A GUIDE TO WHAT IS A MEDICINAL PRODUCT

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INTRODUCTION

The Medicines and Healthcare products Regulatory Agency

1. To protect public health, and on behalf of the UK Licensing Authority, the Medicines and Healthcare products Regulatory Agency (MHRA) regulates medicinal products for human use in accordance with the European Community's medicinal products directive (Directive 2001/83/EC, as amended, "the Directive") and UK law. The MHRA may be called on to determine if a product is a "medicinal product". If it does so determine, then unless an exemption applies, the product is subject to the Medicines for Human Use (Marketing Authorisations Etc.) Regulations 1994, as amended, ("the Regulations") or the Medicines (Homoeopathic products for Human Use) Regulations 1994, as amended or the Medicines (Traditional Herbal Medicinal Products for Human Use) Regulations 2005 and the Medicines Act 1968 ("the Act").

2. The person or company marketing a product has a responsibility to do so in accordance with the law. The Regulations provide that, unless exempt, any medicinal product placed on the UK market must have a marketing authorisation, traditional herbal registration or certificate of registration as a homoeopathic product granted by the European Commission or by the UK Licensing Authority. A marketing authorisation or registration is only granted for a product which meets statutory standards of safety, quality and efficacy. Under the Act medicinal products which fall outside of the Directive are required to have a product licence. Unless exempt, such a product cannot be sold or supplied without such a licence. In practice, very few medicinal products fall outside the Directive definition of that term.

3. The status of many products on the "borderline" between medicinal products and food supplements, biocides, cosmetic products or medical devices can be difficult to determine. This Guidance has been developed and revised to explain how and on what basis the MHRA decides whether products are medicines or not. It includes guidance on the procedures in regulation 3A of the Regulations.

4. Following a thorough assessment of the status of a product, which may include review of an earlier provisional determination, the MHRA may give notice that it has determined that a product is a medicinal product, and cannot be marketed without a marketing authorisation or registration. If compliance is not obtained voluntarily, the MHRA's Enforcement Group investigates and takes enforcement action as necessary. Enforcement options include a formal caution, or prosecution in the criminal courts for a breach of medicines legislation. In

many, but not all cases, the determination is made in accordance with the procedure in regulation 3A of the Regulations.

5. This guidance has been revised and updated to reflect the changes to the definition of a medicinal product which came into force on 30 October 2005, and the case law of the European Court of Justice since 2000. The opportunity has also been taken to revise the information about products containing herbal ingredients following the implementation of the simplified licensing scheme for Traditional Herbal Medicinal Products introduced by the Traditional Herbal Medicinal Products Directive (2004/24/EC), and also to incorporate additional appendices.

Cosmetic products

6. The Cosmetics Directive 76/768/EC, as amended (implemented in the UK by the Cosmetic Products (Safety) Regulations 2004 (SI 2004/2152) as amended, harmonises the requirements for cosmetics in the European Community to achieve free trade in cosmetics whilst ensuring that the products are safe and consumers are not misled. It prohibits, or places restrictions on, certain ingredients and defines a cosmetic product. The definition envisages that a cosmetic product may have a secondary preventative (but not curative), purpose. When deciding whether or not a product on the borderline between cosmetics and medicines is a medicinal product, the MHRA will apply the tests set out in Directive 2001/83/EC. If a product falls within the definition of a cosmetic and within the definition of a medicinal product it will be classified as a medicinal product (*Delattre* 1991, C-369/88). The regulatory status of products in other Member States will also be taken into account.

7. A minority of products may potentially satisfy the definition of a medicinal product ***and*** the definition of another type of product. The MHRA will decide whether to classify such a product as a medicinal product on a case by case basis, taking into account all relevant factors in relation to its presentation and function. However, in accordance with Article 2(2) of the Directive, where doubt remains as to its classification as a medicine or another type of product, it will be classified as a medicinal product.

Food products including food/dietary supplements

8. The definition of food in the Food Safety Act 1990 is that used in Article 2 of EC Regulation 172/2002;

> *"…food ("or foodstuff") means any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans…*

> *Food shall not include…medicinal products within the meaning of Council Directive 65/65/EEC [now Directive 2001/83/EC.]"*

"Food" includes any food, drink or food supplement that is part of the diet. Any ingested product which is not a medicinal product is a "food", including articles and substances of no nutritional value. A product which the average consumer would regard as something to be eaten, drunk or chewed as part of his/her diet for example, because of its taste, flavour, or nutritional value is unlikely to be classified by the MHRA as a medicinal product unless it contains one or more ingredients generally regarded as medicinal and indicative of a medicinal purpose. If the MHRA determines that such a product is not a medicine, it will be regulated under food law. A product which satisfies equally well the conditions for classification as a food and the conditions for classification as a medicinal product will be classified as a medicinal product.

Food law includes a prohibition on claims to treat, prevent or cure disease. An MHRA determination that a product is not a medicine does not amount to an approval that the product may legally be sold under food law. Manufacturers and persons intending to place a product on the market as a food should seek confirmation from the Trading Standards Service of their Local Authority that the product complies with all relevant food law including the requirements of the Food Supplements Directive (Directive 2002/46/EC). This Directive was implemented in England by the Food Supplements (England) Regulations 2003. Separate, equivalent legislation has been made in Scotland, Wales and Northern Ireland. The directive and these regulations apply from 1 August 2005.

Food supplement is defined as:

> *"foodstuffs the purpose of which is to supplement the normal diet and which are concentrated sources of nutrients or other substances with a nutritional or physiological effect, alone or in combination, marketed in dose form"*

The "upper safe level" referred to in Article 5(1)(a) of Directive 2002/46/EC is one of the factors which may be taken into account in setting maximum quantities of vitamins and minerals in food supplements. However, the concept of "upper safe level" is not relevant to the question of whether a product is a food supplement or a medicinal product. A product administered in quantities above or below the "upper safe level" may nonetheless be classified as a medicinal product if it falls within the definition in Article 1(2) of Directive 2001/83/EC (*HLH Warenvertriebs,* 2005 (C-211/03).

9. In addition, we have been advised by the Food Standards Agency (FSA) that ingredients which do not have a history of significant consumption within the EU prior to 15 May 1997 may be subject to the controls of Novel Food Regulation (EC) 258/97. Advice on this point should be sought from the Food Standards Agency either in writing (address provided in Appendix 2) or by e-mailing using the following addresses: novelfoods@foodstandards.gsi.gov.uk or Food_supplements@foodstandards.gsi.gov.uk.

10. In the case of products on the borderline between food and medicine, this Guidance should be read together with relevant guidance issued by the Local Authority Co-ordinating Body on Regulatory Services (LACORS), and with reference to the Joint Health Claims Initiative's published Code of Practice. A "food for a particular nutritional purpose" is defined by, and subject to the provisions of, Directive 89/398/EC, (implemented into UK law by the Food Labelling Regulations 1996, as amended) and includes "dietary foods for special medical purposes" (as defined by Directive 1999/21/EC, implemented into UK law by the Medical Foods (England) Regulations 2000), the Foods for Special Medical Purposes (Scotland) Regulations 2000, the Medical Food Regulations (Northern Ireland) 2000, and the Medical Food (Wales) Regulations 2000.

11. Products to provide nutritional support to athletes and persons who exercise ("sports supplements") would normally be regarded by the MHRA as falling outside the definition of a medicinal product. However some products are marketed with claims that they can significantly modify physiological function and/or contain ingredients which are capable of so doing. These products are likely to fall within the definition of a medicinal product and will therefore fall within the MHRA's remit. Appendix 7 gives more information on products aimed at sports people.

12. Products for persons wishing to lose weight ("slimming/dieting products") would fall within the definition of a medicinal product if: (a) they make medicinal claims; (b) if they modify physiological functions by acting pharmacologically, immunologically or metabolically, or are marketed and used with a view to having such an effect. However, it is also possible that some ingested products with claims to be medical treatments and which act by preventing fat being absorbed by the body or as bulking agents could be classified as medical devices.

Herbal medicinal products and herbal remedies

13. The Traditional Herbal Medicines Directive (Directive 2004/24/EC) was published on 30 April 2004 and implemented by the Medicines (Traditional Herbal Medicinal Products for Human Use) Regulations 2005, which for the most part came into force on 30 October 2005.

Products which were legally on the UK market on 30 April 2004 are not required to comply with the Directive until 30 April 2011. This means that where an unlicensed herbal remedy sold under Section 12(2) of the Medicines Act has transitional protection, by April 2011 it must have either a traditional herbal registration or a marketing authorisation. If it has neither it can no longer be placed on the market after 30 April 2011. This transitional protection does not apply to any products placed on the UK market at any time after 30 April 2004 onwards. Further details may be obtained from the Agency's website www.mhra.gov.uk

14. Herbal remedies are medicinal products and defined in Section 132 of the Medicines Act. They must be licensed unless an exemption applies, for example, one of those in Section 12 of the Medicines Act. The exemption from licensing contained in Section 12(2) is now only available to products which were legally on the market on 30 April 2004. More information on herbal medicinal products is contained in Appendix 5 to this Guidance Note.

