

**CASE AUTH/3431/11/20**

## **COMPLAINANT v ALLERGAN**

**Alleged promotion of Botox on LinkedIn and alleged breach of undertaking**

A complainant who described him/herself as a doctor practising in the field of aesthetics, complained about the promotion of Botox (botulinum toxin type A) on social media by Allergan Limited.

In support of his/her complaint, the complainant provided a number of screenshots of social media posts which had been 'liked' or commented on and shared by Allergan employees.

The complainant noted that he/she had written to the Authority in December 2019 with concerns about the company's de-medicalisation of the medical aesthetics industry and its cavalier approach to promoting its brands to health professionals and patients. The complainant had previously submitted the complaint in Case AUTH/3291/12/19 and referred to the undertaking given in that case.

The complainant submitted that the Authority's response in March 2020 suggested that 'Allergan advised reposting/sharing content on social media would be [made] a formal SOP [standard operating procedure] and rolled out to relevant staff'.

The complainant appreciated that changes within a large organisation like Allergan might take time but was concerned that this had still not been achieved.

Two of the screenshots provided by the complainant included five separate LinkedIn posts which had originally been posted by the same GP/chief executive officer (CEO) of an aesthetics clinic who was described in his/her profile as an 'Allergan mentee'. Two of his/her posts had been 'liked' by a named Allergan product specialist and three 'liked' by a named Allergan area sales manager, respectively.

The first LinkedIn post 'liked' by the named product specialist discussed men's treatments and included, *inter alia*, reference to 'Brotax: To soften fine lines and wrinkles', a shoutout to @[named individual] who had come to the clinic for some subtle 'Brotax' and a number of hashtags including #Brotax and #botox. The second LinkedIn post 'liked' by the same individual discussed booking an appointment at one of the group's clinics and included the hashtag, #Botox.

The complainant submitted that this was active promotion of Botox through re-sharing of the GP/CEO's posts on social media. The complainant noted that whilst the re-sharing took place in 2019, he/she found it unusual that Allergan had not included a full review of all social media activity within the formal SOP that it had rolled out to relevant staff with a requirement to remove and delete any activity that promoted prescription only medicines to the general public. The complainant stated that not only did the first post actively promote Botox through the inclusion of hashtags, references to 'Brotax' for men, it

demonstrated again Allergan's endorsement of the trivialisation of prescription only medicines within medical aesthetics.

The complainant stated that a named area sales manager, like the above product specialist, endorsed the GP/CEO's activity on social media. Two of the GP/CEO's LinkedIn posts 'liked' by the named area sales manager discussed the birthday of the organisation's flagship clinic and the second of those two posts promoted a prize of a free lip enhancement to one reader to celebrate the occasion; only the first post included the hashtag, #Botox. In this regard, the complainant noted that whilst lip enhancement was not a prescription only medicine, the General Medical Council (GMC) was quite clear that doctors should not allow any financial or commercial interests to adversely affect standards of good patient care and in that regard he/she submitted that Allergan's association with doctors who were comfortable to cross the line of good medical practice further supported his/her original concern about the company's de-medicalisation of medical aesthetics. The third LinkedIn post 'liked' by the same area sales manager included #Botox and discussed the fact that the [named clinic group] was a finalist in one of the categories of an aesthetics awards.

The complainant submitted that either Allergan's SOP on the use and engagement with social media was not fit for purpose, it simply did not consider this an important area of its business or perhaps it did not understand its obligations as a pharmaceutical manufacturer.

The complainant noted that the area sales manager referred to above did not seem satisfied in endorsing Allergan's Botox brand alone but was also keen to promote and endorse that of a competitor botulinum toxin. A screenshot was provided of what appeared to be a LinkedIn post from a sales manager at another named company which stated 'Countdown is on...' and included an image of the competitor botulinum toxin's exhibition stand at a conference which had been 'liked' by the Allergan area sales manager. The complainant alleged that this again suggested that Allergan's SOP on the use of, and engagement with, social media was seriously lacking and training of its staff inappropriate.

The complainant provided a screenshot which showed that a second named area sales manager appeared to have shared a LinkedIn post from a senior area sales manager at Allergan Aesthetics which included information about CoolSculpting and CoolTone. In that regard, the complainant noted that Allergan did not feel it was necessary to review the social media activity of an employee who had acted inappropriately within the complainant's last complaint. In response to Case AUTH/3291/12/19 Allergan stated that 'it was acceptable in principle to promote medical devices to members of the public'. The complainant stated that whilst he/she did not dispute that, the company's training around its policies appeared to be substandard and its team's attention to detail was low. The complainant noted that the image provided within the post about CoolSculpting clearly showed reference to Botox on an Allergan exhibition stand. The complainant noted that whilst the promotional draw was Coolsculpting and Allergan had previously stated that it had no intention to promote Botox or other prescription only medicines to the public through social media or any other platforms, this was not the sentiment of its employees.

The complainant noted that the second area sales manager also deemed it acceptable to endorse Botox treatments again through hashtags and provided a screenshot showing that he/she had 'liked' a LinkedIn post by a cosmetic physician and CEO of a named academy. The post described the partnership between the academy and Allergan as a Tier 1 preferred training partner. The post stated, inter alia, 'Being in partnership with the leading brands allows us to deliver the highest quality of education to our trainees, and the best treatments possible for our patients' and thanked @allergan\_medical\_institute for its support and included the hashtags, #botox and #allergan.

The complainant further noted that on 6 March 2020 a second named product specialist was photographed with a named clinician from a named aesthetics clinic. The photograph was published on the clinic's Instagram account (screenshot provided). The clinician's Instagram post on his/her clinic's account was headed #botox[named area] and below the photograph stated 'Lovely to see @[named Allergan product specialist] this lunchtime at [geographical area] clinic for a catch up and to develop the business plans for 2020 for [named clinic]. Allergan (the makers of Botox and Juvederm) have been our partners for years and their support is invaluable in teaching, training and supporting our business to deliver the highest quality of service to our lovely clients'. The hashtags included, inter alia, #botoxandfillers and eight hashtags stating 'botox' followed by a named geographical area. The complainant stated that the number of references to Botox and number of hashtags captured in the customer's Instagram post were quite remarkable and suggested that Allergan's processes and training were suboptimal.

The complainant stated that with the employee in question's own Allergan active Instagram account set to public, he/she could not have failed to notice that he/she had been tagged in a customer's post particularly given he/she had also tagged the customer in a post on his/her own Allergan Instagram account. The employee's Instagram post included the photograph referred to above and stated 'Exciting meeting with @[named health professional] and the team at @[named clinic] today!' and included three hashtags related to Juvederm.

The complainant stated that given all of the above, he/she wondered whether Allergan had engaged with the PMCPA or whether he/she should simply accept that the company would act to its own code of conduct, ignoring UK legal parameters.

The detailed response from Allergan is given below.

The Panel noted that the complainant in this case was also the complainant in Case AUTH/3291/12/19 in which Allergan was ruled in breach of the Code for promoting Botox to the public via its corporate Juvederm Instagram account and via the personal Instagram accounts of two of its employees. The company accepted the Panel's rulings in that case and provided its undertaking on 16 March 2020.

The Panel noted that whilst it was not possible to identify the date that Allergan employees had 'liked' the various LinkedIn posts highlighted by the complainant, the screenshots provided by the complainant showed that the original posts appeared to be at least 11 months old when the complaint was submitted – ie they had been posted before Allergan had provided its undertaking in Case AUTH/3291/12/19. The Panel further noted Allergan's submission that discussions with the employees involved

confirmed that any interaction they had would have occurred at the time of the initial third party post, and not any time since then. Further, the Panel noted that it could be seen from the screenshots provided by the complainant that the second area sales manager had commented and shared the post regarding CoolSculpting and CoolTone a year before the complaint (made in November 2020) was submitted to the PMCPA and the Instagram activity example provided by the complainant had occurred on 6 March 2020. The Panel noted that the complainant had acknowledged that the re-sharing of some posts had occurred in 2019 and that he/she found it unusual that Allergan had not included a full review of all social media activity within its SOP with a requirement to remove and delete any historical activity that promoted prescription only medicines to the general public.

The Panel noted that as a result of the undertaking given in Case AUTH/3291/12/19, Allergan had given an assurance that it would, forthwith, take all possible steps to avoid similar breaches of the Code occurring in the future.

The Panel noted Allergan's submission that senior leaders had sent numerous communications to UK employees reminding them of the requirements related to social media activities, along with a short one-page reference guide for social media activity, actions which appeared to have been taken in relation to Case AUTH/3291/12/19. Readers were asked to respond to confirm that they had read, understood and acknowledged the email by clicking on a tab within it by 15 January 2020. The Panel further noted that details of Case AUTH/3291/12/19 were emailed to staff in September 2020 and stated that in response to that case Allergan had taken swift action to remove the posts (before the complaint was received) and reminded staff of the requirements in relation to social media policies and stated that it had re-issued the Reference Guide to Social Media to all employees which was attached to the email. The email further stated that Allergan had reviewed the social media training and that a series of initiatives would be introduced in the UK in the coming weeks.

The Panel further noted that the Allergan UK Employee Social Media Policy (UKIE-COMPL-POL-002) version 1 had been approved on 17 November 2020. The Panel noted that this policy stated that readers should not endorse, recommend, or otherwise refer consumers (or social media users) to a specific medical practice or health professional. It further listed examples of what posts should comply with which included that if a post contained links the reader must know to where those links led and be sure that the link destinations were acceptable. It further stated that particular care must be taken to check that link destinations did not contain any reference to a prescription only medicine or to websites which had not been approved for UK use for example global company websites.

