

ANONYMOUS EMPLOYEE v BIOGEN

Company culture and bonus scheme

An anonymous, contactable complainant, who described him/herself as a current employee of Biogen Idec, alleged that over the last five years, field-based employees had received huge bonuses and other performance incentives, which the complainant considered was unethical and against the Code. The complainant was concerned that the perception of this, particularly when compared with the salaries of health professionals, was unethical at best and tantamount to 'buying prescriptions' at worst. The complainant was sure that all of the benefits in addition to basic salary needed to be considered in terms of total bonus awards as there was a direct link to product sales.

The detailed response from Biogen is given below.

The Panel noted Biogen's submission about the burden of proof. The Panel noted that as stated in Paragraph 2.2 of the Constitution and Procedure rulings were made on the basis that a complainant had the burden of proving his/her complaint on the balance of probabilities. This was reflected in the Introduction to the Constitution and Procedure which also stated that complaints were judged on the evidence provided by the parties.

The Panel noted that the Code required that representatives must be paid a fixed basic salary and any addition proportional to sales of medicines must not constitute an undue proportion of their remuneration.

The Panel noted that there appeared to be some differences between the company's initial and supplementary response. Biogen initially stated that field-based bonus payments comprised a territory target bonus opportunity which was not linked to scripts or activities and which was triggered only when a certain high percentage of target was achieved. Biogen subsequently submitted that a sales representative would only receive a bonus at the point when a higher percentage of the target was achieved. Below this no bonus payment would be paid. It was unclear which was the correct figure. No supporting material had been provided. In addition, further information from Biogen made it difficult to understand how a target based on sales could not be linked to scripts as stated in the initial response.

The Panel noted Biogen's submission that remuneration included basic salary, car allowance, pension contribution and medical benefit payments. The Panel noted that up until some years ago the bonus/remuneration calculation included incentive trips which apparently were reflected as remuneration. Details were provided. The Panel did not accept Biogen's submission that incentive

trips were not relevant for the purposes of Clause 15.7. They were treated by Biogen as part of the representatives' remuneration which was a fundamental part of the calculation of bonus as a percentage of remuneration. More recently the initiative was changed to a cash award which was also included as part of the bonus/remuneration payments calculation and a more restrictive bonus ceiling implemented.

The Panel noted Biogen's submission that, due to exceptional circumstances in one given year, an exceptional bonus was paid. In other years the % of remuneration received as a bonus was lower including that for sales managers (details provided). The majority being below 30%. The Panel noted Biogen's submission that when interpreting Clause 15.7 undue proportion should be construed as a level which did not incentivise behaviour which was inconsistent with the Code. The Panel queried whether 30-40% remuneration as a bonus was in line with the requirements of the Code. The Panel did not consider that 50-60% remuneration as a bonus was in line with the Code and a breach was ruled accordingly.

By paying a high percentage of remuneration as a bonus in one given year Biogen had failed to maintain high standards. A breach of the Code was ruled.

The Panel did not consider that the circumstances warranted a ruling of a breach of Clause 2 of the Code which was a sign of particular censure and reserved for such use. No breach of that clause was ruled.

On appeal by Biogen the Appeal Board did not accept Biogen's submission that the Panel had applied a fixed threshold when interpreting the Code. That was not so. The Panel had referred to Biogen's submission that the level of bonus should not incentivise non-compliant behaviour. The Appeal Board considered that all the circumstances should be taken into account when deciding whether or not the level of bonus was in line with the requirements of the Code including whether non-compliant behaviour was incentivised. However, the Appeal Board did not accept Biogen's inference that evidence of such non-compliant behaviour was required before a breach of the Code could be ruled. The Appeal Board noted that the Code referred to 'an undue proportion' of remuneration which it considered in the absence of any relevant cases, was for companies to determine. It was not for the Panel to issue guidance and the Appeal Board noted Biogen's submission on the potential implications of an imposition of a ceiling on permitted payments to employees. In the Appeal Board's view, there was no procedural unfairness in this regard contrary to the submission by Biogen.

The Appeal Board noted Biogen's submission about the salary survey and common industry practice and considered that whether a bonus level was common industry practice would not alone determine whether a bonus contravened the Code. The Appeal Board noted that the 2017 industry bonus data provided by Biogen was based on an average of median base salaries. The Appeal Board noted that Biogen's bonus was a percentage of an overall remuneration package, rather than base salary.

