Challenging Government Decisions a Pain in the Neck

By Ognjen Miletic

On 11 December 2015, Cranston J gave Judgment in *Speed Medical Examination Services Limited v Secretary of State for Justice* [2015] EWHC 3585 (Admin). Cranston J held that the Defendant's reforms in respect of the system for obtaining medical reports in whiplash cases was not open to challenge on grounds of irrationality or its purported anticompetitive effects.

Adam Heppinstall and Ognjen Miletic were instructed by the Defendant on a related application for judicial review on issues of proportionality and alleged inadequate consultation, which was settled shortly before trial.

BACKGROUND

1. In this judicial review the Claimant, a Medical Reporting Organisation (**"MRO"**) was challenging the legality of part of the Government's reforms to the process for handling soft tissue whiplash claims. These reforms included a requirement for personal injury solicitors to identify and instruct independent, accredited medical experts for the provision of initial medical reports via an online portal, which is administered by MedCo Registration Solutions (**"MedCo"**).

2. The background to these reforms begins in 2012, when the Secretary of State began work on a "Whiplash Reform Programme", driven by concerns over an increase in whiplash claims in circumstances where the number of

reported road traffic accidents had been declining. Figures also appeared to show that Britain had a disproportionately high number of whiplash claims in comparison with other European countries. This naturally has an impact on the level of motor vehicle insurance premiums.

3. After numerous consultation exercises and stakeholder sessions, the Whiplash Reform Programme resulted in:

    a. The creation of MedCo, in an attempt to ensure a new, centrally managed, accreditation scheme for the instruction of medical experts in whiplash claims.

    b. The establishment of a framework to ensure the independence of doctos and MROs from the claims process itself. The reforms focussed on a prohibition on solicitors having a financial interest in an intermediary through which a medical report was obtained. This severing of ties between solicitors firms and MROs was seen as an imperitive objective as it removed any potential incentive for doctors to certify whiplash claims with little scrutiny.

    c. A two-tier random allocation of MROs. Tier 1 represents larger (high volume, national) MROs and Tier 2 represents smaller MROs. The Ministry of Justice's decision involved setting qualifying criteria for each tier and an 'offer' on the number of MROs which would be presented when legal providers undertook a search through MedCo: the decision set an offer ratio of one Tier 1 MRO and six Tier 2 MROs from which a legal provider could make their choice.

4. The Claimant contended that the MedCo system was both irrational and unlawful as being incompatible with national and European competition law. Leggatt J initially refused permission to apply for judicial review. However, when the application was subsequently renewed, another Judge ordered a 'rolled-up' hearing to consider both permission and, if permission were to be granted, the judicial review itself.

THE RATIONALITY CHALLENGE

5. The Claimant's case was that the Defendant's decision introduced a number of systemic design flaws into the MedCo system, including:

   a. Capping the number of times that an MRO can acess the market – through the offer ratio set by the decision, MROs cannot compete with one another and, with there being fourteen Tier 1 MROs at present, the Claimant's access to the market is limited as it is not allowed to trade with more than 1/14th of the market.

   b. Moreover, the rationale behind rigidity of the offer ratio is undermined by the fact that more and more Tier 2 MROs are entering into the marketplace; in particular, Tier 1 MROs are setteing up Tier 2 affiliates in order to attract more business.

6. Cranston J's view was that the rationality challenge *"does not get off the ground"*. Firstly, he emphasised the *"typically iterative prcoess of public policy-making which makes the threshold for a rationality challenge even harder to surmount in this case"* (para 47). It was difficult for the Claimant to challenge a single 'decision', as in fact the background to any ultimate decision was a protracted, intricate and measured process between 2012 and 2014 involving two formal consultation papers and several roundtable meetings led by Ministers with representative bodies across the sector (including the MROs' trade associaton).

7. Secondly, Cranston J held that it was of considerable importance that the Government proceeded in its reforms following the receipt of support from the major representative bodies whose members were involved in the production and use of medical records commissioned for whiplash injuries. Indeed, the development and implementation of the reforms was the result of a collaborative effort, with a consensus emerging as to how best to tackle the problem at hand.

