EUROPEAN COMMISSION
HEALTH AND CONSUMERS DIRECTORATE-GENERAL

Health systems and products
Medicinal products – authorisations, EMA

PHARM 628

PHARMACEUTICAL COMMITTEE
23 October 2013

Subject: **Interpretation of Pharmaceutical legislation – ECJ judgments**

Agenda item 2a

- **Case C-535/11, Judgment of 11 April 2013, Novartis v Apozyt**

The Court was asked to interpret the rules governing the placing on the market of medicinal products for human use.

The case relates to two centrally authorised products: Lucentis and Avastin, which both contain as active substance a growth inhibitor. Both products were used in the EU to treat patients with wet age-related macular degeneration; only Lucentis is authorised for this indication, though. Avastin, being the older of the two products, was used to treat AMD 'off-label' before Lucentis became available.

In Germany, a company (Company B) tried to 'facilitate' the off-label use of Avastin by providing pre-filled syringes. Additionally, it offered pre-filled syringes of Lucentis drawing-off the content from the original vials into several sterile syringes. In doing so the company was able to produce several syringes/injections from one vial, with the respective effect on costs per unit (according to the SmPC only one vial per syringe should be used).

The company was taken to Court in Germany by the marketing authorisation holder (Company A) with the purpose of stopping this activity, basically arguing that such modification of the products, if at all, could only be done by a marketing authorisation holder.

The European Court of Justice did not agree. According to the ruling the operations of company B do not require a marketing authorisation, provided that the processes in question do not result in any modification of the medicinal product and that they are carried out solely on the basis of individual prescriptions making provision for them.

In those circumstances the activity cannot be equated with a new placing on the market. Instead, it is analogous to actions which, in the absence of the company's activities, could otherwise be, or have been, carried out, under their responsibility, by doctors prescribing the treatment or by pharmacies themselves in their dispensaries, or else in hospitals.

However, company B would be required to hold a manufacturing authorisation.

Additionally, the Court considered that the off-label use of authorised medicinal products may fall under Article 5 of Directive 2001/83/EC. In this context the Court recognised the therapeutic freedom of a doctor to prescribe an off-label alternative to an available authorised product.

- **Case C-109/12, Judgment of 3 October 2013, Laboratoires Lycocentre**

Case **C-109/12** is "borderline-products" case, relating to a vaginal capsule containing live lactobacilli which is intended to correct bacterial imbalance in the vagina. The national Court essentially asks, whether a product which is regarded by one Member State as a medical device in accordance with Directive 93/42/EEC and is provided with a CE marking, may be classified by another Member State as a medicinal product within the sense of Directive 2001/83/EC.

While the Court acknowledges in its ruling – in line with constant case-law – that the classification of a product as a medical device in one Member State does not preclude the competent authorities of another Member State from classifying the same product as a medicinal product, the Court requires that competent authorities apply in those cases the procedural provisions provided by Article 18 and Article 8 of Directive 93/42 "*before applying the classification procedure under Directive 2001/83*". The Court considers it to be evident that where the competent authorities decide to classify as a medicinal product a product already classified in another Member State as a medical device, they must regard the CE marking affixed to the product in question as having been affixed inappropriately as referred to in Article 18 of Directive 93/42.

Finally, the Court confirmed that within the same Member State, a product, which, while not identical to another product classified as a medicinal product, none the less has in common with it an identical substance and the same mode of action, cannot be marketed as a medical device, unless as result of another characteristic that is specific to that product.

- **Interesting pending cases**

Case **T-140/12**, a direct action against the European Medicines Agency, which focuses on the correct interpretation of Article 8 of the Orphan Regulation (EC) No 141/2000 defining the concept of market exclusivity for orphan medicinal products.

Cases **T-472/12** and **T-67/13** (*Novartis* v *Commission*), a direct action against the Commission concerning the application of the global marketing authorisation concept to products that received separate marketing authorisations under the 'old' Regulation (EEC) No 2309/93.

Case **T-547/12** (*Teva Pharma* v *EMA*), a direct action against the European Medicines Agency on the application of the global marketing authorisation concept to fixed combination products.

Cases **T-29/13**, **T-44/13** (*AbbVie* v *EMA*) and **T-73/13** (*InterMune* v *EMA*), another direct action against the European Medicines Agency, which deals with the disclosure of clinical trial data that were submitted as part of a marketing authorisation application, under access to document provisions (Regulation (EC) No 1049/2001).

Case **T-189/13**, a direct action against the Commission decision to delete certain indications from national marketing authorisations of tolpersione-containing oral formulations ('Article 31 referral')

Case **C-512/12** (*Octapharma France*), preliminary reference to the Court on the classification of blood products (plasma) and the interaction between the Medicinal Product Directive 2001/83/EC and the 'Blood Directive' (2002/98/EC).

Case **C-104/13** (*Olainfarm*) a preliminary reference that deals with the use of well-established medicinal use products as a reference product for generic applications

Case **C-269/13P** by which the applicant appeals the ruling of the General Court in case T-539/10 (*Acino* v *Commission*). The case deals with regulatory action in the framework of an 'Art. 20 referral' following a 'Good Manufacturing Practice' (GMP) Inspection that discovered critical deficiencies in the production process of the active substance supplier in India.

Case **C-358/13** ('*Legal highs*') focuses on the correct interpretation of the term '*modifying*' ("*physiological functions*") contained in the definition of medicinal product set forth in Article 1(2)(b) of Directive 2001/83/EC, for the purpose of ascertaining whether certain synthetic drugs could be regarded as medicinal products within the meaning of the Directive.

Action to be taken:

For information