Legal and Regulatory Update

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This section is intended to be a synopsis of recent legal developments and is not intended to be exhaustive. If any issue referred to in this section is to be relied on, specific advice should be sought. Please contact:

Gerry Kamstra
Bird & Bird
90 Fetter Lane
London EC4A 1JP
Tel: +44 (0)20 7415 6000
Fax: +44 (0)20 7415 6111
E-mail: Gerry.Kamstra@twobirds.com
Website: www.twobirds.com

John Wilkinson
Reed Smith
Minerva House
5 Montague Place
London SE1 9BB
Tel: +44 20 7403 2900
Fax: +44 20 7403 4221
E-mail: jwilkinson@reedsmith.com
Website: www.reedsmith.com

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NOTES FROM THE EU

EU: Enlarged Board of Appeal decides on the requirements for divisional applications

In the decision G 1/06 the Enlarged Board of the European Patent Office ('EPO') dated 28th June, 2007, the EPO ruled on the requirements for divisional applications and the possibilities for amending divisional applications later. The issues underlying the decision were raised by two Boards of Appeal at the EPO which indicated an intention to deviate from the EPO's long-standing practice for dealing with divisional applications.

This latest decision has therefore been eagerly anticipated as it clarifies a number of issues relating to the formal requirements for handling divisional applications before the EPO.

In particular, in the life sciences field, the breadth of claims usually filed in a parent application in order to get the broadest scope of protection possible can often lead to unity problems – either *a priori* or *a posteriori*. Therefore, the tool of filing one or more divisional applications relating to subject matter in a parent application which cannot be maintained therein (for one reason or another) is of great importance and the answers provided by the EPO are significant interest to the life sciences sector.

The questions before the Enlarged Board of Appeal related to the requirements of Article 76(1) EPC which stipulates that a divisional application may be filed only in respect to subject matter which does not extend beyond the content of the parent (earlier) application as filed. Insofar as this provision is complied with, the divisional application shall be deemed to have been filed on the date of filing of the earlier application and shall have the benefit of any right to priority.

Similarly, Article 123(2) EPC covers amendments to an application or patent in opposition proceedings and provides that an application or a patent may not be amended in such a way that it contains subject matter which extends beyond the content of the application as originally filed.

The first question that was referred to the Enlarged Board of Appeal was whether a divisional application which was filed containing subject matter, extending beyond the content of the parent application as originally filed (therefore contrary to Articles 76(1) and 123(2)), can be amended after filing and still maintain the filing date of the parent application. The Enlarged Board of Appeal decided that the purpose of Article 76(1) being, in particular, to establish a substantive requirement for the grant of the divisional application, does not justify the conclusion that a divisional application which does not conform to the provision on filing, is invalid. This means that the hitherto existing practice of the EPO in objecting to a divisional application which did not fulfil the requirements of Article 76(1) and giving the applicant a chance to remedy the deficiency, has now been confirmed by the Enlarged Board of Appeal.

The second question and, connected therewith, the third question raised was whether it is still possible to amend a divisional application in order for it to meet the requirements of Article 76(1) EPC when the earlier application is no longer pending and whether there are any further limitations of substance to the amendment beyond those imposed by Articles 76(1) and 123(2) EPC. In the Enlarged Board of Appeal's view, according to Article 76(1) EPC, a divisional

application is a new application which is separate and independent from the parent application.

Consequently, the Enlarged Board of Appeal decided that an amendment to remove added matter not disclosed in the parent application as filed from the divisional application as filed is permissible irrespective of whether the earlier application is still pending or not.

The second set of questions raised was whether there are any specific requirements in the situation in which a divisional application is filed, based on another divisional application, such that the divisional application which is based on another divisional application can only relate to subject matter in the claims of the parent (earlier) divisional application. The Enlarged Board of Appeal held that in the case of a sequence of applications consisting of a root (originating) application followed by divisional applications, each divided from its predecessor, is it a necessary and sufficient condition for a divisional application of that sequence to comply with Article 76(1) EPC that anything disclosed in that divisional application be directly and unambiguously derivable from what is disclosed in each of the preceding applications as filed, that is, the whole content of the application and not only the claims.

In summary, the Enlarged Board of Appeal has now restored legal certainty with regard to the requirements of filing divisional applications and has essentially confirmed the long-standing practice of the EPO in that:

(i) divisional applications can be amended after filing in order to remedy any deficiencies with regard to added matter compared to the parent application; and
(ii) divisional applications, irrespective of whether the parent application itself was a divisional application or not, are subject to the same requirements as any other application and there are no additional limitations for divisional applications provided for in the EPC.

In the recent Dutch patent case between Applera (represented by Bird & Bird) and Stratagene, an Article 76 defence was raised. However, as the Enlarged Board of Appeal's decision had become available shortly before the hearing, it was invoked by Bird & Bird on behalf of Applera. In one of the first cases in which the Enlarged Board of Appeal's decision has been applied, the District Court of The Hague consequently rejected the Article 76 validity defence in its judgment of 13th July, 2007.

EC: Regulation on Advanced Therapy Medicinal products to enter into force

Regulation No 1394/2007 on advanced therapy medicinal products will enter into force on 30th December, 2007 and will apply from 30th December, 2008. The Regulation amends the Community code relating to medicinal products for human use (Directive 2001/83/EC) and the Regulation setting out the Community authorisation procedures for medicinal products (No 726/2004).

The purpose of the Regulation is to facilitate research, development and authorisation of advanced therapy products and to improve patient access to them. The Regulation covers new forms of treatment such as gene therapy, somatic cell therapy and tissue engineering which are neither drugs nor surgery as traditionally defined. Gene and cell therapies are currently being tested at a clinical level for the treatment of specific genetic diseases, rare cancers and other neurodegenerative disorders. Tissue engineering combines various aspects of medicine, biology and engineering, to produce, repair or replace human tissues. Tissue engineering can use human or animal cells or tissues or a combination of them and may also use other bio-materials and molecules or chemical substances, scaffolds or matrices. These new therapies have enormous potential to improve the quality of life of patients.

However, advanced therapies are based on complex and new manufacturing processes and the creation of an EU regulation is a way of addressing this complexity by offering a framework to support advancement and to ensure patient safety. The Regulation creates a centralised European marketing authorisation process for the authorisation, supervision and pharmacovigilence of advanced therapy medicinal products. The Regulation also creates a Committee for Advanced Therapies (CAT) within the European Medicines Agency to bring together expertise from different Member States to enable the evaluation of such products and to provide advice on the authorisation process, long-term follow-up of patients and risk management strategies for the post-authorisation phase. CAT will be in charge of developing criteria and guidelines for the evaluation of these products.

