INTELLECTUAL PROPERTY OFFICE

BL O/035/09

06 February 2009

REGULATION (EC) 1901/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON MEDICINAL PRODUCTS FOR PAEDIATRIC USE

and

REGULATION (EC) 1768/92 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL CONCERNING THE CREATION OF A SUPPLEMENTARY PROTECTION CERTIFICATE FOR MEDICINAL PRODUCTS

APPLICANT	Merck & Co., Inc
ISSUE	Whether the application for an extension to SPC number SPC/GB/02/002 is a valid application
HEARING OFFICER	Dr L Cullen

DECISION

Introduction

1 This relates to an application dated 23 August 2008 that was filed by Merck and Co., Inc. ("the applicant") for a six month extension to the period of protection provided by a supplementary protection certificate (SPC) granted to Merck & Co, Inc, and accorded the number SPC/GB/02/002.

2 This SPC was granted on 30 October 2002 and, subject to the payment of the required fees, will enter into force with effect from 9 March 2014. The active ingredient for which the SPC was granted is Caspofungin, an anti-fungal agent for human use marketed by the applicant under the name Cancidas.

3 The basic patent upon which the granted SPC relies is EP (UK) 0620232 B1, which was filed on 9 March 1994 with a priority date of 16 March 1993, and was granted on 17 November 1999.

4 The marketing authorizations EU/1/01/196/001-003 supplied in support of the SPC were granted on 24 October 2001 by decision of the European Commission.

5 In his examination report dated 9 October 2008 the Examiner (Dr Jason Bellia) observed that:

> "It is my preliminary opinion that your application as filed does not meet the requirements of 8(1)(d)(i) of Regulation 1768/92 insofar as it does not comply with Article 36(1) by reference to Article 36(2) of Regulation No 1901/2006. It would appear that the means by which compliance with the PIP is confirmed is by incorporation of a compliance statement into the corresponding marketing authorisation by the relevant competent authority which in this case is the European Commission. I have reached this conclusion from a reading of the relevant articles in the Paediatric Regulation and from the information issued by the Commission in the Official Journal of the European union 2008/C 243 particularly under the heading "3. SECTION 2: OPERATION OF THE COMPLIANCE CHECK". As the PIP decision number P/30/2008 is not a marketing authorisation I do not find the application to be complete. "

6 The examiner then went one to set a date of 10 February 2009 as the deadline by which this matter should be addressed. He identified two possible options for the applicant to follow to address:

(i) Supply an EMEA authorisation for Cancidas with a compliance statement in accordance with that set out by the Commission in 2008/C 243; or

(ii) Provide argument to show the PIP decision P/30/2008 meets the requirements of Article 8(1)(d)(i) of Regulation 1768/92.

7 The applicant responded in writing on 29 October 2008 indicating that this preliminary view was in error. He presented written arguments in support of his view under paragraph 6(ii) above that the request for an extension to the granted SPC should be allowed

8 The applicant summarised the facts of their application as follows:

> "1.2 In the present case the applicant, Merck & Co., Inc has a Supplementary Protection Certificate ("SPC") in respect of Cancidas, certificate no. SPC/GB02/002 in respect of which the basic patent is EP 0,620,232. On 18 January 2008 Merck Sharp & Dohme (Europe) Ltd (together with Merck & Co., Inc **"Merck")** agreed a PIP with the EMEA and subsequently carried out clinical trials in accordance with that PIP. Merck subsequently sought an opinion on PIP compliance from the paediatric committee pursuant to Article 23(2)(a). On 4 June 2008 Merck received a positive opinion of the Paediatric Committee of the EMEA P/30/2008 confirming that this work complied with the agreed PIP. Accordingly, having carried out the PIP, as required by Articles 7 and 8, Merck applied for an Extension for Cancidas by an application dated 1 September 2008.
>
> 1.3 Merck has a European marketing authorisation (an "MA") in place for Cancidas and has made an application under Article 8 of the Paediatric Regulation for a new (paediatric) indication. This constitutes a Type II

variation to the existing MA. The MA variation has not yet been granted."

9 I agree with this summary of the facts.

10 The applicant indicated that in the interest of having a decision on the issue as soon as possible, they would waive their right to an oral hearing. My decision is thus based on the papers already on file.