Medical devices

15. Some products may be on the borderline between medicinal products and medical devices. Medical devices are subject to the controls of Directives 93/42/EEC, 98/79/EC and 90/385/EEC, implemented in the UK by the Medical Devices Regulations 2002 (SI 2002/618) as amended. These cases are decided after considering the intended purpose of the product taking into account the way it is presented, and the method by which the principal intended action is achieved. In the case of a medical device, the principal intended action is typically fulfilled by physical means (including mechanical action, physical barrier, replacement of, or support to, organs or body functions). Medical devices may be assisted in their function by pharmacological, immunological or metabolic means. However, where a product achieves its principal intended action by pharmacological, immunological or metabolic means, it is a medicinal product.

16. General advice on the legislation which covers medical devices can be obtained from the MHRA website at www.mhra.gov.uk or from the Devices sector of MHRA on telephone 020 7084 2000. For specific advice on borderline issues for medical devices, please refer to Devices Bulletin 17, available on the MHRA website, or telephone 020 7084 3386. Alternatively you may write to the Devices sector of MHRA (see address in Appendix 2).

WHAT IS A MEDICINAL PRODUCT?

Definition

17. Article 1 of Directive 2001/83/EC *as amended* defines a “medicinal product” as:

(a) "Any substance or combination of substances presented **as having properties** for treating or preventing disease in human beings; *["the first limb"]*

(b) Any substance or combination of substances which may be **used in or** administered to human beings **either** with a view to restoring, correcting or modifying physiological functions **by exerting a pharmacological, immunological or metabolic action, or to making a medical diagnosis**" *["the second limb"]*

*The paragraph identifications (a) and (b) are not part of the definition and are added here solely for ease of reference later on. Changes to the definition which came into effect from 30 October 2005 are shown in **bold** to aid identification.*

Medicinal products may well fall under both limbs of the definition but the European Court of Justice ("ECJ") has confirmed that falling under either limb is sufficient to classify a product as a medicinal product. *[Upjohn 1989* C-112/89*]*: **"Directive 65/65** (now Directive 2001/83) **provides two definitions of the term "medicinal product": one relating to presentation, the other to function. A product is medicinal if it falls within either of those definitions."**

18. The definition which was amended as part of the European Commission's 2001 Review adds reference to the mode of action by which medicinal products are expected to work. The MHRA does not believe that the changes to the definition will have a major impact on the classification of products in general. Products on the medicines/device borderline are the most likely to be affected. The Medicines Borderline Section will not be undertaking a general review of decisions that it has made in the past following the change to the definition but companies should seek advice in cases where they believe that a product may now fall outside medicines regulations.

MHRA policy and practice

19. European Community legislation on medicinal products has not yet been fully harmonised. For this reason, it is possible that a product classified as a medicine in the UK may be classified as, for example, a food in another Member State. However, when reaching decisions on the status of products each Member State is obliged to follow the judgments of the European Court of Justice.

This is the basis on which the MHRA, on behalf of the UK Licensing Authority, determines (subject to review by the courts) whether a product is a medicinal product. The Agency's power to do so has been confirmed by a judgement of the Court of Appeal (*R. v. Medicines Control Agency ex parte Pharma Nord (UK) Limited 1998*). The Court ruled that it was

acceptable for the Licensing Authority to determine whether or not a product is a medicinal product, as the decision by the Licensing Authority is subject to review by the courts. The judgement noted:

"The approach of the European Court is equally consistent with the initial decision being made by the licensing authority and that decision being reviewed by whatever are the appropriate courts within a particular member state."

20. The MHRA frequently finds that the initial referral or complaint contains insufficient information to determine whether the product is a medicinal product. If this is the case, the MHRA will consider available information that may have a bearing on the issue. Generally, this will include asking the manufacturer, importer or distributor, depending on which of them has placed the product on the market, for full details of the product's composition, presentation and purpose. Account will be taken of material being used to promote the product, including on the internet. When making a determination on the status of a product the MHRA does not investigate the truth or validity of any claims being made for the product.

21. The MHRA reaches a determination on whether a product is or is not a medicinal product on a case by case basis, and in the light of:

- the definitions set out in paragraph 17 above;
- relevant ECJ and domestic Court precedents; and
- following an assessment of all the available evidence.

When considering that evidence, and determining whether a product comes within either limb of the definition, no single factor or combination of factors will *necessarily* be conclusive, or more or less important than others. But in relation to particular products, a single factor or combination of factors *may* be more important than others, and *may* even be conclusive.

"Presentation"

Paragraph (a) of the definition

22. Sub-paragraph (a) of the definition is concerned with the *presentation* of the product. In assessing whether a product is *"presented as having properties for treating or preventing disease"*, the MHRA considers, in context, any claims (implicit as well as explicit) which are made for it, and the characteristics of its presentation as a whole. The ECJ has placed considerable emphasis on the impression that consumers are likely to form as a result of the product's presentation. [*Van Bennekom 1982*]: **"It is necessary to take the view that a**

product is presented for treating or preventing disease.. whenever any averagely well-informed consumer gains the impression, which provided it is definite, may even result from implications, that the product in question should, regard being had to its presentation, have an effect such as is described by the first part of the EC definition."

Claims to treat or prevent disease

23. A product for which claims are made to treat or prevent disease comes within the first limb of the definition of a medicinal product. Claims to relieve symptoms, or to cure, remedy or heal a specific disease or adverse condition of body or mind will also be regarded as medicinal claims. In context, ***stress, anxiety*** and ***nervous tension*** can be adverse conditions of the mind, and claims to cope with or manage those conditions will be regarded as claims to treat or prevent disease. Again in context, and particularly in the case of products on the borderline between food and medicinal products, claims to *"**protect**"* or *"**avoid**"* may be perceived by consumers as having much the same meaning as *"**prevent**"*. For example, a product may be presented to "**protect**" a consumer against a specific disease or adverse condition in such a way that consumers would believe that the product could "**prevent**" it.

Claims to "maintain" health

24. The MHRA does not consider claims to ***"maintain"*** or ***"help to maintain"*** or ***"support"*** health or a healthy lifestyle, as medicinal in themselves. Nor, if such claims are made in relation to *healthy bodily functions or organs*, is the MHRA likely to consider them as presenting the product for treating or preventing disease. In general, the MHRA is only likely to consider ***"health maintenance"*** claims as medicinal if they suggest or imply that a product, perhaps targeted on a vulnerable section of the population, may *restore*, or *help to restore*, a specific bodily function or organ to a normal healthy state.

Factors particularly relevant to deciding whether a product is a medicine under the first limb of the definition.

25. These are as follows:

- all claims made for the product, both explicit and implicit, including any made on linked "helplines" or in linked publications. "Implicit" claims may include product names. The MHRA is committed to considering each product individually, and it is not possible to produce more than an indicative list of the kind of claims that the MHRA may decide are presenting the product as treating or preventing disease. However, it

may be helpful to refer to the words and phrases listed in Appendix 1. The MHRA has previously decided that, in context - for example, when used in relation to a disease, illness or specific adverse condition - claims which included words like these were presenting products for treating or preventing disease, that is, as medicines;

- *the context* in which the claims are made, and the overall presentation;
- *how a product appears to the public*, or to those to whom it is promoted;
- *the labelling and packaging/package inserts* including any graphics;
- *the promotional literature*, including testimonials and any literature issued by the person placing the product on the market or on their behalf;
- *advertisements*, including those appearing in "advertorials", on television, other media and the Internet;
- *the product form*, (capsule, tablet, etc.) and the way it is to be used;
- *any particular target of the marketing information/advertising material*, for example, population groups with, or particularly vulnerable to, specific diseases or adverse conditions.

A product determined by the MHRA as a medicinal product under the first limb of the definition, but not under the second limb

26. The MHRA may determine that a product is a medicine *solely* because *it falls within the first* ("***presentation***") *limb of the definition*. This reflects the importance the ECJ attaches to protecting consumers from products that could not deliver the claimed medicinal results. [*Van Bennekom* 1982, again]: **"The Directive thereby seeks to protect consumers not only from harmful or toxic medicinal products as such but also from a variety of products used instead of the proper remedies."**

"Function"

Paragraph (b) of the definition

27. Sub-paragraph *(b)* of the definition is concerned with the ***function and intended use of the product***, that is, whether the product "*may be administered… with a view to*" achieving a medicinal purpose.

