Marketing medicines

A lack of harmonisation in the controls on prescription product promotion – can this continue?

PART II

In Part I of this article (*ESRA Rapporteur* 7.1, pp10-13) national differences in approach to the control of prescription product promotion to the healthcare professional were discussed. Differences were noted not only in the detail, but also in the methods of control – through legislation, Codes of Practice or a combination of the two. Thus, in some jurisdictions monitoring (and indeed sanctions) is carried out by the national authority or its agent. In most cases, however, industry practices are largely controlled through a system of self-regulation, implemented by the national industry association.

However, a more fundamental difference exists in attitudes towards promotion to the general public. In most jurisdictions, such practices are specifically excluded. However, it is permitted in both the USA and New Zealand. The arrival of the Internet, a medium that knows no national boundaries, has opened up new opportunities for direct-to-consumer promotion (DTC). However, its borderless nature also provides difficulties for the regulators in terms of ensuring compliance with national regulations. As will be seen, this, together with pressure (certainly in the Western world) for a greater freedom of information, is causing a rethink in attitudes to DTC particularly in Europe.

Direct-to-consumer advertising

Promotion of prescription-only products to patients and the general public – so-called direct- to-consumer (DTC) advertising – is currently permitted in the USA and New Zealand. In Australia, it is banned, although the brand advertising of pharmacy-only medicines has been recently allowed, subject to certain safeguards, approval by the National Drugs and Poisons Schedule Committee, and that there be demonstrable public benefit from the advertising of the product!

In most other jurisdictions, promotion is restricted to healthcare professionals (eg, in the European Union (EU) by Directive 92/28/EEC). However, consistent with the general trend towards more informed consumers, and the greater involvement of patients in their own healthcare, it is likely that rules on this practice may be relaxed in the future. Indeed, Martin Bangemann, Industry Commissioner in Jacques Santer's EU Commission, had asked in 1998 the EU's Directorate General (DG) III (Industry), to begin a review of the subject. Under the new Commission established last year by the new President, Romano Prodi, such regulation will initially fall within the sphere of the DG for Enterprise and the Information Society. However, the Health and Consumer Protection DG, may also intervene. Statements from the commissioner for this DG, David Byrne, on electronic commerce indicate a vision similar to that expressed by DG III in 1998, ie, that EU advertising regulations may need to be revised to account for the effects of US direct-to-consumer advertising on the Internet.

The subject however raises a number of issues both positive and negative depending on one's perspective:

- A higher consumer awareness of the availability of effective treatments can encourage consumers to seek help, encourage informed discussion with a medical practitioner, improve their quality of life, and lessen costs incurred by delays in seeking treatment
- Improved understanding by the public could lead to better treatment and compliance, but may also confuse consumers, lacking adequate knowledge, particularly about drug interactions
- Potential for excessive or misleading promotion which may lead to inappropriate use of medicines
- Consumers have a right to be protected, but also a right to make free choices
- Prescribing of the product is limited to medical practitioners only – however, DTC advertising raises the consumers' level of understanding and thereby interferes with the doctor/patient relationship, and may result in increased pressure on the doctor to prescribe the advertised medicine, and raise false expectations which the professional has to resolve
- Is there a political will? – there are fears that DTC advertising could lead to a massive growth in the use of pharmaceuticals, and hence increased health expenditure, affecting both private and national health reimbursement systems
- Drug companies consider that they have both a right and a responsibility to inform patients about their products, and favour direct marketing both in building brand recognition and as a means to bypass Government controls on spending.
- Might increase industry's profits by targeting people with relatively mild symptoms, who otherwise might not have visited their doctor

- Could foster competition among products leading to improved quality and cost competitiveness resulting in benefits for the payer, but on the other hand might favour those brands which benefit from a considerable promotional budget thereby distorting competition
- A potential change in the company's liability (particularly in the USA), whereby the "learned intermediary" doctrine has previously meant that doctors were considered to be responsible for explaining product usage, potential side-effects, etc to patients – however, with DTC a company's responsibilities might be expected to be increased.

Some of these issues are currently the subject of much debate in New Zealand. Here, DTC advertising is controlled by a mixture of legislation and self-regulation (RMI's Code and the NZ Advertising Standards Authority Code of Therapeutic Advertising). It is supported by government and industry but opposed by the reimbursement agency, Pharmac, and the medical profession. Pharmac is concerned particularly with its impact on healthcare expenditure, since such advertising tends to increase demand for newer, expensive products, a demand which is envisaged to grow further with the new range of "lifestyle" drugs, whereas the medical profession is concerned with its effect on the patient/doctor relationship as outlined in the previous paragraphs.

