URÍA MENÉNDEZ

PORTUGAL

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Introduction

[1] Overview of the Portuguese Pharmaceutical Market

The Portuguese pharmaceutical market was valued at EUR 4.16 billion as of 2005, with the pharmacy sector representing 80.76% and the hospital market the remaining 19.24%. Portugal represents about 3% of the EU pharmaceutical market.[1] From January to December 2005, both the pharmacy and hospital sectors showed a considerable increase (5.43% and 15.50%, respectively) compared with the same period in 2004.[2] In 2005 prescription medicines represented 75.19% of the total market, whereas the penetration of non-prescription medicines is still low (5.57% of the pharmacy sector in 2005)[3]. Generic drugs increased their market share from only 0.34% in 2001 to 12.65% of the pharmacy sector by value in 2005, and 15.15% in 2006.[4] Pharmaceutical products and raw materials imports amounted to nearly EUR 1.6 billion in 2005, while exports (following a decreasing tendency from previous years) were limited to EUR 285 million.[5]

The pharmaceutical industry in Portugal is dominated by multinationals, most of which now import finished products. Between 2001 and 2004 we witnessed a decrease of 14.29% of the existing pharmaceutical companies which operate as manufacturers. There were approximately 140 pharmaceutical companies in the country in 2004, of which 23 operated as manufacturers.[6] However, local companies have made substantial investments in recent years, not only in the construction and acquisition of manufacturing plants but also in the acquisition of sophisticated equipment and new technology. As a result of these efforts, the market share of domestic companies has almost doubled in the last 10-12 years, to reach 15.24% in 2004.[7] Some Portuguese pharmaceutical companies are producing special pharmaceutical products for themselves and third parties, while others are launching new products

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[*] Lawyers of URÍA MENÉNDEZ, Lisbon, Portugal (www.uria.com/eng/index.asp).

[1] Source: IMS Health.

[2] Source: IMS Health.

[3] Source: IMS Health.

[4] Source: INFARMED - Instituto Nacional da Farmácia e do Medicamento (Portuguese Regulatory Medicines Agency) http://www.infarmed.pt.

[5] Source: APIFARMA - Associação Portuguesa da Indústria Farmacêutica (Portuguese Association of the Pharmaceutical Industry), which represents around 99% of the Portuguese Pharmaceutical Companies. http://www.apifarma.pt.

[6] IAPMEI (Portuguese Institute for Support to Small and Medium Size Companies and Investment) "Internacionalizar com qualidade", edition nº 3/2005, May 2005 (http://www.iapmei.pt/iapmei-nwl-02.php?tipo=2&id=854).

[7] Source: IMS Health.

into the market under license from foreign companies. Some companies have even set up small R&D centres jointly with other companies or universities; others are turning to globalisation to develop their business.

In 2004 the total number of employees in the sector was 10,897, of which around 28.7% were employed in local companies. The estimates for 2005 indicate that the domestic pharmaceutical industry employs 3,379 people (an increase of 4.8% in relation to 2004, where those employees numbered 3,224). 30.4% of those employees hold degrees mainly in Pharmacology, Medicine, Engineering, Chemistry, Biology, Economics and Business Management (in 2001 this percentage was only 19.9%).[8]

For the purposes of achieving the objective of rapidly increasing the level of exports of pharmaceutical products, a certain number of Portuguese pharmaceutical manufacturers, the Portuguese External Trade Institute (ICEP), the Portuguese Association of the Pharmaceutical Industry (APIFARMA) and the Portuguese Regulatory Medicines Agency (INFARMED) have set up a strategic joint venture (known as "*PharmaPortugal*"). In addition to the African Portuguese Speaking Countries (PALOP), target markets for exports are the Maghreb countries, Brazil and, within Europe, Spain, Poland and the Czech Republic.[9]

In 2005, INFARMED granted a total of 453 marketing authorisations (MA) under the national procedure. The average term for an authorisation process was 240 days [(*)]. In accordance with the mutual recognition procedure, of a total of 232 processes completed, only 12 failed (the average term to issue a decision was less than 90 days). Portugal was a Reference EU Member State for 76 MA applications submitted according to the mutual recognition procedure. INFARMED also participated as relater or co-relater in five MA processes granted according to the centralised procedure. There were 9,796 processes (referring to changes or amendments to previously granted MAs approved), of a total of 10,935 of these processes concluded by INFARMED in that same year.[10]

[2] Life Sciences sector and incentive programmes[11]

Portugal has a strong reputation for having a sound, trustworthy and competent workforce in the Life Sciences sector. Employees in this sector are trained by universities that are up to date with scientific developments and market tendencies and the Government is strategically committed to strengthening the country's scientific resources. Collaboration projects between multinational pharmaceutical corporations, Portuguese biotech firms and reputed universities have produced some of the most advanced research and therapies developed for worldwide application. In 2002, 38 research projects were funded in the Life Sciences sector, with a total investment of over EUR 2 million. In accordance with the Sixth EU Support Framework, and to respond to the challenge established by the Lisbon

[8] Source: Inquiry on the Characterisation of the Portuguese Pharmaceutical Industry (December 2005) - APIFARMA - Associação Portuguesa da Indústria Farmacêutica (Portuguese Association of the Pharmaceutical Industry), which represents around 99% of the Portuguese pharmaceutical companies.

[9] Source: IAPMEI (Portuguese Institute for Support to Small and Medium Size Companies and Investment): http://www.iapmei.pt/iapmei-nwl-02.php?tipo=2&id=855.

[10] Source: INFARMED - Report of Activities (2005).

[11] Source: API, Agência Portuguesa para o Investimento (Invest in Portugal Agency) - http://www.investinportugal.pt/MCMSAPI/HomePage/.

[(*)] The average term for the completion authorization processes commenced in 2005, was however of only 100 days.

European Council, a budget of EUR 2.2 billion for research and development ("**R&D**") in Life Sciences, genomics and biotechnology for health has been agreed. From 2001 and throughout 2002, several incentive programmes were implemented to support innovative business oriented research initiatives and promote the adoption of technology by companies. Special incentives for hiring employees with PhD's and important resources to fund other training and skills development support schemes for employees have been established. More recently, Law 40/2005, of 3 August, established tax incentives for investment in entrepreneurial R&D, intended to provide the country with a tax benefit system that continuously enhances and promotes R&D activities in private enterprises.

[3] Protocol signed between the Ministry of Health and the Pharmaceutical Industry

As is the case in other countries, the financial sustainability of the Public Health System is a complex structural problem for which appropriate and consistent solutions are urgently required. Amongst the measures adopted to implement high priority health reforms[12] (most of which are in line with the conclusions provided in the Final Report of a Study of the Portuguese System of Reimbursement and Pricing of Medicines, in the Context of the Health System Reform, carried out by Europe Economics[13]), and to balance the need to sustain public expenditure for medical products with the goal of increasing the competitiveness of the Pharmaceutical Industry, a Protocol was signed between the Ministry of Health and the Portuguese Association of the Pharmaceutical Industry (APIFARMA) on 10 February 2006 (the "**Protocol**"). The Protocol will be binding for all companies (including those that are not members of APIFARMA) that adhere to it and, in any event, will have retroactive effect as of 1 January 2006. The Protocol, which is due to remain in force until the end of 2009, presents two distinct negotiation levels (one for 2006/2007 and another one for 2008/2009) and sets the limits for growth in the medicinal products market for the coming years. The hospital sector has been incorporated in an agreement of this type for the first time. However, companies can choose to adhere only to the part applicable to the pharmacy market. The main contents of the Protocol are summarised as follows:

- As regards the pharmacy market, for 2006 zero growth has been established for prices. For 2007, it will not exceed the nominal GDP (Gross Domestic Product) increase.

- The Pharmaceutical Industry will be responsible for growth in excess of those established in the Protocol up to a maximum of EUR 35 million in 2006 and EUR 45 million in 2007.

- For the first three quarters of each year during the term of the Protocol, companies will pay a provisional contribution to the Ministry of Health. In March of the following year, companies will be informed of the final contribution for the preceding year, which will take into account any possible deductions in respect of

[12] The following measures have been considered as a high priority, most of them having already been adopted: (i) Extension of the non-prescription drugs sales points outside pharmacies; (ii) General reduction on drugs pricing; (iii) Promotion of generics; (iv) Revision of the reimbursement system; (v) Negotiation of a protocol between the Ministry of Health and the Pharmaceutical Industry with the purpose of controlling the increase of the market of drugs subject to reimbursement; (vi) Reinforcement and improvement of the information addressed to health professionals; (vii) Prescription by International Common Denomination (ICD); (viii) Transposition of the new European pharmaceutical legislation by creating a New Medicines Act, implying important changes for the whole sector; (ix) Promotion of the rational use of medicines; (x) Definition of programs with a view to improving the quality of prescriptions; (xi) Support to the R&D activities of the Pharmaceutical Industry.

[13] See http://www.infarmed.pt/pt/noticias_eventos/noticias/2005/nt_24_05_2005/final_report.pdf, also available on the Europe Economics site: www.europe-economics.com.

R&D activities that they have developed. The difference between the sum calculated at the end of the year and the total provisional contributions will be paid to, or received from, the Ministry of Health by the companies, as the case may be.

- Should the aggregate individual contributions be lower than the overall contribution of the Pharmaceutical Industry, an adjustment proportional to each company's market share will be carried out.

- The contributions paid in the context of the Protocol will be considered as costs for tax purposes in each financial year.

- The initial price of a drug will be established by comparing it with the average price of drugs in four Reference Countries (Spain, France, Italy and Greece). The price so determined will be the maximum price. The prices approved according to this new system will be reviewed on a yearly basis.

- The prices currently in force would be reviewed on 31 July 2006, in order to apply the new methodology. However, no adjustment will be made in the event of an increase in prices. If the review results in a reduction, companies will have four years to adjust to the average price. From expiry of the Protocol, the prices of medicinal products (with the exception of those that cost EUR 15 or less) will be reviewed annually.

- Provisional prices (for which the average price of drugs in the Reference Countries is not considered) will be calculated on the basis of the new system. These prices are subject to 10% annual adjustments until they reach the average mentioned above.

- With regard to generics, their penetration in over 50% of the corresponding active substance will determine a mandatory reduction (between 3% and 5%) in the respective price. Generics with a price lower than EUR 10 will fall under a different group, with a 20% reduction in the price of the original product.

- The Ministry of Health undertakes to promote the development of the non-prescription medicinal product market (though nothing is mentioned in relation to the measures to be adopted)

- In relation to hospitals included in the National Health System, the Protocol stipulates a maximum growth of 4% over hospital sales in 2005, up to a maximum of EUR 15 million.

- Three distinct segments have been considered in the hospital market:

  (i) the basic market - for which the system used in the pharmacy market will also apply.

  (ii) the specific pathologies component [antiviral medicinal products (AIDS) and antineoplasial and immunomodulator medicinal products (Cancer)] - additional data, such as the development in the number of patients treated, will be taken into account. Compensatory mechanisms to be determined by mutual agreement between the State and the companies are anticipated for a growth in excess of 4%.

(iii) the innovative medicinal products component (those that start to be marketed after the date on which the Protocol enters into effect) - will necessarily imply programme-agreements to be entered into between the State and the companies.

- Hospital debts to companies have also been established in the Protocol, through which the State undertakes to ensure that deadlines contractually agreed between hospitals and the companies will be met.

- For the purposes of controlling the hospital market, a pilot stock management system will be implemented in six hospitals.

- R&D expenses will be deducted from the contribution payable under the Protocol.

- Sums originating from the companies' contributions will be transferred to a Health Research Support Fund, with a view to financing projects developed by pharmaceutical companies with significant technological innovation.

[4] The New Medicines Act

The Portuguese pharmaceutical legislation was subject in 2006 to an extensive in-depth review in order to implement several new EU provisions and to review the national legislation currently in force accordingly. After an internal discussion stage, at the beginning of 2005 INFARMED, in conjunction with the Ministry of Health, released a draft version of a Working Document setting the basis for the New Medicines Act to its partners for comments and suggestions, which was finally enacted by Decree-Law 176/2006 of 30 August and entered into force on the following day. The New Medicines Act envisages implementing Directive 2001/83/EC, of 6 November 2001 (on the Community Code relating to Medicinal Products for Human Use), as amended [14], in addition to consolidating in one single document all the rules and regulations relating to medicinal products for human use, therefore rationalising and harmonising the current legal framework.

Aside from the above, it has been considered appropriate to keep certain matters separate from this new piece of legislation due to their special nature. Therefore, the current legal regimes and regulations applicable to Clinical Trials, Good Clinical Practices, Prescription Drugs Pricing and Reimbursement are, amongst others, set out in several laws that are already in existence and with which the New Medicines Act will have to interact. The main changes introduced into the national legislation by the New Medicines Act include the following:

- In relation to the drugs approval process, the decentralized procedure (allowing the simultaneous application for an MA in several EU Member States) was added to the three procedures already set out in both the EU and the national legislation (national procedure, centralised procedure and mutual recognition procedure);

[14] And also article 31 of Directive 2002/98/CE, of January 27, 2003; Directive 2003/63/CE, of June 25, 2003; Directive 2003/94/CE, of October 8, 2003; Directive 2004/24/CE, of March 31, 2004; and Directive 2004/27/CE of March 31, 2004.

- A marketing authorisation (MA) is now subject to a single renewal authorisation, valid for an unlimited period (therefore replacing a mandatory MA renewal every five years), except in the event that pharmacovigilance reasons would compel a different solution. This change was complemented by a reinforcement of pharmacovigilance rules.

- Certain aspects of the procedures related to exceptional authorisations for the marketing of medicinal products intended for special use and direct acquisition of these was corrected and reviewed;

- A new procedure already established in the EU legislation was introduced in the national legislation, allowing, under certain conditions, the placement into the local market of medicinal products for which no MA has been granted or applied for under the conventional procedures;

- With respect to traditional herbal drugs, a new procedure was established;

- Parallel imports of medicinal products were regulated in Portugal for the first time, therefore legally creating a possibility that until then had not existed in the country;

- A new definition for a generic version of a drug (generic medicine) and specific authorisation rules, including a harmonised regime for data exclusivity were contemplated;

- The rules governing the labelling and leaflet of medicinal products were significantly improved, with a view to providing more correct and clearer information to the public. Braille provisions and consumer tests were also included in the new labelling rules;

- For the purpose of guaranteeing the respect for both the right to health and consumer protection rules contained in the Portuguese Constitution, the legal framework applicable to the advertising of medicinal products was also improved;

- The publication of drugs evaluation reports was subject to new specific norms;

- INFARMED was provided with new responsibilities and new mechanisms were created in order to enable it to have a more effective action, including surveillance of compliance with the law by the appropriate agents and scientific advice to the domestic Pharmaceutical Industry. In addition, the existing instruments in the context of cooperation with international organisations (in particular in the context of the EU) were reinforced.

[5] Extension of the non-prescription drugs sales points outside pharmacies

Having been included in the list of high priority measures of the ongoing Health reform, the sale of non-prescription drugs outside pharmacies has been allowed since 15 September 2005, in accordance with the terms of Decree-Law 134/2005, of 16 August (providing the respective legal framework), as further regulated by Ruling ("*Portaria*") 727/2005, of 14 September.

Accordingly, non-prescription medicines for human use (with the exception of those that are subject to reimbursement and/or acquired by under 16's, in which case pharmacies keep the exclusivity of sale) may currently be sold to the public in premises that comply with the applicable legal and regulatory requirements ("**authorised establishments**"), although they are subject to the same quality and safety controls required for drugs sold in pharmacies.[15]

The sales of non-prescription drugs made through this channel is increasing, while it corresponded to a total of EUR 3,67 million in 2006, it reached EUR 0,71 million in January 2007.

The person responsible for the authorised establishment (who must be a qualified professional although not necessarily a qualified pharmacist, as opposed to the requirements to manage a pharmacy) may manage a maximum of 5 authorised establishments provided that the distance between the two most distant establishments does not exceed 50 Km.

