

Life Sciences Newsletter

October 2009

Fasken Martineau DuMoulin LLP

Major legal and regulatory developments in the area of life sciences have taken place in North America and Europe. Fasken Martineau is proud to present an overview of the most important ones.

If you are interested in any of the topics in this bulletin, please contact the partner with whom you usually do business or the resource person whose contact information appears at the end of this bulletin. Also, any comments or suggestions likely to improve our bulletins would be greatly appreciated.

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INTELLECTUAL PROPERTY

Focus on Supplementary Protection Certificates in the Patents Court

By Jeremy Morton, Tracy Ko, Yasmina Hadded

Three recent decisions of the English High Court have focused attention on the correct interpretation of the SPC Regulation.

Synthon v Merz - In March 2009, Floyd J of the English Patents Court referred four questions to the European Court of Justice on the interpretation of Regulation No 1786/92 on Supplementary Protection Certificates. These related to products authorised under procedures that did not comply with Directive 65/65/EEC. It will be several months before the ECJ issues its judgment.

Merz was granted a Supplementary Protection Certificate ("SPC") for memantine, based on EU-wide marketing authorisations obtained in 2002 and a basic European patent filed in 1989. However, two earlier marketing authorisations for the same compound (each subsequently withdrawn) had been granted in Germany and Luxembourg in 1978 and 1983 respectively under applicable transitional regimes. Neither the German nor the Luxembourg authorities had required any safety or efficacy testing. Synthon argued that those earlier marketing authorisations rendered the SPC invalid or of zero term.

An SPC can extend the period of effective protection under a basic patent for a product covered by a marketing authorization. Two articles of the SPC Regulation were at issue:

Article 13: SPC protection relates to the period between the date of application for a basic patent and the date of the first authorisation in the EU. Protection may be available for this period less 5 years (subject to a maximum of 5 years), to take effect at the expiry of the basic patent;

Article 19 (Transitional provisions): Allows any product protected by a patent on the date of the

Regulation for which the first authorization was obtained after 1st January 1985, to be granted an SPC.

Having reviewed ECJ case law, and in particular *Hässle AB v Ratiopharm* (Case C-127/100), Floyd J referred the following questions to the ECJ (because the answers to the points raised were unclear, as there were conflicting prior decisions):

Question 1: For Articles 13 and 19 of the SPC Regulation, is the "first authorisation" simply an authorisation granted under a national law implementing Council Directive 65/65/EEC or should it be established that in granting that authorisation, the national authority (such as, here, that of Luxembourg) had followed the procedures required under Directive 65/65? Mr Justice Floyd considered provisionally that Member States could not be expected to examine whether Directive 65/65 procedures had been properly followed, and need only confirm that authorisation had been granted under a national law implementing Directive 65/65.

Question 2: Does the expression "first authorisation to place...on the market in the Community" include non-compliant authorisations granted under national law (such as German law), under procedures co-existing with a regime that does comply with Directive 65/65?

On this point, Floyd J favoured Merz's argument and thought that the previous ECJ case law pointed towards the Regulation having a consistent meaning throughout, so that the relevant references to "authorisation" meant only a procedure under 65/65. If so, the German and Luxembourg authorisations should not be taken into account when calculating the duration or validity of the SPC.

Question 3: Is a product which is first authorised for entry to the EU market without satisfying the Directive 65/65 procedures (e.g. under the transitional German procedure) within the scope of the SPC Regulation at all?

Question 4: If the answer to Question 3 is "no", then is an SPC granted in respect of such a product invalid?

On questions 3 and 4, Floyd J provisionally concluded in favour of Synthon. The intended purpose of the SPC Regulation was to compensate for lost time in the period between the filing of the patent application and the grant of the marketing authorisation after the necessary safety and efficacy testing had been undertaken. Products initially placed on the market without such testing should not benefit from the additional SPC protection, even if compliant authorisation is later issued.

Generics (UK) v Synaptech - On the same day that Floyd J. gave judgment in the above case, the Patents Court was also due to give judgment in a similar claim, brought by Generics (UK) in respect of an SPC granted to Synaptech. The judge in this case had already issued a draft judgment finding in Synaptech's favour. Despite argument from Generics (UK) that he should revisit his judgment or make a referral to the ECJ, the Judge decided to issue his judgment unaltered. An appeal by Generics (UK) will be heard on 14th October 2009, which may result in a further reference to the ECJ.

The facts were similar to the Synaptech case. Synaptech had obtained an SPC for a second medical use patent, and the SPC was due to expire on 15th January 2012. Generics (UK) claimed that the SPC ought to have expired by 31st December 2008 on the basis of earlier authorisations of the active ingredient in Germany and Austria, comprising 'deemed' approvals that did not comply with 65/65/EEC.

