

PSYCHIATRIST v AMDIPHARM MERCURY

Alleged unsolicited email

A child and adolescent psychiatrist, complained about an unsolicited, promotional email for Nipatra (sildenafil) sent on behalf of Amdipharm Mercury. Nipatra was indicated for the treatment of men with erectile dysfunction.

The detailed response from Amdipharm Mercury is given below.

The Panel noted that the complainant had received the email via his NHS email account. The Panel further noted that Amdipharm Mercury via a third party had a contract with the database provider for Nipatra email campaigns and that the database provider had obtained consent from the complainant when he completed his registration. An email to the complainant in April 2010 described the registration process for another service and explained that from time to time, 'pharmaceutical promotional materials' would be sent by email. 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. It was clear that the company intended to email promotional material from pharmaceutical companies. The Panel noted that the complainant was emailed in June and November 2012 to confirm his registration and give him the opportunity to opt-out of receiving information as detailed above. It was not clear that the complainant had opted-in or out following the emails of June and November 2012. Amdipharm Mercury had submitted that recipients stayed on the database if they could not be reached or if they did not click the opt-out link.

Nonetheless, the Panel considered that by registering on the site and failing to subsequently 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 Amdipharm Mercury's submission that the complainant could have opted-out of receiving further promotional emails by using the opt-out link or by directly contacting the database on the telephone number provided, both of which were included at the bottom of the email at issue. The Panel noted that the complainant had tried to unsubscribe to the email by replying to it rather than using the recommended opt-out link provided and had not tried to telephone the database direct. In this regard, the Panel ruled no breach of the Code.

The Panel did not consider that Amdipharm Mercury had failed to maintain a high standard and no breach of the Code was ruled. The Panel noted its rulings above and ruled no breach of Clause 2.

During the consideration of this case the Panel queried why the complainant, a child and adolescent

psychiatrist, was emailed about a product indicated for the treatment of erectile dysfunction.

A child and adolescent psychiatrist, complained about an email (ref UK/NIP/NHS/428D/2013) for Nipatra (sildenafil) sent on behalf of Amdipharm Mercury Company Limited. Nipatra was indicated for the treatment of men with erectile dysfunction.

COMPLAINT

The complainant provided a copy of the email at issue and stated that his subsequent email to 'EDtreatments@datafor NHS.com' was apparently undeliverable. This subsequent email read:

'I am very unhappy that despite trying to unsubscribe to emails like this I keep on receiving them.

I would like to know where you got my email address from and what other information is held on the database from which it came and how my details were given to that database. I would like all my details to be removed from that database.'

When writing to Amdipharm Mercury, the Authority asked it to respond to Clauses 2, 9.1 and 9.9 of the Code.

RESPONSE

Amdipharm Mercury explained that it engaged a digital media buying company which was part of a larger digital media agency which had been in existence since 2002 and specialised in, *inter alia*, online advertisements. Amdipharm Mercury had worked with this digital media agency for the last four years to perform its digital media buying. The agency had booked digital campaigns for Amdipharm Mercury with a number of channels. The agency also commissioned email slots with a third party database which was a database of UK medical professionals employed within the NHS and private healthcare sectors. Amdipharm Mercury stated that the complainant was registered as a member on the third party database and it was through this database that he was sent the email at issue. On receipt of the complaint Amdipharm Mercury held discussions with the large digital media agency and the third party database provider in order to help it fully investigate all necessary aspects around the complaint.

Amdipharm Mercury provided a copy of a document which set out the step-by-step procedure for engaging customers and registering them with the database.

An operative employed by the database provider would initially telephone the doctor and then a

registration email was sent to the doctor to confirm the telephone conversation and invite him/her to complete the online registration using the access code provided. A copy of the email, dated 16 April 2010, sent to the complainant with his access code was provided. The registration email stated that the database provider would from time to time send information by e-mail about its associated/affiliated companies and their clients' product and services, which might include updates on specialist services, conferences and seminars, diagnostic, medical and pharmaceutical promotional materials as well as official information. At the end of the email an opt-out tick box was provided for those who did not wish to receive the information. The complainant was given this opportunity to opt-out when he registered but he did not do so.

The complainant successfully registered as a member of the database in May 2010, a copy of the registration confirmation email was provided.

Health professionals could only complete the registration once they had accepted the terms and conditions of the database website which might then allow information about affiliated organisations including promotional emails to be sent to them.

A screen shot of the registration form for the database was provided. The information gathered at the time of registration included; the health professional's name, organisation and address, telephone number, email address and a description of duties and areas of medical interest. This was the only page which was issued to collect information. A copy of the complainant's completed form was provided. The company stated that this information could be shared with the complainant in response to his desire to know what information was held about him.

Amdipharm Mercury explained that health professionals could leave the database at any point if they contacted the database provider either by using the opt-out option provided or telephoning a given number.

All emails sent to the health professional offered the option to opt-out of receiving further emails. The complainant had had this option open to him on several occasions but had not used it. It was estimated that the database provider had sent the complainant approximately 30-40 emails since he first registered in 2010.