As a rule, the breach of the obligations applicable to the sale of these drugs away from pharmacies qualifies as an offence, which is sanctioned with a fine (up to a maximum of EUR 44,000 for collective persons). In addition, accessory penalties (confiscation of drugs and/or closing of the premises) may apply.

Patents

[1] General patent information

The main Portuguese legal framework for patents is found in articles 51 to 166 of the Industrial Property Code (*Código da Propriedade Industrial*, the "**CPI**"), as approved by Decree-Law 36/2003, of March 5. The CPI also includes the main legal provisions regarding other types of industrial property rights, such as trademarks, utility models, designs or models, rewards, logos, names and business signs, designations of origin and geographical indications.

Portugal is a Member State of the EU, and the CPI incorporates EU Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998, on the legal protection of biotechnological inventions (the "Biotech Directive")[16]. In addition, the CPI also incorporates Council Regulation (EEC) 1768/92 of 18 June 1992, concerning the creation of a supplementary protection certificate for medicinal products, and Regulation (EC) 1610/96 of the European Parliament and of the Council of 23 July 1996, concerning the creation of a supplementary protection certificate for plant protection products.

In addition to the CPI regulations regarding patents, conventions, treaties, and international agreements which have been duly ratified by Portugal, such as, the Paris Convention, the European Convention (EPC), the Patent Cooperation Treaty (PCT), the Budapest Treaty and the Trips Agreement, are also applicable in Portugal.

[15] In February of 2007, the number of authorised establishments exceeded 380, of which at least 310 are operating. Source: Infarmed.

[16] With regard to other Industrial Property rights, the CPI already integrated Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998, on the legal protection of designs.

Accordingly, both process and product inventions may currently be subject to patent protection in Portugal, which is valid for a 20-year term.

The Portuguese patents and trademarks office is called "Instituto Nacional de Propriedade Industrial" (INPI) (National Institute of Industrial Property)[17]. It is a public body with administrative and financial autonomy, which is under the supervision of the Ministry of Economy. The INPI was established in 1973 to promote and protect Industrial Property rights, to prevent unfair competition and to support the development of innovation and modernisation of the Portuguese economy, taking into consideration the constitutional right to invention, laid down in the Portuguese Constitution (article 42.2). It is also responsible for receiving applications for registration of Industrial Property rights and for providing information on Industrial Property rights and their protection (both national and international).

INPI decisions and notices are published in the "*Boletim da Propriedade Industrial*" (BPI), which is the Portuguese Industrial Property Gazette.

In addition to Portuguese patent applications, the INPI also receives European patents applications, filed under the EPC, which it sends to the European Patent Office (EPO). EPC applications must be written either in an EPO official language (German, English and French), or if the applicant has its residence or principal place of business in Portugal, in Portuguese language, as long as a translation of the application into one of the official languages is provided.

Conversely, the national phase of the European patent starts when the patent is granted and published by the EPO. In order to obtain patent protection in Portugal, the owner of a European patent is then required to provide the INPI with a translation into Portuguese of the patent file (claims, description, abstracts and drawings) within three months from the publication of the European patent being granted in the European Patent Bulletin, in addition to paying the applicable fees. The INPI will then publish a notice in the BPI regarding the receipt of the translation, with the indications necessary for the identification of the patent.

A European patent application may also be converted into a national patent application in accordance with Article 135 of the EPC. In this regard, the INPI rejects a patent application when the applicant fails to pay the appropriate fees, or to provide a translation of the European patent documents into Portuguese within two months from filing the conversion request. Finally, as there cannot be double protection, a national patent regarding an invention which is already protected by a valid European patent granted to the same inventor or to a third party with the inventor's consent, with the same filing or priority date, will be cancelled as from the expiry of the European patent opposition phase.

[2] Filing a Patent Application

[a] Who may file

[17] Its website is http://www.inpi.pt (where the status of the patents and other intellectual property rights registered with the INPI can be checked).

As a general rule, a patent right belongs to its inventor and/or his successors. A patent application may be filed by the inventor or by a representative. Additionally, a collective invention patent application may be filed by any of the co-inventors. However, if, for any reason, a patent application is not requested on behalf of the inventor, the inventor still has the right to be named as such in the patent application.

Specific rules apply when the inventor is an employee. An invention by an employee created in the process of performing the terms of an employment contract that comprises inventive work, unless otherwise agreed between the employee and the employer, is considered to belong to the employer. However, the employee will have a right to compensation to be determined in accordance with the importance of the invention, if no specific supplementary remuneration for this purpose has been agreed in advance by the parties. Additionally, if a patent application is filed within one year from the termination of the employment contract, it will be construed that the invention subject matter of the patent was concluded during the performance of the employment contract.

If the employment agreement makes no reference to the inventive work, but nevertheless such inventive work is comprised within the scope of the employer's business, the company may choose to acquire full ownership of a patent relating to an invention, or else, to reserve the right to an exclusive exploitation of the patent, or to acquire the patent or to request and/or acquire a foreign patent for that invention[18]. The company has a three-month period from the date it was notified by the employee to pay the due compensation in order to acquire full ownership of the patent. Company's failure to pay this amount will cause the company to forfeit any rights over the invention. Also note that the employee has a duty to provide the employer with information regarding the finalized invention within three months from the date the invention is completed. This three-month period may, however, be reduced to one month, when a patent application has already been filed by the employee with the INPI. The employee's failure to comply with the above obligation may give rise to civil and disciplinary liability.

Unless otherwise agreed, the above provisions will also apply to inventions made upon request ("*obra por encomenda*").

[b] Where to file the application

Patent applications must be filed at the INPI's office in Lisbon. A European patent application may, however, be filed either at the INPI or at the EPO. As a general rule, the CPI determines that, if the applicant has its residence and/or business in Portugal, the EPC patent application must be filed at INPI (provided that a priority claim for a previous claim in Portugal has not been made). The same applies for PCT patent applications.

[c] Minimum filing requirements for a patent application

The patent application must be written in Portuguese and will include the following data:

- the applicant's identification (name, nationality, residence and/or headquarters);

[18] See: Lisbon Court of Appeal ruling of 13 November 1992.

- title or heading summarising the invention;

- name and country of origin of the inventor;

- in the event the applicant wants to claim a priority right, name of the country where a first patent application was filed and date and number of such application;

- indication as to whether a utility model for the same invention has been applied for;

- signature of the applicant or its representative/attorney.

In addition, Portuguese versions of the following documents must also be attached:

- Claims concerning the *novelty* of the invention. Claims must be clear, concise and correctly drafted and should be based on the description of an invention, including, if appropriate, an introduction describing the purpose of the invention and the appropriate technical characteristics to identify the elements that are being claimed as new, and a description of the characteristics of the invention, which define the scope of the protection;

- A description of the invention, which must be clear and complete, in order to allow the invention to be executed by a person skilled in the art. If the description does not allow such person to execute the invention, then the patent could be considered null. A description may be provided within one month from the date the application is filed.

- Any drawings mentioned in the description or in the claims, required for a clear and precise understanding of the patent's description. These drawings may also be delivered within one month from filing the application.

- An abstract of the invention, to be published in the BPI, consisting of a brief summary of the description, claims and drawings, preferably in less than 150 words, which will serve as technical information.

When the application is filed, the filing date of the application is established. Right to priority will be granted to the application, first including a description of the invention and, where applicable, the date, number and place of a previous patent application, even when other formal pre-requisites regarding the application are yet to be fulfilled.

There are filing fees to be paid to INPI together with the application. The amount of these fees will depend on examination of the patent application and on the number of claims (above or below ten). The fees for a first annual renewal must also be included.

[d] Examination of formal requirements

INPI will examine the patent application within one month from the filing date. The formal examination at this stage will only consider the application form, the documents presented and the requirements regarding undisclosed biological material. INPI will also notify the applicant of any errors or deficiencies detected. The applicant may correct those errors or deficiencies within one month from being notified of any such errors or deficiencies. The applicant's failure to correct these errors or deficiencies will result in the application being refused.

A description of the invention will not be considered inaccurate when the patent refers to biological material not available to the public, which cannot be described in a patent application in such a manner as to enable the invention to be reproduced by a person skilled in the art, or where it requires the use of material of such nature. In such cases, the description will be considered sufficient provided that:

(i) such material has been deposited before the filing date in a depositary institution recognised by the Budapest Treaty, of 28 April 1997, on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure;

(ii) the application comprises all relevant information known by the applicant with reference to the characteristics of the biological material deposited; and,

(iii) the patent application states the depositary institution and accession number.

Access and delivery of the biological material is then regulated in terms set out in Article 13 of the Biotech Directive.

When the application has been accepted by INPI, a notice of the patent request will be published in the BPI after the expiry of a period of eighteen months from the date of filing or the date of priority, unless the applicant requests an earlier publication.

[e] Examination on merits

An examination on patentability of the invention will be subsequently conducted by the INPI. If no opposition to the patent request is filed within two months from the publication in the BPI, the INPI will draft a report within three months from the publication of the patent request. However, if an opposition is filed, the new term for the INPI to issue its report will be three months from the date on which the last document regarding the opposition was filed.

If the examination indicates that the patent can be granted, a notice will be published in the BPI. If the INPI decides that a patent cannot be granted, the applicant is notified of the report and of all the issues referred to in the report, in order to enable him to reply to the observations made. This reply may take place within two months from the date of notification. If the applicant's reply is not sufficient, the INPI will notify it one last time to clarify any outstanding issues within one month from such notification. The applicant will be provided with another one month term to file his observations and comments if his latest observations did not respond to the INPI's objections. If the applicant's answers are deemed to be sufficient, the patent will be granted. Otherwise, a notice stating that the patent is rejected or partially granted, according to the examination report shall be published. The applicant's failure to respond to this notice will result in the patent's definitive refusal.

A patent may be partially granted in the cases where the applicant fails to amend the application regarding the definition of the matter to be protected, the elimination of claims, drawings, abstract and/or descriptive phrases, and the amendment of the title of the invention, whenever the INPI carries out those amendments itself.

Examination on the merits will also consider the unity of the invention, and therefore, the application may relate to one invention only, or to a group of inventions linked in such a way as to form a single general inventive concept.

[f] National phase of a PCT application

A PCT application, which had been available in Portugal since 1992, must be filed at the INPI, in order to be effective in Portugal, unless the priority of an application filed in Portugal is claimed. PCT applications may be written in Portuguese, French, English or German language; applicants of Portuguese language applications must provide a translated version into any of the other languages within one month from filing. On the other hand, a Portuguese translation of the French, English and German language applications must be provided for foreign language applications, except when the applicant is claiming the priority of an application filed in Portugal for the same invention. Finally, the application must state the countries for which patent protection is sought.

The national phase of the PCT application begins with the publication, in the BPI, of the PCT application request. If the applicant wishes to extend the PCT patent protection to Portugal, it must deliver a translation into Portuguese language of the application within thirty months from the priority date and pay the applicable fees. Only the formal and material conditions set out in the PCT shall be considered.

[3] Patent subject matter for pharmaceutical inventions

According to article 51.1 of the CPI, any inventions may be the subject matter of patent protection provided that they are new, inventive and have industrial application. The above provision expressly includes among the patentable inventions, the biotechnological inventions, defined by the CPI in accordance with the Biotech Directive, as “a composed product consisting of biological material or a process by means of which biological material is produced, processed or used”.

Article 51.2 further establishes that, if the above requirements are met, patent protection may be granted either for a process or a product, in any field of technology. Article 51.3 defines as patentable any new process for obtaining known products, substances and compounds.

Although the CPI usually protect inventions, simultaneously or sequentially, by means of patent and/or utility model rights (article 51.5), article 119 excludes any inventions or biological material and chemical or pharmaceutical processes or substances from the scope of protection of utility models.

Article 52.1 and 52.2 of the CPI expressly excludes from patent protection, amongst other matters, simple discoveries, scientific theories and mathematical methods, natural materials and substances, and methods for treatment of human or animal body by surgery or therapy and diagnosis methods applied to human or animal body.

These limitations, however, do not apply to:

(i) products, substances or compounds used in surgery, therapy and diagnosis methods (article 52.2);

(ii) a substance or a compound used by any of the above methods which is part of the state of the art, provided, however, that its use in connection with those methods is not included in the state of the art (article 54.1.a).

The protection of a "new use" invention therefore prevails as provided in the EPC, regardless of whether the CPI fails to provide any specific guidelines regarding a second use definition.

In line with Article 5.3 of the Biotech Directive, article 53 of the CPI provides that illegal inventions and inventions with regard to which commercial exploitation is contrary to public order, morality and public health (article 53.1) are unpatentable. This includes processes to clone human beings, to modify the gene-line genetic identity of human beings, the use of human embryos for industrial or commercial purposes, processes to modify the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to humans or animals, and any animals resulting from such processes (article 53.2).

Article 53.3 further determines as non-patentable inventions, in accordance with articles 4.1 and 5.1 of the Biotech Directive, the human body, at the various stages of its formation and development, and also the simple discovery of one of its elements, including a sequence or partial sequence of a gene. This material cannot be the subject matter of patentable inventions, nor can plant varieties and animal species[19], and primarily biological processes for the production of plants or animals.

The limitations regarding the human body will, however, not apply to new inventions entailing inventiveness and industrial applicability, regarding isolated elements from the human body or otherwise produced through a technical process, including the sequence or partial sequence of a gene, even if the structure of that element is identical to the one of a natural element, provided that the industrial application of such sequence or partial sequence of a gene is expressly observed and specifically indicated in the patent application (article 54.1.b). Technical processes used for the identification, characterisation, isolation, purification and reproduction of the gene, seeking a technical application, are also patentable.

The above limitations will likewise not apply to inventions regarding plants or animals provided that their technical feasibility is not confined to a plant variety or animal species (article 54.1.c), inventions concerning a microbiological process or other technical processes, or a product obtained by means of such processes (article 54.1.e), nor to biologic material isolated from its natural environment or produced by means of a technical process even if it previously occurred in nature (article 54.1.d).

[4] Novelty, utility and inventiveness; requirements for pharmaceutical inventions.

According to the CPI, the basic requirements for an invention to be patentable are novelty, utility and inventiveness. The specific details of each requirement are set out in the provisions of the EPC, to which Portugal is a party.

[19] Plant variety protection can be obtained through the procedure set-out in Decree-Law 20/95, of 8 July, according to which Portugal joined the International Union for the Protection of New Varieties of Plants (UPOV), or under a "Community plant variety right", in accordance with Council Regulation (EC) 2100/94, of 27 July 1994, on Community plant variety rights.

[a] Novelty[20]

An invention is considered new if it does not form part of the state of the art, which comprises everything made available to the public, within or outside Portugal, before the date of filing of the patent application, by means of a description, by use, or by any other means. The CPI considers as part of the state of art, the contents of the patent and utility model applications yet unpublished, filed before the date of filing of the relevant patent, for the purpose of obtaining the respective protection in Portugal. The novelty requirement must be understood as absolute novelty, in accordance with the EPC (Article 54). Moreover, an invention's novelty will not be affected by any disclosure of the invention due to, or as a consequence of an evident abuse in relation to the applicant or his legal predecessor, nor by an inappropriate publication carried out by the INPI.

[i] Novelty in the pharmaceutical field

Although the CPI expressly excludes from patent protection, natural materials and substances, and methods for treatment of human or animal body by surgery or therapy and diagnostic methods applied to human or animal body, as previously mentioned, the CPI considers patentable any products, substances and compounds used in any of such treatment and diagnostic methods (article 52.2), and any substance or compound comprised within the state of the art for the execution of any of such methods, provided that its use for any of such methods is not included in the state of the art (article 54.1.a). This means that any substance or compound known by the prior art with a non-pharmaceutical application, may be patentable if its use for surgery, therapy or diagnostic methods had not been disclosed. Therefore, a new use patent for a first pharmaceutical use of a known substance is accepted, as novelty refers to the new use as opposed to the used substance.

