

## **COMPLAINANT v MERCK SHARP & DOHME**

### **Alleged promotion of pembrolizumab on LinkedIn**

#### **CASE SUMMARY**

This case was in relation to the alleged promotion of pembrolizumab, following a LinkedIn post by a senior leader from NHS England, which was 'liked' by one ex-employee and nine current employees from Merck Sharp & Dohme.

The outcome in relation to 'likes' on the LinkedIn post in question by nine current employees, under the 2021 Code was:

<b>Breach of Clause 5.1</b>	<b>Failing to maintain high standards at all times</b>
<b>Breach of Clause 26.1</b>	<b>Promoting a prescription only medicine to the public</b>
<b>Breach of Clause 26.2</b>	<b>Encouraging members of the public to ask their health professional to prescribe a specific prescription only medicine</b>

The outcome in relation to 'likes' on the LinkedIn post in question by one ex-employee, under the 2021 Code was:

<b>No Breach of Clause 5.1</b>	<b>Requirement to maintain high standards at all times</b>
<b>No Breach of Clause 26.1</b>	<b>Requirement to not advertise prescription only medicines to the public</b>
<b>No Breach of Clause 26.2</b>	<b>Requirement that information about prescription only medicines which is made available to the public must not encourage the public to ask their health professional to prescribe a specific prescription only medicine</b>

The overall outcome in relation to Clause 2, under the 2021 Code was:

<b>No Breach of Clause 2</b>	<b>Requirement that activities or materials must not bring discredit upon, or reduce confidence in, the pharmaceutical industry</b>
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**This summary is not intended to be read in isolation.  
For full details, please see the full case report below.**

#### **FULL CASE REPORT**

A complaint was received from a complainant who described themselves as a concerned health professional, about Merck Sharp & Dohme Limited.

## COMPLAINT

The complainant noted that a post was made on LinkedIn, and it was 'liked' by staff based in the UK. The complainant alleged that this was both promoting to the general public, and by using a case study of a patient which was 'cancer free', which was not appropriate for Merck Sharp & Dohme staff to comment [sic].

When writing to Merck Sharp & Dohme, the Authority asked it to consider the requirements of Clauses 2, 5.1, 26.1 and 26.2 of the 2021 Code.

## RESPONSE

Merck Sharp & Dohme submitted that the LinkedIn post was published by a senior leader from NHS England, at the time, following The National Institute for Health and Care Excellence (NICE) recommendation of pembrolizumab as an option for people with triple-negative breast cancer, on 8 November 2022. The post triggered more than 530 reactions. It highlighted the collaboration between the NHS, Merck Sharp & Dohme and NICE, that had enabled accelerated access for patients with few treatment options available. The post then briefly referred to the efficacy of pembrolizumab in this patient population and mentioned a patient who entered pembrolizumab's clinical trial and was now cancer free. The NHS England senior leader finalised the post by signposting readers to a BBC article to 'read more about pembrolizumab being made available on the NHS'.

Merck Sharp & Dohme confirmed that the employee subject of the complaint ceased to be employed by Merck Sharp & Dohme UK on 31 March 2022 but failed to update their LinkedIn profile. As a result of this complaint, Merck Sharp & Dohme would be adding an explicit requirement during the off-boarding for leavers to update any curriculum vitae- related public profiles to reflect they were no longer a Merck Sharp & Dohme employee. Merck Sharp & Dohme was in discussions with its Human Resources department on the most effective way to implement this, as well as the best way to contact the ex-employee to request them to update their LinkedIn profile.

When investigating this LinkedIn post, it had come to Merck Sharp & Dohme's attention that, disappointingly, nine current Merck Sharp & Dohme UK employees had also 'liked' the post, accounting for 1.7% of 'likes'. In-line with Merck Sharp & Dohme's social media guidelines and compliance process, these employees had been instructed to 'unlike' the post and Merck Sharp & Dohme confirmed they had all done so. Merck Sharp & Dohme had triggered the 'Management of actual or potential noncompliance' procedure for these employees. Merck Sharp & Dohme took social media governance and compliance extremely seriously and to ensure it maintained high standards of adherence, it had a dedicated UK social media team in place of which one team member was dedicated to compliance and governance, alongside a significant number of varied resources housed on a central social media UK intranet platform to support UK colleagues with compliance and training. Merck Sharp & Dohme had a rigorous and proactive internal programme of training and communication relating to social media activities to ensure all UK-based employees were aware of their responsibilities. This internal programme included:

- 1 **Biennial training** on Merck Sharp & Dohme's social media policy assigned to all UK-based employees in the learning platform. Merck Sharp & Dohme provided a copy of the policy and the training Quiz for the PMCPA's review, as requested.