Synaptech argued that the "first marketing authorisation" under Article 13 of the SPC Regulation must be one that was granted in accordance with Directive 65/65. On this basis, the first marketing authorisation was a Swedish one granted in 2000. They relied on the ECJ decision in *Hässle* (above), where it was held that the words "authorisation to place...on the market" must be given the same meaning throughout the Regulation, namely an authorisation issued under Directive 65/65. The Judge agreed, and could find no basis on which to diverge from the *Hässle* authority. However, unlike the Synthon case, Generics (UK) apparently did not argue that the SPC Regulation is entirely inapplicable where there has been a non-compliant earlier marketing authorisation. It is on this latter point that there seems

a real possibility of new law from the ECJ in the Synthon case.

Generics (UK) v Daiichi - The third SPC case that we are reporting on concerned Daiichi's patent for a chiral antimicrobial compound, *levofloxacin*, which is the S (-) enantiomer of a compound whose racemic form is known as *ofloxacin*. The patent acknowledged that *ofloxacin* fell within the prior art and had been the subject of a prior Daiichi patent. The Patents Court and the Court of Appeal upheld the validity of the patent, and then turned to the validity of the SPC. Jacob LJ in the Court of Appeal described *levofloxacin* as not just twice as active as *ofloxacin* but "*a lot more soluble and less toxic than was predictable. It can be used in higher dosages than might have been expected with corresponding medical benefit.*" The Court also emphasised that "*its properties (including for instance important characteristics such as bioavailability – which depends or may depend on solubility – and toxicity) had to be established. So it needed a new marketing authorisation. In sum it was a new product from all practical points of view.*" Nevertheless, Generics (UK) argued that *levofloxacin* was not a new active ingredient for the purposes of the SPC Regulation, since *levofloxacin* is the most active component of *ofloxacin* which was already authorised.

The Court robustly rejected these contentions, and refused a reference to the ECJ. Until the patent in suit was published, the skilled man would not have known how to make the enantiomers of *ofloxacin*, nor understood the contribution of each enantiomer to the biological activity of *ofloxacin*. The earlier marketing authorisations for *ofloxacin* did not entitle Daiichi to market *levofloxacin* as such. *Levofloxacin* required marketing authorisation as a new drug. The prior marketing authorisation had in effect been an authorisation for the combination of active ingredients comprised within *ofloxacin*, and not for *levofloxacin* alone. The case might have been different if the prior authorised product had merely been a combination of *levofloxacin* plus an inactive diluent.

Comment: *The Daiichi case in particular illustrates the intense battle fought by generics to try to limit pharmaceutical patent protection, and the ability of patentees to extend protection as research into chiral molecules bears fruit.*

Synthon BV v Merz Pharma GmbH & Co KGaA. [2009] EWHC 656 (Pat)

Generics (UK) Limited v Synaptech Inc [2009] EWHC 659 (Ch)

Generics (UK) Limited v Daiichi Pharmaceutical Co and Daiichi Sankyo [2009] EWCA Civ 646

Cross-Undertakings for Damages

By Ralph Cox and Yasmina Hadded

The High Court has ruled that damages awarded under cross-undertakings can be assessed on an equitable basis - giving the court greater flexibility when awarding damages for companies wrongly enjoined at the interlocutory stage.

Four major pharmaceutical groups, Eli Lilly, Pfizer, AstraZeneca and Merck, brought proceedings against 8PM Chemist in late 2007 arguing that 8PM Chemist's receipt in the UK of branded pharmaceuticals from Turkey for onward posting to patients in the US (as part of the internet pharmacy trade) infringed their UK trade marks. All four groups applied for interlocutory injunctions, the first of which was granted to Eli Lilly in November 2007. Although the injunction was overturned on appeal in January 2008, it had already caused the loss of the Turkish supply business. 8PM Chemist and the Turkish Supplier ("8PM") sought compensation for the lost business under the cross-undertakings as to damages given by the pharma companies when obtaining their injunctions.

The court generally has considerable sympathy for parties that have been incorrectly enjoined and this case was no exception. Mr Justice Arnold, who heard the trial, found that the pharma companies were jointly liable to 8PM and in the course of his judgment made a number of interesting findings on the applicable law.

Assessment of Damages

The first concerned the basis of assessment of damages under a cross-undertaking. It has generally been accepted that the contractual basis should be used but Arnold J noted that this has been doubted in a number of recent cases. This encouraged him to depart from the approach altogether and apply equitable principles

instead. In particular, this allowed Arnold J to assess the damages as at the date of his judgment and so to take account of what had happened in the real world since the injunctions and how that would have affected the profits that 8PM would have made had the Turkish supply business continued. The greater certainty that this lent to the assessment, together with the principle of "liberal assessment" in cases of wrongful interim injunctions, made for a more generous award to 8PM than it would likely have achieved on a contractual basis.