The factors which are relevant in determining whether a product falls within the second limb of the definition have been considered by the ECJ, most recently in the judgment in *HLH Warenvertriebs,* 2005 (C-211/03):

> *"…for the purposes of determining whether a product comes within the definition of a medicinal product 'by function' within the meaning of directive 2001/83, the national authorities…must proceed on a case by case basis, taking account of all the characteristics of the product, in particular its composition, its pharmacological properties, to the extent to which they can be established in the present state of scientific knowledge, the manner in which it is used, the extent of its distribution, its familiarity to consumers and the risks which its use may entail.*
>
> *The pharmacological properties of a product are the factor on the basis of which the authorities of the Member States must ascertain, in the light of the potential capacities of the product, whether it may, for the purposes of the second subparagraph of Art 1(2) of Directive 2001/83/EC, be administered to human beings with a view to…restoring, correcting or modifying physiological function in human beings."*

Although a product may contain nutritional ingredients, if it also contains an active ingredient which has an established use as a medicine in the UK, the MHRA may still determine that the product is a medicinal product because it satisfies this limb of the definition. Where there is doubt or dispute whether the recommended dosage level of the active medicinal ingredient is in doses large enough to have a significant effect on the actual functioning of the body or not, the MHRA will seek the advice of its medical and pharmaceutical assessors.

28. Many herbs have an established or accepted use as medicines. For example, as a bronchodilator ***(Ephedra)***, a respiratory stimulant ***(Lobelia)***, a sedative ***(Valerian)***, a defence against colds and flu ***(Echinacea)***, an anti-depressant ***(St. John's Wort)***, an appetite suppressant ***(Hoodia),*** a diuretic ***(Boldo)***, or sexual stimulant ***(Yohimbe bark)***. The MHRA will generally consider products containing ingredients like these in doses large enough to have a significant effect on the actual functioning of the body to be medicinal products on the basis that they *"may be administered with a view to modifying physiological function in human beings"*.

29. It is important to remember that although a product may *not be presented as, or claim to be* a medicinal product, the MHRA may still determine that it is a medicinal product if it contains substances with properties or claims which indicate that it *"may be administered …*

with a view to restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action, or to making a medical diagnosis" .

In some cases a product may be classified as a medicine under the second limb even where it has not been established that it has an effect on physiological functions. The ECJ in *Upjohn* (1989) held:

> *The fact that the provision uses the expression "with a view to" means that the definition of a medicinal product may include not only products which have a real effect on physiological functions but also those which do not have the advertised effect, thereby enabling public authorities to prevent the marketing of such products in order to protect consumers.*

Factors particularly relevant to deciding whether a product is a medicine under the second limb of the definition

30. These are as follows:

- *the pharmacological, immunological or metabolic properties of the ingredient(s)* and any significant effect(s) they have on physiological function in humans;
- *the composition of the product;*
- *the manner in which the product is used;*
- *the product promotional literature*, including testimonials and any literature issued by a third party on behalf of the person who places the product on the market;
- *the familiarity of the product to consumers and the extent of its distribution in the UK;*
- *the product form*, (capsule, tablet, etc.) and the way it is to be used;
- *the presence of essentially similar licensed, registered or exempt medicines* on the UK market;
- *any claims*, explicit or implicit, which although they may not be claims "*for treating or preventing* [a specific] *disease"* could suggest to the average consumer that the product can be taken *"with a view to restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action …";*
- *the risks which use of the product may pose.*

DETERMINATION PROCEDURE IN CASES WHERE STATUTORY PROCEDURE IS NOT APPOPRIATE

31. Generally, determination of the status of a product will follow the statutory determination procedure set out in ***regulation 3A*** of the Regulations and described in the following sections. However, the MHRA is empowered to determine that a product is a relevant medicinal product without following the statutory determination procedure in certain circumstances. Examples are where:

- there is an identifiable risk to public health and /or patient safety; or
- the product is a copy of, or is identical in all material respects to, another relevant medicinal product that has already been the subject of review panel advice, or an existing licensed or registered medicine.

In such cases, a Notice will be issued without delay and requiring compliance with the Regulations.

THE STATUTORY PROCEDURE

Provisional determinations

32. In all other cases where the MHRA is of the opinion that a product without a marketing authorisation, a traditional herbal registration or a certificate of registration as homoeopathic medicinal product **and** not otherwise exempt is a relevant medicinal product, the MHRA will give notice by Special Delivery of its provisional determination, together with the reasons for it. The notice will say that, if the company disagrees with the provisional determination, it may make representations about it to an Independent Review Panel ("the Panel"). It will ask the company for notice of any intention to make written or oral representations within four weeks of the provisional determination. In the case of ***written representations***, the company will be expected to submit them to the Panel by a date not less than six weeks from the date of the provisional determination. In the case of ***oral representations*** to the Panel, the MHRA will, after consultation with the company, set a hearing date generally not less than eleven weeks from the date of the provisional determination. In either case, there is some scope to allow additional time for proper preparation of the company's case.

Final determinations if no representations are made

33. If no notice of intention to seek an oral hearing or submit representations is received in time, or if the company asks to make representations but does not then do so, the MHRA (acting as the Licensing Authority) will consider the product again, and make and issue a final determination by Special Delivery, together with the reasons for it. If the product is classified as a relevant medicinal product, the company will be reminded of the legal provisions for the marketing of such products and what it needs to do to comply with them. It will be asked to notify the MHRA of its compliance with the final determination within two weeks. The MHRA also has power to issue a notice under regulation 3A(6) of the Regulations, formally requiring the company to stop marketing the product, or not to place it on the market, unless or until a marketing authorisation, a traditional herbal registration or a certificate of registration as homoeopathic medicinal product has been granted in respect of the product. Breach of such a notice is an offence under the Regulations, if the product is a relevant medicinal product.

The Independent Review Panel

34. The Panel is responsible for giving advice to the Licensing Authority on whether the product is a medicinal product within the meaning of Article 1 of Directive 2001/83/EC. The Panel considers the written and/or oral representations from the company and any representations made by the Licensing Authority. It will take account of the relevant legislative provisions and previous advice and consider the evidence before it. It may take further evidence from the MHRA and the company concerned, and hear expert witnesses. It will advise the Licensing Authority whether in its opinion the product is, or is not, a medicinal product, and give its reasons.

35. The Panel operates independently of the MHRA. The Chairman is legally qualified and is supported by members appointed by the Licensing Authority for their expertise and standing in relevant disciplines or areas of business. Members are required to follow a code of practice, which amongst other things requires declarations of interest at meetings and withdrawal from discussion of cases where an interest might influence a member's contribution to the discussion. Members' interests will be published annually.

36. The Panel's Secretariat will suggest Members for Panel meetings to the Chairman on the basis of relevant expertise and availability. The Secretariat will arrange meetings, copy and circulate papers, and provide support to the Panel. Papers and proceedings will be treated as confidential to protect commercially sensitive information in accordance with relevant legislation and Government guidance.

37. The Panel's advice to the Licensing Authority, which may be arrived at by majority vote, will be issued in writing, under both the oral and written representation procedures. The MHRA's consideration and communication of that advice to the company, is dealt with below.

Written Representations Procedure

38. The Review Panel will consider the company's written representations and a written submission by the MHRA. Exceptionally, the Panel may wish to adjourn to seek additional expert advice. Once it has completed its deliberations, it will aim to advise the Licensing Authority within one week. The Licensing Authority, having considered the Panel's advice, will aim to issue its final determination, again giving reasons and enclosing a copy of the Panel's advice, within a further week. If, exceptionally, the Licensing Authority does ***not*** accept the Panel's advice, it will at the same time give its reasons for doing so to the company.

Oral Hearings Procedure

39. The hearing will be in private. To facilitate the review process, companies will be expected to send in copies of any written representations or documentary evidence they want the panel to consider not later than one week before the hearing. If it is necessary to submit new evidence within one week of, (or at), the hearing, the Panel Secretariat should be notified as early as possible. The MHRA will also provide a written report for the Panel to consider.

40. At the hearing the company may, at the discretion of the Chairman, field expert and other witnesses to give evidence on its behalf. The MHRA will have an opportunity to respond to the company's statement and witnesses' evidence. The Panel will, as they think fit, question witnesses as well as the company and MHRA representatives, and may adjourn to a later date in order to seek additional information or advice.

41. If a company gives notice that it no longer wishes to be heard or fails to attend without good reason, the Panel will consider the matter on the basis of the information before it, including any written representations from the company.

42. Once the Panel has completed its deliberations, it will aim to advise the Licensing Authority within one week. The Licensing Authority, having considered the advice, will aim to issue its final determination by Special Delivery, again giving reasons and enclosing a copy of the panel's advice, within a further week. If, the Licensing Authority does ***not*** accept the Panel's advice, it will at the same time give its reasons for doing so to the company.

43. There will be instances where the final determination will have wider application. In these cases, before coming to its final determination, the Licensing Authority may consult interested bodies and accept further representations on the issues, including those identified by the Panel. When appropriate, the Licensing Authority may refer cases back to the Panel to reconsider in the light of any new evidence.