These constituted the training to employees for the UK Social Media Standard Operating Procedure (SOP). Merck Sharp & Dohme's strict and clear Global social media policy was also signposted in the UK training and SOP and was provided for the PMCPA's review. Merck Sharp & Dohme confirmed that this training was previously completed by all UK employees and the refresher training had been assigned in November 2022 as per standard process. Merck Sharp & Dohme would be changing the frequency of this training to yearly instead, considering this complaint. Merck Sharp & Dohme referred to the policies that were very specific about the scenario at hand. The wording did not leave room for any misinterpretation:

- The UK Policy specifically urged employees to 'Take care not to "like", "share", or "comment" on any product related posts – even within "independent" articles or MSD global content (under the ABPI Code of Practice this can be seen as promotion and a breach of the code)'. The associated 'MyLearning Quiz' contained 3/10 questions related to this scenario.
- The Global Social Media Policy also explicitly warned 'Our company is in a highly regulated industry. Your online activities must not be intended as, or be perceived as, promotion of our products. Therefore, when using social media, employees must not:
  - refer to our company's products (either brand, generic or class),
  - post images of our company's products, or
  - share, retweet or like third party content (news, posts by an HCP, etc.) that refers to our products (brand, generic or class) or that contains images of any of our products'.

In addition to this, there were other 'Do's and Don'ts' resources held in the central social media intranet platform to complement this training policy in alternative formats, i.e., Infographics, Scenarios, Downloadable PDFs that also addressed the situation at hand.

- 2 **General reminders in different formats** (email, newsletters, presentations, notice boards) via an internal communications drumbeat. Merck Sharp & Dohme had provided an example from its Global communications function issued on 1 June 2022 for the PMCPA's review.
- 3 **Proactive specific reminders to employees for major news milestones**, prompting caution in their social media usage around upcoming social media 'hot topics'. This was the case for this news item, with Merck Sharp & Dohme's internal communications function issuing a communication to all UK-based employees on 8 November 2022 and [a senior leader] issuing a second message to the Oncology Business Unit with specific social media reminders to not interact with any posts mentioning its products. Both communications included the 'Do's and Don'ts' resource mentioned above (MSD in the News email 8 November 2022 and Email from [a senior leader] 8 November 2022). Other examples of the proactive approach described above was following the publication of results for the Molnupiravir arm of the PANORAMIC study. The PANORAMIC study was a UK-wide clinical trial for

COVID-19 antiviral treatments (including Merck Sharp & Dohme's Molnupiravir), sponsored by [named university] and funded by [named research institute], with no involvement from Merck Sharp & Dohme. In October, a reminder was issued on behalf of Merck Sharp & Dohme's [senior leader] cautioning colleagues about their social media use when the PANORAMIC study interim results were publicised in the UK.

Merck Sharp & Dohme was extremely disappointed to see that despite all its efforts and resources invested in this area, some employees were still not effectively identifying that the content they were interacting with was content Merck Sharp & Dohme explicitly and repeatedly asked them not to [sic] via training and multiple routine and targeted communications.

It seemed that, perhaps unsurprisingly, when such newsworthy announcements were made by government officials in professional networks such as LinkedIn, acknowledging Merck Sharp & Dohme's collaboration with the health system, some employees forgot that, behind the longed-for official message of recognition of the pharmaceutical industry's contribution to people's lives, there was an underlying promotional claim about a company medicine. Merck Sharp & Dohme would be rolling out complementary training in additional scenario-based formats, to consolidate the message that no matter who posts or what the focus of a post was, if it was about a Merck Sharp & Dohme medicine or vaccine, its employees could simply not interact with it.