A second interesting aspect to the decision was the pharma companies' argument that, as a matter of public policy, 8PM should not be able to recover for its losses because importing unlicensed drugs into the US is illegal, even for personal use by patients. This argument was rejected. Having undertaken to compensate 8PM if the injunctions turned out to be wrongly granted, the pharma companies could not now turn round and say that the undertakings were unenforceable. In any event, the US offences were not proven to have extra-territorial effect so that 8PM's acts, which were legal in the UK, were not made illegal by US law. But, even if they were, 8PM did not have to rely on those illegal acts in support of its claim so that the public policy did not apply.

Comment: The decision highlights the sympathy the court will have for companies that have been wrongly enjoined and, if followed, will allow courts greater flexibility in assessing the losses suffered by them.

Eli Lilly & Ors v 8PM Chemist and Ors [2009] EWHC 1905 (Ch)

Sufficiency and Speculation

By Jeremy Morton, Francesca Boateng-Muhammed

Earlier this year the English High Court emphasised the need for pharmaceutical patents to go beyond the speculative if they are to satisfy the requirement of sufficiency. This case has implications beyond its specific facts, particularly in relation to the practice of 'evergreening'.

Almirall commenced proceedings for the revocation of Boehringer's patent on the grounds of anticipation, obviousness and insufficiency. The patent related to a

combination of a known chiral anticholinergic with one or more beta mimetics. The cited prior art included an Almirall patent application and certain 'posters' (notices of research work displayed at a conference). In fact Boehringer scientists had seen those posters, which inspired Boehringer's patent application and a series of other applications in respect of other pharmaceutical combinations.

The claimed combination was said to possess an "unexpectedly beneficial therapeutic effect" in the treatment of respiratory illnesses. However, there had been no experiments by the inventors supporting this conclusion and the inventions had been made entirely 'on paper'. Boehringer's patent also claimed both enantiomers of the chiral compound, but Boehringer had only guessed at which was the active form. They got this wrong, however: the example in the patent, of the formula said to be "of particular interest", was the inactive form.

Boehringer submitted that . . . *[m]any sound patents had been granted for inventions made entirely "on paper" as a result of the ingenuity of an inventor who in his mind, had perceived or with wisdom born of experience had predicted, the possibility of a beneficial technical contribution to the art.* The judge agreed, but with two riders:

"The benefit must be specified and not just recorded in general, adjectival terms. Moreover, if the insight or prediction in question is the raison d'être of the patent, a paper prediction had better get it right. If it is not right, it is really no more than soothsaying. I also think that the burden must be on the patentee in such circumstances to reveal the benefit and if required, show that the benefit really exists."

In fact, Boehringer's position fluctuated during the proceedings as to what the "unexpectedly beneficial therapeutic effect" was, and this reflected badly on their case. There appeared to be next to nothing in the patent about why the invention claimed was inventive - according to the Judge, *"...the addressee would simply be left guessing. This is of course an unsatisfactory conclusion but since the public has a right to know what technical contribution has been made by the patent, this is no place for indulgence. Speculative statements, guesses and unsupported predictions are*

not good enough. In my judgment, this finding has a decisive resonance in the resolution of this entire case."

Boehringer relied on experimental evidence in an effort to demonstrate the claimed effect, but the Judge found this to be inconclusive. In any event, such experiments could not have cured the problem:

"[S]ufficient justification for the solution to a technical problem must be found in the patent as filed. Experiments performed thereafter cannot be relied on at law to make good an initial deficiency of disclosure. It is not even enough that the teaching of a patent is such that it is 'at least plausible' that what was proposed was capable of solving the problem it purports to solve."

Not only did the claims of the patent include within their scope the inactive enantiomer, so that the claims lacked support across their full breadth, but the meaning of the key passage in the specification, concerning the claimed beneficial effect, was also uncertain and the skilled person would not be able to put it into effect. Accordingly, the patent was held invalid for insufficiency.

Comment: *The case concerned patent applications made on the basis of published work that, it seems, had not been fully investigated by the applicant. As such, it is also of potential relevance to lifecycle management and so-called 'evergreening', and strikes a note of caution in respect of patent applications not based on sound research.*

Laboratorios Almirall S.A. v Boehringer Ingelheim International GmbH ([2009] EWHC 439 (Pat))

European Anti-Counterfeit Directive

By Antonina Cuffaro

The European Commission's draft directive on measures against counterfeit medicines, published in December 2008 as part of the "pharmaceutical package" (containing three draft directives), aims to limit the manufacture, importation and distribution of counterfeit substances, poor quality active substances and counterfeit medicines and

further to protect the supply chain against counterfeit drugs.

