

Case no 13, Advertising prescribed drugs to the general public

Members of the Marketing Board:	Viveka Bonde (chairman), Ursula Larsson, Leon Lau
Decision date:	03 May 2023
Complainant:	Boehringer Ingelheim Animal Health Nordics A/S
Defendant:	Elanco Denmark ApS
Subject-matter:	Advertising prescribed drugs to the general public

The Marketing Board's decision - case number 13

On 23 February 2023 ViNordic received a complaint regarding certain marketing actions taken by Elanco Denmark ApS (“Elanco”).

The complaint claimed that Elanco has carried certain marketing actions concerning three online advertisement banners (the “Banners”), regarding Elanco’s veterinary medicinal product Galliprant (the “Drug”), which is subject to veterinary prescription. These marketing actions were carried out by Elanco on the online Swedish magazine VeterinärMagazinet, available on the website www.veterinarmagazinet.se (the “Website”).

The position of the parties

In the complaint Boehringer Ingelheim claims that Elanco’s advertisement is in violation of Article 120 (1) (a) Regulation 2019/06, because Elanco is not advertising exclusively towards target groups mentioned in Article 120 of the Regulation 2019/06. In Boehringer Ingelheim’s opinion the advertisement is targeted towards the animal healthcare sector as a whole and anyone else entering the Website.

In response, Elanco wrote on the 10 March 2023 that the Banners were ordered at VeterinärMagazinet in the belief that the journal and newsletter are directed towards veterinarians, as the name suggests it. Furthermore, Elanco informed that the target group for the Website consists of veterinarians and others working in the animal healthcare sector. Elanco also referred in its response to earlier communication with representatives from the Swedish Medical Products Agency (in Swedish: Läkemedelsverket) who confirmed that the wording used in Article 120 (1) (a) Regulation 2019/06 “persons permitted to supply veterinary medicinal products” can be interpreted as including authorized veterinary

nurses and pharmacy staff. Further on, Elanco requested that the Marketing Board analyses the case as a matter of principle and not as a complaint.

The Marketing Board's decision

Formal considerations

Regarding the Complainant's request that the Marketing Board evaluates a potential breach of Article 120 (1) (a) of the Regulation 201/06:

According to 1§ of the statutes for ViNordic marketing board – Sweden (the “Swedish statutes”), the Marketing Board is established by ViNordic in accordance with § 4.3 of the articles of association for ViNordic. As such, the Marketing Board does not have the prerogatives of a general court of justice. Thus, the Marketing Board does not have jurisdiction to assess potential breaches of law. The Marketing Board can however assess if the ViNordic members breached the marketing rules included in ViNordic's self-regulation system, Vet & Etikett. Vet & Etikett remains relevant after the Regulation (EU) 2019/6 has entered into force, to the extent that its provisions are in line with the rules in the Regulation.

The complaint is essentially raising issues regarding marketing of prescribed veterinary medicinal products to the general public. This is covered by Article 9 in Vet & Etikett. In conclusion the Marketing Board proceeds with assessing the Case in the light of Article 9 in Vet & Etikett.

Regarding Elanco's request that the Marketing Board analyses the Case as a question of principle instead of a complaint:

According to the 1§ of the Swedish statutes, the Marketing Board can give the ViNordic members prior approvals of specific statements for use in advertising in Sweden and process complaints. Elanco's request does not fall under these situations. Furthermore, it is the Complainant who has to withdraw their complaints and then a member company needs to submit a request for prior approval. Thus, the Marketing Board should proceed with assessing this Case as a complaint.

Material considerations

The Marketing Boards finds that when a visitor accesses the Website for the first time, a pop-up window comes up automatically, displaying the following message in both Swedish and English:

Arbetar du inom djursjukvården?

Denna webbplats är endast avsedd för veterinärer eller andra som arbetar i eller i anslutning till djursjukvårdsbranshen.

Access to the content of this web page is restricted to veterinarians or other animal care health professionals.

If you accept this, press JA to continue.