Merck Sharp & Dohme was confident that it drove a compliant culture, backed by its senior leadership and that the findings from this case were isolated and not intentional. Despite this being a case of indirect non-intentional dissemination of information about pembrolizumab by well-trained company employees via LinkedIn, Merck Sharp & Dohme had no choice but to accept a breach of Clauses 26.1 and 26.2, based on its interpretation of the scope of those clauses (attenuated by current case law). Merck Sharp & Dohme strongly refuted a breach of Clause 2 because an employee 'liking' a post highlighting the collaboration between Merck Sharp & Dohme, NICE and the NHS did not bring discredit upon, or reduce confidence in, the pharmaceutical industry. Merck Sharp & Dohme also strongly refuted a breach of Clause 5.1 as it had demonstrated above that it had a strong compliance framework backed up by senior leadership and they had initiated the actions described above to prevent this situation from recurring.

## **PANEL RULING**

The Panel noted that the LinkedIn post in question, was published by an NHS England [senior leader] at the time, following the NICE recommendation of pembrolizumab as an option for people with triple-negative breast cancer, on 8 November 2022.

The Panel noted that the post stated 'I am thrilled that up to 1600 women a year with triple negative breast cancer will be able to benefit from a potentially life-saving drug after the NHS has been able to agree a deal with @MSD and @NICE for pembrolizumab. Used in combination with chemotherapy, pembrolizumab reduces the chances of breast cancer progressing by almost two fifths. This will be the 25<sup>th</sup> breast cancer treatment fast-tracked to patients through funding from the Cancer Drugs Fund and the second treatment for triple negative breast cancer to be introduced this year on the NHS. There are relatively few effective treatment options for women with triple negative breast cancer, so today's deal is fantastic news for people like NHS nurse [named NHS nurse]. After receiving pembrolizumab in a clinical trial, [named NHS nurse] is now cancer-free and credits the treatment with allowing her to make full

recovery. You can read more about pembrolizumab being made available on the NHS here:'. The Panel noted that the post signposted a BBC news article titled 'NHS reaches deal for life-saving breast-cancer drug'.

The Panel noted that the LinkedIn post in question had over 530 reactions including 'likes' by nine current employees identified by Merck Sharp & Dohme and one ex-employee, who had ceased to be employed by the company in March 2022 but had not updated their LinkedIn profile. The Panel did not accept Merck Sharp & Dohme's position that one ex-employee was the subject of the complaint. The complaint consistently referred to 'staff' and had provided a static screenshot of the LinkedIn post showing 'likes' by three Merck Sharp & Dohme staff, one of whom was UK-based and appeared to be the ex-employee. The Panel considered that the complaint applied to all UK staff who had 'liked' the post and that whilst the complainant bore the burden of proof, it was not necessary for the complainant to provide evidence of each individual 'like' for the complaint to be so interpreted; the Panel considered that this approach was consistent with the established interpretation of such complaints. The Panel therefore considered that the complaint applied to the nine current employees and the ex-employee.

The Panel noted Merck Sharp & Dohme's submission that its UK Social Media Policy and Quiz was previously completed by all UK employees and the refresher training had been assigned in November 2022.

The Panel noted that Merck Sharp & Dohme's Social Media policy stated: 'Take care not to "like", "share", or "comment" on any product related posts – even within "independent" articles or MSD global content (under the ABPI Code of Practice this can be seen as promotion and a breach of the Code)'. The Panel noted Merck Sharp & Dohme's submission that 3 out of 10 questions in the associated 'MyLearningQuiz' related to this scenario.

The Panel noted that Merck Sharp & Dohme's Global Social Media policy, which was signposted in the UK policy and SOP, stated, among other things, that 'your online activities must not be intended as, or be perceived as, promotion of our products. Therefore, when using social media, employees must not share, retweet or like third party content (news, posts by an HCP, etc.) that refers to our products (brand, generic or class) or that contains images of any of our products'.

The Panel noted that Merck Sharp & Dohme's 'Dos and Don'ts' resource stated 'Do not like or share PRODUCT (brand or generic) related posts, any pharmaceutical product images – even if it is publicly available news. Check that any image/video you share does not contain product packs or logos. Take care with hashtags that may link to product information' and further noted the example of a proactive global communications email dated June 2022 in which Merck Sharp & Dohme's social media policy was signposted, along with other external communication guidelines.