To achieve the Commission's aims, the directive proposes the introduction of the following three measures:

- anti-counterfeiting technology where certain categories of products will be required to be equipped with a safety device which would identify products falsified (consisting of an individual barcode for the product or system of seals). It is envisaged that only those holding an authorisation to produce such products will be entitled to affix the device and perform the repackaging of medicines;
- strengthened supervision of the supply chain; and
- auditing manufacturers of active ingredients to guarantee the quality and safety of the manufacturing standards of active substances.

Severe penalties for counterfeiting and measures designed to raise public awareness of illegal drug supplies are also expected to be added as the directive makes its way through the Parliament.

Despite some criticism that the package could do more to tackle internet sales, the Commission said when it published it in December that it was not planning to propose harmonized rules on internet sales of prescription drugs, despite the fact that Member States had taken different approaches to regulating such sales.

The ENVI committee is to vote on the amended text of the Directive during October 2009 and the vote at the Parliament plenary session is scheduled for December 2009.

Comment: *At a conference organized by the European Generic Medicines Association at the end of January, Martin Terberger, the head of the enterprise directorate's pharmaceuticals unit said that the sale of counterfeit medicines was already prohibited in the EU and that "the legislator does not have to be active if things are already forbidden and not properly enforced" and further observed that "it doesn't improve the situation to forbid it twice".*

COMMERCIAL AND INDUSTRY ISSUES

Pharmaceutical Sector Inquiry Report

By Stuart Richards

Following the Preliminary report into the European Commission sector inquiry at the end of 2008 and a further period for submissions, the Commission published a final report in July dealing only with prescription medicines.

As reported in the last Newsletter, the report focuses on the lack of new medicines launches and the perceived delay in generic launch following patent expiry. It investigated the operation of competition between originators and between originators and generics companies. The Report also dealt with any shortcomings in the regulatory framework which could be used to exacerbate delays in generics reaching the market.

The Report acknowledged that innovation must not be stifled but on the other hand points to the strains placed on public budgets by the purchase of medicines, which could be alleviated by cheaper generic alternatives. It found that retail prices of medicines amounted to 2% of GDP in 2007 - €14 million. Further it found that on average, at the time of launch generic medicines were 25% cheaper than the originator equivalent, rising to 40% cheaper within 2 years.

The Report found that the average delay between loss of originator exclusivity and actual generic entry was seven months, which the Commission say equated to a loss of potential savings of around €3 billion between 2000 and 2007 (a figure which, as has been noted elsewhere, while large in itself is a fraction of the total market for medicines).

Originators' use of specific instruments (patent strategies, patent litigation, patent settlements, regulatory submissions etc) to delay generic entry would be subject to competition scrutiny if done in an anti-competitive way. It committed to further scrutinise defensive patenting strategies that mainly focus on excluding competitors without pursuing innovative efforts and settlements that limit or delay the market entry of generic drugs. It asks for evidence of submissions made by stakeholders intervening before a

marketing authorisation body to delay the market entry of a competitor.

A difference between the preliminary and final report was increased emphasis on regulatory issues examining how regimes could be adapted to reduce the problem.

The Commission found an urgent need for the establishment of a Community patent and a unified specialised patent litigation system in Europe to reduce administrative burdens and uncertainty for companies. It found that 30% of patent cases run in parallel in several Member States, and in 11% of cases national courts reach conflicting judgments.

Recent initiatives of the European Patent Office (EPO) to ensure a high quality standard of patents granted and to accelerate procedures are welcome. This includes measures taken in March 2009 to limit the possibilities and time periods during which voluntary divisional patent applications can be filed (so called "raising the bar exercise")

The Commission also urged Member States to ensure that third party submissions do not occur and in any event do not lead to delays for generic approvals; to significantly accelerate approval procedures for generic medicines - for example, by generic products automatically and immediately receiving pricing and reimbursement status where the originator drug already benefits from such status, to take action if misleading information campaigns questioning the quality of generic medicines are detected in their territory and to streamline trials that test the added value of novel medicines.

***Comment:** The Commission used the date of the final report to announce the first proceedings brought as a result of its findings made during the inquiry. This involves French pharma company Servier and a number of generics companies in relation to a settlement agreement reached between them. A further detailed report on the options available to companies following the report's findings will follow shortly from the London life sciences team at Fasken.*

GSK Dual Pricing Case

By Stuart Richards

As has been previously reported in previous newsletters, the GSK case involving the setting of dual prices in Spain (an activity which took place in 2001) rumbles on. Following an appeal against the European Court of First Instance decision in 2006, the Advocate General of the European Court of Justice has given her opinion pending the full ECJ decision.