The Appeal Board noted further and better particulars of the circumstances surrounding the payments in question were provided to the Appeal Board which were not made available to the Panel.

The Appeal Board noted Biogen's submission that this payment had been caused by its failure to accurately predict sales for a medicine. The company had subsequently taken steps to adjust its bonus scheme for sales of that medicine. The Appeal Board decided that whilst it did not consider that 50-60% remuneration as a bonus was necessarily acceptable in relation to the requirements of the Code, in the particular circumstances of this case the payment was clearly an outlier based on exceptional circumstances, including an inaccurate sales forecast. It did not appear to be sustained or common practice within Biogen to pay such bonuses. Steps had been taken to remedy the situation and only one payment was made. The Appeal Board ruled no breach of the Code. The Appeal Board did not consider, therefore, that high standards had not been maintained and it ruled no breach of the Code. The appeal on both points was successful.

An anonymous, contactable complainant who described him/herself as a current employee of Biogen Idec Limited was concerned that the company was operating in a number of ways that was against the Code.

COMPLAINT

The complainant alleged that over the last five years, field-based employees had received huge bonuses, in particular three named individuals, which the complainant considered was unethical and against the Code. The complainant was concerned that the perception of this and how it made the pharmaceutical industry look, particularly when compared with the salaries of health professionals, was unethical at best and tantamount to 'buying prescriptions' at worst.

The complainant noted that the three named employees had numerous bonuses each year, including 'big awards', other top achiever bonuses (for which the company paid the tax on behalf of the employee making it even more valuable to the individuals) and incentive trips. The complainant was sure that all of the benefits in addition to basic salary needed to be considered in terms of total bonus awards as there was a direct link to product sales.

The complainant further described recent incentive trips. There was no work or business content included as part of the trip. The complainant stated that when all of these additional benefits were added together for the three named employees (including the fact that Biogen paid

the individuals' tax) their bonuses would be significant compared to their salaries and the salaries of other health professionals.

When writing to Biogen, the Authority asked it to respond in relation to the requirements of Clauses 15.7, 9.1 and 2.

RESPONSE

Biogen stated that its track record with the PMCPA clearly showed that Biogen operated to the highest ethical standards in the way it conducted its business and complied with the Code. Biogen submitted that it had at all times conducted itself in accordance with the letter and spirit of the Code.

Biogen was unclear as to the allegation being made and considered that the matters raised did not fall within the scope of the Code. Biogen submitted that if after its response the Authority considered that there was a case to be answered that it clarified which clauses Biogen needed to address.

Biogen noted that the complainant had failed to make any clear allegations with regard to the Code and had not provided any evidence to support the matters he/she raised.

Biogen was unclear of the intended allegation with regard to bonus payments; the complaint contained vague allegations with no specific details.

Biogen did not understand the basis of the request for details of Biogen's bonus scheme together with details of balance between fixed salary and bonus for field-based employees as the complaint contained no facts or details in support of the allegations. Biogen did not see the basis of a case under Clause 15.7 or otherwise with regard to remunerations or bonuses. Biogen submitted that for confidentiality and data privacy reasons, without expert advice and relevant consents it was unable to provide details of Biogen's bonus scheme or specific details of remunerations and bonus payments to field-based employees or the employees named by the complainant.

Biogen confirmed that the bonus scheme it operated at all relevant times had been within the provisions of the Code and was commensurate with schemes operated by other pharmaceutical companies. Field-based bonus payments were comprised of a territory target bonus opportunity, which was not linked to scripts or activities. According to Biogen an individual was only compensated at the point that they reached a certain high percentage of target (details provided). Below this, there was no bonus payment. The bonus scheme operated for field sales functions conformed to the Code and in particular with the provisions of Clause 15.7 with respect to the proportion of base salary and bonus incentive. All payments were made after deduction of applicable taxes and national insurance contributions.

