

CONTACTABLE EX-EMPLOYEE v ALLERGAN

Alleged promotion of Botox on social media

An ex-employee of Allergan Limited complained about the promotion of Botox (botulinum toxin type A) by Allergan on social media.

The complainant was disturbed by the ongoing promotion of Botox by Allergan through its product specialists/social media. The complainant alleged that the product specialist team proactively inserted hyperlinks (or tags) to customers who then promoted Botox on their social media channels. The complainant provided screenshots from the Instagram accounts of five product specialists from Allergan medical aesthetics and stated that as of the date that the complaint was submitted, all of the accounts were active and open to the public. Screenshots from the tagged/referenced health professionals' social media accounts were also provided.

The complainant alleged breaches of the Code including failure to maintain high standards, disguised promotion, representatives training, relations with the public and the media, the internet and other digital platforms and Clause 2.

The detailed response from Allergan is given below.

The Panel noted that the complainant had not commented specifically on any of the examples of social media activity he/she had provided but had underlined the accounts referenced in the Allergan employees' posts and provided screenshots of posts from those referenced accounts, highlighting mentions of Botox. The Panel noted that it appeared that the employees' Instagram accounts referred to in this complaint were linked to Allergan and not their personal accounts.

The Panel did not know who followed each of the product specialists on their respective Instagram accounts; Allergan made no submission in that regard. On the balance of probabilities, the Panel considered that the Instagram followers on each account would likely include individuals who did not meet the Code's definition of a health professional or other relevant decision maker.

The Panel noted that whether a linked account/tag came within the scope of the Code had to be decided on a case-by-case basis, taking into account all of the circumstances including, among other things, content and distribution of the material. 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. Any material associated with a social media post, for example a link/tag within a post, would be regarded as being part of that post and directing viewers to it. In that regard, the Panel disagreed with Allergan's submission that as the social media activity of Allergan staff

contained no mention of a prescription only medicine, the complaint fell outside the scope of the Code. The Panel considered that companies/employees that included tags as part of their posts, as in the present case, and therefore directed their connections to other accounts and therefore the posts on those 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 refer to independent accounts and thus posts as a means of circumventing the Code.

The Panel noted that the first screenshot was of a post on an Allergan product specialist's Instagram account which contained a photograph of the employee and a named health professional. The post read 'Exciting meeting with @[named health professional] and the team at @[named clinic] today!' and referred to Juvederm within a hashtag. The Panel noted that the tag to the named health professional if clicked appeared to take readers to the named health professional's Instagram account. The screenshot provided by the complainant of the referenced health professional's account showed that it included a post headed #botox[named area] followed by the photograph referred to above. Below the photograph, the post stated 'Lovely to see @[named Allergan employee] this lunchtime at [named] 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 health professional'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. In addition, the post included a number of hashtags which would direct readers to the respective hashtag feeds which would likely include posts that promoted Botox. It appeared that the information on the health professional's account was viewable 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 associated social media account where the post above referring to Allergan as the makers of Botox and which included the hashtag, #botoxandfillers, and a number of other hashtags which referred to Botox, the Allergan employee had promoted a prescription only medicine to the public. A breach of the Code was ruled. This ruling was appealed by Allergan.

The Panel noted that the complainant provided a number of screenshots of the second Allergan employee's Instagram account. In the Panel's view, the complainant had not established that the first and second series of screenshots constituted the promotion of a prescription only medicine to the public. No breaches of the Code were ruled.

The third screenshot of the same product specialist's activity on Instagram provided by the complainant stated 'For those of you that were not lucky enough to be at the Glamour Beauty Festival in Manchester last November, you can catch the full replay of our Live Panel Discussion with' and then stated, inter alia, @[named health professional]. Screenshots of that health professional's Instagram account included what appeared to be a repost of a photograph of the clinician and another Instagram user and that user's Instagram post which stated 'Having a great time with the fabulous [named health professional] in Ireland. Love working with ya baby!'. Below this it stated 'Remembering

back to our innovation teaching sessions today from the Botox laboratories @[instagram user referred to above] congratulations on your launch tonight of your new [masterclass]'. 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. It appeared that the information on the health professional's account was viewable without having to follow the account. The Panel considered that in tagging the health professional in his/her post and thus directing readers to the associated social media account where the above post which included reference to Botox could be viewed, the Allergan employee had promoted Botox, a prescription only medicine, to the public. A breach of the Code was ruled. This ruling was appealed by Allergan.