The Relevant Law

11 In this case the relevant legislation is Regulation (EC) No 1901/2006 of the European Parliament and of the Council of 12 December 2006 on medicinal products for paediatric use and amending Regulation (EEC) No 1768/92, Directive 2001/20/EC, Directive 2001/83/EC and Regulation (EC) No 726/2004[1]. I will refer to these other community instruments as necessary in explaining the basis for my decision.

EC Regulation 1901/2006

12 This regulation describes the system for promoting & authorizing paediatric testing of medicinal products in the European Community. The objective of Regulation 1901/2006 is to provide suitable incentives and rewards to companies that produce medicinal products so that they will carry out clinical tests to find out the effectiveness of these drugs when used in children but also ensuring that no unnecessary clinical or other trials take place involving children. It is well established that medicinal products can have different effects when used in adults and when used in children and that tests should be carried out in children to determine if and what these different effects are. This is made clear in the recitals to EC Regulation 1901/2006; see for example recitals 4-6.

13 I do not propose to examine all of this regulation in detail as it covers a number of different situations depending on whether the medicinal product is or is not already the subject of a marketing authorization for human use when the regulation came into force and depending on the procedure used to obtain the marketing authorisation.

14 For the purposes of this case, Articles 7, 8, 23, 24, 28 and 36 are especially relevant. Article 36 of EC Regulation 1901/2006, which refers to the six month extension to the term of the SPC as a reward for carrying out an approved and validated set of paediatric study, reads:

[1] (i) Regulation (EEC) No 1768/92 of the European Parliament and of the Council of 18 June 1992 concerning the creation of a supplementary protection certificate for Medicinal products; (ii) Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the member states relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use; (iii) Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the community code relating to medicinal products for human use, as amended; (iv) Regulation (EEC) 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency.

Article 36

(1) Where an application under Article 7 or 8 includes the results of all studies conducted in compliance with an agreed paediatric investigation plan, the holder of the patent or supplementary protection certificate shall be entitled to a six-month extension of the period referred to in Articles 13(1) and 13(2) of Regulation (EEC) No 1768/92.

The first subparagraph shall also apply where completion of the agreed paediatric investigation plan fails to lead to the authorisation of a paediatric indication, but the results of the studies conducted are reflected in the summary of product characteristics and, if appropriate, in the package leaflet of the medicinal product concerned.

(2) The inclusion in a marketing authorisation of the statement referred to in Article 28(3) shall be used for the purposes of applying paragraph 1 of this Article.

(3) Where the procedures laid down in Directive 2001/83/EC have been used, the six-month extension of the period referred to in paragraph 1 shall be granted only if the product is authorised in all Member States.

(4) Paragraphs 1, 2 and 3 shall apply to products that are protected by a supplementary protection certificate under Regulation (EEC) No 1768/92, or under a patent which qualifies for the granting of the supplementary protection certificate. They shall not apply to medicinal products designated as orphan medicinal products pursuant to Regulation (EC) No 141/2000.

(5) In the case of an application under Article 8 which leads to the authorisation of a new paediatric indication, paragraphs 1, 2 and 3 shall not apply if the applicant applies for, and obtains, a one-year extension of the period of marketing protection for the medicinal product concerned, on the grounds that this new paediatric indication brings a significant clinical benefit in comparison with existing therapies, in accordance with Article 14(11) of Regulation (EC) No 726/2004 or the fourth subparagraph of Article 10(1) of Directive 2001/83/EC.

15 A paediatric investigation plan (hereafter ‘PIP’) is defined in Article 2(2) as meaning

> "a research and development programme aimed at ensuring that the necessary data are generated determining the conditions in which a medicinal product may be authorised to treat the paediatric population"

16 Articles 7 and 8 cover the general marketing authorisation requirements for medicines for paediatric use:

Article 7

(1). An application for marketing authorisation under Article 6 of Directive 2001/83/EC in respect of a medicinal product for human use which is not authorised in the Community at the time of entry into force of this Regulation shall be regarded as valid only if it includes, in addition to the particulars and documents referred to in Article 8(3) of Directive 2001/83/EC, one of the following:

(a) the results of all studies performed and details of all information collected in compliance with an agreed paediatric investigation plan;

(b) a decision of the Agency granting a product-specific waiver;

(c) a decision of the Agency granting a class waiver pursuant to Article 11;

(d) a decision of the Agency granting a deferral.