[b] Industrial Application

Article 55.3 of the CPI, in accordance with the EPC's Article 57, provides that an invention which can be made or used in any kind of industry or in agriculture, is subject to industrial application. The concept of industrial applicability is broad and differs from the concept of utility, which is not required according to Portuguese law. Therefore, the INPI does not perform any examination of an invention's utility.

According to the INPI's practice, concepts lacking practical reality, meaningless concepts and concepts contrary to the laws of physics and chemistry (e.g., a ghost-catcher concept), will not be granted patents. Additionally, it is considered that any kind of craftworks and hand-made products and techniques lack industrial applicability, this is because craftworks and hand-made products are not mass-produced products.

[c] Inventiveness [21]

The inventiveness requirement is established in article 55.2, which provides that an invention will be considered as involving an inventive step, whenever it is not considered to be obvious by a person skilled in the relevant art.

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[20] See: Supreme Court decisions of 23 November 1976, 19 April 1979; 24 May 1983, 21 June 1983, 21 February 1988, and 26 January 2006; the Lisbon Court of Appeal decision of 3 November 1994, and the Oporto Court of Appeal decision of 5 December 2002.

[21] See: Oporto Court of Appeal decision of 27 February 1991

The state of the art considered for inventiveness should be the same as that considered for the examination of the novelty. However, the CPI does not reflect the exact wording of Article 56 of the EPC. The EPC establishes that, "if the state of the art also includes documents [European patent applications deposited before the date of filing of the patent and not yet published] within the meaning of Article 54, paragraph 3, these documents are not to be considered in deciding whether there has been an inventive step". Article 56.2 of the CPI, however, does not exclude from the state of the art patent applications not yet published, namely, Portuguese patent applications and the EPC and PCT patent applications designating Portugal as the contracting State for which protection for the invention is being sought.

[5] Patent term and term extensions

Patents are valid for twenty years from the date of filing[22]. This term may be extended by means of Supplementary Protection Certificates (SPC's). These supplementary protection certificates are the Community SPC's established in Council Regulation (EEC) 1768/92 of 18 June 1992[23], and Regulation (EC) 1610/96 of the European Parliament and of the Council of 23 July 1996, concerning the creation of an additional protection certificate for plant protection products. The term extensions will therefore correspond with the term extensions set out in both Regulations.

SPC's are regulated in articles 115 and 116 of the CPI's. According to these provisions, for an SPC to be issued, a written request in Portuguese must be submitted to the INPI, comprising:

a) the name or business name, nationality, resident or registered office of the applicant;

b) the number of the basic patent and the title of the invention;

c) the number and date of the first authorisation to place the product in the Portuguese market, and, should this authorisation not be the first marketing authorisation in the European Economic Area ("EEA"), the number and date of that authorisation; and,

d) a copy of the first marketing authorisation in Portugal or, where that authorisation is not the first marketing authorisation for the EEA, a copy of the publication of that authorisation, plus a summary regarding the identity of the authorised product and the legal provision under which the authorisation procedure took place, together with a copy of the notice publishing the authorisation in the appropriate official publication.

After filing the SPC application, the INPI will perform an examination to discover whether the application was filed in due time, and if it fulfils all the necessary requirements. If the application meets the conditions set out in the Council Regulation (EEC) no. 1768/92 of 18 June 1992, and in the Regulation (EC) no. 1610/96 of the European Parliament and of the Council of 23 July 1996, the INPI will issue the SPC, and publish notice of the application together with notice of the concession in the BPI. If the application does not meet all the conditions, the INPI will

[22] This 20-year term is valid since 1996. In fact, Portugal did not implement Article 33 of the Trips Agreement in its 1995 Industrial Property Code. The USA then filed a WTO claim against Portugal. The case was dropped when Portugal amended its patent term in 1996.

[23] Which was formerly regulated by Decree-Law no. 106/99, of 31 March 1999, later revoked by the CPI.

ask the applicant to amend the irregularities within two months. A new decision regarding the SPC concession will be taken in lieu of the fulfilment requirements following the applicant's response.

[6] Patent Infringement

[a] Scope of Protection

The scope of protection of a patent right set-forth in article 97 of the CPI, and the rights granted by the patent (and respective limitations) are detailed in articles 101, 102, 103 and 104 of the CPI.

[b] Infringing acts

According to article 101 of the CPI, a patent grants to its holder an exclusive right of exploitation, in any part of the Portuguese territory, in addition to the right to prevent third parties (without the authorisation of the respective right holder) from producing, offering, storing, marketing, using, importing (without prejudice to the parallel imports regime described below) or possessing a product subject matter of a patent right granted by a patent, provided that the protection does not exceed the scope defined by the patent claims. Aside from this, the description and the drawings may be used to interpret the claim. If the subject matter of the patent refers to a process, the rights conferred by such patent comprise the products directly obtained by the patented process[24].

[c] Non-infringing acts

In certain situations a third party is entitled to use a patented invention, provided that certain requirements are duly fulfilled. Article 102 provides limitations to the effects of a patent, establishing that the rights conferred by the patent will not extend to:

- the acts carried out in the private sphere and for non-commercial purposes;

- the extemporaneous preparation for individual cases in a pharmacy of a medicine in accordance with a medical prescription, in addition to the acts concerning the medicine so prepared;

- the acts carried out exclusively for experimental or trial purposes relating to the subject matter of the patented invention, including experiments for the preparation of the administrative procedures necessary for the products to be approved by the official bodies, provided that the commercial exploitation of these products is not initiated before the expiry of the patent which protects such products (please refer to paragraph l.2.v above).

- the use onboard vessels of other EU and OMC Member States, of the patented invention, in the body of the vessel, in the machinery, tackle, gear and other accessories, when these vessels temporarily or

[24] See: Supreme Court decisions of 25 February 1993, and of 22 April 1999; Lisbon Court of Appeal decision of 2 February 1999.

accidentally enter Portuguese waters, provided that the invention is used there exclusively for the needs of the vessel;

- the use of the patented invention in the construction or operation of aircraft or land vehicles or other means of transport of other EU or OMC Member States, or of accessories to such aircraft or land vehicles, when these temporarily or accidentally enter the Portuguese territory;

- the acts specified in Article 27 of the Convention on International Civil Aviation, dated 7 December 1944, where these acts concern the aircraft of another country;

[d] Exhaustion of rights

Article 103 establishes the principle of exhaustion of rights within the EEA. In accordance with this Article, the rights granted by a patent do not include the acts regarding the products protected by such patent after the commercialisation of such products in the EEA by the right holder or with its consent. Once the product has been introduced in the EEA market, the holder of the patent right is not entitled to forbid or restrict its commercialisation.

[e] Prior personal possession

Article 104 provides that the rights conferred by a patent may not be invoked, within the territory against a person who, in good faith and for business purposes, becomes aware of the invention through his own means, has used the invention, or has made serious preparations for its use before the filing date or the priority date of the application. That person will have the right to continue producing the product and using the procedure as customary, but this right may only be transferred or assigned together with the transfer of the business in which such production or use was being made. It must be emphasised, however, that the right of prior personal possession will not apply when the knowledge of the invention was obtained by unfair means.

The burden of proof concerning the elements of the above provision lies with the person that invokes prior personal possession in good faith and for business purposes.

[f] Provisional protection after the application and before the granting of the patent right

Article 5 of CPI establishes that filing of an application for a patent grants the applicant, from the date of the respective publication in the BPI, the same protection that would be provided by the granting of the patent right. In light of this, the applicant may claim reasonable compensation from any person who has used the invention in Portugal in circumstances where that person would be liable in accordance with Portuguese law for infringement of a national patent. The court decisions will not be issued before the definitive decision of the INPI concerning the granting or refusal to grant the patent right concerned.

[g] Parties who may sue or be sued in an action

The owner of a patent has *locus standi* to sue for infringement. In accordance with article 101 paragraph 3 of the CPI, «*the patent holder is entitled to oppose itself to all the acts infringing its patent right, even if those acts are*

grounded on another patent right with a posterior priority date, without the need to challenge the titles or to request for the annulment of the patents on which such posterior right is based».

In relation to civil actions, in co-ownership cases, a claim may be brought jointly by all the co-owners of the patent, by some of the co-owners, or individually by each co-owner. If the claim is brought by only one or some of the co-owners, damages will only be awarded in relation to those who brought the action. During the proceedings, the co-owners who have not brought the action may be called to join the claimant(s) in court. In this case, the effects of the court decision will be produced in relation to all the claimants present.

In relation to criminal proceedings, the patent holder or the licensee of a patent right is entitled to submit a complaint to the Portuguese Attorney General's Office (*Ministério Público*) so that criminal proceedings may be initiated.

Judicial proceedings may be brought against anyone, be it a company or an individual, violating the rights of a patent owner. [25]

[h] Courts having jurisdiction in Patent Infringement

An action for patent infringement may be initiated based on civil or criminal law and, in certain cases, situations of patent infringement may also give rise to administrative proceedings leading to the application of a fine to the offender by an administrative authority. According to the CPI, in such administrative proceedings, the investigation phase is conducted by an administrative authority (*ASAE - Autoridade de Segurança Alimentar e Económica*). The final decision regarding the application of a fine shall be taken by the INPI.

In the case of civil actions, specialised courts (adjudging at first instance) have exclusive jurisdiction over such claims. According to Articles 78 paragraph e) and 89 of Law no. 3/99, of 13 January any civil action (claim for damages) based on patent infringement shall be brought before a Commercial Court (*Tribunal do Comércio*) or, when a Commercial Court is not available, (in Portugal there are only two commercial courts, one in Lisbon and the other in Gaia), before a Civil Court. In terms of *rationae loci*, the common rules applicable to claims for damages proceedings will apply. Therefore, a civil action must be brought before the court which has jurisdiction over the place where the infringement was or is being committed.

An appeal against a judicial decision, if permitted by law (that is, if the damages claimed exceed EUR 3,740.98), will be assessed by the Court of Appeal (*Tribunal da Relação*). After a decision has been issued by the Court of Appeal and if the damages claimed exceed EUR 14.963,94, a second appeal may be submitted to the Supreme Court of Justice (*Supremo Tribunal de Justiça*).

All criminal litigation will be brought before the criminal courts of first instance. However, as explained below, the initiation of the criminal procedure (*i.e.*, the commencement of an investigation phase) depends on a previous complaint submitted to the Public Prosecution Service. The local court with jurisdiction is the court of the area where the breach was or is being committed.

[25] See: Supreme Court decision of 31 January 1996

[i] Application of the doctrine of equivalents in pharmaceutical cases

The CPI does not contain any reference to the doctrine of equivalents. Nevertheless, article 97 of the CPI, sets out that the scope of protection conferred by the patent has to be determined by the content of the claims and that the description and drawings will serve for its interpretation. Article 97 of the CPI must therefore be construed in light of Article 69 of EPC, and the "Protocol on the Interpretation of article 69 of the Convention".

The doctrine of equivalents apparently has only been referred to by a Portuguese court in a decision issued more than two decades ago by the Lisbon Court of Appeal under the former Portuguese Industrial Property Code of 1940 (decision of 26 June 1974). The court then decided that despite the substitution of some of the means described in the appropriate patent, patent infringement can be determined where the following three conditions (the "triple identity" test) are met:

(i) the substitutive means derive from the same inventive idea which is the subject matter of the patent;

(ii) such means have the same function as the means described in the patent; and

(iii) such means are aimed at the same results as the means described in the patent.

In any event, it is generally accepted that the doctrine of equivalents is applicable in Portugal, and that the Portuguese courts must construe Article 97 in accordance with the EPC and the EPO practice.

[j] Infringement of a process Patent

[i] Reversal of the burden of proof

Contrary to the general principle applicable in Portuguese civil law, where the burden of proof generally lies with the party claiming a certain right, in certain patent process infringement scenarios the burden of proof lies with the defendant. In this regard, article 98 of CPI establishes: «*If the subject matter of the patent is a process for the manufacture of a new product, this product manufactured by a third party shall be presumed to have been manufactured through the patented process, unless the third party provides proof that the process used is different*». This, however, will only apply in civil actions, as in criminal actions or administrative infraction proceedings, the general principle of law "*in dubio pro reu*" (presumption of innocence), will apply and the proof will be freely assessed by the court.

[ii] Means of proving infringement

Apart from the specific case of a process patent, referred to above, the burden of proof usually lies with the party which invokes a right or an exception. The minimum evidence generally provided to bring an action for infringement is the following:

- Certificate of the filing of the Portuguese translation of the EPC patent with the INPI;

- Certificate of the EPC patent issued by the INPI, if applicable;

- Evidence (expert report) regarding the correspondence between the allegedly infringing product/process and the claims of the patent;

- Evidence regarding the infringing action: (i) manufacture of patented products; (ii) use of the patented process; (iii) import or distribution of patented products; and/or (iv) sale of patented products.

Evidence can be submitted before the court at any stage before the end of the main hearing. When evidence that could have been submitted by the parties at an earlier stage is submitted during the main hearing, the court sanctions the party with a fine. The dismissal of the claim on the ground of insufficient evidence is only made by the court with the final judgment. If the claim is considered to be filed in bad faith, the applicant may be ordered by the court to pay a fine and to indemnify the other party accordingly.

According to Portuguese law, there are no discovery or investigation proceedings. Aside from this, Portuguese law establishes the possibility for a party to request the court to order the other party or a third party to present certain documents that are in their possession, either before or after the commencement of the action for the merits. The necessity for such request must however be justified. Also, according to Portuguese law, if there is a risk of evidence being lost and in order to preserve such evidence, it is possible to start the witness interrogations before the court prior to the commencement of the proceedings or before the main hearing.

[iii] Attachment proceedings

Portuguese law only establishes the possibility of attachment of products or other goods that infringe the patent through the competent criminal authorities, namely when those products result from illegal actions punished by criminal law. Article 319 of the CPI states that customs may confiscate, imported and/or exported products and goods which, directly or indirectly, contain false indications regarding their origin or designations of origin, trademarks or names illicitly used and applied, or whenever an infringement is otherwise revealed. If the infringement is manifest, the attachment will be carried out by customs which will notify any interested party, allowing him to legalise the products or goods provisionally confiscated. Additionally, the seizure may also be executed upon the request of a third party with an interest. In any event, the attachment will be annulled if it is not confirmed by the Attorney General's Office (*Ministério Público*) within 10 days from notification by the interested party.

[iv] Infringement via importation of a product prepared by a patented process or an equivalent process

The importation of a product prepared directly by a patent process is strictly forbidden, unless the alleged offender is able to establish that the process used is different.

[k] Remedies available to a patent holder in a patent infringement

[**i] Preliminary injunctions**

The CPI establishes two major types of injunction proceedings, depending on the purposes of the patent holder when filing such proceeding. The injunctions available to a patent holder are the following:

- Attachment (*arresto*) of the patented product. This preliminary injunction consists of a judicial apprehension of products or other objects infringing a patent right.

- Unspecified injunction, which will be used when the purpose of the petitioner is not, or at least not exclusively, the apprehension of the products infringing the patent rights. This may occur when the patent holder/petitioner intends to ask the court to issue a judicial order to prevent or stop the infringement.

In light of this, preliminary injunctions can be brought both:

a) to prevent the occurrence of infringing actions, in which case the non-specified injunction would be the most appropriate proceedings. In this case, the petitioner may request an order from the court addressed to the potential offender not to initiate the infringing behaviour; or

b) for urgency reasons, once the infringement has occurred, in order to cease the infringement.

In relation to the first point, Portuguese law does not specify how imminent the acts of infringement must be for the court to issue a positive decision. The petitioner will provide preliminary proof of the fear that someone is infringing or about to infringe its rights. The requirement of *periculum in mora* (i.e., the risk of a negative change in the current situation before the decision on the merits is adopted) is mandatory for interim relief to be granted. The other general requirement is that the petitioner must provide summary proof that they are the holder of the right which is intended to be protected through the preliminary injunction (*fumus bonus iuri*).

