Impartiality and procedural flaws in the EU

Judgment of the Court of Justice of the European Union of 14 March 2024 (C-291/22)

Background

The origin of this judgment refers to the European Commission's Implementing Decision not to grant a marketing authorisation for Hopveus®, a medicinal product intended to treat alcohol dependence.

The refusal to grant marketing authorisation was based on an unfavourable opinion of the Committee for Medicinal Products for Human Use (CHMP) of the European Medicines Agency (EMA). The applicant, D&A Pharma, requested a re-examination of the CHMP's opinion. Given the specificity of the scientific and clinical concerns regarding Hopveus®, the CHMP decided that it would be more appropriate for an ad hoc expert group to conduct the re-examination instead of the Scientific Advisory Group on Psychiatry (SAG). SAGs are the permanent bodies to which the CHMP may delegate the assessment of certain types of medicinal products. Following the new unfavourable CHMP opinion, the European Commission refused to grant marketing authorisation for Hopveus®.

D&A Pharma brought an action before the General Court of the European Union (GC) seeking the annulment of the European Commission's decision on two grounds. First, on the ground that it was based on a procedural flaw since the CHMP had convened, for the purposes of the review, an ad hoc expert group and not the SAG on psychiatry. Secondly, because it was based on a lack of impartiality of two of the ad hoc group's experts. The GC dismissed the appeal, confirming the validity of the European Commission's decision. D&A Pharma decided to appeal to the Court of Justice of the European Union (CJEU) as it disagreed with the decision of the GC.

About the impartiality of experts

The CJEU recalls that the Charter of Fundamental Rights of the European Union guarantees the right of every person to have his or her affairs handled impartially by the institutions, bodies, offices and agencies of the Union. In the case of the CHMP, that requirement of impartiality is compromised when there is a conflict of interest of one of its members, irrespective of their personal conduct. According to the CJEU, such a breach may render final decision adopted by the Commission as unlawful.

In the first instance, D&A Pharma claimed that two of the members of the group had a conflict of interest with the opinion they were assessing. One of them (expert A) provided consultancy services related to several pharmaceutical products. The other (expert B) was the principal investigator of a product aimed at the treatment of alcohol dependence (AD 04) and, therefore, a rival product to Hopveus®.

The GC rejected these allegations on the grounds that no evidence of bias of these experts had been provided and that they were not in a situation of conflict according to the EMA's conflict of interest policy.

In relation to expert A, the GC concluded that experts who have declared an interest as a consultant or strategic advisor for medicinal products of one or more companies may be a member of the ad hoc expert group convened by the CHMP for the purpose of the re-examination of the marketing authorisation application submitted for a competing product. This is except for chairpersons, vice-chairpersons or other members who have a leading or coordinating role in the group. However, the CJEU considers that this interpretation is incompatible with the principle of objective impartiality applicable to all EU bodies.

In relation to expert B the GC examined whether AD 04 should be qualified as a "competing product" with Hopveus® to determine whether this expert should have been excluded from the ad hoc expert group. The GC considered that AD 04 and Hopveus® were not competing products, as AD 04 was aimed at "patients who wish to control their alcohol use but are unable or unwilling to abstain completely from drinking", whereas Hopveus® was intended to "accompany patients who seek to abstain from alcohol completely".

According to the CJEU, two pharmaceutical products are competitors on a given market where, for the same therapeutic indication, they are interchangeable or substitutable. Therefore, it must be determined whether AD 04 and Hopveus® are interchangeable or substitutable to such degree. The CJEU states that the assessment should not be based solely on the objective characteristics of the products. Instead, it should involve an overall assessment of factors which may be considered in order to evaluate whether patients and their prescribing doctors may see one product as a valid alternative to the other.

The CJEU concludes that the GC did not make such an overall assessment, but only noted that AD 04 is intended for patients who "intend to moderate their alcohol use" and that Hopveus® is intended for patients who "intend to give up alcohol use altogether". However, the CJEU considers that the mere difference in the intensity of the therapeutic effect of two products intended to treat the same pathology may encourage certain patients to substitute, in the context of their treatment, one of those products for the other based on the evolution of their symptoms or other considerations of therapeutic opportunity and efficacy on the part of their prescribing doctors. For this reason, the CJEU considers that the GC made an error in law concluding that there was no potential commercial competition between AD 04 and Hopveus® without carrying out an overall assessment of all relevant factors.

The EMA's conflict of interest policy provides that a principal investigator of a competing product (expert B) may participate in an expert group if he withdraws from the final deliberations and the vote on the opinion. The CJEU, however, understands that this participation is not adequate to ensure that the re-examination is conducted in an impartial manner.

About the convening of the ad hoc group of experts

Regarding the second ground, the CJEU accepts that Regulation No 726/2004 does not exclude the possibility that the CHMP, in the context of a re-examination, may decide whether to consult the relevant SAG for the product seeking marketing authorisation.

However, the CJEU notes that the EMA itself limited this power in its Guidelines on the review procedure published on its website. It follows from these guidelines that the EMA undertakes that (i) the CHMP will systematically consult an

SAG when the applicant for review so requests; and that (ii) the pertinent SAG must be the one set up in the therapeutic area of the product concerned. An ad hoc expert group shall only be convened if no SAG has been established in that area.

The CJEU argues that, by adopting rules of conduct and publishing that it will apply them to the cases provided for therein, the EMA limits its discretion and can no longer, in principle, depart from those rules. For this reason, the CHMP could have convened an ad hoc SAG only if, following a detailed examination, and in the absence of manifest error, it concluded that the therapeutic indication for Hopveus® did not fall predominantly within the therapeutic field of psychiatry. However, the CHMP did not carry out that examination and did not reach such a conclusion. Therefore, the CJEU holds that the decision to convene an ad hoc group of experts instead of the psychiatry group constitutes a procedural flaw in the adoption of the EMA's opinion. That defect means that the decision to refuse marketing authorisation is void since it was adopted on the basis of an opinion of the EMA which should have been considered void.

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