FINAL DETERMINATIONS FOLLOWING REVIEW

Notice under Regulation 3A(6) of the Regulations

44. The Notice will set out the Licensing Authority's reasons for its determination. Should the determination confirm that the product is a medicine, it will include a reminder of the legal provisions for marketing relevant medicinal products, and what the company needs to do to comply. The company will be asked to notify the MHRA of its intention to comply, giving details, within two weeks. The MHRA also has power to issue a notice under regulation 3A(6) of the Regulations, as amended, formally requiring the company to stop marketing the product, or not to place it on the market, unless or until a marketing authorisation, a traditional herbal registration or a certificate of registration as homoeopathic medicinal product has been granted in respect of the product. Breach of such a notice is an offence under the Regulations if the product *is* a relevant medicinal product.

Publication of final determinations

45. It will be normal practice to publish material details of all final determinations. The company concerned will have an opportunity to comment on what the MHRA proposes to publish. Details of final determinations can be found on the MHRA website www.mhra.gov.uk under 'Final Determinations'.

THE INTERNET

46. Information on the internet about a product and its uses is not excluded from the definition of the term 'advertising' under the Medicines (Advertising) Regulations 1994 (SI 1994/1932). To help companies avoid bringing unlicensed products within the definition of a medicinal product guidance on the use of the internet can be found on the Borderline products page of www.mhra.gov.uk.

MARKETING AUTHORISATIONS

47. Guidance on marketing authorisations is provided in the ”Notice to Applicants” (Volume II of the Rules Governing Medicinal Products in the European Community) This can be obtained from http://ec.europa.eu/enterprise/pharmaceuticals/eudralex/homev2.htm

REGISTRATIONS FOR TRADITIONAL HERBAL MEDICINAL PRODUCTS

48. Guidance on the registration scheme for Traditional Herbal Medicinal Products can be found on www.mhra.gov.uk under ‘Traditional Herbal Medicines Registration Scheme’.

HOMOEOPATHIC MEDICINAL PRODUCTS

49. Guidance on the legislation which controls homoeopathic medicinal products and on the registration scheme can be found on www.mhra.gov.uk under ‘Homoeopathic Medicines’.

WHAT TO DO IF YOU ARE NOT SURE IF A PRODUCT IS MEDICINAL

50. Classification is carried out on a product by product basis. If you have looked at all the literature in the Guidance Note and on the website and you are still unsure, complete the advice request form which is available on the Agency’s website at www.mhra.gov.uk under Borderline/How the MHRA determines whether a product is medicinal.

APPENDIX 1 WORDS AND PHRASES

The words and phrases listed below have all contributed to a determination by the MHRA that the product they were associated with was a medicinal product. But it is not the case that use of any of these words or phrases to promote or describe a product will **necessarily** lead to the MHRA determining that the product is a medicine. **The intended and implied meaning of such words and phrases has to be considered in context**.

The list is not exhaustive. All the words and phrases used in relation to a product will be considered by the MHRA in the determination process.

WORDS & PHRASES	WHAT THESE MAY SUGGEST OR IMPLY ABOUT A PRODUCT
“Alleviates”	In context, may suggest a claim to treat disease by reducing, ameliorating or correcting disease or an adverse condition.
“At the first sign of a spot...”	Implied claim to treat ‘spots’, an adverse condition.
“Avoids”	In context, may be a claim to prevent specific disease(s).
“Boosts the immune system”	In context, claim may tend to suggest that the product may be administered with a view to modifying physiological function and having a significant effect on the metabolism.
“Burns fat”	A claim that the product may be administered with a view to having a significant effect on the metabolism and modifying physiological function.
“Calm/calms/calming”	In context, may be a claim to sedate.
“Can benefit those who suffer from...”	A claim to treat or prevent disease in specific patient groups or in those at particular risk of specific diseases or adverse conditions.

“Can lower cholesterol”	In context, a high level of cholesterol may be an adverse condition, and a claim to lower it may suggest that the product can treat that adverse condition, and may be administered with a view to having a significant effect on metabolism.
“Clears”	In context, may be a claim to effectively treat or correct disease or an adverse condition.
“Clinical Trials Evidence”	Implied claim to (medicinal) efficacy in relation to disease or an adverse condition.
“Clinically proven”	An implied claim that the product has met the appropriate efficacy test in relation to disease or an adverse condition.
“Combats”	In context, a claim to work directly to treat, prevent or cure disease or an adverse condition.
“Controls”	In context, a claim to treat disease or adverse condition and prevent further problems.
“Counteracts”	In context, a claim to treat or cure disease or symptoms of disease.
“Cure/cures”	A claim to treat (successfully) disease.
“Eliminates”	In context, a claim to treat or cure disease or adverse condition.
“Fights”	In context, a claim to work directly to treat or cure disease or an adverse condition.
“Heals”	A claim to treat or cure disease or an adverse condition, and to restore health.
“Helps body adjust after crossing time zones”	A claim that the product, when administered, has a significant (sedating) effect on the metabolism by modifying the body clock and sleep cycle. (Especially in

	relation to the adverse condition known as Jet Lag.)
“Help maintain a normal mood balance”	In context, an implied claim that the product may be administered with a view to altering mood, that is, it has a sedating or anti-depressant activity.
“Help maintain normal water balance”	In context, an implied claim that the product may be administered with a view to preventing or correcting water retention, that is, it is a diuretic medicine.
“Help/help with...”	In context, may be a claim to treat, provide relief from, and cure symptoms of disease or an adverse condition.
“Increases metabolic rate”	A claim that the product may be administered with a view to a significant effect on the metabolism.
“Is said to help with...”	In context, may be an implied claim to efficacy in relation to disease or adverse condition.
“Medical research...”	An implied claim to efficacy as a medicine.
“Prevents/preventing”	In context, a claim to stop development of, and prevent disease or an adverse condition.
“Protects against...”	In context, a claim to prevent a specific disease or an adverse condition.
“Remedies....”	A claim that the product may be administered to treat, correct or cure disease or an adverse condition.
“Removes”	In context, may be a claim to treat (cure or clear) disease or an adverse condition.
“Repairs”	In context, a claim to treat (heal, cure, restore) damaged body tissues or correct dysfunctional systems

	of the body or mind.
“Restores”	In context, a claim to restore physiological function.
“Stimulates the nervous system”	In context, this claim tends to suggest the product may be administered with a view to modifying physiological function and have a significant effect on the metabolism.
“Stops”	A claim to prevent, or arrest the development of disease or an adverse condition.
“Stops craving for ....”	A claim to treat an addiction (a disease) by modifying physiological function.
“Strengthens the immune system”	In context, claim tends to suggest the product may be administered with a view to modifying physiological function and having a significant effect on the metabolism.
“Strips off sun- damaged pre-cancerous cells”	A claim to treat, prevent or correct disease or an adverse condition.
“Traditionally used for....”	In context, a claim to treat or prevent disease or an adverse condition.
“Treats/clears infestations”	In relation to humans, a claim to stop, treat or remove parasitic infestations such as head/body/public lice. An infestation of lice is an adverse condition.
“Treats/Treatment/Treating”	In context, these are claims to treat or prevent disease or an adverse condition.

APPENDIX 2 USEFUL ADDRESSES

The Advertising Standards Authority Ltd (ASA)
Mid City Place
71 High Holborn
London
WC1V 6QT

Tel: 020 7492 2222
Fax: 020 7242 3696
E-mail enquiries@cap.org.uk

Aromatherapy Trade Council (ATC)
PO Box 387
Ipswich
IP2 9AN

Tel: 01473 603630
Fax: 01473 603630

Association of British Pharmaceutical Industry (ABPI)
12 Whitehall
London
SW1A 2DY

Tel: 020 7930 3477
Fax: 020 7747 1411

British Herbal Medicine Association (BHMA)
1 Wickham Road
Boscombe
Bournemouth
BH7 6JX

Tel: 01202 433691
Fax: 01202 417079

Broadcast Advertising Clearance Centre (BACC)
Franciscan Court
16 Hatfields
London
SE1 8DJ

Tel: 020 7633 2935

Committee of Advertising Practice (CAP)
Mid City Place
71 High Holborn
London
WC1V 6QT

Tel: 020 7492 2200
Fax: 020 7242 3404
E-mail advice@cap.org.uk

Cosmetics, Toiletry & Perfumery Association Limited (CTPA)
Josaron House
5/7 John Princes Street
London
W1G OJN

Tel: 020 7491 8891
Fax: 020 7493 8061

Council for Responsible Nutrition
(Chairman's Office)
Senator Court
4 Belmont Road
Uxbridge
UB8 1HB

Tel: 01895 819218
Fax: 01895 819016

Department of Trade and Industry
Consumer Safety Unit
1 Victoria Street
London
SW1H OET