For the purposes of point (a), the decision of the Agency agreeing the paediatric investigation plan concerned shall also be included in the application.

(2). The documents submitted pursuant to paragraph 1 shall, cumulatively, cover

all subsets of the paediatric population.

Article 8

In the case of authorised medicinal products which are protected either by a supplementary protection certificate under Regulation (EEC) No 1768/92, or by a patent which qualifies for the granting of the supplementary protection certificate, Article 7 of this Regulation shall apply to applications for authorisation of new indications, including paediatric indications, new pharmaceutical forms and new routes of administration.

For the purposes of the first subparagraph, the documents referred to in Article 7(1) shall cover both the existing and the new indications, pharmaceutical forms and routes of administration.

17 Articles 23 and 24 concern the issue of compliance with the paediatric implementation plan and read:

Article 23

1. The competent authority responsible for granting marketing authorisation shall verify whether an application for marketing authorisation or variation complies with the requirements laid down in Articles 7 and 8 and whether an application submitted pursuant to Article 30 complies with the agreed paediatric investigation plan.

Where the application is submitted in accordance with the procedure set out in Articles 27 to 39 of Directive 2001/83/EC, the verification of compliance, including, as appropriate, requesting an opinion of the Paediatric Committee in accordance with paragraph 2(b) and (c) of this Article, shall be conducted by the reference Member State.

2. The Paediatric Committee may, in the following cases, be requested to give its opinion as to whether studies conducted by the applicant are in compliance with the agreed paediatric investigation plan:

(a) by the applicant, prior to submitting an application for marketing authorisation or variation as referred to in Articles 7, 8 and 30, respectively;

(b) by the Agency, or the national competent authority, when validating an application, as referred to in point (a), which does not include an opinion concerning compliance adopted following a request under point (a);

(c) by the Committee for Medicinal Products for Human Use, or the national competent authority, when assessing an application, as referred to in point (a), where there is doubt concerning compliance and an opinion has not been already given following a request under points (a) or (b).

In the case of point (a), the applicant shall not submit its application until the Paediatric Committee has adopted its opinion, and a copy thereof shall be annexed to the application.

3. If the Paediatric Committee is requested to give an opinion under paragraph 2, it shall do so within 60 days of receiving the request.

Member States shall take account of such an opinion.

Article 24

If, when conducting the scientific assessment of a valid application for Marketing Authorisation, the competent authority concludes that the studies are not in conformity with the agreed paediatric investigation plan, the product shall not be eligible for the rewards and incentives provided for in Articles 36, 37 and 38.

18 Article 28 of EC Regulation 1901/2006 provides further detail on the marketing authorisation procedures for applications that fall within the scope of Articles 7 and 8 (see above) and reads:

Article 28

1. Applications may be submitted in accordance with the procedure laid down in Articles 5 to 15 of Regulation (EC) No 726/2004 for a marketing authorisation as referred to in Article 7(1) of this Regulation which includes one or more paediatric indications on the basis of studies conducted in compliance with an agreed paediatric investigation plan.

Where authorisation is granted, the results of all those studies shall be included in the summary of product characteristics and, if appropriate, in the package leaflet of the medicinal product, provided that the competent authority deems the information to be of use to patients, whether or not all the paediatric indications concerned were approved by the competent authority.

2. Where a marketing authorisation is granted or varied, any waiver or deferral which has been granted pursuant to this Regulation shall be recorded in the summary of product characteristics and, if appropriate, in the package leaflet of the medicinal product concerned.

3. If the application complies with all the measures contained in the agreed completed paediatric investigation plan and if the summary of product characteristics reflects the results of studies conducted in compliance with that agreed paediatric investigation plan, the competent authority shall include within the marketing authorisation a statement indicating compliance of the application with the agreed completed paediatric investigation plan. For the purpose of the application of Article 45(3), this statement shall also indicate whether significant studies contained in the agreed Paediatric Investigation Plan have been completed after the entry into force of this Regulation.