When health professionals clicked the opt-out link, they were taken to an automated webpage which stated that they had been opted out. A copy of the screen grab was provided. The health professional was removed from receiving all emails immediately and indefinitely and his/her name was recorded in an unsubscribed folder in the database. The unsubscribed email folder was used by the database provider before each transmission, to double check that no unsubscribed health professional received any further emails.

Amdipharm Mercury noted that the complainant had stated that he had tried to unsubscribe several

times to 'emails like this' but he continued to receive them. There was no evidence to suggest that the complainant tried to opt-out of receiving emails from the database provider. Amdipharm Mercury noted that the complaint was general and did not specifically apply to emails sent by the database provider in question.

Amdipharm Mercury also noted that when the complainant tried to contact the database provider, his reply to the email address was undeliverable. This was not the recommended pathway for anyone looking to unsubscribe from the database provider's emails. Had the complainant followed the instructions to opt-out, he would not have encountered this problem as his email would have been received. The agency confirmed that the opt-out email always worked and was checked for functionality before emails were sent; checking that the opt-out link worked was a fundamental part of the test-run process, and nothing was sent without one. Additionally, the link did not have a time limit nor did it expire at any stage.

The database provider went even further and provided a contact telephone number for anyone who wished to unsubscribe in case they wanted to speak to someone directly.

Each doctor was called annually. If the doctor could not be reached the name would stay on the database list. Recipients would stay on the database list unless they clicked the opt-out option. A copy of the emails sent to the complainant in June as well as November 2012 were provided, the opt-out box was not clicked and so he remained on the database.

Amdipharm Mercury provided an email from an employee of the database provider who had spoken to the complainant in the course of investigating his complaint. The complainant acknowledged that he had not used the unsubscribe button at all, which he agreed was the correct method, but instead had attempted to return the agency email. It was unfortunate that at the time, the agency had experienced a brief outage and therefore the email could not be delivered. The complainant also stated that his general comments about being unable to opt-out previously referred to other emails which he had received from other sources.

The information presented above outlined that the agency took several steps to ensure that health professionals registered to the database in an informed and rational manner. All necessary documentation specific to the complainant's engagement and registrations had been provided. Amdipharm Mercury submitted that its agency adopted high standards at all times and that there had been no breach of Clauses 9.1 and 2. The complainant gave his consent and permission to receive email information from time to time which could have included promotional information. Each email sent to the complainant included information on how he could opt-out if he so wished. In this case, more than one option was available (email and telephone). The company denied a breach of Clause 9.9.

In conclusion, Amdipharm Mercury submitted that it (and the agencies acting on its behalf in this case) had maintained high standards in procedure, content and documentation and had therefore not breached the Code.

PANEL RULING

The Panel noted that the complainant had received via his NHS email account a promotional email for Nipatra. 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 Amdipharm Mercury via a third party had a contract with the database provider for Nipatra email campaigns.

The Panel noted Amdipharm Mercury's submission that the complainant was registered as a member on the database and the database provider had obtained consent from the complainant when he completed his registration. An email to the complainant in April 2010 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. It was clear that the company intended to email promotional material from pharmaceutical companies. The Panel noted that the complainant was emailed in June and November 2012 to confirm his registration on the database and give him the opportunity to opt-out of receiving information as detailed above. Information provided by the agency stated that when health professionals were contacted annually to confirm their contact details, once the information had been confirmed they would be sent the opt-in statement. To proceed recipients had to acknowledge the opt-in statement. It was not clear that the complainant had opted-in or out following the emails of June and November 2012. Amdipharm Mercury had submitted that recipients

stayed on the database if they could not be reached or if they did not click the opt-out link.

Nonetheless, the Panel considered that by registering on the site and failing to subsequently 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 Amdipharm Mercury's submission that the complainant could have opted-out of receiving further promotional emails by using the opt-out link or by directly contacting the database on the telephone number provided, both of which were included at the bottom of the email at issue. The Panel noted that the complainant had tried to unsubscribe to the email by replying to it rather than using the recommended opt-out link provided and had not tried to telephone the database direct. In this regard, the Panel ruled no breach of Clause 9.9.

The Panel did not consider that Amdipharm Mercury had failed to maintain a high standard. No breach of Clause 9.1 was ruled. The Panel noted its rulings above and ruled no breach of Clause 2.

During the consideration of this case the Panel noted that Clause 11.1 of the Code required that promotional material should only be sent to those whose need or interest in the particular information could be reasonably assumed. In that regard, the Panel queried why the complainant, a child and adolescent psychiatrist, was emailed about a product indicated for the treatment of erectile dysfunction. The Panel noted that the database provider informed Amdipharm Mercury that in his role as the lead consultant, the complainant had to be consulted prior to all purchases and was therefore listed as a payor within the database. The Panel queried, however, whether the complainant would be consulted on purchases outside of his specialist area.

Complaint received	18 July 2013
Case completed	29 August 2013