The Panel noted that the screenshot provided by the complainant of the third product specialist's Instagram activity appeared to include a repost from a clinician who had an extensive network of patients and worked with top-leading brands such as @allerganaesthetics. It then referred to being approached to write an article for @allergansparkuk. A hashtag to a named clinician was included at the bottom of the post. The screenshot of the tagged health professional's Instagram account provided by the complainant included a piece about the differences between Botox and fillers and stated, inter alia, that Botox was a muscle paralysis agent that removed the fine line and wrinkles, crow's feet and neck bands. The Panel noted that Botox was not indicated for 'neck bands'. The piece further stated that Botox was ideal for dynamic wrinkles ie lines between the eyebrows and its effects could last 4-6 months. It appeared that the information on the health professional's account was viewable without having to follow the account. The Panel considered that in including a hashtag to the health professional in his/her post and thus directing readers to the associated social media account where the above post which included claims for Botox could be viewed, the Allergan employee had promoted Botox, a prescription only medicine, to the public. A breach of the Code was ruled. This ruling was appealed by Allergan.

The Panel noted that the screenshot provided by the complainant of the fourth product specialist's Instagram activity included an image of a clinic showing Juvederm posters and stated 'It's so lovely to walk into a clinic and be greeted by your posters, thank you [name] and [name] for being lovely customers'. The post included a tag which appeared to be to a named clinic. The Panel noted that the screenshot of the tagged account provided by the complainant stated that the clinic consisted of internationally and Harley Street trained clinicians in the named geographical area followed by reference to, inter alia, Botox. Further, a number of images could also be seen in a grid on the account, one of which stated 'You can't buy happiness but you can buy Botox' which in the Panel's view was a claim for Botox and trivialised the use of a prescription only medicine. It appeared that this information on the clinic's account was viewable without having to follow the account. The Panel considered that by including the tag within his/her post and thus directing readers to the associated Instagram account where the above information could be viewed, the Allergan employee had promoted Botox, a prescription only medicine, to the public. The tagged account included reference to and claims for Botox. A breach of the Code was ruled. This ruling was appealed by Allergan.

The Panel noted that the screenshot provided by the complainant of the fifth product specialist's Instagram activity stated 'Meet your Finalist [two named health professionals]' followed by tags to their social media accounts. The Panel noted that

this post appeared to be made in July. The Panel noted that the complainant provided screenshots of two posts from one of the tagged health professional's social media account dated February, respectively, each of which referred to Botox within two hashtags. It appeared that this information on the clinic's account was viewable without having to follow the account. The Panel noted that whilst no indication was included within the health professional's posts 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. In addition, the Panel noted that the Botox hashtags would direct readers to hashtag feeds which were likely to contain posts that promoted Botox. The Panel considered that in tagging the health professional in his/her post and thus directing readers to the associated social media account where the two posts which referred to Botox in two hashtags could be viewed, the Allergan employee had promoted a prescription only medicine to the public. A breach of the Code was ruled. This ruling was appealed by Allergan.

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. This ruling was appealed by Allergan.

The Panel noted Allergan's submission that it could not be held accountable for the activities of independent parties not acting on the company's behalf, including health professionals. By referencing health professionals' social media accounts in social media posts, Allergan did not accept liability for the social media activity of those health professionals. 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 full 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.

The Panel noted its comments and rulings above and was concerned about the tone and content of some of the social media posts in question on other users' Instagram accounts to which individuals, which would likely include members of the public, had been directed to by Allergan employees. 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 a prescription only medicine to the public including in once instance for an unlicensed indication and in another trivialising its use, Allergan had reduced confidence in, and brought discredit upon, the pharmaceutical industry. A breach of Clause 2 was ruled. This ruling was appealed by Allergan.

The Appeal Board noted the Panel's general comments concerning Instagram. 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 appeal 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 considered that by including a tag within an Allergan employee's post the Allergan representative was directing readers to the associated Instagram account. The Appeal Board was concerned that an Allergan employee considered that it was appropriate to link directly to an aesthetic clinic where it would be extremely likely that Botox and its supply would be discussed and queried how linking to and liking organisations and thereby sharing how and where to access Botox could be considered to be anything other than promotional. The Appeal Board considered that in general if a pharmaceutical company employee linked to a separate social media account which regularly posted material about prescription only medicines or included a post promoting a prescription only medicine which was likely to be viewed by those who followed the link, then such a link was likely to be promotion of a prescription only medicine to the public. The Appeal Board considered that chronology was important. If an Allergan employee was linking to a health professional's account on Instagram that contained promotional content for Botox this would be in breach of the Code 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.