Biogen submitted that as a current employee, the complainant would be cognisant of, and a beneficiary of the bonus scheme. Biogen was surprised therefore that the allegations made in the complaint contradicted the structure of the bonus scheme. The details of Biogen's

annual scheme were published on the internal company website and was accessible to all employees. Biogen submitted that its field-based sales teams annually signed that they agreed to the terms and conditions of the relevant bonus schemes which included compliance with the Code (including provisions of Clause 15.7) plus high standards. Biogen noted that should a person behave in an unethical manner, the terms stipulated that Biogen reserved the right to revoke the bonus payment.

Biogen stated that the introduction to the Code referred to its scope and stated: 'The Code covers the promotion of medicines for prescribing to both health professionals and other relevant decision makers. It also includes requirements for interactions with health professionals. In addition, it sets standards for the provision of information about prescription only medicines to the public and patients, including patient organisations'.

Biogen submitted that importantly, the Code did not purport to control internal company matters such as the remuneration provided to company employees or the benefits supplied by the company to its staff, save to the very limited extent that might fall within Clause 15.7 (see below) and was within the context of Clause 15. Furthermore, there was no provision or requirement of the Code that remuneration or benefits provided to company employees should be linked in any way to the remuneration or benefits provided to health professionals, the details of which were not in any event generally known or related to pharmaceutical companies.

Biogen submitted that, in addition, the complainant had not adequately explained several of the serious allegations which had been made. In particular, it was unclear why a bonus payment amounted to 'buying prescriptions', in circumstances where no health professional received an associated benefit and the basis for the complainant's assertion that all benefits provided to company employees should be taken into account when considering total bonus payments, 'as there is a direct link to product sales' was unexplained. In the above circumstances, it was Biogen's firm view that the following aspects of the complaint did not fall within the scope of the Code:

- (i) The actual sums paid by Biogen to its employees whether by way of fixed salary or bonuses.
- (ii) Any linkage or suggested linkage between remuneration provided to company employees and health professionals.
- (iii) Any benefits provided by the company to its employees, which were not linked to sales, including (for the reasons set out in Biogen's initial response).

Biogen submitted that in addition to the fact that such matters fell outside the Code, details relating to the remuneration provided to individual employees was protected in accordance with the Data Protection Act 1998 and Biogen could not properly disclose such information to PMCPA, or to any other person, without the consent of those concerned. For the avoidance of doubt, Biogen stated that such information could not be fully anonymised in view of the nature of the information and the limited number of employees involved. Any

person who was aware of the job titles, seniorities and activities of the individuals concerned in a given year, would be able to determine the remuneration received by each individual based on pseudonymised information, which did not identify them by name.

Biogen noted that the only part of the Code which addressed the salary and remuneration provided to sales representatives (and that too in a very limited context) was Clause 15.7, which stated:

Representatives must be paid a fixed basic salary and any addition proportional to sales of medicines must not constitute an undue proportion of their remuneration.

The term 'representative' was defined at Clause 1.7 as:

'... a representative calling on members of the health professions and other relevant decision makers in relation to the promotion of medicines'.

No further clarification was provided in the supplementary information to Clause 15 and no guidance in relation to this issue had been issued by the PMCPA. Biogen contended that Clause 15.7 should be construed purposively. The mischief which the clause intended to prevent was any use of bonus payments linked to sales of medicines which might place pressure on sales representatives to act in a way which was inconsistent with the Code. It was not intended to investigate the bonus schemes of companies or the salaries or remunerations of representatives.

The wording of Clause 15.7 required the following:

- (i) Representatives must be paid a fixed basic salary. This meant that field-based representatives (who called on health professionals and other relevant decision makers in relation to the promotion of medicines) must not be employed on the basis that their entire salary was determined by commissions or bonus targets.
- (ii) And any addition proportional to sales of medicines must not constitute an undue proportion of their remuneration. Biogen submitted that 'Any addition' in its view referred to any additional cash payment in addition to the basic salary. Remuneration was generally understood to include basic salary, car allowance, bonus, cash medical insurance, pension payments and other similar benefits. What amounted to 'undue proportion' was not defined in the Code nor was there any guidance. Biogen understood that this should be considered in the context of the purposive interpretation of Clause 15.7 set out above. That was 'undue proportion' should be construed as that the company did not incentivise its representatives to act in contravention of the Code.