The recitals to the Regulation state that it should not interfere with decisions made by Member States on whether to allow the use of any specific type of human cells, such as embryonic stem cells or animal cells. Furthermore, it should not affect the application of national legislation prohibiting or restricting the sale, supply or use of medicinal products containing, consisting or derived from these cells.

The Regulation applies existing Community legislation with respect to donation, procurement and testing of human cells or tissues, clinical trials, good manufacturing practice and medical devices. It sets out the evaluation, labelling and post-authorisation procedures for advanced medical products. There are also transitional provisions for advanced therapy medicinal products and tissue engineered products that are legally on the Community market when the Regulation comes into force; these products must comply with the Regulation by 30th December, 2011 and 30th December, 2012, respectively.

Further information can be found at the EMEA medicines and emerging science website http://www.emea.europa.eu/htms/human/mes/advancedtherapies.htm and the Commission's website for the Regulation http://ec.europa.eu/enterprise/pharmaceuticals/advtherapies/index.htm.

EU: EPC 2000 introduces changes to the patentability of second and subsequent medical use of known compounds

The European Patent Convention 2000 ('EPC 2000'), which will enter into force on 13th December, 2007, will introduce wide ranging changes to substantive patent law throughout Europe. Of particular interest to the life sciences sector will be the changes introduced in respect of the protection of second and subsequent medical uses of known substances.

At present, the EPO allows a first medical use of a substance to be patented, that is, in claims of the form 'substance X for use as a medicament'. But claims in this form for the use of the same substance for treatment of a further medical condition (ie a second or subsequent medical use) are not permitted. This restriction stems from the fact that methods for treatment are specifically excluded from patentability and claims for second and subsequent uses are considered to fall foul of this prohibition. As a result, so-called Swiss-style or 'second medical use' claims (ie *the use of compound X in the manufacture of a medicament for the treatment of disease Y*) have traditionally been used to circumvent the problem. Such claims get round the exclusion by inserting a requirement for 'manufacture'.

Under the EPC 2000 however, Swiss-style claims will no longer be necessary as purpose-related product protection for a second (and subsequent) medical use of a known substance can be achieved by using a simplified claim, for example, the language 'substance X for use in a method for treating medical condition Y'.

The source of this change is Article 54(4) of the EPC 2000 which provides that the state of the art '*shall not exclude the patentability of any substance or composition, comprised in the state of the art, for use in a method referred to in Article 53(c)* [method of treatment of the human/animal body], *provided that its use for any such method is not comprised in the state of the art*'.

Swiss-style claims are still possible under the EPC 2000 but are no longer required, although applicants may be well advised to continue including Swiss style claims in addition to the 'new' format claims until the national courts and/or EPO Board of Appeal have decisively clarified that there are no substantive differences in the scope of protection offered by the respective claims formats.

These changes will apply to all European patent applications still pending when the EPC 2000 comes into force on 13 December and to those filed thereafter.

New ECJ reference in relation to Supplementary Protection Certificates for Medicinal Products

The latest reference to the ECJ under Council Regulation (EEC) No 1798/92 concerning the creation of a supplementary protection certificate for medicinal products, which establishes the scheme by which Supplementary Protection Certificates (SPCs) enable *de facto* patent term extension of up to five years to be secured for pharmaceuticals, concerns the time limit for filing an application for such an SPC. Where the basic patent that it is sought to 'extend' by an SPC has already been granted, Article 7(1) of the Regulation requires that such application be filed within six months of the grant, in or effective in the member state where the SPC is sought, of the first authorisation to place a product on the market as a medicinal product.

This deadline can present problems for applicants who are not also the applicant for a marketing authorisation in seeking to file an SPC application within such deadline because in some Community member states, such as the UK, marketing authorisations are not published until some time, and occasionally some months, after their nominal date of grant. However the UK Patent Office, in its Decision of 25th July, 2002 in *Abbot Laboratories SPC Application* [2004] RPC 20, held that the relevant date was when the authorisation took effect under national law and, under such national law, rejected a submission that it was the date of publication of the grant that should count for such purposes.

The ECJ has now been asked by the German Federal Supreme Court to rule on the point. The reference, Case C-452/07, *Health Research Inc.* poses the following two questions:

(1) Is the 'date on which the authorisation referred to in Article 3(b) to place the product on the market as a medicinal product was granted', referred to in Article 7(1) of the Regulation determined according to Community law or does that rule refer to the date on which authorisation takes effect under the law of the Member State in question?
(2) If the Court's answer is that the date referred to in Question 1 is determined by Community law, which date must be taken into account for that purpose?

However, even if the effect of the ECJ decision once it is given, probably in 2009, is that the relevant date is that of the nominal grant of a marketing authorisation, and not for example that of its publication, an applicant that has not filed its application for an SPC within the time fixed by Article 7(1) may in certain Community jurisdictions still be allowed so to do so out of time in certain cases. Thus in the UK, in the *Abbot Laboratories SPC Application* discussed above, the UK Patent Office in the exercise of its discretion allowed such an application to be filed out of time, where the late filing had

occurred as a consequence of a corporate acquisition, the purchaser and the seller each reasonably believing that the other was attending to it, and where they had acted promptly as soon as they became aware of the irregularity. In that case the applicants also identified cases in France, the Netherlands, Sweden and Luxembourg where such late filings had also been allowed on the specific facts of those respective cases.

UK: the OFT's report into medicines distribution in the UK

On 11th December, 2007, the Office of Fair Trading ('OFT') published its long awaited report into the distribution of medicines in the UK.

Until recently, branded prescription medicines were distributed to retail pharmacies via a number of distributors, all competing to attract pharmacies' and manufacturers' business. The manufacturer would supply medicines to the wholesaler typically at a 12.5 per cent discount to the list price and then the wholesaler would supply the pharmacy offering a discount of, on average, 10.5 per cent.

The OFT's study was instigated over concerns raised by Pfizer's decision in March 2007 to start to distribute its prescription drugs exclusively through a single wholesaler, UniChem. A number of manufacturers, including AstraZeneca, Eli Lilly and Novartis have now also indicated that they may implement changes to the way in which they distribute their medicines, including the use of new distribution schemes known as 'direct to pharmacy' ('DTP') schemes.

Under a DTP scheme, the manufacturers set the prices paid by the pharmacies and simply pay the wholesaler a fee for delivering medicines to the pharmacies. The benefit of DTP schemes to manufacturers is the increased ability to control the distribution of their medicines and also the prices paid by pharmacies.

The study investigated the potential impact, principally in terms of competition and choice, of DTP schemes, focussing in particular on the Pfizer/UniChem exclusive DTP arrangement. It also looked at the likely effects of other manufacturers following suit and either introducing DTP schemes or reducing the number of distributors used.

