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EUCOPE Position

On the Commission Proposal COM (2012) 542

'Medical Devices Regulation'

Summary

EUCOPE welcomes the Commission's effort to further improve patient safety and public health by revising the current legal framework for medical devices in the EU. The Commission's commitment to support innovation and the competitiveness of the medical devices industry taking into account the interests of small and medium sized companies is highly appreciated. However, in certain parts the current proposal provides for measures which **will unnecessarily restrict and delay patients' access to new technologies and compromises the European medical devices industry's competitiveness**. Especially, we see a need to restrict the instruments of delegated acts (foreseen 16 times) and implementing acts (foreseen 24 times) in the Commission proposal. These instruments should be used only where non-essential parts of the legislation are concerned. Otherwise the Parliament and Council should be involved.

We particularly see need for amendments on the following aspects:

1. **It shall remain the responsibility of the Member States and not the Commission to decide** on a case-by-case basis **whether or not a product falls within the scope of this Regulation.**

2. **Combining the regulatory regimes for medical devices and pharmaceuticals leads to legal uncertainties**. The Commission proposal foresees that products composed of substances or combinations of **substances that are intended to be ingested, inhaled or administered rectally or vaginally and that are absorbed by or dispersed in the human body should comply with the relevant requirements of Annex I of Directive 2001/83/EC** (Point 9.2., Annex I of the proposal). This is **not appropriate** given the mode of action of most of these products. In addition, such products **shall only be classified in class III where actual safety issues have been detected** in the past which justify a classification in the highest risk class (by contrast to Rule 21, Annex VII).

3. **The involvement of the Medical Device Coordination Group in conformity assessment procedures is not necessary** since it does not enhance patient safety and public health but considerably hampers fast patient access to new and innovative medical devices.

4. The "**assessment procedure in specific cases"** as adopted by the European Parliament in its report of 2 April 2014 on the Commission proposal (Article 44a) would establish a centralized 'double check' measure, which as currently worded, would basically duplicate the work already conducted by notified bodies. This would lead to substantial delays in making new innovative technology available to patients while not enhancing the level of patient safety.

5. It should be clarified that **where clinical data is already available**, e.g. from literature, **it is not required to carry out additional clinical investigations** for class III medical devices.

6. **Publicly available data** on clinical investigations shall be **limited to clearly specified pieces of information** in order to protect commercially sensitive information.

7. The Unique Device Identification (UDI) **should refer to the product batch level (one number for each lot / batch) but not require a different number for each individual product / pack**. This is **sufficient to allow for traceability and product recalls** and hence to increase patient safety. In this respect, the Commission Recommendation on the UDI points in the right direction as it distinguishes between product classes and does not require serialisation of individual packs (with unique numbers for each pack sold). The latter would result in extensive financial and logistic burden which (as can be seen from prescription medicines' serialisation) would not achieve any additional benefit for patient safety.

8. The general **transitional period of three years is too short** considering the significant transformation of the current market for medical devices. **A general transitional period of at least five years is necessary to achieve a smooth adjustment of the existing market** to the new regulatory framework as it is foreseen for in-vitro diagnostics (COM (2012) 541).

9. The **general exclusion of products that contain or consist of biological substances or organisms that are viable**, including living micro-organisms, bacteria, fungi or viruses from the scope of the proposal **is not justified** since it would impede the marketing of a wide range of efficient and safe medical devices.

10. **Aphaeresis devices should not *per se* be grouped into class III** as provided for in Rule 20, Annex VII but **should be classified taking into account their intended purpose and the actual inherent risk**.

1. Commission's right to categorize products (regulatory status of products)

According to Article 3(1) the Commission may, at the request of a Member State or on its own initiative, by means of implementing acts, determine whether or not a specific product, or category or group of products, falls within the definitions of 'medical device' or 'accessory to a medical device'. EUCOPE considers this provision highly questionable for various reasons. Firstly, it contradicts the established rule that it is the **responsibility of the Member States** to decide on the regulatory status of products on a case-by-case basis which is also included in the current proposal (Recital 8). Additionally, as implementing acts can be considered as "legislative measures" they must be deemed **generally unsuitable to regulate individual cases**. Furthermore, although the Commission's decision would concern individual cases, **no effective legal remedy exists** for a manufacturer to challenge an unjustified (often scientific) assessment of a product if it is taken by way of implementing act.

