C/M/S/ Cameron McKenna

A Year in Pharmaceuticals

January 2008

For further information on any of the topics covered in this bulletin, please contact your client partner or:

Nick Beckett, Intellectual Property
+44 (0)20 7367 2490
nick.beckett@cms-cmck.com

Michael Draper, Corporate
+44 (0)20 7367 2068
michael.draper@cms-cmck.com

Sarah Hanson, Commercial
+44 (0)20 7367 2559
sarah.hanson@cms-cmck.com

David Marks, Competition
+44 (0)20 7367 2136
david.marks@cms-cmck.com

Niall McAlister, Corporate
+44 (0)20 7367 2694
niall.mcalister@cms-cmck.com

Shuna Mason, Regulatory
+44 (0)20 7367 2300
shuna.mason@cms-cmck.com

Contents

A round-up of ten topical issues that faced the pharmaceutical industry in 2007 and what they could mean for 2008...

A Year in Pharmaceuticals

EU Regulation of medicinal products for paediatric use

On 26 January 2007, the EU Regulation on medicinal products for paediatric use (Regulation (EC) 1901/2006, as amended by (EC) 1902/2006) came directly into force across the EU (although the application of the main provisions is staggered until approximately mid-2009). The Regulation aims to facilitate the development and accessibility of medicinal products for use in children; to ensure children's medicinal products are subject to high quality ethical research and to improve the information available on the use of medicinal products in different paediatric populations.

The Regulation provides that in future, subject to waiver or deferral, companies must submit paediatric data (in the form of results and studies that comply with an agreed paediatric investigation plan), whenever they apply for a marketing authorisation for a new product not previously authorised in the Community (from 26 July 2008), or for a variation or extension of an existing marketing authorisation concerning a new indication, pharmaceutical form or route of administration (from 26 January 2009).

The Regulation provides rewards and incentives to encourage the completion of paediatric studies within an agreed timeframe. Incentives include a six-month extension of the supplementary protection certificate ("SPC") for products protected by SPC or patent, or full data exclusivity (under the 8+2+1 rules) for products not covered by IP rights and where a new indication is developed exclusively for use in the paediatric population.

The new obligations to generate and collect paediatric data will inevitably increase the cost of bringing new products to market. Companies may wish to re-assess their product development and marketing portfolios and arrangements in light of the new opportunities and obligations.

OFT's PPRS Study

In February 2007, the OFT published its market study on the operation of the Pharmaceutical Price Regulation Scheme ("PPRS"). The study recommended retaining the PPRS structure of a pact between industry and government, but removing the current profit cap on an individual company's drug portfolio and replacing it with an up front, per drug, value-based price approval.

Value-based assessments may be difficult to conduct, as they would be based on a broad 'equivalence' between products. Therapeutic comparisons have already proved problematic in the introduction of limited reimbursement lists, in establishing data exclusivity, in identifying relevant product markets for competition law purposes and in creating specifications for therapeutic tendering. There are also concerns that value-based assessments will delay drug launch, eating into a drug's effective patent life.

A renegotiation of the PPRS scheme between industry and the Department of Health is currently underway.

Direct to pharmacy distribution model and OFT's study on distribution of medicines

In March 2007, Pfizer implemented a new "Direct to Pharmacy" model for distribution of its pharmaceutical products, following the High Court's rejection of an application by wholesalers for an interim injunction to stop it. Under the new system, pharmacies and dispensing doctors are buying Pfizer prescription medicines directly from Pfizer and not through third party wholesalers. Pfizer arranges delivery of products through a single logistic service provider (LSP), Unichem.

The wholesalers that applied for the interim injunction against Pfizer argued that the scheme and the exclusive appointment of Unichem were anti-competitive, but the Court rejected the application for reasons of delay and on the merits. The wholesalers had also complained to the OFT, which in April 2007 launched a market study into UK medicines distribution.

