

DOCTOR v BOEHRINGER INGELHEIM

Pradaxa email

A medical director of a primary care service provider complained that a promotional email about Pradaxa (dabigatran) had been sent by a third party to his NHS account. Pradaxa was Boehringer Ingelheim's product for prevention of stroke and systemic embolism in certain patients.

The complainant alleged that the email had been sent unsolicited. The complainant did not request any such information and had not given his email address to any party in connection with either Pradaxa or any other medicine. The complainant could not find a link to unsubscribe from the distribution list. The complainant stated that his complaint was about a breach of both UK law and the Code.

The Authority advised that it could only consider complaints within the context of the Code.

The detailed response from Boehringer Ingelheim is given below.

The Panel noted Boehringer Ingelheim's submission that the database provider obtained consent from the complainant when he completed his registration. An email to the complainant in February 2011 described the registration process for another service and explained that from time to time information would be sent '... by e-mail about our associated/affiliated companies and their clients' product and services, which may include updates on specialist services, conferences and seminars, diagnostic, medical and pharmaceutical promotional materials as well as official information'. This was followed by a new paragraph 'However, please be advised that we will not share your e-mails with any third parties'. The unsubscribe facility which stated 'If you do not wish to receive such information please click the box*' appeared at the very end of the email after the signature and contact details. Additionally, members of the database had been emailed an opt-in policy which included the following: 'All our e-mail communications to healthcare personnel, in accordance within the Data Protection Act 2001 include an 'unsubscribe' option which allows recipients to 'opt-out' if they wish. They can 'opt-out' of receiving promotional material only and still receive official information. If a recipient chooses to 'opt-out' of receiving promotional material we will stop sending messages to that person'. The policy also referred to contact by email and telephone to update and validate information wherein recipients would be told they had opted-in to receive emails from the

service provider and their affiliates which might contain promotional information. The Panel did not have a copy of the covering email providing a copy of the policy to the complainant.

The Panel noted that the database was used to email campaigns on behalf of government departments and agencies which many NHS employees would consider important information and want to receive. The Panel considered that it was not at all clear on the registration email sent to the complainant in February 2011 that he could consent to receive official information by email but choose not to receive promotional material. It was not acceptable to rely on the opt-in policy which was sent separately in this regard. Although it was clear on the registration email that the complainant would receive, *inter alia*, promotional material for medicines on registration, recipients might choose not to unsubscribe given the impression from the wording of the email and the positioning of the unsubscribe option that they would otherwise not receive any material by email including official information. This was not satisfactory and in the Panel's view should be improved. The Panel queried whether the recipient was given a *bona fide* choice. Nonetheless the Panel considered that by registering on the site and failing to unsubscribe, the complainant had given prior permission to receive, *inter alia*, promotional material by email and no breach of the Code was ruled.

The Panel noted Boehringer Ingelheim's submission that the unsubscribe facility was omitted in error from the Pradaxa email. The Panel noted that the unsubscribe option did not appear in the version of the email certified by the company. This was a serious error. A breach of the Code was ruled as acknowledged by Boehringer Ingelheim.

A medical director of a primary care service provider, complained about a promotional email (ref DBG 2624) he had received about Pradaxa (dabigatran). Pradaxa was Boehringer Ingelheim Limited's product for prevention of stroke and systemic embolism in certain patients.

COMPLAINT

The complainant alleged that the email had been sent unsolicited to his NHS email account. Pradaxa was marketed for stroke prevention in patients with atrial fibrillation (SPAF). The email referred to the SPAF academy and had a Boehringer Ingelheim

logo at the bottom along with references and prescribing information.

The complainant stated that he did not request any such information either from Boehringer Ingelheim or via any third party or pharmaceutical representative. He had not given his email address to any party in connection with either this or any other pharmaceutical product.

The complainant checked the email carefully to find out how to unsubscribe himself from the list being used to send the message and could not find any such link.

The complainant had a number of concerns:

- The Privacy and Electronic Communications (EC Directive) Regulations 2003, which applied to all organisations that sent out marketing by telephone, facsimile, email or any other form of electronic communications, provided that organisations could not send unsolicited marketing emails to individual subscribers unless the recipient had given his prior consent. The complainant noted that this would have required some form of positive action by him and he had not knowingly completed any opt-in or any opt-out form of consent.
- In line with the regulations mentioned above, Clause 9.9 stated that telephone, text messages, email, telemessages, facsimile, automated calling systems and other electronic data communications must not be used for promotional purposes, except with the prior permission of the recipient.
- Even allowing for the above, the sender had made no provision for the recipient to request that they be unsubscribed from the mailing list or to prevent any further unsolicited email (spam).
- The sender had not made it clear how the recipient came to be on the mailing list or for what purpose their details were originally collected.

The complainant stated that his complaint was about a breach of both UK law and the Code.

When writing to Boehringer Ingelheim, the Authority advised that it could only consider complaints within the context of the Code; it could not consider matters under UK law. The company was asked to respond in relation to Clause 9.9 as cited by the complainant.