EC Regulation 1768/1992

19 EC regulation 1768/1992 concerning the creation of a supplementary protection certificate (SPC) for active ingredients in medicinal products describes the circumstances and means by which an applicant can obtain up to five years additional protection for the active ingredient being marketed in products for use in humans to compensate for the time taken to obtain regulatory approval to put this product on the market. The additional term of protection provided by the SPC relates to the use of the active ingredient in medicinal products that are being sold in the market and its scope is defined by the basic patent on which the application is based.

20 In order to fulfill its objective to reward companies that produce medicinal products for carrying out paediatric testing of these products in addition to their testing for adult use, EC regulation 1901/2006 has amended EC Regulation 1768/92 to specify how an additional 6 month extension to the term of protection provided by the SPC can be obtained.

21 Article 8 of EC regulation 1768/92, following amendment by Regulation 1901/2006, lays down the requirements for an application for a six month extension to the SPC in parts 8(1)(d), 8(1a) and 8(1b), and now reads:

Article 8

1. The application for a certificate shall contain:

(a) a request for the grant of a certificate, stating in particular:

(i) the name and address of the applicant;

(ii) if he has appointed a representative, the name and address of the representative;

(iii) the number of the basic patent and the title of the invention;

(iv) the number and date of the first authorization to place the product on the market, as referred to in Article 3 (b) and, if this authorization is not the first authorization for placing the product on the market in the Community, the number and date of that authorization;

(b) a copy of the authorization to place the product on the market, as referred to in Article 3(b), in which the product is identified, containing in particular the number and date of the authorization and the summary of the product characteristics listed in Article 4a of Directive 65/65/EEC or Article 5a of Directive 81/851/EEC;

(c) if the authorization referred to in (b) is not the first authorization for placing the product on the market as a medicinal product in the Community, information regarding the identity of the product thus authorized and the legal provision under which the authorization procedure took place, together with a copy of the notice publishing the authorization in the appropriate official publication.

(d) where the application for a certificate includes a request for an extension of the duration:

(i) a copy of the statement indicating compliance with an agreed completed paediatric investigation plan as referred to in Article 36(1) of Regulation (EC) No 1901/2006;

(ii) where necessary, in addition to the copy of the authorisations to place the product on the market as referred to in point (b), proof that it has authorisations to place the product on the market of all other Member States, as referred to in Article 36(3) of Regulation (EC) No 1901/2006.";

(1a) Where an application for a certificate is pending, an application for an extended duration in accordance with Article 7(3) shall include the particulars referred to in paragraph 1(d) and a reference to the application for a certificate already filed.

(1b). The application for an extension of the duration of a certificate already granted shall contain the particulars referred to in paragraph 1(d) and a copy of the certificate already granted.";

2. Member States may provide that a fee is to be payable upon application for a certificate and upon application for the extension of the duration of a certificate."

Analysis & Argument

22 The question to be decided in this case is whether the documents supplied by the applicant, in particular that identified as P/30/2008, meets the requirements of Article 8 of EC Regulation 1762/92 as amended, as a valid application for a six-month extension to the duration of the granted SPC.

23 In this case, an SPC has already been granted and so the situation in Article 8(1b) of EC Regulation 1762/92 applies. Thus, the application for the extension

can only be made, according to Article 7(3) of EC Regulation 1768/92, when all the requirements of Article 8(1)(d) have been fulfilled. If this is the case, then according to Article 3 an extension to the certificate shall be granted. Thus, the essential question to consider is does the application meet the requirements of Article 8(1)(d)? If so a valid application has been made, if not, then the application is not valid.

24 Article 8(1)(d)(i) of EC Regulation 1762/92 specifies that an application for an extension of the duration of a certificate must contain "*a copy of the statement indicating compliance with an agreed completed paediatric investigation plan as referred to in Article 36(1) of EC Regulation 1901/2006*". In addition to the authorisations required under Article 3(b) (i.e. a copy of the first MA to place the product on the market in the community and of the MA to place the product on the market in the member state where the application is being made), the application for an extension must also contain, where necessary "*proof that it has authorisations to place the product on the market of all other Member States, as referred to in Article 36(3) of EC Regulation 1901/2006* [see 8(1)(d)(ii) which refers to Article 8(1)(b) and Article 3(b)]. Furthermore the application must include reference to the already granted SPC [see Article 8(1b)].