In the USA, due to a requirement to provide full text of the approved product labelling, DTC advertising was for a long time largely limited to the printed media. However, in August 1997, the FDA issued draft guidelines for drug advertisements broadcast on television and radio, enabling the approved patient information to be provided separately (eg, by post or reference to the printed media). It is estimated that, as a result of this liberalisation, pharmaceutical company spending on prescription product DTC advertising doubled in the two years from 1996 to 1998 amounting to about $1.3 billion in 1998 (about 16 % of the total advertising spend), and that the top ten DTC spenders invested 44% more on DTC than advertising to professionals. In 1999, DTC spending exceeded $2 billion, with the top five classes being antihistamines, inhaled nasal steroids, alopecia, anti-migraine and prescription smoking deterrents.

Interestingly, in a recent Harris poll, 49% of physicians believe that DTC advertising of prescription drugs has helped "educate and inform" their patients. In contrast, in another 1999 survey *Attitudes and Behaviors Associated with Direct-To-Consumer Promotion of Prescription Drugs,* conducted by the FDA, it was concluded that about one-third of consumers ignored the brief summary of product information that accompanied print DTC advertisements. These conclusions will no doubt impact on the FDA as it evaluates its policies on DTC advertising. Currently, there is a high level of FDA enforcement activity in the area of DTC advertising, and due to the high cost of correcting violative broadcast DTC advertisements, most companies obtain FDA preclearance.

A recent new development in the UK has been the launch of two disease awareness campaigns to the general public. One campaign on television addressed incontinence, and the second was a print campaign on male impotence. Both campaigns, needless to say, were established by companies with products in the respective fields, although neither mention specific products, and the company names/logos etc. were discreetly presented. Many view these campaigns as edging UK advertising towards DTC. However, it can equally be argued that as a result of this increased disease-awareness, the consumer is thereby enabled to take a greater responsibility in his own general healthcare, seek professional advice at an earlier stage, and be prescribed preventive treatment which will result in long term cost savings.

The Internet

The Internet represents a relatively new medium for product promotion. In contrast to other media, though, it is not limited by national boundaries and hence offers unique opportunities for advertising. Jan Leschly, the CEO of SmithKline Beecham, has been quoted as saying (in the context of how industry must adapt to the Internet age) "One third of people going on the Web are looking for medical information. After pornography, it is the largest use of the Web."

Legislation and guidance is, to date, limited. Most authorities take the view that the Internet is just another form of advertising medium and as such is largely covered by existing rules. For instance, on the UK's Medicines Control Agency website (*http://www.open.gov.uk/mca/mcahome*) in the section on the Medicines Advertising and Promotion activities of the Post-Licensing Section, it is stated that ".... existing legislation applies to advertising and promotion of medicines via all media, including the Internet". Patrick Deboyser, then Head of DGIII's Pharmaceutical Unit at the EU Commission, also stated at the Geneva IFPMA meeting in October 1998 on the use of the Internet that he did not see the need for specific new legislation on Internet advertising (The IFPMA has recently published a report of this meeting entitled *The Internet and Pharmaceutical Products: The State of the Art and the Way Forward*).

In the context of prescription medicines in Europe, promotion is limited, as with other forms of media, to healthcare professionals. A recent letter from the Agence Française de Sécurité Sanitaire des Produits

de Santé (AFSSAPS) to the SNIP, the French Industrial Association, informed them that the agency had established an Internet Surveillance Unit, and reminded them (as a result of what they had discovered) that publicity on the Internet is subject to the rules governing all other pharmaceutical advertising (including the requirement that a full copy be submitted to the Agency). It was also recalled that prescription medicines can only be promoted to healthcare professionals, and in the context of the Internet, this will necessitate promotion on sites protected by access codes available only to such professionals. The method of supply of the access code to the professionals, as well as the controls put in place to assure the appropriate qualification of those wishing to have access to the site, would have to be clearly stated in the letter of submission

The IFPMA considers that the principles and standards set out in its Code for information provided by companies about their products are equally valid for and applicable to information made available via the Internet.

As to the relevance of national law to the Internet, most authorities take the view that advertising referring specifically to the use of a product within its territory falls within the scope of its national laws, whether the advertising was placed by a company resident within its national boundaries or abroad. (In some cases, the situation is clear – the Norwegian authorities, for example, have stated that any publicity in the Norwegian language would be viewed as being aimed at the their market and hence subject to Norwegian rules – the same logic cannot unfortunately apply to many other languages!). The UK's Code of Practice Authority has cited "case" precedence in that a UK company was ruled in breach of the UK Code in relation to an advertisement which had been placed in a UK publication by its parent company, operating outside the UK.

In the US, where, as mentioned above, advertising direct to the consumer is permitted, the Internet is used extensively by companies for product promotion and by patients for healthcare information. The FDA's DDMAC has taken a number of enforcement actions concerning pharmaceutical companies' Internet websites, and issued a number of warning or notice of violation letters. FDA had for some time indicated that they were working on a guidance document to provide clarification, but have recently announced that they will not now be issuing such a document because of the fluidity of this issue.

In the light of the above, what can a European-based company place on an open-access website on the Internet?