The Panel noted Allergan's submission that it had ensured that the employees whose social media actions had been referred to by the complainant had removed all similar posts and reversed any social media activity, as far as practicably possible. It appeared to the Panel that this had only occurred following receipt of the current complaint (Case AUTH/3431/11/20). In the Panel's view, Allergan would have been well advised to have carried out this activity following Case AUTH/3291/12/19 to ensure that all of its employees had removed all similar posts and reversed any social media activity at that time that was not in line with the requirements of the Code.

Nonetheless, given that the undertaking referred to future activity the Panel considered that Allergan had not breached the terms of its undertaking. The undertaking was provided on 16 March 2020 and there was no evidence that any of the social media activity highlighted by the complainant in this case had occurred after that date; it all appeared to be historical activity. No breach of the Code was ruled and thus the Panel also ruled no breaches of the Code.

The Panel noted that the social media activity in question in this case involved either LinkedIn or Instagram.

The Panel noted that one of the LinkedIn posts by a health professional who described him/herself as an 'Allergan mentee' and which was 'liked' by the first named Allergan product specialist when referring to the use of Botox in men, referred to the medicine as 'Brotox'. The post referred to the use of 'Brotox' to soften fine lines and wrinkles. Further the hashtags, #botox and #Brotox were included within the LinkedIn post. The post referred to Botox and its indication and included reference to #botox and #Brotox which would direct readers to their related hashtag feeds which were likely to contain posts that promoted Botox. The Panel considered that in 'liking' the LinkedIn post and, on the balance of probabilities, proactively distributing it to his/her connections on LinkedIn which would likely include individuals who did not meet the Code's definition of a health professional or other relevant decision maker, the Allergan employee had promoted Botox, a prescription only medicine, to the public. A breach of the Code was ruled.

The Panel further considered that by 'liking' the post the product specialist had endorsed the use of the term 'Brotox', which in its view trivialised the use of a prescription only medicine as alleged. In that regard, high standards had not been maintained and a breach of the Code was ruled.

The Panel noted that the second LinkedIn post by the same health professional and 'liked' by the same product specialist was regarding booking an appointment at one of the group's aesthetics clinics and included the hashtag, #Botox. The Panel noted that whilst no indication was included within the health professional's post at issue, the indication of Botox was widely known, including to members of the public, and thus, in the Panel's view, mention of Botox in itself was promotional. The Panel further noted that the hashtag would direct readers to the Botox hashtag feed which was likely to contain posts that promoted Botox. The Panel noted that in 'liking' the LinkedIn post and, on the balance of probabilities, proactively distributing it to his/her connections on LinkedIn, which would likely include individuals who did not meet the Code's definition of a health professional or other relevant decision maker, the Allergan employee had promoted Botox, a prescription only medicine, to the public. The Panel ruled a breach of the Code.

The Panel noted that three LinkedIn posts 'liked' by the first area sales manager were originally posted by the same health professional who created the LinkedIn posts above.

The Panel noted the complainant's concern that an Allergan employee in 'liking' one of the posts had engaged with a health professional who promoted the prize of a free lip enhancement to celebrate the birthday of one of his/her clinics. Whilst the Panel queried whether this was an appropriate post for a pharmaceutical company employee to engage

with, it noted that as lip enhancement did not involve the use of a prescription only medicine, as acknowledged by the complainant, reference to such a procedure did not fall within the scope of the Code. The Panel therefore ruled no breach of the Code in relation to the Allergan employee's 'like' of the LinkedIn post in question.

The Panel noted that the further two LinkedIn posts by the same health professional and 'liked' by the same area sales manager, one also relating to the above clinic's birthday and the other relating to the group of clinics being a finalist in the clinic of the year category at an awards ceremony, both included the hashtag, #Botox. The Panel noted that whilst no indication was included within the health professional's post at issue, the indication of Botox was widely known, including to members of the public, and thus, in the Panel's view, mention of Botox in itself was promotional. The Panel further noted that the hashtag would direct readers to the Botox hashtag feed which was likely to contain posts that promoted Botox. The Panel noted that in 'liking' the two posts and, on the balance of probabilities, proactively distributing them to his/her connections on LinkedIn, which would likely include individuals who did not meet the Code's definition of a health professional or other relevant decision maker, the Allergan employee had promoted Botox, a prescription only medicine, to the public. The Panel ruled a breach of the Code in relation to each post.

The Panel noted that the same area sales manager had 'liked' a LinkedIn post by a manager of another pharmaceutical company which stated 'Countdown is on...' and included an image of a Nabota conference stand. Nabota was another botulinum toxin which did not appear to be an Allergan product; the Panel had no information before it regarding where the conference in question had been held and whether Nabota was licensed in the UK or elsewhere. The Panel considered that although the LinkedIn post had been 'liked' and thus, on the balance of probabilities, proactively distributed by an Allergan employee to his/her connections, which would likely include individuals who did not meet the Code's definition of a health professional or other relevant decision maker, there was no evidence that the Allergan employee had promoted one of Allergan's prescription only medicines to the public and thus no breach of the Code was ruled.

The Panel noted that a second area sales manager created a LinkedIn post by commenting 'Now that's cool!!' and sharing an original LinkedIn post by an Allergan Aesthetics senior area sales manager. The Panel noted the complainant's concern that the image within the original LinkedIn post about CoolSculpting clearly showed reference to Botox on an Allergan exhibition stand. The Panel noted that the reference to Botox was small and almost illegible in the background of the image provided by the complainant. Therefore, in the Panel's view, the complainant had not discharged his/her burden of proof that the Allergan employee's proactive distribution of the original post to his/her connections on LinkedIn, which would likely include individuals who did not meet the Code's definition of a health professional or other relevant decision maker, had constituted the promotion of a prescription only medicine to the public and no breach of the Code was ruled in relation to that post.

The Panel noted that the second area sales manager had also 'liked' a LinkedIn post from a cosmetic physician and CEO of a named academy describing the partnership between the academy and Allergan as a 'Tier 1 preferred training partner'. The post stated, inter alia, 'Being in partnership with the leading brands allows us to deliver the highest quality of education to our trainees, and the best treatments possible for our patients' and

thanked @allergan\_medical\_institute for its support and included the hashtags, #botox and #allergan. The post referred to being in partnership with leading brands when referring to Allergan allowing the academy to deliver the best treatments possible for patients which in the Panel's view were promotional claims for Allergan's medicines including Botox. Further the post included the hashtag, #botox which would direct readers to the hashtag feed which was likely to contain posts that promoted Botox. The Panel considered that in 'liking' the LinkedIn post and, on the balance of probabilities, proactively distributing it on LinkedIn to his/her connections, which would likely include individuals who did not meet the Code's definition of a health professional or other relevant decision maker, the Allergan employee had promoted Botox, a prescription only medicine, to the public. A breach of the Code was ruled.

The Panel noted that a second product specialist was tagged in a named clinician's Instagram post on his/her clinics account which included a photograph of the clinician and the product specialist. The clinician's Instagram post was headed '#botox[named area]' followed by the photograph. Below the photograph, the post stated [named health professional's Instagram user name] 'Lovely to see @[named Allergan employee] this lunchtime at the [geographical area] clinic for a catch up and to develop the business plans for 2020 for [named clinic]. Allergan (the makers of Botox and Juvederm) have been our partners for years and their support is invaluable in teaching, training and supporting our business to deliver the highest quality of service to our lovely clients'. The hashtags included, inter alia, #facialaesthetics, #botoxandfillers and eight hashtags stating 'botox' followed by a named geographical area.

In the Panel's view, whilst the Allergan employee would be notified when tagged, the Panel did not consider that this automatically meant that Allergan or its employee could, in those circumstances, be held responsible for the clinician's post. Whilst the Panel understood that an individual might not be able to prevent him/herself from being tagged in other individuals' posts, it appeared that if a user wanted to prevent tagged photographs from automatically being added to his/her page there was a setting that allowed a user to manually add the photograph or hide it from their profile page. The Panel noted, however, that individuals had total control over whether or not to tag others in their posts. In that regard, the Panel noted that companies/employees that included tags as part of their posts, as in the above, and therefore directed members of the public to other accounts, needed to be satisfied that the content on those accounts was reasonable as far as the Code was concerned. If that were not the case, then companies/employees would be able to direct readers to independent profiles and the posts on them as a means of circumventing the Code.

In that regard, the Panel noted that the Allergan employee's Instagram account included a post which contained the same photograph as above and whilst it only referred to Juvederm, which was not a prescription only medicine, the employee's Instagram post also included a tag to the named clinician which if clicked appeared to take readers to his/her clinic's account where the post above could be viewed without having to follow the account.

The Panel considered that in tagging the clinician in his/her Instagram post and thus directing readers to the clinician's clinic's social media account the Allergan employee had promoted a prescription only medicine to the public. The clinician's post included reference to Botox within the wording of the post. The Panel noted that whilst no

indication was included within the health professional's post at issue, the indication of Botox was widely known, including to members of the public, and thus, in the Panel's view, mention of Botox in itself was promotional. The Panel further noted that the post included a number of hashtags which would direct readers to the respective hashtag feeds which were likely to contain posts that promoted Botox. A breach of the Code was ruled which was successfully appealed.