The Appeal Board noted that in relation to the Instagram posts described above that were the subject of appeal, the complainant bore the burden of proof and had not provided sufficient details such that the Appeal Board could be certain of the chronology; in some instances it was not clear whether the posts on the tagged accounts were posted before or after the Allergan employee's posts linking to those accounts. In one instance, two posts by a health professional which referred to Botox were made prior to the Allergan employee's tag. It was, however, difficult to establish from the information provided by the complainant and given the time lapse between when the health professional had posted and when the Allergan employee had tagged his/her account how far back in the health professional's account the posts featuring Botox would appear. The Appeal Board therefore considered that there was insufficient evidence before it to determine whether each of the Allergan employee's posts linked to

promotional material for Botox at the point they were made and ruled no breach of the Code in relation to each. The Appeal Board consequently considered that Allergan had not failed to maintain high standards and no breaches of the Code were ruled including Clause 2. The appeal on all points was successful.

Following its completion of the consideration of the appeal in this case, the Appeal Board was very concerned in general about the linking by Allergan employees to health professionals' social media material. The Appeal Board noted that the complainant had not provided detailed information about the chronology. The Appeal Board noted that social media was often used by young people. The Appeal Board wished to highlight that from 1 October 2021 it would be a criminal offence for anyone (other than a registered doctor, nurses, dentists and pharmacists, where the treatment has been approved by a doctor) to administer botulinum toxin or a filler by way of an injection for a cosmetic purpose to a person under the age of 18 in England or to make arrangements to provide these to anyone under the age of 18 in England. Consideration of the complaint was completed prior to the introduction of the new law and the role of the Appeal Board (and Panel) is to consider complaints under the ABPI Code. Neither the Appeal Board nor the Panel can make any finding regarding the application of legal requirements.

An ex-employee of Allergan Limited complained about the promotion of Botox (botulinum toxin type A) by Allergan on social media.

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 stated that he/she was disturbed by the ongoing promotion of Botox by Allergan through its product specialists/social media. The complainant alleged that the product specialist team proactively inserted hyperlinks (or tags) to customers who then promoted Botox on their social media channels. The complainant provided screenshots from the Instagram accounts of five product specialists from Allergan medical aesthetics and stated that as of the date that the complaint was submitted, all of the accounts were active and open to the public. Screenshots from the tagged/referenced health professionals' social media accounts were also provided.

The complainant alleged breaches of Clause 2 (discredit to, and reduction of confidence in, the industry), Clause 9 (high standards, format, suitability and causing offence, sponsorship), Clause 12 (disguised promotion), Clause 15 (representatives), Clause 16 (training), Clause 26 (relations with the public and the media) and Clause 28 (the internet and other digital platforms).

When writing to Allergan, the Authority asked it to consider the requirements of Clauses 2, 9.1 and 26.1 of the Code. Clauses 12, 15, 16 and 28 were not taken up with the company as the complainant, despite a request for more information, provided no reason as to why he/she considered the material was in breach of those clauses.

RESPONSE

Allergan denied breaches of Clauses 2, 9.1 and 26.1 with regards to the alleged promotion of Botox on social media for at least three reasons:

- the social media posts pre-dated Allergan's undertaking
- none of the posts by Allergan employees referred to Botox or any other prescription only medicine and therefore fell outside the scope of the Code
- the posts that referred to Botox were not by Allergan employees, but rather third party health providers for whom Allergan could not be held responsible.

Allergan noted the complainant's allegation that Allergan had promoted Botox on social media and had attempted to evidence this by providing screenshots of the social media accounts of a number of Allergan personnel where their social media posts had included reference to health professionals' social media accounts, either by the process of 'tagging' them in a post or including their details as a hashtag. The complainant went on to provide further screenshots of the referenced health professionals' social media accounts where Allergan prescription only medicines were mentioned.

Allergan noted that where the complainant had provided screenshots of social media posts by Allergan personnel, such posts did not refer to prescription only medicines. Instead, the focal point on such posts reflected professional relationships between a representative and a health professional. Given that the referenced social media activity of Allergan staff contained no mention of a prescription only medicine, Allergan considered that the complaint not only fell outside the scope of the Code but was also in line with all applicable laws.

With regard to what instructions were given to Allergan staff, Allergan's employee engagement with social media was covered by policies which required that any activity met certain criteria, such as not referencing prescription only medicines in any social media posts. The policies and training provided to employees set out appropriate interactions between Allergan employees and health professionals, which Allergan believed to be exemplified in the employee posts presented by the complainant.

Allergan stated that in order to ensure that its employees conducted themselves appropriately on social media platforms, since Case AUTH/3291/12/19 Allergan had taken the following actions:

- 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 social media standard operating procedure (SOP) had been updated and training had been provided
- a number of key positions had been recruited, including several senior leadership positions examples were provided of three positions, who all 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.

With regard to the screenshots of social media posts from Allergan employees and health professionals provided by the complainant, Allergan stated that although it might appear as if the two activities in the screenshots were linked, in those instances where the screenshots included dates of the posts, it could be seen that there were several months between the posts by Allergan staff and the posts of the health professionals which referred to prescription only medicines.