Although the preliminary injunction depends on the action on the merits, it can, however, be filed within or before the merits action. Therefore a preliminary injunction can be filed and decided before the filing of the merits action. In this case, after such decision is issued, the petitioner has a 30-day period (or a 10-day period in the event the other party has not been heard in the injunction proceedings) to file the merits action. As preparatory actions may be also prosecuted under the CPI, and may be sufficient evidence to file injunction proceedings, the petitioner can either wait until the product is launched or act once it has sufficient evidence of the preparatory actions. Nevertheless, the preliminary injunction should be filed as soon as the petitioner has obtained the necessary evidence of the preparatory actions or, as the case may be, of the infringing behaviour. If an injunction is requested in order to prevent the occurrence of an infringing action (i.e., before the infringement is committed) and the court adopts the necessary measures to stop the preparatory actions of the potential offender and the offender complies with the court decision, then the merits claim will consist in a formal request for the court to definitively confirm the prohibition of the preparatory actions. Should this situation occur, and unless the petitioner has suffered no damages as a consequence of these preparatory acts, there will be no infringement claim.

[ii] Action on the merits

The infringement of a patent right may entail the initiation of three types of proceedings:

a. Civil Action (claim for damages)

These are judicial proceedings of civil nature through which any party who has suffered damages resulting from an unlawful act may sue the offender in order to obtain a fair compensation for damages. In order for this action to be successful the following must apply:

- there must be an unlawful act (the infringement)
- the conduct of the offender must either be wilful or negligent;
- there must be damages;
- the conduct must have produced the damages.

Should these requirements be met, the patent holder will be entitled to claim for damages and the loss of profits caused direct or indirectly by this conduct. The criteria for loss of profits is established in the Portuguese Civil Code, namely, the profits that the plaintiff would have obtained if the infringement had not taken place (including the royalties that the offender would have paid to the patent owner for the legitimate use of the patent).

b. Criminal proceedings

According to the CPI, certain patent infringements are "criminal offences":

(a) violation of an exclusive right granted by a patent. Those who, without the consent of the patent owner: (i) produce goods which are the subject matter of the patent; (ii) use or apply means or processes protected by the patent; or (iii) import or distribute goods which have been obtained using products or processes protected by the patent right, may be punished with a prison sentence of three years or a fine of up to 360 days.

(b) selling, moving and concealing products protected by a patent, with knowledge of this fact, may be punished with a prison sentence of one year or a fine of up to 120 days;

(c) holding a patent right in bad faith, without being lawfully entitled to it, may be punished with a prison sentence of one year or a fine of up to 120 days. In these cases, the Court will also issue a decision annulling the patent registration, or, upon the request of the interested party, assign the registration in favour of the inventor.

(d) registration of acts that are lawful but inexistent or by concealing important facts, will be punished with a prison sentence of three-year or a fine of up to 360 days.

Criminal proceedings will be initiated by the Attorney General's Office (*Ministério Público*) only if a complaint is submitted by the patentee or licensee within six months from the infringement. If the Attorney General's Office finds sufficient evidence to substantiate the complaint, formal prosecution may follow and proceedings be instituted. As a general rule, the wilful misconduct of the defendant must be proven for the defendant to be found guilty in criminal proceedings, unless negligence is expressly considered prohibited.

With regard to patents, and on the basis of the offences described above, the infringing act must be carried out intentionally.

c. Administrative infraction proceedings (*Processos Contra-Ordenacionais*).

These proceedings deal with infractions which, from a Portuguese law perspective, are less serious than criminal offences, therefore only punished with fines.

[l] Defences available for the offender:

[i] Invalidity: general rules concerning the invalidity of a title

The validity of the title invoked by the patent holder may be challenged on the basis of several facts. In accordance with article 33 of the CPI, the title will be considered null if:

- the subject matter of the industrial property right cannot be protected;
- some formalities considered necessary for the correct allocation of rights have been ignored; or
- public order rules have been breached.

In relation to patents specifically, the CPI establishes further causes of nullity. According to article 113 of the CPI, the patent will be considered null in the following cases:

- when the patent does not comply with the novelty, inventiveness and industrial application requirements;
- when the subject matter of the patent concerned cannot be protected;
- when it is acknowledged that the title given to the patent comprises a different subject matter;
- when the subject matter has not been described in such a way that it allows its execution by a specialist in that field.

According to article 114, the declaration of nullity may apply only to some claims, but it will not be possible to declare the partial nullity of a claim. Furthermore, the patent will remain in force, provided that the remaining claims constitute an autonomous patent. The nullity may be invoked at any time and by any party that proves to have an interest in ensuring that the invalidity is recognised, as well by the Public Prosecutor.

Furthermore, article 34 of the CPI sets out that a title can be declared annulled in the following cases:

- the patent rights do not belong to the title holder;

- the patent rights have been granted in breach of any of the following rules:

  - the patent must be granted to its inventor or inventors;

  - if the invention was created within the scope of an employment contract, the patent holder will be the employer. The employer will be awarded compensation in accordance with the importance of the invention, if the invention is not comprised within the employment contract.

In these cases, instead of the title being annulled, the interested party can request the reversion of title in its favour.

[ii] Challenge of the validity of the title by the offender within specific judicial proceedings

The offender can challenge the validity of the title invoked by the claimant on which the claim is based. The invalidity proceedings may be heard by the same court if the nullity claim is filed by the offender within the same procedure by means of a counterclaim (*reconvenção*). These proceedings can also be filed independently from infringement proceedings. In this regard, if the invalidity claim is filed before the infringement claim, the parties can ask the court to join the proceedings. The court may decide on this issue at its sole discretion, provided that both claims have been filed with the same court.

If the invalidity claim is filed after the infringement has been brought before the court, then the infringement court can stay the infringement proceedings until a final decision has been issued on the invalidity.

[iii] Exhaustion of rights

As referred to above, the alleged offender may argue that the rights granted by the patent holder have been exhausted.

[iv] Prior personal possession

This also applies with regard to prior personal possession. The alleged offender may argue and must prove that:

(i) it became aware of the invention through its own means;

(ii) it acted in good faith;

(iii) it has used the invention, or had made significant preparations for its use;

(iv) all the above facts occurred before the filing or the priority date of the application.

[v] Experimental use and regulatory submission exception

Article 102, c), of the CPI, expressly sets out that patent rights do not extend to «acts carried out exclusively for trial or testing purposes, including tests required for the preparation of the necessary administrative procedures to obtain the approval of a product by the competent authorities, provided that the industrial and business exploitation of this product is not carried out prior to the expiry of the relevant patent». Although the CPI does not incorporate the *Bolar* provision established in article 10(6) of Directive 2001/83/EC (as amended by Directive 2004/27/EC) - which states that studies and clinical trials necessary for obtaining an authorisation for a generic medicinal product will not be considered a breach of patent rights or Community SPC's rights. The CPI already limits the rights granted by a patent in this regard. This issue was the object of article 19 (8) on the New Medicines Act, which set-forth that the test and studies required for the granting of a MA generic drug are not contrary to rights granted relating to patents.

Therefore, the rights of patent holders should not prevail over experimental treatment, for the purposes of an application to an Authority, provided that these scientific trials and tests are necessary to ensure the approval of a drug by the competent authorities, bearing in mind that both the experimental phase and the approval of procedures, tend to be time consuming. As a result, clinical trials and tests, namely those regarding generic drugs, will not constitute a patent infringement under Portuguese law.

[vi] Compulsory licenses

According to article 107 of CPI, «*compulsory licenses over a specific patent may be granted in the following cases:*

a) lack or insufficient exploitation of a patented invention;

b) dependency between patents.

However, compulsory licenses will only be granted if the potential licensee has made the necessary efforts to obtain a license from the patent holder on acceptable commercial terms and these efforts fail to succeed within a reasonable term.

With regard to pharmaceutical products, when the subject matter of the patent is a process for the preparation of a pharmaceutical product and whenever such patent process represents an important technical development of the older patent, both the holder of the latter and the holder of any product patent somehow related to these products, may request a compulsory license for the new process patent.

[vii] Obligation to exploit

According to article 106 of the CPI, the patent holder has four years (from the filing of the prosecution request) or three years (from the granting of the patent), to exploit the patent (directly or through a third party). Once the longest of these terms has elapsed, it is the patentee who must evidence that the patent is being exploited.

[viii] Parallel imports (patent aspects)

The principle of exhaustion of rights within the EEA area is recognised by the CPI, which article 103 reads as follows: «*the rights conferred by a patent shall not entitle its owner to prohibit acts concerning the patented products, after such products have been commercialised in the EEA directly by the patent owner or with its consent*». The rights conferred by a patent may constitute a restriction or a measure with an equivalent effect to the free movement of goods. However, the new Medicines Act currently in force[26] provides a specific procedure to obtain the authorisation for companies to carry out parallel imports, therefore the implementation of parallel imports of pharmaceutical products in Portugal being possible. This is a novelty implemented by the New Medicines Act. The absence of regulation on parallel imports did not prevent the control over any parallel imported pharmaceutical products by the national regulatory authority (INFARMED), in particular in respect of the origin of the product, the similarity with the pharmaceutical products marketed in Portugal (such as, the active substances and therapeutic indications), compliance with packaging requirements, the danger to public health (e.g., in cases in which the imported pharmaceutical product is not identical but only similar) and prices, among others.

The lack of this procedure previously did not allow the implementation of parallel imports of pharmaceuticals, but this is expected to change with the enactment of the New Medicines Act.

§ X.02 Trademarks/Trade dress protection for pharmaceutical products

[1] Trademark protection of the shape and colour of pharmaceutical products

The CPI does not contain any specific provisions regarding the registration of shape and colour as trademarks of pharmaceutical products, and thus, the general provisions.

[i] Trademark protection for the shape of products

According to article 223, paragraph 1.b, of the CPI, shapes and tri-dimensional objects cannot be registered as a trademark, whenever: (i) that particular shape is considered to be the result of the product's shape or nature; (ii) a technical result must be obtained; or (iii) the shape adds to the value of the product (e.g., an art product). This last exclusion regarding shapes that add to a product's value does not apply, however, to packaging, but rather to the shape of product. Consequently, an original shape, which is not technically essential nor adds to the value of the product, may be registered as a trademark.

[ii] Trademark protection of the colour of products

Generally, colours can be used in a product or a package in several ways so as to constitute a trademark, namely: i) the distinct use of a colour; ii) the use of a distinguishing mixture of colours; iii) a pre-determined use of colours; and iv) the use of a certain colour as the trademark colour. Under article 223, paragraph 1.e of the CPI, a single colour, presented individually, cannot constitute a trademark, since it lacks distinctiveness. The same applies for rainbow colours or intermediary colours. All others combinations, pre-determined presentations and patterns, may be considered a trademark, provided that they are considered unusual and distinctive.

[26] Approved by Decree-Law 176/2006 of August 30.

[2] Specific trademark provisions relating to pharmaceutical products

In this regard, the provisions of the CPI regarding trademark rights will apply, as there is no specific regulation on pharmaceutical products. Nevertheless, according to the Medicines Act, pharmaceutical products may be identified through a trademark, provided that the trademark is not mistaken for international standard designations, and this use does not lead to confusion regarding its product characteristics. In addition, the trademark name to be used to identify the pharmaceutical product must be included in the marketing authorisation application filed with INFARMED.

[3] Parallel importation of pharmaceuticals (trademark aspects)

As stated above, the New Medicines Act currently in force foresees a specific procedure regarding parallel imports authorisations, and therefore, the parallel import of pharmaceutical products in Portugal has become a reality. In any event, according to the CPI, by registering a trademark, the owner has the exclusive right to use, and to prevent the unauthorized use of the product by third parties, because of its identification or similarity with the registered trademark, if there is likely to be confusion with regard to the product between the trademark and the signs disclosed to the public. Therefore, if a third party uses the trademark without the owner's consent, in such a way that there is confusion on the distinctive nature or the reputation of the trademark, a trademark infringement is considered to be taking place.

Trademark rights are, however, limited in two ways: the exhaustion of rights and the informative use of the trademark. Indeed, articles 259 and 260 of the CPI, in line with Article 7 of First Directive 89/104/EEC of the Council, of 21 December 1988, to approximate the laws of the Member states relating to trademarks (which in turn relates to Articles 12 and 13 of Council Regulation (EC) no. 40/941 of 20 December 1993 on Community trademarks), state that:

- the trademark shall not entitle the owner to prohibit a third party from using, in commercial products, independently or with his consent, in the EEA (unless there are legitimate reasons for the owner to oppose, namely, if the condition of the goods is altered or impaired after they have been placed in the market); and

- rights resulting from the trademark registration shall not entitle the owner to prohibit a third party from using, in the course of trade, provided that it uses it in accordance with honest practices in industrial or commercial matters: a) its own name or address; b) indications concerning the type, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of the service, or other characteristics of goods or services; and c) the trademark, whenever it is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts.

There is no case law on the interpretation of the scope of the exhaustion of trademark rights and on the descriptive use of the trademark, therefore it should be construed in accordance with the European Court of Justice decisions (*Bristol/Paranova, Eurim-Pharm/Beiersdorf; MPA Pharma/Rhône-Poulenc Pharma; Pharmacia & Upjohn/Paranova; Merck/Paranova; Boehringer/Swingward*, for exhaustion of rights; *Höltergoff/Freiseleben, Gilette/La* for the descriptive use of the trademark).

[4] Specific rules governing the attachment of infringing pharmaceutical products, either at national borders or internally

As referred to above in relation to patents, article 319 of the CPI establishes that customs may confiscate, imported and/or exported products and goods which, directly or indirectly, contain false trademarks or names illicitly used and applied. In addition, if an infringement is otherwise discovered and be noticeable, seizure proceedings will be initiated by customs, which in turn will notify the interested party. Attachments may be executed upon the request of a third party with an interest. In any event, attachment procedures are considered void in the absence of confirmation from the Attorney General's Office within 10 days from the notification by any interested party(ies).

Moreover, products and goods which are unlawful imitations may also be confiscated in accordance with Portuguese law.

Data exclusivity and public access to information

[1] Third party reliance on and use of data generated by a pharmaceutical company relating to the safety and effectiveness of a drug

Article 15 of the New Medicines Act states that when applying for an MA, the applicant must provide INFARMED with certain data[27], which must include the results of pharmaceutical tests and pre-clinical and clinical trials, in order to demonstrate the safety and efficacy of the medicinal product. However, there are situations in which the applicant may benefit from the data previously generated and submitted by the originator of the information in order to be exempted from the obligation to submit the results of pharmaceutical tests and pre-clinical trials (although this does not prevent the applicant from performing additional tests and trials). As stated in article 19 of the New Medicines Act, without prejudice to any Industrial Property rights, the applicant will not have to provide the results of pre-clinical and clinical trials, as long as it can be proven that the relevant drug is a generic of a reference drug which has been authorized in one of the Member states or the EEA on the European Community for, at least, eight years.

According to article 20 of the New Medicines Law, the presentation of the pre-clinical and clinical trials, will may not be necessary, without prejudice to any Industrial Property rights, if the applicant can prove that the active substances of the drug have a well established clinical use in the European Community Service for at least 10 years, with a recognised efficacy and an acceptable level of safety, which can be evidenced through updated scientific literature.

If the product is a new drug containing well known active substances, which have not yet been used together for therapeutic purposes, the results of toxicological and pharmacological tests and clinical trials relating to this mixture must be submitted (no scientific references regarding each of its active substances are required). In any event, the data submitted by the originator will not be disclosed to any third parties, even if this data is relied on and referred by the applicant for a similar product[28].

[27] Please refer to § X.04 - The Drug Approval Process.

[28] INFARMED regularly publishes a list of the pending MA applications, although disclosing information only on the active substances of the medicine concerned, as well as information on whether or not it refers to a generic medicine.

