

MEMBER OF THE PUBLIC v MERZ

Alleged promotion on Instagram

A complaint was received from a contactable member of the public who indicated that he/she worked for a body contouring company. The complainant alleged that a named representative from Merz Pharma UK had used an Instagram account to promote Bocouture (botulinum toxin type A). Bocouture was indicated for the temporary improvement in the appearance of certain upper facial lines.

The complainant provided copies of images downloaded from an Instagram account in which a representative from Merz had created his/her own account under the company's name and had actively promoted Bocouture on the account. Bocouture was a prescription-only medicine.

The detailed response from Merz is given below.

The Panel noted that the Instagram account was set up by a Merz representative for business purposes. This appeared to be contrary to the Merz policy on social media based on the extracts from the company handbook provided by Merz.

The Panel queried why another representative was to communicate to the representative in question that the images on the Instagram profile should be removed. It was not known whether this had happened. In any event removal of the images would leave the account still running. It was not clear whether this would be in line with the policy given that using personal social media accounts for business purposes was reported as being contrary to the Merz policy.

The Panel was also concerned that checking that the images had been removed was left to a junior person and not a member of staff responsible for representatives. It was only when a manager was made aware some days later that an image of Bocouture could be seen that the matter was escalated. Following this all representatives were asked to confirm by email that they did not hold active business social media accounts containing product details.

The Panel considered that although the Instagram post was primarily about medical devices and encouraged viewers to be ready for summer, the pack shot of Bocouture, a prescription only medicine, would be seen as part of that message ie that the products illustrated were available to viewers to be 'summer ready'. In this regard the Panel considered that the Instagram post was an advertisement.

The Panel noted that the privacy arrangements for the account in question were not clear. Nor was it clear who followed the account. Merz submitted that the followers were Merz colleagues, healthcare

professionals and other relevant decision makers. On the balance of probabilities, the Panel concluded that the Instagram account was not private. Anyone, including members of the public would be able to view it.

The Panel considered that including a pack shot of a prescription only medicine on the Instagram account in a posing which advertised other Merz products meant that Bocouture, a prescription only medicine, was being advertised to the public. The Panel therefore ruled a breach of the Code.

The representative in question had failed to maintain a high standard of ethical conduct and a further breach was ruled. The Panel noted Merz's submission that it had a policy that employees were not to use personal social media accounts for business purposes but nevertheless considered that the company had failed to maintain a high standard given the initial failure to properly review the material and identify that the product images included a prescription only medicine and the delay between being notified about the Instagram account and the instruction for the profile to be deleted. It was also concerning that juniors were asked to deal with the matter. The Panel therefore ruled a breach as high standards had not been maintained.

The Panel did not consider that the complainant had shown on the balance of probabilities that there was a breach of Clause 2 of the Code.

A complaint was received from a contactable member of the public who indicated that he/she worked for a body contouring company. The complainant alleged that a named representative from Merz Pharma UK Ltd had used an Instagram account to promote Bocouture (botulinum toxin type A). Bocouture was indicated for the temporary improvement in the appearance of certain upper facial lines.

COMPLAINT

The complainant provided copies of images downloaded from an Instagram account in which a representative from Merz had created his/her own Instagram account under the company's name and had actively promoted Bocouture on the account. Bocouture was a prescription-only medicine.

When writing to Merz, the Authority asked it to consider the requirements of Clauses 2, 9.1, 15.2 and 26.1 of the Code.

RESPONSE

Merz referred to the complainant as an ex-employee. The company explained that at a Merz educational meeting on 13 June, a manager was

told by a colleague (another representative) that the representative named by the complainant had set up a Merz profile on Instagram and had imported images of the dermal fillers Belotero and Radiesse, both of which were medical devices. It was discussed that some customers preferred to use the direct messaging function of Instagram as an effective way to communicate meeting arrangements and other business logistics vs email or conventional texting, and this was why the representative in question set up the account.

The manager was also made aware that a director and another manager had advised the representative that under no circumstances were Merz employees to use personal social media accounts for business purposes and that they should refer to the Policy on Social Media as outlined in the company handbook.

The manager was assured that his/her colleague would tell the representative immediately that the images on the Instagram profile should be removed. The manager's motive was based on the fact that he/she clearly understood that any images of product sourced direct by any staff member that had not been through the formal approval process should not be used in social media (or any form of communication).