Arbetar du inom djursjukvårdsbranschen?

JA NEJ

If the visitor presses the button “Ja” the pop-up window disappears, and the visitor can access the entire content of the Website. If the visitor presses the button ‘Nej’, the pop-up window comes up again. In order to close the pop-up window and access the content of the page the visitor has to press “JA”. No further identification or login information is required from the user. The visitor does not have to provide any proof that he or she is a veterinarian. Access of the Website is conditioned upon the visitor’s consent. In other words, anyone who wishes to access the Website can do so by pressing the JA button.

Further on, it appears from the Website’s cookie policy that permanent cookies are being stored. One of the cookies’ settings is to store information about the computer that accessed the Website. If cookies are permitted by the visitor at the time of the first access, then the pop-up window will not be displayed the next time when the user accesses the Website. If the Website is accessed from a computer that is available to more persons, and one visitor agreed to the use of cookies on the Website, the pop-up window will no longer be displayed meaning that the future visitors of the Website will not see it.

According to LER’s guidelines ‘Use of digital channels based on the Ethical Rules for the Pharmaceutical Industry in Sweden’, a website is the most common digital channel and is classified as a channel that reaches the public, unless verification (e.g., pop-up or password) is required to access the website. This practice has long been commonly accepted and there are many different types of websites with different target groups.

The Marketing Board’s position is that generally, the use of pop-up windows to restrict the access to the Website is in line with the current Swedish practice. However, the Board considers that a case-by-case analysis should be performed in this case, to assess if the pop-up window fulfils its restrictive scope in a satisfactory manner.

According to Article 9 of Vet & Etikett, information about veterinary products may only be sent or distributed to categories that are **legally entitled** to receive such information and that can reasonably be assumed to have a need and interest in such information. The interpretation of the term “legally entitled” should be done in accordance with the provisions of Article 120 of the EU Regulation 2019/06 which permits marketing actions of prescribed veterinary medicinal products only when such actions are aimed at a) veterinarians and b) at persons permitted to supply veterinary medicinal products in accordance with national law.

It appears from Annex 1 submitted to the case that the Banners were displayed on the Website’s home page (see the link address on the top right corner of the screenshots where it can be read <https://www.veterinarmagazinet.se>). The pop-up window is large in size and covers a significant part of the Website’s homepage. The advertisement banners seem to be displayed at the top of the Website’s homepage and other pages. The pop-up window is displayed in the centre of the homepage, but it does not cover the banners with advertisement which appear at the top of the page. Therefore, the visitor can still read the banner with commercials on the homepage even if it takes no action to close the pop-up window. It therefore seems that the Banners could have been seen by any visitors without consenting in the pop-up window.

The Marketing Board finds that any visitor of the Website’s homepage could have seen the Banners displayed on the home page. In addition, the Marketing Board notes that in this case

the pop-up was not functional, i.e. pressing 'Nej' did not work. To avoid a violation of Article 9 of Vet & Etikett, a member company needs, when ordering and executing a digital advertisement, to ensure that the pop-up actually works. For the company's own compliance, it is therefore advisable that the company documents that such a check has been made when the advertisement is posted. This can be done for example by taking a screen shot and saving it. The Marketing Board cannot see that Elanco has done any such measures, albeit assumingly having acted in good faith. The company is ultimately responsible for its supplier's handling of the material meaning that a strict responsibility for ensuring that the advertising complies with Vet & Etikett lies with the company and not with the veterinary magazine.

In conclusion, the Marketing Board finds that Elanco has breached Article 9 of Vet & Etikett.

Elanco is ordered to pay a fine of SEK 5,000 in accordance with § 4 par. 3. p. B in the Swedish statutes, as well as a fee for the complaint to the Marketing Board of SEK 5,000 according to § 5 in the Swedish statutes. The payment must reach the Marketing Board within 30 days from the day of the decision. At the same time, the Marketing Board obliges the company to immediately cease using the material to which the complaint relates.

The complainant receives a copy of this document.