Also under article 27 of the New Medicines Act, an MA holder may consent that this pharmaceutical pre-clinical and clinical documentation is used in the approval process of a drug with the same qualitative and quantitative active substances composition and the same pharmaceutical form.

[2] Disclosure of unfavourable test results

(i) Disclosure of unfavourable tests before the approval of the drug

As mentioned above, when applying for an MA, the applicant shall submit pharmaceutical tests and pre-clinical as well as clinical trials, in order to prove the safety and efficacy of the pharmaceutical product for which the MA is being requested. INFARMED shall then issue an evaluation report, in which it can reject the granting of the MA if the relevant product is likely to be harmful under normal circumstances or constitute a risk to public health. In this case, the originator need not publicly disclose the results of the tests. According to Article 188 of the New Medicines Act, all the data submitted in relation to the MA request shall be treated as confidential by INFARMED and its employees [29].

(ii) Disclosure of unfavourable tests once the drug has been approved

In accordance with the New Medicines Act, INFARMED is the authority responsible for the respective monitoring, coordination and implementation, which includes the adoption of appropriate measures to ensure the safety of the medicinal products existing in the market. INFARMED is entitled to suspend or revoke an MA based on pharmacovigilance reasons. Prior to the implementation of any such measures (and without prejudice to urgent suspension measures, which can be executed immediately), INFARMED will inform the European Medicines Agency (EMEA), the other EU Member States in question and the MA holder of its decision.

The New Medicines Act sets out obligations on the MA holder, the most important of which refers to the need to have, in the Portuguese territory and on a continuous and permanent manner, a person with appropriate qualifications on pharmacovigilance issues. This qualified person, whose responsibilities are also provided in detail, is jointly and severally liable with the MA holder for any failure to comply with the respective obligations, which include the following:

- to keep detailed records of suspicions of adverse reactions occurred in Portugal, other EU Member States or in any third country of which he has become aware;

- to record and immediately informed INFARMED of all the suspicions of serious adverse reactions occurred in Portugal, which have been notified by health professionals or that he has become aware of;

- to notify both EMEA and INFARMED of all the suspicions of serious adverse reactions occurred in a third country, which he has become aware of through a health professional or by any other means;

[29] Article 30 of the New Medicines Act sets out that INFARMED will make its evaluation report public on its website, without specifying whether this will apply if the results of tests are unfavourable and the MA is rejected. Currently, this is not standard practice. In any event, the information made available to the public will not include any commercial data of confidential nature.

- to provide INFARMED with any additional information relating to the development of the notified circumstances;

- to provide the relevant authorities with any other data deemed relevant for the assessment of the risks and the benefits of each medicine, including appropriate data on post-authorisation safety studies.

The above mentioned notifications will be made as soon as possible and never after 15 days from the date on which the information was received. In addition, the MA holder must notify INFARMED of the updated periodical post-authorisation safety reports according to the following calendar:

- immediately upon request;

- half-yearly, from the granting of the MA and up to two years after its first placement into the market;

- yearly, during the two years following the term of the period above;

- every three years, after the term of the period referred to in the preceding paragraph;

- with the renewal of the MA.

The MA can be suspended, or revoked, whenever the drug does not comply with the applicable legal requirements or with the terms and conditions of the respective MA, including, amongst other situations, when the product is dangerous when used normally, or it constitutes a risk to the public health, or its therapeutic efficacy is not sufficiently evidenced, or the Good Manufacturing Practices (GMP) have not been complied with. The decision on the suspension or revocation of the MA will be notified to the MA holder and is subject to appeal before the administrative courts. Although the decision is published at INFARMED's website and communicated to EAM, the European Commission, the other Member States and to the MA holder, the grounds for the suspension or revocation are not made available to the public.

New Drug Approval Process

[1] Competent Authorities

INFARMED is the Government Agency (under the supervision and aegis of the Ministry of Health), responsible for regulatory issues in relation to pharmaceutical products in Portugal.

The scope of responsibility of INFARMED (introduced by Decree-Law 10/93, of January 15, is currently governed by Decree-Law 495/99, of November 18 and the New Medicines Act approved by Decree-Law 176/2006 of August 30) is to monitor, assess and regulate all activities relating to both human and veterinary medicines (in the latter case, together with the Department of Veterinary Medicine) and health products, in order to protect public health. INFARMED's main activities include the regulation and supervision of medicinal and health products, from research to their use by healthcare professionals and patients, which are considered to be of significant importance.

INFARMED's responsibilities comprise the following tasks:

- Research, evaluation and authorisation of medicines;

- Quality, safety and efficient control of medicines;

- Good Clinical Practices (GCP) in clinical trials;

- Research, assessment, registration, monitoring and supervision of health products;

- Clinical research evaluation, assessment and registration of EC marked medical devices, notification of health care products and market supervision activities;

- Licensing and inspection of pharmaceutical activity;

- Licensing, auditing and inspection of manufacturers, wholesalers, pharmacies and establishments authorized for the sale of non-prescription drugs, ensuring that the rules and regulations applicable to each operator are complied with, including Good Manufacturing Practices (GMP), Good Distribution Practices (GDP) and Good Pharmacy Practices (GPP);

- Quality control of medicines and health products;

- Collecting medicines and health product samples along the whole circuit and their analytical control at INFARMED's laboratory ;

- Adverse Drug Reactions monitoring through pharmacovigilance and monitoring the use of health products;

- Collecting and evaluating Adverse Drug Reactions or any other incidents that may occur with medical devices and any other information related to the usage of medicines and health products;

- Monitoring the development of the market and the endorsement of the rational use of medicines, including generic drugs;

- Evaluation of medicines for reimbursement purposes;

- Assessment of pharmaco-therapeutic and pharmaco-economic studies;

- Monitoring the access and use of medicines and health products.

At national and European levels, INFARMED also carries out duties as Reference Laboratory on the Quality Control of Medicines within the Network of Official Medicines Control Laboratories (OMCL). Furthermore, INFARMED's responsibilities include ensuring compliance with the international obligations of the Portuguese State, at a European Union level and in particular, before the EMEA, as well as in the context of the Council of Europe, in particular, before the European Pharmacopoeia Commission and within the World Health Organization (WHO) with regard to the control of narcotics and psychotropic substances.

[2] Overview of Procedures

As Portugal is a Member State of the EU, the approval of drugs for placement into the national market is governed by the rules and procedures of the European regulatory system applicable to this area, thus comprising four possible procedures: (i) the centralised procedure; (ii) the mutual recognition procedure; (iii) the decentralized procedure; and (iv) the national procedure. With regard to the centralised procedure [as provided by Council Regulation (EEC) 2309/93], the mutual recognition procedure and the decentralized procedure (as provided by Directive 2001/83/EC), please refer to Chapter 7 - EUROPE in this regard [30], which are complemented with the relevant specific regulations in Portugal, as explained below.

The Drug Approval Process in Portugal is currently governed by the New Medicines Act, which introduced an extensive in-depth review of the Portuguese Pharmaceutical Legislation, including the transposition into national law of Directive 2001/83/EC, of November 6 (on the Community Code relating to Medicinal Products for Human Use), as amended.

a. The Centralised Procedure

A national code for each medicine (to be requested by the applicant) must correspond to each marketing authorisation (MA) granted under this procedure[31].

b. The Mutual Recognition Procedure

This procedure is applicable to the requests made to INFARMED regarding: (i) the recognition in other Member State of an MA granted in Portugal; or (ii) the recognition in Portugal of an MA granted in other Member States.

The application for an MA in accordance with this procedure must include the following data:

- the indication that INFARMED will assume the quality of reference Member State or the indication of the reference Member State responsible for the preparation of the information report;

[30] Further information can be found at http://www.emea.eu.int (for the centralised procedure) and at http://heads.hma.eu (for the mutual recognition and decentralized procedures). Additional clarification of practical aspects related to the registration, in Portugal, of medicinal products approved via any of these procedures is available at http://www.infarmed.pt.

[31] The practical procedure to obtain a national registration or code number for the medicine can be found at http://www.infarmed.pt.

- the same documentation and elements as applicable in National Procedure;[32]

- any other element that may be relevant for the preparation of the evaluation report.

INFARMED will assume the role of reference Member State when the first MA of the relevant drug was granted in Portugal. In this event, INFARMED will prepare the evaluation report within 90 days following the receipt of the respective application. This report will be notified to the applicant as well as to the other Member States involved, together with the drafts of the summary of the characteristics of the medicine, its label and information leaflet. Upon being identified by the remaining Member States of their approval of these documents within ninety days, INFARMED shall complete the procedure and notify the decision to the applicant.

When INFARMED does not act as reference Member State, it shall, upon receiving from the relevant reference Member State the documentation above, indicate within 90 days from the approval of this documentation. A shorter period may apply if there were an agreement on this issue between the relevant Member States.

INFARMED'S opinion shall be negative whenever it considers that there is a potential serious risk to the public health. This opinion shall be notified to the relevant reference Member State, to the remaining Member States involved, to the applicant, and when INFARMED's act as reference Member State, to the coordination group in charge of the issues regarding MA's involving two or more Member States.

Under certain circumstances the intervention of the Committee for Medicinal Products for Human Use (CMPHU) may be requested to arbitrate in cases where there is a lack of consensus between the Member States involved or in other cases specially set out in article 5 of the New Medicine Act.

c. The Decentralised procedure

This procedure is applicable to MA applications made before INFARMED, when this same request has been simultaneously made in another Member State on States.

The application for an MA under this procedure shall include the following information:

- list of the Member States involved;

- indication of the reference Member State, responsible for the preparation of the evaluation report;

- the same documentation and elements as applicable in the case of the National Procedure[33]

[32] Please refer to 14A.05 [2].

[33] Please refer to 14 A.05 [2].

- any other element that may be relevant for the preparation of the evaluation report and the drafts of the summary of the characteristics of the medicine, its label and information leaflet.

INFARMED shall act as reference Member State whenever requested by the applicant. When acting as reference Member State INFARMED shall issue and present the evaluation report within 120 days from receipt of the respective application, this report will be communicated to the applicant and the remaining Member States together with a draft of the summary of the characteristics of the drug, its label and information leaflet. Upon being notified by the remaining Member States of their approval of these documents, INFARMED completes the procedure and notifies the applicant of its decision.

Whenever INFARMED is not acting as reference Member State, INFARMED will issue its opinion on the elements above, and communicate it to the relevant reference Member States within 90 days following its receipt.

Also in this case a shorter term of 30 days may apply i if there were an agreement on this issue amongst the Member States involved.

INFARMED's opinion will be negative whenever it considers that there is a potential serious risk to public health. This opinion will be communicated to the reference Member State, the remaining Member States involved, to the applicant, and when INFARMED acts as reference Member State to the coordinating group.

This could also lead to arbitration before the CMPH.

d. The National Procedure

The marketing of medicinal products in Portugal is subject to the prior granting of an MA, which must be applied for in relation to each specific product. The MA will be issued by INFARMED. In order to obtain an MA, the interested party will submit an application to INFARMED, providing the following data:

- Name or corporate name, permanent address of the applicant and (if applicable) the respective VAT number;

- Name of the medicinal product;

- Number of volumes that form the application.

The application shall be submitted together with the following information:

- pharmaceutical form, and qualitative and quantitative particulars of all the constituents of the medicinal product, including but not limited to the active substances and excipients, in their usual terms, and, if applicable, the reference to its international non-proprietary name (INN) as recommended by the WHO, or in the absence of this, its chemical name;

- therapeutic indications; counter-indications and adverse reactions;

- posology, method and way of administration;

- motives that justify the adoption of any preventive, or security measures as to the drug stockage, its administration or the elimination of its residuals, together with an indication of potential environmental risks resulting form the drug;

- one or more drafts of the summary of the product characteristics (SPC) [34], a sample of the outer packaging and of the container and, if applicable, the results of the evaluations carried out in cooperation with target-groups of patients;

- copy of the manufacturing license valid in Portugal, or when the drug is not manufactured in Portugal, a certificate of the manufacturing license granted to the respective manufacturer.

- data regarding the manufacturing of the medicinal product, including a description of the manufacturing method;

- description of the control methods employed by the manufacturer;

- results of the pharmaceutical tests and pre-clinical and clinical trials[35];

- detailed description of the pharmaco-vigilance system, together with evidence of the existence of a person responsible for it, and of the means required to notify any adverse reaction detected and, if applicable, of the risk management system to be used by the applicant;

- environmental risk valuation report, including, if applicable, an indication of the measures proposed to limit such risk;

- statement evidencing that the clinical trials carried out outside the European Community have complied with the ethical requirements set out under the clinical trials legislation;

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[34] According to Article 18 of the New Medicines Act, the SPC will include the following information: (i) name of the medicinal product; (ii) qualitative and quantitative composition; (iii) pharmaceutical form; (iv) clinical data: therapeutic indications, dosage and way of administration, side effects, warnings and special precautions, pregnancy, effects on drivers, adverse reactions and overdose; (v) pharmacological properties: pharmacodynamic properties, pharmacokinetic properties, pre-clinical safety data; (vi) pharmaceutical data: listing of excipients, incompatibility, shelf life, special storage precautions, type of outer packaging, instructions for using and handling; (vii) holder of Marketing Authorisation; (viii) number of MA; (ix) first authorisation/renewal date; (x) latest update.

[35] For the purposes of laboratory control, INFARMED may require that the company responsible for the placement of the drug into the market submits samples of the same (either as a finished product or within the different phases of its manufacturing) to a suitable laboratory (public or private).

- copy of the MAs issued by the authorities responsible in other countries, as well as any decision refusing the granting of the authorisation, if any, and the grounds for such refusal;

- list of Member States in which an application for an MA has been submitted, with copies of SPC and package leaflets proposed or authorized therein.

- when applicable, copy of the qualification of the drug as an orphan-drug, with a copy of the opinion of EMEA.

- indication of the elements that will be deemed confidential and a non confidential version of such elements;

- document evidencing the payment of the fees due;

- other elements detailed in Annex I to the New Medicines Act.

The SPC is subject to the approval of INFARMED. When the MA is granted, INFARMED will provide the respective holder with the SPC as approved.

A decision on the approval of an MA must be taken within 210 days from of the filing application date, although this delay can be suspended whenever the applicant is requested either to provide additional information or clarification or to correct any possible deficiency in the application.

The MA is granted for 5 years and is renewable for an indefinite period upon request, which must be filed at least 180 days before the expiry date. The MA renewal application must describe the situation referring to the pharmacovigilance data on the product and, if applicable, updated documentation showing that the previously authorized medicine has been adapted to scientific and technical advances, must also be provided.

[3] Grounds for refusal to grant an MA

INFARMED shall refuse the granting of an MA in any of the following situations:

- the applicant has not fully complied with the application requirements;

- the medicinal product is considered harmful when used under normal circumstances;

- its therapeutic efficacy is insufficiently substantiated by the applicant;

- its qualitative and quantitative composition is not declared by the applicant;

- the benefit-risk ratio is considered unfavourable under the proposed use conditions;

- the medicine is deemed as potentially harmful to the public health.

INFARMED must notify the applicant of the refusal to grant the MA and provide the respective justification. The applicant can appeal against such decision.

[4] Grounds to revoke or suspend an MA previously granted

An MA previously granted (and even the manufacturing or import licenses for the relevant product) can be suspended or revoked in any of the following circumstances:

- there is a circumstance that would lead to the refusal of the MA under the terms of article 25.1 b) to g) of the New Medicines Act;

- absence of the required controls over the products; its components on the manufacturing intermediary products;

- the MA holder has not followed the manufacturing technical, scientific and control developments;

- the MA holder has not implemented the required modifications to the MA;

- the medicine is harmful when used under normal circumstances;

- the medicine is considered as potentially harmful to public health;

- the MA holder has introduced unauthorized changes to the medicine;

- non-compliance with Good Manufacturing Practices (GMP).