Allergan submitted that the practice of referencing a health professional's social media account in non-promotional social media was common across the industry, for example, referencing health professionals that were speaking at symposia or who had worked with the company on an activity.

Allergan submitted that it could not be held accountable for the activities of third parties, including health professionals. By referencing health professionals' social media accounts in social media posts, Allergan did not accept liability for the social media activity of those health professionals. 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 activities, 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. Allergan stated that although it was not its responsibility to continually review the posts of health professionals to determine whether they had acted in contravention to advertising rules, it often reminded them about the guidance on the advertising of prescription only medicines.

Allergan acknowledged that it did have a 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 in the Allergan posts and therefore it did not breach any advertising laws, and certainly not any provisions of the Code.

Allergan stated that its position remained that the complaint fell outside the scope of the Code, or failing that, Allergan was not in breach of the same.

PANEL RULING

The Panel noted that the social media activity in question in this case involved Instagram. The complainant had provided screenshots from the Instagram accounts of five Allergan product specialists all of which were, according to the complainant, active and open to the public when the complaint was submitted. The Panel noted the complainant's concern that the product specialist team proactively inserted hyperlinks (or tags) to customers who then promoted Botox on their social media channels. The complainant had not commented specifically on any of the examples of social media activity he/she had provided but had underlined the accounts referenced in the Allergan employees' posts and provided screenshots of posts from those

referenced accounts, highlighting mentions of Botox. The Panel noted that it appeared that the employees' Instagram accounts referred to in this complaint were linked to Allergan and not their personal accounts as 'allergan' appeared within the username of each employee's account, either as Allergan_[name], [name]_allergan or [name]allergan[year].

The Panel did not know who followed each of the product specialists on their respective Instagram accounts; Allergan made no submission in that regard. On the balance of probabilities, the Panel considered that the Instagram followers on each account would likely include individuals who did not meet the Code's definition of a health professional or other relevant decision maker.

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 on Instagram, tags 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 would not appear publicly on hashtag pages.

The Panel noted that whether a linked account/tag came within the scope of the Code had to be decided on a case-by-case basis, taking into account all of the circumstances including, among other things, content and distribution of the material. 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. Any material associated with a social media post, for example a link/tag within a post, would be regarded as being part of that post and directing viewers to it. In that regard, the Panel disagreed with Allergan's submission that as the social media activity of Allergan staff contained no mention of a prescription only medicine, the complaint fell outside the scope of the Code. The Panel considered that companies/employees that included tags as part of their posts, as in the present case, and therefore directed their connections to other accounts and therefore the posts on those 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 refer to independent accounts and thus posts as a means of circumventing the Code.

The Panel noted that the first screenshot was of a post on an Allergan product specialist's Instagram account which contained a photograph of the employee and a named health professional. The post read 'Exciting meeting with @[named health professional] and the team at @[named clinic] today!' and referred to Juvederm within a hashtag. The Panel noted that the tag to the named health professional if clicked appeared to take readers to the named health professional's Instagram account. The screenshot provided by the complainant of the referenced health professional's account showed that it included a post headed #botox[named area] followed by the photograph referred to above. Below the photograph, the post stated 'Lovely to see @[named Allergan employee] this lunchtime at [named] 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 health professional'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. In addition, the post included a number of hashtags which would direct readers to the respective hashtag feeds which would likely include posts that promoted Botox. It appeared that the information on the health professional's account was viewable 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 associated social media account where the post above referring to Allergan as the makers of Botox and which included the hashtag, #botoxandfillers, and a number of other hashtags which referred to Botox, the Allergan employee had promoted a prescription only medicine to the public. A breach of Clause 26.1 was ruled.

The Panel noted that the complainant provided a number of screenshots of the second Allergan employee's Instagram account. The first series of screenshots introduced the product specialist and the complainant had not highlighted any linked accounts or posts within the first series of screenshots. In the Panel's view, the complainant had not established that this particular post constituted the promotion of a prescription only medicine to the public. No breach of Clause 26.1 was ruled.

The Panel noted that the next screenshot of the same product specialist's activity on Instagram provided by the complainant included a tag (details provided). The Panel noted, however, that the three additional screenshots provided by the complainant appeared to be posts by three separate individuals promoting Botox and either recommended or included a tag to a named aesthetics medical clinic. It was unclear to the Panel what, if any, relationship existed between the tag and the named aesthetics medical clinic or the three named individuals' posts. It was not for the Panel to make out a complainant's complaint; in the Panel's view, the complainant had not established that use of the tag by the Allergan product specialist in his/her post constituted the promotion of a prescription only medicine to the public and the Panel therefore ruled no breach of Clause 26.1.