The Panel noted its comments and rulings above and considered that Allergan had failed to maintain high standards and a breach of the Code was ruled. Further, the Panel was extremely concerned that Allergan employees had either directed others to or had proactively distributed posts that promoted a prescription only medicine on social media; it was particularly concerned about the terminology used in some of those posts. The Panel acknowledged that while the Allergan employees might be involved in the promotion of products which were not covered by the Code, eg Juvederm, some would likely also be responsible for the promotion of Botox, a prescription only medicine which was covered by the Code. The Panel noted its comments and rulings above and considered that in promoting prescription only medicines to the public and trivialising aesthetic medicine Allergan had reduced confidence in, and brought discredit upon, the pharmaceutical industry. A breach of the Code was ruled.

On appeal by Allergan, the Appeal Board upheld all but one of the Panel's rulings of breaches of the Code in relation to advertising to the public and upheld the Panel's ruling that high standards had not been maintained. Thus, all but one of the appeals on these points were not successful.

The Appeal Board noted that social media was often used by young people. The Appeal Board was extremely concerned that Allergan employees had either directed others to or had proactively distributed posts that promoted a prescription only medicine to the public on social media; it was particularly concerned about the terminology used in some of the posts. The Appeal Board considered that in the repeated promotion of a prescription only medicine to the public and trivialising the use of a prescription only medicine Allergan had reduced confidence in, and brought discredit upon, the pharmaceutical industry. The Appeal Board upheld the Panel's ruling of a breach of Clause 2. The appeal on this point was not successful.

Taking all the circumstances into account the Appeal Board decided that in accordance with Paragraph 11.3 of the Constitution and Procedure, Allergan should be publicly reprimanded for its widespread use of social media which promoted a prescription only medicine to the public.

A complainant who described him/herself as a GMC registered doctor practising in the field of aesthetics, complained about the promotion of Botox (botulinum toxin type A) on social media by Allergan Limited.

The complainant provided a number of screenshots of social media posts which had been 'liked' or commented on and shared by Allergan employees.

The complainant noted that he/she had written to the Authority in December 2019 with concerns about the company's de-medicalisation of the medical aesthetics industry and its cavalier approach to promoting its brands to health professionals and patients. The complainant had

previously submitted the complaint in Case AUTH/3291/12/19 and referred to the undertaking given in that case.

Botox was indicated for, *inter alia*, the temporary improvement in the appearance of moderate to severe vertical lines between the eyebrows seen at maximum frown (glabellar lines) and/or, moderate to severe lateral canthal lines (crow's feet lines) seen at maximum smile and/or, moderate to severe forehead lines seen at maximum eyebrow elevation when the severity of the facial lines has an important psychological impact in adult patients.

## COMPLAINT

The complainant submitted that the Authority's response in March 2020 regarding his/her last complaint suggested that 'Allergan advised reposting/sharing content on social media would be [made] a formal SOP [standard operating procedure] and rolled out to relevant staff through the company's Learning Management System'.

The complainant appreciated that changes within a large organisation like Allergan might take more than a few days but given it was now almost a year on from that communication he/she was concerned that this had still not been achieved.

Two of the screenshots provided by the complainant included five separate LinkedIn posts which had originally been posted by the same GP/chief executive officer (CEO) of an aesthetics clinic who was described in his/her profile as an 'Allergan mentee'. Two of his/her posts had been 'liked' by a named Allergan product specialist and three 'liked' by a named Allergan area sales manager, respectively.

The first LinkedIn post 'liked' by the named product specialist discussed men's treatments and included, *inter alia*, reference to 'Brotox: To soften fine lines and wrinkles', a shoutout to @[named individual] who had come to the clinic for some subtle 'Brotox' and a number of hashtags including #Brotox and #botox. The second LinkedIn post 'liked' by the same individual discussed booking an appointment at one of the group's clinics and included the hashtag, #Botox.

The complainant submitted that this was active promotion of Botox through re-sharing of the GP/CEO's posts on social media. The complainant noted that whilst the re-sharing took place in 2019, he/she found it unusual that Allergan had not included a full review of all social media activity within the formal SOP that it had rolled out to relevant staff with a requirement to remove and delete any activity that promoted prescription only medicines to the general public. The complainant stated that not only did the first post actively promote Botox through the inclusion of hashtags, references to 'Brotox' for men it demonstrated again Allergan's endorsement of the trivialisation of prescription only medicines within medical aesthetics.

The complainant stated that a named area sales manager, like the above product specialist, endorsed the GP/CEO's activity on social media. Two of the GP/CEO's LinkedIn posts 'liked' by the named area sales manager discussed the birthday of the organisation's flagship clinic and the second of those two posts promoted a prize of a free lip enhancement to one reader to celebrate the occasion; only the first post included the hashtag, #Botox. In this regard, the complainant noted that whilst lip enhancement was not a prescription only medicine, the General Medical Council (GMC) was quite clear that doctors should not allow any financial or commercial interests to adversely affect standards of good patient care and in that regard

he/she submitted that Allergan's association with doctors who were comfortable to cross the line of good medical practice further supported his/her original concern about the company's de-medicalisation of medical aesthetics. The third LinkedIn post 'liked' by the same area sales manager included #Botox and discussed the fact that the [named clinic group] was a finalist in one of the categories of an aesthetics awards.

The complainant submitted that either Allergan's SOP on the use and engagement with social media was not fit for purpose, it simply did not consider this an important area of its business or perhaps it did not understand its obligations as a pharmaceutical manufacturer.

The complainant noted that the area sales manager referred to above did not seem satisfied in endorsing Allergan's Botox brand alone but was also keen to promote and endorse that of a competitor botulinum toxin, Nabota. A screenshot was provided of what appeared to be a LinkedIn post from a sales manager at a named company which stated 'Countdown is on...' and included an image of the Nabota exhibition stand at a conference which had been 'liked' by the Allergan area sales manager. The complainant submitted that this again suggested that Allergan's SOP on the use of, and engagement with, social media was seriously lacking and training of its staff inappropriate.

The complainant provided a screenshot which showed that a second named area sales manager appeared to have shared a LinkedIn post from a senior area sales manager at Allergan Aesthetics which included information about CoolSculpting and CoolTone [CoolSculpting was a fat freezing procedure to destroy fat cells in different areas around the body] stating 'Now that's Cool!!'. In that regard, the complainant noted that Allergan did not feel it was necessary to review the social media activity of an employee who had acted inappropriately within the complainant's last complaint. In response to Case AUTH/3291/12/19 Allergan stated that 'it was acceptable in principle to promote medical devices to members of the public'. The complainant stated that whilst he/she did not dispute that, the company's training around its policies appeared to be substandard and its team's attention to detail was low. The complainant noted that the image provided within the post about CoolSculpting clearly showed reference to Botox on an Allergan exhibition stand. The complainant noted that whilst the promotional draw was Coolsculpting and Allergan had previously stated that it had no intention to promote Botox or other prescription only medicines to the public through social media or any other platforms, this was not the sentiment of its employees.

The complainant noted that the second area sales manager also deemed it acceptable to endorse Botox treatments again through hashtags and provided a screenshot showing that he/she had 'liked' a LinkedIn post by a cosmetic physician and CEO of a named academy. The post described the partnership between the academy and Allergan as a Tier 1 preferred training partner. The post stated, inter alia, 'Being in partnership with the leading brands allows us to deliver the highest quality of education to our trainees, and the best treatments possible for our patients' and thanked @allergan\_medical\_institute for its support and included the hashtags, #botox and #allergan.

The complainant further noted that on 6 March 2020 a second named product specialist was photographed with a named clinician from a named aesthetics clinic. The photograph was published on the clinic's Instagram account (screenshot provided). The clinician's Instagram post on his/her clinic's account was headed #botox[named area] and below the photograph stated 'Lovely to see @[named Allergan product specialist] this lunchtime at [geographical area] clinic for a catch up and to develop the business plans for 2020 for [named clinic]. Allergan (the

makers of Botox and Juvederm) have been our partners for years and their support is invaluable in teaching, training and supporting our business to deliver the highest quality of service to our lovely clients'. The hashtags included, inter alia, #botoxandfillers and eight hashtags stating 'botox' followed by a named geographical area. The complainant stated that the number of references to Botox and number of hashtags captured in the customer's Instagram post were quite remarkable and suggested that Allergan's processes and training were suboptimal.

The complainant stated that with the employee in question's own Allergan active Instagram account set to public (screenshots provided), he/she could not have failed to notice that he/she had been tagged in a customer's post particularly given he/she had also tagged the customer in a post on his/her own Allergan Instagram account, a copy of which was provided. The employee's Instagram post included the photograph referred to above and stated 'Exciting meeting with @[named health professional] and the team at @[named clinic] today!' and included three hashtags related to Juvederm.

The complainant stated that given all of the above, he/she wondered whether Allergan had engaged with the PMCPA or whether he/she should simply accept that the company would act to its own code of conduct, ignoring UK legal parameters.

When writing to Allergan, the Authority asked it to consider the requirements of Clauses 2, 9.1 and 26.1 in relation to social media activities and governance and Clauses 2, 9.1 and 29 with regard to the alleged breach of the undertaking given in Case AUTH/3291/12/19.