Dual pricing was used by GSK (through a subsidiary Glaxo Wellcome) when it required Spanish wholesalers to pay a higher price for products which they export to other EU Member States than for those resold on the Spanish market. In May 2001, the Commission adopted a decision finding that Glaxo Wellcome had infringed Article 81(1) by entering into agreements with wholesalers which agreements had the object of restricting competition. GSK appealed arguing that there were no agreements (as a way to avoid sanction under Article 81(1) at all, as has been used successfully used in supply quota cases following the Bayer/Adalat decision) and there was no restrictive intent or effect as the practice merely compensated for a pricing irregularity caused by the Spanish authorities' setting of prices. The European Court of First Instance (CFI) agreed with the Commission that there were agreements which were anticompetitive, but by effect not intent. The CFI also considered that the Commission had failed to conduct an adequate assessment under Article 81(3) to determine whether the sales conditions were exempt from the application of Article 81(1).

The CFI further considered that the Commission was wrong in its conclusion that, because the dual pricing system did not have sufficient advantages, it was not necessary to conduct a balancing exercise against the disadvantages resulting from the restriction of competition. The CFI concluded that the Commission was required to conduct an appropriate examination of GSK's factual arguments and evidence in order to be in a position to conduct the balancing exercise required by an assessment of an agreement under Article 81(3). The Commission was, therefore, required to reconsider GSK's application for exemption as originally

submitted to the Commission (although, when the CFI handed down its judgment, the notification system under Regulation 17 had been abolished, the partial annulment of the Commission's decision had retroactive effect)

GSK and the Commission and others appealed to the ECJ. The Advocate General says all appeals should be dismissed. However she did find that the CFI should have found that the sales conditions restricted competition by object (as opposed to effect). The Advocate General also considers that the CFI erred in relation to its approach to the assessment of the benefits of the agreement under Article 81(3). Notwithstanding these findings at the end of the day she says that the CFI's final decision was the right one.

Comment: As ever, the Advocate General's opinion is not binding on the ECJ. We have seen (most notably in the Greek/Syfait cases) a tendency on the ECJ to depart from the Advocate General's opinion. As there was an element to the CFI's decision that seemed to take account of the peculiarities of the pharma market, and the Advocate General has instead adopted the "standardised approach" eventually taken by the ECJ in the Greek case, perhaps we will not see too much divergence.

Ownership of Pharmacies

By Paul Ranson

The European Court of Justice (ECJ) has, in two recent judgments, upheld the right of Member States to restrict the ownership of pharmacies to pharmacists.

Under EU freedom of establishment rules, businesses have the right to conduct economic activities in more than one Member State. Any national laws which restrict such freedom are permitted in the interests of public health but such measures must be proportionate may not be excessively restrictive. Unfortunately however there is no harmonisation at an EU level as to who may operate pharmacies, with the result that the rules governing the retail pharmacy vary widely from one Member State to another.

The ECJ had to decide whether German and Italian legislation limiting the ownership and operation of

pharmacies to pharmacists was compatible with EC law. It concluded that, although national legislation excluding non-pharmacists from either operating pharmacies or acquiring stakes in companies operating pharmacies amounted to a restriction on the freedom of establishment, this was justified by the need to ensure that the reliable and of high quality provision of medicines to the public. The particular nature of medicinal products led to concerns that the operation of pharmacies by non-pharmacists could result in risks to public health.

Member States may therefore lawfully require that only qualified, independent pharmacists may supply medicinal products at retail level.

Comment: Whilst the requirements of Member States vary, these decisions may impede the ambitions of pan-EU pharmacy chains especially in the German and Italian markets.

REGULATORY

ECJ on Generics and pre-EU Accession Marketing Authorisations

By Paul Ranson

The European Court of Justice has ruled on whether an applicant for a marketing authorisation can rely on the marketing authorisation of a reference drug if that earlier marketing authorisation does not meet EU standards.

Nivalin (galantamine) was originally a product marketed by Waldheim for the treatment of poliomyelitis, authorised by the Austrian regulatory authorities in 1963. Its indications had later been extended to Alzheimer's, but the dossier contained almost no relevant supporting data. This product had been on the market in Austria before and after Austria's accession to the EU. The product was eventually withdrawn from the market in 2001.

Janssen-Cilag obtained a marketing authorisation for galantamine for the treatment of Alzheimer's (Reminyl) in Sweden in 2000.

In 2005 Generics (UK) applied for a UK marketing authorisation for generic galantamine for the treatment

of Alzheimer's using Nivalin as the reference product. The MHRA refused the application in early 2007 on the basis that Reminyl was the appropriate reference product (and its data exclusivity period did not expire until March 2010). Generics (UK) challenged this decision in the UK High Court.