The OFT has found that there is a 'significant risk' that such schemes could result in higher costs for the NHS (a claim denied by Pfizer), along with potentially longer waiting times for pharmacies and patients to receive medicines as a result of inefficient distribution. The OFT also warned that the widespread use of exclusive distribution arrangements could lead to longer-term competition concerns, although it did not recommend further immediate action at this stage.

The OFT has however recommended:

(i) that the Department of Health makes the necessary changes to the Pharmaceutical Price Regulation Scheme ('PPRS'), which is currently in the process of renegotiation, to ensure that the costs of medicines to the NHS does not rise as a result of these new schemes. The OFT's proposals in this regard are to either reduce PPRS list prices by an amount equivalent to the average discounts received by pharmacies or for pharmaceutical suppliers to offer a minimum list price discount to pharmacies; and
(ii) the adoption of minimum service standards by manufacturers to discourage any drop in the services currently being delivered to pharmacies.

The Government now has 90 days to respond to the recommendations of the OFT.

UK: Declaratory jurisdiction of the English Courts as to certain aspects of the validity of divisional patent applications that are still pending at the EPO

Given the speed with which patent matters can be brought to full trial on the merits in

the English courts, it is now well-established practice to require those seeking to introduce a generic version of a well-established pharmaceutical to 'clear the path' of any patents that might block the way and be asserted against them, whether by seeking to revoke such patents, or seeking a declaration of noninfringement, or both. However, to date, such jurisdiction has only been available for granted patents and not in respect of pending applications. The decision of Mr Justice Kitchin in the Patents Court of 31st July, 2007 in Arrow Generics Limited and anr *v* Merck & Co, Inc [2007] EWHC 1900 shows that the English courts are prepared in principle to make declarations as to some aspects of the validity of patent applications.

The Arrow decision is the latest in the long running alendronate saga. The patent applications in question are pending divisionals in the EPO of the Merck '292 patent for a dosing schedule of alendronate. The UK designation of the '292 patent was revoked by the Patents Court in January 2003, for *inter alia* lack of novelty and inventive step; and the Court of Appeal confirmed this in November 2003. The '292 patent, which proceeded to grant in November 2001, had also been centrally opposed at the EPO.

In July 2004 the EPO Opposition Division revoked the '292 patent, also on lack of novelty and inventive step; and the EPO Technical Board of Appeal upheld the revocation in March 2006, but on different grounds and without getting to the issues addressed by the Opposition Division. Meanwhile, Arrow and other generic manufacturers had entered the UK market with their alendronate products. One of the divisionals of '292 had proceeded to grant but as the UK designation of this had been withdrawn before grant, the Patents Court found it had no jurisdiction over this. There is also case law under which the Patents Court had previously declined to entertain a declaration that an applicant 'had not infringed any valid claim' of a patent.[1] In the particular circumstances of this case the Patents Court was prepared to allow Arrow to seek a declaration that its own product lacked inventive step at the priority date of the other still pending divisionals, thereby enabling Arrow again to clear the path, but without having to await the grant of such other divisionals.

Although this particular decision arose under a somewhat special set of circumstances, the increasing use of divisionals practice in Europe, which can only now have been further encouraged by the recent favourable decision of the EPO Enlarged Board of Appeal in Decision G 0001/05 of 28th June, 2007, may well mean that this new declaratory jurisdiction will find increasing favour in the future.

Sweden: The Swedish system of generic substitution, interchangeability between reference drugs and generics

In order to place a generic drug on the market in Sweden, it must first be approved by the Swedish Medical Products Agency (the 'SMPA') or the European Medicines Agency, as the case may be. Following approval, the Pharmaceutical Benefits Board ('PBB') will determine whether the generic will be included in the Pharmaceutical Benefits Scheme ('PBS') and thus be subsidised by the Swedish state.

As a general principle, if a drug covered by the PBS has been prescribed but there is one (or more) less expensive, substitutable drug available, then the drug shall be substituted with the least expensive substitutable drug available. A drug will not be substitutable if it differs from the reference drug to such an extent that it cannot be considered equivalent. The issue whether a generic drug is interchangeable with a specific reference drug is decided by the SMPA.

A dispute between a Swedish producer of a reference drug and the SMPA arose when the SMPA decided that a previously approved

generic drug was considered to be interchangeable with the producer's reference drug. The producer of the reference drug claimed that the drug should not be considered interchangeable due to, *inter alia*, an alleged discrepancy in the safety profile between the reference drug and the generic. Furthermore, the producer also claimed that the SMPA's initial decision to grant a marketing authorisation for the generic was based on insufficient evidence and therefore the SMPA had failed to ensure that the matter was thoroughly investigated. The SMPA argued that the facts on which the decision to grant the marketing authorisation were based were not relevant to the dispute regarding the products' interchangeability.

In the judgment (case no. 8075-05) delivered on 16th February, 2007, the Swedish Administrative Court of Appeal held that even though the court is unable to overturn (in the case on interchangeability) the SMPA's decision to grant the marketing authorisation, the court is responsible for examining all objections raised in the trial regarding the products' interchangeability. However, the court reached the conclusion that the drugs were *de facto* substitutable. The reference producer's action was therefore dismissed.

While this judgment is unlikely to significantly affect pharmaceutical producers' activities, it clearly shows that there are several ways for a producer of a reference drug to interfere with the marketing approval of competing generics.

The Netherlands: New developments in Dutch patent litigation: Evidential seizure

The pharmaceutical company Teva Pharmaceuticals Europe B.V. *et al.* has won its lawsuit against Abbott Laboratories Inc in the Court of The Hague, The Netherlands (Judgment of 25th July, 2007). This is one of the first decisions since the implementation of the Enforcement Directive into Dutch law.

Based on this recently introduced legislation, owners of intellectual property rights have a number of new instruments, such as *ex parte* proceedings, to preserve evidence of alleged infringements of their intellectual property rights, including evidential seizures. Evidential seizures are now an important weapon for enforcing intellectual property rights and combating infringement and have been used frequently since 1st May, 2007. However, this weapon should be treated with a degree of caution.

On the basis of these new provisions, Abbott had levied prejudgment evidential seizures at the premises of Teva asserting that there was an imminent infringement of Abbott's patent rights. Various documents relating to the alleged imminent infringement were seized and descriptions of the documents made.

In the lawsuit filed by Abbott, Abbott requested that the Court allow it to inspect the seized and described documents, while Teva, by way of a counteraction, asked that the Court lift the seizures.