Tel: 020 7215 5000
Fax: 020 7222 0612

Food Standards Agency
Aviation House
125 Kingsway
London
WC2B 6NH

Tel: 020 7276 8000
Fax: 020 7276 8833

Chinese Medicine Association of Suppliers
8th Floor
87-90 Albert Embankment
London
SE1 7UD

Tel: 020 7587 6700
Fax: 020 7587 6720

Health Food Manufacturers' Association (HFMA)
1 Wolsey Road
East Molesey
Surrey
Kt8 9EL

Tel: 020 8481 7100
Fax: 020 8481 7101
E-mail info@hfma.co.uk

Medicines and Healthcare products Regulatory Agency
(Devices Sector)
8/2-A03
Market Towers
1 Nine Elms Lane
London
SW8 5 NQ

Tel: 020 7084 3386
Fax: 020 7084 3112

The Organisation for Professionals in Regulatory Affairs (TOPRA)
7 Herons Quay
Marsh Wall
London
E14 4JB

Tel: 020 7538 9502
Fax: 020 7515 7836

Proprietary Association of Great Britain (PAGB)
Vernon House
Scilian Avenue
London
WC1A 2QH

Tel: 020 7242 8331
Fax: 020 7405 7719

The Trade Association of Producers and Suppliers of Ayurvedic Products from India (TAPASI)
81 Wimpole Street
London
W1G 9RF

Tel: 020 7224 6070
Fax: 020 7224 6080

Appendix 3 HEAD LICE INFESTATION AND HEAD LICE PRODUCTS

Introduction

1. As the appropriate and competent authority, the Medicines and Healthcare Products Regulatory Agency (formerly the Medicines Control Agency and the Medical Devices Agency) has long considered the presence of, or infestation by head-lice in the hair as an adverse medical condition. Indeed there is no evidence to suggest that any alternative status has ever been applicable and there is no compelling reason why this should now change.

2. The problem of head lice in humans has existed for centuries and it shows no signs of going away. Being most common in children up to approximately 12 years of age, it has long been subject to control and advice by various Health Authorities and Departments. Providing such a service involves a considerable drain on resources for what is deemed to be a minor ailment and disproportionate in comparison to more life-threatening diseases such as meningitis. As a consequence, current advice is mostly centred on prevention and self-treatment. The most widely circulated advice is frequent use of 'cosmetic' hair conditioners, which make the hair surfaces difficult for lice to latch onto making residency less possible or attractive. The advice for treatment where conditioners have either failed to prevent infestation or have not been applied, is to use a fine tooth, or nit comb in conjunction with conditioners. In most cases this will prove effective, however soliciting professional advice would normally be recommended where the strategy fails.

3. At this stage GPs or pharmacists may recommend use of one of the many currently approved products which are "clinically" indicated for treatment or removal of head lice. Some of these are prescription only medicines.

4. The medical name for head lice infestation is *Pediculosis Humanus Capitis*. The head louse is one of a group of three human lice, the others being Body and Pubic Lice. Both of these tend to be regarded as more urgent medical concerns, perhaps due to their more personal nature. Although the patient groups and methods of transmission are generally different (pubic lice infestation is regarded as a sexually transmitted disease) the symptoms are, by and large, the same for all three types. The medical definition of infestation is akin to that for infection. The distinction between infestation and infection is that the former is usually limited to surface dwelling parasites such as lice, fleas and ticks. Both terms concern the invasion or habitation by foreign organisms that become established and multiply.

5. Confusion about the status of head lice infestation has probably arisen for a number of reasons. In general it has relatively insignificant symptoms and effects, which often result in it being treated as a minor health concern by GPs and Health Authorities alike. Much has been done to inform and educate the public about head lice; largely to combat ignorance and the wide social stigma attached. Head lice were once regarded with horror and panic and often wrongly associated with poor hygiene, health and even low social class. It is probably reasonable to assume that successful promotion of the facts has lead to a more relaxed attitude and a diminished level of concern about the issue. The fact that most cases can be dealt with, without the need for medical advice and purchase of medical or other health products is also important. For the most part, the only people concerned about head lice are sufferers and their families.

Facts about Head Lice – The Nature of the Beast

6. Head lice have proved themselves to be a very successful species over centuries and there is no sign of their extinction being evident. They are perfectly adapted to life on their human hosts and with six short legs, each equipped with a large claw to grasp individual hairs, can move swiftly across the head, causing irritation and making them hard to detect. Their success is due to their size (about 3mm), camouflage ability, prolific feeding and breeding habits and ability to spread to a new host through contact. Lice have an average life span of about 35 days, of which 25 may be in adulthood. During this period each female will lay between six to eight eggs per day, each glued to an individual hair strand close to the scalp. The eggs are known as “nits”. Female lice normally out-number males by four to one.

7. The louse feeds solely on human blood and does so on an average of five times per day. Its mouth has a retractable fang, which penetrates the scalp and probes to find a blood vessel. Before feeding, the louse injects saliva containing an anaesthetic, anticoagulant and enzymes. These prevent the host from being aware of the bite and aid in the digestion of the blood. Digested blood is passed as black powdery excreta, which is loose enough to fall off the scalp and over a host’s face.

8. The general symptoms of infestation are related to irritation of the scalp. Although it is commonly recognised that lice do not carry disease, the potential for secondary bacterial infection exists due to abrasions, which may occur following repeated, prolonged or vigorous scratching. Infestation can be distressing to sufferers and their families and may cause raised levels of anxiety and stress. In some cases it has the potential to exacerbate other conditions such as sleep disorders, conjunctivitis, rhinitis and skin disorders such as psoriasis.

9. Unfortunately head lice infestation is not a transient or self-limiting medical condition. It needs to be treated to avoid advancement and to reduce the risk of transmission. Failure to treat raises the potential for secondary conditions and is considered to be socially and medically unacceptable.

10. The health advice mentioned in paragraph 2 relates to the use of any commercially available hair conditioner to ease the removal of lice and nits, with the aid of a fine toothcomb. These are widely available as separate products and offer consumers, as a first line, cheaper alternatives to medicated or specifically targeted products.

The Law

11. MHRA is the UK body responsible for the regulation of both medicinal products and medical devices.

In coming to a view about any product's status, and whether it is a licensable medicinal product, or a medical device, the Agency takes into account UK and EC legislation, relevant court decisions, and its own guidance.

A **'medicinal product'** is defined in Article 1 of Council Directive 2001/83/EEC and this definition is also part of UK law as a result of the Medicines For Human Use (Marketing Authorisations, etc.) Regulations 1994 (S.I. 1994/3144.) The definition is:

“Any substance or combination of substances presented as having properties for treating or preventing disease in human beings

Any substance or combination of substances which may be used in or administered to human beings either with a view to restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action, or to making a medical diagnosis”

In determining whether or not a product is a medicine, the Agency looks at claims made for the product and at the effect it has on human physiology. If it satisfies one or both of the above criteria, it is classed as a medicine.

A "**medical device"** is defined in Article 1 of Council Directive 93/42/EEC and in UK law under The Medical Device Regulations 2002 (Statutory Instrument Number 618). The definition is as follows:

"any instrument, apparatus, appliance, material or other article, whether used alone or in combination, including the software necessary for its proper application intended by the manufacturer to be used for human beings for the purpose of:

- diagnosis, prevention, monitoring, treatment or alleviation of disease,

- diagnosis, monitoring, treatment, alleviation of or compensation for an injury or handicap,

- investigation, replacement or modification of the anatomy or of a physiological process,

- control of conception,

and which does not achieve its principal intended action in or on the human body by pharmacological, immunological or metabolic means, but which may be assisted in its function by such means;"

In determining whether or not a product may be considered to be a medical device, the Agency looks at the claims made for the product, its intended purpose and the mode of action on the human body.

The Status of Head Lice Products

12. Most head lice products fall into one of three categories: - those used to treat headlice, those used to assist treatment with a fine-toothed or headlice comb and those used solely to repel headlice.

13. All products that are presented as treatments for headlice infestation fall to be regulated by MHRA either as medicines or medical devices. Products for administration to humans containing substances that are presented to kill headlice and/or nits, or to otherwise interfere with or alter the normal life-cycle of lice or their eggs with a view to eventual eradication, are regarded as treating the condition and may be classed as medicines depending on the mode of action.

Medicinal products that treat headlice infestations

14. Products for administration to humans containing active substances known to be capable of killing headlice (Pediculicides), are usually classed as medicines and require a Marketing Authorisation (formerly product licence) before they can be placed on the market.

Medical devices that treat headlice infestations

15. Fine-toothed combs for the removal of head lice and nits are regarded as medical devices and must meet the requirements of the Medical Device Directive 93/42/EEC and associated UK legislation, including bearing the CE mark.

16. Any product that is specifically intended for the treatment of head lice infestation by facilitating the use of a fine tooth/head lice comb and presented for this purpose only, may be regarded as an accessory to a medical device. If so it will be subject to the requirements of the Medical Device Directive 93/42/EEC.