The Panel noted Merck Sharp & Dohme's submission that its internal communications function issued a communication to all UK-based employees on 8 November 2022 in relation to the news item in the LinkedIn post in question. The Panel noted that this email stated 'Employees should not, as per our UK social media policy, retweet/repost or "like" ANY social media posts that mention our products or brand names from their personal accounts. This includes any social media tweets/posts from our company or any other company/stakeholder. We know that, particularly if there is positive news, you may want to share on social media. However, as these are channels for the general public, we must as employees adhere to both MHRA and PMCPA

Code of Practice guidance on not publicising our brands/products to the general public – which includes not liking or forwarding any social media that includes product mentions. This is very important as there could be serious implications to MSD'. The Panel noted that the email contained an attached pdf of the 'Dos and Don'ts' resource mentioned above.

The Panel noted Merck Sharp & Dohme's submission that on 8 November 2022, a second communication was issued by [a senior leader] to the Oncology Business Unit with specific social media reminders to not interact with any posts mentioning its products and contained a link to the 'Dos and Don'ts' resource. The Panel noted that this email similarly made it clear, among other things, that employees should not 'like' any social media posts that included mentions of products or brand names.

Clause 26.1 stated that prescription only medicines must not be advertised to the public and Clause 26.2 stated, among other things, that information about prescription only medicines which is made available to the public either directly or indirectly must not raise unfounded hopes of successful treatment and that statements must not be made for the purpose of encouraging members of the public to ask their health professional to prescribe a specific prescription only medicine.

The Panel understood that if an individual 'liked' a post it increased the likelihood that the post would appear in their connections' LinkedIn feeds, appearing as '[name] likes this'. In the Panel's view, activity conducted on social media that could potentially alert one's connections to the activity might be considered proactive dissemination of material, including to members of the public. In the Panel's view, the claim in the post 'After receiving pembrolizumab in a clinical trial, [named NHS nurse] is now cancer-free and credits the treatment with allowing her to make full recovery' could raise unfounded hopes of successful treatment with respect to the product in question. The Panel considered that 'liking' the LinkedIn post in question, thereby disseminating it, promoted pembrolizumab to the general public and might encourage members of the public to ask their health professional to prescribe pembrolizumab. The Panel therefore ruled a **breach of Clauses 26.1 and 26.2**, as accepted by Merck Sharp & Dohme. This ruling applied to the 'likes' posted by the nine current employees.

The Panel noted Merck Sharp & Dohme's submission that in-line with its social media guidelines and compliance process, the employees who had 'liked' the post in question had been instructed to 'unlike' the post and Merck Sharp & Dohme confirmed they had all done so, and that it also triggered its 'Management of actual or potential noncompliance' procedure for these employees.

The Panel considered that although Merck Sharp & Dohme had training resources and procedures in place to manage employees' use of social media, it had been let down by its nine current employees who had not followed its UK Social Media Policy or guidance provided in proactive internal communications to employees, resulting in breaches of the Code being ruled as above. In that regard, high standards had not been maintained and a **breach of Clause 5.1** was ruled.

With regard to the ex-employee who had also 'liked' the post, the Panel was concerned that Merck Sharp & Dohme did not have an off-boarding process in place with an explicit requirement for leavers to update their public profiles to reflect that they were no longer employed at the company. That the individual was no longer an employee would not be apparent to those to whom the 'like' was disseminated. However, noting that the individual had

ceased to be a Merck Sharp & Dohme employee some seven months previously, the Panel considered that the company was, in the particular circumstances of this case, not responsible for the activity in question. The Panel accordingly ruled **no breach of Clauses 26.1, 26.2 and 5.1** of the Code.

The Panel, noting its comments and rulings above, did not consider that the particular circumstances of this case warranted a ruling of a breach of Clause 2 which was a sign of particular censure and was reserved for such use and **no breach of Clause 2** was ruled.

**Complaint received**      **21 November 2022**

**Case completed**        **3 January 2024**