If however, an involvement of the Commission would be deemed necessary in terms of equal standards within the single market, it should only **apply under limited conditions**:

- The Proposal should allow for product determination by the Commission **only at request of a Member State** but not on the Commission's own initiative. This would respect the general responsibility of Member States as referred to in Recital 8 which is based on established case law (c.f. joined cases C-211/03, C-299/03 and C-316/03 to C-318/03, preliminary ruling *HLH Warenvertrieb and Orthica*). Also, where the Commission "on its own initiative" determines the regulatory status of a product there is a high risk of

conflicts with previous assessments of Member States' authorities which must be avoided in terms of legal certainty for the respective manufacturer.

- **Products that are already on the market** and those to be introduced during the transitional periods of the new regulation should **not be subject to any review** by the Commission (Art. 3). In these cases there has already been a comprehensive assessment of the product's regulatory status and physiological function on the Member State level under the previous legal regime. A re-assessment of these products by the Commission with potentially contradictory results would expose manufacturers to a high grade of legal uncertainty and endanger the market-supply with needed medical devices.

- With regard to the lack of legal remedies towards implementing acts the proposal should foresee a **strong involvement of the industry** and especially of all manufacturers concerned by the Commission's decision as well as the already existing Medical Devices Borderline and Classification Expert Group prior to the adoption of an implementing act. Also, according to Article 2(1) of the current proposal, the manufacturer's intention is a vital criterion for the determination whether or not a product is a medical device. The need for consultation should be outlined in the recitals and the relevant Article should be amended by introducing **mandatory consultations/hearings (including publication of their content)** of the respective stakeholders and the manufacturer concerned as a precondition for the adoption of an implementing act by the Commission.

- The Commission shall establish clear rules for the determination of the regulatory status of the product and apply these rules in a consistent way and shall give a comprehensive reasoning for its decisions.

2. Products composed of substances or combinations of substances that are intended to be ingested, inhaled (...) and that are absorbed by or dispersed in the human body

Combining the legal regimes for medical devices and medicinal products is inappropriate as due account must be made to the mode of action of the product.

The proposal provides for new rules for products composed of substances or combinations of substances that are intended to be ingested, inhaled or administered rectally or vaginally and that are absorbed by or dispersed in the human body. If those products fall under the definition of a medical device they are classified in the highest risk class (class III – Rule 21 of Annex VII) and must comply with the relevant requirements of Annex I of Directive 2001/83/EC on medicinal products for human use (Point 9.2 of Annex I).

When the Parliament adopted its report on the Commission proposal it deleted Point 9.2 of Annex I and Rule 21 of Annex VII which was welcomed by EUCOPE since a classification of such products in the highest risk class and an analogy to the rules for medicinal products did not sufficiently take the actual nature of these products into consideration. We understand, however, that there are concerns among the legislators that the complete deletion of Point 9.2 and Rule 21 does not sufficiently reflect the nature of substance-based medical devices and consequently their classification.

The crucial criterion for new classification rules and the applicability of the relevant requirements of Annex I of Directive 2001/83/EC must be the **principal intended action** of a product. **If absorption or a subsequent systemic dispersion is not intended, biodistribution as well as pharmacodynamic and pharmacokinetic studies as required by Annex I of Directive 2001/83/EC are not feasible**. Therefore, **it will *per se* not be possible to obtain all relevant clinical data in accordance with Annex I of Directive of 2001/83/EC.** Consequently, these products could not comply with the requirements laid down in Point 9.2.

Only where the substance **is absorbed and systemically dispersed** by the human body **for achieving its intended effect,** compliance with the relevant requirements laid down in Annex I to Directive 2001/83/EC might be possible. Thus, Point 9.2. of Annex I of the Commission proposal which reads as follows:

> "Devices that are composed of substances or combination of substances intended to be ingested, inhaled or administered rectally or vaginally and that are absorbed by **or** dispersed in the human body shall comply, by analogy, with the relevant requirements laid down in Annex I to Directive 2001/83/EC."

has to be changed as follows:

> Devices that are composed of substances or combination of substances intended to be ingested, inhaled or administered rectally or vaginally and that are **intended to be systemically absorbed by and** dispersed in the human body **for achieving their principal intended effect** shall comply, by analogy, with the relevant requirements laid down in Annex I to Directive 2001/83/EC.

It has to be expected that a great number of medical devices would have to be withdrawn from the market which would endanger the supply of safe and frequently used medical devices in the EU and thus put patient safety at risk. In addition, the attempt to combine the legal regimes for medical devices and for medicinal products is completely unknown in EU health legislation and will lead to legal uncertainties.