Following completion of its market study, the OFT published its recommendations to the Government in December 2007. The OFT did not object to direct to pharmacy schemes, recognising that they had advantages as well as some potential drawbacks when compared with the traditional wholesale model. The OFT recommended that:

- the Department of Health made further changes to the Pharmaceutical Price Regulation Scheme (PPRS) to ensure that NHS medicine costs do not increase as a result of changes in distribution
- if the Government is concerned about reductions in service standards to pharmacies, it should seek agreement of manufacturers to adopt minimum service standards; Government should also pay less if service standards are reduced.

The Government has 90 days in which to respond to the OFT's recommendations. This ties in with the current renegotiation of the PPRS which the Department of Health aims to conclude by mid-2008.

Boehringer -v- Swingward ECJ Parallel Trade Decision

In April 2007, the European Court of Justice gave judgment for the second time in the long-running *Boehringer v Swingward* parallel trade case. The Court gave judgment on a number of matters:

- Overstickered packs. The Court confirmed that previous case law determining the protocol that parallel traders should comply with to avoid trade mark infringement, applies to over-stickered parallel traded products as well as reboxed products
- Necessity test. The Court confirmed that a parallel trader must show that the action of repackaging was necessary to parallel trade a product, but it need not show that the extent of repackaging (i.e. the manner and style of repackaging) was necessary
- Co-branding, de-branding and over- stickering. The Court noted that aspects of repackaging such as co-branding (where the parallel importer's trade mark is placed alongside the proprietor's trade mark), de-branding (where the proprietor's trade mark is removed) and over-stickering may damage a proprietor's trade mark and so provide legitimate reasons for that proprietor to object to the parallel trade. However, the ECJ said that it was a matter of fact for the national court to decide in each case as to whether a particular case of co-branding, de-branding or over-stickering damaged the trade mark
- Burden of proof. It is for the importer to prove that it has complied with any conditions set down in case law as necessary for a parallel trader to avoid infringing a proprietor's trade mark
- Notice. The ECJ confirmed that, where a parallel trader fails to provide notice to the trade mark proprietor that it intends to parallel import the proprietor's products, this lack of notice constitutes trade mark infringement. The sanction for such infringement must be proportionate, effective and a sufficient deterrent.

Branded generics included in PPRS pricing

The High Court has considered the status of PPRS in a dispute relating to the 1999-2004 PPRS.

The PPRS is an agreement between the Department of Health and the pharmaceutical industry that restricts the maximum profits that can be made from the sales to the NHS of medicines covered by the scheme. The price regulation provisions allow members of the scheme to determine the prices of their individual products at launch and also control subsequent price increases. In the 1999-2004 scheme participants were also required to reduce their overall prices by at least 4.5% in comparison to list prices.

The products covered by the PPRS are "all branded, licensed NHS medicines". Generics (unbranded copies of out-of-patent products) as well as branded medicines sold over the counter and those products supplied predominately under private prescriptions are not covered under the PPRS. However, "branded generics" (copies of patent-expired products that bear a brand name) along with branded products supplied through tendering processes or local/central contracts are included.

A dispute over the application of the PPRS arose between GSK and the Department of Health, which was referred to a panel appointed under the scheme. The question was whether branded medicines, reimbursed as generics, should be included when calculating the overall price reductions given by a particular pharmaceutical company. The panel found in favour of the Department of Health and decided that these medicines should not be included.

GSK appealed the decision of the panel to the High Court. The Court first found that it had jurisdiction to hear the case, on the basis that the PPRS does constitute a binding contract between the Department of Health and the pharmaceutical companies participating in the scheme. The Court went on to find that GSK was not prohibited from including sales of branded products sold to fulfil generic prescriptions in any calculation of list price reductions. The Court also noted that due to supply chain issues beyond companies' control, reductions by companies in pricing levels did not always translate into equivalent cost savings for the Department of Health.

This decision, along with the OFT market studies on the operation of the PPRS and on the distribution of medicines, is an important part of the backdrop to the current PPRS renegotiation.