Biogen submitted that it did not employ (or hire as contractors) any representatives on a purely commission or bonus basis. All representatives were paid a fixed basic salary which was pegged to the industry standard. Biogen consistently used recognised external and independent reports (which provided guidance on average industry standard salaries of representatives) to benchmark salaries and remuneration paid to sales

representatives to ensure these were aligned with the industry norms. On an annual basis, Biogen participated in a number of salary surveys that were industry specific to ensure that it could collect external market data on the roles at Biogen. The basic salary scale and remunerations of the representatives was well within the range of the equivalent industry standard. Therefore, Biogen submitted that it could not be said that excessive payments were made to representatives.

Biogen addressed the case preparation manager's specific requests for information as follows:

1 Company bonus schemes for representatives linked to sales for the last 5 years

Biogen submitted that it ran separate bonus schemes for its sales representatives and national sales managers. The bonus schemes for sales representatives were linked to sales of medicines and were structured as territory target bonus. These were not linked to individual hospital targets, scripts or activities. All sales representative targets were set, approved and payouts approved on a quarterly basis by a cross functional leadership team. The targets were based on Biogen's globally approved financial forecasts.

a) Bonus Schemes for Sales Representatives

Biogen submitted details of the target bonus for each sales representative. This was not based on the representative's individual salary but on the average salary of all the sales representatives (Target Bonus). Therefore, the lowest salaried representative would benefit from a higher proportion relative to his/her individual salary and the highest salaried representative would receive a lower proportion.

The target for each sales representative (details provided) was agreed and set at the start of each year (the Target). The Targets were based on the sale of products and separate products might be given separate weightage.

A sales representative would only receive a bonus when he/she achieved a certain percentage of the Target. Below this, there was no bonus payment. Biogen provided details as to how the bonus payments changed according to the percentage of Target achieved.

During the year, other incentives might be put in place during periods such as product launches. These were not linked to scripts or activities and were predominantly linked to territory performance as measured by patient uptake.

b) Bonus Schemes for Sales Managers

Biogen submitted that the Target Bonus of a sales manager was a percentage of the basic salary (details provided). However, 50% of the Target Bonus was based on non-sales performance goals (that was, not linked to the sales of the medicines) and include leadership competency and manner of performance. The remaining 50% was based on national sales performance. Therefore, it was only this 50% element that was relevant for the purposes of Clause 15.7 as the clause expressly referred to '.... any addition proportional

to sales of medicines'.

Each bonus scheme expressly stated that all activity required compliance with the Code and Biogen's Code of Conduct. In order to be eligible for any bonus or incentive payment the sales representative has to strictly adhere to the requirements of the Code.

As clearly demonstrated above, Biogen's bonus schemes could not be construed to be in contravention of the provisions of Clause 15.7.

2 Balance between fixed basic salary and bonus

Biogen noted that as stated above, Clause 15.7's requirement for proportionality for any payment in addition to the basic salary paid to the sales representative was linked to 'remuneration' and not the fixed basic salary. The balance between bonus as a percentage of remuneration and sales representatives and the sales managers for the period were provided in detailed tables: For the purposes of calculating the remuneration Biogen had taken into account the basic salary, car allowance, company pension contribution and medical benefit payments (Remuneration). Biogen also noted that these payments included any cash paid as achiever awards (see below).

Biogen noted that in one specific year and due to exceptional circumstances (details provided), one payment was made of a certain percentage of the remuneration as a bonus.

Biogen stated that under no circumstances could it be construed that any of the bonus payments was an 'undue' proportion.

3 Details of other incentives given to representatives such as top achiever bonuses

Biogen submitted that as part of its global initiative up until some time ago, Biogen offered sales representatives incentive trips. After that, the initiative was changed to a fixed cash sum as achiever awards. It was never the case that representatives received both incentive trips and cash awards in any one year.

a) Incentive Trips

Biogen contended that the wording 'any addition proportional to sales of medicines' in Clause 15.7 related only to cash payments paid in addition to the basic salaries. It did not include benefits such as incentive trips. Therefore, details of incentive trips were not relevant for the purposes of Clause 15.7.

Details of the numbers of sales representatives offered such trips were provided. The remuneration relating to these trips was included and reflected in the disclosed bonus/remuneration table.

b) Achiever Awards

Details of the numbers of sales representative awards for best performance were provided. The payment to each winner was included as part of the bonus/remuneration payments in the disclosed tables.