The third screenshot of the same product specialist's activity on Instagram provided by the complainant stated 'For those of you that were not lucky enough to be at the Glamour Beauty Festival in Manchester last November, you can catch the full replay of our Live Panel Discussion with' and then stated, *inter alia*, @[named health professional]. Screenshots of that health professional's Instagram account included what appeared to be a repost of a photograph of the clinician and another Instagram user and that user's Instagram post which stated 'Having a great time with the fabulous [named health professional] in Ireland. Love working with ya baby!'. Below this it stated 'Remembering back to our innovation teaching sessions today from the Botox laboratories @[instagram user referred to above] congratulations on your launch tonight of your new [masterclass]'. 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. It appeared that the information on the health professional's account was viewable without having to follow the account. The Panel considered that in tagging the health professional in his/her post and thus directing readers to the associated social media account where the above post which included reference to Botox could be viewed, the Allergan employee had promoted

Botox, a prescription only medicine, to the public. A breach of Clause 26.1 was ruled. This ruling was appealed by Allergan.

The Panel noted that the screenshot provided by the complainant of the third product specialist's Instagram activity appeared to include a repost from a clinician who had qualified as a dentist over ten years ago but that since his/her move into facial aesthetics in 2016, he/she had built an extensive network of patients and worked with top-leading brands such as @allerganaesthetics. It then referred to being approached to write an article for @allergansparkuk. A hashtag to a named clinician was included at the bottom of the post. The screenshot of the tagged health professional's Instagram account provided by the complainant included a piece about the differences between Botox and fillers and stated, *inter alia*, that Botox was a muscle paralysis agent that removed the fine line and wrinkles, crow's feet and neck bands. The Panel noted that Botox was not indicated for 'neck bands'. The piece further stated that Botox was ideal for dynamic wrinkles ie lines between the eyebrows and its effects could last 4-6 months. It appeared that the information on the health professional's account was viewable without having to follow the account. The Panel considered that in including a hashtag to the health professional in his/her post and thus directing readers to the associated social media account where the above post which included claims for Botox could be viewed, the Allergan employee had promoted Botox, a prescription only medicine, to the public. A breach of Clause 26.1 was ruled. This ruling was appealed by Allergan.

The Panel noted that the screenshot provided by the complainant of the fourth product specialist's Instagram activity included an image of a clinic showing Juvederm posters and stated 'It's so lovely to walk into a clinic and be greeted by your posters, thank you [name] and [name] for being lovely customers'. The post included a tag which appeared to be to a named clinic. The Panel noted that the screenshot of the tagged account provided by the complainant stated that the clinic consisted of internationally and Harley Street trained clinicians in the named geographical area followed by reference to, *inter alia*, Botox. Further, a number of images could also be seen in a grid on the account, one of which stated 'You can't buy happiness but you can buy Botox' which in the Panel's view was a claim for Botox and trivialised the use of a prescription only medicine. It appeared that this information on the clinic's account was viewable without having to follow the account. The Panel considered that by including the tag within his/her post and thus directing readers to the associated Instagram account where the above information could be viewed, the Allergan employee had promoted Botox, a prescription only medicine, to the public. The tagged account included reference to and claims for Botox. A breach of Clause 26.1 was ruled. This ruling was appealed by Allergan.

The Panel noted that the screenshot provided by the complainant of the fifth product specialist's Instagram activity stated 'Meet your Finalist [two named health professionals]' followed by tags to their social media accounts. The Panel noted that this post appeared to be made on 10 July. The Panel noted that the complainant provided screenshots of two posts from one of the tagged health professional's social media account dated 21 February and 25 February, respectively, each of which referred to Botox within two hashtags. It appeared that this information on the clinic's account was viewable without having to follow the account. The Panel noted that whilst no indication was included within the health professional's posts 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. In addition, the Panel noted that the Botox hashtags would direct readers to hashtag feeds which were likely to contain posts that promoted Botox. The Panel considered that in tagging the health professional in his/her post and thus directing readers to the associated social media account where the two posts which referred to Botox in two hashtags could be viewed, the Allergan employee had promoted a prescription only

medicine to the public. A breach of Clause 26.1 was ruled. This ruling was appealed by Allergan.

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. This ruling was appealed by Allergan.

The Panel noted Allergan's submission that it could not be held accountable for the activities of independent parties not acting on the company's behalf, including health professionals. By referencing health professionals' social media accounts in social media posts, Allergan did not accept liability for the social media activity of those health professionals. 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 full 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.

The Panel noted its comments and rulings above and was concerned about the tone and content of some of the social media posts in question on other users' Instagram accounts to which individuals, which would likely include members of the public, had been directed to by Allergan employees. 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 a prescription only medicine to the public including in once instance for an unlicensed indication and in another trivialising its use, Allergan had reduced confidence in, and brought discredit upon, the pharmaceutical industry. A breach of Clause 2 was ruled. This ruling was appealed by Allergan.

