EXPLANATORY MEMORANDUM TO

THE HUMAN MEDICINES (AMENDMENT) REGULATIONS 2019

2019 No. 62

1. Introduction

1.1 This explanatory memorandum has been prepared by the Medicines and Healthcare products Regulatory Agency (MHRA) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument amends the Human Medicines Regulations 2012 (the 2012 Regulations) in order to transpose the final provisions of Directive 2011/62/EU (the Falsified Medicines Directive), requiring two new safety features to appear on the packaging of certain medicinal products, and to give effect to Delegated Regulation (EU) 2016/161(the Delegated Regulation), which supplements the Falsified Medicines Directive by laying down detailed rules for the safety features.

2.2 The instrument also provides for the sale or supply of prescription only medicines by retail pharmacy businesses under a 'serious shortage protocol' where there is or may be a serious shortage of particular prescription only medicines. These protocols would allow for substitution, in restricted circumstances, of a different strength, quantity or pharmaceutical form of a prescription only medicine, or a different prescription only medicine, to that ordered by the prescriber.

2.3 Finally, this instrument amends the exemption for drug treatment services to supply Naloxone Hydrochloride for administration in emergencies involving a heroin overdose so that this is no longer limited to Naloxone Hydrochloride products that are for injection.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

Implementation of the Falsified Medicines Directive and the Delegated Regulation

6.1 The regulation of human medicines is an area of shared competence between the EU and Member States under article 4 of the Treaty on the Functioning of the EU (TFEU); but in light of the EU's comprehensive exercise of the competence, Member States are precluded from exercising the competence nationally.

6.2 The EU has created a comprehensive code for the marketing, manufacturing, packaging, distribution, advertising and monitoring of human medicines. The framework for this is set out in Directive 2001/83/EC. This has been transposed into UK legislation through the 2012 Regulations.

6.3 The Falsified Medicines Directive amends Directive 2001/83/EC as regards the prevention of the entry into the legal supply chain of falsified medicinal products and the majority of this was transposed into UK legislation in 2013. This instrument amends the 2012 Regulations in order to implement the remaining aspects which require two new safety features (a unique identifier and an anti-tampering device) to appear on the packaging of certain medicinal products from 9 February 2019.

6.4 The Delegated Regulation supplements the Falsified Medicines Directive by laying down detailed rules for the safety features and takes direct effect in UK law from 9 February 2019 by virtue of section 2(1) of the European Communities Act 1972. This instrument amends the Human Medicines Regulations in order to make the Delegated Regulation workable and enforceable in the United Kingdom by introducing sanctions for breaches of the requirements and implementing flexibilities provided for in the Delegated Regulation to accommodate the particular characteristics of the UK supply chain.

Serious shortage protocol

6.5 Under Part 12 of the 2012 Regulations, medicines which are classed as prescription-only medicines (POM) can only be sold or supplied in accordance with an appropriate practitioner's prescription. An appropriate practitioner includes a doctor, dentist or other independent prescriber. This instrument makes provision for a 'serious shortage protocol' to be issued by Ministers where there is or may be a serious shortage of a prescription only medicine. This would enable pharmacists to sell or supply against the protocol rather than a prescription.

Availability of Naloxone

6.6 Naloxone hydrochloride is licensed as a prescription only medicine for the treatment of opioid overdose. Schedule 17 of the 2012 Regulations provides an exemption allowing drug treatment services provided by or on behalf of NHS bodies and local authorities to supply Naloxone Hydrochloride for parenteral administration in emergencies. However, under the current provisions Naloxone Hydrochloride for administration other than by injection (such as nasal Naloxone Hydrochloride products) is not available for supply in drug treatment services without the services of a doctor or other independent prescriber.

7. Policy background

What is being done and why?

Implementation of the Falsified Medicines Directive and the Delegated Regulation

7.1 Falsified medicines are often disguised as authentic medicines but may contain ingredients of poor or toxic quality, or in the wrong dosage. As they have not been properly checked for quality, safety and efficacy, they can pose a real risk to patients' health. As falsified medicines become more sophisticated, the risk of them reaching patients increases. They represent a serious threat to global health and call for a comprehensive strategy both at European and international level. At present there is no mechanism that allows users to verify the authenticity of an individual pack of a medicinal product.