RESPONSE

Boehringer Ingelheim firmly asserted that the email received by the complainant from the third party database provider was in part compliant with Clause 9.9 after the complainant's consent by opting-in and registering for the same. A copy of the agreement was provided. The database provider had agreed with Boehringer Ingelheim to include a prominent opt-out link at the end of the email as was its usual practice.

Boehringer Ingelheim had a contract with the database provider as a third party through another organisation for the Pradaxa email campaigns.

Boehringer Ingelheim explained that the database was part of a permission-based secure database which supplied details of doctors to members signed up to receive this type of information. It had evolved into providing permission based secure online messaging collating email addresses of doctors registered within the UK. Similar to other media partners, it was a private company that had developed this facility which was used by the NHS but also by third parties to complete secure online messaging where permission had been granted.

The database provider had sent email campaigns on behalf of many government departments and agencies. Details were given.

In line with usual process, consent was obtained from the complainant when he completed his registration. Consent highlighted the following, '... will from time to time send information by e-mail about our associated/affiliated companies and their clients' product and services, which may include updates on specialist services, conferences and seminars, diagnostic, medical and pharmaceutical promotional materials as well as official information'. It also gave an option to opt-out of this registration as, 'If you do not wish to receive such information please click the box*'.

This was also highlighted in the 'opt-in' policy, which all signed up members of the database would have received via their registered email address.

Unfortunately in the email at issue the opt-out option was left out in error by the database provider, for which it had taken full responsibility. Boehringer Ingelheim noted that the opt-out option to these kinds of email was still in place on the main registration form.

The database provider had assured Boehringer Ingelheim and taken steps to make sure this did not happen again. As a corrective measure the unsubscribing option would be made available to the recipients of the original email.

In summary, the email received by the complainant was with his consent and the database provider had agreed with Boehringer Ingelheim to include a prominent opt-out link at the end of the email as was its usual practise. However, given the absence of the opt-out function in this instance, Boehringer Ingelheim admitted a breach of Clause 9.9.

PANEL RULING

The Panel noted that the complainant had received via his NHS email account a promotional email for Pradaxa. The Panel noted that Clause 9.9 prohibited the use of email for promotional purposes except with the prior permission of the recipient. The Panel

noted that Boehringer Ingelheim via a third party had a contract with the database provider for Pradaxa email campaigns.

The Panel noted Boehringer Ingelheim's submission that the database provider obtained consent from the complainant when he completed his registration. An email to the complainant in February 2011 described the registration process for another service and explained that it '... will from time to time send information by e-mail about our associated/affiliated companies and their clients' product and services, which may include updates on specialist services, conferences and seminars, diagnostic, medical and pharmaceutical promotional materials as well as official information'. This was followed by a new paragraph 'However, please be advised that we will not share your e-mails with any third parties'. The unsubscribe facility which stated 'If you do not wish to receive such information please click the box*' appeared at the very end of the email after the signature and contact details. In addition the Panel noted that all members of the database had been emailed an opt-in policy for the service provider which included the following statement 'All our e-mail communications to healthcare personnel, in accordance within the Data Protection Act 2001 include an 'unsubscribe' option which allows recipients to 'opt-out' if they wish. They can 'opt-out' of receiving promotional material only and still receive official information. If a recipient chooses to 'opt-out' of receiving promotional material we will stop sending messages to that person'. The policy also referred to contact by email and telephone to update and validate information wherein recipients would be told they had opted-in to receive emails from the service provider and their affiliates which might contain promotional information. The Panel did not have a copy of the covering email providing a copy of the policy to the complainant.

The Panel noted that the database provider sent email campaigns on behalf of government departments and agencies which many NHS

employees would consider important information and want to receive. The Panel considered that it was not at all clear on the registration email sent to the complainant in February 2011 that he could consent to receive official information by email but choose not to receive promotional material. It was not acceptable to rely on the opt-in policy which was sent separately in this regard. Although it was clear on the registration email that the complainant would receive, *inter alia*, promotional material for medicines on registration, recipients might choose not to unsubscribe given the impression from the wording of the email and the positioning of the unsubscribe option that they would otherwise not receive any material by email including official information. This was not satisfactory and in the Panel's view should be improved. The Panel queried whether the recipient was given a *bona fide* choice. Nonetheless the Panel considered that by registering on the site and failing to unsubscribe the complainant had given prior permission to receive *inter alia* promotional material by email. No breach of Clause 9.9 was ruled.

The Panel noted that the supplementary information to Clause 9.9 required that where prior permission to use emails for promotional purposes had been granted each email should have an unsubscribe facility. The Panel noted Boehringer Ingelheim's submission that the unsubscribe facility was omitted in error from the Pradaxa email by the database provider. The Panel noted that the unsubscribe option did not appear in the version of the email certified by the company. This was a serious error. The Pradaxa email did not feature an unsubscribe link and in this regard, as acknowledged by Boehringer Ingelheim, was in breach of Clause 9.9 of the Code. A breach of that clause was ruled accordingly.

Complaint received

21 September 2011

Case completed

31 October 2011