APPEAL FROM ALLERGAN

Allergan appealed the Panel's rulings of breaches of Clauses 2, 9.1 and 26.1.

Allergan submitted that overall, without prejudice to the specific grounds to be developed in the appeal submission, the PMCPA should not have allowed this complaint to proceed as it was based on matters outside the scope of the Code (namely third-party social media activity), 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.

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 had continued to challenge all industries, including the pharmaceutical industry, 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 was acquired by AbbVie in May 2020 (which had more restrictive policies in place). In line with its undertaking, Allergan 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 (details provided); 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 find the best way to guide best practices to make effective use of this increasingly relevant means of engaging with the general public, whilst remaining compliant.

The complaint should not have proceeded

Allergan submitted that the PMCPA should not have allowed the complaint to proceed as it was based purely on the content of third-party social media activity. No Allergan employee post contained any content that fell under the scope of the Code; furthermore, no employee liked or shared a third-party post that resulted in that content falling under the scope of the Code.

Allergan submitted that the Panel had incorrectly asserted that Allergan was liable for the content of third-party social media posts and it would like the Appeal Board to consider the following reasons to overturn the Panel rulings:

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

The Panel ruled that Allergan breached the Code by simply tagging third party accounts, whose retrospective posts mentioned Botox with or without information on its use.

Allergan submitted that no pharmaceutical company should be held responsible for the content and conduct of any third-party social media activity, simply through using hashtags or tagging, since hashtags allowed 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 it had proactively directed followers, albeit through no instruction, to search for and find the posts of tagged third party accounts, and therefore was forever responsible for this content, both retrospectively and prospectively.

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 potentially unacceptable content, the follower would have needed to see on their feed that the Allergan staff member had tagged a third party. The follower would then have needed to click that post, and then click on the third party's account. They then would have to search through all historical posts to find information on Botox.

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'. Allergan submitted that 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. This was an entirely unreasonable standard which would stifle the pharmaceutical industry's use of this increasingly relevant and effective means of communication.

Allergan note 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 the industry should not be placed in a situation where it had to operate without clear guidance and direction. It was clear that the reason tagging was used was so that an acceptable and compliant post could be read by the tagged account's followers, not as they claimed, to encourage a reader to search for potentially unacceptable content somewhere within that tagged account's historical activity.

Allergan submitted the important requirements of Clause 28.6 were highly relevant and had a significant bearing on its position. Allergan's interpretation was that 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, 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 responsible 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 tagged @mentions. On the basis that: @mentions were in a

different colour to the post content; clicking on them links to new pages/sites; and users of social media know this 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. 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 @mentions in their accounts, and all would be affected by this ruling which will be interpreted as '@ and # are 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.

Mention of brand name alone was not a promotional claim

Allergan noted that the Panel had ruled that content of third-party posts that mentioned Botox (either in a hashtag or in the post) were under the scope of the Code and mention of Botox was a promotional claim. The Panel noted that 'You can't buy happiness but you can buy Botox' was a claim made by a third-party for which Allergan was responsible.

Although Allergan submitted that the Code did not apply to such posts, it also considered that the mention of a brand name alone, with no other information about its use, should not be viewed as a promotional claim. This could set an erroneous precedent across the industry where inclusion and mention of a brand name alone could and did take place in a compliant non-promotional context. 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. The posts at issue were neither written, liked or shared by Allergan employees.

Allergan noted that the Panel had 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, Allergan considered this finding 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 its 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 that 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 drug in the profile.

Allergan submitted that if the Panel's ruling was upheld for these posts being within the scope of the Code, and that they breached Clause 26.1, this would be inconsistent with the above cases, which would add even greater confusion; 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 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 urged the Appeal Board to consider the matter in a manner consistent with previous Panel decisions, as noted above.

Summary

Allergan submitted that the PMCPA should not have allowed the complaint to proceed as it was based purely on the content of third-party social media activity; the mention of a brand name alone, with no other information about its use, should 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 appeal the Panel's rulings of breaches of Clauses 26.1, 9.1 and 2. Allergan submitted that:

- The company was striving to better understand the Code, PMCPA guidance and case rulings to find the best ways to make effective use of these valuable opportunities for patient engagement whilst remaining compliant.
- The company's social media SOP did not allow any interactions with posts that mention a prescription only medicine and that did not occur in the social media activity which formed the basis of this complaint
- The Panel should not have allowed this complaint to go ahead as the Code did not apply to third-party social media activity
- 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 allow other users to find company posts and tagging allows tagged account followers to see company posts

- The mention of a brand name alone, with no other information about its use, should be properly viewed as a promotional claim.

COMMENTS FROM THE COMPLAINANT

There were no comments from the complainant.

