Device or product? Court examines photodynamic oncology therapy

Contributed by **Preslmayr Attorneys at Law**

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Facts

Photodynamic therapy is increasingly being recognised as an attractive, alternative treatment modality for superficial cancer. Treatment consists of two relatively simple procedures:

- the administration of a photosensitive substance; and
- illumination of the tumour to activate the substance.(1)

Several photosensitising substances used to perform photodynamic therapy (eg, verteporfin, temoporfin, porfimer-sodium) have obtained marketing authorisation as medicinal products from the European Medicines Agency. The plaintiff wished to market a photosensitising substance under the name Fotesi in Austria. Based on a classification confirmation by the German State Agency for Health and Labour Safety of Schleswig-Holstein for the photodynamic therapy of tumours, it applied to the Federal Agency for Safety in Healthcare (BASG) for a declaratory ruling to classify the photosensitising substance as a medical device in Class III.

The plaintiff argued that Fotesi is packed as a sterile, freeze-dried powder in injection bottles. After dissolution in a customary infusion solution, it must be administered to the patient, where it accumulates in the tumour cells and is discharged by healthy cells. Forty-eight hours after administration, Fotesi is activated by therapy light, absorbs this energy and destroys the tumour cells. According to the manufacturer, this process is not pharmacological, immunological or metabolic, but simply physical.

However, having consulted experts at the department of medical/pharmaceutical chemistry at the University of Vienna and the Differentiation Committee at the Ministry of Health, the BASG refused to issue the requested declaratory decision.

The plaintiff filed a complaint against this decision with the higher administrative court.

Legal background

Section 1 of the Medicinal Products Act (in line with EU Directive 2001/83/EC on the Community Code relating to medicinal products for human use) defines a 'medicinal product' as any substance or combination of substances that, according to prevailing public understanding, serves (or according to the form of marketing is designated) to:

- treat, alleviate, prevent or diagnose diseases, ailments, bodily harm or morbid conditions;
- diagnose the state or function of the body or psychological conditions;
- replace substances or bodily fluids of the human or animal body;
- fend off germs, parasites or exogenous substances; or
- influence the condition or function of the body or psychological conditions.

Devices containing a medicinal product and those to which a medicinal product is designated to be applied to the human or animal body are considered as medicinal products. If a product falls within the definition of a 'medicinal product' and the definition of a product subject to another law, the Medicinal Products Act applies exclusively. If a person wishes to market a product, the BASG must establish whether such product falls under the definition of a 'medicinal product'. In the course of such proceedings, the

BASG may obtain the expert opinion of the Differentiation Committee.

Section 2 of the Medical Devices Act (in line with Directive 93/42/EEC concerning medical devices) defines a 'medical device' as any instrument, apparatus, appliance, software, material or other article, whether used alone or in combination – including software intended by its manufacturer to be used specifically for diagnostic and/or therapeutic purposes and necessary for its proper application intended by the manufacturer – to be used for human beings to:

- diagnose, prevent, monitor, treat or alleviate disease;
- diagnose, monitor, treat, alleviate or compensate for an injury or disability;
- investigate, replace or modify the anatomy or a physiological process; or
- control conception.

Furthermore, such device must not achieve its principal intended action in or on the human body by pharmacological, immunological or metabolic means, but may be assisted in its function by such means.

The Medical Devices Act does not apply to medicinal products in the sense of the Medicinal Products Act. Where a device is intended to administer a medicinal product within the meaning of the Medicinal Products Act, but does not contain a medicinal product when placed on the market, the device shall nevertheless be governed by the Medical Devices Act without prejudice to the Medicinal Products Act with regard to the medicinal product. However, if such a device is placed on the market in such a way that the device and the medicinal product form a single integral product that is intended exclusively for use in the given combination and is not reusable, that single product will be governed by the Medicinal Products Act. At the request of the manufacturer or its representative, the BASG will establish whether a product falls within the definition of the Medical Devices Act and classify the medical device.

Decision

The higher administrative court(2) rejected the appeal. The court held that the Medicinal Products Act expressly provides that products that are defined as a 'medicinal product' are subject only to the pharmaceutical legislation, although such product might fall also under the definition of another law. In the version of the act applicable to the case, the definition of 'medicinal product' did not yet incorporate medicinal products by their mode of operation (ie, pharmacological, immunological, metabolic). However, Section 2 of the Medical Devices Act defined 'medical devices' by the negative description as:

> "*[an] instrument, apparatus, appliance, software, material or other article … which [does] not achieve [its] principle intended action in or on the human body by pharmacological, immunological or metabolic means, but which may be assisted in its function by such means*."

The act does not apply to medicinal products. In this regard, the legislative materials included in the act explain that the differentiation of medical devices and medicinal products is both important and difficult, because medical devices and medicinal products are both destined to ensure prevention, diagnosis and therapy. However, they differ by their principal intended action – in medical devices, this is normally achieved through physical means.

In the case at hand, the court considered it decisive whether the principal intended action of the product was metabolic or physical in nature, or whether only a supporting metabolic effect existed. According to the plaintiff, the BASG was incorrect in its assertions because it did not consider the legislature's intention to separate the intended principal action and the consecutive metabolic effect. The administration of the product itself would have no metabolic effect.

According to the court, the meaning of the term 'metabolic' is clear in light of the expert opinion issued by the Differentiation Committee, which referred to the guidelines provided by the European Commission on the subject.(3) The expert opinions of both the university and the Differentiation Committee established that the product had a metabolic effect, as its intended effect was that certain cells would die off by influencing oxygen present in the human body and the metabolism of these cells. The application took effect by influencing oxygen metabolism – through the creation of a reactive oxygen species that interacted with tumour cells – and was therefore a chemical reaction. Furthermore, the mode of application by a venoclysis is typical for a medicinal product.

Any assessment of the product's effect with respect to the mechanism of action must consider that the result could not be achieved without the oxygen present in the body for purposes of energy generation. The plaintiff itself submitted that "effects based on reactions of singled oxygen in the cells are the consequence of energy input and intended action of photodynamic therapy in its entirety". Therefore, the BASG was right to assess the intended principal action of the product in question as metabolic.

Comment

The decision provides useful guidance on the differentiation of medical devices and medicinal products. It also supports the high safety standards with which medicinal products must comply by blocking off the back door to marketing medicinal products as medical devices.

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Endnotes

(1) Triesscheijn *et al*, "Photodynamic Therapy in Oncology", *The Oncologist* 2006, 11:1034-1044.

(2) September 26 2013, File 2010/11/0213.

(3) MEDDEV 2.1/3 rev 3.