17. While the inclusion of a suitable comb is optional, the product particulars must include clear instructions for the combined use of headlice or fine tooth comb with the product.

18. Other products which may act physically (e.g. electro-action, suffocation) are also likely to be regulated as medical devices and must comply with the same regulatory requirements.

Products used to repel headlice

19. Repellents are regarded differently to the other categories since their purpose is to protect an external human surface and thereby avoid the presence of headlice from occurring. As such, any product recommended solely for use prior to infestation as a repellent, would normally be regarded as falling under the General Products Safety Directive.

20. Products sold as repellents must not claim or imply that they may have a secondary use as a treatment. It would be preferable for such products to include the phrase "*This product is not intended for use when the presence of headlice or nits has been detected*." Additionally, repellents must not be sold or supplied with headlice or fine toothed combs and must not include references to their use in the product particulars.

If necessary, advice should be sought from MHRA before marketing.

For further information contact:

Medicines: Simon Parker.
Medicines Borderline Section,
MHRA. Market Towers, 1 Nine Elms Lane, London SW8 5NQ.
Tel: 020 7084 2612 Fax: 020 7084 2439
E-mail: simon.parker@mhra.gsi.gov.uk

Devices: Mrs Clare Headley. MHRA, 8/2 803, European Regulatory Affairs, Market Towers, 1 Nine Elms Lane, London SW8 5NQ.
Tel: 020 7084 3386 Fax: 020 7084 3107
E-mail: clare.headley@mhra.gsi.gov.uk

Appendix 4 HANGOVER PREVENTIVES AND CURES

Introduction

1. The purpose of this note is to provide help and information on the legal position and status of products that are sold, supplied or promoted for the purpose of preventing or treating hangovers.

Background

2. In the UK, unlicensed products are considered and determined by the MHRA's Medicines Borderline Section (Borderline Section). Many products are sold under labels such as "food supplements" or "cosmetics". However, in some cases these descriptions are inappropriately applied and it is the statutory role of the Medicines Borderline Section to determine whether or not they should instead be classified as medicines.

3. Every year, MHRA's Medicines Borderline Section is required to advise on and investigate a number of unlicensed products that are presented for either the prevention or cure of hangovers.

4. Many of the products examined emanate from the United States. The free availability of hangover products in the USA may possibly be one reason that many people assume that it is possible to sell such products freely in the United Kingdom. However, this is not the case, UK legislation is quite different to that of the USA.

5. EU regulations are applied consistently throughout its member states to control the authorisation and marketing of licensed and registered medicines. Unlicensed products however, are regulated under national rules and the legislation which operates in each member state often varies for a number of reasons, which reflect the different cultures, attitudes and histories that exist. Each interpretation is also subject to published Guidance by the European Commission, often in the light of judgments by the European Court of Justice (case law).

The Status of Hangover products in the UK

6. The MHRA (and formerly the MCA) has regarded products to treat or prevent hangovers as medicines for many years and its advice to companies on this subject has been consistent throughout. The Agency's view was challenged by a company marketing a product called "Hangover Helper" in 2001. Under the statutory review process contained in the provisions of The Medicines For Human Use (Marketing Authorisations Etc.) Amendment

Regulations 2000 (S.I. 2000/292), it made representations to the Independent Review Panel for Borderline Products.

7. The Panel, after considering all of the evidence and examining the definition of a medicinal product, concurred with the agency. It also gave advice to the effect that the term "hangover" is well recognised as describing the symptoms associated with over indulgence with alcohol. These symptoms may include nausea, headache, dizziness and lethargy.

8. This confirmed that it is not lawful to sell, supply or advertise an unlicensed product that claims – or implies that it can treat or prevent a hangover or any of its symptoms. (e.g. In the context of alcohol consumption, the term "The morning after" would normally be associated with hangovers). Restrictions also extend to claims to de-toxify the liver or protect against toxic effects of alcohol consumption.

Product presentation

9. For the purposes of determining the status of a product, the Medicines Borderline Section takes into account everything and anything that may come to the general public's attention. This includes, labelling, leaflets, packaging, use of graphics, advertisements, internet promotions, editorials and broadcasts. It is the message conveyed as well as the actual wording that is taken into account and, where this is deemed inappropriate, further action will be taken.

Legal hangover products

10. There are a number of legitimately licensed and approved medicines available for the symptoms of a hangover. The majority are available over the counter in general sales outlets such as supermarkets, as well as from pharmacies.

Alternative marketing opportunities

11. The vast majority of the products that the Medicines Borderline Section has seen over the years, have only been regarded as medicinal due to the claims made for them. Most have contained combinations of readily available substances that are commonly found as food supplements. In some cases, companies have taken advice from the Borderline Section by re-naming products and making appropriate modifications to product presentation allowing them to then be marketed as food supplements, which are not connected with the consumption of alcohol.

12. Advice on suitable presentation can be obtained from a number of sources such as Trading Standards Officers or Trade Associations, or from the Medicines Borderline Section.

Action that MHRA's Medicines Borderline Section will take upon discovery of an unlicensed hangover product on UK market

13. The fact that the status of products presented for the prevention or treatment of hangovers as medicines is already established, means that they are not, in effect, deemed to be borderline and cannot be subject to fresh determination procedures.

14. Upon discovery of the sale, supply or promotion of an unlicensed hangover related product in the UK, the Agency's Medicines Borderline Section may issue an **Urgent Warning Notice** to the company concerned. In other cases the matter may instead be referred directly to the Agency's Enforcement Unit for consideration of proceedings in the criminal courts.

15. It should also be noted that information from a third party may be sent direct to the Enforcement Unit, or be discovered by investigators in the course of their business. In these circumstances, it is likely that proceedings will be considered without a referral to the Medicines Borderline Section.

16. Further information about the work of the MHRA and the Medicines Borderline Section can be found on the agency's website http://medicines.mhra.gov.uk .

Appendix 5 MEDICINAL PRODUCTS CONTAINING HERBAL INGREDIENTS

Introduction

1. The MHRA is responsible for the administration and enforcement of medicines legislation in the UK. The inclusion of herbal ingredients in a medicinal product does not take that product outside the definition of a medicinal product, but in some circumstances the product may be exempt from the licensing requirements of medicines legislation. The information in this note must be read in conjunction with the earlier sections of Guidance Note 8 *A guide to what is a medicinal product*.

2. From the MHRA's viewpoint the first question to be addressed is whether or not the product is a medicinal product. If a product is not a medicinal product then the MHRA will not be involved in its regulation. Some herbs have well-known pharmacological effects and would usually only be found in products for a medicinal purpose. Such products would require marketing authorisations or traditional herbal registrations unless they come within the exemption mentioned below.

The Legislation

3. The definition of a medicinal product in Article 1.2 of Directive 2001/83/EC reads as follows:

> "Any substance or combination of substances presented as having properties for treating or preventing disease in human beings;
>
> Any substance or combination of substances which may be used in or administered to human beings either with a view to restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action, or to making a medical diagnosis"

4. If a product satisfies either or both of the above criteria, it may be classed as a medicinal product. In broad terms, when classifying a product, the Agency looks at the way it is presented and its function, that is, its effects (when administered) on human physiology.

5. Many herbs are used in medicine and a number have active substances that are capable of "restoring, correcting or modifying physiological function" or are presented as having such properties. Medicinal products with active herbal ingredients, or herbal ingredients that are presented as being active, may only be legally marketed in the UK with a

marketing authorisation or certificate of registration unless they are a “herbal remedy” sold or supplied by a person in accordance with Section 12(1) of the Medicines Act or benefit from the exemption in s.12(2) of that Act.

Controls on the Retail Sale of Herbal Remedies Exempt from Licensing

6. There are further controls on the retail sale of medicinal products including herbal remedies in Sections 52, 53 and 56 of the Act. Sections 52 and 53 set conditions for the retail sale of medicinal products; Section 56 provides exemptions from these conditions for those herbal remedies covered by the section 12 exemptions. Section 56 is however, limited by The Medicines (Retail Sale or Supply of Herbal Remedies) Order 1977 (S.I. 1977/2130). The Order is complex but in essence products containing the substances listed in Part 1 of the Schedule to the Order are excluded from the Section 56 exemption and may not be sold other than through a registered pharmacy. Products containing the substances listed in Part II of the Order may not be sold, other than through a registered pharmacy if they are being sold under the Section 12(2) exemption. However, products containing the ingredients listed in Part II of the Order and within the limits of Part III may be sold under the Section 12(1) exemption other than in a registered pharmacy.

