NICE Technology Appraisal of azacitidine for the treatment of myelodysplastic syndromes, chronic myelomonocytic leukaemia and acute myeloid leukaemia

Observations from the Appraisal Committee on the ground 3 appeal points related to the Human Rights Act 1998

1. This document describes the Appraisal Committee's observations on Celgene's appeal points under ground 3 related to articles 2, 3, 8 and 14 of the ECHR, in the context of the legal advice provided to the Appeal Panel on these points ("the Panel advice"). Celgene's appeal points do not explain in detail the basis on which it considers that the respective articles of the ECHR are applicable and breached. Therefore, this document can only refer to the Panel advice.

Articles 2 and 3

2. The Appraisal Committee is of the view that article 2 or 3 of the ECHR are not engaged in relation to developing NICE guidance on the clinical and cost effectiveness of health technologies. As far as the Appraisal Committee understands this legislation, the rights under articles 2 and 3 are essentially negative, and that the case law referred to in the Panel advice indicates that a state may at least be required to provide an overall health service in some form which offers a minimal level of healthcare benefit, and that treatments generally available within that service must not be withheld from people on improper, non-medical grounds. The Appraisal Committee is of the view that these requirements are met in the UK by the NHS. As far as the Appraisal Committee is aware, the case law does not require a state to make specific treatments generally available within a health service, nor does it support the claim that articles 2 and/or 3 are engaged in relation to decisions on the allocation of resources within a health service.

Article 8

3. As far as the Appraisal Committee understands the Panel advice, the case law supports the proposition that "private life" includes a person's physical and psychological integrity and that article 8 can be relevant and applicable in relation to issues about availability of medical treatment. However, the Appraisal Committee considers that the guidance on azacitidine has not breached article 8 rights as outlined below.

Article 8 (1)

4. Celgene's article 8 point misquotes article 8 (1), which provides an entitlement to "**respect for** private and family life" [emphasis added] rather than a right to private and family life as such. The Appraisal Committee reads article 8 as being

essentially negative – it restricts interference by the state rather than requiring the state to ensure the provision of specific amenity.

5. The Appraisal Committee notes from the case law referred to in the Panel advice that article 8 imposes some positive obligations, but that these are defined narrowly and the threshold for establishing a breach is still high. In some of the ECHR cases referenced in the Panel advice complaints about lack of access to medical treatments have been found not to engage article 8 at all, while in other cases article 8 has been found to be engaged but not breached. However, the cases quoted in the Panel advice do not themselves provide an example in which article 8 (1) has been found to be breached by a failure to provide access to specified medical treatments. In addition, the cases in which article 8 has been found to be applicable concern individual decisions on availability of or access to treatment for particular patients rather than decisions on general availability. Indeed, in one of the cases quoted in the Panel advice, where a breach was not found, the Court commented that 'the applicants had access to the standard of healthcare offered to the general public'.

6. Therefore, to the Appraisal Committee's knowledge there is no case law which indicates that article 8 is breached by a fully reasoned decision as to which medical treatments should be recommended to be generally available within a national healthcare system. As far as the Appraisal Committee can see, a finding that article 8 (1) is engaged in this case and has (potentially) been breached would go far beyond of what is set out in the ECHR and also the case law to date, and is not justified.

7. If a recommendation not to provide treatment that can extend life on average by 9.5 months constitutes a breach of article 8 (1), it appears to the Appraisal Committee that article 8 is regarded as imposing a positive obligation on states to extend life as long as possible by providing specific medical treatments. Should that be true, this would be a considerable step away from the character of article 8 as a right to limit state interference in individual lives. Also, as mentioned in paragraph 2 above, the Appraisal Committee is of the view that articles 2 and 3 do not create any the obligation to provide specific medical treatments.

8. The Appraisal Committee notes that the Panel advice quotes the "very considerable benefit" provided by azacitidine of "an additional 9.5 months of life". The Appraisal Committee is aware that 9.5 months of life would undoubtedly be of very great value to patients and their families and refers to this and the other benefits in the Final Appraisal Determination sections 4.4, 4.5 and 4.12. The nature and extent of this benefit was at the forefront of the Appraisal Committee's minds when carrying out the appraisal and developing the guidance. However the Committee cannot see that the nature and size of this benefit in itself means that a failure to recommend azacitidine potentially breaches article 8 (1).

9. The Appraisal Committee does not understand the basis on which the benefits gained from the medical treatments considered in the case law referred to in the Panel advice are so different in nature from the benefits to be gained from treatment with azacitidine. Azacitidine prolongs life but does not provide a cure. Any difference between azacitidine and the treatments referred to in the case law appears to be one of degree. The Appraisal Committee queries whether the size of a benefit can be used as determining factor in deciding whether article 8 obligations have been met, and if so, what particular length of life extension would trigger the article 8 right.