## RESPONSE

Allergan submitted that based upon its investigation into the complaint, it should not be sanctioned with breaches of Clauses 2, 9.1 and 29 with regards to breaching its undertaking and Clauses 2, 9.1 and 26.1 with regards to its social media activities and governance as the interactions with third party posts on LinkedIn took place prior to the ruling in Case AUTH/3291/12/19 since when, as part of its undertaking, Allergan had put a number of measures in place to deal with social media activities and governance, and therefore further breaches were not warranted.

Allergan noted that the complainant had provided examples of social media activity where Allergan employees had 'liked', and in one instance commented on, the social media activity of third parties which referred to prescription only medicines. As these activities occurred before Allergan had responded to Case AUTH/3291/12/19, it did not consider it appropriate to rule further breaches of Clauses 2, 9.1 or 26.1 for which it had taken the following action:

- Allergan senior leaders had sent numerous communications to UK employees reminding them of the requirements related to social media activities, along with a short one-page reference guide for social media activity
- the Allergan social media SOP had been updated and training had been provided
- a number of key positions had been recruited, including several senior leadership positions such as a director for marketing, national sales director and a new general manager, all of whom had a priority to strengthen compliance governance

- additional compliance structures had been created, including fortnightly drop-in compliance clinics for all staff, as well as regular compliance committees for senior leadership to address any areas of improvement to ensure previous breaches did not occur again
- Allergan had since ensured that the employees whose social media actions had been referred to by the complainant had removed all similar posts and reversed any social media activity, as far as practicably possible.

Allergan stated that as part of its on-going commitment to the Code, it had scheduled additional face-to-face (virtual) mandatory training which required all employees to review their historical social media activity to ensure posts and/or interactions that would be misperceived as referring directly or indirectly to any prescription only medicines were removed as far as practicably reasonable.

Training certificates of the social media policy in place at the time of the social media activity were provided. Allergan also provided the above referenced updated social media policy, communications from senior leadership, and the short one-page reference guide.

With regards to activity on LinkedIn, Allergan stated that the screenshots of the first five examples showed that one social media post was posted 11 months before the screenshots were taken and the others were posted at least a year before such screenshots were taken by the complainant. Due to the way that LinkedIn displayed dates, it was not possible to determine the exact date of the posts, however, based on the date of the complaint, Allergan estimated they would all have occurred at the latest in November/December 2019, and possibly earlier.

In the one example where an Allergan employee had made a comment (the complaint regarding the post about CoolSculpting), Allergan submitted that the screenshot showed the comment was made at least a year before the complaint. In the other cases an exact date of the Allergan interaction with the post was not possible to identify, however discussions with the employees involved confirmed that any interaction they had would have occurred at the time of the initial third party post, and not any time since then. Allergan supported this view as the transient nature of social media meant that although posts existed until deleted, they were generally only active and appeared on an individual's LinkedIn feed for a short period of time. In order to interact with the post a significant time period after the date of posting, one would have to consciously navigate on to an individual's LinkedIn profile and search through historical activity. This was also supported by the one example (CoolSculpting) where the date of Allergan employee's activity could be narrowed down as it occurred at the same time as the third party post.

The reason Allergan believed it was prudent to provide the above clarification was to, first, show the lengths it took to find such social media activity of an Allergan employee on LinkedIn, and secondly, make it clear that since those posts from 2019 and the beginning of 2020 (a period in which the PMCPA had already sanctioned Allergan for the same reasons), Allergan had implemented robust compliance systems to support its employees in paying due care and attention when engaging on social media.

As a result of the ruling in Case AUTH/3291/12/19, Allergan signed an undertaking on 16 March 2020. All LinkedIn examples provided in this complaint predated that undertaking. In Allergan's view, there had been no breach of undertaking.

With regard to the Instagram posts, Allergan's position was that there was no mention of any prescription only medicines in its employee's social media post or Instagram profile, merely the social media account of a health professional was referenced. The complainant had provided a screenshot of the health professional's post which did refer to a prescription only medicine, however Allergan could not be held accountable for the activities of third parties. By referencing a health professional's social media account in a social media post, Allergan did not accept liability for the social media activity of that health professional. Further, Allergan considered that should a pharmaceutical company be liable for such social media posts of health professionals which might be posted well before or after any Allergan employee's post, it would have wide-ranging ramifications across the industry. Health professionals were bound by relevant rules and regulations when promoting their activity, such as but not limited to, the Advertising Standards Agency's UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (CAP Code), which placed restrictions on how prescription only medicines were presented to members of the public. Though it was not Allergan's responsibility to continually review the posts of health professionals to determine whether they had acted in contravention to advertising rules, the company often reminded them about the guidance on advertising prescription only medicines.

Allergan agreed that it was the company's responsibility to ensure that its employees' posts did not contravene these rules and, in the evidence provided by the complainant, Allergan was certain that there were no references to any prescription only medicines and therefore the Allergan posts did not breach any advertising laws, and certainly not any provisions of the Code.

## **PANEL RULING**

The Panel noted that the complainant in this case was also the complainant in Case AUTH/3291/12/19 in which Allergan was ruled in breach of the Code for promoting Botox to the public via its corporate Juvederm Instagram account and via the personal Instagram accounts of two of its employees. The company accepted the Panel's rulings in that case and provided its undertaking on 16 March 2020.

The Panel noted that whilst it was not possible to identify the date that Allergan employees had 'liked' the various LinkedIn posts highlighted by the complainant, the screenshots provided by the complainant showed that the original posts appeared to be at least 11 months old when the complaint was submitted – ie they had been posted before Allergan had provided its undertaking in Case AUTH/3291/12/19. The Panel further noted Allergan's submission that discussions with the employees involved confirmed that any interaction they had would have occurred at the time of the initial third party post, and not any time since then. Further, the Panel noted that it could be seen from the screenshots provided by the complainant that the second area sales manager had commented and shared the post regarding CoolSculpting and CoolTone a year before the complaint (made in November 2020) was submitted to the PMCPA and the Instagram activity example provided by the complainant had occurred on 6 March 2020. The Panel noted that the complainant had acknowledged that the re-sharing of some posts had occurred in 2019 and that he/she found it unusual that Allergan had not included a full review of all social media activity within its SOP with a requirement to remove and delete any historical activity that promoted prescription only medicines to the general public.

The Panel noted that as a result of the undertaking given in Case AUTH/3291/12/19, Allergan had given an assurance that it would, forthwith, take all possible steps to avoid similar breaches of the Code occurring in the future.

The Panel noted Allergan's submission that senior leaders had sent numerous communications to UK employees reminding them of the requirements related to social media activities, along with a short one-page reference guide for social media activity, actions which appeared to have been taken in relation to Case AUTH/3291/12/19. The Panel noted that an email sent to Allergan staff in January 2020 stated:

'...always remember that you do not interact on any social media platform with any posts that make reference to a Prescription Only Medicine or products in development. This could be mention of brand names (even if one word), pack shots/images, audio, video etc and that would include liking, sharing, reposting, adding to personal Instagram stories and any other form of social media. It is important to know that LinkedIn is a social media site, so this requirement extends to activity on LinkedIn.'

Readers were asked to respond to confirm that they had read, understood and acknowledged the email by clicking on a tab within it by 15 January 2020. The Panel further noted that details of Case AUTH/3291/12/19 were emailed to staff in September 2020 and stated that in response to that case Allergan had taken swift action to remove the posts (before the complaint was received) and reminded staff of the requirements in relation to social media policies and stated that it had re-issued the Reference Guide to Social Media to all employees which was attached to the email. The email further stated that Allergan had reviewed the social media training and that a series of initiatives would be introduced in the UK in the coming weeks.

The Panel further noted that the Allergan UK Employee Social Media Policy (UKIE-COMPL-POL-002) version 1 had been approved on 17 November 2020. The Panel noted that this policy stated that readers should not endorse, recommend, or otherwise refer consumers (or social media users) to a specific medical practice or health professional. It further listed examples of what posts should comply with which included that if a post contained links the reader must know to where those links led and be sure that the link destinations were acceptable. It further stated that particular care must be taken to check that link destinations did not contain any reference to a prescription only medicine or to websites which had not been approved for UK use for example global company websites.

The Panel noted Allergan's submission that it had ensured that the employees whose social media actions had been referred to by the complainant had removed all similar posts and reversed any social media activity, as far as practicably possible. It appeared to the Panel that this had only occurred following receipt of the current complaint (Case AUTH/3431/11/20). In the Panel's view, Allergan would have been well advised to have carried out this activity following Case AUTH/3291/12/19 to ensure that all of its employees had removed all similar posts and reversed any social media activity at that time that was not in line with the requirements of the Code.

Nonetheless, given that the undertaking referred to future activity the Panel considered that Allergan had not breached the terms of its undertaking. The undertaking was provided on 16 March 2020 and there was no evidence that any of the social media activity highlighted by the complainant in this case had occurred after that date; it all appeared to be historical activity. No breach of Clause 29 was ruled and thus the Panel also ruled no breach of Clauses 2 and 9.1.

The Panel noted that the social media activity in question in this case involved either LinkedIn or Instagram.