Ruling on several issues, the Court found that the seizures had to be considered unlawful and should be lifted. The Court held that, not only had the seizures been levied in the name of the wrong Abbott entity but also more importantly, although the threshold for the evidence required to instigate evidential seizures was not as high as in ordinary patent infringement (preliminary relief) proceedings, Abbott had not made out a plausible argument that there was a threat of infringement. Abbott only submitted evidence that Teva had applied for marketing authorisations in various countries and was preparing the launch of a generic product, without any evidence that these marketing authorisations were actually going to be used prior to the expiry of Abbott's patents.

In an important decision, the Court found that it was established case law in The Netherlands that the mere application for a marketing authorisation does not constitute patent infringement. The fact that a marketing

authorisation must be used within three years (the so-called 'sunset' clause) does not constitute sufficient threat of infringement to justify evidential seizure actions. The Court recognised that it was of the utmost importance to generic manufacturers that they be in a position to enter the market as soon as possible after the relevant patent protection expires.

Finally, the Court held that the seizures had to be lifted as Abbott had failed to institute the 'main action' in a timely fashion. Only an infringement action on the merits could be regarded as a main action; preliminary injunction proceedings for inspection of seized documents could not.

The Netherlands: Implications of the new Medicines Act in the Netherlands

On 1st July, 2007, the new Medicines Act ('Geneesmiddelenwet') entered into force in The Netherlands. The new Medicines Act implements European Directives and deregulates and simplifies the pharmaceutical provision in The Netherlands. It replaces the old Medicines Act of 1963 and its accompanying delegated legislation. Some important changes are highlighted below.

Administrative fines

The new Act enables the Public Health Inspectorate to impose considerable administrative fines for violating certain provisions of the Act. Under the old Medicines Act, only criminal penalties were possible and these were often considered to be inappropriate. The level of the administrative fines has been set out in policy guidelines with the maximum amount being €450,000 for each violation. The administrative fines can be imposed upon both pharmaceutical companies and practitioners, for example, in the case of practitioners accepting gifts or hospitality.

Advertising

The Medicines Act no longer makes an exception for advertising which is exclusively intended as a reminder of the name of the medicinal product. This kind of advertising (eg pens bearing the name of a medicinal product) has to be regarded as written advertising and must therefore set out the summary of product characteristics.

Prescription through the internet

The new Act includes more stringent rules for prescription of medication through the internet. An internet prescription is prohibited where the practitioner does not know the patient, has never met the patient and does not have the medication history of the patient available.

Obliged to report adverse reactions

Under the new Act, practitioners are obliged to report severe adverse drug reactions to the Netherlands Pharmacovigilance Centre.

Changes to definitions

The definition of 'practitioner' now includes certain nurses under the new Medicines Act. The Ministry of Health may appoint categories of nurses with the power to prescribe medicines. Until now, the Ministry has not done so.

The definition of 'medicinal product' in the new Medicines Act is now consistent with the Medicines Directive 2001/83/EC.

Homeopathic products

A major change for homeopathic medicinal products in the new Act is the obligation to demonstrate the effectiveness of homeopathic medicines with an indication. This obligation also applies to homeopathic products which are already registered, in which case the effectiveness has to be demonstrated by means of clinical data within 18 months.

The practicalities of some of these amendments have already raised questions and the Ministry of Health, Public Health

Inspectorate and self-regulatory bodies are currently discussing how best to tackle these recent changes. It remains to be seen how these new changes may be carried out in practice.

The Netherlands: Alternext Amsterdam – An attractive alternative?

Most small and midsized companies attempt to obtain financing for their future growth and development by getting loans from financial institutions and private parties. However, it is sometimes unattractive or even impossible for these small and midsized companies to attain loans against fair conditions, for various reasons, such as an inability to provide sufficient collateral. As an alternative, such companies may attempt to acquire financing by making use of the flexibility of the capital markets.

In 2006, Euronext, following the great success of both AIM (Alternative Investment Market) in London and Alternext Paris and Brussels, launched Alternext Amsterdam, a Stock Exchange regulated market. The objective of Alternext Amsterdam is to form an alternative route for small and midsized companies that want to enter the capital markets under a lighter regulatory regime, that is, without the extensive requirements regarding financial reporting, market abuse and corporate governance of a regulated market (gereglementeerde markt). Any company, regardless of its industrial sector or country, may request a listing on Alternext Amsterdam. The total of Alternext listed companies in Paris, Brussels and Amsterdam now amounts to 114.

The securities applying for listing on Alternext Amsterdam must be freely negotiable and transferable. Moreover, the company must present the financial statements of at least two years. The listing is contingent upon the securities being in public hands. This can be achieved in two ways:

(i) a public offer subscribed for at least €2.5m (whereby a prospectus should be published); or
(ii) a private placement of at least €5m, made in the two preceding years, distributed among at least five qualified investors (as defined in the Dutch Act on the financial supervision (Wet op het financieel toezicht) which includes professional investors).

All companies seeking to be listed on Alternext Amsterdam must have, both during the preparation of the listing and throughout its listed life on Alternext Amsterdam, a listing sponsor. This listing sponsor is an audit firm, bank or corporate finance advisor that has been appointed by Euronext as an official Alternext listing sponsor. The listing sponsor helps the applicant to prepare for the admission to Alternext and will furthermore function as a long-term financial partner that monitors and guides the listed company throughout its listed life.

The Netherlands: Inclusion in the G-Standard of a generic medicine held not to be infringing

In Glaxo Group Ltd *v* Pharmachemie B.V., the District Court of The Hague was asked to consider the question whether the inclusion of the generic medicine Ondansetron in the so-called 'G-Standard' prior to the expiry of the patent protection (of a second medical use of) this medicine constituted patent infringement. In its judgment of 4th July, 2007, the court answered that it did not.

The G-Standard is a database published by the company Z-Index B.V., a subsidiary of the Royal Dutch Pharmaceutical Society (KNMP). The database was set up in 1985. It served to meet the need among pharmacists to have an effective tool for reimbursement from health insurers. Over the years, the G-Standard has become a multi-function central information source for all relevant parties in the public health environment. It is

no longer used by pharmacists alone, but also by manufacturers, wholesalers, general practitioners and insurance companies.

Pursuant to Section 53(1) the Dutch Patent Act 1995, the patentee has the exclusive right to make, use, put on the market or resell, hire out or deliver the patented product or the product directly obtained by a patented process, or otherwise deal in it in or for his business, or to offer, import or stock it for any of these purposes. Glaxo argued that the inclusion in the G-Standard of generic Ondansetron had to be considered an 'offer' for any of the given purposes, or at least an offer in the sense of Section 53(1). The District Court did not agree.

The District Court held that the mere publication of a generic medicine in the G-standard could not automatically be understood to be an offer to perform acts reserved for the patentee in relation to that medicine. The District Court considered that the G-standard was primarily a tool for acts including ordering and supplying medicines, rather than a platform for offering medicines. The publication of a medicine in the G-standard could therefore be regarded as a preparatory act for the supply of the medicine, rather than as an offer in its own right.