10. The Committee would interpret the word "respect" in article 8 (1) as being more concerned with the way in which the state interacts with individuals, i.e. the way in which decisions are taken about the availability of treatment, than the exact nature of the benefits to be gained from individual treatments. This would mean looking at the safeguards in place to ensure that patients' interests are respected when decisions are made. Such procedural protections exist in NICE's technology appraisal process, by including full consideration of the views of patients and those who represent and treat them, and which enables the medical and broader benefits of treatment to be evaluated in light of their cost. The 9.5 months average life extension has been fully considered in the decision making as outlined below.

11. The Appraisal Committee feels that it is important to emphasise in this context what 'cost per QALY' means. The QALY is a common denominator which enables NICE to compare benefits gained from treatments across different treatments and conditions. The cost per QALY gained for azacitidine [£63,000] is calculated by dividing the cost difference between azacitidine and best supportive care by the full health benefit that azacitidine brings to patients, which includes the 9.5 months average life extension. By doing so, the 9.5 months life extension is valued in the same way as comparable benefits achieved by other treatments, and the 'cost per QALY' is a figure for the cost per benefit, not a nominal figure for baseline cost or cost of the treatment to the NHS. Therefore, the additional 9.5 months of life has been fully valued and included within the Committee's decision-making.

Application of article 8 (2)

12. Should the Appeal Panel conclude that article 8 is applicable to and breached by the Appraisal Committee's decision not to recommend azacitidine, the Appraisal Committee understands that the question is whether the guidance nevertheless complies with the part 2 of article 8.

13. The Appraisal Committee has therefore also considered whether any interference by the guidance with article 8 rights is "necessary" as outlined in article 8 (2), particular with regard to 'the protection of health or morals, or for the protection of the rights and freedoms of others'. The Appraisal Committee is strongly of the view that any interference in this case is indeed within this definition of "necessary" and forms part of NICE's remit, as outlined below.

14. The need to allocate limited public resources only to cost-effective medical treatments is necessary in a society such as the UK, in which the state inevitably has limited funds available but aims to provide a healthcare system which is comprehensive in scope and free at the point of access. The underlying principle here is that for the population as a whole it is best to get as much health benefit as possible with the resources available.

15. NICE was established to address this. Its functions with regard to technology appraisals means that it can only recommend treatments on the basis of their clinical and cost effectiveness. It is inherent in NICE's role that there will be clinically effective treatments, i.e. treatments which provide significant benefits to patients, which cannot be recommended for general use in the NHS because they are not cost-effective.

16. The Appraisal Committee would like to highlight the implications of the comparison between the cost per QALY gained for azacitidine [£63,000] and the cost per QALY gained at which treatments are normally considered to be cost-effective [£20,000 to £30,000 per QALY gained]. As explained above, the very considerable benefits achieved with azacitidine are fully captured within the cost per QALY figure, and this cost per QALY ratio enables the comparison of like with like – it compares the benefits of azacitidine with equivalent benefits from other drugs, including potentially equivalent life extensions. A cost of £63,000 per QALY gained, which – as outlined above - fully values the 9.5 months life extension benefit, means that the benefits achieved by azacitidine cost more than twice as much as the same benefits achieved by treatments that are normally considered to be cost-effective uses of NHS resources – which could include other drugs that extend life by a similar period. The figure of £63,000 per QALY gained is not the product of a value judgment by the Committee as to the importance or value of this particular extension of life – it is simply the cost per benefit. The decision made by the Committee is whether the NHS should fund this treatment when the same money could be used to achieve twice as much benefit using other treatments. That decision is about balancing the needs of individuals against the needs of the population as a whole.

17. Therefore, if the Committee recommended a treatment like azacitidine at more than twice the normal cost per QALY figure, then the effect is to reduce the overall health benefit within the population, because money used to fund azacitidine will displace twice the equivalent benefit provided by cost-effective treatments. In other words, if one person benefits from azacitidine, at least two other people loose the equivalent benefit. On these grounds the Committee considers that it is necessary for the guidance not to recommend azacitidine, so as to preserve the rights of other patients in the NHS and to protect the overall health of the population (as also referred to in paragraph 20 of the Panel advice).

18. The Appraisal Committee noted that in paragraph 22 of the Panel advice there is reference to 'any significant effect on budgets'. The Appraisal Committee would like to highlight that it is bound by NICEs Guide to the methods of technology appraisal

published in June 2008 that explicitly states in section 6.2.14 that 'The potential budget impact of the adoption of a new technology does not determine the Appraisal Committee's decision. '

Article 14

19. The Appraisal Committee considers that none of the substantive rights in the ECHR are engaged in relation to its guidance, and is therefore of the view that article 14 is not engaged. However, should the Appeal Panel come to the conclusion that article 8 is engaged, the Appraisal Committee is of the view that there is no breach of article 14 for the reasons already set out in the Panel advice.