A recent development (April 1999) from the European Commission's Pharmaceutical Committee concerned "Borderline information /advertising". In its decision, referenced as "PHARM 250a", the Committee concluded that "the unmodified and unabridged publication on the Internet of information on medicinal products (prescription-only and OTC products) which have been authorised by competent authorities, eg, the Summary of Product Characteristics (SmPC), the package leaflet, or public assessment reports (eg, EPAR) of a medicinal product was possible. Such information should not normally be considered as advertising, unless the presentation of this information clearly constitutes a 'hidden inducement' to promote the prescription, sale, supply or consumption of the medicinal product." This guidance represents a significant change for certain European countries, where such information has previously been viewed as advertising.

It is also clear that, in the UK at least, companies may establish disease-awareness websites. In this context, it has been suggested that such information could also be extended to include information on available therapies, as long as such information was complete and objective, but such an approach has yet to be tested.

Dissemination of scientific information

As mentioned above, promotion of prescription products to healthcare professionals and, where permitted, to the consumer, must be limited to that allowed by the marketing authorisation. However, restrictions on product promotion are not meant to inhibit the distribution of scientific information. This is interpreted differently between jurisdictions. In Europe, for example, the distribution of reprints of publications from scientific journals is permitted in a number of states (where such publications are considered to be already in the public domain), even if the content of the article is "off-label" (in some cases, however, the reprint must not refer to a product by its trade name). In others such dissemination is viewed as being "promotional" and is hence not permitted, being subject to the national rules governing promotion.

It should be noted however, that Medical Affairs representatives may always provide "off-label" information to healthcare professionals in response to unsolicited physician requests on the subject.

Before 1997, the dissemination of "off-label" materials in the US was not possible except by Medical Affairs staff under the condition described above. However, in response to industry and patient groups the US Congress passed, in November 1997, the FDA Modernisation Act (FDAMA) which included provisions for dissemination of off-label information to healthcare professionals.

FDA's subsequent implementing regulations (November 1998) made provision for companies to distribute off-label reprints of articles from reputable

peer-reviewed publications or reference texts, for products approved for other indications, so long as they include balancing safety information, have filed or, agree to file, supplemental new drug applications for the unapproved use(s) within six months, and pre-submit the reprint to DDMAC. However, regulation of such reprints by the FDA was judged (Washington Legal Foundation (WLF) v. Jane Henney *et al* – July, 1999) to be at variance with the American Constitution (Right to Free Speech). The FDA appealed against the judgement but in oral arguments before the Judge in January of this year, FDA acknowledged that FDAMA neither prohibited off-label speech nor conferred upon FDA authority to regulate it outside a specifically established agreement. A final decision in the case could be given in two to six months. FDA can, however, regulate dissemination of any reprints that are considered misleading. From an industry point of view, companies must be aware of potential product liability and patient safety issues in disseminating such reprints.

Conclusion

It is clear from the above that approaches to the control of promotional activities relating to prescription medicines vary from country to country. In most jurisdictions promotion is limited to healthcare professionals. However, in the USA and New Zealand, promotion to the consumer (DTC) is permitted. With the introduction of the Internet as a promotional medium – and a medium that knows no national boundaries – it will become increasingly difficult to ensure and enforce compliance with local national legislation. Thus the European consumer/patient may already access information about possible treatments/his prescribed product/others from a US-based Internet website. The European Commission has already recognised this and decided to review its position regarding DTC advertising, but in essence a world-wide approach is wanted. Two extreme positions are possible – DTC advertising to be prohibited or permitted world-wide. In the current climate where consumer pressure (certainly in the Western world) is calling for moves towards a greater freedom of information and greater transparency, the latter direction is the more likely.

Indeed, at the October 1999 meeting of the Transatlantic Business Dialogue group (European and North American representatives of industry and decision-makers) in Berlin, it was concluded that "EU citizens should have the same access to health information as US citizens. The EU should review existing regulations and work on solutions such that patients in the EU can benefit from appropriate health information, taking into account the American experience in exploring deregulation of DTC advertising. In this process, patient interests should be safeguarded and consultation with doctors should be assured."

In addition, both through the Internet directly and via patient-support groups linked through the Internet, patients will become more aware of medicines not available within their own borders but available elsewhere and one can anticipate increased public pressure on regulatory agencies to further harmonise drug availability on a world-wide basis. Purchase of prescription products available in other markets via the Internet is possible – the expense will however be limiting in many cases, since such purchases will not be reimbursable by healthcare insurance or social security systems. There are concerns that Internet supply may be used by the unscrupulous, as a means to bypass standard controls, and to sell prescription products directly to patients, without appropriate professional consultation and a valid prescription. The supplied products could also be of poor quality, unlicensed or counterfeit.

Finally, the recent policy change in the USA regarding the distribution of "off-label" journal reprints by the industry to healthcare professionals may also have consequences regarding attitudes to promotion in a wider arena in the long term.

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