The next morning, whilst on annual leave, the manager asked a junior person to review the representative's Instagram profile and confirm that all images of product had been removed. As the images seen on the grid view were only recognised as Belotero and Radiesse so not prescription-only medicines, the action was not deemed urgent and, due to resourcing pressures and workload, other work was prioritised. A meeting between the manager and junior person was scheduled for Wednesday, 19 June when it was agreed that the matter would be discussed further.

Merz stated that during the two weeks spanning the period in question, the marketing team responsible for the injectables portfolio (Belotero, Radiesse and Bocouture) executed a number of events which relied heavily on the manager and junior person and the vacancies in the team, intensified pressure during this period. Due to these distractions the representative's Instagram account was not checked and the image in question remained undetected.

At the meeting on 19 June the manager was told that the images had not been removed and that if the images on the grid view were enlarged, a pack shot of Bocouture could be seen. This information was immediately escalated to another manager in order to instruct the representative to immediately delete his/her profile. This was actioned that afternoon and no further viewing of the profile was possible. The manager received written confirmation of the deletion of the account from the representative that evening.

In parallel with this activity, the complainant contacted the PMCPA on 18 June and Merz received the complaint on 20 June. The sales managers were immediately contacted by medical affairs

who requested that, as a matter of urgency, all representatives confirmed by email that they did not hold active business social media accounts containing product details. Sales managers were also briefed to remind their teams to contact themselves, medical affairs or refer to the company handbook for details of the Merz Social Media Policy if they had any immediate questions. In addition, a full audit of all Merz staff for any social media accounts was undertaken; no accounts identified contained product promotion of a prescription only medicine.

Merz submitted that the Instagram profile in question was initially examined on the 'tile view' where it was noted that a series of pack shots of products as part of a collection of photographs had been uploaded. There were four photographs on the page including images of Merz colleagues and pack shots of Radiesse and Belotero. One of the tiles showed seven packs – six of these were Belotero and one was Bocouture. The images uploaded were not from the Merz bank of certified and approved pack shots and company policy was very clear that all product-related communications, including any images, must be certified and approved through the Merz approval system, regardless of whether they were prescription only medicines or medical devices. Merz noted that there were only four images on the account (normally nine could be seen) which illustrated the relative newness of it. It was active for just six days.

Merz stated that the representative had looked at similar accounts held by employees of two other manufacturers in aesthetic medicine and sought to recreate their page layout and look. The representative had then searched Instagram for 'Belotero' and copied some of the photographs found under the hashtag #beloterofiller. This was not an official or approved Merz hashtag and the photograph chosen was from a German healthcare professional. The representative's focus was on the dermal filler Belotero and the caption below (not shown in full in the complaint letter) made this clear:

'Summer is on the way! Are you Ready...

Patients today don't want a filler that "owns" them; they want a filler that naturally integrates into their tissue, so that they can retain their identity and express their emotions with confidence.

Thanks to the Belotero portfolio of fillers, it's possible to tailor a personal treatment protocol for every patient, so that they can feel empowered, own their age and own their beauty.'

This was approved copy that the representative had lifted from the Merz Belotero website. Belotero was a medical device and so promotion of it fell outside the Code.

Merz noted that in the tile view (four images on a mobile device screen) the Bocouture pack (around half the size of the other packs) was less obvious and set against a dark background. In addition, the image resolution made the brand name difficult

to read and so those viewing the page who were not health professionals would not easily see the Bocouture brand name. If this image alone was selected (and viewed in full screen mode) the Bocouture pack was only 6mm x 8mm (on a standard smart phone screen). Further, given that the accompanying text exclusively referred to a dermal filler the complainant's allegation that the representative had actively promoted Bocouture was misleading.

Merz noted its company culture regarding the intrinsic regard for the Code across the entire business and the training processes rigorously implemented and adhered to throughout the organisation as outlined below.

The Merz Company Handbook, which was trained out to all employees when they started employment with Merz, clearly outlined the company policy on the use of social media. On the business use of social media the guidance was as follows:

'If your duties require you to speak on behalf of the organisation, this does not automatically give you the authority to do so in a social media environment. Discussion of the company or any information relating to the Company in a social media environment is not permitted unless specifically authorised by your line manager or a member of the Management team' ... 'You should not presume that content generated will remain private' ... 'You should contact your colleagues and/or relevant experts if you plan to generate content within social media relating to the company to ensure content is accurate and not infringing any third party rights.'

Merz medical affairs regularly presented updates on the Code to the sales teams at regional and team meetings. All permanent members of the promotional team had to undertake the ABPI examination and were regularly coached in the field by the Merz training manager and sales managers.

