

MCAC 04 2014

COMPLAINT BY PHARMA DYNAMICS

AGAINST BAYER (PTY) LTD

Adjudication

6th May 2014

Committee Members:

3 MCA Panelists (1 Legal)

Pharma Dynamics (Pty) Ltd ('PD') lodged a complaint against Bayer (Pty) Ltd ('Bayer'), alleging that the Bayer Group products were advertised in contravention of the provisions of Code of Marketing Practice ('the Code') (sections 2.1, 2.3.5, 2.5, 5.2.1, 20.8 and 22.1). A ruling was required on whether the advertising of products by Bayer's global parent company, utilizing the internet, was performed within the ambit and spirit of the Code.

1. Bayer is guilty of contravening **section 2.1** of the Code: Bayer failed to maintain the required high ethical standard whilst conducting promotional activities. This finding is partially based on Bayer's knowledge of a prior complaint to the MCA by Bayer against PD, which presupposes that, due to this complaint, Bayer was in a position to ensure that their own activities were beyond reproach;
2. Bayer is guilty of contravening **section 2.3.5**: It is likely that a consumer would not distinguish between Bayer and the Bayer Group.
3. Bayer is guilty of contravening **section 2.5** of the Code: A consumer was able to access product information via links from www.bayer.co.za. Bayer is associated with the Bayer Group and a reasonable, average consumer will not distinguish between the technical points pertaining to the difference between the respective local and global entities, i.e. www.bayer.co.za and www.bayer.com.
4. The Medicines Substance and Control Act, 101 of 1965 ("the Act"), prohibits advertising of scheduled medicines (2-6) directly to consumers and by including the various links on their website, Bayer aided consumers in accessing such prohibited information, contravening the Act, as well as **section 5.2.1** of the Code.
5. Bayer is guilty of contravening **section 20.8** of the Code in that the links from www.bayer.co.za provide access to information to consumers which could encourage consumers to request their doctors to provide specific products.
6. Bayer does not require healthcare professionals to enter a password before accessing educational information and, as such, contravened the provisions of **section 22.1** of the Code.

In conclusion, Bayer is responsible for their website, www.bayer.co.za, and as such has a duty to ensure that all information directly and indirectly displayed on/via this website is performed within the ambit of the Code and the Act. Bayer cannot shift blame to the global entity, as this would not be within the spirit of

the Code and more importantly, Bayer in all material aspects remains responsible for all information displayed on www.bayer.co.za.

Ruling:

7. Bayer must remove all links on www.bayer.co.za constituting direct consumer marketing within 7 (seven) days from receipt of this ruling;
8. Any information intended for healthcare professionals and not for the general public, must be password protected within 7 (seven) working days of receipt of this ruling;
9. The MCA must conduct ongoing monitoring of Bayer's advertising;
10. The Code and in particular **section 22** dealing with Internet advertising must be referred to CTAC in order to review these sections and amend where so required to remove uncertainty and ensure that application of this section does not discriminate between local and global entities. The principles of the Code should be upheld and should be equitable for all players which means that local generic companies should not be precluded from also advertising in the same manner.

Penalty / corrective action ordered:

Bayer must pay PD the lodging and adjudication fees incurred by PD within 30 (thirty) days of receipt of this ruling.

Expedited

3 July 2014

Committee Members:

3 MCA Panelists (1 Legal)

Following a ruling issued on 6 May 2014 Pharmadynamics has provided supplementary evidence alleging Bayer has transgressed the provisions of Section 22 of the Code.

The Adjudication Committee assessed the information provided by Pharmadynamics in conjunction with the allegation to assess whether Bayer complied with or transgressed the provisions of Section 22.1, 22.2 and 22.5 of the Code.

The Committee reviewed facts provided as well as the local and global Bayer websites. The Committee found that Bayer SA had removed all details on its Products and the local website contained no production information. In terms of the local website it was held that there was no transgression of the Code and Bayer had complied with the sanction of the previous ruling.

The local website contained a link to the global website www.bayer.com. A pop up notification appears advising the user that by clicking the quick links tab the user will be leaving the local website and entering the global site. The Committee needed to ascertain whether the content of the global website fell within the parameters of the Marketing Code of South Africa.