APPEAL BOARD RULING

The Appeal Board noted that in a linked Case AUTH/3431/11/20 Allergan had raised a process point in its appeal in that it considered that under Paragraph 5.2 of the PMCPA Constitution and Procedure 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. It was inferred that this point also applied in the current Case AUTH/3441/11/20. The Chair confirmed Allergan's position in this regard at the appeal hearing. The Appeal Board noted that Case AUTH/3441/11/20 was similar to Case AUTH/3431/11/20. 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 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 Case AUTH/3291/12/19 was dated as being signed on 16 March 2020. In the current case, Case AUTH/3441/11/20, the Appeal Board considered that the chronology between the third-party posts and the Allergan employee's engagement with the third-party account on Instagram was different to the prior case. The

Appeal Board also noted that the current case concerned the use of hashtags and tagging and these had not been the subject of adjudication in Case AUTH/3291/12/19. 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/3441/11/20 were such that they were not closely similar and therefore Case AUTH/3441/11/20 should proceed, and the merits of the appeal considered.

The Appeal Board noted the Panel's general comments above concerning Instagram. 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 the first screenshot was of a post on an Allergan product specialist's Instagram account which contained a photograph of the employee and a named health professional. The post read 'Exciting meeting with @[named health professional] and the team at @[named clinic] today!' and referred to Juvederm within a hashtag. The Panel noted that the tag to the named health professional if clicked appeared to take readers to the named health professional's Instagram account. The Appeal Board considered that by including the tag within his/her post the Allergan representative was directing readers to the associated Instagram account. The screenshot provided by the complainant of the named health professional's account showed that it included a post headed #botox[named area] followed by the photograph referred to above. Below the photograph, the post stated 'Lovely to see @[named Allergan employee] this lunchtime at [named] 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 health professional's post included reference to Botox within the wording of the post. It appeared that the information on the health professional's account was viewable without having to follow the account.

The Appeal Board noted that the Allergan employee's Instagram post and that of the named health professional provided by the complainant and noted above were both undated. It

appeared from Case 3431/11/20 that the Allergan employee's post was made on 6 March and based on the content of the health professional's post, it was likely made the same day. The Appeal Board considered that chronology was important. If an Allergan employee was linking to a health professional's account on Instagram that contained promotional content for Botox this would 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 it was not clear whether the named clinician's post was posted before or after the Allergan employee's post linking to his/her account. The complainant bore the burden of proof and had not provided sufficient details such that the Appeal Board could be certain of the chronology. The Appeal Board therefore considered that there was insufficient evidence before it to determine whether the Allergan employee's post linked to promotional material for Botox at the point it was made. The Appeal Board consequently ruled no breach of Clause 26.1 of the Code. The appeal on this point was successful.

The third screenshot of another product specialist's activity on Instagram provided by the complainant stated 'For those of you that were not lucky enough to be at the Glamour Beauty Festival in Manchester last November, you can catch the full replay of our Live Panel Discussion with' and then stated, *inter alia*, @[named health professional]. The Appeal Board considered that by including the tag within his/her post the Allergan representative was directing readers to the associated Instagram account. Screenshots of that health professional's Instagram account included what appeared to be a repost of a photograph of the clinician and another Instagram user and that user's Instagram post which stated 'Having a great time with the fabulous [named health professional] in Ireland. Love working with ya baby!'. Below this it stated 'Remembering back to our innovation teaching sessions today from the Botox laboratories @[instagram user referred to above] congratulations on your launch tonight of your new Singapore Masterclass'. It appeared that the information on the health professional's account was viewable without having to follow the account. The Appeal Board noted from the evidence provided by the complainant that the post from the Allergan employee appeared to be dated 21 January although in the evidence provided the date was partially cut off in the horizontal plane. The post on the linked account of the health professional was dated 28 May of what was assumed to be the same year. The Appeal Board noted its comments above about chronology. The complainant had not provided sufficient details such that the Appeal Board could be certain of the chronology. The Appeal Board therefore considered that there was insufficient evidence before it that the Allergan employee's post linked to promotional material for Botox at the point it was made. 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 that the screenshot provided by the complainant of the third product specialist's Instagram activity appeared to include a repost from a clinician dated 27 May, who had qualified as a dentist over ten years ago but that since his/her move into facial aesthetics in 2016, he/she had built an extensive network of patients and worked with 'top-leading brands such as @allerganaesthetics'. It then referred to being approached to write an article for @allergansparkuk. A hashtag to a named clinician was included at the bottom of the post. The Appeal Board considered that by including the tag within his/her post the Allergan representative was directing readers to the associated Instagram account. The screenshot of the tagged health professional's Instagram account provided by the complainant included a piece about the differences between Botox and fillers and stated, *inter alia*, that Botox was a muscle paralysis agent that removed the fine line and wrinkles, crow's feet and neck bands. The Appeal Board noted that Botox was not indicated for 'neck bands'. The piece further stated that Botox was ideal for dynamic wrinkles ie lines between the eyebrows and its effects could

last 4-6 months. It appeared that the information on the health professional's account was viewable without having to follow the account.