THE COMPETITION LAW CHALLENGE

8. The Claimant's competition law challenge was that the Defendant's 'decision' was unlawful because it led to MedCo infringing the prohibition in Part I, Chapter II of the Competition Act 1998, and to an infringement of Article 102 and consequently 106(1) of the Treaty on the Functioning of the European Union. Essentially, the Claimant was arguing that the design of the MedCo scheme, in particular the offer ratio, was such that there was no method for controlling its anticompetitive effects; MedCo is an undertaking in a dominant position, which it is abusing, and for which there is no legal justification.

9. Cranston J accepted that the competition law challenge was arguable and its importance was such that a grant of permission was justified. However, he ultimately held that the judicial review itself was refused.

10. Cranston J found that MedCo is plainly in a dominant position, and it mattered not that its monopoly was derived by reason of law as opposed to its own conduct. Nevertheless, after setting out the relevant European jurisprudence, Cranston J agreed with the analysis of Leggatt J in initially refusing permission to apply for judicial review, namely:

> *"… in circumstances where (a) MedCo is not an MRO and (b) the decision as to the number and mix of MROs presented on a search has been made by the defendant and not by MedCo, I cannot see how it can reasonably be argued that MedCo is abusing a dominant position in the relevant market by administering the system in accordance with the requirements imposed by the defendant."*

11. It was important that MedCo was operating in a different market from the MROs and the medical experts. This situation can be contrasted with cases such as *Deutsche Telekom AG v Commission* Case C-280/08P [2010] ECR I-9555, which involved vertically integrated, dominant commercial operators having limited competition in the same market in which they themselves

are active. Conversely, MedCo is a regulator acting in the public interest and implementing a policy of the Secretary of State; the Secretary of State, too, is a regulator which is not itself active and has no financial or economic interest in the downstream market which it is regulating.

12. The Claimant further attacked the justification for the MedCo system, asserting that there was no concrete evidence to support the contention that the previous system was faulty and/or susceptible to nefarious outcomes. Alternatively, even if the previous system did lead to the perverse incentivisation of fraudulent medical reports, there were already less onerous systems in place that could achieve the result of eradicating/mitigating these problems. These include an expert's already subsisting obligations pursuant to CPR Part 35 and recourse to the criminal law.

13. Cranston J held that even if MedCo had acted in a way which restricted competition, or there is a risk that it will do so, then there is objective justification. It was inaccurate to depict the end-result as 'guesswork', as the scheme was modelled following a great deal of market intelligence gathering and surveys. Further, the scope for review and audit was built into the decision.

14. Further, the evidence demonstrated that those engaged in the development of the policy were fully cognisant of the competition law implications. The system that was implemented was thought to strike the correct balance in mitigating conflicts of interest while at the same time ensuring that all MROs had an opportunity to be presented in the search results and preserving choice for users.

15. Finally, Cranston J emphasised that he could not accept that the MedCo solution was disproportionately intrusive, not least because of the area of

discretionary judgment Government policy makers have as a matter of EU law (see *R (Lumsdon) v Legal Services Board* [2015] UKSC 41; [2015] 3 WLR 121).

COMMENT

16. This case reiterates that challenging Government decisions is always a difficult task. As a starting point, in cases of significant reform it is frequently problematic to pinpoint and isolate a single decision. The iterative process of public policy development is more akin to an evolving organism that is composed of several interlinking and interdependent components. Judges are likely to be reticent to be too critical, or at least sufficiently critical to the extent required for a successful judicial review application, in circumstances where the Government is most often far better placed to balance competing interests and make decisions in the pursuit of important public policy aims.

17. Having said this, the touchstone of impenetrable decision making is an integrated consultation process with active engagement by the very sectors that are likely to be impacted by the outcome. It will be very difficult for an entity to subsequently challenge any decision when they have already been afforded ample opportunity to object to the decision in the first instance or assist in the development of the relevant policy in question.