The reference by the High Court to the ECJ sought clarification on whether or not a member state marketing authorisation granted before that member state had joined the EU could be used as a reference product for a generic drug.

In support of its argument that Nivalin should be the reference product Generics (UK) contended that Austria had implemented the EU medicines laws before it had joined the EU and Nivalin had subsequently remained on the EU market.

The ECJ decided that the MHRA was entitled to reject Generics (UK)'s application because Nivalin had not been the subject of a marketing application procedure compliant with EU rules, nor had the Austrian dossier been updated after 1995 when Austria joined the EU.

Comment: This decision suggests that the ECJ may take a very strict approach to generic applications where there are potential safety issues and that products cannot be valid reference products until the original pre-EU marketing authorisation has been fully updated to comply with the EU rules (especially the data in the underlying dossier).

Case C-527/07 Generics (UK) Ltd v the Medicines and Healthcare products Regulatory Agency (MHRA)

Medicinal Product and Borderline Classification

By Paul Ranson

Apart from the definition of 'medicinal product' in Directive 2001/83 there is limited guidance as to how national authorities and courts determine whether or not a product is a medicine. In a recent case (Case C-88/07, Commission v Spain) on the classification of herbal products by the Spanish authorities, the European Court has gone some way to ensuring a degree of consistency in decision making. It also ruled on whether a product could be deemed to be medicinal product merely because it

contains an ingredient that may have physiological effects in a higher concentration.

Article 1.2 of Directive 2001/83 defines a medicinal product as "(a) Any substance or combination of substances presented as having properties for treating or preventing disease in human beings; or (b) Any substance or combination of substances which may be used in or administered to human beings either with a view to restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action, or to making a medical diagnosis."

Specifically relying on part (b) of the definition, the Spanish Medicines Agency (AEMPS) withdrew from the Spanish market a number of herbal products lawfully produced and marketed in another European Member State as foods, on the ground that they were deemed to be unlicensed medicinal products. The AEMPS based its decision on a national register dating from 1973 which listed every medicinal herb that could legally be used as a basis for herbal preparations. Products containing herbs not listed in the register were automatically classified as medicinal products.

This approach was challenged on the basis that no scientific evidence was adduced that the particular product did in fact act as a medicine (i.e. that a constituent of the product did have a metabolic, pharmacological or immunological effect).

The Court upheld the challenge deciding that such an approach could not be justified under 2001/83 and impeded free movement of goods within the EU. Although accepting that a product could indeed be lawfully classed as a medicinal product in EU country and as a food in another, the Court considered that national regulatory authorities could not merely rely on an out of date national register and instead had to scientifically establish on a case by case basis that a product can have an effect on physiological functions before classifying it as a medicinal product..

As a further consequence of the Spanish law, food supplements and other products were considered to be medicinal products simply because they contain a medicinal herb or another substance as an active ingredient, irrespective of how minor the concentration

of the ingredient. The European Court of Justice held that this approach was incorrect and held that EU authorities must investigate whether an ingredient really has a significant physiological effect before they can decide that a food supplement containing medicinal herbs is a medicinal product and must be authorised as such.

Comment: This is potentially good news for companies with borderline products in that national regulatory authorities will now need to scientifically assess borderline products in the light of the 2001/83 in order to establish that a product is a medicine.

Advertising and Independent Statements

By Paul Ranson

Generally, advertising rules (as set out in Articles 86 to 100 of Directive 2001/83) as implemented nationally, are aimed at marketing authorisation holders. However the way legislation is drafted gives national enforcement authorities powers to police others making statements about medicinal products. We look at a recent decision by the ECJ in response to a reference for a preliminary ruling such powers were considered (Case C-421/07 *Anklagemyndigheden v Frede Damgaard*).

The case concerned the medicinal product Hyben Total. It has been marketed in

Denmark by its manufacturer Natur-Drogeriet until marketing authorisation was refused in 1999. In 2003, a Mr. Damgaard stated on his website that the product contained rosehip powder (which is supposed to alleviate the pain in certain conditions) and that the medicinal product was on sale in Sweden and Norway. The Danish authorities prosecuted him, alleging that those statements constituted advertising of an unlicensed medicinal product. Mr. Damgaard argued that his activities did not amount to advertising as he was not employed by the manufacturer and had no interest in that company or the product. The website comprised information on food supplements.

The European Court of Justice held that no link between the party making the statements and the manufacturer is required. The statements must be evaluated together with other circumstances, such as

the nature of the activity carried out and the content of the message. So, even though the third party in question is acting on his own initiative and completely independently of the manufacturer and the seller of such a medicinal product, it is for the national court to determine whether that dissemination an activity or inducement designed to promote medicinal products.