The Traditional Herbal Medicines Directive

7. The Traditional Herbal Medicines Directive (Directive 2004/24/EC) was published on 30 April 2004. Products which were legally on the UK market on 30 April 2004 are not required to comply with the Directive until 30 April 2011. This means that where an unlicensed herbal remedy sold under Section 12(2) of the Medicines Act has transitional protection, it must have either a traditional herbal registration or a marketing authorisation by April 2011. If it has neither it can no longer be placed on the market from 30 April 2011. This transitional protection does not apply to any products placed on the UK market at any time after 30 April 2004. Further details may be obtained from the Agency's website www.mhra.gov.uk

8. A product may be classified as medicinal because of the claims being made for it (as is currently the case). Products which include herbal ingredients for which a ‘no’ is noted in the medicinal uses column in the list of herbal ingredients (***see paras 18-20***) may therefore be classified as medicinal products because of the way they are presented and as such may need to be registered.

9. To sum up, if a product is a herbal medicinal product it must have a marketing authorisation or certificate of registration unless the product is also a herbal remedy within the definition in the Act **and** is being supplied under Section 12(1) or was legally on the

market under Section 12(2) of the Act on 30 April 2004. Then provided the conditions laid down in Section 12 of the Act are met, the product can be manufactured, sold and supplied without a licence until 30 April 2011. Sections 52 and 53 of the Act impose further conditions on the retail sale of the product unless the conditions in section 56 are satisfied and the product does not contain a substance listed in SI 1977/2130.

Herbal Remedies

10. Section 132 of the Act defines a herbal remedy as:

> ".... a medicinal product consisting of a substance produced by subjecting a plant or plants to drying, crushing or any other process, or of a mixture whose sole ingredients are two or more substances so produced, or of a mixture whose sole ingredients are one or more substances so produced and water or some other inert substance."

11. Section 12(1) allows a person to make, sell and supply a herbal remedy during the course of their business provided the remedy is manufactured or assembled on the premises and that it is sold or supplied as a consequence of a face to face consultation between that person and an individual.

12. Section 12 (2) allows the manufacture, sale or supply of herbal remedies (other than by personal consultation) where:-

> the process to which the plant or plants are subjected consists only of drying, crushing or comminuting;
>
> the remedy is sold without any written recommendation as to its use, and
>
> the remedy is sold under a designation which only specifies the plant(s) and the process, and does not apply any other name to the remedy.

The exemption in Section 12(2) is no longer available for products which were not legally on the market on 30 April 2004. Please see paragraph 7 for more details on this point.

THE CLASSIFICATION OF HERBAL PRODUCTS

13. There are many herbs that are known to have medicinal uses and, at the same time, have known uses as either foods or cosmetics. The MHRA obtains its information from various sources, but mostly from respected textbooks and published data. Occasionally the MHRA has to consider the status of a herb that does have uses other than medicinal ones and in such cases, will make a judgement as to which is the dominant function and pay particular regard to the purpose of the herb's inclusion in a particular product.

14. Where the available data suggests that a herb has food uses which are limited to the local indigenous population of its country of origin, then it is unlikely to be regarded as the dominant function - especially if its origins lie in a different continent, particularly where its consumption is for a purpose other than nutrition.

15. When the MHRA considers the uses and property of a particular herb, we consider the known/reported uses of the herb, whether those uses apply to the whole plant or a particular part of the plant (leaves, fruit, root etc.) and how this information relates to the product in question. The MHRA also considers the amount of each ingredient when coming to a view on the status of a product. UK medicines legislation does not provide a definitive list of substances whose inclusion automatically makes a product a medicinal product.

16. Please see Guidance Note 8 *A guide to what is a medicinal product* for information on how the MHRA assesses the claims made for a product.

17. The decision as to whether or not a product *is* a medicinal product is made on a case by case basis taking into account the factors set out in the main text of this Guidance Note. Nothing in this guidance affects a company's right to a review by the Independent Review Panel where a provisional determination is issued.

Herbal Aide-Memoire

18. To assist companies in determining the likely status of their product the MHRA has compiled a list of herbal ingredients. The list gives the botanical and other names of various plants together with the known uses of those plants. The list can be found on www.mhra.gov.uk under borderline products.

19. The list gives the following information:

- Botanical name
- Common name
- Any recorded medicinal uses
- Any recorded food uses.
- Recorded use in aromatherapy
- Recorded use in cosmetic products
- General comments
- The part(s) of the plant used medicinally

20. The list is not exhaustive **and the following points should always be considered** -

- The list is for information only, the status of a product under medicines legislation is determined on a individual basis taking into account all the factors detailed in Guidance Note 8.

- Products which contain an ingredient for which a 'no' is noted in the medicinal uses column may nonetheless be classified as medicinal depending on the product's presentation

- The list has no legal status

- If a product is not a medicinal product advice should be sought from the relevant regulatory body on the legality of that product. The fact that a product is not a medicinal product does **not** necessarily mean that it is safe, acceptable or legal under other legislation. For example a herbal product may be a food, cosmetic or a consumer product and specific legislation will apply. Manufacturers should therefore consult the appropriate regulatory bodies, including the Food Standards Agency (FSA) for foods and food supplements, the Department of Trade and Industry for cosmetics or consumer products. Additional information may be obtained from the Trading Standards Service of the relevant Local Authority.
- Although food use may be recorded or reported for a herbal ingredient it is for an individual to check with the FSA that a herb or product is safe for human consumption. The Food Safety Act (1990) states that all food sold in the UK should not be injurious to health. The MHRA accepts no responsibility on this point.

- In addition, we have been advised by the FSA that herbal ingredients which do not have a history of significant consumption within the EU prior to 15 May 1997 may be subject to the controls of Novel Food Regulation (EC) 258/97. Advice on this point should be sought from the Food Standards Agency either in writing or by e-mailing herbals@foodstandards.gsi.gov.uk.

APPENDIX 6 PRODUCTS FOR SMOKING/NICOTINE CESSATION

Introduction

1. The purpose of this note is to provide help and information on the legal position and status of products that are sold, supplied or promoted for the purpose of assisting people to give up the use of nicotine products.

Background

2. In the UK, unlicensed products are considered and determined by the MHRA's Medicines Borderline Section (Borderline Section). Many products are sold under labels such as "food supplements" or "cosmetics". However, in some cases these descriptions are inappropriately applied and it is the statutory role of the Borderline Section to determine whether or not they should instead be classified as medicines.

3. Every year, MHRA's Medicines Borderline Section is required to advise on and investigate unlicensed products that are presented to help people who want to quit using nicotine products. A few of the products examined emanate from other countries, in particular the United States, where they may be sold legally under the Dietary Supplement Health and Education Act (DSHEA). This permits the sale of products of natural origin in the USA, without the requirement to have them licensed as medicines, subject to certain rules regarding the claims that may be made for them. This also means that such products are not evaluated by the US Food and Drugs Administration (FDA).

4. The free availability of such products in the USA may possibly be one reason why many people assume a similar position is adopted in the United Kingdom. However, this is not the case. The UK does not have any equivalent legislation and unlike the USA, it is tied into the medicines and food regulations that operate throughout the European Union.

5. EU regulations are applied consistently throughout its member states to control the authorisation and marketing of licensed and registered medicines. Unlicensed products however, are regulated under national rules and the legislation which operates in each member state often varies for a number of reasons which reflect the different cultures, attitudes and histories which exist. Each interpretation is also subject to published Guidance by the European Commission, often in the light of judgments by the European Court of Justice (case law).

The status of smoking/nicotine cessation products in the UK

6. The MHRA (and formerly the MCA) has regarded products to treat or reduce an uncontrollable desire to use nicotine as medicines for many years, and its advice to companies on this subject has been consistent throughout. The Agency's view has been challenged on two occasions by companies that were marketing such products without the appropriate authorization, the first in 2002 called "Quit Now" and the second called "Smoke No More" in 2003. Under the statutory review process contained in the provisions of The Medicines For Human Use (Marketing Authorisations Etc.) Amendment Regulations 2000 (S.I. 2000/292), both companies made representations to the Independent Review Panel for Borderline Products.

7. The Panel, after considering all of the evidence (which included several expert witness submissions) and having examined the definition of a medicinal product, concurred with the agency that products presented for the cessation of smoking are regarded as being for the treatment of nicotine addiction which, along with all other forms of substance addiction, is regarded as an adverse medical condition.

8. This confirmed that an unlicensed product that claims – or implies that it can assist in the cessation of using nicotine products and smoking is a medicinal product.

Product presentation

9. For the purposes of determining product status, the Medicines Borderline Section takes into account everything that may come to the attention of the general public. This includes, labelling, leaflets, packaging, use of graphics, advertisements, internet promotions, editorials and broadcasts. It is the message conveyed as well as the actual wording that is taken into account and, where this is deemed inappropriate, further action will be taken.

Legal smoking cessation products

10. There are a number of legitimately licensed and approved medicines available. The majority are available over the counter in general sales outlets such as supermarkets, as well as from pharmacies.

11. There are also a number of products which provide, quitting programmes, practical advice and information for those who wish to give up.

