One South Place
London EC2M 2WG
+44 20 7903 1000 tel
+44 20 7903 0990 fax

Weil, Gotshal & Manges

24 December 2010

José Manuel Barroso
President of the European Commission
1049 Brussels
Belgium

Dear President Barroso,

Urgent Need for Immediate Action Regarding Export of Sodium Thiopental, Pancuronium Bromide, Potassium Chloride, Pentobarbital and other drugs used in Administering Capital Punishment

We are writing to you concerning our client Reprieve's initiative to restrict the export of sodium thiopental and other similar drugs from EU countries to the US for the purpose of administering lethal injections, which we believe is best achieved by way of an amendment to Council Regulation No. 1236/2005 (the "**Regulation**"). The Commission will be aware of sodium thiopental's central role in the execution protocols of many of the death penalty states in the US and that domestic manufacture of this particular drug in that country ceased in late 2009. Due to the resulting shortages in supply within the US, death penalty states are now having to look overseas in order to obtain the sodium thiopental which they need to proceed with executions.

We therefore write to urge the Commission to exercise its powers granted under Article 12(2) of the Regulation to amend the annexes to the Regulation with a view to making it a binding law in all Member States that the export of sodium thiopental, and equivalent drugs, must be controlled and also to prohibit such export where there is a reasonable risk that such drugs will be used in administering capital punishment. We believe that a list of all drugs that may potentially be used in capital punishment should be added to the list of "controlled products" laid out in Annex III to the Regulation in conjunction with an end use "catch all" provision to prohibit the export of any product where there is a reasonable risk that it may be used for such purpose.

The Commission will be aware of the reasons why this matter has become so urgent of late. Sodium thiopental has in fact recently been exported from the EU to the US for use in administering lethal injections, in direct violation of the spirit and intention of the Regulation. It has recently come to light that one or more of the US states has also imported pancuronium bromide and potassium chloride from the UK for executions. Finally, because of shortages in the US of sodium thiopental, last week Oklahoma used Pentobarbital to execute John Duty.

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In addition, the Commission will be aware of, the following:

- The EU's commitment to and leadership role in the worldwide fight for the abolition of the death penalty.
- Articles 2 and 3 of the Charter of Fundamental Rights of the EU (now legally binding on all EU institutions since the entry into force of the Lisbon Treaty) which provide that no one shall be put to death or subjected to torture or inhumane or degrading punishment.
- Remarks made by the Council of the European Union on 18 April 2008 acknowledging the criticisms made by Amnesty International of the shortcomings of the implementation of the Regulation and the need to reassess it (including its annexes).
- A resolution or the European Parliament of 14 June 2010 addressed to the Commission and urging it to ensure that the Committee on Common Rules for the Export of Products (the "Committee") meets on a clear timetable to discuss changes to the Regulation.
- Despite the above, the Committee is not due to meet to discuss the implementation of changes to the Regulation further until "early 2011" (according to the response of the Commission on 30 November 2010 to questions raised by Members of the Parliament, Heidi Hautela, Ana Gomes and Sarah Ludford).
- The action taken on 29 November 2010 by the UK Secretary of State for Business, Skills and Innovation to ban the export of sodium thiopental from the UK for use in administering lethal injections. This action was taken using powers granted under UK delegated legislation and was effected following the Arizona Attorney General's disclosure that UK-sourced sodium thiopental had been used in the execution of Jeffery Landrigan in the State of Arizona on 26 October 2010.
- The submissions made by Archimedes Phanna in favour of the UK ban on exports to the US of sodium thiopental for executions, in light of the company's opposition to its life-saving drugs being used to kill. It should be underlined that Archimedes Pharma presented evidence in the British courts that it was illegal, under the US Food & Drug Administration (FDA) regulations, for European sodium thiopental to be imported into the US.
- The positive response of the British company Hameln to the suggestion that its potassium chloride might have been exported for executions in the US. The managing director for Hameln wrote to our client Reprieve as follows: "We do not disagree with your proposal to support a ban on exports to a country [such as the US] where therapeutic equivalents already approved and routinely available." Hameln stated in subsequent conversation that they had no objection to the requirement of an export licence on potassium chloride.

We believe that there is a clear and broad-ranging consensus that the imposition of an immediate EU wide ban on the export of these drugs for use in capital punishment, and their control under Article 5 and Annex III of the Regulation, is desirable and necessary both to comply with the EU's obligation to oppose the application of the death penalty in all its manifestations and to fully enforce the spirit of

and purpose behind the Regulation's enactment.

In light of this we and our client note that, despite more than five years having passed since the Regulation was enacted, no self-initiated attempts appear to have been made by the Commission to use the power granted to it by the Regulation to amend the annexes so that they cover drugs such as sodium thiopental which are being used in capital punishment and other ill treatment. Furthermore it has been more than two years since the Council formally acknowledged Amnesty International's criticism of the Regulation and its various deficiencies and almost six months since the European Parliament, the co-legislative body of the European Union, officially called upon the Commission to act to remedy these deficiencies.

If the Commission needed any more clear signal of the pressing need to move quickly and effectively on this it cannot have come in a more sobering form than the execution of Jeffry Landrigan on the 26 October 2010 by the State of Arizona using sodium thiopental, a product that the State of Arizona was able to obtain from an EU source because of the acknowledged deficiencies in this Regulation. Yet, despite this, two months after Mr Landrigan's execution using products sourced from an EU Member State, there is no more clear timetable on this than that another Committee will be convened "in early 2011".

The UK government's example shows that action can indeed be taken, using delegated legislative powers such as those at the Commission's disposal under Article 12 of the Regulation, to change the law so that the EU and its Member States adhere to their obligation and duty to oppose the death penalty in all forms. We and our client wish to work with the Commission to find ways to identify and implement the changes needed to make sure that no more people are executed using products sourced from the EU and are willing to meet with the Commission at the very earliest opportunity.

Given the urgent need for action here and the serious consequence of further delay, we believe that any further hesitation on the part of the Commission to exercise its delegated legislative powers under the Regulation swiftly and effectively is likely to constitute a failure to act on the part of the Commission, in breach of its obligations to do so under the Charter of Fundamental Rights of the European Union. In this case, the Commission will be aware of the power of Member State governments, and individuals affected by the Commission's inaction, to pursue an article 265 TFEU proceeding against the Commission in respect of a failure to act. All such options are, of course, presently being actively considered.

Coming, as you do from Portugal, the nation that first abolished the death penalty, I am sure you will take action as fast as humanly possible. We would like to explore with the Commission ways to bring about the necessary changes as quickly as possible. In that context we and our client are willing to meet with you at your earliest convenience to discuss how this can be effectively and, most importantly, quickly be achieved. One or more of our team will make ourselves available to come to Brussels at your convenience in January in order to help resolve this as quickly as possible.
We look forward to receiving your response.

Yours sincerely,

Brenda Coleman

Brenda Coleman

cc:

Ana Maria Gomes, MEP
Heidi Hautala, MEP
Sarah Ludford, MEP

Clive Stafford-Smith, Reprieve