Capsulas

Supply obligations and the prevention of shortages under the new European pharmaceutical legislation

The new European legislation expands the intervention tools available to public authorities

Background

The European pharmaceutical package places security of supply among the central objectives of the regulatory framework, strengthens the prevention of shortages, and provides for significant penalties in the event of non-compliance with the applicable rules.

All of this entails an increase in the obligations imposed on companies, which will have to take on a more active role in ensuring continuity of supply, and new coordination mechanisms at Union level.

In this Capsulas, we analyse the main obligations affecting marketing authorisation holders (MAHs) in relation to supply and shortages.

Notification obligations

Until now, EU legislation allowed MAHs to withdraw a medicinal product from the market by simply giving at least two months' notice (Article 13 of Regulation (EC) No 726/2004 and Article 23a of Directive 2001/83/EC), or even at shorter notice in "exceptional circumstances".

The new Regulation introduces stricter and more harmonised rules that will apply to all medicinal products, whether authorised by the EMA or by Member States. As it is a Regulation, it will be directly applicable in all Member States, without the need for transposition.

In this regard, it is expected that MAHs will have to inform the competent authority of the Member State - and the EMA in the case of a centralised marketing authorisation - and provide reasons for the following decisions:

- The permanent cessation of the marketing of the product, at least 12 months in advance.
- The temporary suspension of marketing, at least 6 months in advance.
- A request for the withdrawal of the marketing authorisation, also at least 12 months in advance.
- Foreseeable temporary disruptions in supply lasting more than two weeks, at least 6 months in advance. Where duly justified exceptional circumstances arise, the MAH may notify such interruptions at a later point in time, as soon as it becomes aware of them.

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Critical medicinal products

Additional specific obligations are introduced in relation to medicinal products considered "critical" in any Member State or priority antimicrobials.

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In these cases, before proceeding with the cessation, suspension or withdrawal, the MAH must:

- Publish a declaration of its intention to transfer the marketing authorisation or to issue a letter of access, and inform the national competent authorities and the EMA accordingly. This declaration must be published through a dedicated page on the MAH's website, and the electronic link to that page must be communicated to the competent authority of the Member State and to the EMA.

- Offer, on reasonable terms, the transfer of the marketing authorisation or the granting of a letter of access to a third party that has declared its intention to market the medicinal product or to use the pharmaceutical, non-clinical and clinical documentation contained in its file for the purpose of submitting an application for a marketing authorisation.

- Inform the competent authority of the outcome of the negotiations with such third parties (the EMA, in the case of medicinal products authorised under the centralised procedure, and the national authorities in all other cases).

In addition, in the formal notification of cessation or withdrawal, the MAH must provide evidence that it has taken effective measures to make the marketing authorisation available to third parties.

It should be noted that Spain has, for several years, been one of the most active Member States in this area, with the AEMPS playing a prominent role. Notwithstanding this, the new European legislation will mean that the AEMPS will no longer be able to require certain medicinal products to remain on the market. This possibility, however, is maintained in the Preliminary Draft Law on Medicinal Products and Medical Devices.

Shortage prevention plans

The Regulation requires MAHs to have in place, and to update periodically, a shortage prevention plan (SPP) as a key tool for the preventive management of shortage risk.

This obligation applies to all prescription medicinal products, as well as to those expressly designated by the Commission on the basis of criteria such as the number and frequency of previously notified critical shortages; the characteristics of the medicinal product and the availability of authorised alternatives; its therapeutic relevance and the conditions it is intended to treat; or potential risks to public health.

The EMA will draw up guidelines on the preparation and content of SPPs, and the Commission or the national authorities may require the MAH to submit the relevant SPP to them at any time.

Furthermore, in relation to medicinal products not subject to this obligation, the MAH must carry out a regular documented risk assessment of potential supply chain risks and, where necessary, take mitigating measures. Both the EMA and the national authorities may request the submission of such assessments at any time.

Parallel trade

In recital 138a, the Regulation recognises that, although the Court of Justice of the European Union has ruled that parallel trade is beneficial to the internal market, it has also recognised the need to ensure reliable supply to meet essential medical needs, ensuring the availability of quality medicinal products for the public.

In this context, the Regulation enables Member States to require wholesale distributors intending to supply to another Member State to notify

that intention to the competent authority of the Member State of origin.

Based on this information, the Member State of origin may adopt the necessary measures to prevent or mitigate possible shortages in its territory. In any event, such measures must be duly justified on grounds of the protection of public health and be proportionate to the objective pursued, in accordance with EU law.

Critical shortages of Union concern

Beyond measures at national level, the Regulation also establishes specific coordination mechanisms at Union level to address particularly serious shortage situations.

In this regard, a list of critical shortages that cannot be resolved without coordination at EU level will be established and kept up to date, and recommendations may be issued on measures to resolve or mitigate such critical shortages of Union concern.

Following the inclusion of a medicinal product in the list of critical shortages of Union concern, the MAH must provide any additional information that the EMA may request, including periodic information on available stocks of the medicinal product concerned; take into account the recommendations and measures adopted at European level; report on the results of those measures; and inform the EMA and the competent authority of the Member State of the end date of the critical shortage of Union concern without undue delay.

Penalty regime

One of the main new features of the pharmaceutical package is the extension of the existing penalty regime in the pharmaceutical field.

At present, the penalty regime for non-compliance with MAH obligations in relation to medicinal products authorised under the centralised procedure is laid down in Regulation (EC) No 658/2007, which includes the definition of the conduct that may give rise to a penalty, the principles governing the imposition of penalties, the rights of the parties concerned, and other procedural rules.

The new Regulation maintains and strengthens Regulation (EC) No 658/2007, empowering the European Commission to impose penalties in the event of non-compliance by MAHs with obligations such as:

- Notification obligations within the time limits laid down in the Regulation.
- The obligation to transfer the marketing authorisation or to allow a third party to use the documentation in the file of the medicinal product.
- The obligation to have an SPP in place and to keep it up to date.
- The obligation to cooperate and provide the information requested in shortage situations.
- Specific obligations in relation to critical shortages of Union concern.
- Obligations relating to critical medicinal products.
- Compliance with the recommendations issued by the Executive Steering Group on Shortages and Safety of Medicinal Products.

Failure to comply with these obligations may lead to the imposition of financial penalties, in the form of fines or periodic penalty payments.

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Fines may amount to up to 5% of the MAH's Union turnover in the preceding business year; and periodic penalty payments may amount to up to 2.5% of the MAH's average daily turnover in the European Union in the preceding business year for each day of delay in complying with the obligations.

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