Comment: This judgment may affect the delineation between “advertising” for and “information” about medicinal products in the EU. Any third party communication about a medicinal product (e.g. health websites or statements by health professionals) may now possibly fall within the scope of the concept of advertising.

Proposed New EU Legislation on Information to Patients

By Stuart Richards

Currently EU law prohibits advertising prescription medicinal products. The provision of certain information to consumers is however permitted. The European Commission has put forward a proposal that would allow industry to provide information on prescription drugs to patients in Europe. The proposal which is proving controversial is currently under review by European Parliament.

The key measures of the proposal by the Commission are as follows:

- Marketing authorisation holders could provide patients with summaries of product characteristics (“SmPc”), labelling and packaging leaflets as approved by the relevant competent authorities. Information which “does not go beyond the elements of the summary of product characteristic but presents them in a different way” would also be allowed. No guidance has been provided on what is meant by “presenting in a different way” which will no doubt lead to differing individual interpretation;
- Marketing authorisation holders could provide the general public with “medicinal product-related information about non-interventional scientific studies... or information which presents the medicinal product in the context of the condition

to be prevented or treated". The latter limb would give rise to the possibility of pharmaceutical companies including reference to a product in conjunction with providing information regarding a particular disease, a practice currently not allowed;

- Only certain communication channels should be allowed; health-related publications; websites on medicinal products; and written answers to requests for information from a member of the public. Specifically there should be no unsolicited communication;
- Marketing authorisation holders will be required to register their websites that contain information on medicinal products with the competent authorities of the Member State of the country code top level domain used by the website;
- Member States would be obliged to ensure that there are in place adequate and effective methods of monitoring; either by controlling information before dissemination, unless the content has already been approved by the relevant authority, or by having an equivalent level of monitoring by way of a different mechanism, such as self regulation.

Comment: These proposals will now be considered by the European Council and Parliament. While it is by no means clear that they will be adopted, if they are – which would likely not be until 2010 - it will be interesting to follow their evolution and to see just how much "promotion" will become acceptable.

Promotion - Industry Gifts to Doctors

By Tracy Ko

The report of the Royal College of Physicians (RCP), "Innovating for Health - Patients, Physicians, the Pharmaceutical Industry and the NHS" recommends a tightening of the Association of the British Pharmaceutical Industry's (ABPI) Code of Practice so as to ban all 'gifts' from the pharmaceutical industry to doctors.

The RCP's report, whilst recognising the importance of collaboration and partnership between the doctors and the pharmaceutical industry, expresses concern about the industry's influence over doctors including through the giving of gifts.

In the United Kingdom, the ABPI's Code of Practice ("Code") places restrictions on the gifts, hospitality and medical and educational goods and services can be given to members of the health profession. In particular, it prohibits the industry from giving gifts to doctors as inducements to prescribe any medicine except inexpensive promotional aids that are relevant to the practice of the medical profession such as pens, diaries, surgical gloves and coffee mugs. However, the RCP wants the Code to go further and completely prohibit the giving of gifts to doctors as well as medical students and doctors in training.

The RCP refers to the voluntary "Code on Interactions with Healthcare Professionals" of PhRMA (the Pharmaceutical Research and Manufacturers of America, the US pharmaceutical industry's trade association) which states that "practice-related items of minimal value (such as pens, note pads, mugs and similar 'reminder' items with company or product logos)" should not be given to doctors or members of their staff.

In addition, the RCP's report criticises the National Health Service for not sufficiently supporting and valuing doctors, and identifies this as one of the reasons why health professionals turn to the industry for financial support and become "dependent on its gift culture", and why the industry plays a significant role in the funding of doctors' continuing professional development and medical education. The report acknowledges the important role of the industry in medical education and therefore does not call for an end to all industry funding of medical education. However it recommends that the ABPI and its members establish a pooled fund for the industry's financial support of doctors' medical education so that such financing is not linked to a single specific pharmaceutical company.

Comment: The ABPI has welcomed the report and has indicated that it will carefully consider the RCP's recommendations, but it remains to be seen whether

the ABPI will actually take those recommendations on board and update its Code of Practice.

CANADIAN DEVELOPMENTS

Regulation of Electrical Medical Devices in Ontario

By Timothy M. Squire

The Ontario Electrical Safety Authority has postponed new registration requirements for Electrical Medical Device Manufacturers

The Ontario Electrical Safety Authority (“ESA”) has postponed the requirement (originally introduced by the ESA in April 2009 in conjunction with *Ontario Product Safety Regulation 438/07* (the Regulation)) that manufacturers of electrical medical devices who sell their products in Ontario register with the ESA by August 30, 2009. This requirement was intended to protect consumers and the public from unapproved or unsafe electrical products.

A failure to register would have deemed all electronic medical devices made by a manufacturer as “unapproved” for sale in Ontario and subject to investigation, public notification and fines even if approved by Health Canada.