25 Article 8(1)(d)(i) of EC Regulation 1762/1992 refers to "*a statement indicating compliance with an agreed <u>completed</u> paediatric investigation plan as referred to in Article 36(1) of EC Regulation 1901/2006*"(my emphasis). However Article 36(1) of EC Regulation 1901/2006 refers to a "*statement indicating compliance with an agreed paediatric investigation plan*". Article 36(2) of EC Regulation 1901/2006 indicates that a statement such as that referred to in Article 28(3) of EC Regulation 1901/2006 shall be used to apply Article 36(1) of this regulation. However, Article 28(3) of EC Regulation 1901/2006 uses the same words as Article 8(1)(d)(i) of EC Regulation 1762/1992 i.e. it refers to an 'agreed completed paediatric investigation' . The inclusion of the additional word "*completed*" in these Articles is relevant in my view and indicates that not only must the PIP be agreed (so that it is known what paediatric tests will be carried out), but that these agreed tests are completed and the results are known.

26 Looking at Article 36 which describes the rewards and incentives available for those who complete an agreed set of paediatric studies rather than demonstrating that the product testes id safe and effective in paediatric populations, three types of rewards available are indentified in Article 36(1), 36(4) and 36(5). Articles 36(2) and 36(3) provide additional information about the reward in Article 36(1). In this case we are concerned with the reward provided by Article 36(1)-(3) for products that are protected by an SPC.

27 Merck considers that '*the correct interpretation of the Paediatric Regulation for the purpose of qualification for an Extension under Article 36(1) is that compliance with the PIP can be established by the opinion of the Paediatric Committee of the EMEA*'. Thus they argue that a positive opinion from the Paediatric Committee is sufficient to meet the requirement under Article 36(1) to show that the application under Article 8 includes the results of all studies in compliance with an agreed PIP.

28 Turning now to the documents provided by the applicant which are summarised

on form SP4 submitted with the application dated 29 August 2009. The applicant refers to a document identified as P/30/2008 dated 23 May 2008 as the number and date of the authorisation containing the statement of compliance according to Art 36(1) (see part 7 of form SP4). This document is entitled "Positive Opinion of the Paediatric Committee on Compliance with A Paediatric Investigation Plan for" and refers to PIP decision number P/30/2008 dated 23 May 2008 under the heading 'Scope of the Compliance Application'. This document also provides information under two other headings i.e. 'Basis for Opinion' and 'Opinion'. Attached to this document as 'Annex 1: Information about the Authorised Medicinal Product' is a summary of the details of the EU marketing authorisations granted for this medicinal product. I note that the header on this document is 'EMeA, European Medicines Agency – Pre-authorisation Evaluation of Medicines for Human Use'.

29 The examiner considers that Article 36(1) has to be read in conjunction with Article 36(2) and that compliance with the PIP is confirmed by incorporation of a compliance statement into the corresponding marketing authorisation by the relevant competent authority. As PIP decision number P/30/2008 is not a marketing authorisation and does not contain a statement of compliance then his view is that the application is not complete.

30 On the other hand, the applicant has argued that Article 36(2) is not the only way to establish if the reward under Article 36(1) applies. They argue that the correct interpretation is that the requirement for an extension under Article 36(1) is compliance with the agreed PIP and that this may be evidenced either by a statement of compliance from the EMEA's Paediatric Committee or (as indicated by Article 36(2)) by inclusion of a statement of compliance in the MA. They consider that Article 36(2) merely provides a safe harbour; one way of being sure of showing the compliance required by Article 36(1).

31 Article 36(1)-(3) and the first sentence of Article 36(4) make it clear that these rewards and incentives relate only to applications made under Article 7 and 8 that include the results of all studies conducted in compliance with an agreed PIP. Articles 28 and 29 refer to the marketing authorisation procedures to be used for applications falling within the scope of Articles 7 and 8. These fall into two types – the centralised procedure via the EMeA described in EC Regulation 726/2004 (see Article 28(1) of EC Regulation 1901/2006) or the harmonised procedures provided via the national competent authorities in each Member State referred to as the Mutual Recognition procedure and the Decentralised procedure described in Directive 2001/83/EC (see Article 29 of EC Regulation 1901/2006).

