

EX-EMPLOYEE v ALLERGAN

Commercial policy

An ex-employee complained about a commercial policy implemented by Allergan Limited with respect to its products used in aesthetic medicine – Botox (botulinum toxin Type A), a prescription only medicine and the medical devices Juvederm and CoolSculpting. Botox was indicated, *inter alia*, for the temporary improvement in the appearance of certain facial lines when the severity had an important psychological impact.

The complainant provided details and was concerned about an incentive to prescribe Botox offered in the form of a commercial overlay policy, bundling Botox, Juvederm and Coolsculpting together. As the incentive was offered to large chains of private medical practice, the financial incentive to prescribe Botox over another toxin came into play.

The detailed response from Allergan appears below.

The Panel noted that the commercial arrangements related to sales of a medicine and two medical devices. The Panel noted that the arrangements proposed a discount for purchases of the medicine. Allergan submitted that there was no bundling or conditionality making the prices of one group of products contingent on another.

The Panel also noted Allergan's submission that the two presentations provided by the complainant were drafts subject to revisions and discussion although the company also submitted that one had been used with a customer. Neither presentation clearly indicated that it was a draft subject to revisions and modifications although one of the presentations included some slides labelled 'draft proposal'.

One presentation referred to testing the terms with a named clinic chain next week and the volume gains and cross selling opportunities off-setting the potential dilution risk. The other presentation (undated) referred to two options, moving to standard commercial policy structure and access portfolio pricing terms.

The Panel noted that the definition of promotion excluded measures or trade practices relating to prices, margins or discounts which were in regular use by a significant proportion of the pharmaceutical industry on 1 January 1993. The supplementary information to Clause 18.1 Terms of Trade, stated that terms of trade were excluded from the provisions of Clause 18. Other trade practices were subject to the Code. The terms 'prices', 'margins' and 'discounts' were primarily financial terms.

On the information supplied, the Panel considered that the arrangements appeared to be a term of trade relating to prices, margins and discounts. Such arrangements were used by a significant proportion of the pharmaceutical industry on 1 January 1993. The Panel considered that as the arrangement related to the cost of the medicine, it could take the

benefit of the exemption. The Panel therefore ruled no breaches of the Code including Clause 2.

An ex-employee complained about a commercial policy implemented by Allergan Limited with respect to its products used in aesthetic medicine – Botox (botulinum toxin Type A), a prescription only medicine and the medical devices Juvederm and CoolSculpting. Botox was indicated, *inter alia*, for the temporary improvement in the appearance of certain facial lines when the severity had an important psychological impact.

COMPLAINT

The complainant was concerned about an incentive to prescribe offered in the form of a commercial overlay policy, bundling Botox, Juvederm and Coolsculpting together. The company took the revenue value the business currently brought in and then used that value as a threshold level to reduce the price across all three products. Large Juvederm customers and Coolsculpting customers received a hugely reduced Botox price or *vice versa*. As the incentive was offered to large chains of private medical practice, the financial incentive to prescribe Botox over another toxin came into play.

The new standard commercial policy adopted by Allergan in 2017 meant that one named chain of skincare clinics would incur a substantial price increase (prior to the commercial policy overhaul, individual clinics or businesses were placed on a pricing policy that was agreed internally based on their volumes, loyalty and the impact that losing the business would have). To reduce the impact of this and therefore the risk of losing its current Botox and Juvederm business, the commercial policy overlay was created, intended to incentivise the clinic to not only purchase Coolsculpting equipment (in which it had shown interest) but to also enable Allergan to offer significantly better terms on both Juvederm and Botox by creating an umbrella discount across all three products leveraging the potential revenue the named chain of skincare clinics had across the portfolio.

The complainant provided copies of two relevant presentations to support his/her allegations.

When writing to Allergan, the Authority asked it to consider the requirements of Clauses 2, 9.1 and 18.

RESPONSE

Allergan stated that it commercialised and distributed in the UK, *inter alia*, pharmaceutical and medical device products in the field of aesthetic medicine. The products included Botox, a prescription only medicine, Juvederm products, a range of dermal fillers registered and CE marked as class III medical devices, and Coolsculpting, a non-invasive fat reduction system, CE marked and registered as a class II medical device. These products were sold to different private customers in the market, including qualified and registered practitioners, clinics, chains of clinics, and pharmacies. There were no regulatory restrictions on the pricing of these products and therefore Allergan had developed a transparent, open and fair commercial policy that applied evenly to all customers taking into account the category in which they operated (eg pharmacy vs single health professional) and the volume of product that they purchased.

Allergan submitted that its commercial policy was completely unrelated to any other promotional activity and/or interaction between Allergan and its customers, including but not limited to marketing, advertising or promotional materials, access to education and training initiatives,

provisions of samples or evaluation products. The policy covered exclusively the trading interaction between Allergan and its customers whereby based on the volumes purchased, a customer could access pre-determined discount levels.