However manufacturers and distributors of electrical medical devices sold in Ontario must as soon as practicable after becoming aware, report any serious electrical incident or accident or a defect in the design or function of an electrical medical device to the ESA

Following such report, the ESA may commence an investigation and require the assistance of the manufacturer, wholesaler, importer, distributor or retailer of the electrical medical device in question. The ESA can also require any of these parties to issue a public notice relating to a risk or defect in an electrical medical device or the occurrence of an adverse event, or to order that the electrical medical device is no longer approved for sale in Ontario.

The above obligations are in addition to the problem reporting requirements of manufacturers and

distributors to report adverse events to Health Canada and the investigatory and remedial powers of Health Canada under the jurisdiction of the *Medical Device Regulations* of the *Medical Device Regulations*, SOR/98-282.

Comment: The ESA has not indicated when or if the registration requirement will be reinstated, and according to the ESA website (www.esasafe.com), the decision to postpone was made after concerns with the system were raised by industry. In any event manufacturers and distributors who sell electrical devices in Ontario are well advised to pay close attention to the ESA and the regulations made under the *Ontario Electricity Act*, and to similar electricity regulations in each province.

Health Canada on Foreign Clinical Trial Results

By Timothy M. Squire

In response to the growing number of clinical trials outsourced to foreign countries in support of market authorizations for drugs and medical devices, Health Canada announced on June 5, 2009 that it is examining the issue of foreign clinical studies to determine if specific guidance in this issue is required.

An increasing number of clinical trials are being outsourced to emerging economies such as India, China and Eastern Europe, in order to limit expense and avoid the strict regulations governing research on humans in Canada and in other jurisdictions. This has led to concern about the quality and applicability of foreign clinical trials, the treatment of patients involved in such studies, and ultimately, whether the results can be relied upon to substantiate the safety and effectiveness requirements for market authorization for drugs and medical devices.

Health Canada has reminded sponsors that clinical study results submitted in support of a Canadian market authorization must be conducted in accordance with internationally recognized Good Clinical Practice standards. In relation to pharmaceuticals Health Canada recognizes ICH GCP (1997) and in relation to medical devices, the recommendations of Global

Harmonization Task Force (GHTF) ISO TC 194 for the conduct and performance of clinical investigations of in vivo medical devices, which is comprised of ISO 14155-1 (general requirements) and ISO 14155-2 (clinical investigation plans).

Health Canada has also advised that when clinical data from studies conducted outside of Canada are included in an application for market approvals, it will scrutinize that data to determine whether the results are considered to be accurate and reliable. If Health Canada has concerns about the data, it will require the sponsor to provide satisfactory evidence to required recognized standard or an equivalent. The evidence required will be considered on a case by case basis, and if it is not considered to be satisfactory, the market authorization will be refused.

***Comment:** In terms of further guidance on the issue of foreign clinical trials, Health Canada has advised that stakeholders will be consulted as this initiative moves forward, and that further information will be available on the Health Canada Website.*

Labelling - Listing Non-Medicinal Ingredients in OTC Drugs

By Mathieu Gagné

It is currently not a legal requirement for drug manufacturers to list non-medicinal ingredients ("NMIs") on the labels of drugs sold in Canada. That situation might change in the course of the next few months.

Health Canada is considering making the listing of NMIs mandatory on the outer label of non-prescription drugs. A regulation to that effect was moreover published in the *Canada Gazette* last June 6, 2009. Listing NMIs is already mandatory in the United States, Europe and Australia. In Canada, it has been mandatory for natural health products since 2004 and for cosmetics since 2006.

The goal of the proposed amendment is to allow consumers to make an informed choice when purchasing drugs to avoid such risks as allergic and adverse drug reactions. However, the proposed amendment will not apply to:

- prescription drugs;
- non-prescription drugs only administered under the supervision of practitioner;
- drugs that are represented as being solely for use as a disinfectant on hard non porous surfaces;
- drugs for veterinary use.

Canadian Drug Laws

We are proud to announce that "Drugs Laws in Canada – and other Health Products" (French and English editions), authored by Mathieu Gagné, a partner in our Montréal office, will be released in autumn 2009. The book presents Federal and Provincial standards applicable to drugs (and other health products) from research and development to supply.

Editors : Paul Ranson, London and Lucie Dufour, Montréal

The texts included in this collection are intended to provide general comments on Life Sciences Law. They reflect the point of view of their respective author and are not opinions expressed on behalf of Fasken Martineau DuMoulin LLP or other member corporations. These texts are not intended to provide legal advice. Therefore, readers should seek out advice on issues specific to them before acting on any information set out in these texts. We would be pleased to provide additional information on request.

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