The District Court also ruled that Pharmachemie had not used the G-standard as a tool to offer generic Ondansetron. Pharmachemie included generic Ondansetron in the G-standard of June 2006 (published mid-May 2006) in order to facilitate the trade in the medicine upon the expiry of the patent on 24th June, 2006. The District Court considered that including Ondansetron in the G-standard was necessary for this because if the medicine were not published in the G-standard: (i) it could not be included in patient and medication control systems; (ii) it could not be paid for by health insurers; and (iii) logistical problems would arise. In addition, the District Court held that the publisher of the G-standard, Z-index, used a strict monthly production schedule. Furthermore, Pharmachemie explicitly informed the customers of the G-standard via a so-called 'Taxebrief' (of 29th May, 2006) that it would not supply generic Ondansetron before 25th June, 2006.

The District Court held that in this light, a reasonable interpretation of the law entails that the mere fact that the information from the G-standard of June 2006 was available a few weeks before the expiry date of EP 266 should not be regarded as an offering of generic Ondansetron.

NOTES FROM THE US

SPECIAL UPDATE: THE FDA AMENDMENTS ACT 2007

The Food and Drug Administration Amendments Act of 2007 took effect on 1st October, 2007 and represents the most comprehensive overhaul of food and drug law in the US in ten years. The 2007 Amendments implement several major changes to the Federal Food, Drug, and Cosmetic Act ('FDCA'), which include in summary:

1. the increase of the Food and Drug Administration's ('FDA') regulatory authority to monitor the safety of marketed drug products and medical devices;
2. the addition of incentives for development and oversight of paediatric drugs and devices;
3. the reauthorisation, increase, and addition of new user fees for prescription drug and device products for another five years; and
4. the strengthening of food safety requirements.

One notable omission is provisions to permit FDA approval of generic or 'follow-on' biologics, a contentious topic that continues to be debated by Congress.

Summary

The 2007 Amendments give FDA the authority to:

- require post-approval labelling changes to strengthen safety information on prescription drugs;
- impose new civil monetary penalties for certain violations of the FDCA;
- collect fees for advisory review of television advertisements for prescription drugs;
- assess special user fee rules for positron emission tomography drugs, and
- apply new annual fees for registration of device establishment and filing periodic reports.

The 2007 Amendments also provide medical device manufacturers with additional incentives to develop certain medical products.

In particular, the Amendments:

- provide incentives for the development of medical devices for paediatric patients;
- permit manufacturers of paediatric 'humanitarian devices' to add a profit when charging for the use of a device; and
- streamline third-party device inspections.

The FDA will also benefit from expanded food safety authority. The agency is now required to take proactive steps to ensure food safety, including the establishment of the following:

- an early warning and surveillance system to identify pet food adulteration and associated illnesses;
- processing and ingredient standards for pet food;
- improved communication requirements for ongoing recalls of both human and pet food;
- procedures to work with the states to improve the safety of fresh and processed produce; and
- an Adulterated Food Registry with alert procedures.

The FDA has also received additional oversight responsibilities for genetic test safety and quality, and the 2007 Amendments provide exclusivity for certain drugs containing enantiomers. These changes are described in more detail below.

Paediatric research

The 2007 Amendments re-authorise the Paediatric Research Equity Act ('PREA'), and amend the FDCA, to encourage drug and biological product manufacturers to conduct more paediatric studies, strengthen requirements for labelling changes based on paediatric studies, and report adverse events.

Paediatric research assessments required for new drugs and biologics

Applicants submitting new drug and biologic applications – including supplements to existing applications for a new active ingredient, indication, dosage form, dosing regimen, or routes of administration – are required to include a paediatric assessment. The assessment must provide sufficient data about all relevant paediatric populations to assess safety and efficacy and to support appropriate dosing for the intended indication. Orphan drugs are exempted, unless otherwise required by regulation.

In certain circumstances, a paediatric assessment may be deferred until a specified date. Applicants may also apply for a partial or full waiver of the requirement to provide an assessment. A waiver may be granted where the applicant demonstrates that:

- it would be 'impossible or highly impracticable' to perform such a study;
- the product would be 'ineffective or unsafe in all paediatric age groups';
- the product would not provide 'meaningful therapeutic benefit';

- the product would not likely be used 'in a substantial number' of children; or
- a paediatric formulation of the product is not possible.

To ensure the ongoing review of paediatric plans, assessments, and deferrals, the 2007 Amendments require FDA to establish an internal committee.

Labelling changes required for waivers and assessments

When a determination is made that a paediatric assessment does or does not demonstrate that the product is safe and effective for use in children, or that the results are inconclusive to such a determination, this information must be provided in the product labelling. Any full or partial waiver of the paediatric assessment requirement must also be included in the product labelling.

Paediatric adverse event reporting required

With effect from 1st October, 2007, for the one-year period following a paediatric-specific labelling change, all adverse event reports ('AERs') for that product, regardless of when received, must be forwarded to FDA's Office of Pediatric Therapeutics ('OPT'). In considering such AERs, as well as any recommendations from the Pediatric Advisory Committee, the OPT will determine whether any further action should be undertaken. After the first year, AERs will be referred to OPT 'as appropriate'. Review of AERs in this manner is intended to 'supplement, not supplant' other FDA AER review mechanisms and processes.

By 1st October, 2008, the FDA committee reviewing paediatric assessments in submissions must conduct a retrospective review of the assessment and deferral process.

Failure to submit a paediatric assessment with a supplement to an application will result in the product being considered misbranded. Failure to implement recommended labelling changes will render the product misbranded. Misbranding may subject the product and the applicant, manufacturer, and distributor to enforcement actions, such as seizure, injunction, and criminal penalties.

Best Pharmaceuticals for Children Act of 2007

Recognising that children are not the same as adults and highlighting the need to study the effects of drugs in children, the 2007 Amendments broaden the scope of the Best Pharmaceuticals for Children Act ('BPCA II') by increasing the number of drugs that should be studied in and labelled for children.

The 2007 Amendments encourage paediatric research in drug products that are off patent by providing additional marketing exclusivity. The Amendments also strengthen requirements for labelling changes, require AERs, and establish a programme to identify and prioritise products for study in paediatric populations.

Additional marketing exclusivity for paediatric drugs provided

BPCA II extends various marketing exclusivity and patent extension periods currently available under various provisions of the FDCA. An applicant is eligible to receive periods of marketing exclusivity and patent term extensions when an FDA-requested paediatric study is completed and the results are accepted by FDA.

Priority review offered for paediatric labelling changes

As a further incentive to conduct paediatric studies, any new drug application or supplement to an existing application that proposes labelling changes based on new paediatric use information resulting from clinical trials will receive priority review by FDA.