The decision on the revocation or suspension of the MA of a medicinal product necessarily implies the withdrawal of the medicine within the term set out in the respective notification. The holder of the MA revoked or suspended is entitled to appeal against this decision.

[5] Different Types of MA Applications and Special Authorisations

a. Exemption from tests and trials ("abridged applications")

Article 19 and 20 of the New Medicines Act states that, without prejudice to Industrial Property rights, an applicant will not be required to provide the results of pre-clinical and clinical trials, provided that such applicant is able to prove that:

- the medicinal product is a generic of a reference drug which is authorised in one of the Member States of the EEA or in the European Community, for at least, the last 8 years;

- the active substance of the drug has a well established clinical use in the European Community for at least the last 10 years, with a recognised efficacy and an acceptable level of safety, which can be evidenced by current scientific literature.

If the product is a new drug containing active substances used in the composition of authorized drugs but not used in combination for therapeutic purposes, the results of new toxicological and pharmacological tests and clinical trials relating to that combination will be provided. However, it is not necessary to provide scientific references in relation to each individual active substance.

Under article 22 of the New Medicines Act an MA holder may consent that its pharmaceutical, pre-clinical and clinical documentation be used in the evaluation of request relating to a drug with the same qualitative and quantitative active substance composition and the same pharmaceutical form.

b. Marketing Authorisation Under Special Conditions

INFARMED may authorize the marketing of drugs which have not been granted an MA or valid registration in Portugal. The requirements, duration and other elements to be observed by the requests to be made under this provision were determined by INFARMED (resolution 105/CA/2007).

INFARMED, prior to the granting an authorisation under these items must:

- notify the holder of an MA for this drug issued in a Member State, unless it is the applicant of this exceptional authorisation;

- request from the relevant authority in this Member State, an updated copy of the evaluation report and of the MA for the drug in question.

The granting of this authorisation must be notified to the European Commission.

c. Authorisation for Special Use (ASU)

Bearing in mind that the granting of an MA is an essential condition to supply drugs in Portugal, the supply of medicinal products without a valid MA is prohibited. Nonetheless, Article 92 of the New Medicines Act also stipulates that INFARMED may authorise the use of medicines for which no MA has been granted (or even applied for), in the following circumstances:

- when those medicines are considered indispensable (by means of a clinical report) for the treatment and diagnosis of certain pathologies;

- when, they are necessary to prevent an actual or potential propagation of pathogenical agents, toxins, chemical agents or nuclear radiation, likely to have harmful effects;

- when, they are acquired by a pharmacy and to be used by a particular patient (only in exceptional cases).

This authorisation may be granted to (i) institutions which meet certain requirements, and (ii) manufacturers, wholesalers or MA holders, for the purposes of supplying the market with the quantities of medicine that may be strictly necessary to prevent the rupture of stocks of medicines which do not have a therapeutic alternative.

The requirements, conditions and terms of this authorisation are also the object of INFARMED's resolution 105/CA/2007.

[6] Supplementary Approvals ("Variations and Extensions")

The New Medicines Act provides the legal regime currently applicable to alterations and amendments to the terms of a MA. New therapeutic indications or a change in the manufacturing conditions or location of the drug, amongst others, are considered as alterations to the original MA. In line with the provisions of Regulations (EC) 1084/2003 and 1085/2003, both of 3 July, the New Medicines Act sets forth and regulates the following types of alterations to MA's granted under the national procedure:

- Type I Alterations, or Minor Alterations (distinguishing between Type IA Alterations and Type IB Alterations) - amongst others (i) changes to the name of an active substance; (ii) changes to the specification regarding the active substance, the raw material, the intermediate products or the reagents; (iii) changes to an excipient specification; (iv) substitution of an excipient for another comparable/similar excipient; (v) changes to the size of the pills, capsules, suppositories and pessaries; (vi) changes to the specification of a final product.

  The qualification as Type IA or Type IB depends on whether certain conditions (which vary in relation to each alteration concerned) are met. This analysis must be made on a case-by-case basis[36].

- Type II Alterations, or Major Alterations (those which are not Type I Alterations or to MA Extensions).

- MA Extensions (alterations deemed equivalent to situations requiring a new application for an MA request, related to certain changes in the active substances and in the dosage, pharmaceutical form and route of administration, which do not entail material changes to the safety and efficacy profile of the medicines).

[36] Following a Circular dated of November 11, 2004 (providing further clarification on the procedures for Supplementary Approvals), INFARMED published (on March 22, 2006), a Circular alerting for the most common mistakes when applying for a Supplementary Approval, which can be found at: http://www.infarmed.pt/portal/page/portal/INFARMED/MEDICAMENTOS_USO_HUMANO/AUTORIZACAO_DE_INTRODUCAO_NO_MERCADO/ALTERACOES_TRANSFERENCIA_TITULAR_AIM/ALTERACOES/NI_27032006.pdf.

In accordance with the New Medicines Act, a notification of a Type IA alteration is subject to the approval of INFARMED, which shall decide within 14 days from receipt of the notification. These alterations shall be deemed to have been impliedly approved in the event that no resolution is adopted within the said period.

In relation to Type IB alterations, the notification must be validated by INFARMED within 5 days. Subsequently, and if duly validated, INFARMED shall adopt a resolution within 30 days from the validation date. Otherwise, the alteration is impliedly deemed as approved. In both cases, INFARMED is entitled to request additional information and clarification in the event that the information provided is deemed insufficient.

With regard to Type II alterations, the MA holder shall submit to INFARMED a request to amend the MA. A decision on the same shall be taken within 60 days. This term is renewable for 30 additional days in the event that any changes are made to the therapeutic indications. INFARMED is entitled to request additional information whenever the information provided is deemed insufficient.

In relation to MA Extensions, the procedure shall be the same as with the filing for a new MA request.[37]

In addition to the above, the New Medicines Act provides a specific procedure (which is not comprised in the abovementioned EU Regulations), which refers to the assignment of the MA to another person or entity. In this case, the application shall be submitted with the following main elements:

- Name of the relevant medicine, authorisation number and date;

- Complete identification of the MA holder and of proposed assignee of the MA;

- Common statement of the assignor and the assignee, mentioning the date from which the assignment shall be effective, if duly authorized;

- Document evidencing that the procedure in relation to the medicine concerned, duly updated and completed, was or will be made available to the person in favour of which the assignment will be made.

- Summary of the Product Characteristics (SPC), as well as a sample of the outer packaging and of the container of the medicinal product, together with the identification of the person or entity for whom the assignment is intended.

- Document evidencing the payment of the fee due;

- Documents evidencing the transferee's capacity, competence and experience required from an MA holder by law;

[37] Please refer to section [2] Overview of Different Procedures, above.

- Document identifying the person responsible for the pharmacovigilance with the relevant curriculum vitae and contacts;

- Document identifying the scientific department responsible for the information relating to the drug, together with the curriculum vitae and contact details of the relevant person responsible.

INFARMED shall issue a decision within 60 days counted from the filing of the relevant application.

The failure to comply with the abovementioned rules entitles INFARMED to suspend or revoke the MA. In addition, this non-compliance may entail the application of a range fines up to a limit of EUR 29,927.87.

The legal regime applicable to Supplementary Approvals permits exceptional procedures being adopted for public health reasons. Thus, INFARMED may exceptionally grant a provisional Supplementary Approval for a vaccine in the event of a pandemic virus (identified as such by the WHO), although complete data on its clinical safety and efficacy would always be required.

[7] Limited Category and Non-prescription Drugs

a. Orphan Drugs/emergency release

The New Medicines Act does not provide an original definition for orphan medicinal products ("**OMP**"), and refers to the definition provided in Regulation (EC) 141/2000 of 16 December 1999, on orphan medicinal products (please refer to Chapter 7 - EUROPE above). In Portugal there is no specific procedure to obtain an MA concerning OMP. Therefore, as a rule, the procedure to obtain an MA for an OMP shall comply with the general norms applicable to the drug approval process, as detailed above in section [2]. Notwithstanding this, the applicant is entitled to request that such MA be granted under special conditions, if he is not able to provide complete data regarding the efficacy and safety of the medicine under its normal employment conditions (please refer to section [5] b. above).

If the applicant requests for an MA to be granted under special conditions, it must provide INFARMED with the clinical and non-clinical reports submitted, and the reasons for not submitting complete information, as well as to providing evidence of the risk-benefit balance assessment. The OMP can be the subject matter of a request for an ASU, under the conditions set out in section [5] c. above. When applying for an MA concerning an OMP for which an ASU has been previously granted, the applicant may request to be exempted from submitting the results of toxicological and pharmacological tests and clinical trials, grounded on the fact that the OMP is intended for a specific therapeutic use and has a recognised efficacy and an acceptable safety level, evidenced by the regular use of the OMP under a prior ASU.

b. Experimental Medicines

Experimental Medicines are subject to the provisions of the New Medicines Act, the legal regime applicable to the Good Clinical Practices (set forth by Decree Law 102/2007, of 2 April 2007, which implements Directive 2005/28/CE, of the Commission), and subsidiary, by Law no. 46/2004, of 19 August 2004 ("**Clinical Trials Law**") (see section 8 hereunder).

The New Medicines Act establishes a special duty for the manufacturers of experimental medicines to ensure that:

- all operations are carried out according to the information provided in the clinical trial request presented by the respective promoter and approved by the relevant authority; and

- it reviews the manufacturing processes from time to time, in the light of scientific and technical progress and developments in the preparation of the experimental medicine, and as required, modify the MA or the clinical trial request.

c. Immunological, radiopharmaceutical and blood or plasma derived medicines

Immunological, radiopharmaceutical and human blood or plasma derived medicines are also subject to the general rules set-forth by the New Medicines Act, with certain special characteristics as to their authorisation regime, name, SPC, labelling and control.

d. Homeopathic Drugs

Homeopathic medicines are subject, with the necessary modifications to the general legal regime applicable to medicines for human use, as set forth in the New Medicines Act. However, some of these homeopathic products (in summary, those that meet all of the following characteristics: a) intended for oral or external administration; b) present a level of dilution within certain parameters to ensure that the product is innocuous; and c) absence of special therapeutic indications on the respective label or in any other information related to the product), are subject to a simplified registration procedure (also before INFARMED), in relation to which applicants are required to supply documents providing, among other, the following data:

- scientific name of the homeopathic materials, including a list of the respective methods of administration, pharmaceutical forms, dosage and presentation forms for which the registration is requested;

- information on how each material is obtained and checked and details on the respective homeopathic nature;

- details of the manufacturing process and of the control method regarding pharmaceutical forms;

- manufacturing authorisation;

- registrations or authorisations obtained in either Member States;

- samples;

- details related to the sensitivity of the product.

INFARMED supervises the compliance of the applicable legislation, by assessing the registration applications, checking the capability of the manufacturer to produce, at an industrial scale, stable and standardised products, in harmony with the approved specifications. In terms of safety, the New Medicines Act regulates the information to be provided on label and leaflets of homeopathic medicines.

e. Herbal/traditional medicines

The New Medicines Act implemented in Portuguese legislation the Directive 2004/24/EC, of 31 March 2004 amending, as regards traditional herbal medicinal products, Directive 2001/83/EC on the Community Code relating to medicinal products for human use. Traditional herbal medicines that meet the requirements set-forth in Article 141 of the New Medicines Act are subject to a simplified registration process with INFARMED, which may determine, if judged convenient, to subject a particular medicine to the standard new medicines approval procedure.

The specific requirements applicable to herbal medicines are set forth in detail in Section VI of Chapter VIII of the New Medicines Act, where it is detailed the elements to be provided for purposes of proceeding to the registration. .

One of the specific data to be included in the registration of traditional medicinal products file [38] is a summary description of the way the herbal medicine has been developed, bearing in mind its route of administration and the use proposed for the product. .

d. Non-prescription drugs

Neither the provisions of the Medicines Act specifically applicable to the Drugs Approval Process nor the Supplementary Approvals Regime provide special rules for non-prescription drugs. Therefore, their placement into the Portuguese market and any changes requiring supplementary approvals, are subject to the general rules.

[8] Clinical Trials

[a] Recent developments

Law 46/2004, of August 19 ("**Clinical Trials Law**"), implementing Directive 2001/20/EC, of April 4 ("**Clinical Trials Directive**"), provide the current legal regime applicable to clinical trials in Portugal. Notwithstanding the immediate entry into force of the Clinical Trials Law, there was a considerable period of time during which the old procedures for clinical trials in Portugal (as set forth in Decree-Law 97/94, of April 9, which had been revoked by the Clinical Trials Law) were still followed. This was because the required guidelines for the new procedures had not been introduced immediately. The guidelines included the setting up of the necessary regulatory and ethics infrastructures in order to apply the principles set forth in the Clinical Trials Law. INFARMED found a solution which consisted of a transitional period during which clinical trial applications had to be submitted in a hybrid format. This transitional period basically determined the need of initially seeking ethics approval followed by notification to INFARMED of the authorisation together with a submission of the essential documents (including the EudraCT application form).

[38] Article 141 of the New Medicines Act.

In order to clarify matters, INFARMED published a Circular, stating that in the event that at least one ethics approval for a clinical trial had been obtained before the implementation of the new procedures, that clinical trial would follow the transitional system. The necessary guidelines, including the regulatory and ethics infrastructures in order to apply the principles set forth in the Clinical Trials Law have been set up and implemented through the following regulations:

- Ruling (*Portaria*) 57/2005, of January 2005 - providing the composition and operation rules of the Ethics Committee for Clinical Research ("**CEIC**" or "**Ethics Committee**");

- Ministerial Order (*Despacho*) 3568/2005, of 21 January - appointing the members of the CEIC;

- Ministerial Order (*Despacho*) 3978/2005, of 31 January - appointing the members of the Executive Commission within the CEIC;

- Ruling 396/2005, of 7 April - establishing the costs payable in connexion with the acts comprised in the procedures established by the Clinical Trials Law;

- Resolution 94/CA/2005, of May 10, of the Board of Directors of INFARMED ("**Resolution 94/CA/2005**") - approving the detailed guidance intended to provide advice on the application format and contents of a request for (i) authorisation of a clinical trial on a medicinal product for human use, (ii) notifications of substantial proposed amendments, and (iii) declaration of the end of the clinical trial;

- Resolution 542/CA/2005, of 24 June, of the board of directors of INFARMED - approving the detailed guidance intended to provide advice on the application format and contents of a request for a prior opinion of the CEIC on the authorisation of a clinical trial on a medicinal product for human use, as well as the rules to be followed in any notification or amendment request regarding the relevant clinical trial protocol or notification on adverse reactions (this Resolution also approved new forms to replace those that had been approved by Resolution 94/CA/2005, also comprising the request for authorisation from the Ethics Committee).

The relevant forms, instructions and guidelines have been published on INFARMED's website.[39]

[39] The relevant forms, instructions and guidelines can be found at: http://www.infarmed.pt/portal/page/portal/INFARMED/MEDICAMENTOS_USO_HUMANO/ENSAIOS_CLINICOS/EUDRACT (EudraCT Database); http://www.infarmed.pt/portal/page/portal/INFARMED/MEDICAMENTOS_USO_HUMANO/ENSAIOS_CLINICOS/PEDIDO_DE_AUTORIZACAO_DE_EC/formulario_pedido.doc (request of a clinical trial); ttp://www.infarmed.pt/portal/page/portalINFARMED/MEDICAMENTOS_USO_HUMANO/ENSAIOS_CLINICOS/PEDIDO_NOTIFICACAO_DE_ALTERACAO_DE_EC (notification of amendments / request for authorisation of a substantial amendment and request for the opinion of the Ethics Committee); http://www.infarmed.pt/portal/page/portal/INFARMED/MEDICAMENTOS_USO_HUMANO/ENSAIOS_CLINICOS/DECLARACAO_DE_FIM_DE_EC(declaration of the end of the clinical trial); http://www.infarmed.pt/portal/page/portal/INFARMED/MEDICAMENTOS_USO_HUMANO/ENSAIOS_CLINICOS/SUSPENCAO_DE_EC_E_INFRACCOES/suspensao_ec_inf.pdf (suspension of the clinical trial and infringements);http://www.infarmed.pt/portal/page/portal/INFARMED/MEDICAMENTOS_USO_HUMANO/ENSAIOS_CLINICOS/MEDICAMENTO_EXPERIMENTAL (information and declaration related to investigational medicinal products to be used in a clinical trial).