32 Thus I consider that it is reasonable to conclude as did the examiner that Article 36(1) should be read with reference to Article 36(2) and in conjunction with Article 28(3) when it comes to considering applications for a paediatric that fall within the scope of Article 8 as in this case.

33 Article 28(3) makes clear that the competent authority is the body responsible for including within the marketing authorisation for the medicinal product a statement indicating compliance of the application with the agreed completed PIP. In addition the competent authority will also indicate in this statement whether significant studies contained in the PIP have been competed after entry into force

of EC Regulation 1901/2006. However, the competent authority will only do so if the application for the variation to the marketing authorisation complies with all the measures contained within the agreed completed PIP and if the summary of product characteristics (hereafter 'SmPC') reflects the results of studies conducted in compliance with the agreed PIP. The competent authority in this situation is the body responsible for granting marketing authorisations. This is either the European Commission who issues decisions granting EU marketing authorisations or a national competent authority who grants marketing athorisations valid in that member state. For example, the Medicines Health Regulatory Authority (MHRA) is the national competent body that grants marketing authorisations valid in the UK.

34 Article 36(1) of EC Regulation 1901/2006 makes it clear that where an application under Article 8 "*includes the results of all studies conducted in compliance with an agreed paediatric investigation plan*", the holder of an SPC "*shall be entitled to a six month extension of the period referred to in Article s13(1) and 13(2) of Regulation (EEC) No1768/92"* (my emphasis). The second sub-paragraph makes it clear that this reward does not depend on the tests in children showing that medicinal product is effective and thus approval of a paediatric indication is merited, it is sufficient to complete an agreed paediatric study which shows that the product has no effect. However, the information on these tests has to be made available as part of the information about this medicinal product, hence the requirement that the outcome of these (unsuccessful) tests has to be reflected in the SmPC. In both these scenarios a positive opinion of the Paediatric Committee would be the result if the agreed completed PIP had been complied with. However, it is only in the SmPC that the results of these studies would be recorded and one would be aware whether or not the product has been approved for paediatric use and has a therapeutic effect in children. This I consider to be further support for the view that a statement of the kind referred to in Article 36(2) is what is required to meet the requirement of Article 36(1) because one of the requirements under Article 28(3) is that the SmPC has been updated to include the outcome of these tests.

35 Article 36(2) says that inclusion of the statement referred to in Article 28(3) in the marketing authorisation "*shall be used for the purposes of applying paragraph 1*". In addition, Article 36(3) requires that if the authorisation has been granted using the procedures described in Directive 2001/83/EC, which are also those referred to in Article 29 of EC regulation 1901/2006, then all Member States must have authorised the product if the entitlement under Article 36(1) is to apply. There appears to be no way in which the applicant can obtain the reward in Article 36(1) if the market authorisation procedure he has used is one of those described in Directive 2001/83/EC unless he has secured a varied marketing authoristion in all member states. It would be inconsistent in my view if one was able to obtain the reward in Article 36(1) using the procedure referred to in Article 28 without also having to obtain the varied marketing authorisation valid in all the member states. In my view this offers further support for the fact that in order for an applicant to obtain the reward under Article 36(1) they need to have secured an updated market authorisation valid in all the member states that indicates the PIP has been complied with and the outcome of these tests.

36 As mentioned in paragraphs 8 above, the applicant is seeking an extension for an authorised medicinal product which is already protected by an SPC. This is the situation covered by Article 8 of EC Regulation 1901/2006. In this situation, paediatric testing of the medicinal product will be to determine how effective this known medicinal product would be for treating the same or a new condition in children. Each tested use in the paediatric population that is effective and useful is referred to as a new paediatric indication and the marketing authorisation has to be updated or 'varied' to include the details of this new paediatric indication. Article 8, second sub-paragraph, indicates that an application for a marketing authorisation will be valid for the purposes of seeking an extension to the SPC term only if it comprises one of the additional documents listed in Article 7(1). I note here that if the marketing authorisation application includes the additional documents under Article 7(1)(a) i.e. the results of all studies performed and details of all information collected in compliance with an agreed PIP, it also needs to include the decision of the European Medicines Agency (EMeA) agreeing the PIP. I note here that this is a reference to the agreed PIP and not to the agreed completed PIP. I also note that this is a reference to 'the Agency' and not to the competent authority. The EMeA is not a competent authority for granting marketing authorisations, the European Commission is.