7.2 The Falsified Medicines Directive introduced a number of measures from 2013 to help identify and remove falsified medicines from the legitimate supply chain. This instrument amends the Human Medicines Regulations 2012 in order to implement the final aspect, which requires two new safety features (a unique identifier contained in a 2D bar code and an anti-tampering device) to appear on the packaging for almost all prescription only medicines for sale in the European Economic Area (EEA). This instrument also gives effect to the Delegated Regulation, which supplements the Falsified Medicines Directive by laying down detailed rules on two new safety features.

7.3 From 9 February 2019 manufacturers will be required to:

- place the safety features on the packaging of certain medicinal products; and
- upload into a European data repository, information on the safety features that enables the verification and identification of the product in question.

7.4 The 2D barcode will then need to be scanned at various points in the supply chain to verify the authenticity of the medicinal product and on supply to the patient, the unique identifier must be 'decommissioned'. This involves changing the active status of the unique identifier to prevent any further successful verification.

7.5 The Delegated Regulation includes a number of flexibilities for Member States in order to accommodate the particular characteristics of the supply chain in their territory. In particular, it allows Member States to exempt specific institutions or persons authorised or entitled to supply medicinal products to the public from the obligation of verification of the safety features. This instrument implements this flexibility by requiring wholesalers to decommission medicines before supplying them to such persons or organisations.

7.6 This instrument also introduces sanctions for breaches of the Delegated Regulation to make the requirements enforceable in the United Kingdom. These sanctions are consistent with those applicable to infringements of existing requirements under the Human Medicines Regulations.

Serious shortage protocol

7.7 The instrument makes provision for a serious shortage protocol to be issued by Ministers for serious shortages of particular prescription only medicines or a prescription only medicines of a specified description.

7.8 Currently, if a pharmacy cannot dispense what is on a prescription, it will either send the patient back to the prescriber or if there is an urgent need, contact the prescriber, discuss an alternative and then get the prescription changed by the prescriber. The intent of the protocol is that in the event of a serious shortage of a prescription only medicine that affects or may affect the whole or any part of the United Kingdom, in appropriate circumstances, pharmacists may dispense an alternative quantity, an alternative pharmaceutical form, an alternative strength, a therapeutic equivalent or a generic equivalent as indicated in the protocol without going back to the prescriber.

7.9 Any protocol would be developed with and signed off centrally by clinicians. I would enable pharmacists, using their professional judgement, to supply an alternative quantity, strength, pharmaceutical form or medicine that is both available and suitable as prescribed in the protocol.

7.10 The power to issue protocols is a reserve power that the Department anticipates would only be used in exceptional circumstances. Protocols for either an alternative quantity, strength or pharmaceutical form are likely to be more common than protocols for a therapeutic or generic equivalent, which would only be used in very exceptional circumstances, where appropriate.

7.11 Protocols for therapeutic or generic equivalents will not be suitable for all medicines and patients. For example, those types of protocols would not be suitable for treatments for epilepsy or treatments requiring biological products where the medicines that are prescribed need to be prescribed by brand for clinical reasons. In these cases, patients would always be referred back to the prescriber for any decision about their treatment before any therapeutic or generic alternative is supplied.

7.12 The serious shortage protocol provisions provide an additional tool to manage serious supply shortages. The Department will continue to work with the industry, the NHS and the Medicines and Healthcare Products Regulatory Agency to mitigate the impact of supply issues on patients as it does now. The Department would always endeavour to discuss with manufacturers the supply issues relating to a specific drug before including it in a serious shortage protocol.

Availability of Naloxone

7.13 Currently, drug treatment services provided by or on behalf of the NHS and local authorities can obtain stocks of injectable Naloxone Hydrochloride and supply it to anyone requiring access for use in an emergency involving a heroin overdose.

7.14 A nasal Naloxone product is now available, and these Regulations will allow drug treatment services to obtain stocks of such a product and supply it on the same basis as the injectable preparation. It is expected that the nasal product will be more acceptable to first responders who are not medically trained or practised in administering injections.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union. However, if withdrawal from the European Union were a contributing factor to a serious shortage of prescription only medicines, a serious shortage protocol could be used in those circumstances.

9. Consolidation

9.1 The majority of medicines legislation was consolidated in 2012 as the Human Medicines Regulations 2012. There are no plans currently to repeat the exercise.

10. Consultation outcome

Implementation of the Falsified Medicines Directive and the Delegated Regulation

10.1 The Government has engaged widely with industry and stakeholders on implementation of the FMD, including extensive pre-consultation informal engagement. In addition to this we formally consulted on our approach to the legislative flexibilities set out in the Delegated Regulation.