With regard to LinkedIn, the Panel noted that it was different to some other social media platforms in that it was a business and employment-orientated network and was primarily, although not exclusively, associated with an individual's professional heritage and current employment and interests; its application was not limited to the pharmaceutical industry or to health care. In the Panel's view, it was of course not unacceptable for company employees to use personal LinkedIn accounts. The Panel noted that compliance challenges arose when the personal use of social media by pharmaceutical company employees overlapped with their professional responsibilities or the interests of the company. The Panel noted that material could be disseminated or highlighted by an individual on LinkedIn in a number of ways, by posting, sharing, commenting or 'liking'. The Panel understood that if an individual 'liked' a post it increased the likelihood that the post would appear in his/her 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. In addition, an individual's activity and associated content might appear in the individual's list of activities on his/her LinkedIn profile page which was visible to his/her connections; an individual's profile page was also potentially visible to others outside his/her network depending on the individual's security settings. Company employees should assume that such activity would, therefore, potentially be visible to both those who were health professionals or other relevant decision makers and those who were members of the public. In that regard it was imperative that they acted with extreme caution when using all social media platforms, including LinkedIn, to discuss or highlight issues which impinged on their professional role or the commercial/research interests of their company. Whether the Code applied would be determined on a case-by-case basis, taking into account all of the circumstances including, among other things, content and distribution of the material. If an employee's personal use of social media was found to be in scope of the Code, the company would be held responsible. The Panel considered that companies should assume that the Code would apply to all work-related, personal LinkedIn posts/activity by their employees unless, for very clear reasons, it could be shown otherwise. Any material associated with a social media post, for example a link within a post, would be regarded as being part of that post. Companies must have comprehensive and up to date social media policies that provide clear and unequivocal guidance on what was, and what was not, acceptable and it was extremely important that employees were trained upon them and followed them.

The Panel understood that the hashtag feature, which had been in use on other social media platforms, was introduced to LinkedIn in 2018. The Panel understood that hashtags allowed users' content to be grouped, meaning that the relevant people with those interests could easily find content surrounding the hashtag. Hashtags allowed content on the hashtag's topic to be found easier; clicking on a hashtag would take readers to the hashtag's feed where they could see content posted which related to the hashtag topic and view all posts which mentioned that hashtag. The Panel understood that the content on the hashtag's feed was always being updated.

The Panel noted that one of the LinkedIn posts by a health professional who described him/herself as an 'Allergan mentee' and which was 'liked' by the first named Allergan product specialist when referring to the use of Botox in men, referred to the medicine as 'Brotox'. The post referred to the use of 'Brotox' to soften fine lines and wrinkles. Further the hashtags, #botox and #Brotox were included within the LinkedIn post. The post referred to Botox and its indication and included reference to #botox and #Brotox which would direct readers to their related hashtag feeds which were likely to contain posts that promoted Botox. The Panel considered that in 'liking' the LinkedIn post and, on the balance of probabilities, proactively

distributing it to his/her connections on LinkedIn which would likely include individuals who did not meet the Code's definition of a health professional or other relevant decision maker, the Allergan employee had promoted Botox, a prescription only medicine, to the public. A breach of Clause 26.1 was ruled.

The Panel further considered that by 'liking' the post the product specialist had endorsed the use of the term 'Brotax', which in its view trivialised the use of a prescription only medicine as alleged. In that regard, high standards had not been maintained and a breach of Clause 9.1 was ruled.

The Panel noted that the second LinkedIn post by the same health professional and 'liked' by the same product specialist was regarding booking an appointment at one of the group's aesthetics clinics and included the hashtag, #Botox. The Panel noted that whilst no indication was included within the health professional's post at issue, the indication of Botox was widely known, including to members of the public, and thus, in the Panel's view, mention of Botox in itself was promotional. The Panel further noted that the hashtag would direct readers to the Botox hashtag feed which was likely to contain posts that promoted Botox. The Panel noted that in 'liking' the LinkedIn post and, on the balance of probabilities, proactively distributing it to his/her connections on LinkedIn, which would likely include individuals who did not meet the Code's definition of a health professional or other relevant decision maker, the Allergan employee had promoted Botox, a prescription only medicine, to the public. The Panel ruled a breach of Clause 26.1.

The Panel noted that three LinkedIn posts 'liked' by the first area sales manager were originally posted by the same health professional who created the LinkedIn posts above.

The Panel noted the complainant's concern that an Allergan employee in 'liking' one of the posts had engaged with a health professional who promoted the prize of a free lip enhancement to celebrate the birthday of one of his/her clinics. Whilst the Panel queried whether this was an appropriate post for a pharmaceutical company employee to engage with, it noted that as lip enhancement did not involve the use of a prescription only medicine, as acknowledged by the complainant, reference to such a procedure did not fall within the scope of the Code. The Panel therefore ruled no breach of Clause 9.1 in relation to the Allergan employee's 'like' of the LinkedIn post in question.

The Panel noted that the further two LinkedIn posts by the same health professional and 'liked' by the same area sales manager, one also relating to the above clinic's birthday and the other relating to the group of clinics being a finalist in the clinic of the year category at an awards ceremony, both included the hashtag, #Botox. The Panel noted that whilst no indication was included within the health professional's post at issue, the indication of Botox was widely known, including to members of the public, and thus, in the Panel's view, mention of Botox in itself was promotional. The Panel further noted that the hashtag would direct readers to the Botox hashtag feed which was likely to contain posts that promoted Botox. The Panel noted that in 'liking' the two posts and, on the balance of probabilities, proactively distributing them to his/her connections on LinkedIn, which would likely include individuals who did not meet the Code's definition of a health professional or other relevant decision maker, the Allergan employee had promoted Botox, a prescription only medicine, to the public. The Panel ruled a breach of Clause 26.1 in relation to each post.

The Panel noted that the same area sales manager had 'liked' a LinkedIn post by a sales manager of another pharmaceutical company which stated 'Countdown is on...' and included an image of a Nabota conference stand. Nabota was another botulinum toxin which did not appear to be an Allergan product; the Panel had no information before it regarding where the conference in question had been held and whether Nabota was licensed in the UK or elsewhere. The Panel noted that the term promotion meant any activity carried out by a pharmaceutical company or with its authority which promoted the administration, consumption, prescription, purchase, recommendation, sale, supply or use of its medicines and in that regard a pharmaceutical company could only be seen to promote its own medicines. The Panel thus considered that although the LinkedIn post had been 'liked' and thus, on the balance of probabilities, proactively distributed by an Allergan employee to his/her connections, which would likely include individuals who did not meet the Code's definition of a health professional or other relevant decision maker, there was no evidence that the Allergan employee had promoted one of Allergan's prescription only medicines to the public and thus no breach of Clause 26.1 was ruled.

The Panel noted that a second area sales manager created a LinkedIn post by commenting 'Now that's cool!!' and sharing an original LinkedIn post by an Allergan Aesthetics senior area sales manager. The original post stated 'Happy to introduce the newest member of the CoolSculpting family, the new FDA-Cleared CoolTone. Exciting times ahead for our... ' and included an image of a gentleman holding what the Panel assumed was the CoolTone device on an exhibition stand. The Panel noted the complainant's concern that the image within the original LinkedIn post about CoolSculpting clearly showed reference to Botox on an Allergan exhibition stand. The Panel noted that the reference to Botox highlighted by the complainant was small and almost illegible in the background of the image provided by the complainant. Therefore, in the Panel's view, the complainant had not discharged his/her burden of proof that the Allergan employee's proactive distribution of the original post to his/her connections on LinkedIn, which would likely include individuals who did not meet the Code's definition of a health professional or other relevant decision maker, had constituted the promotion of a prescription only medicine to the public and no breach of Clause 26.1 was ruled in relation to that post.

The Panel noted that the second area sales manager had also 'liked' a LinkedIn post from a cosmetic physician and CEO of a named academy describing the partnership between the academy and Allergan as a 'Tier 1 preferred training partner'. The post stated, *inter alia*, 'Being in partnership with the leading brands allows us to deliver the highest quality of education to our trainees, and the best treatments possible for our patients' and thanked @allergan\_medical\_institute for its support and included the hashtags, #botox and #allergan. The post referred to being in partnership with leading brands when referring to Allergan allowing the academy to deliver the best treatments possible for patients which in the Panel's view were promotional claims for Allergan's medicines including Botox. Further the post included the hashtag, #botox which would direct readers to the hashtag feed which was likely to contain posts that promoted Botox. The Panel considered that in 'liking' the LinkedIn post and, on the balance of probabilities, proactively distributing it on LinkedIn to his/her connections, which would likely include individuals who did not meet the Code's definition of a health professional or other relevant decision maker, the Allergan employee had promoted Botox, a prescription only medicine, to the public. A breach of Clause 26.1 was ruled.

With regard to Instagram, the Panel noted that Instagram was a photo and video sharing social networking service which allowed users to upload media that could be edited with filters and

organised by hashtags and geographical tagging. Instagram posts could be shared publicly or with pre-approved followers and users could browse other users' content by tags and locations and view trending content. The Panel understood that tags on Instagram allowed social media users to engage an individual, business or any entity with a social profile when they mentioned them in a post or comment. Hashtags were used within a post to identify a keyword or topic of interest and facilitate a search for it. The Panel understood that hashtags worked by organising and categorising photographs and videos. If someone had a public Instagram account and added a hashtag to a post, that post would be visible on the corresponding hashtag page (which was basically a directory of all the photographs and videos tagged with that hashtag). The Panel understood that when people with private profiles tagged posts, they wouldn't appear publicly on hashtag pages. The Panel noted that whether a tagged account came within the scope of the Code had to be decided on a case-by-case basis.

