Notice to applicants

Application of Article 59 of Regulation (EU) 2017/745 on medical devices

Notice to applicants dated 27/01/2025

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General presentation

The purpose of this document is to provide information about the application of Article 59(1) of Regulation (EU) 2017/745 on medical devices, which allows any competent authority to authorise, by way of derogation, the placing on the market in its territory, in the exclusive interest of patients or public health, of medical devices for which the mandatory regulatory procedures prior to their placing on the market have not been followed.
It is intended for patients, healthcare professionals and manufacturers, and is an information document for all the stakeholders concerned, as well as a tool intended to assist with the submission of applications and to clarify ANSM's decisions.
As a reminder, pursuant to the aforementioned Regulation (EU) 2017/745, only devices covered by

- an EU declaration of conformity attesting that they comply with the general safety and performance requirements applicable to them,
- and, where the intervention of a notified body (NB) is required, by an EU certificate of conformity, may be placed on the market;

Custom-made medical devices, however, must be subject to a specific statement, provided for in “Annex XIII” of Regulation (EU) 2017/745.
Pursuant to part II of Article L.5211-3 of the French Public Health Code (Code de la santé publique – CSP), the exemption consists in ANSM authorising, by way of derogation, the placing on the market or putting into service of medical devices for which the conformity assessment procedures have not been applied, and provided that the interests of public health or patient safety or health have been established in the context of a duly justified application. It can be issued individually for a specific patient, or generally for a specific device. In the latter case, it is issued for a specific period and for a national territory only.

Applicable legislation: Article 59(1) of Regulation (EU) 2017/745 on medical devices stipulates that: “by way of derogation from Article 52, any competent authority may authorise, on a duly justified request, the placing on the market or putting into service within the territory of the Member State concerned, of a specific device for which the procedures referred to in that Article have not been carried out but use of which is in the interest of public health or patient safety or health [...]”.

In addition, part II of Article L. 5211-3 of the French Public Health Code (CSP), as amended by Order No 2020-582 of 20 April 2022 adapting French law to Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, states that “pursuant to Article 59 of this Regulation, the French National Agency for Medicines and Health Products Safety may, upon duly justified request, by way of derogation from the obligation for prior assessment of the conformity of each device provided for in Article 52 of Regulation (EU) 2017/745, authorise the placing on the market or putting into service within French territory of a device that has not been

subject to such assessment, but whose use is in the interest of public health or of the safety or health of patients".

The use of the words "upon duly justified request" (in French: "sur demande dûment justifiée") implies, on the one hand, the transmission by the applicant of a certain number of elements and information motivating and justifying the request, and on the other hand, an evaluation of this data by ANSM, whose conclusions will lead to a reasoned decision to grant or refuse this request.
With CE marking being the method used for placing medical devices on the market under ordinary law, the implementation of this exceptional derogation procedure, despite the compassionate nature of the application and the potentially innovative nature of the device, is conditional upon the existence of preclinical and clinical data, which provide guarantees for patient safety and demonstrate a benefit for the patient in relation to the risks incurred.
In the case of an exemption being requested for first use in humans – "first-in-man use" – other than in a clinical investigation, preclinical data takes on particular importance, and must be sufficient to demonstrate the safety of use and a favourable risk-benefit ratio for the patient to which the application relates.

ANSM considers that the derogation procedure can only be a temporary solution. In this context, and barring exceptions, the manufacturer's commitment to move "towards CE marking", notably by submitting an application for a clinical trial, is an important factor in the assessment of the application.

The exemption cannot allow for the circumventing of the CE marking procedure, nor can it constitute a valid basis or be invoked in support of the conformity certification procedure. Furthermore, it cannot be used in the context of medical device development, since the regulatory and safety framework for clinical investigation (CI) meets the imperatives of patient protection and reliable data collection, guaranteeing both optimum ethical and medical protection of people and the attainment of product performance and safety of use.

As a matter of principle, and in terms of safety, a manufacturer applying for an exemption under the aforementioned Article 59 must be able to provide the data required to submit a CI application and complete a statement pursuant to section 4.1 of Annex XV.