Biogen summarised that its bonus schemes were fully compliant with the requirements of Clause 15.7 that payments did not constitute an undue proportion of overall remuneration. Importantly, Biogen ensured that the intention underpinning Clause 15.7 was met by stating explicitly that eligibility for a bonus was conditional upon a representative being fully compliant with the Code. There was no evidence that any of Biogen's bonus plans had resulted in any improper activity by any Biogen representative and the complainant did not provide any evidence to the contrary or even suggest otherwise. For the avoidance of doubt, Biogen's bonus plans were also commensurate with arrangements operated by other pharmaceutical companies.

Clauses 9.1 and 2

Biogen submitted that in circumstances where there has been no breach of Clause 15.7 or any other breach of the Code, there was no basis for a finding of breaches of Clauses 9.1 and 2. Overall Biogen was concerned by this complaint apparently made by an anonymous employee as, in its opinion, most of the matters raised fell outside the scope of the Code and the naming of specific Biogen employees suggested a personal motive; it was troubling that confidential information regarding the remuneration paid to the three named individuals might have been acquired improperly by the complainant. Biogen submitted that it was inappropriate for this matter to be raised to the PMCPA without concrete evidence of any breach of the Code. Biogen submitted that such evidence was lacking in this case. Biogen's approach to bonus incentive schemes, remuneration and basic salary for field-based employees was fully in line with the industry standards (as benchmarked by independent audits) and to its knowledge and interpretation, was in keeping with both the spirit and guidance of the Code.

PANEL RULING

The Panel noted Biogen's submission about the burden of proof. The Panel noted that as stated in Paragraph 2.2 of the Constitution and Procedure rulings were made on the basis that a complainant had the burden of proving his/her complaint on the balance of probabilities. This was reflected in the Introduction to the Constitution and Procedure which also stated that complaints were judged on the evidence provided by the parties.

The Panel did not accept Biogen's submission about the acceptability of the provision of information about bonuses and remuneration, anonymised or otherwise to the Panel. Biogen appeared to have misunderstood the process. The Authority was accustomed to handling such information. The Code of Practice Panel and the Appeal Board must be given sufficient information to consider the matter before it. Paragraph 1.4 of the Constitution and Procedure gave the Director power to ask for copies of any relevant material. The Constitution and Procedure dealt with confidentiality of materials in relation to disclosure to the opposing party and the content and publication of the case report, which would be the only public record of the proceedings. Nonetheless, the Panel noted that Biogen had provided some additional information in response to a request from the Case Preparation Manager.

The Panel noted that Clause 15.7 required that representatives must be paid a fixed basic salary and any addition proportional to sales of medicines must not constitute an undue proportion of their remuneration.

The Panel noted that there appeared to be some differences between the company's initial and supplementary response. Biogen initially stated that field-based bonus payments comprised a territory target bonus opportunity which was not linked to scripts or activities and which was triggered only when a certain high percentage of target was achieved. Biogen subsequently submitted that a sales representative would only receive a bonus at the point when a higher percentage of the target was achieved. Below this no bonus payment would be paid. It was unclear which was the correct figure. No supporting material had been provided. In addition, further information from Biogen made it difficult to understand how a target based on sales could not be linked to scripts as stated in the initial response.

The Panel noted Biogen's submission that remuneration included basic salary, car allowance, pension contribution and medical benefit payments. The Panel noted that up until some years ago the bonus/remuneration calculation included incentive trips which apparently were reflected as remuneration. Details were provided. The Panel did not accept Biogen's submission that incentive trips were not relevant for the purposes of Clause 15.7. They were treated by Biogen as part of the representatives' remuneration which was a fundamental part of the calculation of bonus as a percentage of remuneration. More recently the initiative was changed to a cash award which was also included as part of the bonus/remuneration payments calculation and a more restrictive bonus ceiling implemented.