The Panel noted that a second product specialist was tagged in a named clinician's Instagram post on his/her clinics account which included a photograph of the clinician and the product specialist. The clinician's Instagram post was headed '#botox[named area]' followed by the photograph. Below the photograph, the post stated [named health professional's Instagram user name] 'Lovely to see @[named Allergan employee] this lunchtime at the [geographical area] clinic for a catch up and to develop the business plans for 2020 for [named clinic]. Allergan (the makers of Botox and Juvederm) have been our partners for years and their support is invaluable in teaching, training and supporting our business to deliver the highest quality of service to our lovely clients'. The hashtags included, inter alia, #facialaesthetics, #botoxandfillers and eight hashtags stating 'botox' followed by a named geographical area.

In the Panel's view, whilst the Allergan employee would be notified when tagged, the Panel did not consider that this automatically meant that Allergan or its employee could, in those circumstances, be held responsible for the clinician's post. Whilst the Panel understood that an individual might not be able to prevent him/herself from being tagged in other individuals' posts, it appeared that if a user wanted to prevent tagged photographs from automatically being added to his/her page there was a setting that allowed a user to manually add the photograph or hide it from their profile page. The Panel noted, however, that individuals had total control over whether or not to tag others in their posts. In that regard, the Panel noted that companies/employees that included tags as part of their posts, as in the above, and therefore directed members of the public to other accounts, needed to be satisfied that the content on those accounts was reasonable as far as the Code was concerned. If that were not the case, then companies/employees would be able to direct readers to independent profiles and the posts on them as a means of circumventing the Code.

In that regard, the Panel noted that the Allergan employee's Instagram account included a post which contained the same photograph as above and whilst it only referred to Juvederm, which was not a prescription only medicine, the employee's Instagram post also included a tag to the named clinician which if clicked appeared to take readers to his/her clinic's account where the post above could be viewed without having to follow the account.

The Panel considered that in tagging the clinician in his/her Instagram post and thus directing readers to the clinician's clinic's social media account the Allergan employee had promoted a prescription only medicine to the public. The clinician's post included reference to Botox within the wording of the post. The Panel noted that whilst no indication was included within the health professional's post at issue, the indication of Botox was widely known, including to members of the public, and thus, in the Panel's view, mention of Botox in itself was promotional. The Panel

further noted that the post included a number of hashtags which would direct readers to the respective hashtag feeds which were likely to contain posts that promoted Botox. A breach of Clause 26.1 was ruled.

The Panel noted its comments and rulings above and considered that Allergan had failed to maintain high standards and a breach of Clause 9.1 was ruled. Further, the Panel was extremely concerned that Allergan employees had either directed others to or had proactively distributed posts that promoted a prescription only medicine on social media; it was particularly concerned about the terminology used in some of those posts. The Panel acknowledged that while the Allergan employees might be involved in the promotion of products which were not covered by the Code, eg Juvederm, some would likely also be responsible for the promotion of Botox, a prescription only medicine which was covered by the Code. The Panel noted its comments and rulings above and considered that in promoting prescription only medicines to the public and trivialising aesthetic medicine Allergan had reduced confidence in, and brought discredit upon, the pharmaceutical industry. A breach of Clause 2 was ruled.

### **APPEAL FROM ALLERGAN**

Allergan appealed the Panel's rulings of breaches of Clauses 2, 9.1 and 26.1 of the Code. Allergan submitted that that the Panel should not have allowed this complaint to proceed as it was based on matters which pre-dated a signed undertaking, and it would be procedurally unfair to do so; that mention of a brand name alone could not be considered as a promotional claim, and that no pharmaceutical company should be held responsible for the content of third party social media activity. Such a finding was considered to be disproportionate.

### **Organisation and Background**

Allergan submitted that digital health transformation, including greater access to such interoperable digital platforms as social media, had been fully recognised by various governmental bodies, regulatory authorities and healthcare delivery policy makers as important in shaping a predictive, preventive and personalised healthcare system in the future. It also promoted greater engagement among relevant stakeholders to optimise care and management of diseases and conditions. This area was an integral part of the UK Government's life sciences policy agenda. Embracing such digital transformation and the increasing utilisation of social media continued to challenge all industries, including the pharmaceutical industry as a key stakeholder in digital transformation, on setting and enforcing policies around the globe. LinkedIn, Twitter, Facebook, Instagram and other platforms had become mainstream ways of communicating, and companies were all striving to better adapt their businesses and policies accordingly. In relation to the UK pharmaceutical industry specifically, Allergan was making great efforts to understand the Code, PMCPA guidance and case rulings to guide best practices to make effective use of these valuable opportunities for, in particular, greater patient engagement, whilst always remaining compliant.

Allergan submitted that it was committed to improving compliance across its organisation, as outlined in detail in its original response to this case. Allergan highlighted again that the issues previously raised in relation to the matter occurred in 2019, and that it was acquired by AbbVie in May 2020 (which had more restrictive policies in place). In line with Allergan's undertaking, the company submitted it had made significant improvements to its compliance processes and infrastructure to ensure that similar events did not occur again. These included:

- Senior leadership had changed in several areas; visibility and commitment to ensuring Code compliance across the organisation was high
- The Allergan global and UK social media SOPs had been updated, in addition to the adoption of AbbVie's global social media policy; mandatory training on these updated policies had been delivered to all employees and contractors of Allergan's UK commercial organisation
- Numerous communications had been sent to UK employees by senior leaders reminding them of the compliance requirements related to social media activities
- A culture of continuous learning and improvement was being fostered with, for example, the roll-out of compliance clinics, compliance committees and mandatory compliance training.

Consistent with the commonly adopted industry approach, Allergan submitted that it was striving to better understand the Code, PMCPA guidance and case rulings to guide best practices in effectively embracing this increasingly relevant means of engaging with the general public, whilst remaining compliant. Revisiting historical issues that had already been addressed through meaningful remedial actions, as described above, served only to hinder its collective efforts and progress in this important area.

### **The complaint should not have proceeded**

Allergan submitted that the PMCPA should not have allowed the complaint to proceed as it was based on matters which pre-dated a signed undertaking. Indeed, in the Panel's ruling, it was acknowledged by the Panel that the matters in this case were all historical and occurred before Allergan provided its undertaking in Case AUTH/3291/12/19:

'The undertaking [for Case AUTH/3291/12/19] was provided on 16 March 2020 and there was no evidence that any of the social media activity highlighted by the complainant in this case had occurred after that date; it all appeared to be historical activity'.

Allergan submitted that it accordingly undertook corrective and preventative actions to ensure employees understood how to achieve Code compliance in the future. This current complaint concerned a matter that was very similar to that in Case AUTH/3291/12/19 and Allergan submitted that for this reason it should not have gone ahead. Paragraph 5.2 of the PMCPA Constitution and Procedure clarified this:

'If a complaint concerns a matter closely similar to one which has been the subject of a previous adjudication, it may be allowed to proceed at the discretion of the Director if new evidence is adduced by the complainant or if the passage of time or a change in circumstances raises doubts as to whether the same decision would be made in respect of the current complaint. The Director should normally allow a complaint to proceed if it covers matters similar to those in a decision of the Panel where no breach of the Code was ruled and which was not the subject of appeal to the Appeal Board'.

Allergan submitted that there had been no new evidence provided by the complainant or any change in circumstances that raised doubt as to whether the same ruling would be made. By allowing this case to go ahead the PMCPA had failed to follow its own Constitution and Procedure and the case should have been dismissed on receipt of its original response. It was also procedurally unfair for the PMCPA to adopt such an approach that was plainly inconsistent with the Constitution and Procedure.

Should the Appeal Board consider that new evidence was adduced by the complainant, Allergan submitted that it would like the Appeal Board to consider the following reasons to overturn the Panel rulings:

### **Mention of brand name alone is not a promotional claim**

Allergan submitted that the mention of a brand name alone, with no other information about its use or effects, should not be considered a promotional claim. This could set an erroneous precedent where the mention of a brand name in non-promotional context could be deemed a breach of the Code. This position, if upheld, would also render the decision incompatible with the purpose of the broader regulatory framework for enforcing advertising and promotional activities.

Allergan submitted that its UK social media SOP did not allow staff to interact with any third-party social media content that mentioned a prescription-only medicine – not because it could potentially be a breach of the Code to do so, but because Allergan was pursuing a stricter internal position and considered a blanket ban on such activities a more practical approach than to apply a case-by-case assessment of each potential interaction.

However, Allergan submitted that as this complaint pre-dated this SOP, staff did like third-party posts that mentioned #Botox. The Panel stated that the indication for Botox was widely known and therefore ruled that the mere mention of 'Botox' alone was a promotional claim. In light of previous Panel rulings, this finding was incorrect and, if not rectified, could have a far-reaching effect on the activities conducted by the UK pharmaceutical industry.