Alternative marketing opportunities

12. Some of the products that the Medicines Borderline Section has seen over the years have contained substances that are regarded as medicinal in their own right. Others have only been regarded as medicinal due to the claims made for them, containing mainly combinations of readily available substances that are commonly found as food supplements or may be found in cosmetic products.

13. A few companies have taken advice from the Medicines Borderline Section by re-formulating and re-naming products and making appropriate modifications to product presentation, allowing them to then be marketed as food supplements or cosmetics, which are not connected with the use of nicotine products.

14. Advice on suitable presentation can be obtained from a number of sources such as Trading Standards Officers or Trade Associations, or from the Medicines Borderline Section.

Action that MHRA's Medicines Borderline Section will take upon discovery of an unlicensed nicotine cessation product on UK market

15. The fact that the status of products presented for the cessation of nicotine use as medicines is already established, means that they are not, in effect, deemed to be borderline and cannot be subject to fresh determination procedures.

16. Upon discovery of the sale, supply or promotion of such an unlicensed product in the UK, the agency's Borderline Section may issue an **Urgent Notice** to the company concerned. In other cases the matter may instead be referred directly to the agency's Enforcement Unit for consideration of proceedings in the criminal courts.

17. It should also be noted that information from a third party may be sent direct to the Enforcement Unit, or be discovered by investigators in the course of their business. In these circumstances, it is likely that proceedings will be considered without a referral to the Medicines Borderline Section.

18. Further information about the work of the MHRA and the Medicines Borderline Section can be found on the Agency's website http://medicines.mhra.gov.uk .

APPENDIX 7 PRODUCTS AIMED AT SPORTS PEOPLE

Background

1. The MHRA's Medicines Borderline Section receives many enquiries and complaints about products aimed at sports people from manufacturers, importers and retailers of those products. Many companies are unaware that medicines regulations may apply to their business.

2. The products – capsules, powders, tablets, shakes, bars - *will* be controlled under either foods or medicines regulations. Foods are not required to be licensed but they are governed by the Food Safety Act 1990 and associated regulations which cover the quality, labelling and advertising of food stuffs. Advice on the Food Safety Act can be obtained from the Food Standards Agency or the Trading Standards Service of your Local Authority. In addition, ingredients which do not have a history of significant consumption within the EU prior to May 1997 may be subject to the controls of Novel Food Regulation (EC) 258/97. Advice on this point should be sought from the Food Standards Agency either in writing or by e-mailing using the following addresses: novelfoods@foodstandards.gsi.gov.uk or food-supplements@foodstandards.gsi.gov.uk.

Medicines Legislation

3. In broad terms, when classifying a product, the Agency looks at the way the product is presented (especially any claims) and at its function, that is, its effects (when administered) on human physiology. If a product satisfies *either* limb of the definition it is likely to be classified as a medicinal product. There is more information about the ways in which we apply the definition to individual products in the main text of Guidance Note 8

Claims

4. Obviously, not many products aimed at sports people claim to "treat or prevent disease" but if there are claims which imply that the product will "correct, restore or modify" physiological function then the consumer will take the product "with a view" to doing just that. Examples of the type of claims might be:

"burns fat"
"increases metabolic rate"
"stimulates circulation"
"suppresses appetite"
"mimics insulin"
"acts like human growth hormone"

All of these and other claims like them are unacceptable for unlicensed products.

5. The claims we take into consideration *don't have to be on the product label.* All forms of product literature and advertising are relevant, including websites. Much of the scientific text used makes implied medicinal claims and is therefore unacceptable – even if it is only accessible via a hyperlink.

Food Labelling Regulations

6. The Food Labelling Regulations contain detailed provisions for both the labelling *and advertising* of food. Food safety law is administered and enforced locally on behalf of the Food Standards Agency by the Trading Standards Service.

Advertising

7. As respects medicines, "advertisement" is defined broadly under Section 92 of the Medicines Act to cover "every form of advertising whether in a publication or elsewhere" e.g. print, websites, television, radio advertisements etc are all covered.

There is a difference between scientific or academic review and advertising, therefore journals such as The Lancet or the BMJ can publish research findings - even about unlicensed products - with impunity. However, company websites are not scientific or academic review but advertising intended to promote the products and substances they feature. It makes no difference if web users have to click on one or more links to get to the science if they started at the advertisement.

8. Medicinal products without a marketing authorisation, herbal registration or homoeopathic registration cannot be advertised (Regulation 3 (1) of the Medicines (Advertising) Regulations).

9. Advertisers should note that a number of self-regulatory codes of advertising practice operate alongside current legislation. All forms of advertising will be covered by one of the self-regulatory codes. The British Code of Advertising, Sales Promotion and Direct Marketing apply to all non-broadcast advertising, including press, e-mail and SMS. Pre-publication advice on the Codes' requirements can be obtained from the Committee of Advertising Practice Copy Advice team on Tel: 020 7492 2100 or fax: 020 7404 3404. Broadcast advertising is covered by the CAP (Broadcast) Codes – the TV Code and the Radio Code. These Codes also require that before submitting an advertisement for publication, advertisers must hold documentary evidence to prove all claims including non-medicinal claims, whether direct or implied, that are capable of objective substantiation.

Products Imported from the USA

10. The USA has a very different set of regulations from the UK and the rest of Europe and many products which may be legal for sale as food supplements in the USA are classified as medicinal products in the UK. The legislation in the USA permits substances of natural origin to be sold without the approval of the regulatory authorities and this includes herbal extracts. An extract is generally more potent than the whole source material and may not be readily identifiable from the label – for example “hydroxyevodiamine” is an extract of the medicinal herb *Evodia rutaecarpa* and would not be acceptable in an unlicensed product in the UK.

Herbal Remedies

11. The Directive (2004/24) was published on 30 April 2004 and introduced a registration scheme for traditional herbal medicines. From 30 October 2005 herbal remedies sold in the UK have to be registered if they were not legally on the market on 30 April 2004.

12. The registration scheme covers manufactured, finished traditional herbal remedies and manufacturers, importers and wholesale dealers of the remedies will require licences. The scheme requires these remedies to meet specific and appropriate standards of safety and quality and for the product to be accompanied by the necessary information for its use. The normal requirement for medicines to demonstrate efficacy has been replaced by a requirement to demonstrate traditional use. In order to obtain a product registration under the new arrangements, it will be necessary to prepare and submit a registration dossier.

13. Registrations under the scheme will be restricted to herbal medicines which are intended for use without the supervision of a medical practitioner, for treatment of the symptoms of uncomplicated conditions. Further information can be found on the Agency’s website at www.mhra.gov.uk under Medicines/herbal

Substances which are medicinal and which may not be sold unlicensed

14. The following substances have already been determined by the MHRA to be medicinal and may not therefore be sold without a marketing authorisation

Gamma-aminobutyric acid (GABA)
Prohormones
Ephedrine (also the herb ephedra, ma huang, desert tea, mormon tea)
Synephrine (whole citrus aurantium is not medicinal)
Dehydroepiandrosterone (DHEA) [also subject to the Misuse of Drugs Act]
Hydroxy Citric Acid (whole garcinia cambogia is not medicinal but advice on the status of garcinia under food legislation should be obtained from the FSA)
Steroids
Human Growth Hormone (HGH)
Yohimbe

Claiming that a foodstuff has the same effects as any of these substances is a medicinal claim.

Herbs That Maybe Medicinal

15. The following herbs are all known to have medicinal uses and including them in a product for sports may well lead to that product being classified as a medicine (see Appendix 5 on products with herbal ingredients for more information).

Botanical name	Common name
Salix alba	White willow
Tribulus terrestris	
Rhodiola rosea	
Gymnema sylvestre	
Epimedium sagitattum	Horny Goat Weed
Evodia rutaecarpa	
Eurycoma longifolia	Long jack, Tongkat ali
Taraxacum officinale	Dandelion
Urtica dioica	Nettle
Hoodia gordonii	
Sida cordifolia	

There is also a list of herbal ingredients and their reported uses on the Agency's website at www.mhra.gov.uk under Borderline/How the MHRA determines whether a product is medicinal

What To Do If You Are Not Sure If a Product is Medicinal

16. Classification is carried out on a product by product basis. If you have looked at all the literature in the Guidance Note and on the website and you are still unsure, complete the advice request form which is available on the Agency's website at www.mhra.gov.uk under Borderline/How the MHRA determines whether a product is medicinal.

European Specialist Sports Nutrition Alliance

17. The European Specialist Sports Nutrition Alliance (ESSNA) speaks for specialist manufacturers across Europe about new legislation affecting the sector's products. It is in dialogue with the European Commission, The European Parliament, the World Anti Doping Agency, and Member State Competent Authorities including the MHRA. ESSNA members are committed to complying with legislation in a responsible manner. You may wish to seek further information about ESSNA from contact@ESSNA.com.