The Panel noted Biogen's submission including that an exceptional bonus was paid in one given year; other years the % of remuneration received as a bonus range was provided and, including sales managers, the majority being below 30%. The Panel noted Biogen's submission that when interpreting Clause 15.7 undue proportion should be construed as a level which did not incentivise behaviour which was inconsistent with the Code. The Panel queried whether 30-40% remuneration as a bonus was in line with the requirements of Clause 15.7. The Panel noted Biogen's calculation of remuneration as set out above and did not consider that 50-60% remuneration as a bonus was in line with Clause 15.7 and a breach was ruled accordingly.

By paying a high percentage of remuneration as a bonus in one given year Biogen had failed to maintain high standards. A breach of Clause 9.1 was ruled.

The Panel did not consider that the circumstances warranted a ruling of a breach of Clause 2 of the Code which was a sign of particular censure and reserved for such use. No breach of that clause was ruled.

APPEAL BY BIOGEN

Biogen submitted that the supplementary information to Clause 15 did not address Clause 15.7 and the PMCPA had issued no guidance on its interpretation or provided any additional information on it. Furthermore, Biogen was aware of no previous cases considered by the PMCPA where Clause 15.7 had been interpreted and applied.

In the absence of any clarification or guidance, Biogen submitted that Clause 15.7 could only be construed purposively, and this had to be in the context of the provisions of Clause 15 generally and relating to ethical conduct and compliance with the Code. The Code did not control internal company remuneration arrangements, bonus schemes or level of payments to its employees, save to the extent that these impacted upon the promotion and sale of medicinal products and related areas, including interactions with health professionals. Consequently, the purpose of Clause 15.7 was to prevent field-based employees being incentivised by inappropriate bonus payments to initiate or participate in inappropriate interactions with health professionals or otherwise to breach the Code.

Biogen submitted that whilst a situation where the bonus payments received by a substantial proportion of field-based employees were viewed as inappropriate might suggest that the overall structure of the remuneration was inconsistent with Clause 15.7, particularly where this was associated with breaches of other parts of the Code, Clause 15.7 was not intended as a mechanism for widespread scrutiny or investigation of bonus schemes or of remuneration provided to individual employees across the pharmaceutical industry.

Biogen noted that the Panel expressed uncertainty in relation to Biogen's explanation of its bonus schemes, specifically the percentage level of target achieved to trigger payments. For certain years the bonus payments were triggered on achievement of the higher percentage. Biogen submitted that the Panel's ruling of a breach of Clause 15.7 in this matter was incorrect for the following reasons:

The overall remuneration structure offered by Biogen was entirely appropriate

Biogen noted that after considering the information submitted by it in response to the complaint, the Panel found no breach of the Code relating to Biogen's overall bonus arrangements or made any criticism of it, except a single payment in one given year. Biogen's view was that the Panel found general acceptability of its bonus schemes for a specific period.

Biogen submitted that its bonus structures were in accordance with Clause 15.7 and were operated in a manner to ensure that there was no breach of the Code. Whilst they were linked to sales of products, all bonus payments were structured by reference to territory sales targets and were based on the number of pack sales, the sales data of which was provided by independent third parties. They were not linked to prescriptions. The bonus schemes expressly stated that all activities of the sales representatives should comply with the Code and Biogen's own code of conduct. Any breach could result in reduction or withdrawal of the bonus and disciplinary

actions.

Biogen's bonus payments were below the level viewed by the PMCPA as objectionable

Biogen gave details of bonus payments over a four year period which included all incentive payments and achiever awards. Biogen confirmed that even when one bonus payment constituted 50-60% of remuneration in one given year, the maximum payment was less than 60%. Biogen provided details of the average bonus payment in other years.

The remuneration structure, including bonus payments, offered by Biogen was commensurate with the arrangements in the industry

Biogen submitted that in order to ensure that the remuneration it offered its employees was competitive, it monitored the arrangements of the pharmaceutical industry generally through review of various industry surveys, including data produced by a salary survey provider, relating to the salaries and incentive payments of various pharmaceutical/biotech companies and data for the year 2017 was provided. The 2017 data was consistent with previous years. Over 80 companies participated in the survey. The data showed that the salaries of staff involved in direct sales ranged between £36,000 to £97,000 (the median being between £41,500-£89,800). The incentives percentage against the basic salary ranged between 12-51.3%. Of this, 11 companies paid bonuses between 30-51%, more than 6 paid between 40-52%. (The median ranges were between 17-33%.) The highest average payment by Biogen was below 30%.