The Clinical Trials Law does not distinguish between commercial and non-commercial clinical studies. However, non-interventional studies (i.e. those falling within any of the following circumstances) are excluded from its scope of application:

- the medicinal product is prescribed in the usual manner in accordance with the terms of the MA;

- the assignment of the subject to a particular therapeutic strategy is not decided in advance by a trial protocol but falls within current practice, with the prescription of the medicine being clearly separated from the decision to include the subject in the study;

- no additional diagnostic or monitoring procedures shall be applied to the subjects and epidemiological methods shall be used for the analysis of collected data;

[b] Parties involved in a Clinical Trial

A clinical trial involves the participation of the following entities:

- Sponsor (*Promotor*) - an individual, company, institution or organisation that takes responsibility for the initiation, management and/or financing of a clinical trial;

- Trial Site (*Centro de Ensaio*) - the site where the clinical trial is carried out, which can be a public or private health establishment, laboratories or other entity provided with adequate material and human resources;

- Investigator (*Investigador*) - a doctor or a person following a profession agreed in Portugal for investigations that requires scientific background and experience in patient care. The investigator is responsible for the conduct of a clinical trial at a trial site. If a trial is conducted by a team of individuals at a trial site, the investigator is responsible for the team, and is called the principal investigator;

- Subject (*Participante*) - an individual who participates in a clinical trial, either as a recipient of the investigational medicinal product or a control.

- Monitor (*Monitor*) - a professional with the necessary clinical or scientific skills, appointed by the sponsor to follow up the clinical trial and to keep the latter informed on the same, reporting on the developments and verifying the information and collected data.

[i] Obligations of the Sponsor

The obligations of the Sponsor (which must be established in an EU Member State) comprise the following:

- A request for a prior opinion of the CEIC on the tests to be carried out, being a condition for their initiation that the latter issues a favourable opinion;

- A submission to INFARMED with a valid request for authorisation of the clinical trial;

- The entering into an agreement with the trial site, establishing the conditions to conduct the clinical trial and its economic aspects.

- The appointment of an investigator and submission of evidence of his scientific qualifications and professional experience;

- Providing the investigator with all relevant toxicological, pharmacological and clinical data, in order to guarantee the safety of the medicinal product, as well as with all information deemed necessary to conduct the trial in adequate terms;

- To establish and keep a vigilance and safety system for the clinical trial;

- To ensure compliance with the notification, communication and information duties, as established in the Clinical Trials Law and described below.

- To notify INFARMED and the Ethics Committee on the conclusions of the clinical trial.

After starting a clinical trial, the sponsor may amend the protocol (legally defined as "*the document that describes the purposes, the conception, the methodology, the statistical aspects and the organisation of a clinical trial, including its successive versions and any alterations to the former document*"), as long as the amendments (i) do not constitute substantial modifications; (ii) do not affect the subjects' safety; and (iii) do not provide changes in the interpretation on the scientific evidence on which the trial is grounded.

Any other amendments could only be adopted following a favourable opinion of the Ethics Committee and provided that neither INFARMED nor the regulatory authorities of the other EU Member States present reasoned objections. If one or more reasoned objections are made, the sponsor will have to choose between making an adjustment to the protocol in accordance with those objections or not making the modifications.

The sponsor and the investigator will be held liable, even if they are not at fault, for all the damages suffered by the subject and caused by the trial. In this regard, the sponsor must enter into an insurance agreement covering the liability of both the investigator and the sponsor. In any event, neither the specific provisions of the Clinical Trials Law nor a favourable opinion of the Ethics Committee or the authorisation granted by INFARMED do exempt the sponsor, the investigator, the members of the respective team and the trial site from disciplinary, civil and criminal liability [or even from liability arising from offences that do not constitute crime (*contra-ordenações*)].

[ii] Obligations of the Investigator

The Investigator must comply with the following duties:

- Conduct the clinical trial in accordance with the applicable laws and regulations;

- Provide the subject or his representative (as the case may be), with information and clarification about the clinical trial, mainly on its objectives and associated risks and the inconveniences of the trial;

- Obtain the free and informed consent from the subjects of the trial;

- Collect, record and notify adverse events and reactions both to INFARMED and CEIC;

- Propose the sponsor to amend the protocol, as well as to suspend the trial, where justified reasons occur.

- Ensure that the clinical files, as well as all the information collected during the trial, are duly recorded and prepare a final report;

- Ensure full confidentiality in relation to the preparation, carrying out and conclusion of the trial, as well as with respect to the data referring to the subjects.

[c] Financial Agreement

Prior to conducting a clinical trial, the sponsor and the trial site must enter into a financial agreement, establishing the terms of the trial, the conditions for its execution and the economic aspects of the same. This agreement shall include the following data:

- Direct costs of the trial (including the remuneration of the investigator and of each of the remaining members of the team);

- Indirect costs;

- Terms of payment;

- Other conditions established between the Parties.

[d] Information and notification duties

[i] Urgent safety measures

If a new event relating to the conduct of the trial or the development of the investigational medicinal product is likely to affect the safety of the subjects, the sponsor and the investigator must take appropriate urgent safety measures in order to protect the subjects against any immediate hazard. The sponsor will then inform

INFARMED, and the relevant regulatory authorities of the EU Member States and the Ethics Committee, on the new events and the measures taken.

[ii] Records and notification of adverse events

The investigator must report to the sponsor, within 24 hours, all serious adverse events, except for those that the protocol or the investigator's brochure identifies as not requiring immediate reporting. The immediate report shall be followed by detailed written reports, which must be submitted to the sponsor within 5 days. Adverse events and/or laboratory abnormalities identified in the protocol as critical to safety evaluations will be reported to the sponsor, in accordance with the reporting requirements and within the time periods specified in the protocol. If the death of a subject is reported, the investigator must provide the sponsor and the Ethics Committee with any additional information requested.

The sponsor will keep detailed records of all adverse events are reported to it by the investigator(s). These records will be submitted, upon request, to the regulatory authorities of the Member States in which territory the clinical trial is being conducted.

[iii] Registrations and notification of serious adverse reactions

The sponsor must ensure that all relevant information about suspected serious unexpected adverse reactions that are fatal or life-threatening is recorded and reported to INFARMED, to the competent regulatory authorities in all the Member States concerned, and to the Ethics Committee, within 7 days counted from the moment the sponsor became aware of said information. The relevant follow-up information is subsequently communicated within an additional 8-day term. All other suspected serious unexpected adverse reactions must be reported to INFARMED, to the relevant competent authorities and to the Ethics Committee as soon as possible and, in any event, within 15 days from the moment the sponsor becomes aware.

During the clinical trial, the sponsor will provide INFARMED and the Ethics Committee once a year with a listing of all suspected serious adverse reactions that have occurred over this period together with a report on the subjects' safety.

[iv] Data Base

INFARMED is responsible for the creation of a data base, which must include the following information:

- The data extracted from the information submitted with request for the authorisation of the clinical trial;
- Amendments made to the request referred to in the previous point;
- Amendments to the protocol;
- Declaration of the end of the clinical trial;

- References to the inspections made in order to verify compliance of the trial with Good Clinical Practices;

- Data concerning the suspicion of unexpected serious adverse reactions.

The data included in the data base is deemed confidential and the sponsor has no obligation to make any public disclosure of the results. However, INFARMED is allowed to submit such data, upon request, to the relevant Ethics Committee or other entity that proves to have a legitimate interest. However, INFARMED may publish on its website information concerning clinical trials authorized in Portugal, including the identification of the trial sites involved, the therapeutic area and the population object of the study, unless the sponsor expressly opposes to such disclosure.

[9] No Patent List equivalent to the "Orange Book"

In Portugal there is an annual official publication on pharmaceutical products, known as "*Prontuário Farmacêutico"* or "*Prontuário Terapêutico"* [40], which comprises all pharmaceutical products duly authorized and available in the EU pharmaceutical market (furthermore providing a set of guidelines for the respective therapeutic use). This publication does not include, however, any reference to patents, patent owners, therapeutic equivalence assessments and/or exclusivity data and therefore does not constitute a listing of patents by a drug originator (or its licensee). Likewise, the information included in the national data base known as "*INFOMED*"[41] (allowing a free access to detailed information on all drugs for which an MA has been granted, including the status of the respective MA) does not provide any reference related to patents or exclusivity data.

Regardless of the absence of either an "Orange Book" or any publication similar to the cumulative supplements of the American FDA's list of Approved Drug Products With Therapeutic Equivalence Evaluations (the "Orange Book"), it has recently been suggested to create a Portuguese "Orange Book", with a list of pharmaceutical products available and information regarding bio-equivalence.

[10] Obtaining an Approval for a Generic Version of a Drug

The New Medicines Act defines Generic Drugs[42] as those with the same qualitative and quantitative composition in active substances, under the same pharmaceutical form, and which respective bio-equivalence with the reference drug has been demonstrated, based on appropriate bio-availability studies. The approval for a generic version of a drug is subject to the legal provisions applicable to the approval of drugs in general, although the following particular aspects apply:

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[40] This official publication can be found at http://www.infarmed.pt/prontuario/prontuario_terapeutico.pdf . A specific search can be made through http://www.infarmed.pt/prontuario/index.php.

[41] *INFOMED* can be accessed at http://www.infarmed.pt/infomed/inicio.php.

[42] Generics are identified through the ICD of their active substances, followed by the name of the MA holder or a fantasy name, dosage and pharmaceutical form and the Portuguese abbreviation "MG", corresponding to "*Medicamento Genérico*" (meaning Generic Drug). In the absence of an ICD for the active substances, the drug shall be identified by its generic name.

- Presentation of reports on pre-clinical tests and clinical trials is not required, except when: (i) it is not demonstrated that the medicine meets the bio-availability requirements defined on INFARMED's directives or on the Community area; or (ii) the bio-equivalence may not be demonstrated by means of bio-availability studies; or (iii) the medicine has, in relation to the reference medicine, differences in the active substances or its therapeutic indications, on its dosage, or its pharmaceutical form, or route of administration;

- The generic medicines may only be marketed (i) 10 years after the initial authorisation granted to the reference medicine at a national or Community level; or (ii) 11 years after the initial authorisation to the reference medicine, if within the initial 8 years the MA holder of the reference medicine has obtained an authorisation to one or more new therapeutic indications, which, upon a scientific evaluation prior to its authorisation, are deemed to bring a significant clinical benefit in relation to the existing therapeutics.

A significant modification introduced by the New Medicines Act is that patent infringements are no longer specifically seen as a fact that would prevent the issuing of the generic drug MA.

A list of all active substances (identified by the respective ICD or generic name) for which an application for an MA has be submitted is available to the public on INFARMED's website[43].

§ X.05 Packaging and labelling

The rules governing the packaging and labelling of (both prescription and non-prescription) drugs for human use are set out in the New Medicines Act. The New Medicines Act provides that the MA holder and the manufacturer are responsible for the inclusion, in the medicine packaging, of information regarding the characteristics of the medicinal product and safety measures for the relevant use. This information - which must be written in Portuguese (although it can also be provided in other languages) - shall be included in the exterior package, in the immediate package and in the leaflet.

The exterior package, or, whenever the medicine does not have it, the inner package, must provide certain information that is written with legible and indelible ink, as follows:

- the name of the medicinal product followed by the International Common Denomination (ICD);

- a statement with the active substances expressed qualitatively and quantitatively per dosage unit, or according to the form of administration for a given volume or weight, using their common names;

- the pharmaceutical form and the contents by weight, volume or number of doses of the product;

- the method and route of administration;

[43] http://www.infarmed.pt/pt/medicamentos/uso_humano/lista_subst_activas/lista_subst_activas.php.

- the expiry date (month and year);

- the expiry date after the medicine's main packaging has been opened, if applicable;

- a list of excipients which knowledge is necessary for the appropriate use of the drug (in the case of injectable products, or external or eye preparations, all excipients must be indicated).

- number of MA registration;

- code number of the medicine in digital and bar code representation;

- manufacturing batch number;

- sales price for consumers (PVP);

- a special warning stating that the medicinal product must be stored out of reach and sight of children;

- the name and address of the MA holder and, where applicable, the name of its representative;

- name of the technical director (qualified person) and professional title;

- classification of the medicine (prescription or non-prescription drug);

- special storage indications, if any;

- specific indications related to the disposal of unused medicinal products or waste products, where appropriate;

- an expression equivalent to "free sample" or "sale forbidden";

- an expression equivalent to "external use", printed in a red background, where appropriate;

- in the case of non-prescription medicinal products, instructions for use;

- pictogram adequate to warn about the effects of the medicines as to the capability to drive or use machines when applicable.

Besides the fact that both prescription and non-prescription drugs are subject to strict rules, any kind of advertising to the public is strictly forbidden in relation to prescription drugs.

§ X.06 Government Price Controls on Pharmaceuticals

[1] Regulation and monitoring of prescription drug prices

The governmental body responsible for the establishment of prices in prescription medicinal products is the Portuguese Directorate-General for Enterprises (*Direcção-Geral da Empresa*) ("**DGE**"). The DGE is a department of the Ministry for Economic and Innovation Affairs (*Ministério da Economia e da Inovação*)[44]. The DGE defines the initial maximum price of pharmaceutical products (both national and imported) which are to be introduced for the first time in the Portuguese territory. The rules governing the regulation of prescription drug pricing are now set forth under the recently enacted Decree-Law 65/2007, of 14 March (on the pricing of prescription pharmaceutical products for human use and of reimbursed non-prescribed medicines) ("**Decree-Law 65/2007**").

The establishment of the public price of the pharmaceutical product in question (the "**PVP**") will depend on the pricing framework used in the four countries taken as a reference for pricing purposes (Spain, France, Italy and Greece, referred to as the "**Reference Countries**"). The PVP shall be determined by calculating the maximum price at the level of production or importation in Portugal (the "sale price to wholesalers" or, as referred to below, the "**PVA**") which cannot exceed:

- The average of the PVA value in force in all the Reference Countries for the same product or, if this product does not exist in all the countries, the average of the PVA in force in at least two of the Reference Countries;

- In the event the same product only exists in one of the Reference Countries, the PVA in force in such country;

- In the event the same product does not exist in any of the Reference Countries, the average of the lowest PVA of the identical or essentially similar pharmaceutical specialities in relation to the product, in force in the Reference Countries, excluding generics;

- In the event that neither the same product nor an identical or essentially similar pharmaceutical speciality exist in the Reference Countries in relation to the product, although it exists in Portugal, the PVA established for the identical or essentially similar pharmaceutical speciality that is being marketed in Portugal;

- In the event neither the same product nor an identical or essentially similar pharmaceutical speciality in relation to the product exists in the Reference Countries and in Portugal, the PVA in force in the country of origin.

[44] Please refer to the DGE's website at http://www.dgcc.pt.

The above referred comparisons, with the same product or, if there is no such product, with the identical or essentially similar pharmaceutical speciality in relation to the product, in the Reference Countries, in Portugal or in the country of origin, will be performed in accordance with the following priorities:

- With the same pharmaceutical form, dosage and presentation;

- With the same pharmaceutical form and with the most similar dosage and presentation.

Prices of the referred pharmaceutical products are subject to an annual review, on the basis of a comparison with the price average in force in the Reference Countries. Please note, however, that Decree-Law 65/2007 established a principle of stability in the medicinal products pricing, in which the initial price established is not subject to the above referred review during a term of three years.