10.2 The public consultation was launched in July 2018 and ran for a period of 10 weeks. Its scope was to consult on the steps proposed to make sure the UK meets its obligations to transpose the provisions of the Falsified Medicines Directive requiring safety features to appear on the packaging of certain medicinal products. The consultation closed in September, and more than 50 replies were received from a wide range of stakeholders. The consultation response can be found on the following webpage: https://www.gov.uk/government/consultations/implementing-safety-features-under-the-falsified-medicines-directive

10.3 Overall, the responses broadly supported the Government's proposed positions regarding the level of sanctions imposed and on each national flexibility, where the UK has legal scope to make changes. However, some concerns were raised which we have considered in turn and amended our approach where appropriate:

- In relation to the flexibility to exempt persons operating within a healthcare institution from the obligations of verification and decommissioning where this is done by a wholesaler belonging to the same legal entity, it was initially not considered that there would be any need to implement this in the UK. However, there were responses that suggested that this exemption may be beneficial and provide additional flexibility for some hospitals. As such, the exemption has now been included for use in the circumstances set out in the Delegated Regulation.
- Respondents to the consultation largely favoured the proposed use of non-criminal enforcement measures before the application of any criminal sanctions. To support this approach, the SI introduces formal written warning notices where persons who supply products to the public are considered to have contravened a provision of the Delegated Regulation.

Serious shortage protocol

10.4 DHSC separately consulted industry, pharmacy and general practitioner stakeholder representative bodies on the provision for the serious shortage protocol. Consultation responses were broadly supportive of the proposal. Concerns were raised about substitution of medicines for high-risk patients. However, any protocol would be developed with and signed off centrally by clinicians. Protocols for therapeutic or generic equivalents will not be suitable for all medicines and patients. For example, they will not be suitable for treatments for epilepsy or treatments requiring biological products where the medicines that are prescribed need to be prescribed by brand for clinical reasons. In these cases, patients would always be referred back to the

prescriber for any decision about their treatment before any therapeutic or generic equivalent is supplied.

10.5 Industry respondents favoured a time limited introduction of the provision for a serious shortage protocol. In response to both concerns, a review clause has been included requiring a review of the serious shortage protocol as soon as is reasonably practical after the end of one year after the first such protocol starts to have effect. This will look at, specifically, any adverse consequences for either the market in prescription only medicines or patient safety. A stakeholder consultation will be conducted as part of the review. The Department will continue to work closely with suppliers to mitigate the impact of shortages on patients including on the consideration of introducing a serious shortage protocol.

Availability of Naloxone

10.6 The original exemption to allow drug treatment services access to injectable Naloxone was subject to consultation and there was near unanimous support for the change (118 responses out of 122). These Regulations do not extend beyond those services and so no further consultation was carried out on the amendments to allow drug treatment services to also obtain and supply non-injectable Naloxone products for use in an emergency.

11. Guidance

Implementation of the EU Falsified Medicines Directive (2011/62/EU)

11.1 Stakeholders impacted by the implementation can find guidance through the MHRA's FMD portal[1]. This includes MHRA guidance on how to apply to register safety features on medicines packaging. Alongside Government produced guidance, the MHRA and DHSC have also supported the production of stakeholder-led guidance on the requirements of the Delegated Regulation for individual sectors.

Serious shortage protocol

11.2 Only Ministers would be able to publish a protocol when they consider that a medicine is or may become in serious shortage. The list of protocols and the protocols themselves would be issued and kept centrally. Any alternative quantity, strength, pharmaceutical form or medicine which is to be supplied would be agreed centrally and based on the views of senior clinical advisors. A standard template for the protocols will be developed. As part of that template we would require retail pharmacists to dispense against the prescription instead of against the protocol when the medicine in the protocol is available again.

Availability of Naloxone

11.3 Public Health England will work with DHSC and the MHRA to publish supplementary advice to existing guidance for commissioners and providers of drug treatment services

[1] https://www.gov.uk/guidance/implementing-the-falsified-medicines-directive-safety-features

12. Impact

Implementation of the Falsified Medicines Directive and the Delegated Regulation

12.1 The impact on business, charities, voluntary bodies and the public sector is likely to be a net cost which MHRA has mitigated by implementing the flexibilities within the Delegated Regulation where available.

