Stibbe

COVID-19 – Healthcare and Life Sciences law: Belgian perspective

Ignace Vernimme and Philippe Campolini[1]

Abstract

The Belgian legal and regulatory framework applicable to the healthcare and life sciences sector has adapted in response to the COVID-19 pandemic. Measures have been taken to encourage research, speed up clinical trials and avoid shortages of drugs or medical devices. These measures have been adopted both by the Belgian Government, thanks to special powers granted during the crisis, and by the Federal Agency for Medicines and Health Products.

Compulsory licensing – Shortage of Medical devices – Shortage of drugs – 3D printing – Clinical trials

Introduction

The current COVID-19 outbreak is challenging in many respects. The healthcare and life sciences sector, perhaps more than any other, is strongly affected. The sector plays a major role in the fight against this virus, in particular through the research efforts to develop a vaccine. In this regard, the issue of research funding is crucial. The European Union, for example, has raised EUR 7.4 billion as a result of a global donor marathon. The aim is to put the common good first and prevent certain companies or countries from monopolising access to a vaccine. The Belgian Government has taken part in this momentum by investing 20 million euros in research.

The pandemic also affects the Belgian legal and regulatory framework. For some circumstances, existing rules already provide useful tools. This is the case of the compulsory licensing regime (which has however never been applied in Belgium so far). In other cases, the applicable framework needed to be reformed in order to fight against COVID-19. Belgium has reacted by adopting several measures in order to be able to respond more effectively to the challenges the healthcare and life sciences sectors are facing, especially to avoid a shortage of medical devices or medicines. These measures include guidelines regarding 3D printing of (compounds of) medical devices. The legal framework applicable to clinical trials has been adapted as well in order to minimize risks for patients.

[1] Both authors are IP and Life Sciences Partners at Stibbe (Brussels). They can be contacted at the following e-mail addresses: ignace.vernimme@stibbe.com and philippe.campolini@stibbe.com.

Compulsory license

Belgian law organizes the grant of compulsory licenses in Articles XI.37 to XI.46 of the Code of Economic Law (hereinafter "CEL"). These provisions describe six situations in which an application for a compulsory license can be filed. Two situations relate to public health: a compulsory license may be applied for "in the interest of public health" (Art. XI.38 CEL) or to export to countries with public health problems (Art. XI.39 CEL). The competent authority to grant compulsory licenses based on public health grounds is the Council of Ministers, by royal decree. When the license is applied for "in the interest of public health", the application must be made to the Minister of Economy and a copy of it must be sent to the Bioethics Advisory Committee, which provides a non-binding opinion on the application to the Minister. The patentee is also informed of the application and is invited to take position and to suggest the reasonable remuneration he would expect if the compulsory license is granted.

No such compulsory license has ever been granted in Belgium so far, but some have called for the system to be used in the context of the current pandemic. On 9 April 2020, a proposal of resolution was submitted to the Belgian Parliament by the Belgian Labour Party (PTB/PVBA[2]) concerning the compulsory licensing system[3]. The text aimed at asking the Belgian Government to undertake the grant of compulsory licenses to ensure that medicines and vaccines against COVID-19 are made available free of charge to everyone. The proposed resolution stated that compulsory licenses should be granted when manufacturers impose prices that are disproportionate to the real costs of research and development and when manufacturers cannot meet the demand quickly enough. The proposed resolution also called on the Belgian Government to advocate changes to EU legislation so that compulsory licenses can be granted at EU level. The resolution was however rejected by the Health Commission of the Parliament on 25 May 2020.

The same political party has previously submitted a proposal of law to the Belgian Parliament to amend Article XI.38 CEL[4]. The text aims at allowing the Belgian Minister of Health to grant, by ministerial order, licenses to exploit and apply patented medicines when there is a risk of disproportionate prices in relation to the real production costs. This proposal is currently pending.

Shortage of medical devices

[2] Parti du travail de Belgique (PTB) / Partij van de Arbeid van België (PVBA).

[3] https://www.lachambre.be/FLWB/PDF/55/1166/55K1166001.pdf. See also the debate on another proposal of resolution (on the sharing of knowledge and technologies to fight the COVID-19) submitted by the Ecologist Parties (Ecolo-Groen) during which members of the Belgian Labour Party asked to use the compulsory licensing system in the fight against COVID-19. The authors of the proposal rejected these request considering that at that time, it was preferable to give priority to any voluntary action (https://www.lachambre.be/doc/flwb/pdf/55/1167/55k1167003.pdf#search=%22licence%20obligatoire%20%2055k%20%3Cin%3E%20keywords%22).