Derogation decisions taken by ANSM render:

- the manufacturer responsible for providing information that can guarantee the safety of use of its medical device and the benefits for the patient(s), for example. In all circumstances, the manufacturer remains liable for the device that is the subject of the application. To find out more, read the exemption application procedures.
- the practitioner, prescriber and/or user responsible for the choice of therapeutic strategy or the decision to use a non-CE-marked device, with regard to the latter's use, or with regard to the obligation to provide patients with clear and exhaustive information enabling them to give their free and informed consent. The granting of an exemption also assigns a role and obligations to healthcare organisations,

notably for the adoption of appropriate information, monitoring and traceability procedures for these medical devices not covered by a CE mark **(see the focus on healthcare professionals on page 9, and healthcare facilities on page 10).**

Key messages

CE marking is the method used for placing medical devices on the market under ordinary law. It guarantees the application of and compliance with strictly defined technical and regulatory requirements.
Therefore, an exemption for the placing on the market of a medical device pursuant to Article 59(1) of Regulation (EU) 2017/745 remains an exceptional measure which cannot, under any circumstances, permanently replace the procedures applicable to conformity assessment (as defined in Article 52 of said Regulation), the procedures for placing a product on the market (in accordance with Article 5 of said Regulation), or circumvent the regulations on clinical investigations (which provide a safe framework for patients and healthcare professionals).

I Exemption applications

Simplified procedure – Individual application:
https://www.demarches-simplifiees.fr/commencer/ansm-demande-de-derogation-individuelle-relative-aux-dispositifs-medicaux

Please note: Apart from the patient identification in point 4 of the form, which must be provided solely by the initial of their last name, the initial of their first name, and their year of birth, any document mentioning this patient (such as the prescription) must be anonymized.

Similarly, any date concerning the patient, appearing in the elements or documents submitted, must be limited to the year.

Simplified procedure – General application:
https://www.demarches-simplifiees.fr/commencer/ansm-demande-de-derogation-globale-relative-aux-dispositifs-medicaux

Applications must be reasoned, substantiated and anticipated, so as to enable an assessment of the safety data and the expected benefits for the patient(s) in relation to the risks associated with non-compliance with the applicable procedures, and must be part of a regulatory process for access to the market through CE marking, barring exceptions, particularly in the case of implant revision. In this context, the prior implementation of a clinical investigation should be considered, as a guarantee of optimum regulatory, ethical and medical protection of patients, but also of the performance and safety of use of the products.
Exemptions are granted by ANSM on an exceptional basis in the light of the information sent to the applicant in application of this notice, the interests of the patient(s) and their safety.
The following types of exemptions are granted:

- Individual: issued to one or more identified patient(s)
- General: issued to unidentified patients, but for a precisely targeted scope (duration, device references, special conditions, etc.)

ANSM may monitor the application of the exemption and the conditions under which it is granted, and may subsequently withdraw or suspend it.

Criteria required to assess the application

Individual exemption

- Justification of the patient's need/interest (characteristics, initials and age, medical context and condition, degree of urgency, life expectancy if applicable, etc.).

- Inability to include the patient in a clinical investigation.

- Absence of any alternative CE-marked device for the indication.

- Absence of any suitable and/or available therapeutic alternative (including medication or surgery).

- Reasons for the absence of CE marking, and information about the status of the device with regard to CE marking procedures: old CE obtained, timetable if CE marking in progress or planned, etc.

- Safety and performance data: standards, summary of clinical data and investigations, preclinical data, full reports of preclinical tests in the specific case of “first-in-man” use.

- Information about the characteristics of the medical device (mode of action, sterility, expiry date, storage location, etc.).

- Declaration of conformity to the general safety and performance requirements, with the exception of the aspects covered by the exemption, and attestation that all precautions have been taken to protect the health and safety of the patient(s).

General exemption

- Justification of the need/interest of the patient(s) (characteristics; initial of the patient’s last name, initial of the first name and year of birth; medical context and condition; degree of urgency; life expectancy if applicable…).

- Inability to include the patient in a clinical investigation.