Adverse event reporting and labelling changes required

Consistent with FDA's heightened focus on post-approval safety, where a paediatric study of a new drug or already marketed drug has been completed, the applicant or manufacturer

of the product must submit all post-approval AERs.

Proposed paediatric study implemented

To enable paediatric studies, the Secretary, in collaboration with the Director of NIH and the Commissioner of FDA, will develop and publish, and annually update, a list of priority paediatric products with therapeutic, efficacy, or safety gaps that merit study.

There are no new penalties applicable for violation of the new rules.

Paediatric medical device safety

The 2007 Amendments implement the Paediatric Medical Device Safety and Improvement Act ('PMDSI') of 2007 to address growing concerns that medical devices are not developed or tested for the safe and effective use in paediatric populations, including for the treatment of paediatric diseases and paediatric differences in physique.

Paediatric assessments and tracking required in PMAs

The PMDSI establishes processes to assess and track paediatric population needs for devices and methods to reduce the number of clinical studies needed for approval. Manufacturers submitting PMAs will now be required, where possible, to include information that describes any paediatric subpopulations and the number of such patients with the disease or condition that the device is intended to treat, diagnose, or cure.

Cost recovery limitations lifted for HDEs; profit permitted

To encourage product development, the 2007 Amendments lift the restriction under the Humanitarian Device Exemptions ('HDE') on making a profit from the use of HDE-designated devices when such use is intended for paediatric patients. Now, the ban on profit will not apply to manufacturers of HDE devices that are intended for use in paediatric patients or subpopulations, so long as the device was not previously approved or labelled for use in paediatric patients, and the number of devices does not exceed the established annual distribution amount.

Research grants available for paediatric unmet medical needs

The 2007 Amendments provide for grants to support device research for unmet medical needs in the paediatric population.

Post-market surveillance of paediatric medical devices required

The 2007 Amendments provide for post-marketing surveillance of class II and class III devices. The Amendments authorise FDA to require more than 36 months of post-market surveillance to assess the safety and efficacy of a device on paediatric-specific factors, such as growth, development, and activity level.

To track paediatric device approvals, FDA must submit an annual report to Congress accounting for the number of devices approved or labelled for use in children in the year preceding the report. No new penalties have been added specifically to address these new requirements.

Clinical trial databases

Federal requirements for registration of clinical trials were originally authorised under the FDA Modernization Act of 1997 ('FDAMA'). Until now, however, the registration of clinical trials was required only for drug products intended to treat life-threatening diseases and conditions. The 2007 Amendments expand the requirement to register all clinical trials involving drugs, biologics, and devices, with only a few exceptions.

Clinical trial registries expanded to include devices

The requirement to register clinical trials now applies to studies of devices approved under the 510(k), PMA, and HDE pathways. An applicable device clinical trial is defined as 'a prospective clinical study of health outcomes comparing an intervention with a device'.

Publicly available and searchable information
The 2007 Amendments also broaden the information required to be submitted to the clinical trial registry. Listed information must include information on the status of the trial (ie, ongoing), the anticipated completion date, and information describing the trial (ie a brief title, a summary, the study design, purpose, and phase, the disease or condition being studied, the number of subjects, the study location(s), recruiting information, administrative information such as the investigational new drug application or investigational device exemption unique protocol numbers, and the name and contact information of the sponsor and responsible party and of the study site facility contact).

Required disclosure of study results
The 2007 Amendments implement a new (and controversial) requirement. Applicants must now include study results in the NIH clinical trial registry, which the Amendments refer to as the 'registry and results data bank'. Generally, study results are to be submitted no later than one year after the study is completed.

The implementing processes specific to these 2007 Amendments are not yet complete or clear.

To ensure compliance, FDA has explicit authority to enforce these clinical trial registry requirements. If a sponsor fails to register any trial or submit trial results, or has submitted false information, NIH is required to post a notice describing the noncompliance on the registry and results database. FDA is authorised to impose civil monetary penalties for failure to comply with the requirements of this Act.

Increased post-approval surveillance of drug safety

The 2007 Amendments strengthen the FDA's authority to monitor and address drug safety issues after approval. Of particular note, FDA is authorised to require the holder of an approved application to conduct either post-approval studies or clinical trials if the Agency, at any time after approval (not just as a condition of approval), becomes aware of 'new safety information'. In addition, FDA is authorised to require safety labelling changes, and the development of Risk Evaluation and Mitigation Strategies ('REMS') for particular drugs or biologics.

Post-approval safety studies may be required
FDA may now require a 'responsible person' to conduct one or more safety studies when 'scientific data [is] deemed appropriate' by FDA (including information regarding related drugs).

Safety labelling changes may be required
The 2007 Amendments provide a mechanism for the FDA to order a labelling change if it becomes aware of new safety information that it believes should be included in the labelling of a drug. Following FDA notification, an applicant will have 30 days to provide either (i) a supplement proposing changes to the approved labelling, or (ii) detailed reasons why a labelling change is not warranted.

Risk Evaluation and Mitigation Strategies (REMS) may be required
Either as part of an initial approval or post-approval, FDA may determine that a 'Risk Evaluation and Mitigation Strategies' ('REMS') plan is necessary to help ensure that the benefits of a drug continue to outweigh the risks of a serious adverse drug experience. At the time of initial approval, the Agency may determine that an REMS plan is necessary based on the following factors:

- the estimated size of the population likely to use the drug;
- the seriousness of the disease or condition to be treated by the drug;
- the expected benefit of the drug;
- the duration of treatment;
- the seriousness of known or potential adverse events; and
- whether the drug is a new molecular entity.

Within two years, FDA must develop new post-market risk identification and analysis methods.

Failure to comply with FDA post-approval safety labelling or REMS requirements may result in a drug being considered misbranded and may result in civil penalties up to $250,000 per violation, and up to $1,000,000 for all violations adjudicated in a single proceeding. If the violation continues following written notice, a company will be subject to a penalty of $250,000 for the first 30-day period that the company continues to be in violation. Such amount will double for every 30-day period that the violation continues, not to exceed $1,000,000 for any 30-day period or $10,000,000 for all violations adjudicated in a single proceeding.

Other provisions to ensure drug safety and surveillance

Clinical trial guidance for antibiotic drugs

FDA is charged with developing, within one year, a guidance document addressing clinical trials for antibiotics. Within five years, FDA must review and update the guidance to reflect developments in scientific and medical information and technology.

Prohibition against adding drugs or biologics to food

The marketing of foods to which are added an approved drug or biologic, or a drug or biologic for which substantial clinical investigations have been instituted, is prohibited.

