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Revision of the Clinical Trials Directive
Options for the further development of the existing system

I. Introduction

In 2009 the European Commission published a first consultation paper which dealt with the assessment of the correct functioning of Directive 2001/20/EC (referred to in the following as: "Clinical Trials Directive"). It emerged that despite harmonisation by the Clinical Trials Directive, the approval of clinical studies in the EU is frequently associated with difficulties. During the consultation conducted at that time, the industrial federations pointed out the following aspects primarily:

- Different requirements placed on the dossier to be submitted to the national competent authority. These include, for example, different

requirements placed on the format for the Clinical Trial applications as well as additional national requirements.

- Overstepping of the deadlines for the approval procedure set out in the Clinical Trials Directive.

- Different assessment of the Clinical Trial application through to the approval of the same study on the one side and rejection by a different national authority on the other.

On the basis of this assessment and the comments received, the Commission published a concept paper in February 2011 which deals with the revision of the Clinical Trials Directive. This concept paper picks up on a few aspects addressed by the public hearing in 2009. The Commission adopted a negative position on the possibility of a central assessment of a clinical trials application, which would lead to a centralised approval of a clinical trial (see Consultation Item No. 3).

In connection with the revision of the Clinical Trials Directive thought is being given to improving the harmonisation of requirements placed on the approval of clinical trials in future by regulating the area of clinical trials of medicinal products for use on humans by a European Regulation. One fundamental question arises here:

If the revised regulatory system were to provide for a "central assessment" and a "central approval" of clinical trials, could any such approval be made by the EMA or would the decision-making power have to remain with the Commission?

This question is to be answered in the following.

II. Decision by the European Medicines Agency

The introduction of a central assessment as part of the revision of the Clinical Trials Directive would become additionally attractive if it were to be decided that the EMA itself could make the decision on approving clinical trials. It is therefore questionable whether and how the EMA can be entrusted with decision-making powers of this nature.

This issue leads to the basic problem as to the legal foundation on which European Agencies can at all be set up. Since the TFEU contains an explicit legal foundation for the formation of agencies just as little as the European Treaty at the time, this subject is highly contentious in scientific literature. The dispute ranges from the question as to the legal basis on which the agencies may be established through to the question as to what extent court legal protection is possible against measures of the agencies. These discussions are essentially of theoretical interest because the practice in European Law has long since set itself aside from these concerns.

With reference to Article 95 European Treaty (now Article 114 TFEU), the Court of Justice has explicitly decided that this provision may be consulted as a legal basis for establishing an agency (see C-217/04, -ENISA-). This circumstance is of particular relevance for the area of medicinal products because in the same way as Directive 2001/20/EC, Regulation 726/2004/EC was also based on Article 95 European Treaty, so that no difficulties exist as far as the competence of the EU is concerned.

1. Transfer of decision-making powers: the Meroni doctrine

It is questionable whether decision-making powers could also be transferred to the EMA in this connection for approval of clinical trials. This question is still frequently assessed on the basis of the so-called Meroni doctrine which for its part goes back to two judgements of the Court of Justice (9 and 10/56, - Meroni). In these judgements from the fifties the Court of Justice was required to decide whether the higher authority of the ECSC is allowed to delegate implementation powers to a legal entity under private law which has been established according to the national law of a Member State. A delegation of this type was only allowed if the corresponding implementation powers were "precisely outlined" and if the higher authority adequately monitored the exercising of these powers. At the same time the Court of Justice made it clear that no discretionary powers of a political character may be transferred because any such transfer could damage the institutional balance. It is also important for the Court of Justice that the legal protection afforded by the courts may not be restricted by the transfer of implementation powers.

Whether and the extent to which these principles may be consulted today to assess the delegation of decision-making powers to agencies is highly contentious. According to one view, the criteria resulting from the Meroni doctrine continue to be of significance today for the conditions under which decision-making powers may be transferred to agencies. According to another view, the Meroni doctrine can no longer be readily consulted today because the Meroni rulings ultimately refer to the ECSC Treaty and case-specific features result which do not readily permit a transfer of the principles resulting from the judgements to the TFEU.