[4] https://www.lachambre.be/FLWB/PDF/55/0407/55K0407001.pdf.

In order to combat shortages of medical devices, the Federal Agency for Medicines and Health Products (hereinafter “FAMHP”) adopted a circular in the beginning of April 2020, to clarify the modalities under which health care institutions (mainly hospitals) are allowed to manufacture medical devices and their accessories or to reprocess single-used medical devices[5].

The aim of this circular was to sort out an existing situation, as some health care institutions in Belgium had already started to manufacture or reprocess such devices following the COVID-19 outbreak. For instance, a team of engineers from the VUB University had been developing a prototype of ventilator with the support of the university hospital UZ Brussels, the companies DAF, and Volvo using the motors of the windshield wipers as a key component of the prototype. The factory Audi Brussels put a production line at their disposal. In the same vain, the UCL University, its innovation lab OpenHub – involving more than 300 people from the private and public sectors – and the university hospital UCL have developed a project to manufacture emergency ventilators in order to anticipate a potential lack of ventilators in intensive care units in Belgium. The industrial pilot production of 25 ventilators was finally put at the disposal of hospitals in need outside Belgium. Following such initiatives, a non-profit making association called *OpenMedTech* was set up in order to give access to technologies for the production oft medical devices within an Open Source approach.

According to the circular, healthcare institutions are now allowed to work with external companies on alternative solutions to combat shortage of medical devices. This can be done, on the one hand, by producing certain medical devices said to be "in-house" and, on the other hand, by reprocessing single-use medical devices. The main conditions for the manufacture of “in-house” medical devices are the following:

- The device must be necessary for the treatment of COVID-19;
- The shortage of the device must be proven;
- The external company which the hospital outsources the manufacture to must meet ISO norms;
- A notification must be sent to the FAMHP by the care institution;
- The device may not be put on the market but only used by and within the institution which outsourced its manufacture (or the group of hospitals that have worked together for the manufacture) ;
- Such manufacture or reprocessing is only allowed within the period of the COVID-19 outbreak.

5 https://www.famhp.be/en/human_use/health_products/medical_devices_accessories/generalities/guidance_COVID_19/circular_for.

Similar requirements apply to the reprocessing of single-use medical devices. The devices covered by the circular are the ones covered by the directives 93/42/CEE on medical devices and 98/79/CE on in vitro diagnostic medical devices that will progressively be replaced by the EU regulations 2017/745 and 2017/746. The new regulations will be fully applicable in May 2021 for medical devices – initially in May 2020 but postponed by one year due to the coronavirus crisis[6] – and May 2022 for in vitro diagnostic medical devices.

Since the publication of the circular, the CHU Liege hospital for instance has notified the FAMHP of the in-house manufacture of nasopharyngeal swab. The Erasme hospital has done the same for connectors between Decathlon snorkeling masks and respiratory systems.

It is worth underlying that the circular does not set forth any notification to the "original" manufacturer of the medical devices concerned. Furthermore, the medical devices manufactured under this exceptional regime will not be authorized anymore after the crisis unless if they have been regularized in the meantime and meet the applicable EU regulations/norms.

3D printing guidelines

The FAMHP has also published non-mandatory guidelines for in-house making of respiratory devices accessories using 3D printing, as well as a list of manufacturers meeting these guidelines[7].

The FAMHP recommends for instance all hospitals to contract with an organization having extensive knowledge of the ISO14971 (Application of risk management to medical devices) and ISO13485 (Medical devices — Quality management systems) standards and capable of designing and manufacturing according to these standards.

The agency also recalls that the criteria set in its circular on the manufacture of "in-house" medical devices and on the reprocessing of single-used medical devices (see above) must in any case be met.