The strict interpretation of Section 22.2 of the Code was applied. The use of the conjunction “and” “... and it makes specific reference to the availability or use of the medicine in South Africa” indicates the drafters of the Code required two conditions to be met for the provisions of the Code to apply.

It is established that Bayer SA is an affiliate of the global entity and thus one of the two conditions have been met.

The second condition requires the content on the Products listed on the global website to make specific reference to its availability in South Africa or the use of such medicine in South Africa. The global website did not do this and therefore the second condition of the requirement of Section 22.2 was not met.

The conclusion was reached that as the conditions for the application of Section 22.2 was not met Bayer did not transgress the provisions of the Code.

Appeal

29 September 2014

Committee Members:

3 MCA Panelists (1 Legal)

1. Following a complaint by the Appellant, a MCA Adjudication Committee on 16 May 2014 ruled inter alia that:
 - 1.1 the Respondent must remove all links on www.bayer.co.za constituting direct consumer marketing within 7 (seven) days from receipt of the ruling by the Respondent; and
 - 1.2 any information on the Respondent’s website www.bayer.co.za intended for healthcare professionals and not the general public must be password protected with 7 (seven) days from receipt of the ruling by the Respondent.
2. On 12 June 2014 the Appellant informed the MCA that the Respondent has not complied with the ruling of the MCA Adjudication Committee in that the Respondent did not make any changes to the www.bayer.co.za website. The Appellant in particular complained that (1) the Respondent’s website contains numerous links to their international websites which in turn have links to the numerous product websites which constitute direct consumer marketing and (2) no changes were made to the healthcare professional websites in that they are not password protected.
3. A MCA Expedited Committee considered the Appellant’s complaint and in doing so considered in particular whether the Respondent has complied with sections 22.1, 22.2 and 22.5 of the Code following the ruling of the MCA Adjudication Committee.

4. On 3 July 2014 the MCA Expedited Committee found that the Respondent took reasonable measures to comply with the Code and as it stood then, there was no breach of sections 22.1, 22.2 and 22.5 of the Code.
5. The Appellant then on 16 July 2014 suggested that the finding of the MCA Expedited Committee is incompetent, in that it was not required to consider an appeal and therefore not required to consider the merits of the original complaint against the Respondent. The Appellant further suggested that all the MCA Expedited Committee was required to do, was to consider whether the Respondent complied with the ruling of the MCA Adjudication Committee as handed down on 16 May 2014. The Appellant in the circumstances sought an order setting aside the ruling by the MCA Expedited Committee and for the MCA to consider the Respondent's compliance with the ruling of the MCA Adjudication Committee dated 16 May 2014, in particular whether the Respondent removed all links on www.bayer.co.za constituting direct consumer marketing; and whether any information intended for healthcare professionals, and not the general public are password protected.
6. Having considered all of the facts available, the Appeal Committee was satisfied that the MCA Expedited Committee did check whether the Respondent complied with the ruling of the MCA Adjudication Committee in so far as removal by the Respondent of all links on the website www.bayer.co.za constituting direct consumer marketing and (2) whether any information intended for healthcare professionals and not the general public are password protected. The Appeal Committee that there is no reference to any products on the website concerned. Any reference to "products" that may have existed previously must therefore have been removed. Further to this, the Appeal Committee could not find any information on the Respondent's South African website, www.bayer.co.za, intended for healthcare professionals that needed to be password protected. One can therefore only assume that same may have been removed with the removal from the website of any reference to "products". As for the MCA Expedited Committee's ruling that, on the interpretation and applicability of section 22.5 of the Code in this instance, the Appeal Committee agreed with the Appellant that the MCA Expedited Committee was not required to consider same.
7. The Appeal Committee in the circumstances ruled as follows:
 - 7.1 The appeal in so far as the MCA Expedited Committee's ruling on the interpretation and applicability of section 22.5 of the Code in this instance is upheld and the ruling is set aside; and
 - 7.2 The appeal against the findings of the MCA Expedited Committee in so far as the Respondent's alleged failure to comply with the ruling of 16 May 2014, in that it failed to remove all links on www.bayer.co.za constituting direct consumer marketing, and (2) it failed to remove any information intended for healthcare professionals and not the general public are password-protected, is dismissed.

There was no order as to costs.