Ultimately, this dispute remains to be seen because if the strict Meroni criteria are taken as basis, a transfer of decision-making powers to the EMA, which would empower it to decide on an application for the approval of a clinical trial, would be admissible. One aspect in favour here is that the decision to approve a clinical trial is not a political discretionary decision in the sense of the Meroni judgements because only precisely defined powers would be transferred to the EMA in this context. The foundation for any such transfer of powers would be a corresponding EU Regulation which would set out the specific legal framework as so far in Directive 2001/20/EC. The assessment of an application for approval of a clinical trial of a medicinal product for human use is a tied decision in that the application would have to be assessed in accordance with precisely defined criteria. If these are satisfied the applicant would be entitled to the granting of an approval for the study; conversely, the approval for the study could only be refused if the statutory requirements, in particular the requirements placed on the IMPD and the clinical trial protocol, are not satisfied. The requisite decision-making process could be readily integrated into the usual procedures within the EMA: validation by the EMA, assessment by a scientific committee, decision by the EMA. This would not be associated with a weakening of the institutional balance, in particular a weakening of the Commission which would naturally assume the legal supervision of the decision-making process.

The guarantee of the court legal protection viewed to be essential by the Court of Justice presents no problems with respect to the TFEU because Art. 263 (1) Sentence 2, (5) and Art. 265 (1) Sentence 2 TFEU now explicitly provide for legal protection also against acts of institutions and other agencies insofar as these have legal effects on third parties. Even with the application of the European Treaty legal protection against decisions of the agency has already been granted.

It is to be pointed out in this connection that the EMA has not been making decisions only since the coming into force of the Paediatric Regulation. In centralised procedures the EMA is regularly required to make decisions which have legal effects on third parties. Reference may be made here to cases T-133/03 and T-264/07. The first case referred to the rejection of a change in name for a medicinal product which has a Community marketing authorisation. The rejection of the change in name was ordered by the agency. In the second case the EMA rejected an application for classification in accordance with the Orphan Drug Regulation. It is worth noting that the Court of Justice did not see the need either in these proceedings or in those of Nycomed in connection with the rejection of a waiver application to question the decision-making powers of the EMA. This is at least an indication that the ECJ has no basic concerns with the Agency being given decision-making powers in the area of medicinal products.

Finally, the fact that in centralised proceedings the decision on a marketing authorisation application is not made by the Agency but by the Commission itself could speak against a power of the EMA to decide on the approval of a clinical trial. However, this is essentially based on the fact that this is provided for in Regulation 72/2004/EC. A glance at other agencies such as the ECHA and the EASA shows, however, that this need not necessarily be the case. Assuming a corresponding consensus between Commission, Council and Parliament, a transfer of decision-making powers to the EMA would be conceivable.

2. EMA as regulatory agency

The EMA is a typical regulatory agency. The function of such regulatory agencies is to assume executive tasks in a specific area. The Commission Communication "The Operating Framework for the European Regulatory Agencies" (COM (2002) 718) and the draft of an Inter-institutional Agreement on the Operating Framework for the European Regulatory Agencies (COM (2005) 59) deal with the requirements placed on such agencies. It is clear from these documents that the Commission views it to be admissible to equip regulatory agencies such as the EMA with decision-making powers. It is stated as follows in the draft for an Interinstitutional Agreement on the Operating Framework for the European Regulatory Agencies:

4. An agency may be entrusted with one or more of the following tasks:

a) Applying community standards to specific cases. To this end, the agency shall be given the power to adopt individual decisions which are legally binding on third parties; (...)

For the tasks provided for in Point 4 (a), the agency shall exercise direct executive responsibility within the scope of the powers conferred on it by secondary legislation and in accordance with the provisions of the EC Treaty. In particular when carrying out these tasks, agencies may not:

a) adopt general regulatory measures;
b) have decision-making powers confirmed on them in areas in which they would be required to arbitrate in conflicts between public interests or exercise permissible discretion;
c) have responsibilities entrusted to them with respect to which the EC Treaty has conferred direct decision-making powers on the Commission.

These conditions defined by the Commission are anything but incidental: the Commission attempts here to be guided by the conditions resulting from the Meroni decisions for a transfer of decision-making powers. Reference can therefore be made to the above statements under III.1. It is to be said that no other legal impediments exist with respect to the transfer of any such decision-making powers because the EMA corresponds to the requirements of the above Commission Communication in terms of structure.

Finally it must be pointed out that - besides the EMA - a number of regulatory agencies now exist who have been given the power by way of Regulation to make individual case decisions which are binding on third parties. These include the European Chemicals Agency (ECHA), the Office for Harmonization in the Internal Market (OHIM) and the European Aviation Safety Agency (EASA). Not least the EMA itself belongs to those agencies which are empowered to take individual case decisions vis-à-vis third parties. This power results inter alia from Article 25 of Regulation 1901/2006/EC according to which the EMA is entitled to make decisions on applications with respect to paediatric investigation plans.

It is therefore to be said that the EMA could be conferred with the power to approve the conducting of clinical trials at Community level by a corresponding EU Regulation.