37 Articles 23 & 24 of EC Regulation 1901/2006 indicate how compliance with the PIP will be established. The competent authority responsible for granting marketing authorisations (which are, as mentioned above, the European Commission or the national competent authority) is referred to in Article 23(1) as being the body responsible for verifying whether an application for a marketing authorisation or variation complies with the requirements of Article 8. The competent authority is also responsible under Article 24 for conducting a scientific assessment of a valid application for a Marketing Authorisation and if as part of this process the competent authority considers that the PIP has not been complied with, then the reward under Article 36 will not be available for that product. Article 7 and 8 indicate what are the elements of a valid application for a marketing authorisation. Article 28(2) refers to the role of the Paediatric Committee in this process referring to the circumstances when the Paediatric Committee may be asked to give its opinion as to whether or not the studies conducted by the applicant are in compliance with the agreed PIP. This request for an opinion from the Paediatric Committee may come from the applicant prior to submitting his application for a marketing authorisation or variation under Article 8 [see Article 28(2)(a)], from a national competent authority or via the EMeA [Article 28(2)(b)] or from the Committee on Medicinal Products for Human Use or the national competent authority [see Article 28(2)(c)]. I note that in relation to a request from an applicant under Article 23(2)(a), the applicant is not allowed to submit his application, i.e. it is not a valid application under Article 8 until after the Paediatric Committee has given its opinion and a copy of this is included with the application. As a result, I consider that the opinion of the Paediatric Committee is only a part, albeit a very important part, of the process that a competent authority uses to carry out the assessment of compliance with the PIP in Article 23(1) and Article 24.

38 This is further supported by the Communication from the Commission published in the Official Journal of the European Union 2008/C 243/01 and referred to by

the examiner in his preliminary report which provides further details on the compliance check referred to in Article 23 and 28(3). While the applicant question the relevance of this communication for purposes of interpretation it is clearly helpful as it has been drawn up to meet the requirement under Article 10 of EC Regulation 1901/2006 to do so. It indicates that the compliance check is performed by the competent authority and involves two steps - one under Article 23 and one under Article 24. Obtaining the opinion of the Paediatric Committee is part of the step under Article 23.

39 In this case the original marketing authorisation for Caspofungin on which the granted SPC (SPC GB/02/002) was based was obtained via the centralised EMeA procedure (see paragraph 5 above). A copy of the Commission decision granting this authorisation and associated summary of product characteristics (SmPC) is on file. Unsurprisingly this is also the procedure that was chosen by the applicant to obtain a varied marketing authorisation for the new paediatric indication (see paragraph 8 above). However, as indicated by the applicant in their letter of 29 October 2008, the variation to the marketing authorisation had not yet been granted when the application for the SPC extension was filed with the IPO. Thus it is clear that the application does not include a varied marketing authorisation that includes a statement of compliance such as that referred to in Article 28(3) and Article 36(2).

40 There is no information in EC Regulation 1901/2006 as to what exactly the statement of compliance should be. However the Communication from the Commission referred to above provides further information on what this statement of compliance referred in Article 28(3) of EC Regulation 1901/2006 will be and the examiner referred the applicant to this as part of his preliminary view. However, this communication does not give any indication as to where in the marketing authorisation this statement of compliance will be found.

41 I consider that the positive opinion document from the Paediatric Committee submitted by the applicant is not suitable as a means to fulfill the requirements under Article 8(1)(d)(i) of EC Regulation 1768/92. The Paediatric Committee is not a competent authority for granting marketing authorisations as required by Article 23(1). Obtaining such an opinion is only part of the process and further steps are necessary e.g. the scientific assessment of valid applications for marketing authorisations (see Article 24 and 28) before an updated or varied marketing authorisation can be obtained. It is clear, for example, from Recitals (8), (9), (11) and (16) and Article 6 of EC Regulation 1901/2006 that while the Paediatric Committee plays an important role in carrying out assessments of medicinal products to treat paediatric populations this is an advisory or support role that it does through the formulation of opinions – see for example Article 6(a)-(c). In my view, this positive opinion document only indicates that the application to update the marketing authorisation for a new paediatric indication is only partially completed. There are further steps to be completed before the application for the varied market authorisation to show the new paediatric indication has been granted. An important one of these is the update to the summary of product characteristics to reflect the outcomes of the completed agreed paediatric plan as referred to in Article 28(3). The decision attached by the applicant to his application for an extension to the granted SPC is identical to