First judicial review of a decision of NICE

In the first ever judicial review of *NICE Eisai Ltd v National Institute for Health and Clinical Excellence*, Eisai Limited challenged the decision of the NICE Appeal Panel and the consequent guidance issued by NICE in relation to a particular class of Alzheimer's medicines, which the guidance stated should not be made available to mild Alzheimer's sufferers. The High Court decided that the consultation procedure employed by NICE (including the disclosure of only a "read only" version of the economic model used by NICE) did not deny Eisai access to significant information or the opportunity to make an intelligent response. The court decided that NICE were under no obligation to allow consultees to quality assure the model and that there was no substantive legal right for consultees to see every document.

The Court rejected all four grounds on which Eisai claimed there had been errors of reasoning which robbed both the guidance and the decision of the NICE Appeal Panel of logic. The Court declined to open up the underlying experts' debate about the clinical and cost-effectiveness of this class of Alzheimer's disease medicines by deciding which experts were to be preferred. However, the Court did decide that the NICE guidance was unlawful in its treatment of certain non-typical patient groups and discriminated against them in breach of anti-discrimination legislation. In consequence, NICE has had to revise its guidance to ensure that this no longer discriminates against those non-typical groups of patients.

Eisai has applied to the Court of Appeal for permission to appeal the High Court decision on the point of NICE's refusal to disclose a fully executable version of the economic model.

Lifesciences aspects of the Companies Act 2006

The main company law development in 2007 (which affect lifesciences companies in common with companies operating in all other sectors) was the increasing impact of the Companies Act 2006. This is a mammoth piece of legislation (comprising exactly 1,300 sections) that recasts all legislation relating to the establishment and operation of companies in the United Kingdom. The process of bringing the Act into force began in 2007 and will continue through to October 2009.

Most of the Act's changes are relatively slight and represent incremental improvements in administration and good practice. Sometimes the changes are more radical. At the risk of gross over-simplification, the principal areas of change made by the Act relate to: the codification of directors' core duties and rules on derivative actions (see below); modernisation of company administration (for example relating to the passing of shareholder resolutions and communications with shareholders generally); expanded reporting obligations to a company's shareholders; and simplification of the law relating to financial assistance (given in connection with the acquisition of a company's shares) and relating to reductions of a company's share capital, at least in relation to private companies.

Amongst the myriad detailed changes made by the new legislation, we would pick out three areas worthy of mention in the context of lifesciences companies:

- The new law on directors' duties and their enforcement. The directors of companies in all sectors need to inform themselves about this. The previous common law relating to directors' duties has now been codified and reduced to seven core duties. These cover a clarification of the objective of a company's management (i.e. to promote the success of the company for the benefit of all its members); the clarification of the standard of competence to be expected from directors (to exercise reasonable care, skill and due diligence in a formulation which combines both subjective and objective elements); and strict but workable provisions relating to the avoidance and management of conflicts of interest. In carrying out their duty to promote the success of the company, directors must also have regard to a number of specific "corporate social responsibility" factors (including the impact of their decisions on suppliers, customers, employees, the community and the environment)
- In parallel with this codification, the Act introduces a new means of enforcing, on behalf of the company, the duties owed by directors to the company. This "derivative action" can be brought by any shareholder in the company. There has been much concern that this procedure would allow activist shareholders or pressure groups (e.g. animal rights activists) to bring actions based on, for example, the directors of a lifesciences company failing to take into account the impact of its activities on the environment (i.e. animals involved in pre-clinical testing). There are, however, a number of hurdles which need to be overcome before such a derivative action can be brought, let alone succeed. It should also be remembered that a successful action can only be based on a breach of duty by a director to the company which results in a loss to the company (not to any individual shareholders)
- New law on availability of residential addresses. We are not there yet, but by October 2009 significant improvements should have been made in keeping confidential the residential addresses of both directors and shareholders. By then, the only significant risk of directors' residential addresses being easily accessed by third parties (including pressure groups) will be in relation to information filed before 1 January 2003 (such older information having been recorded on microfiche at Companies House and, therefore, difficult to expunge)
- For those setting up new lifesciences companies, the balance of convenience and advantage between incorporating as a public company or a private company will have shifted further in favour of private companies.

