COVINGTON

Consultations on UK Medicines and Medical Devices Regulation in Case of a "No Deal" Brexit

October 15, 2018

Food, Drugs, and Devices

On August 23, 2018, the UK Government published several technical guidance notices relating to the regulation of medicines and medical devices in the event of a "no deal" or "hard" Brexit, i.e., a scenario where the EU and UK fail to conclude a withdrawal agreement and an associated transitional period and where the UK becomes a "third country" from midnight CET on March 29, 2019. The UK's Medicines and Healthcare Products Regulatory Agency ("MHRA") has now released a consultation on a statutory instrument that the UK would adopt in response to a "hard" Brexit. Stakeholders can submit responses to the consultation through an online portal on the Department of Health and Social Care website until **11.45 p.m. on November 1, 2018**.[1]

Uncertainty remains regarding where the UK and EU will find themselves at 12 p.m. CET (11 p.m. GMT) on March 29, 2019. However, most accept that it will either be a "no deal" scenario, or that the EU and the UK will agree a formal withdrawal agreement, most likely conditional on the resolution of certain issues, such as the Irish border concerns. If there is a withdrawal agreement, there will most likely be a transitional period to provide for business and regulatory continuity. The most recent draft of the Withdrawal Agreement envisaged a 21-month transitional period ending on December 31, 2020.

While the MHRA's consultation prepares for a "no deal" scenario, the Agency clearly has the possibility of a transitional arrangement in mind at least for the UK. It gives companies until the end of 2020 to bring about structural changes necessary to operate in the post-Brexit UK, where necessary with a further period until the end of 2021 to complete the regulatory filing procedures necessary to effect these changes.

In this alert, we set out the legislative background which has led to this consultation and highlight its key features.

[1] https://consultations.dh.gov.uk/mhra/mhra-no-deal-contingency-legislation-for-the-regul/consultation/intro/.

Background

The European Union (Withdrawal) Act 2018 (the "Withdrawal Act") effectively transposes all EU law in effect at the point of Brexit on March 29, 2019 into UK law. It does so in two ways: (a) any domestic legislation that implements EU law (mainly Directives) will continue to have effect after March 19, 2019 (e.g., the Human Medicines Regulations 2012 ("HMR"), the Medicines for Human Use (Clinical Trials) Regulations 2004 ("CTR") and the Medical Devices Regulations 2002) and (b) any EU law with direct effect (mainly EU Regulations, subject to some exceptions) is transposed into national legislation after March 29, 2019.

The effect of this automatic transposition is that references to the EU, and by extension the EEA, in EU law will automatically be transposed into UK law, unless UK law is amended to exclude this. For example, the requirements that a marketing authorization ("MA") is held by an entity in the EU will automatically become part of UK law, as will the requirement that the qualified person for pharmacovigilance ("QPPV") should reside in the EU. Moreover, the requirement under EU law that products should be imported and/or batch-released in the EU will also apply in the UK. The same does not apply in reverse since, absent a transitional period in a formal withdrawal agreement with the EU, the UK will simply become a "third country" as a matter of EU law, without the EU having any scope for flexibility.

Nevertheless, the UK will need to make changes to its domestic law to reflect the legal and regulatory issues arising from Brexit, and this is what the proposed statutory instrument is designed to do. One should note, however, that the power granted by the Withdrawal Act to adopt secondary legislation is limited. The relevant Government Minister is entitled only to propose legislation to give effect to changes arising from Brexit that he or she "*considers appropriate to prevent, remedy or mitigate –(a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law*".[2] This provision does not authorize the Minister to use a statutory instrument to set out the detailed regulatory framework that will operate post-Brexit. The UK Government will need to set out much of the detail required in legislation, policy documents and other guidelines at a later date. Note also that while the consultation documents contain proposed legal text, the MHRA has made it clear that it is "indicative" and that the drafting might change.

Medicinal Products

Unsurprisingly, the majority of the consultation focuses on medicinal products. Companies should be aware of the following **six key features**.

1. Firstly, while the European Medicines Agency ("EMA") has taken steps to exclude the UK and hence the MHRA from many ongoing EMA procedures and work streams, a **"hard" Brexit will formally sever all ties**, meaning that the UK will not play any role in EU regulatory processes or networks. In particular, it will no longer play a part in the centralized, mutual recognition or decentralized procedures, or play a role in any of the related committees. It will also have no access to shared systems including many of the IT systems that play a key role in EU medicines and medical device regulations, such as EudraLink, Eudravigilance,

[2] Section 8 of the Withdrawal Act.

EudraCT, EUDAMED. Moreover, there will be no exchange of data between the EU and the UK, e.g., on inspections, etc.

2. Most companies are working diligently to transfer EU and non-UK Member State authorizations from UK marketing authorization holders ("MAH") to MAHs within the EEA. This is because UK companies will no longer be able to hold such approvals post-Brexit. The UK benefits from a little more flexibility. Existing MAs granted before or on March 29, 2019 through the centralized procedure will automatically be converted into equivalent UK MAs (so-called "grandfathering"), unless the MAH expressly objects. For in-process applications via the centralized procedure, however, applicants will need to re-file national applications with the MHRA. The consultation envisages that the MHRA will have discretion whether to take into account Committee for Medicinal Products for Human Use ("CHMP") opinions, which it is likely to do. For new active substance applications for a UK MA filed after Brexit date, the consultation also provides for a new assessment route (so-called "targeted assessment"), during which the MHRA may take account of either a MA granted by the European Commission, an opinion of the Committee for Medicinal Products for Human Use ("CHMP") or a MA granted by the competent authority of a country recognized by the MHRA, which would include the EEA Member States.