For the calculation of the final PVP of the prescription pharmaceutical products in question, the maximum commercialisation margins established by Decree-Law 65/2007, of 6.87% and 18.25%, for wholesalers and pharmacies, respectively, should be taken into account[45]. Wholesalers add the "wholesalers' margin" to the PVA, the sum of the two being the total price at which the medicines are to be sold to the pharmacies (which are subsequently sold to the public - at the approved PVP level - by adding the pharmacy's margin). Thus, when fixing the PVA the DGE already calculates the final sale price to the public, the PVP (by adding the above-mentioned margins, the INFARMED tax and the applicable VAT). This final sale price of the prescription pharmaceutical product, known as PVP, is a maximum price.

In the case of generics, the PVP must be at least 35% below the PVP of the reference prescription pharmaceutical product (which must have the same dosage and an identical pharmaceutical form). This will be reduced to 20%, whenever the PVA of the reference prescription pharmaceutical product is inferior to € 10 in all of its presentations. However, in the event the reference pharmaceutical product is not authorised in Portugal but is authorised in another EU Member State, the PVP will be calculated in accordance with the rules described above for prescription pharmaceutical products, taking into consideration the rules on generics pricing. If the generic product in question belongs to a standardised group of pharmaceutical products, the PVP must be equal to or below the referred group's reference price.

Decree-Law 65/2007 provides that the PVP on parallel imported medicinal products will have to be at least 5% below the PVP of the medicinal product concerned. In the event the medicinal product does not have a price approved in Portugal, a PVP will be calculated using the general pricing rules described in Decree-Law 65/2007.

There is no Portuguese case law to date concerning this topic.

[i] Right to appeal a decision of the agency

[45] Also in accordance with Decree-Law 65/2007, those margins will be different to the extent the pharmaceutical product is not reimbursed, in which case they will be 8% and 20% (wholesalers and pharmacies, respectively).

There is a general right to appeal decisions of the DGE. In those cases, the general principles concerning appeals against decisions of any administrative body would apply. These general principles are contained in the applicable procedural administrative regulations. For instance, it would be possible to appeal before the appropriate administrative body or before the competent administrative court.

§ X.07 Government Drug Payment Plans

[1] Overview of government drug payment or consumer reimbursement plans

INFARMED is the competent authority that analyses any applications filed by the MA holder for reimbursement of a prescription pharmaceutical product by the National Health System (*Serviço Nacional de Saúde* - "**SNS**"). INFARMED then presents the reimbursement proposal to the Ministry of Health for the latter's final authorisation. The rules governing the reimbursement of prescription pharmaceutical products are established under Decree-Law 118/92, of 25 June, as amended[46] ("**Decree-Law 118/92**").

During the reimbursement proceedings, INFARMED may suggest to the holder of the marketing authorisation, for reimbursement authorisation purposes, that the price of the prescription pharmaceutical product set by the DGE should be lowered. Reimbursement of prescription pharmaceutical products is dependant on the verification of one of the following situations, as set out in Decree-Law 118/92:

- a pharmaceutical product that contains new active substances with a pharmacologic innovative action mechanism which will overcome any given therapeutic shortcoming, defined by a larger efficiency or tolerance by reference to the existing alternative treatments;

- a new pharmaceutical product that has an identical qualitative composition by reference to others already marketed and reimbursed, provided that, within an identical pharmaceutical form, its price is 5% below the lowest of the reimbursed non-generic pharmaceutical products, the price indicated being determined by mass unit of the active substance;

- a new pharmaceutical form, a new dosage or a new package of a pharmaceutical product already reimbursed, with identical qualitative composition to the extent that the existence of a therapeutic need and an economic advantage are demonstrated or acknowledged;

- new pharmaceutical products that are not a significant therapeutic innovation or possess an identical qualitative composition to others already reimbursed, if they present economic advantages in relation to medicinal products already reimbursed, used with the same therapeutic objectives and possessing proven identical action mechanisms;

[46] The referred Decree-Law 118/92 was amended (and re-published as amended) by Decree-Law 129/2005, of 11 August. It was subsequently amended by Law 53-A/2006, of 29 December (the Portuguese State Budget Law) and by the mentioned Decree-Law 65/2007.

- a group of medicinal solutions which composition contains active substances already reimbursed, to the extent that a therapeutic advantage is demonstrated and that its price is not higher than the sum of the prices of the medicinal products when used by itself and with identical dosage;

- a group of medicinal solutions of active substances, which does not exist in the market by itself and that evidences an advantage over medicinal products of the same therapeutic group derived from results obtained in executed clinical trials.

The level of reimbursement by the Portuguese State on the prices of the listed pharmaceutical products for that purpose is divided into four ranks, defined in accordance with essential nature and "social justice" criteria:

- Rank A (essential pharmaceutical products which affect chronically ill patients) with a reimbursement of 95% of the PVP;

- Rank B, with a reimbursement of 69% of the PVP;

- Rank C, with a reimbursement of 37% of the PVP; and

- Rank D, with a reimbursement of 15% of the PVP.

Furthermore, the level of reimbursement for certain pathologies and special groups of patients can be included in a special framework. Finally, it should be underlined that, the degree of reimbursement in levels B, C and D for pensioners who do not benefit from a pension above the minimum wage is increased by 15%. The same benefit would be applicable in Rank A with an increase of 5%.

[2] How a drug is listed in a drug form for coverage purposes

INFARMED has an obligation to publish any reimbursement decisions in the Official Gazette (*Diário da República*) as well as in the most prominent places for publicity purposes[47], in accordance with Decree-Law 118/92.

[3] Who is covered by the plan

All patients enlisted in the SNS are covered by the reimbursement scheme mentioned above. Other than the SNS, there are "health sub-systems", which cover around 25% of the population, but where the access to those sub-systems is limited to certain professional classes: e.g., civil servants with access to ADSE services. Furthermore, users of those sub-systems also have access to the SNS.

[47] Please refer to INFARMED's website where the list of current reimbursed products is provided at: http://www.infarmed.pt/portal/page/portal/INFARMED/MEDICAMENTOS_USO_HUMANO/AVALIACAO_ECONOMICA_E_COMPARTICIPACAO/MEDICAMENTOS_COMPARTICIPADOS.

[4] Restrictions on pricing, preferential generic drug prescription or resulting from the inclusion of a drug in a form

With regard to restrictions on pricing, a reference price system for reimbursed products is in force since 2003. The framework was enacted by Decree-Law 270/2002, of 2 December. The system applies to reimbursed products included in standardised groups (i.e., a group of pharmaceutical products with the same composition on qualitative and quantitative active substances, pharmaceutical form, dosage and application, in which at least a generic product existing in the market is included) and that are prescribed, and reimbursed, in the scope of the SNS.

The reference price for each group must correspond to the PVP of the existing generic product in each group with the highest PVP. However, the reimbursement of products with a PVP exceeding the reference price will be made in relation to the reference price. In turn, the reimbursement of a pharmaceutical product with a PVP that does not exceed the reference price will be set in accordance with the same PVP.

One of the functions of INFARMED is to proceed with the re-evaluation of the reimbursed pharmaceutical products. Within the referred powers, INFARMED may decide to propose to the Ministry of Health any withdrawal of a pharmaceutical product from the reimbursement scheme, based on excessive cost, the reduced comparative effectiveness in relation to other reimbursed products with the same therapeutic indications, or, instead, their reclassification as a prescription drug.

Finally, another potential restriction that can arise from the applicable reimbursement framework should be underlined. It refers to the fact that the level of reimbursement set by INFARMED can be subject to a maximum amount of sales by the marketing holder of the prescription pharmaceutical product. If that level of sales is exceeded, the company will reimburse to the State (SNS) the level of the reimbursement in excess.

With regard to preferential issues on generic drug prescribing, as set by Decree-Law 271/2002, of 2 December, it should be noted that the prescription of medicinal products containing active substances for which there is a generic should be carried out by indicating the International Common Denomination ("**ICD**") of the generic product's denomination. In the event the doctor wishes to indicate in the prescription the trademark's denomination or the holder of the marketing authorisation in the case of generics, he/she must inform the patient of the existence of the generic pharmaceutical product that is reimbursed by the SNS as well as its price. Each time the doctor considers that there are reasons not to authorise the delivery to the patient of a generic product instead of the prescribed non-generic product he/she must expressly state that in the relevant prescription form [as provided in Ruling (*Portaria*) 1501/2002, of 12 December]. Subsequently, when the product is delivered to the patient, the pharmacist should inform the patient of the existence of a generic, its respective price and the applicable reimbursement regime. Only the pharmacist will be able to alter the original prescription at the request of the patient, provided that there is no express declaration from the doctor against that replacement.

§ X.08 "Internet Pharmacy" issues (other than patent and trademark issues)

All restrictions applicable to the distribution and sale of drugs in Portugal constitute significant obstacles to the legitimate exercise of any of these activities through the Internet and, therefore, should prevent the direct acquisition of drugs from foreign pharmacies, by domestic patients. In this respect, please bear in mind the following:

- in Portugal only pharmacies (and authorized establishments, in the case of non-prescription drugs that are not subject to reimbursement schemes) are allowed to sell drugs directly to the public [48];

- a hospital may only use medicines for its own use, that is to say, those to be administered to incoming patients and outgoing patients who are following a treatment prescribed by and under the supervision of the hospital in question [49];

- manufacturers, importers and wholesalers can only to sell drugs directly to pharmacies, authorized establishments and to health institutions duly authorized for the acquisition of drugs;

- given that the placement of a drug into the market depends on prior approval by the competent authorities, pharmacies, authorized establishments and hospitals can only purchase medicines for which an MA has been granted, following the process legally foreseen, which is conducted by INFARMED[50];

- according to Decree-Law135/95 of June 9, as amended (which sets out the regime applicable to the wholesale distribution of medicines) and Ruling (*Portaria*) 349/98, of June 15 (providing the GDP), generally only wholesalers duly authorized by INFARMED are allowed to distribute medicines in the Portuguese market. The two exceptions[51] to this rule refer to:

  (a) the distribution by the holder of an MA granted under Portuguese law, provided that the respective distribution activity is limited to its authorized manufactured products and that the same does not have premises in Portugal specifically intended for wholesale activities;

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[48] Under Decree-Law no. 44204 of February 2, 1962, as amended (providing the regime applicable to the Pharmaceutical Activity within hospitals), where the pharmacy services within hospitals are the property of certain institutions ("*Misericórdias*") and provided that the necessary administrative licence ("*alvará*") has been granted, they are also allowed to re-sell medicines to the public.

[49] In exceptional terms, hospitals are also legally allowed to re-sell medicines:

(a) to patients residing in isolated areas that are quite distant from a pharmacy;

(b) to the public (i) in the event that an emergency situation occurs and the medicines needed are not available in the local/national market or (ii) where, due to unexpected circumstances, there is a risk of discontinuation of regular supply and distribution of medicines [in this last case subject to prior authorisation from the Ministry of Health (as set forth in Decree-Law no. 29/97, of January 23)].

[50] INFARMED may exceptionally authorize the use of medicines for which no MA has been issued, provided that the same are deemed absolutely necessary for the treatment or diagnosis of certain pathologies, or exclusively intended for research and clinical tests. In any case, this (exceptional) authorisation for special use (ASU) can only be granted provided that certain conditions are met (please refer to Section [ ] - The Drug Approval Process).

[51] It should be underlined that, even in these cases, the manufacturer or the wholesaler are only allowed to distribute products in Portugal provided that they are able to comply with all obligations applicable to authorized wholesalers (which, in practical terms, can be an obstacle).

(b) the distribution by the holder of a wholesale authorisation granted by another EU Member State and, again, provided that the same does not have premises specifically intended for the wholesale distribution activity in Portugal.

In light of this legal framework and bearing in mind that the e-commerce and distant sale of drugs is not compatible with: (i) the legal regime applicable to the advertising on medicines: [52] or (ii) with the reimbursement price system of medicines (where applicable); or (iii) data protection legislation [53], we can conclude that the advertising and commercialisation of both prescription and non-prescription drugs through the Internet are illegal activities. However, regardless of the current legal regime, the advertising and commercialisation of drugs through the Internet is a practice that cannot be ignored, although extremely difficult to control. In addition, any possible legal action that could be taken by INFARMED against the parties responsible for this type of infractions would always be limited to sites hosted in Portugal.

In spite of the above, it might be of interest to note that, further to a recommendation issued by the national Competition Authority [54] ("*Autoridade da Concorrência*" - the "**AdC**"), on January 31, 2006, the Secretary of State for Health publicly announced that the Government intends to include distance sales of medicines (through the Internet) in the new legislation on pharmacies, which is expected to be enacted in the near future. Nonetheless, there has been no clarification as to whether such measure will apply exclusively to non-prescription drugs or will be more comprehensive. In any event, the fact that Portuguese citizens acquire medicines through the Internet from other countries, in questionable quality and safety conditions, together with the importance of offering this alternative to citizens who have reduced mobility, are the reasons that the AdC has given to include this measure in its recommendation.

In relation to the possibility for pharmacists to ship drugs to patients residing abroad, regardless of the absence of a specific provision expressly prohibiting this activity, several regulations should be taken into account:

- Decree-Law 48547, of August 27, 1968, as amended, establishing the regime applicable to the pharmaceutical activity ("**Decree-Law 48547**"), states that the sale and delivery of drugs directly to the public (both prescription and non-prescription drugs) must take place exclusively in pharmacies or, in relation to non-prescription drugs, also in authorized establishments;

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[52] There are neither specific regulations on the advertising on drugs on the Internet nor rules concerning the level of security that a site must provide. However, advertising principles set forth in the Portuguese legislation apply in this situation. Although not expressly established in the law, it is recommended, mainly concerning advertising on medicines subject to medical prescription, to provide a password protection in order to ensure that only health professionals are able to access such informative sites. A different understanding would allow the performance of advertising activities through Internet sites which would not be allowed, if they were carried out through other means of communication.

[53] Law 67/98, of October 26 (implementing Directive 95/46/CE, of October 24, 1995).

[54] This recommendation, made available at the address indicated bellow, was the result of an extensive study carried out on the current situation of pharmacies in Portugal, from a competition point of view, and provides for a set of measures to be adopted with the purpose of eliminating unjustified restrictions and distortions: http://www.autoridadedaconcorrencia.pt/vImages/recomendacao2006_01.pdf.

- In accordance with Decree-Law 48547, and as regards prescription drugs, the respective delivery depends on the exhibition of a medicinal prescription (which is valid for 10 days);

- The medicinal prescription must comply with the terms set out in Ruling (*Portaria*) 1501/2002, of December 12, which requires the prescription to be made by a doctor in Portugal. Moreover, the prescription will be stamped and dated by the pharmacist, when the drug is delivered to the patient, being also required that the bar code of the relevant medicine be fixed to the prescription. Thus, the presence of the patient (or someone acting on his/her behalf), upon delivery should be seen as an essential condition;

- Additionally, one of the pharmacists' duties is to provide the patients with information and advice regarding the use of the medicines, upon request or whenever deemed convenient by the pharmacist, which would not be practicable in the shipping of drugs to patients residing abroad;

- Finally, as mentioned above, when the drug is delivered to the patient, the pharmacist should inform the same of the existence of a generic, the respective price and the applicable reimbursement regime. Moreover, should a generic be delivered in place of the reference product prescribed by a doctor (where admissible), the signature of the patient is also required.

In light of the above, even if not expressly stated in the applicable rules, based on the interpretation of the above mentioned norms, we consider that the delivery of drugs (allowed only in pharmacies and, for non-prescription drugs, in certain authorized establishments) requires the presence of the patient (or someone acting on his/her behalf).

Finally, it could also be noted that, in the event of shipping, the storage, handling and transportation conditions would not be subject to any type of control by INFARMED. As medicines are products requiring special conditions in order to avoid their deterioration, the total absence of control could risk their safety and efficacy.

In view of the above, we can also conclude that the export of medicines by pharmacies would not be in accordance with the Portuguese legislation.