The Appeal Board noted that there was no date provided on the post highlighted by the complainant on the tagged health professional's Instagram account so it was unclear when the material concerning Botox was added. The Appeal Board noted its comments above about chronology. The complainant had not provided sufficient details such that the Appeal Board could be certain of the chronology. The Appeal Board therefore considered that there was insufficient evidence before it that the Allergan employee's post was linking to promotional material for Botox at the point it was made. 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 that the screenshot provided by the complainant of the fourth product specialist's Instagram activity included an image of a clinic showing Juvederm posters and stated 'It's so lovely to walk into a clinic and be greeted by your posters, thank you [name] and [name] for being lovely customers'. The post included a tag which appeared to be to a named clinic. The Appeal Board considered that by including the tag within his/her post the Allergan representative was directing readers to the associated Instagram account. The Appeal Board noted that the screenshot of the tagged account provided by the complainant stated that the clinic consisted of internationally and Harley Street trained clinicians in the named geographical area followed by reference to, *inter alia*, Botox. Further, a number of images could also be seen in a grid on the account, one of which stated, 'You can't buy happiness but you can buy Botox'. It appeared that this information on the clinic's account was viewable without having to follow the account. The Appeal Board was concerned that an Allergan employee considered that it was appropriate to link directly to an aesthetic clinic where it would be extremely likely that Botox and its supply would be discussed and queried how linking to and liking organisations and thereby sharing how and where to access Botox could be considered to be anything other than promotional. However, the Appeal Board noted that the complainant bore the burden of proof and that there was no date on the information provided by the complainant to confirm when the material concerning Botox was added to the clinic's account including within the user profile description. The Appeal Board noted its comments above about chronology. The complainant had not provided sufficient details such that the Appeal Board could be certain of the chronology. The Appeal Board therefore considered that there was insufficient evidence before it that the Allergan employee's post linked to promotional material for Botox at the point it was made. 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 that the screenshot provided by the complainant of the fifth product specialist's Instagram activity stated 'Meet your Finalist [two named health professionals]' followed by tags to their social media accounts. The Appeal Board noted that this post appeared to be made on 10 July. The Appeal Board noted that the complainant provided screenshots of two posts from one of the tagged health professional's social media accounts dated 21 February and 25 February of what appeared to be the same year, each of which included references to the hashtag Botox. It appeared that the information on the health professional's account was viewable without having to follow the account. The Appeal Board noted its comments above that using the term Botox was seen as promotional. The Botox hashtags would direct readers to hashtag feeds which in the Appeal Board's view were likely to contain posts that promoted Botox. The Appeal Board considered that by tagging the health professional in his/her post the Allergan employee had directed readers to the associated social media account where the two posts made prior to the Allergan employee's tag and which

referred to Botox in two hashtags could be viewed. The Appeal Board considered that in general if a pharmaceutical company employee linked to a separate social media account which regularly posted material about prescription only medicines or included a post promoting a prescription only medicine which was likely to be viewed by those who followed the link, then such a link was likely to be promotion of a prescription only medicine to the public. The Appeal Board noted, however, that it was difficult to establish from the information provided by the complainant and given the time lapse between February and July how far back in the health professional's account the posts featuring Botox would appear. The Appeal Board did not consider that the complainant had provided sufficient evidence in this regard and 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 above and consequently considered that Allergan had not failed to maintain high standards and no breach of Clause 9.1 was ruled. Consequently, the Appeal Board ruled no breach of Clause 2. The appeal on both points was successful.

Following its completion of the consideration of the appeal in this case, the Appeal Board was very concerned in general about the linking by Allergan employees to health professionals' social media material. The Appeal Board noted that the complainant had not provided detailed information about the chronology. The Appeal Board noted that social media was often used by young people. The Appeal Board wished to highlight that from 1 October 2021 it would be a criminal offence for anyone (other than a registered doctor, nurses, dentists and pharmacists, where the treatment has been approved by a doctor) to administer botulinum toxin or a filler by way of an injection for a cosmetic purpose to a person under the age of 18 in England or to make arrangements to provide these to anyone under the age of 18 in England. Consideration of the complaint was completed prior to the introduction of the new law and the role of the Appeal Board (and Panel) is to consider complaints under the ABPI Code. Neither the Appeal Board nor the Panel can make any finding regarding the application of legal requirements.

Complaint received **13 December 2020**

Case completed **1 October 2021**