12.2 The impact is due to the cost of scanners, software, training and familiarisation, adapting work areas, licence changes and decommissioning products before supplying them to the public.

12.3 The MHRA has taken on board evidence and feedback from the consultation and further discussion with stakeholders and used this to prepare a final Impact Assessment. In line with other measures around releasing commercial and sensitive data, the Impact Assessment is not being published at this time. Disclosure of financial information on costs and pricing information has the potential to prejudice commercial interests including the ability to participate competitively in commercial activity.

Serious shortage protocol

12.4 An Impact Assessment has not been prepared for this policy. The amendments to the 2012 Regulations providing for a serious shortage protocol are enabling and intended to be used when there is a recognised serious shortage. They do not create or impose significant costs on business, charities or voluntary bodies. There is also no significant impact on the public sector.

12.5 The main benefits of the protocol would be the NHS cost savings associated with GP time. There may be some risks to patients, and therefore costs associated with this but clinicians setting out the guidance will consider and minimise these risks when setting out the guidance.

12.6 Whilst costs savings from GPs are expected, the impact on community pharmacies is expected to be neutral. There will be cost savings from not having to liaise with GPs but community pharmacies will need to inform the GP when they dispense against a protocol and they may also be required to do some further checks that they would not do when dispensing against a prescription.

Availability of Naloxone

12.7 No impact assessment has been produced. A Regulatory Triage Assessment was prepared as the EANCB evaluation of costs/benefits to business was estimated to be below £10m.

13. Regulating small business

Implementation of the Falsified Medicines Directive and the Delegated Regulation

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 Exempting specific institutions or persons authorised or entitled to supply medicinal products to the public from the obligation of verification of the safety features, by requiring wholesalers to decommission on behalf of them, will minimise regulatory burdens on small businesses.

13.3 To exclude small and micro businesses would make them the weak link of the supply chain which would:

- pose a threat to public health by providing an easy route for falsified medicines to enter the supply chain; and
- potentially damage small and micro businesses by reducing the demand for their medicines if other businesses and customers see them as an unsafe to do business with.

13.4 In addition to this, the EU legislation does not give us the flexibility to specifically exclude small and micro businesses. However, MHRA will endeavour to ensure communications are as clear as possible to support small and micro businesses.

Serious shortage protocol

13.5 The legislation applies to activities that are undertaken by small businesses.

13.6 No specific action is proposed to minimise regulatory burdens on small businesses.

13.7 Many community pharmacies are small business. Whilst costs savings from GPs are expected, the impact on community pharmacies is expected to be neutral. There will be cost savings from not having to liaise with GPs but community pharmacies will need to inform the GP when they dispense against a protocol and they may also be required to do some further checks that they would not do when dispensing against a prescription.

13.8 GP practices are exempt from the Small Firm Impact Test as they are considered part of the public sector due to their provision of primary medical services for the NHS. Public sector organisations are exempt from this test.

Availability of Naloxone

13.9 The legislation does not apply to small businesses.

14. Monitoring & review

14.1 The Human Medicines Regulations 2012 are subject to a regular review by the Secretary of State. This instrument makes the amended provisions subject to that review. It also provides for a separate review of serious protocols as soon as is reasonably practical after the end of one year after the first such protocol starts to have effect. This will look at, specifically, any adverse consequences for either the market in prescription only medicines or patient safety. A stakeholder consultation will be conducted as part of the review.

15. Contact

15.1 Adrian Bartlett at the Medicines and Healthcare products Regulatory Agency Telephone: 44 7823 552386 or email: adrian.bartlett@mhra.gov.uk can answer any queries regarding the instrument regarding implementation of the Delegated Regulation under the Falsified Medicines Directive.

15.2 Anne Ryan at the Medicines and Healthcare products Regulatory Agency (MHRA) (Telephone: 0203 080 6392 or email: anne.ryan@mhra.gov.uk) can answer any queries regarding the instrument regarding Naloxone.

15.3 Sandor Beukers at the Department of Health and Social Care (DHSC) (Telephone: 020 7972 1152 or email: sandor.beukers@dhsc.gov.uk) can answer any queries regarding the instrument regarding the serious shortage protocol.

15.4 Patrick Carey, Deputy Director for EU and International, at the Medicines and Healthcare Products Regulatory Agency (MHRA) can confirm that this Explanatory Memorandum meets the required standard.

15.5 The Secretary of State, the Rt Hon Matt Hancock MP at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.