3. The consultation recognizes that, by March 29, 2019, many of the MAHs for centrally authorized products will be outside the UK, as will be the QPPV. The draft statutory instrument therefore gives companies a transitional period until the end of 2020 to adjust. By that time, the holders of UK marketing authorizations will need to be established within the UK, as will the UK QPPV. Companies will have until 2021 to make the necessary regulatory filings to give effect to these changes.

4. The consultation also envisages some flexibility in respect of the **pharmaceutical supply chain**. Given the effect of the Withdrawal Act, products imported into the EU or batch-released onto the EU market will, in principle, also be batch-released for the purpose of UK law. This means that these products should be able to enter the UK market, even in a "hard" Brexit scenario, and the draft UK statutory instrument reflects this. The UK envisages that all the EEA Member States will be "designated countries" from which batch-released products can be imported into the UK. This is because the UK will recognize that the product would have been manufactured to an appropriate standard of Good Manufacturing Practice and because it will also recognize the results of inspections of those facilities by the relevant national regulators.

5. The consultation presumes that Brexit will have no impact on regulatory **data and market exclusivities.** The protection period will remain the same, and the consultation assumes that the timing of those periods will commence when the product is first approved either in the EEA or in the UK, whichever is earliest. The consultation documentation indicates that the MHRA's intention is to incorporate provisions on **paediatric investigation plans** ("PIPs") into the HMR. However, some uncertainty arises from the current draft that could be understood to indicate that the MHRA requires companies to prepare a separate PIP from that submitted as part of any procedure in the EU-27. Further clarification from the MHRA is needed on this point. On **orphan designation**, the consultation envisages that exclusivity runs from the grant of an MA in either the EU-27 or the UK, whichever is the earlier. The current draft proposes that the MHRA will only assess an orphan status at the same time as it assesses the UK marketing authorization. Thus, unlike in the EU-27, companies will not be able to obtain an orphan designation prior to the MA application.

6. The consultation proposes to revoke the UK implementation of the **Falsified Medicines Directive** ("FMD"), which was due to enter into force in February 2019. The rationale is that in a "hard" Brexit scenario, the UK would not have access to the relevant databases (hub and repositories) to create, verify and decommission unique identifiers in accordance with the FMD. The consultation documentation indicates that the MHRA would accept packaging which contains the safety features required under the FMD, as long as the packaging also complies with the requirements under UK national law. However, this may create issues for companies in relation to the tracking of products through the supply chain, if they enter the UK from the EU-27.

Clinical Trials

From a clinical trial regulatory perspective, the UK has taken the position that clinical trials are currently regulated under the Clinical Trials Directive 2001/20/EC, as implemented into UK national law by the CTR, which remain in force pursuant to the Withdrawal Act. Since the Clinical Trials Regulation (EU) No. 536/2014 will not have taken effect before Brexit, the consultation assumes that minimal changes will be required. **Sponsors** of studies in the UK already do not need to be established in the UK. In the normal course, a third country sponsor would need to designate a local **legal representative**. However, the consultation envisages that there will not need to be a UK legal representative, provided that the sponsor or legal representative is in one of a number of designated jurisdictions, including the EEA Member States. However, sponsors of UK clinical trials should note that the consultation currently provides that where neither the sponsor nor the legal representative are established in the UK, the chief investigator shall function as a contact point for the MHRA, which is likely to be highly controversial for many companies.

The MHRA also proposes to accept the summary of product characteristics or equivalent documents as evidence of the safety, quality and efficacy of **investigational medicinal products** ("IMPs") that are authorized in certain jurisdictions, including specifically the EEA Member States. Similarly, the Agency would accept qualified person batch releases for IMPs from these jurisdictions.

Medical Devices

The consultation assumes that there should be little impact on medical device regulation. Following the theme of the Withdrawal Act, **CE-marked** medical devices will be allowed to circulate freely within the UK post-Brexit. However, those higher risk devices that manufacturers cannot self-certify would need to be underpinned by a notified body certificate of conformity issued by a legitimate notified body. In the absence of transitional arrangements that provide otherwise, notified bodies will need to be established within the EEA. Companies relying on UK- notified body certificates will need to obtain replacements from notified bodies in the EEA. The consultation envisages merely that manufacturers of **all** medical devices and *in vitro* diagnostic medical devices will need to submit a simple **registration**, along with a fee of £100,[3] before marketing products in the UK.

* * *

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Food, Drugs, and Devices practice:

Grant Castle	+44 20 7067 2006	gcastle@cov.com
Robin Blaney	+32 2 549 5260	rblaney@cov.com
Brian Kelly	+44 20 7067 2392	bkelly@cov.com
Katharina Ewert	+44 20 7067 2233	kewert@cov.com

[3] This is the fee currently applied for registrations of class I and *in vitro* diagnostic medical devices. Thus, it may be subject to subsequent fee amendments.