Merz had taken this opportunity to review its current processes and to clarify policy where it considered that it might be required. Additionally, an email was sent to UK employees about the use of social media and this topic would be discussed with employees again at the upcoming sales meeting in July.

Clause 26.1 (advertising to the public)

Merz considered two perspectives; intent and definition/interpretation.

Merz submitted that:

- 1 Intent – based on a meeting with the representative and the wording on the Instagram page (that pre-dated the complaint) it was clear that the Instagram account was intended to serve as a communication portal with Merz colleagues, other relevant decision makers and healthcare professionals only and to highlight only the dermal filler Belotero. The 57 followers of the representative's account were audited and they

exclusively comprised the above categories; there were no members of the public. Accordingly, there was no opportunity for the post to be seen by the public.

- 2 Definition/interpretation (of advertising) – the Code defined 'promotion' but not (explicitly) 'advertising'. Clauses 5 and 6 detail the requirements for advertisements and these, importantly, furnish the viewer with enough information to make an informed decision to administer, consume, prescribe, purchase, recommend, sell, supply or use a medicine. Merz submitted that for an image to act as an advertisement there must be the context for a viewer to become influenced to act. The presence of a pack image only with a brand name that, even in expanded view, had letter heights smaller than 2mm, suggested that the ability of the viewer to discern what was shown as a prescription only medicine was negligible (unless they were a health professional with prior contextual knowledge).

In view of the above, Merz submitted that the inclusion of the small pack image of Bocouture without any other information and accompanying text that referred exclusively to a dermal filler to a group of individuals who were exclusively industry members, health professionals or other relevant decision makers supported that the Instagram posting could not constitute advertising to the public and therefore Clause 26.1 had not been breached.

Clause 15.2 (high standard of ethical conduct for representatives)

Recognising the relatively narrow definition of Clause 15.2 (which related to ethical standards) Merz noted the representative's behaviour and subsequent co-operation with the internal investigation, and the culture of the organisation which was driven and reinforced with a high degree of regularity from both a corporate and local leadership perspective. One of the company values was to 'Deliver trusted results'. Merz noted that part of the supporting sub-text stated:

'Quality, ethics and excellence are at the heart of what we do, patients really matter and we will always be honest.'

At a local level the managing director for Merz UK personally took all new employees through an induction process that included the company's values and also reinforced the mantra which stated that Merz would never compromise patient safety or mislead health professionals. This was widely understood by all staff and empowered them to act when they considered that these standards were not being upheld.

Since Clause 15.2 was specific to 'ethical' conduct, Merz did not consider that the representative's actions were unethical. As the representative acted in a way that he/she thought was morally right and made an honest mistake in including a photograph of a medicine it was difficult to see these actions

as immoral. The representative was sincerely apologetic and his/her remorse supported the point that he/she recognised his/her error and that his/her moral compass was genuine and appropriate for the industry.

Clause 9.1 (high standards)

Merz noted that since it was set up in 2006, compliance, standards and ethical behaviour were a cornerstone of the way it did business. As the complainant was an ex-employee who would have been privy to all commercial briefings, (and therefore able to cite clear breaches had the culture been such), should support that fact that Merz took compliance seriously. Merz noted that the Instagram account was first established on 13 June, first identified as containing an errant Bocouture carton on 19 June and suspended immediately, that same day, and the matter promptly escalated to the representative's line manager for disciplinary review. All of this happened before the complaint arrived on 20 June. The presence of clear guidance and training on the use and associated risks of social media, the speed of response and empowerment of a junior member of staff to act swiftly to remedy the matter indicated that clear professional standards and effective processes were in place. The fact that a full audit of all Merz staff social media accounts failed to identify further cases confirmed this was an isolated incident. In this regard, Merz submitted that high standards had been maintained.

Clause 2 (bringing the industry into disrepute)

Since Clause 2 was a sign of particular censure, reserved for serious, multiple or repeated breaches, Merz submitted that this single alleged promotion on Instagram did not constitute such a breach.

In summary, Merz noted that it had had little interaction with the Panel for many years which reflected its culture and systems. As a small company its resources were limited, however, it prioritised compliance and its culture and intent was genuine. The complaint had served as a useful reminder to the organisation of why compliance was important and it would use it as an internal case study across the business to reinforce ethical and compliant behaviours.

PANEL RULING

The Panel noted that Merz referred to the complainant as an ex-employee. The complainant however, described him/herself in such a way that the Panel considered him/her to be a member of the public.