- Absence of any alternative CE-marked device for the indication, or proof of the inability to use it.

- Absence of any suitable and/or available therapeutic alternative (including medication or surgery) or proof of the inability to use it.

- Reasons for the absence of CE marking and information about the situation with regard to CE-marking procedures: old CE mark obtained, timetable if CE marking is planned or in progress, etc.
- Safety and performance data: standards, summary of clinical data and investigations, preclinical data, certificate of maintenance of performance.

- Information about the characteristics of the medical device (mode of action, sterility, expiry date, storage location, etc.).

- Qualitative and quantitative assessment of exemptions already granted.

- Declaration of conformity to the general safety and performance requirements, with the exception of the aspects covered by the exemption, and attestation that all precautions have been taken to protect the health and safety of the patient(s).

Practical details of the application and contents of the file

- The application is sent to ANSM using the “démarche simplifiée” form , completed by the manufacturer or, where applicable, its authorised representative. It may be sent via a consultant, in which case a copy of the application is systematically sent to the manufacturer; it cannot be sent directly to ANSM by a healthcare professional.
- It must be fully completed.
- The documents identified by an asterisk in the form are mandatory (blocking) and must be provided by the manufacturer, and possibly via the applicant.
- The exemption is granted to the manufacturer; so the letter is sent to the manufacturer and a copy is sent to the other persons potentially concerned (applicant, healthcare professional, healthcare institution).

The application comprises three items:
- description of the system.
- justification/description of non-compliance with applicable regulatory procedures.
- the interests in relation to public health or to the health or safety of patients.

II Focus on healthcare professionals

Although the exemption is granted to the manufacturer as the entity in charge of placing the devices on the market, and therefore in the best position to transmit the required preclinical and/or clinical data, the role and responsibilities of healthcare professionals in the derogation procedure should be emphasised. On the one hand, they relate to the information that may be provided in support of the application, and on the other hand, they concern their professional obligation to provide clear and exhaustive information to the patient(s).

Role and responsibilities concerning the manufacturer's application for an exemption

The justification of the public health interest and the benefit likely to be provided to the patient(s) by the device that is the subject of the application for a derogation, as required by Article 59(1) of the aforementioned Regulation (EU) 2017/745 implies, in addition to the safety data under the manufacturer's responsibility, the transmission of information relating to medical practice, including justification for the choice to use a non-CE marked medical device in relation to the alternative products and/or therapies and the characteristics specific to each situation: emergency, patient's condition, etc.

By their very nature, these elements are provided and justified by healthcare professionals whose responsibility is therefore incurred for these points, as well as for the ensuing medical acts if the exemption is granted. In this respect, the complexity and specific nature of certain medical situations may lead ANSM to ask the healthcare professionals concerned for an undertaking attesting to their knowledge of the assessment carried out by ANSM and their responsibility.

Similarly, they remain involved in the monitoring and consequences of procedures carried out with the "exempted" device(s), as well as with regard to medical device vigilance obligations.

Role and responsibilities with regard to patients

The French Public Health Code (CSP) stipulates that all patients are entitled to clear and exhaustive information about their state of health and the care they receive (Article L.1111-2), and that they are responsible for giving their free and informed consent (Article L.1111-4).
Insofar as these provisions are applicable to medical practice, or even the "special doctor-patient relationship", this obligation is incumbent upon healthcare professionals who are also required to compile and retain the documents needed to prove their total compliance.

III Points brought specifically to the attention of healthcare facilities in which medical devices subject to exemption are made available and used

As a healthcare facility in which a “non-CE-marked” medical device is likely to be used, the facility is responsible for:

- firstly, demanding and allocating the resources required to ensure compliance with the transparency requirement and the obligation to inform all the parties involved (directors, heads of department, the responsible pharmacist in the hospital pharmacy, etc.) about the circulation and use of these devices, from their entry into the facility through to their use;
- secondly, implementing appropriate procedures for monitoring these medical devices to enable the tracking of their circulation within the facility, in the interests of patients.
- lastly, notifying ANSM and the manufacturer of any incident or risk of incident involving this non-CE-marked medical device.

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