

COMPLAINANT v MERCK SHARP & DOHME

Alleged frequent and disguised promotional emails

A complainant who described him/herself as a concerned UK health professional, complained about two almost identical emails from Merck Sharp & Dohme, received within minutes of each other. The emails were headed 'Explore MSD Connect Today' and invited recipients to access the latest information about Merck Sharp & Dohme products, support their patients with online resources and sign-up for online and live events.

The complainant noted that the two emails had different subject lines ('Diabetes 101 – what's new?' and 'Diabetes Round-up') neither of which indicated that the content was promotional. The complainant noted that he/she had signed up to receive emails but considered that two identical emails in half an hour was excessive especially as it was not clear that each email was a signpost to a promotional website. Finally, the complainant noted that there did not appear to be a link to prescribing information for any product on the website.

The detailed response from Merck Sharp & Dohme is given below.

The Panel noted there was no direct or implied mention of any medicine in the emails at issue, however, both emails referred to and included links to a promotional website. In the Panel's view, recipients would be clear that the MSD Connect website would include information about the company's medicines as stated in the content of the email. However, the Panel considered that as the emails did not promote any specific medicines, the emails were not in themselves promotional and therefore were not disguised. There was no need to include prescribing information. No breaches of the Code were ruled.

The Panel noted Merck Sharp & Dohme's submission that when a reader accessed the MSD Connect website, prescribing information was clearly available. The Panel noted that the complainant bore the burden of proof and did not consider that he/she had provided evidence to show that, on the balance of probabilities, the MSD Connect website did not include prescribing information for any of Merck Sharp & Dohme's medicines as alleged and no breach of the Code was ruled.

The Panel noted Merck Sharp & Dohme's submission that the two emails had been sent to the same health professional within seconds due to a technical error experienced by a third party. The same email, using different subject lines, was sent to a number of health professionals within seconds of each other. On balance, based on the particular circumstances of this case, the Panel did not consider that this meant that high standards had not been maintained. No breach of the Code was ruled.

A complainant who described him/herself as a concerned UK health professional, complained about two almost identical emails from Merck Sharp & Dohme which he/she received within minutes of each other. The emails were headed 'Explore MSD Connect Today' and invited recipients to access the latest information about Merck Sharp & Dohme products, support their patients with online resources and sign-up for online and live events. There was a graphic related to diabetes under which it was stated 'Register with MSD Connect to access this whitepaper and additional content'. Below that statement was a boxed statement regarding the reporting of adverse events via the Yellow Card scheme and also to Merck Sharp & Dohme. Both emails had the same reference number, GB-NON-00443.

COMPLAINT

The complainant noted that, although identical, the two emails had different subject lines ('Diabetes 101 – what's new?' and 'Diabetes Round-up') neither of which indicated that the content was promotional. The complainant stated that, because of the different subject lines, the sending of the two emails was deliberate and not due to a technical glitch. The complainant noted that he/she had signed up to receive emails but considered that two identical emails in half an hour was excessive especially as it was not clear that each email was a signpost to a promotional website. Finally, the complainant noted that there did not appear to be a link to prescribing information for any product on the website.

When writing to Merck Sharp & Dohme, the Authority asked it to consider the requirements of Clauses 4.1, 9.1 and 12.1 of the 2016 Code.

RESPONSE

Merck Sharp & Dohme explained that in September 2018, it instructed a named media-buying agency to conduct A/B testing on the email in question which was intended to promote MSD Connect (a promotional website) to health professionals. This activity was then sub-contracted to the publishing house that managed a general practice journal and website, and which had significant experience in A/B testing of emails.

Merck Sharp & Dohme submitted that A/B testing was a standard marketing approach that sought to provide a tailored and personalised email experience for health professionals. In this case, Merck Sharp & Dohme set up two versions of an email, each with a different subject line (version A and version B) but with exactly the same content in each. The intention was that these would be

sent to a test group of health professionals who had previously consented to receive promotional emails. Half of the test group was to be sent version A, while the other half was to be sent version B. Metrics would then set out which version was opened the most. Based on this information, Merck Sharp & Dohme could then send that version to a wider group of health professionals who had consented to receive emails.

Merck Sharp & Dohme submitted that the A/B testing email in question was certified on 17 February 2019. The A/B testing email with the two different subject lines was sent out by the publishing house on 18 February 2019 but despite instructions, both subject headed emails were sent to the same health professionals within seconds of each other. This was not Merck Sharp & Dohme's intention and the publishing house had acknowledged that this was the consequence of a technical fault within its organisation. The sending of two emails was not what had been agreed and was not deliberate as it undermined the purpose of the A/B testing; it also exposed health professionals to the repeat/identical email content.