The guidelines expressly refer to the EU standards applicable to 3D printers, 3D printed products used in a medical context and the harmonized standards under the Medical Device Directive relevant for ventilator parts. The FAMHP's website also includes a link to the European Q&A on "conformity assessment procedures for 3D printing and 3D printed products to be used in a medical context for COVID-19" where the following is recommended: "*In order for 3D printing companies to manufacture parts, components or accessories of medical devices, they should get into contact with an existing medical*

[6] Regulation (EU) 2020/561 of the European Parliament and of the Council of 23 April 2020 amending Regulation (EU) 2017/745 on medical devices, as regards the dates of application of certain of its provisions, *OJ* L 130, 24 April 2020.

[7] https://www.afmps.be/fr/humain/produits_de_sante/dispositifs_medicaux/generalites/guidance_COVID_19.

devices manufacturer and request the design specification required. These specifications will lay out the technical designs and requirements for the product. For example, to manufacture ventilator valves, it would be crucial to have access to the file of the design in order to know the dimensional characteristic, material to use and tolerances required."

Shortage of drugs

Besides medical devices, the crisis also caused (concerns of) certain drug deficiencies. In this regard, the European Commission published a communication containing "guidelines on the optimal and rational supply of medicines to avoid shortages during the COVID-19 outbreak" in April 2020[8]. On 17 September, the European Parliament adopted a resolution on the shortage of medicines[9].

In Belgium, a royal decree was passed on 24 March 2020 "concerning special measures to combat shortage of medicinal products in the framework of the SARS-CoV-2 outbreak"[10]. This was followed by the publication of a decision of the FAMHP on 1st April 2020[11] and by the adoption on another royal decree on 23 June 2020 concerning "measures in the fight against the spread of the coronavirus COVID-19, with a view to the insurance and proper management of stocks of drugs and the extension of pharmacy authorisations"[12].

These acts mainly regulate the supply and the distribution – including quotas for wholesalers and optimal distribution between hospitals – as well as the export of drugs with (potential) efficacy for the treatment of COVID-19. A list of the products covered by these emergency measures has been established by the FAMHP. Such measures have been in place since 1 April 2020 and have now been refined the 8 April[13] and extended until 1 June 2020[14]. They include among others:

- Export of the listed products within EEA must be notified to the FAMHP, which can ban such export in the interest of Belgian patients, and export outside of the EEA is prohibited;

- Wholesalers are limiting sale quantities of the drugs and raw materials to the quantities corresponding to last year's sales for the same period, increased by a maximum of 50%;

[8] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0408(03)&from=FR.
[9] https://www.europarl.europa.eu/doceo/document/TA-9-2020-0228_EN.pdf.
[10] http://www.ejustice.just.fgov.be/eli/arrete/2020/03/24/2020040773/justel.
[11] https://www.afmps.be/sites/default/files/content/diverse_dringende_maatregelen_betreffende_specifieke_geneesmiddelen_ter_bestrijding_van_tekorten_van_geneesmiddelen_in_het_kader_van_de_sars-cov-2_pandemie.pdf.
[12] http://www.ejustice.just.fgov.be/eli/arrete/2020/06/23/2020041939/justel.
[13] https://www.fagg.be/sites/default/files/content/wijzigingsbesluit.pdf.
[14] https://www.afmps.be/sites/default/files/content/besluit_2_-_verlenging_1_mei_2020.pdf.

- Every stock surplus of the listed products in hospitals or pharmacies must be reported to the FAMHP for possible redistribution;

- The Belgian market's regular manufacturers were requested to increase production and speed up delivery, and other manufacturers have been sought out and found to obtain further supplies;

- A supply of raw materials has been organized in order to start up local production in Belgium wherever possible;

- Stocks have been found and purchased in other European countries and around the world; a large part of these stocks are strategic stocks purchased by the Belgian government and made available free of charge;

- Medicinal products for veterinary use or with other concentrations or molecules have been made available after verifying full compatibility and safety for said use;

- The necessary administrative procedures have been accelerated;

- Exemptions have been granted allowing pharmaceutical companies to import batches of medicinal products directly from abroad.

These measures have been re-assed in the end of May 2020. Based on the fact that the peak of the outbreak had been reached, that the situation in the hospitals had stabilised and that the risk of shortages of drugs was no longer current, the FAMHP maintained the above regime but withdrew the obligation of notification and the obligation to report every stock surplus. This adapted regime has been in place since 29 May 2020[15] and has been extended several times[16].