that filed by the applicant with his original SPC application. The summary of product characteristics has not been altered in any way to indicate the outcome of the agreed completed PIP, indeed it still includes a specific statement saying that caspofungin has not been tested in the paediatric population [see Section 4.2, page 12 of Annex 1: Summary of Product Characteristics attached to Commission Decision of 24-10-2001 granting the market authorisation for Caspofungin].

42 I find further support for my view that the application for the marketing authorisation must include the results of all studies conducted in compliance with the agreed PIP and when granted it must include a statement of compliance referred to in Article 28(3) from a consideration of Article 37. Both of these elements must be present if the applicant, having conducted paediatric studies, is to obtain the reward identified in this Article in relation to products designated as an orphan medicinal product.

43 In their written submission, the applicant argued that if it was necessary to wait until they could furnish evidence of a granted updated or varied marketing authoristion to apply for the 6 month SPC extension for products that are already covered by an SPC rather than doing so on the basis of the opinion on compliance of the Paediatric Committee, they are in danger of being denied the reward for doing the paediatric studies through no fault of the applicant but rather because of the time taken by the competent authority to process the application and grant the update marketing authorisation. However, in my view the reward is not only based on completing an agreed PIP, it is also based on making sure that information regarding the use of medicinal products in the paediatric population is made available and improved and this achieved by including this information in the marketing authorisation and in the SmPC and, where relevant, the product & labeling information. This is illustrated for example by recital (28) of EC Regulation 1901/2006. Thus there would seem to a valid reason why it is necessary to wait until the varied marketing authorisation is granted. However, I do have some sympathy with the concern expressed by the applicant in relation to the impact of delays beyond their control in obtaining updated granted marketing authorisations from a competent authority and the need make an application for an SPC extension prior to expiry of the original granted SPC. Article 7(4) and 7(5) of EC Regulation 1768/92 require that the application for an extension to the SPC must be lodged before expiry of the original SPC. For the period of 5 years after EC Regulation 1901/2006 enters into force, the application must be made 6 months before the SPC expires, thereafter, the application must be lodged 2 years before the SPC expires. I do not think that it can be one of the intended consequences of this Regulation that the time taken by the competent authority to process the application and grant the update marketing authorisation should prevent an applicant from being able to obtain a reward for carrying out an agreed completed PIP and making the information on its outcomes available.

Conclusion

44 I find that the application filed by the applicant Merck and Co for a six-month extension to granted SPC GB/02/002 does not meet the requirements laid down in Article 8(1)(d)(i) for a valid application for an extension. The application does

not include an authorisation containing a statement of compliance with an agreed completed paediatric investigation plan as referred to in Article 36(1) of EC Regulation 1901/2006.

45 The examiner in his preliminary report allowed the applicant a period within which to rectify the irregularity with their application for an extension to SPC/GB/02/002 and set a deadline of 10 February 2009 for them to do so. For the reasons I have indicated above the problem identified by the examiner remains with this application. The applicant still has a short time left to rectify this irregularity before the deadline set by the examiner expires. If he fails to do so, then as the examiner also indicated in his preliminary report, the application will be refused in accordance with Article 10(3) and 10(4). I note that this time period is extendable as of right under rule 108 (The Patents Rules 2007) and that further discretionary periods may be available. I consider that if the applicant is unable to provide an authorisation containing a statement of compliance with an agreed completed paediatric investigation plan as referred to in Article 36(1) of EC Regulation 1901/2006 because of delays beyond their control, for example, because of the time taken by the competent authority to provide an updated varied marketing authorisation then this is a factor to be taken into consideration should a discretionary extension to this time period be sought.

Appeal

46 Under the Practice Direction to Part 52 of the Civil Procedure Rules, any appeal must be lodged within 28 days.

Dr L CULLEN
Deputy Director acting for the Comptroller