Biogen submitted that the bonus data did not give the full outlier and contended that where the payments were shown to be 40 or 51%, the outlier could be 50-60% (if not more) of the basic salary. Further, as the salary survey provider data was a median average, it implied that payments of other companies were likely to be higher.

Biogen submitted that this survey confirmed that its bonus schemes and bonuses paid to individual field-based employees were consistent with those across the industry generally and even the range of 50-60% would fall within the industry standard. Assessing an individual bonus award as a percentage of total remuneration in isolation was meaningless. In particular, an exceptional bonus award made without evidence of any wrongdoing, did not suggest a remuneration structure that incentivised activities in breach of the Code.

PMCPA had applied a fixed threshold which had not been published or explained; this was unfair

Biogen submitted that the Panel found that a single bonus payment of 50-60% of remuneration constituted a breach of Clause 15.7. No reasons for that finding had been provided by the PMCPA. It seemed to be based on a determination that any bonus over a certain (unspecified) threshold, was contrary to Clause 15.7, regardless of the circumstances (which did not appear to have been considered by the Panel in this matter). Based on the Panel's decision, it appeared that the fixed bonus

threshold was below 50-60% of remuneration, but above 30-40% of remuneration. If such a threshold existed, it should be published and the reasons for it communicated.

Biogen submitted that in the absence of any communication or guidance regarding the fixed threshold applied by the Panel, a finding of breach of Clause 15.7 based on the simple fact of the payment made on one occasion to a single employee in one given year, was patently unfair. The need for flexibility in order to consider the particular circumstances was the only basis upon which failure to provide specific guidance regarding the interpretation of Clause 15.7 could be justified. However, in this case the PMCPA had omitted to adopt such an approach.

In any event, a fixed threshold could not be appropriate because the industry was diverse, and control of payments made to employees was potentially anti-competitive

Biogen submitted that while, as indicated above, the interpretation of Clause 15.7 was unclear and the extent of control exercised over the remuneration (other than fixed salary) paid to field-based staff was uncertain, it was relevant that the imposition of a ceiling on permitted payments to employees, might be anti-competitive. Biogen had insufficient information to comment in more detail in relation to the general approach of the PMCPA in the context of Clause 15.7, however there was no indication that such matters had been considered in imposing the fixed threshold for bonus payments applied in this case. To the extent, contrary to Biogen's primary submission, Clause 15.7 permitted the PMCPA to scrutinise the remuneration provided to individual employees, the associated bonus payments should be considered flexibly in the context of their own particular facts.

The payment of an exceptional bonus should be considered on its own particular facts

Biogen submitted that as indicated above, the Panel had applied an inflexible and unpublished standard to its assessment of Biogen's bonus schemes, as a result of which it had ruled a breach in relation to a single bonus payment. However, it was inappropriate to consider occasional, unusual payments made under bonus schemes without taking into account the particular circumstances in which such exceptional bonuses were paid. A high proportion could not be automatically construed as an undue proportion and the relevant circumstances needed consideration. In this case, in expressing concern in relation to the single bonus payment, the PMCPA had neglected to adopt such an approach and the Panel's assessment and resulting ruling was therefore unfair.

Biogen submitted that as stated above, the single, exceptional bonus was due to exceptional circumstances. Biogen detailed the circumstances which gave rise to the payment. The company stated that there had never been any suggestion of inappropriate conduct in relation to individuals.

In summary therefore, Biogen submitted that its

bonus schemes overall were entirely reasonable and consistent with Clause 15.7 and practice in the industry. The Panel's application of a rigid standard to the interpretation of Clause 15.7, based on an undisclosed threshold, including in the context of a single exceptional bonus payment was procedurally unfair and inappropriate. If the Appeal Board disagreed and concluded that a fixed threshold was appropriate, despite lack of evidence of harm, Biogen submitted that fairness required that prior to any such conclusion, clear guidance was issued informing companies of the PMCPA's position and justifying the threshold so established.

In the context of the current complaint, the Panel ruled a breach of Clause 9.1 based simply on the fact of the finding of a breach of Clause 15.7 (one bonus payment). No other reasons were provided, with the resulting inference that a breach of Clause 15.7 would inevitably result in a finding of breach of Clause 9.1.

