to identify the 'winning' party, who will in principle be entitled to recover its costs. If, however, there is no clear winner, the Tribunal may make no order as to costs (see for example *Quarmby Construction v OFT* [2011] CAT 34).

5. Determining the "winner" in this case is not without complexity. The CMA acknowledges that its Decision was set aside but submits it has prevailed in substance on the basis that there is no "material difference" between the outcome of the Judgment and the Decision (Judgment, [324]).

6. Both Flynn and Pfizer reject this contention. They are right to do so. In cases of competition law infringement, the process of reasoning by which an outcome pertains is more important than the outcome itself. The dangers to economic growth and development of an incorrect approach by the regulator were stressed in *Meta Platforms Inc v. CMA* [2022] CAT 26 at [110], and these dangers are no less in cases such as this. That is because the reasoning process adopted by the regulator not only informs the outcome, but also informs the conduct of other market participants not party to the proceedings. In this case, the CMA's incorrect insistence (despite clear indications from the Court of Appeal) on a "cost plus" analysis was potentially hugely damaging to the pharmaceutical market in that it incorrectly stated the key criteria for determining whether an infringement exists. The CMA is not entitled to rely upon the fact that by very different process, the Tribunal reached the same result.

7. The fact is that the CMA's Decision was set aside and had to be remade. The CMA should not recover its costs, and that conclusion is not disturbed by the other factors in Rule 104. As to this, the CMA argues that Rule 104(e) and (f) fall squarely in its favour. In particular, the CMA's estimated costs of the proceedings are in the range of £3.38m - £3.48m. It submits that those costs are proportionate and reasonable in amount, were

proportionately and reasonably incurred, and submit that they are 'considerably less' than those incurred by either of the appellants. These points are insufficient to undermine the conclusion we have reached that the CMA is not entitled to its costs because its reasoning processes in the Decision were wrong.

8. Pfizer and Flynn go further and submit that as most of their efforts were directed at challenging the Decision itself, they are, in effect, the successful parties for cost purposes. Pfizer and Flynn, for their part, make two further points which they say are relevant to the Tribunal's assessment of costs under Rule 104, in tandem with their submission that they were the successful parties. The first relates to the reasonableness of the CMA's conduct; the second to the CMA's ability to offset cost awards against penalties paid.

9. As to conduct, a core element of Pfizer's challenge to the Decision was that it was produced on the back of significant procedural irregularities. Pfizer had written to the CMA on 8 April 2020, during the remittal stage, setting out its concerns in this regard. It noted, in particular, the risk that members of the CMA case team involved in the proceedings to date may not approach the reinvestigation in an objective manner and, for that reason, suggested it would be prudent for the CMA to appoint a new case team. The CMA chose not to do so.

10. On that basis, and in circumstances where the Tribunal went on to find that the Decision was in fact tainted by "confirmation bias" (Judgment, para 280), Pfizer submit it would be unfair for the CMA to be awarded its costs. Instead, Pfizer should receive its costs of persuading the Tribunal to set aside the decision because of confirmation basis.

11. Whilst these points are in further support of our conclusion that the CMA should not recover its costs, they do not justify a costs order in favour of Pfizer and Flynn. Pfizer and Flynn certainly attacked the Decision as wrong and misconceived (as it was). But they <u>also</u> contended that there was no infringement at all and here they substantially lost. The Tribunal remade the Decision and (by a very different process) found infringements to exist in the teeth of Pfizer's and Flynn's opposition. We consider that neither Pfizer nor Flyn should recover their costs from the CMA.

12. For these reasons, we make no order as to costs.

The Honourable Mr Justice Marcus Smith
Chair of the Competition Appeal Tribunal

Made: 4 March 2025
Drawn: 4 March 2025