Allergan submitted that the Code did not define what constituted a 'promotional claim'. Instead, the Panel made its decisions on a case-by-case basis. With no clear guidance, pharmaceutical companies were required to predict how the Panel might perceive their communications on any given day. When previous rulings were ignored, this task was made even more challenging. The Code was based on both EU and UK law which relied heavily on case precedent when considering matters; it should be the same in the self-regulatory environment. Of relevance in this case were the following cases:

- In Case AUTH/2777/7/15, the product name (Clexane) was given as part of the job title with no claims about the product and the Panel ruled it was not promotional to include only the brand name on representative materials. Allergan submitted the indication for Clexane would have been known to those receiving the business card and this was not commented upon.
- In Case AUTH/3270/10/19, the product name (Xarelto) was used three times on a landing page, but the Panel did not consider that this promoted Xarelto and ruled that it was not promotional to include only the brand name on website materials. Allergan submitted that the indication might or might not have been known to those visiting the website but this point was irrelevant in this case.
- More recently, in Case AUTH/3410/10/20, a social media profile was ruled to contain a promotional claim as it mentioned both the brand name of the medicine and its indication. Here, the Panel did not rule that the mention of the brand name alone was promotional, but instead it was promotional because it had included the indication of the medicine in the profile.

Allergan submitted that if the Panel's ruling was upheld, this would be inconsistent with the above cases, which would add even greater confusion. The question must be asked how 'widely known' must a prescription only medicine be for its mere mention to be considered promotional, how would 'widely known' be determined, and by whom? Allergan would anticipate many pharmaceutical companies to be confused and impacted by this ruling.

Allergan submitted that it considered that there were many examples of products and companies affected by the Panel's ruling of breaches of Clause 26.1 made on this basis. Allergan submitted that that it would urge the Appeal Board to consider the matter in a manner consistent with previous Panel decisions, as noted above.

### **Allergan was not responsible for the content of third-party posts**

Neither Allergan, nor any other pharmaceutical company, should be held responsible for the content and conduct of any third party's social media posts, simply through using hashtags or tagging, since hashtags allow other users to find (acceptable and compliant) company posts and tagging allowed tagged account followers to see those (acceptable and compliant) company posts. This widely understood phenomenon was utilised in social media to increase the reach of the (acceptable and compliant) company post.

Allergan therefore appealed the Panel's ruling that Allergan had proactively directed followers, albeit through no instruction, to search for and find other posts using the same hashtags as well as the posts of tagged third party accounts, and therefore were forever liable for all independent, retrospective and prospective content.

Not only did the Panel rule that Allergan breached the Code by 'liking' third-party content which contained mention of Botox, but it also ruled a breach of the Code with content which was not attributable to that third party but which was accessed via clicking the hashtag "#Botox". Allergan submitted that the degree of remoteness in this ruling was extreme and did not appreciate how social media was used. For a follower of the Allergan staff member to find this potentially unacceptable content, the follower would have needed to see on their feed that the Allergan staff member had liked a third-party post, the follower would then have needed to click that post, and then click on the hashtag for Botox. Only then would a feed of all posts which included '#Botox' have appeared. Please note, these posts originated from around the world and at the time of drafting this letter, the Instagram feed for '#Botox' included over 10.8 million posts. Akin to reference information, the use of # allowed a user to find information that they were searching for – it did not represent the proactive dissemination of third-party content that was clearly independent.

Allergan noted that the Panel took a similar position for posts that were liked that contained @mentions (tagging) of other (non-Allergan) individuals. The Panel noted that whether a tagged account came under the scope of the Code had to be decided on a case-by-case basis and that companies should only link to other accounts if 'satisfied that the content on those accounts was reasonable as far as the Code was concerned', otherwise this could be a means of 'circumventing the Code'. If this ruling was upheld, in practice, this would require pharmaceutical companies to conduct extensive retrospective due diligence, and ongoing monitoring, of any third-party accounts they would like to tag. In Allergan's opinion, this was an entirely unreasonable standard which would stifle the pharmaceutical industry's use of this increasingly relevant and effective means of communication. For example, if Allergan tagged a

health professional in their [legitimate, devoid of mention of any prescription medicine] Instagram post, Allergan would have to be responsible for a post of the health professional which had not been created at that moment in time- such a post could come to fruition six months later, which under the current Panel ruling, Allergan would be responsible for.

Allergan noted that the PMCPA's website stated that one of its key roles was to provide 'advice and guidance on the Code'. Despite the omnipotence of social media and repeated requests, the PMCPA had not provided updated guidance on digital communications. The archived version of this guidance (March 2016) offered no guidance in relation to the use of @ and #. Allergan submitted that it was of the strongly held belief that the industry should not be placed in a situation where it had to operate without clear guidance direction.

Allergan submitted the requirements of Clause 28.6 were highly relevant and had significant bearing on its position – a company could not be held responsible for independent third-party content when a user was redirected to another site, of which the company had no control or influence, and this fact was made clear to a reader.

Allergan submitted that although previously accepted as most pertinent to external links on websites, applicability for social media posts that contained links to third party websites was tested in Case AUTH/3162/2/19 where the company was not held liable for third-party content because the reader would have been aware that upon accessing the link, they were being redirected to a site which was not that of Allergan. The ruling in this case for website URLs was equally applicable to @mentions and #. On the basis that: @mentions and # content was in a different colour to the post content; clicking on them linked to new pages/sites; and users of social media knew it was third-party content, Allergan would argue that no company could be held responsible for a user choosing to access third-party content through clicking on @mentions or searching for the same #.

Allergan submitted that if this finding was upheld, the consequences of the precedent would be far-reaching for the entire UK pharmaceutical industry; there were thousands of examples of pharmaceutical companies using # and @mentions in their accounts, and all would be affected by this ruling which would be interpreted as '@ and # were not permitted unless all content on all social media platforms was fully monitored for retrospective and prospective potentially unacceptable third-party content'. This was certainly not in line with the letter or the spirit of the requirements in Clause 28.6.

## **Summary**

Allergan submitted that the PMCPA should not have allowed the complaint to proceed as it was based on matters which pre-dated a signed undertaking; the mention of a brand name alone, with no other information about its use, should not be considered to constitute a promotional claim; and neither Allergan nor any other pharmaceutical company should be held responsible for the content and conduct of any third party's social media posts, simply through using hashtags or tagging, since hashtags allowed other users to find company posts and tagging allowed tagged account followers to see company posts.

Allergan submitted that the matters alleged in this case relating to LinkedIn and Instagram posts, were not in breach of the Code and it appealed the Panel's rulings of breaches of Clauses 26.1, 9.1 and 2. Allergan submitted:

- The company was striving to better understand the Code, PMCPA guidance and case rulings to guide best practices to make effective use of these valuable opportunities for patient engagement whilst remaining compliant.
- Revisiting historical issues that had been addressed through meaningful remedial actions, served only to hinder the company's progress in this important area.
- The Panel should not have allowed complaints to go ahead that were based on closely similar matters that had already been dealt with in Case AUTH/3291/12/19.
- The company's social media SOP did not allow any interactions with posts that mentioned a prescription only medicine – historical posts should not be considered under the current SOP.
- The mention of a brand name alone, with no other information about its use, should not be considered to constitute a promotional claim.
- No pharmaceutical company should be held responsible for the content and conduct of any third party's social media posts, simply through using hashtags or tagging, since hashtags allowed other users to find company posts and tagging allowed tagged account followers to see company posts.

Allergan hoped that its grounds for appeal were clear, and the company looked forward to presenting these in further detail to the Appeal Board for each post at issue, together with industry examples of social media use.

#### **COMMENTS FROM COMPLAINANT**

The complainant submitted that he/she had no further comments.

#### **APPEAL BOARD RULING**

The Appeal Board noted that Allergan had raised a process point in its appeal in that it considered that under Paragraph 5.2 there had been no new evidence provided by the complainant or any change in circumstances that raised doubt as to whether the same ruling would be made to that in Case AUTH/3291/12/19 and that the posts at issue predated the undertaking given in that case. Allergan submitted that the complaint should therefore not have proceeded. The Chair confirmed Allergan's position in this regard at the appeal as this point was not raised in its presentation. Allergan confirmed that this remained its position.

The Chair considered that in these circumstances the Appeal Board had an implied discretionary power to consider the procedural point raised by Allergan.

The Appeal Board noted Paragraph 5.2 of the Constitution and Procedure included:

'If a complaint concerns a matter closely similar to one which has been the subject of a previous adjudication, it may be allowed to proceed at the discretion of the Director if new evidence is adduced by the complainant or if the passage of time or a change in circumstances raises doubts as to whether the same decision would be made in respect of the current complaint. The Director should normally allow a complaint to proceed if it covers matters similar to those in a decision of the Panel where no breach of the Code was ruled and which was not the subject of appeal to the Appeal Board.'

The Appeal Board noted that Case AUTH/2790/8/15 (Anonymous, non-contactable ex-employee v Chugai – Consultancy arrangements) had previously dealt with the application of

Paragraph 5.2 at appeal. In that case, the Appeal Board's view was that, the first sentence of the relevant section of Paragraph 5.2 (above) was a condition precedent. The Director had to decide whether the conditions set out in that sentence had been met before exercising any discretion as to whether a complaint about a matter closely similar to one which had been the subject of a previous adjudication should be allowed to proceed. The Appeal Board noted that in Case AUTH/2790/8/15 the matters at issue were closely similar to those raised in a prior Case AUTH/2749/2/15. The Appeal Board had noted that the questions to be considered were 'Had new evidence been adduced?' or 'Had the passage of time or a change in circumstances raised doubts as to whether the same decision would be made?'