Technologies to ensure safety in the drug supply chain

FDA must develop standards and identify and validate effective technologies to secure the drug supply chain against counterfeit, diverted, sub-potent, substandard, adulterated, misbranded or expired drugs.

Citizen petitions and petitions for stay of agency action

The 2007 Amendments include a provision intended to curb the perceived abuses of the Citizen Petition process to delay the entry of generic drugs into the market. FDA is now prohibited from delaying approval of a generic based on a citizen petition unless FDA affirmatively finds that such 'delay is necessary to protect the public health'. Whether this provision will actually be effective is questionable.

Post-market drug safety website

FDA must develop by 1st October, 2008 an internet website which will provide links to drug safety information and improve communication of drug safety information to patients and providers.

Action package for approval

The FDA is now required to post, within 30 days after approval, on the FDA's website the 'Action Package for Approval' of any new drug product containing active ingredients that have never before been approved. The Action Package must include documents 'generated by the FDA' related to the approval of a drug. However, FDA must post *within 48 hours* after approval ('excepts where such materials require redaction') a summary review that documents conclusions from all reviewing disciplines about the drug, noting any critical issues and disagreements with the applicant and within the review team and how they were resolved, recommendations for action, and an explanation of any no concurrences with review conclusions, including a summary of the Agency's review and conclusions.

Risk communication

The FDA must establish an advisory committee on risk communication which will advise the Agency on methods to effectively communicate risks associated with FDA-regulated products. Membership will be comprised of representatives of patient,

consumer, and health professional organisations.

Response to the Institute of Medicine

The FDA is charged with responding to the 2006 Institute of Medicine ('IOM') report entitled 'The Future of Drug Safety – Promoting and Protecting the Health of the Public'. The response must include an assessment of how well the FDA actions have implemented the IOM's recommendations.

Database for authorised generic drugs

Within nine months, the FDA is expected to publish a complete list on the Agency's website of all authorised generic drugs. The database is to be updated quarterly.

Adverse drug reaction reports and postmarket safety

FDA must post a quarterly report on the Agency's Adverse Event Reporting System Website of any new safety information or potential signal of a serious risk identified within the last quarter.

Regulation of drug advertising

Under the 2007 Amendments, the FDA may require the submission of a television advertisement for a drug 45 days prior to dissemination for pre-review. The amendments require a drug's conditions for use and the major statement relating to side effects and contraindications to be presented in a 'clear, conspicuous and neutral manner'.

Congress has given the FDA 30 months to issue a regulation that establishes standards for determining whether a major statement relating to side effects and contraindications is presented in a clear, conspicuous, and neutral manner. In addition, FDA is required to submit a report to Congress within two years on DTC advertising and the agency's ability to communicate to certain subsets of the population, including children and the elderly.

The 2007 Amendments provide for a civil monetary penalty for disseminating a violative DTC advertisement not to exceed $250,000 for the first violation in a three-year period and not to exceed $500,000 for a subsequent violation in each three-year period.

Prescription drug user fees

The 2007 Amendments reauthorise the Prescription Drug User Fee Act ('PDUFA IV'). PDUFA is intended to reduce the review time for new drug applications ('NDAs') by supplementing FDA's resources to ensure adequate staffing.

Fees for advisory review of DTC television drug advertising established

PDUFA IV establishes a new programme to assess and collect fees from companies that voluntarily seek FDA advisory reviews of their direct to consumer ('DTC') television prescription drug advertisements. However, FDA has recently announced that the programme will not be implemented because too few companies have agreed to submit and pay user fees for such review.

Fees for positron emission tomography ('PET') drug establishments

PDUFA IV now includes special rules for user fees regarding approved positron emission tomography drugs. Each person who is named as the applicant in an approved human drug application for a positron emission tomography ('PET') drug is subject to one-sixth of an annual establishment fee for each establishment identified in the application as producing PET under the approved application.

Fee revenue amounts increased yearly through 2012

PDUFA IV increases the statutory revenue amount for user fees in fiscal year 2008 to $392,783,000. In addition, under PDUFA IV fees are set aside specifically for drug safety. For each fiscal year, one-third of the fee revenue will come from application fees, one-third from establishment fees, and one-third from product fees.

Fee adjustment criteria modified

As in the past, PDUFA IV will rely on the US Consumer Price Index ('CPI') to adjust fee revenue amounts for each fiscal year after 2008 for inflation. If the applicant, however, certifies to the Secretary that it is a not-for-profit medical centre that has only one establishment for the production of PET drugs, and at least 95 per cent of the total number of doses of each PET drug produced by such establishment during such fiscal year will be used within the medical centre, then it will not be assessed an annual establishment fee for a fiscal year.

Small business fee waiver or reduction criteria clarified

PDUFA IV clarifies that only businesses with fewer than 500 employees (including employees of affiliates) and no products already introduced into interstate commerce may qualify for a small business waiver of fees. Additionally, PDUFA IV clarifies that the person named as the applicant and assessed the user fee is the person who is eligible for a waiver or reduction of fees. The Secretary will consider only the circumstances and assets of the applicant involved and any affiliate of the applicant.

Beginning in fiscal year 2008, not later than 120 days after the end of each fiscal year for which fees are collected, the Secretary must prepare and submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate a report concerning the progress of the FDA in achieving the goals set forth in the 2007 Amendments. The Secretary must also provide a report on the implementation of the authority for such fees during such fiscal year and the use, by the FDA, of the fees collected for such fiscal year.

Various penalties and fines may be assessed for failure to pay fees or for late payment of fees related to the new advisory reviews of DTC television advertisements. Specifically, any person who has not paid all advisory review fees and/or operating reserve fee by the specified deadline must pay 150 per cent of the fee that otherwise would have applied at least 20 days before FDA will accept any DTC advertisement for advisory review. An advisory review submission will be considered incomplete if the fee is not paid and it will not be accepted by FDA. If the FDA does not receive payment of a PDUFA fee within 30 days after it is due, the fee will be treated as a claim of the United States government pursuant to 31 U.S.C. § 3711.

Medical device user fees

The Medical Device User Fee and Modernization Act of 2002 ('MDUFMA'), P.L. 107-250, amended the FDCA to provide FDA with new responsibilities, resources, and challenges.

The 2007 Amendments re-authorise and expand MDUFMA ('MDUFMA II'). MDUFMA II establishes medical device user fees for the fiscal years 2008–2012, which will increase revenue for the medical device review programme to cover the anticipated costs related to rent, security, and statutorily mandated payroll and benefit increases. MDUFMA II also enhances the process for pre-market review of medical device applications and requires new unique labelling requirements for medical devices.

Four new user fees added

MDUMFA II adjusts total revenue for device review to ensure a 6.4 per cent increase from year to year over the next five years. Beginning this fiscal year, device companies will be required to pay two new annual fees: an establishment registration fee and a periodic report filing fee. FDA is also adding new fees for two types of applications.