The Panel noted that the Instagram account was set up by a member of the Merz sales team, a representative, for business purposes. This appeared to be contrary to the Merz policy on social media. The Panel was not provided with a copy of a policy but was provided with extracts from the company handbook which Merz submitted clearly outlined the company policy on the use of social media.

The Panel queried why another sales representative was to communicate to the representative in question that the images on the Instagram profile should be removed. It was not known whether this had happened. In any event removal of the images would leave the account still running. It was not clear whether this would be in line with the policy given that using personal social media accounts for business purposes was reported as being contrary to the Merz policy. The company also submitted that the policy stated that the use of social media for discussion of the company or any information relating to the company in a social media environment was not permitted unless specifically authorised by the line manager or member of the management team.

The Panel was also concerned that checking that the images had been removed was left to a junior person and not a member of staff responsible for representatives and that the images were only looked at in the grid view. It was only when a manager was made aware some days later that an image of Bocouture, a prescription only medicine, could be seen that the matter was escalated to the sales manager. Following this all representatives were asked to confirm by email that they did not hold active business social media accounts containing product details. The full audit of Merz staff was reported as confirming that no accounts identified contained promotion of a prescription only medicine. The Panel noted Merz's submission that the account in question was new and active for just six days.

The Panel noted Merz's submission that when four images were viewed on tile view on a mobile phone, the Bocouture pack, which was around half the size of the six other packs shown, was small and the brand name difficult to read. The six other packs were products from the Belotero range. Merz submitted that these were medical devices (fillers) and thus not covered by the Code.

The Panel considered that although the Instagram post was primarily about the medical devices and encouraged viewers to be ready for summer, the pack shot of Bocouture, a prescription only medicine would be seen as part of that message ie that the products illustrated were available to viewers to be 'summer ready'. In this regard the Panel considered that the Instagram post was an advertisement.

The Panel understood that whether the Instagram post was available to the public would depend on the privacy settings of the account. Instagram was said to be a photo/video sharing site. Business profiles were not able to be made private. It appeared that by default, anyone could see a person's profile and posts on a personal account. Personal accounts could be made private so that only followers approved by the account holder could see what that account holder shared. If an account was set to private, only approved followers would see the photos or videos on hashtag or location pages. Only those accepted by the account owner would be able to see the postings. This appeared to the Panel to be different to the arrangements for some other social media platforms.

The complainant stated that he/she came across the Instagram account online. The account details indicated that there were '57 followers 131 following'. The Panel noted that the privacy arrangements for the account in question were not clear. Nor was it clear who followed the account. Merz submitted that the followers were Merz colleagues, healthcare professionals and other relevant decision makers. There was a difference between potential audiences with regard to advertising prescription only medicines and advertising medical devices. It was not clear from either the complainant or Merz whether it was appropriate to advertise a prescription only medicine to all the followers. Although the account was a personal account it was set up for business purposes and was therefore likely to be more useful if it were available to anyone to view. In addition, from the photograph provided by the complainant, which included an option to follow the account, it appeared to the Panel that the complainant was not following the account. The photograph provided by the complainant included the pictures in tile view and it appeared that the complainant would be able to click on each tile to view the enlarged version. The complainant provided a photograph of the enlarged version. On the balance of probabilities, the Panel concluded that the Instagram account was not private. Anyone, including members of the public would be able to view it.

The Panel considered that including a pack shot of a prescription only medicine on the Instagram account

in a posing which advertised other Merz products meant that Bocouture, a prescription only medicine, was being advertised to the public. The Panel therefore ruled a breach of Clause 26.1.

The Panel considered that the representative in question had failed to maintain a high standard of ethical conduct and ruled a breach of Clause 15.2. The Panel noted Merz's submission that it had a policy that employees were not to use personal social media accounts for business purposes but nevertheless considered that the company had failed to maintain a high standard given the initial failure to properly review the material and identify that the product images included a prescription only medicine and the delay between being notified about the Instagram account and the instruction for the profile to be deleted. It was also concerning that juniors were asked to deal with the matter and one of them did not appear to have sufficient knowledge to deal with the matter. The Panel therefore ruled a breach of Clause 9.1.

In considering the matters overall, the Panel did not consider that the complainant had shown on the balance of probabilities that there was a breach of Clause 2 of the Code. This clause was used as a sign of particular censure and reserved for such use.

Complaint received

19 June 2019

Case completed

12 September 2019