New Guidance on how MHRA and VMD will deal with requests for information under FOIA

In November 2007 the Medicines and Healthcare products Regulatory Agency (MHRA) and other parties published guidance on how they will deal with requests for information under the Freedom of Information Act 2000 (FOIA).

This guidance replaced a memorandum of understanding (MOU) that had been in place since late 2004, which used a 'traffic light' system to differentiate between types of information. In the 2004 MOU each information type was coded green, amber or red in accordance with the ease of their disclosure. A good number of the amber

classifications left considerable room for disagreement, particularly over the amount of sensitive material to be redacted before disclosure.

The new guidance, like the MOU, categorises information into three tables according to when it may be published:

- documents that public bodies will routinely publish online/in print
- documents/information that public bodies will disclose on request
- documents/information that public bodies may be able to disclose on request if disclosure is in the public interest.

It is intended to be helpful for regulators, information requestors and industry. Whilst it does not intend to be a legally binding document, it provides guidance and a statement of good practice for the MHRA when dealing with an individual request under the FOIA.

The new guidance is intended to reflect the greater spirit of openness and commitment to disclosure that the Access to Information legislation was designed to foster in public bodies but in practice it has not affected what the regulatory bodies disclose as they treat each request on its own merits in accordance with the legislation and accompanying legislative guidance.

House of Lords clarifies rules of law and procedure in patent entitlement disputes

In the decision of *Yeda Research and Development Co Ltd v Rhone-Poulenc Rorer International Holdings Inc and Another*, in 2007 the House of Lords overturned the broad principle established in *Markem Corporation v Zipher Ltd (2005)* that any claim of entitlement to a patent (including by someone claiming to be the true inventor) must be based upon 'some other rule of law', for instance, breach of contract or confidentiality. The only determination for the Court to make is to decide who was the inventor of the claimed invention. The decision also clarified the procedure relating to amending an entitlement claim, specifically how the limitation period applies to an application for amendment.

UK IPO will no longer examine trade mark applications on relative grounds

From 1 October 2007, the UK Intellectual Property Office (UKIPO) stopped examining trade mark applications on relative grounds and the onus is now on proprietors of potentially conflicting marks to object to the mark. Owners of CTMs and certain Madrid Protocol registrations may 'opt in' to the notification system of the UKIPO to receive details of applications for potentially conflicting marks automatically.

Previously, the UKIPO considered applications on both absolute and relative grounds, so an application would not be registered if it was identical with or confusingly similar to an earlier mark. Under the new system implemented from 1 October 2007, the Registrar will continue to undertake searches of the registers as part of the examination process for each new application, but merely inform the applicant of the search results and any potentially conflicting earlier trade marks. It is then the applicant's choice whether to withdraw the application or proceed despite the risk of conflict. However, an application will automatically proceed to publication unless withdrawn by the applicant.

Provided there are no other objections to registration, there is a two month period between issuing the examination report and accepting the application and arranging for its publication, during which it can be amended or withdrawn. If and when the application proceeds to publication in the Official Trade Marks Journal, the owners of any relevant conflicting marks will be notified (provided they are entitled to automatic notification or have opted in). A three month window in which proprietors of an earlier mark may oppose conflicting applications will begin on the date of publication.

C/M/S/ Cameron McKenna

Law-Now™

CMS Cameron McKenna's free on-line information service

Receive expert commentary and analysis on key legal issues affecting your business. Register for free email alerts and access the full Law-Now archive at **www.law-now.com**

CMS Cameron McKenna LLP
Mitre House
160 Aldersgate Street
London EC1A 4DD

T +44 (0)20 7367 3000
F +44 (0)20 7367 2000