Once it knew of the issue, Merck Sharp & Dohme immediately halted any other A/B testing of emails until the agencies involved had taken appropriate preventative and corrective action to ensure that health professionals were not subjected to the same experience again.

Merck Sharp & Dohme noted the allegation that there did not appear to be a link to prescribing information to any product on the website. The company assumed that the complainant had commented on the email in question and not the promotional website. As the email did not contain any product name, information or claims Merck Sharp & Dohme did not consider that it fell under Clause 4.1 as it was not promotional material for a medicine. Once the website MSD Connect was reached, then prescribing information was clearly available one click away. The company denied any breach of Clause 4.1.

Merck Sharp & Dohme noted that the complainant had alleged that the emails amounted to disguised promotion. Merck Sharp & Dohme stated, however, that it was clearly indicated in email inboxes that the emails in question contained promotional information (a relevant screenshot was provided). Additionally, there was a clear header on the emails that stated 'This email has been sent by [named third party] and contains third party promotional information'. Merck Sharp & Dohme noted the complainant's acknowledgement that he/she signed up to receive promotional emails and, given the above, it considered that the emails were sufficiently clear that they contained promotional content. Furthermore, as stated in relation to Clause 4.1 above, once a health professional landed on MSD Connect, it was very clearly signposted as a promotional website, from which prescribing information, per product, was one click away. Merck Sharp & Dohme thus denied a breach of Clause 12.1.

Additionally, Merck Sharp & Dohme submitted that it was clear that the emails in question contained promotional information for a website, however, the emails themselves were not promotional for a medicine and therefore did not need to have prescribing information. Merck Sharp & Dohme denied any breach of Clause 9.1 as it did not believe it had failed to maintain high standards.

In summary, Merck Sharp & Dohme submitted that the emails created complied with the Code and were sent with the appropriate permissions in place and clearly signposted as containing promotional material. Whilst Merck Sharp & Dohme recognised that this had upset one health professional, for which the company sincerely apologised, the matter, in its view, did not amount to any breach of the Code.

PANEL RULING

The Panel noted the complainant's allegation that the subject line of both emails did not indicate that the content of either email was promotional. The Panel noted that there was no direct or implied mention of any medicine in the emails at issue, however, both emails referred to and included links to a promotional website. In the Panel's view, recipients would be clear that the MSD Connect website, that was being introduced to readers within the emails, would include information about Merck Sharp & Dohme's medicines as stated in the content of the email. However, the Panel considered that as the emails did not promote any specific Merck Sharp & Dohme medicines, the emails were not in themselves promotional and therefore were not disguised. The Panel therefore ruled no breach of Clause 12.1.

The Panel noted Merck Sharp & Dohme's submission that when a reader accessed the MSD Connect website, prescribing information was clearly available one click away. Merck Sharp & Dohme provided an example of a webpage with links to the prescribing information appearing at the bottom of the page. The Panel did not review the entire MSD Connect website. The Panel noted that the complainant bore the burden of proof and did not consider that he/she had provided evidence to show that, on the balance of probabilities, the MSD Connect website did not include prescribing information for any of Merck Sharp & Dohme's medicines as alleged and no breach of Clause 4.1 was ruled in relation to the MSD Connect website.

The Panel noted its comments above and considered that as the emails at issue did not promote any specific Merck Sharp & Dohme medicines, there was no requirement to include prescribing information in the emails. The Panel therefore ruled no breach of Clause 4.1 in relation to each email.

The Panel noted that the complainant stated that he/she had signed up to receive emails. The supplementary information to Clause 9.9 ensured that emails included information as to how to unsubscribe from receiving them. The Panel noted

Merck Sharp & Dohme's submission that the two emails with different subject lines had been sent to the same health professional within seconds due to a technical error. This was unfortunate and Merck Sharp & Dohme had been let down as a result of a technical error experienced by a third party agent for which it was, nonetheless, responsible for under the Code. The same email, using different subject lines, was sent to a number of health professionals within seconds of each other. On balance, based on

the particular circumstances of this case, the Panel did not consider that this meant that high standards had not been maintained. The Panel therefore ruled no breach of Clause 9.1.

Complaint received **18 February 2019**

Case completed **28 May 2019**