Allergan stated that within this context, and specifically with regard to this case, its commercial representatives had had commercial meetings with a chain of clinics in the UK, active in the aesthetic market, and to this purpose, had developed the materials provided by the complainant. The slide deck 'Proposed Portfolio Commercial Policy Overlay' had been developed only for Allergan's internal discussion and in preparation for the meeting with the customer. This slide deck had not been presented to the customer or to any other external third party. The slide deck 'Working together in partnership' was presented to the customer, and referred exclusively to business-to-business discussions over commercial terms, for the supply of and purchase of products. Neither document was promotional as they were both drafts subject to revisions and modifications in accordance with business discussion, they had not been subject to any internal approval.

Allergan submitted that the material and activities to which they related referred to terms of trade, specifically pricing and discounts to list price. These practices were in regular use by the industry before 1 January 1993 and therefore not covered by the term 'promotion' as defined at Clause 1.2.

The materials also mentioned training and education services that Allergan provided, at no cost, to all professionals who had an interest in its products; the services were not subject to, conditional or connected to the purchase of Allergan products. When Allergan dealt with large customers which engaged a large number of professionals who delivered aesthetic procedures at their premises, Allergan might agree on logistics and timing for those activities to the extent that this was more effective with regards to attendance and costs to running the event. These events were subject to compliance to laws, regulations, industry codes and Allergan internal policies and procedures.

Allergan reiterated that it operated a clear and transparent commercial policy where there was a linear relationship between product volume purchases and pricing; higher volume purchases resulted in higher discounts. For customers who had substantially larger business in the aesthetic market and had the potential to purchase substantially higher volumes of products compared with the average customer in the markets, Allergan offered 'enhanced terms'. This simply meant that the company might offer those customers a higher level of discount, compared with customers that were on an overall lower purchase value level. In addition, Allergan noted that the following terms were part of the policy:

- a) There was no bundling or conditionality making the pricing of one group of products contingent on another; customers were free to purchase any product within the portfolio in any quantity. Discounts would vary depending on the overall purchase level for each of the product line.
- b) There was no exclusivity, loyalty clauses or privileges or other restrictions in place. Customers or prescribers could purchase any competitor products of their choosing and provide their patients with any treatment options that best suited their needs.
- c) The commercial policy operated at a business-to-business level and there was no incentive or any transfer of value to any prescriber that might elect to use Allergan's products.
- d) The price terms offered for Botox, included in Allergan's offer to the prominent chain of clinics, was reasonable and commercially sound (details were provided). Further,

competitor products were readily available at such prices or below. In addition, the commercial offer included in the materials relating to the case represented a price increase to the customer across both medical devices and prescription only medicine vs their previous pricing offered by Allergan.

Allergan noted that as an outcome of the business interactions for which the materials subject to the case had been prepared and used, Allergan and the customer entered into a supply agreement, which was currently valid. It included confidentiality obligations binding on both parties including the commercial terms in place.

Allergan denied breaches Clauses 2, 9.1 or 18.1.

PANEL RULING

The Panel noted that the commercial arrangements related to sales of a medicine and two medical devices. The Panel noted that the arrangements proposed a discount for purchases of the medicine. Allergan submitted that there was no bundling or conditionality making the prices of one group of products contingent on another.

The Panel also noted Allergan's submission that the presentations provided by the complainant were drafts subject to revisions and discussion although the company also submitted that one (Working Together in Partnership to Develop Medical and Business Outcomes) had been used with a customer. Neither presentation clearly indicated that it was a draft subject to revisions and modifications although one of the presentations included some slides labelled 'draft proposal' (see below).

The Proposed Portfolio Commercial Policy Overlay presentation (dated 3 July 2018) referred to testing the terms with a named clinic chain next week. This presentation referred to the volume gains and cross selling opportunities off-setting the potential dilution risk. The Working Together in Partnership to Develop Medical and Business Outcomes (undated) referred to two options. Option 1, moving to standard commercial policy structure and Option 2 access portfolio pricing terms. A number of individual slides in this presentation were marked as 'draft proposal'.

The Panel noted that the definition of promotion in Clause 1.2 excluded measures or trade practices relating to prices, margins or discounts which were in regular use by a significant proportion of the pharmaceutical industry on 1 January 1993. The supplementary information to Clause 18.1 Terms of Trade stated that terms of trade were excluded from the provisions of Clause 18. Other trade practices were subject to the Code. The terms 'prices', 'margins' and 'discounts' were primarily financial terms.

On the information supplied, the Panel considered that the arrangements appeared to be a term of trade relating to prices, margins and discounts. Such arrangements were used by a significant proportion of the pharmaceutical industry on 1 January 1993. The Panel considered that as the arrangement related to the cost of the medicine, it could take the benefit of the exemption to Clause 18.1. The Panel therefore ruled no breach of Clause 18.1 and consequently no breach of Clauses 9.1 and 2.

Complaint received **29 July 2019**

Case completed **22 November 2019**