# AESGP Position Paper on Classification Rule 14

*This paper concerns the classification on a case-by-case basis of medical devices composed of substances or of combinations of substances in accordance with the classification rule 14 set in Annex VIII of the Medical Devices Regulation[1] (MDR) taking into account all their characteristics, including in particular their intended purpose and their inherent risks. Its main purpose is to provide actors of the MDR implementation with AESGP's views on the pragmatic, proportionate and science-based interpretation of this classification rule when it comes to substances based medical devices.*

***Rule 14***
*All devices incorporating, as an integral part, a substance which, if used separately, can be considered to be a medicinal product, as defined in point 2 of Article 1 of Directive 2001/83/EC, including a medicinal product derived from human blood or human plasma, as defined in point 10 of Article 1 of that Directive, and that has an action ancillary to that of the devices, are classified as class III.*

While Rule 21 has been newly introduced by the MDR, Rule 14 already existed (with some wording adjustments[2]) under the Medical Devices Directive in the form of Rule 13. In that regard, it is worth noting that the explanations provided in MEDDEV 2. 4/1 Rev. 9 on classification of medical devices with regard to Rule 13 remains therefore valid.

Rule 14 covers devices incorporating, as an integral part, a substance considered, if used separately, to be a medicinal product, and that has an action ancillary to that of the devices.

Article 1 of Directive 2001/83/EC (as amended) defines a 'medicinal product' as:

- *'Any substance or combination of substances presented as having properties for treating or preventing disease in human beings; or*
- *'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 order to decide whether a substance is considered a medical device or a medicinal product, the following points should be considered:

- The intended purpose of the substance taking into account the way the whole product is presented;
- The method by which the principal intended action of the substance is achieved.

[1] Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC (Text with EEA relevance), OJ L 117, 5.5.2017, p. 1–175

[2] Rule 14 of MDR has undergone some rewording when compared to the corresponding Rule 13 under MDD which read: *All devices incorporating, as an integral part, a substance which, if used separately, can be considered to be a medicinal product, as defined in Article 1 of Directive 2001/83/EC, and which is liable to act on the human body with action ancillary to that of the devices, are in Class III.* Notwithstanding the deletion of „*and which is liable to act on the human body*", it is still relevant whether or not the substance can be considered to be a medicinal product, as defined in Article 1 of Directive 2001/83/EC. This is generally considered to be equivalent to "*which is liable to act on the human body*" as per Rule 13 (MDD).

Medical devices may contain a substance which, if used separately, can be considered to be a medicinal product, which acts on the body in a manner ancillary to the device. However, where such substances act in a manner that is more than ancillary, the product is regulated as a medicinal product rather than a medical device.

The factors which are relevant in determining whether a substance falls within the definition of a medicinal product have been considered by the Court of the Justice of the European Union on several occasions:

- The judgment in HLH Warenvertriebs, 2005 (C-211/03) says:

  "*…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."*

- Commission of the European Communities v Federal Republic of Germany (C-319/05) says:

  "*… the definition of medicinal product by function is designed to cover products whose pharmacological properties have been scientifically observed and which are genuinely designed to make a medical diagnosis or to restore, correct or modify physiological functions."*

- The judgment in Hecht-Pharma GmbH, 2009, (C-140/07) says:

  *"... a product cannot be regarded as a medicinal product within the meaning of that provision where, having regard to its composition – including its content in active substances – and if used as intended, it is incapable of appreciably restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action. The capacity to restore, correct or modify physiological functions should not lead to the classification as medicinal products by function of products which, while having an effect on the human body, do not significantly affect the metabolism and thus do not strictly modify the way in which it functions."*

  *It is apparent from Article 1(2)(b) of Directive 2001/83 that the substance in question must be capable of restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action and that that capability must have been scientifically established*.

- The judgment in Commission of the European Communities v Kingdom of Spain (Case C-88/07) says:

  *« …the mere fact that one or more medicinal herbs are among the constituents of a product is not sufficient to permit the conclusion that that product contributes to restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action or to making a medical diagnosis, within the meaning of Article 1(2)(b) of Directive 2001/83.*

*It is possible that, having regard, in particular, to the small amount of the active substance contained in it and/or the manner in which it is used, a product based on medicinal herbs will have no effect on physiological functions or that its effects will not suffice for it to be a medicinal product by function. »*

In so far Rule 14 must be understood as a specific rule for drug-device combinations as defined in Article 2 (1) MDR whereas the primary intended purpose of the device is supported by an ancillary medicinal action of an active pharmaceutical ingredient (API), e.g. a bone cement with an antibiotic ingredient in connection with a hip implantation. In the given example the antibiotic ingredient reduces the risk of infection during the surgical procedure whereas the bone cement exhibits the primary intended purpose (fixation of the corresponding implant).

A substance can only be considered to be a medicinal product within the medical device if, in its amount present in the medical device at hand and within the intended application of the device (as presented) it:

- is capable to appreciably restore, correct or modify physiological functions by exerting a pharmacological, immunological or metabolic action AND;
- exerts a pharmacological, immunological or metabolic action in a manner ancillary to the device.

As an example, a substance designed to preserve the whole formulation, although it could kill bacteria, but is not capable to appreciably restore, correct or modify physiological functions by exerting a pharmacological, immunological or metabolic action, does not significantly affect the metabolism and thus do not strictly modify the way in which it functions would not be considered as a substance which, if used separately, can be considered to be a medicinal product.

The claims of the manufacturer about the intended uses and mode of action of the substances of course have to comply with MEDDEV 2.1/3 rev. 3: „*Although the manufacturer's claims are important, it is not possible to place the product in one or other category in contradiction with current scientific data. Manufacturers may be required to justify scientifically their rationale for the qualification of their product.*"

Therefore, to determine whether a device falls within Rule 14, a case by case assessment of the device must be carried out taking into consideration the composition of the device and in particular the amount of the substance at issue and the intended application of the device (as presented) so as to determine if this substance:

- is capable to appreciably restore, correct or modify physiological functions by exerting a pharmacological, immunological or metabolic action AND;
- exerts a pharmacological, immunological or metabolic action in a manner ancillary to the device.

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