The Appeal Board noted that the undertaking in the previous case, Case AUTH/3291/12/19, was dated as being signed on 16 March 2020. The Appeal Board noted that the current case, Case AUTH/3431/11/20 concerned the use of the term 'Brotax' and hashtags which had not been the subject of adjudication in Case AUTH/3291/12/19. Further, the previous case, Case AUTH/3291/12/19, concerned the posting of a Botox pack shot and the re-posting of a video containing the Botox pack shot on the company's Instagram account and reference to Botox being the injectable product of the year at the Aesthetics Awards 2019 on a senior employee's personal Instagram page whereas the current case concerned both Instagram and LinkedIn and the proactive dissemination of third party LinkedIn posts as a result of Allergan employees' interaction with them. The Appeal Board noted the requirements of Paragraph 5.2 of the Constitution and Procedure and considered that the differences between Case AUTH/3291/12/19 and Case AUTH/3431/11/20 were such that they were not closely similar and therefore Case AUTH/3431/11/20 should proceed, and the merits of the appeal considered.

The Appeal Board noted the Panel's general comments above concerning Instagram and LinkedIn. It also noted the company's comments about the relevance of previous cases and the impact of the rulings on the industry as a whole. Like the Panel, the Appeal Board considered each case on its individual merits in relation to the requirements of the Code. Unlike most other industries, the pharmaceutical industry was prohibited from advertising certain products to the public which made the use of social media more complex. Some of the previous cases provided for the appeals were not considered to be relevant to the circumstances of the case at issue.

The Appeal Board noted that Botox was a prescription only medicine that had other indications outside of aesthetic use. However, 'Botox' had become synonymous in popular culture as a cosmetic treatment to reduce facial lines and wrinkles. 'Botox' in everyday common language might incorrectly be associated with any botulinum toxin, there were other licensed botulinum toxins available. The Appeal Board considered that when Allergan, as the manufacturer of Botox, interacted via social media with reference to 'Botox' this would likely be deemed promotional. This was consistent with the Panel's ruling in Case AUTH/3291/12/19. The purpose of interacting on social media was to amplify the audience of the original post by enhancing its reach and engagement with its content. The Appeal Board noted that both Instagram and LinkedIn were public platforms and queried how linking to and liking organisations and sharing posts by Allergan employees, and thereby disseminating and highlighting how and where to access Botox could be considered to be anything other than promotional.

The Appeal Board noted that one of the LinkedIn posts by a health professional who described him/herself as an 'Allergan mentee' and which was 'liked' by the first named Allergan product specialist when referring to the use of Botox in men, referred to the medicine as 'Brotax'. The

post referred to the use of 'Brotox' to soften fine lines and wrinkles. Further the hashtags, #botox and #Brotox were included within the LinkedIn post. The post referred to Botox and its indication 'to soften fine lines and wrinkles' and included reference to #botox and #Brotox which would direct readers to their related hashtag feeds which were likely to contain posts that promoted Botox.

The Appeal Board considered that in 'liking' the LinkedIn post and, on the balance of probabilities, proactively distributing it to his/her connections on LinkedIn which would likely include individuals who did not meet the Code's definition of a health professional or other relevant decision maker, the Allergan employee had promoted Botox, a prescription only medicine, to the public. The Appeal Board upheld the Panel's ruling of a breach of Clause 26.1. The appeal on this point was not successful.

The Appeal Board noted its comments above and it further considered that by 'liking' the post the product specialist had endorsed the use of the term 'Brotox', which in its view was entirely inappropriate and trivialised the use of a prescription only medicine as alleged. In that regard, high standards had not been maintained and the Appeal Board upheld the Panel's ruling of a breach of Clause 9.1. The appeal on this point was not successful.

The Appeal Board noted that the second LinkedIn post by the same health professional and 'liked' by the same first named product specialist stated 'Are you interested in booking an appointment but feeling nervous about having your first treatment?...' at one of the group's aesthetics clinics and included the hashtag, #Botox. The Appeal Board noted that whilst no indication was included within the health professional's post at issue, that had to be seen in the context of the widespread use of the word 'Botox' in popular culture and its well-known association with reducing facial lines and wrinkles. The Appeal Board further noted that the hashtag would direct readers to the Botox hashtag feed which was likely to contain posts that promoted Botox. The Appeal Board was very concerned that not only did liking this post promote Botox, the post provided a booking email and phone number of the aesthetic clinic and thus a means for the reader to access Botox. The Appeal Board noted that in 'liking' the LinkedIn post and, on the balance of probabilities, proactively distributing it to his/her connections on LinkedIn, which would likely include individuals who did not meet the Code's definition of a health professional or other relevant decision maker, the Allergan employee had promoted Botox, a prescription only medicine, to the public. The Appeal Board upheld the Panel's ruling of a breach of Clause 26.1. The appeal on this point was not successful.

The Appeal Board noted that the further two LinkedIn posts by the same health professional and 'liked' by an area sales manager, one also relating to the above clinic's birthday and the other relating to the group of clinics being a finalist in the clinic of the year category at an awards ceremony, both included the hashtag, #Botox. On the same basis as before the Appeal Board found that the Allergan employee in 'liking' the LinkedIn post had promoted Botox, a prescription only medicine, to the public. The Appeal Board upheld the Panel's ruling of a breach of Clause 26.1 in relation to each post. The appeal on this point was not successful.

The Appeal Board noted that a second area sales manager had also 'liked' a LinkedIn post from a cosmetic physician and CEO of a named academy describing the partnership between the academy and Allergan as a 'Tier 1 preferred training partner'. The post stated, inter alia, 'Being in partnership with the leading brands allows us to deliver the highest quality of education to our trainees, and the best treatments possible for our patients' and thanked @allergan\_medical\_institute for its support and included the hashtags, #botox and #allergan.

The post referred to being in partnership with leading brands when referring to Allergan allowing the academy to deliver the best treatments possible for patients which in the Appeal Board's view were promotional claims for Allergan's products including Botox. Further the post included the hashtag, #botox which would direct readers to the hashtag feed which was likely to contain posts that promoted Botox. On the same basis as before the Appeal Board found that the Allergan employee in 'liking' the LinkedIn post had promoted Botox, a prescription only medicine, to the public. The Appeal Board upheld the Panel's ruling of a breach of Clause 26.1. The appeal on this point was not successful.

The Appeal Board noted that a second product specialist was tagged in a named clinician's Instagram post on his/her clinic's account which included a photograph of the clinician and the product specialist. The clinician's Instagram post was headed '#botox[named area]' followed by the photograph. Below the photograph, the post stated [named health professional's Instagram user name] 'Lovely to see @[named Allergan employee] this lunchtime at the [geographical area] clinic for a catch up and to develop the business plans for 2020 for [named clinic]. Allergan (the makers of Botox and Juvederm) have been our partners for years and their support is invaluable in teaching, training and supporting our business to deliver the highest quality of service to our lovely clients'. The hashtags included, inter alia, #facialaesthetics, #botoxandfillers and eight hashtags stating 'botox' followed by a named geographical area. The post was undated.

In the Appeal Board's view, whilst the Allergan employee would be notified when tagged, the Appeal Board did not consider that this meant that Allergan or its employee could, in the particular circumstances of this case, be held responsible for the clinician's act of tagging. The Appeal Board considered that pharmaceutical companies should be cautious about the effect of tagging by others.

The Appeal Board noted that the Allergan employee's Instagram account included a post, dated 6 March which contained what appeared to be the same photograph as above and whilst it only referred to Juvederm, which was not a prescription only medicine, the employee's Instagram post also included a tag to the named clinician which if clicked appeared to take readers to his/her clinic's account page which contained the post above. The Appeal Board considered that chronology was important. If an Allergan employee was linking to a post from a health professional on Instagram that contained promotional content for Botox this would likely only be in breach of Clause 26.1 if there was evidence to show that the promotional content appeared on the linked account at the point the linkage was made by the Allergan employee. In this instance the post made by the Allergan employee was dated 6 March. The Appeal Board noted that whilst the post made by the health professional which linked to the Allergan employee was apparently undated, it referred to seeing the named Allergan product specialist 'this lunchtime' and included what appeared to be the same photograph as that in the employee's post dated 6 March. What was not clear, however, was whether the named clinician's post was posted before or after the Allergan employee's post linking to his/her account. The Appeal Board considered that there was insufficient evidence before it that the Allergan employee's post linked to promotional material for Botox at the point the link was made. On this narrow ground the Appeal Board consequently ruled no breach of Clause 26.1 of the Code. The appeal on this point was successful.

The Appeal Board noted its comments and rulings of breaches of the Code above and considered that Allergan had failed to maintain high standards and it upheld the Panel's ruling of a breach of Clause 9.1. The appeal on this point was not successful.

The Appeal Board noted that social media was often used by young people. The Appeal Board was extremely concerned that Allergan employees had either directed others to or had proactively distributed posts that promoted a prescription only medicine to the public on social media; it was particularly concerned about the terminology used in some of the posts. The Appeal Board noted its comments and rulings above and considered that in the repeated promotion of a prescription only medicine to the public and trivialising the use of a prescription only medicine Allergan had reduced confidence in, and brought discredit upon, the pharmaceutical industry. The Appeal Board upheld the Panel's ruling of a breach of Clause 2. The appeal on this point was not successful.

The Appeal Board noted its comments above including those with regard to the ruling of a breach of Clause 2. Taking all the circumstances into account the Appeal Board decided that in accordance with Paragraph 11.3 of the Constitution and Procedure, Allergan should be publicly reprimanded for its widespread use of social media which promoted a prescription only medicine to the public.

**Complaint received**      **20 November 2020**

**Case completed**        **29 October 2021**