Biogen submitted that this was not fair or appropriate and it disputed the finding of breach of Clause 15.7 above. The factors were also relevant to the consideration of whether Biogen had failed to maintain high standards. Furthermore, in the absence of clear guidance on the acceptability of bonus schemes, a finding of breach of Clause 9.1 was unfair. The PMCPA had chosen not to issue guidance on the interpretation of Clause 15.7 and in these circumstances, it was unfair to sanction Biogen for failing to meet a specific high standard which had not been defined. That unfairness was compounded in circumstances where the bonus schemes operated by Biogen reflected those of the industry.

There was no evidence that the bonus schemes operated by Biogen had resulted in any breach of the Code. Biogen had explained that its understanding of Clause 15.7 was that this was intended to ensure that bonus schemes did not encourage field-based employees to breach the Code.

Biogen submitted that its compliance procedures were robust. It was therefore highly material in this case that there was no evidence whatsoever that Biogen's bonus schemes encouraged any activities in contravention of the Code.

Overall, Biogen submitted that the rulings of breaches of Clauses 15.7 and 9.1 were unfair and inappropriate. In particular, the bonus structure of Biogen had at all material times been commensurate with the industry standards and was regularly reviewed and adjusted appropriately by senior management in accordance with the company's global and local policies; Clause 15.7 was subject to no guidance on its interpretation and the findings of the Panel were unreasoned and failed to take into account the particular circumstances of Biogen and the individual bonus award viewed as objectionable.

Biogen therefore respectfully requested the Appeal Board found no breaches of the Code in respect its remuneration of its field-based employees and sales managers, including its bonus schemes.

COMMENTS FROM THE COMPLAINANT

The complainant provided no comments on the appeal.

APPEAL BOARD RULING

The Appeal Board did not accept Biogen's submission that the Panel had applied a fixed threshold when interpreting Clause 15.7. That was not so. The Panel had referred to Biogen's submission that the level of bonus should not incentivise non-compliant behaviour. The Appeal Board considered that all the circumstances should be taken into account when deciding whether or not the level of bonus was in line with the requirements of Clause 15.7 including whether non-compliant behaviour was incentivised. However, the Appeal Board did not accept Biogen's inference that evidence of such non-compliant behaviour was required before a breach of Clause 15.7 could be ruled. The Appeal Board noted that Clause 15.7 referred to 'an undue proportion' of remuneration which it considered in the absence of any relevant cases, was for companies to determine. It was not for the Panel to issue guidance and the Appeal Board noted Biogen's submission on the potential implications of an imposition of a ceiling on permitted payments to employees. In the Appeal Board's view, there was no procedural unfairness in this regard as submitted by Biogen.

The Appeal Board noted Biogen's submission about the salary survey and common industry practice and considered that whether a bonus level was common industry practice would not alone determine whether a bonus contravened Clause 15.7. The Appeal Board noted that the 2017 industry bonus data provided by Biogen was based on an average of median base salaries. The Appeal Board noted that Biogen's bonus was a percentage of an overall remuneration package, rather than base salary.

The Appeal Board noted further and better particulars of the circumstances surrounding the payments in question were provided to the Appeal Board which were not made available to the Panel.

The Appeal Board noted Biogen's submission that this payment had been caused by its failure to accurately predict sales for a particular medicine; at the appeal Biogen provided further details on this point. The company had subsequently taken steps to adjust its bonus scheme for sales of that medicine. The Appeal Board considered from information provided that Biogen did not have an effective cap on its bonuses. The Appeal Board decided that whilst it did not consider that 50-60% remuneration as a bonus was necessarily acceptable in relation to the requirements of Clause 15.7 of the

Code, in the particular circumstances of this case the payment was clearly an outlier based on exceptional circumstances, including an inaccurate sales forecast. It did not appear to be sustained or common practice within Biogen to pay such bonuses. Steps had been taken to remedy the situation and only one payment was made. The Appeal Board ruled no breach of Clause 15.7. The Appeal Board did not consider, therefore, that high standards had not been maintained and it ruled no breach of Clause 9.1. The appeal on both points was successful.

Complaint received **7 August 2017**

Case completed **22 March 2018**