Finally, it is still necessary to bear in mind the ruling of the Constitutional Court delivered on 17 October 2019 (thus, before the COVID-19 pandemic) which has been of some interest since the issue of drug shortages became concrete[17]. The Court validated the principle of the adoption of measures to guarantee sufficient stocks and protect public health if they are properly justified. However, the Court considered that the challenged legal provision in the case at hand[18] was not properly justified and constituted a violation of the EU provisions on the free movement of goods. Said provision provided for that wholesaler-dispatchers ("grossistes-répartiteurs"/"groothandelaar-verdelers", which are wholesalers that are submitted to public obligations to ensure supply and avoid

[15] https://www.afmps.be/sites/default/files/content/besluit_3_fin.pdf.
[16] The measures have been extended by the adoption of successive decisions of the FAMHP: extension until 28 July 2020 (https://www.fagg.be/sites/default/files/content/besluit_3_-_verlenging__2.pdf); extension until 28 August 2020 (https://www.afmps.be/sites/default/files/content/besluit_3_-_verlenging_2_augustus_2020.pdf); extension until 28 September 2020 (https://www.afmps.be/sites/default/files/content/besluit_3_-_verlenging_3_september_2020.pdf); extension until 28 October 2020 (https://www.afmps.be/sites/default/files/content/besluit_3_-_verlenging_4_oktober_2020.pdf).
[17] Constitutional Court of Belgium, 17 October 2020, n° 146/2019, https://www.const-court.be/public/f/2019/2019-146f.pdf.
[18] http://www.ejustice.just.fgov.be/eli/loi/2019/04/07/2019012142/justel.

shortages) may only supply drugs to other wholesaler-dispatchers, pharmacies or hospitals, and therefore not to other distributors.

The changing conditions under which clinical trials are currently conducted in BE

On 30 April 2020, the FAMHP published a new version of its Guidance on the management of clinical trials during the COVID-19 pandemic. This document supplements the third version of European guidelines for the management of clinical trials during the coronavirus pandemic[19]. This directive applies to clinical trials for the prevention or treatment of COVID-19, as well as clinical trials underway in Belgium.

Priority is given to any clinical trial application for the treatment or prevention of COVID-19 infection. For national COVID-19 related trials, a single submission to the national contact point is sufficient and a single review by the selected evaluating ethics committee is foreseen. The agency commits to perform the review in four working days after submission.

On 13 July 2020, a FAMHP circular shortened the assessment time for clinical trials when the main objective of these trials is the therapeutic treatment of the COVID-19 or its prevention[20]. The circular formalised what has been done in practice since 25 March 2020: the AFMPH services already processed clinical trial applications within a shortened period of four working days. A first clinical trial for a vaccine was authorised by these services in June 2020[21].

Finally, the European Union adopted a particular regulation on 15 July 2020 “on the conduct of clinical trials with and supply of medicinal products for human use containing or consisting of genetically modified organisms intended to treat or prevent coronavirus disease (COVID-19)”[22]. This regulation, that has an impact in all EU Members States, provides for a number of derogations, in particular from the GMOs rules, in order to facilitate clinical trials and not to delay them. These measures shall apply as long as WHO has declared COVID-19 to be a pandemic.

Conclusion

---

19 https://www.famhp.be/en/news/coronavirus_new_version_of_belgian_directive_for_management_of_clinical_trials_during. See also https://www.famhp.be/en/news/coronavirus_national_guideline_for_the_management_of_clinical_investigations_for_medical. This first document is an addendum to the second document. Both are concerned with the management on the clinical trials during the COVID-19 pandemic.

20 https://www.afmps.be/sites/default/files/content/omzendbrief_fr.pdf.

21 https://www.famhp.be/en/news/coronavirus_first_covid_19_vaccine_trial_authorized_in_belgium.

22 Regulation (EU) 2020/1043 of the European Parliament and of the Council of 15 July 2020 on the conduct of clinical trials with and supply of medicinal products for human use containing or consisting of genetically modified organisms intended to treat or prevent coronavirus disease (COVID-19), (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32020R1043).

The Belgian legal and regulatory framework applicable in the healthcare and life sciences sector has been revised to respond to the urgency of the pandemic. Both hard law (royal decrees) and soft law (including guidelines) propose these amendments. It seems clear that other texts will be adopted. It will be interesting to see, once the COVID-19 epidemic is over, which measures will be maintained by the Belgian legislator. This crisis has at least one positive aspect: preparing the regulatory framework for possible future pandemics.