Furthermore, the **safety profile of these medical devices does not require a classification in the highest risk class (III)**. The original wording of the Commission proposal covers products that are absorbed by or dispersed in the human body **regardless whether or not absorption or dispersion is their principal intended action.** There are products on the market **which achieve their principal intended action without being absorbed or dispersed** (e.g. fat binder for weight management, simethicone for the treatment of flatulence and meteorism). However, absorption or dispersion is not needed to achieve the intended effect. **These products are tested for their tolerability in the human body according to ISO 10993 standards and there have not been any related safety issues.** The Commission's aim to ensure a high level of safety of these products is highly appreciated. This aim, however, is already achieved by the existing regulatory framework for medical devices which is fundamentally risk based and comparable to the pharmacovigilance requirements. It would not increase safety as those products have not been subject to serious safety concerns in the past.

EUCOPE suggests that the risk classification of substance-based medical devices reflects their intended action and the duration of use as laid down in Annex VII of the Proposal. This proposal would have the effect that products covered under Rule 21 would at least be in risk class IIa or higher, ensuring involvement of a Notified Body in the conformity assessment. Furthermore, using the duration of use to further define the different risk classes is an approach that is well established and clearly defined.

> Devices that are composed of substances or combination of substances intended to be ingested, inhaled or administered rectally or vaginally **are in class IIa if normally intended for transient or short term use and are in class IIb if normally intended for long term use**.
>
> Devices that are composed of substances or combination of substances intended to be ingested, inhaled or administered rectally or vaginally and **that are intended to be systemically** absorbed by **and** dispersed in the human body **for achieving their principal intended effect are in class III**.

3. Involvement of the Medical Device Coordination Group (MDCG)

EUCOPE sees no necessity to involve the to-be established MDCG in conformity assessments.

The Commission proposal provides for an establishment of a Medical Device Coordination Group (MDCG). According to Article 44 of the proposal the MDCG shall, *inter alia*, scrutinise conformity assessments for devices classified in class III and under certain circumstances for devices in lower risk classes. **These**

procedures could considerably delay the market entry and are not necessary to ensure patient safety and protect public health as the Commission proposal already provides for stricter and more detailed criteria to be observed by the Member States when designating and monitoring notified bodies. Additionally, any new designation of notified bodies and the monitoring of notified bodies are made subject to 'joint assessments' with the MDCG and the Commission. Consequently, an effective control of the qualification and standards of the work of notified bodies at EU level will be ensured. **Therefore, a further involvement of the MDCG in the conformity assessment procedure is not necessary and should be refrained from**.

4. No additional pre-marketing assessment procedure necessary to secure safety

The "**assessment procedure in specific cases**" (Article 44a) as adopted by the European Parliament in its report of 2 April 2014 on the Commission proposal **would establish a centralized 'double check' measure** and **would basically duplicate the work already conducted by notified bodies**. EUCOPE would like to underline that the Commission proposal - as mentioned before - already provides for stricter and more detailed criteria to be observed by the Member States when designating and monitoring notified bodies. These measures will meet the public's interest and secure the possible highest standards of patient safety.

5. Clinical evidence for class III products

In Recital 46 of the proposal it is stipulated that

"*To ensure a high level of safety and performance, demonstration of compliance with the general safety and performance requirements should be based on clinical data that, for class III medical devices and implantable medical devices should, as a general rule, be sourced from clinical investigations to be carried out under the responsibility of a sponsor who can be the manufacturer or another legal or natural person taking responsibility for the clinical investigation*."

It becomes obvious from this wording that exemptions to this rule are possible. This should be clarified in the wording of Recital 46 by adding a second sentence:

"If clinical data proving clinical evidence is already available at the disposition of the manufacturer, e.g. from literature, it is not required to carry out additional clinical investigations."

6. Registration of clinical investigations

EUCOPE considers it to be vital that only clearly specified information on clinical investigations will be publicly accessible.

The proposal provides for the sponsor's obligation to enter comprehensive information on clinical investigations into an electronic system set up by the Commission which shall be publicly accessible (Article 52(3)). Although the Commission acknowledges that confidentiality is justified to protect "commercially sensitive information", the proposal lacks a clear definition of this term. In particular, it has to be clarified that any data that might be the basis for a patent application or any other intellectual property right has to remain confidential. **Therefore, EUCOPE seeks that an amendment to the current proposal also includes a clear definition of the term "commercially confidential information".** Furthermore, an exhaustive enumeration of which information on clinical investigations shall be made publicly available is crucial to avoid any legal uncertainties.