Establishment registration and periodic report fees

An annual establishment fee now must be paid by every device establishment (including an establishment that sterilises or otherwise

makes a device for a specification developer or any other person), single-use re-processor, and specification developer.

New application fees

MDUFMA II also establishes new fees for two types of application submissions. There is now a fee for 30-day notices (making modifications to manufacturing procedures or methods) and a fee for a request for classification information under § 513(g) of the FDCA, which will be assessed at 1.35 per cent of the cost of a full PMA.

Fee submission and modular application refunds

These new fees are subject to the standard payment requirements under MDUFMA. Specifically, all user fees are due upon submission of the application (ie PMA, premarket report, supplement, § 510(k) premarket notification, 30-day notice, § 513(g) classification request, and periodic reporting concerning a class III device).

MDUFMA II also adds a refund provision for modular applications. The Secretary must refund 75 per cent of the application fee paid for an application submitted for a modular application that is withdrawn before a second portion is submitted and before a first action on the first portion. If a modular application is withdrawn after a second or subsequent portion is submitted before any first action, the Secretary, based on the level of effort already expended on the review of the portions submitted, may return a portion of the fee.

New unique device identification system added

FDA is required to promulgate regulations that establish a unique device identification system and that require the device label to bear a unique identifier, unless FDA requires an alternative placement or provides an exception for a particular device or type of device.

User fees for small businesses reduced

In an effort to reduce the burden on small business, MDUFMA II reduces the rates paid by firms meeting the definition of a small business.

Third-party inspection programme streamlined and expanded

MDUFMA II changes the third-party accredited persons inspection programme in three areas. First, it streamlines the administrative process associated with qualifying for the programme. Secondly, MDUFMA II expands participation in the programme. Thirdly, MDUFMA II permits the industry to voluntarily submit to FDA third-party accreditation persons' reports assessing conformance with Internal Organization for Standardization quality standards. FDA will consider this information when establishing inspectional priorities.

Electronic registration and reporting required

MDFUMA II requires all establishments to submit their registration and listing information by electronic means, except in those situations where FDA agrees that electronic registration is not reasonable.

MDUFMA II also includes the following provisions intended to ensure medical device safety, surveillance, and continued interaction with the industry:

Reporting and enhanced public input required

The Secretary must prepare and submit a performance and fiscal report to the Committee on Health, Education, Labor, and Pensions of the Senate and the Committee on Energy and Commerce of the House of Representatives. MDUFMA II also provides for enhanced public input during the next reauthorisation process and has a sunset provision for 1st October, 2012.

Study of nosocomial infections relating to medical devices required

The Comptroller General of the United States must conduct a study on the number of nosocomial infections attributed to new and reused medical devices and the causes of such

nosocomial infections. The report must be completed by 1st October, 2008.

Report on indoor tanning devices and skin damage or cancer required

The Secretary must determine whether the labelling requirements for indoor tanning devices, including the positioning requirements, provide sufficient information to consumers regarding the risks that the use of such devices pose for the development of irreversible damage to the eyes and skin, including skin cancer, and propose modifications or determine if no label can adequately communicate such risks.

Section 510(k) report required

The Comptroller General of the United States must conduct a study on the appropriate use of the process under Section 510(k) of the FDCA as part of the device classification process to determine whether a new device is as safe and effective as a classified devices.

Under MDUFMA II, failure to make payment of a user fee will render the submission incomplete and the submission cannot be accepted by FDA. Until the fee is paid and registration is completed, the establishment will be deemed to have failed to register.

Food safety

With respect to foods (meaning foods other than dietary supplements), the principal change brought about by the 2007 Amendments is the establishment of mandatory adverse event reporting.

To establish mandatory adverse event reporting for foods, Congress made a number of amendments to the FDCA. New Section 417 requires FDA to establish a reportable food registry by 1st October, 2008. The registry is intended to facilitate the gathering and communication of information about reportable foods. A reportable food is defined as 'an article of food (other than infant formula) for which there is a reasonable probability that the use of, or exposure to, such article of food will cause serious adverse health consequences or death to humans or animals'.

The FDA is directed to issue guidance by 27th June, 2008 that addresses the submission of reports and provision of notifications under new Section 417.

The 2007 Amendments require the FDA to take steps to improve pet food safety. By 1st October, 2008, the FDA must establish an early warning and surveillance system to identify adulteration and outbreaks of illness. By 1st October, 2009, the FDA must publish a rule that establishes ingredient standards and definitions, processing standards, and updated standards for labelling that include nutritional and ingredient information. For both human and pet foods, FDA is required to improve communications during a recall by working with stakeholders to collect and aggregate information, use existing networks to enhance quality and speed of communication, and post information regarding recalled foods in a searchable database.

To enable enforcement of the new adverse event reporting requirements for foods, Congress has made it a prohibited act to fail to submit a report or provide a notification as required by new Section 417(d). Committing a prohibited act may result in product seizure, injunction, and/or criminal prosecution. To discourage abuse of the registry, Congress also made it a prohibited act to falsify a report or notification.

Other provisions

Priority review voucher to encourage tropical disease treatments

FDA is now authorised to issue 'priority review vouchers' to the sponsor of a tropical disease product application submitted after 1st October, 2007 and subsequently approved. The voucher entitles the holder to a six-month priority review of a single human new drug application or biological license application.

Improving genetic test safety and quality

New regulations for genetic tests could be proposed within the next few years depending on a report commissioned by Congress under these Amendments. The 2007 Amendments require investigation into and a written report to assess the overall safety and quality of genetic tests and to make recommendations to improve Federal oversight and regulation of genetic tests.

Exclusivity of certain drugs containing a single enantiomer

The 2007 Amendments provide ten years of marketing exclusivity to an application for a nonracemic drug containing an active ingredient (including any ester or salt of the active ingredient) a single enantiomer that is contained in a racemic drug approved in another application; however, the applicant must first elect to have the single enantiomer not considered the same active ingredient as that contained in the approved racemic drug so long as certain conditions are met. The conditions for eligibility for market exclusivity include:

- the single enantiomer has not been previously approved except in the approved racemic drug;
- the marketing application submitted for the nonracemic drug includes full reports of new clinical studies; and
  - these clinical studies must necessary for the approval of the application;
  - the studies must be conducted or sponsored by the applicant; and
- the application cannot rely on any investigations previously submitted to support approval of the approved racemic drug; and
- the indication for use of the nonracemic drug must be in a different therapeutic category than the therapeutic category for which the approved racemic drug is indicated.

Note

1. see *Organon Teknika v Hoffmann-La Roche* [1996] FSR 383.