7. Introduction of a Unique Device Identification (UDI) system

The introduction of a system that allows the identification and traceability of medical devices to enhance patient safety is generally welcomed. It is important, however, to bear in mind the experiences gained from pharmaceutical legislation where all prescription medicine packs generally have to be serialized with a unique

number for each pack (Article 54a Directive 2011/62/EU). This costly measure does not significantly contribute towards patient safety as product recalls can be done on the batch / lot level. Thus, the UDI **should refer to the product batch level (one number for each lot / batch) but not require a different number for each individual pack**. In addition, the EU institutions should bear in mind that where mass market **products with a low risk profile** are concerned, such as plasters or wound dressings, **a general exemption from the UDI system is appropriate**. The Commission has taken a similar approach with respect to OTC medicinal products which are, in general, exempted from the obligation to bear the safety features (Article 54a(1) of Directive 2011/62/EU).

8. Transitional periods

According to Article 97(2) of the proposal its provisions shall apply from **three years after it entered into force**. By contrast, the proposal for a regulation on in-vitro diagnostic medical devices (IVD – COM (2012) 541) stipulates that it shall be **applicable five years** after its entry into force due to the significant changes to the classification system for IVDs and to the conformity assessment procedures (c.f. Explanatory Memorandum, Point 3.9). The proposal on medical devices, however, will lead to a significant conversion of the regulatory system not only in relation to the classification system as explained above but also with respect to clinical evaluations and investigations or the identification and traceability of devices. This will result in an extensive transformation of the current market for medical devices which makes a longer transitional period necessary. **Therefore, EUCOPE calls for a minimum period of five years before the provisions of the Regulation are applicable.**

9. Scope of the Regulation

EUCOPE sees the need for a clarification to what extent biological substances are excluded from the scope of the Regulation. A general exclusion is not justified.

According to Article 1(2)(f) of the proposal the Regulation shall not apply to products that contain or consist of biological substances or organisms other than those referred to in Article 1(2)(c) and (e) that are viable, including living micro-organisms, bacteria, fungi or virus. **This general exclusion is not justified.** "Biological substances" is an umbrella term for a wide range of products, some of which just exhibit a physical mode of action, e.g. *lactobacillus gasseri* for the treatment of bacterial vaginosis. Lactobacillus gasseri has been granted a GRAS (**G**enerally **R**ecognized **A**s **S**afe) status by the FDA, and its intended purpose is not achieved by pharmacological, immunological or metabolic means. Such products clearly fall within the definition of a medical device and cannot be approved as medicinal products as they have no medicinal activity. To exclude such products from the scope of the Regulation would lead to a *de facto* prohibition of such products which is not justified since these products are legally on the market without any relevant risk potential. The general exclusion of biological substances in the future would result in a loss of efficient and safe medical devices and impede innovations in this growing market. **Therefore EUCOPE considers it to be vital that Article 1(2)(f) of the proposal which currently reads**

> **"***products that contain or consist of biological substances or organisms other than those referred to in points (c) and (e) that are viable, including living micro-organisms, bacteria, fungi or viruses***"**

is amended in the following way:

> *"products that contain or consist of biological substances or organisms other than those referred to in points c) and e) that are viable* ***and that achieve their intended purpose by pharmacological, immunological or metabolic means, such as certain*** *living microorganisms, bacteria, fungi or virus;".*

10. Classification of aphaeresis devices

According to Rule 20 of Annex VII "All devices intended to be used for aphaeresis, such as aphaeresis machines, sets, connectors and solutions, are in class III" whereas, in the past, these products were included in class IIb. **There is no scientifically and medically sound reason why these devices should be generally classified as class III products**. The classification of aphaeresis machines, sets, solutions and connectors should be assessed by taking established classification criteria into account, namely the potential risks associated with the technical design and manufacture. A general classification of tubing sets, connectors and solutions in class III constitutes an **unreasonable and thus unjustified burden for the manufacturer as such products are used for a large variety of other medical devices,** e.g. devices for dialysis in renal failure which are not generally grouped in class III.

The Commission has justified this re-classification with incidents that had occurred to blood plasma donors and a request submitted by France. **However, experience gained from vigilance and market surveillance proves that aphaeresis is a reliable and safe therapeutic method**. Furthermore, the proposal also significantly strengthens the position of notified bodies vis-à-vis manufacturers, including their right and duty to carry out unannounced factory inspections and to conduct physical or laboratory tests on devices. This will result in an enhanced safety for all medical devices including aphaeresis devices. **Thus, a *per se* classification of these devices in class III would be unproportional**.

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